THE BANARAS LAW JOURNAL

Vol. 5 January–December, 1969 Nos. 1 & 2

ARTICLES

REPORTING OF JUDICIAL PROCEEDINGS—SOME LEGAL ASPECTS — *P. M. Bakshi*

MARRIAGEABLE AGE, CONSENT AND SOUNDNESS OF MIND IN INDIAN MATRIMONIAL LAW: A PLEA FOR RATIONALIZATION — *B. N. Sampath*

THE SUCCESSION OF STATES AND INTERNATIONAL TREATIES — *Vladimir Paul*

THE PROVINCE OF ARTICLE 136 — *D. K. Srivastava*

CONCESSION CONTRACTS AND INTERNATIONAL LAW — *Subhash C. Jain*

GULF OF AQABA IN INTERNATIONAL LAW — *Subhash Nagpal*

NOTES AND COMMENTS

Kelsen's "Pure Science of Law" and the Indian Legal System (R. A. Malviya).

BOOK REVIEW

R. P. Dhokalia, *The Codification of International Law* (W. Paul Gormley).

(Editor)

SURYA P. SHARMA

BANARAS HINDU UNIVERSITY, VARANASI–5.

BANARAS HINDU UNIVERSITY

Visitor	The President of the Republic of India (Ex-officio)
Chancellor	H. H. Maharaja Dr. Vibhuti Narain Singh of Banaras
Vice-Chancellor	Dr. A. C. Joshi
Rector	Dr. H. P. Dwivedi
Finance Officer	Sri U. Ramachandra Rao
Registrar	Dr. K. N. Lal
Librarian	Sri P. N. Kaula
Dean, Faculty of Law	Dr. Anandjee

LAW SCHOOL

Dean Dr. Anandjee

Teaching Staff

Anandjee	*B.Sc., LL.B. (Banaras), LL.M., J.S.D. (Yale)*	Professor
Banerjee, P.N.	*B Sc., LL.M. (London)*	Lecturer
Bhardwaj, V.K.	*B.Sc., LL.M. (Banaras)*	Lecturer
Bijawat, M.C.	*M.A., LL.B. (Banaras), LL.M., J.S.D. (Yale)*	Reader
Chaturvedi, M.N.	*M.A., LL M. (Banaras), LL.M. (Yale). S.J D. (Nw.)*	Lecturer
Dharma Pratap	*M.Sc.. LL.M. (Banaras). D.Phil. (Oxford)*	Reader
Dhokalia, R.P.	*M.A., LL.B. (Alld.). Ph.D. (Manchester)*	Reader
Durga Prasad	*B.Sc., LL B (Lucknow), LL.M. (Banaras)*	Lecturer
Gaur, K.D.	*B Sc., LL.M. (Alld)*	Lecturer
Jain, M.P.	*B.A. (Hons.), LL.M. (Delhi), J.S.D. (Yale)*	Professor
Khatri, M.L.	*B.Sc., LL.B. (Banaras)*	Part-time Lecturer
Krishna Bahadur	*M.A., LL.M. (Lucknow)*	Lecturer
Mehta, J.P.	*M.A., LL B. (Banaras)*	Part-time Lecturer
Misra, R K.	*M.A , LL.M. (Lucknow)*	Lecturer
Nayak, K.N.	*M.A., LL.M (Banaras), LL.M., J.S.D. (Yale)*	Reader
Nigam, S.S.	*M.Sc., LL.M. (Lucknow), Advocate*	Professor
Pande, R.S.	*M.A., LL.M. (Banaras)*	Lecturer
Parasuraman, S.	*M.A., B.Com., LL M. (Banaras)*	Lecturer
Raj Krishna	*M.A., LL.M. (Lucknow), Ph. D. (Canberra)*	Reader
Sampath, B.N.	*B.Sc., B.L. (Mysore) LL.M. (Osmania)*	Lecturer
Saksena, S.N.	*B.A., LL B. (Agra)*	Part-time Lecturer
Singh, P.N.	*M.A., LL.B. (Lucknow), Advocate*	Part-time Lecturer
Singh, S.N.	*B A., LL M. (Banaras)*	Lecturer
Singh, V.N.	*M.A., LL.M. (Lucknow)*	Lecturer
Sharma, Surya P.	*B.Com . LL M (Delhi), LL.M., J.S.D. (Yale)*	Reader
Srivastava, S.C.	*B Sc., LL M. (Banaras)*	Lecturer
Surendra Nath	*M A., LL.B (Banaras), LL.M. (Northwestern)*	Lecturer
Yogendra Singh	*B.A., LL.M. (Banaras)*	Lecturer

Research Assistants

Bhatia, S.K.	*M.A., LL.B. (Banaras)*
Sinha, S.P.	*M.A., LL.M. (Banaras)*
Srivastava, D.K.	*M.A., LL.B. (Banaras)*
Rao, R. J.	*B.A., LL.M. (Osmania)*

THE BANARAS LAW JOURNAL

Cite This Volume

5 Ban. L. J. (1969)

THE BANARAS LAW JOURNAL

Vol. 5 January—December, 1969 Nos. 1 & 2

CONTENTS

ARTICLES

Reporting of Judicial Proceedings—Some Legal Aspects ... ... *P. M. Bakshi* 1

Marriageable Age, Consent and Soundness of Mind in Indian Matrimonial Law : A Plea for Rationalization *B. N. Sampath* 28

The Succession of States and International Treaties *Vladimir Paul* 53

The Province of Article 136 ... ... *D. K. Srivastava* 75

Concession Contracts and International Law ... *Subhash C. Jain* 106

Gulf of Aqaba in International Law ... *Subhash Nagpal* 130

NOTES AND COMMENTS

Kelsen's "Pure Science of Law" and the Indian Legal System ... ... *R. A. Malviya* 149

BOOK REVIEW

R. P. Dhokalia, The Codification of International Law ... ... *W. Paul Gormley* 169

Reporting of Judicial Proceedings—Some Legal Aspects

P. M. Bakshi*

Publication, outside the court, of matters arising in judicial proceedings is a question of growing importance. Scandalous and obscene matters or details, which come on the record in such proceedings, are sometimes reported to the outside public, in newspapers or by other media, and certain legal questions arise. This article is intended to focus attention on the legality of such publication.[1] It will be convenient to discuss separately—

I Defamatory matters;

II Indecent or obscene matters;

III Matter violating personal privacy.

I Defamatory Matters

As regards defamatory matter in judicial proceedings, the present position in India in criminal law is that while the publication of defamatory matter is an offence under section 499 of the Indian Penal Code and punishable under section 500 of that Code, exception 4 to section 499 provides that "it is not defamation to publish a substantially true report of a proceeding of a Court of Justice, or the result of any such proceeding."

The exception is very wide, both qualitatively and quantitatively. Speaking qualitatively, the exception does not require that the publication must be for the "public good" or without malice. Good faith is not an essential ingredient of the exception.[2] Quantitatively, it

* P. M. Bakshi, Secretary, Law Commission of India.

1 It is not proposed to deal with publication amounting to contempt of Court, which is a subject requiring full-fledged study by itself.

2 *Annoda Prasad* v. *Monotosan*, A.I.R. 1953 Cal. 503.

embraces all kinds of matters, whether they are slightly defamatory or grossly defamatory, and whether they injure the reputation of a party or of a witness or of a third person. The exception applies even if the proceedings have been held *in camera* or their publication has been prohibited by Court, though in these cases the question of contempt of court may arise.

So far as civil liability for defamation is concerned, in India, there is no statute corresponding to the English Act, the Law of Libel Amendment Act, 1888 or the Defamation Act, 1952.[3] Therefore the common law rule,[4] under which, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accur te report of what takes place before that tribunal is privileged, would seem to apply. Thus, at civil law, in India, the publication of reports of judicial proceedings (in newspapers or elsewhere) would enjoy only a qualified privilege.[5]

In England, so far as criminal liability is concerned, at common law, the publication of a matter, defamatory of any living private person or definite class of living persons, was an indictable misdemeanour[6] if effected by writing or print or by signs, effigies or pictures. (As to spoken words, there are certain refinements, which need not be gone into).

There is, however, an exception, (even at common law) regarding judicial proceedings. Faithful and fair reports of the proceedings of Courts of Justice, though the character of individuals may incidentally suffer, are privileged, and for the publication of such reports, the publishers are neither criminally nor civilly responsible.[7] The privilege is a *qualified* one.[8]

The punishment for the common law offence of defamation is now governed by section 4 of the Libel Act,[9] 1843, which runs as follows :

3 These are discussed separately. See *infra.*

4 The common law rule is discussed in detail separately. See *infra.*

5 Iyer, *Torts* 286, paragraph 25 (1957).

6 *I Russell on Crime* 774 (1964).

7 *Wason* v. *Walter*, (1869), L. R. 4 Q.B. 73 (Cockburn C. J.)

8 See Russel, *op. cit.* note 6, at 794 (under topic No. 2. "Qualified Privilege").

9 Libel Act, 1843 (6 & 7 Vict. c. 96); Russell *op. cit.* note 6, at 780, 781.

> If any person shall maliciously publish any defamatory libel *knowing the same to be false*, every such person, being convicted thereof, shall be liable to be imprisoned in the common goal or house of correction for any term not exceeding two years and to pay such fine as the Court shall award.

Section 5 of the Act punishes any person who maliciously publishes any defamatory libel (in other cases—which would apply even where the matter is not known to be false).[10]

So far as the privilege in respect of judicial proceedings is concerned, a statutory provision was made in 1888 by the Law of Libel Amendment Act, 1888.[11]

> A fair and accurate report *in any newspaper* of proceedings publicly heard before any court exercising judicial authority shall, if punished contemporaneously with such proceedings, be privileged :
>
> Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.

Thus, the privilege is, as regards newspapers, governed by this statutory provision. It is, apparently,[12] as absolute one.[13]

One procedural provision may be noted. In England, Section 8 of the Law of Libel Amendment Act, 1888 provides :

10 See Archbold, *Criminal Pleadings, Practice & Procedure*, paragraph 3622 (1966)

11 51 and 52 Vict., c. 64.

12 *Infra.*

13 The Defamation Act, 1952 (15 & 16 Geo. Vi and 1 Eliz. 2 c. 66) grants a qualified privilege in respect of publication of certain proceedings of courts outside the U. K. and also proceedings of commissions, tribunals and the like inside the U. K. (section 7). Further, the privilege conferred by section 3 of the 1888 Act in respect of the contemporaneous reports of proceedings before courts exercising judicial authority is, by the 1952 Act (section 8), defined as applying only to courts within the United Kingdom. The privilege is extended to broadcasting (section 9). These changes in the law are, however, not material for the purposes of criminal law, as section 17 (2) of the 1952 Act expressly provides that "nothing in this Act affects the law relating to criminal libel."

No criminal prosecution shall be commenced against any proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge at Chambers being first had and obtained.

Such an application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application.[14]

So far as civil liability in England is concerned, at common law, the publication *without malice* of a fair and accurate report of proceedings before a judicial tribunal exercising its jurisdiction in open court is privileged. The privilege is thus a *qualified* one. It is not confined to newspapers, and extends to all persons who desire, for any legitimate reason, to make known to the public what happened within the walls of the courts.[15]

The privilege, thus, not being confined to newspapers, attaches also to reports in a pamphlet or (probably) in a broadcast or any other form of publication. Nor is the privilege confined to reports published contemporaneously with the judicial proceedings; if the report is published after some time, the late publication does not necessarily affect the privilege at common law—though it may be important on the question of malice.[16] As the privilege is founded upon the grounds of public policy and benefit and advantage to the community,[17] it does not extend to protection of any report, however, fair and accurate, which is blasphemous, seditious or immoral or prohibited by statute or statutory rule etc. or by order of the court prohibiting a report of the proceedings, in any case where the publication of the report would interfere with the course of justice.[18] Further, the privilege attaches only to reports of such proceedings as take place in an open court.[19]

14 See Archbold, *op. cit.* note 10, paragraph 3627.

15 Gatley, *Libel and Slander*, 187, paragraphs 319, 281, 500, (1960).

16 *Id.* at 281, paragraph 501.

17 "Common convenience and welfare of society".—*Macintosh* v. *Dunn* (1908) A.C. 390.

18 Gatley, *op. cit.* note 15, at 282, paragraph 503.

19 Gatley, *op. cit.* note 15, at 285, paragraph 508.

Coming now to the position resulting from certain statutory provisions in England relevant to civil liability, we may first note section 3 of the Law of Libel Amendment Act, 1888,[20] which is as follows :

A fair and accurate report *in any newspaper* of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged :

Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.

Though the Act of 1888 does not say whether the privilege is absolute or qualified, the better opinion is that it is absolute.[21]

This interpretation of the Act appears to have been assumed by the Court of Appeal in a case[22] where the statute is said to have given a "complete answer" and "complete protection." Action would not, thus, lie for defamatory statements contained in such reports, even though the proprietor or the editor of the newspaper published the reports *with actual malice* towards a person defamed in the report. Commenting upon this provision, one writer has stated that "anything more unjust, or pernicious or inimical to public welfare cannot well be imagined.'[23]

Certain changes made by the Defamation Act, 1952,[24] may now be noted. The Act[25] was passed as a result of the recommendations in the Porter Committee's Report.[26] First, the operation of the absolute

20 The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64).

21 For detailed discussion of the reasons, see Gatley, *op. cit.* note 15, at 302, paragraphs 540, 541.

22 *Farmer* v. *Hyde*, (1937) 1 K. B. 728, at 740, 744.

23 Bower, *Actionable Defamation* 406-408 (2nd ed.) cited in Salmond, *Torts* 350 (n. 73) (1957).

24 15 & 16 Geo. VI and 1 Eliz. 2, c. 66.

25 The Act has been reviewed by Eric C. E. Todd in 16 *Modern Law Review* 198 (1953).

26 The Porter Committee's Report (1948), Cmd. 7536, will be found reviewed by J. A. G. Griffith in 12 *Modern Law Review* 271 (1949).

privilege granted by the 1888 Act is, by section 8 of the 1952 Act, confined to *courts within the United Kingdom*. Secondly, having so limited its operation, section 9(2) of the 1952 Act, extends this absolute statutory privilege (which, in the 1888 Act is confined to newspapers) to broadcasting. Thirdly, apart from making these changes in the absolute statutory privilege, the 1952 Act gives a *qualified* privilege under section 7(1) and (2) read with the Schedule, Part I, item 4 and Part II, item 10, in respect of publication in newspapers of proceedings of courts *outside the U. K.* and also of certain commissions, committees and other authorities inside the U. K.

To summarise the position, in England the statutory provisions relevant to civil liability confer :

(i) *an absolute* privilege on *newspapers* in respect of proceedings of courts within the U. K—by virtue of the 1888 Act as amended by the 1952 Act;

(ii) an absolute privilege in respect of broadcasting for proceedings of courts in U. K.—by virtue of the 1888 Act as extended by the 1952 Act; and

(iii) *a qualified privilege on newspapers*, in respect of proceedings of courts outside the U. K. and certain commission and other authorities within the U. K.

Where the statutory provisions discussed above do not operate, the publication of reports of judicial proceedings would still enjoy the qualified privilege prevailing at common law.[27]

Broadly speaking, the following points of difference are apparent between the position at English common law and the position by statute regarding civil liability, in respect of proceedings of courts within the U. K.

(i) at common law, the privilege is qualified, while by statute it is absolute;

(ii) at common law, it extends to publication in any form, while by statute, it is confined to newspapers and broadcasting;

27 As to common law, *supra*, at 4.

(iii) at common law, the publication need not be contemporaneous, (if there is no malice), while by statute, it must be so.

While the common law rule excludes seditious publication, the statute does not expressly say so. There are certain other minor points, which need not be discussed.

The common law requirements of fairness and accuracy and of open court are common to statute also. The common law reservation for matter prohibited by court or by statute,[28] would not perhaps apply to the statutory privilege.[29]

From the above summary of the law in England and India, the points of difference that exist between English law and Indian law can be roughly summarised as follows :

(a) *Regarding Civil Liability* :

India	*England*
(i) Qualified privilege for all forms of publication (as at common law).	(i) Absolute privilege for newspapers and broadcasting. Qualified privilege in other cases. (The first by statute; the second at common law).
(ii) No privilege where publication prohibited by Courts (as at common law).	(ii) (Probably) privilege exists for newspapers and broadcasting even if publication of proceedings prohibted.[30] This is so far as *libel* is concerned. It may still amount to contempt of Court.

(The privilege in India is, thus, narrower).

(b) *Regarding criminal liability* :

India	*England*
(i) Absolute privilege for all forms of publication.	(i) Absolute privilege for newspapers and broadcasting : Qualified privilege in other cases.

28 See *supra*, at 4.
29 See *supra*, at 5.
30 See *supra*, at 5.

(ii) Privilege exists even if proceedings are not publicly heard.[31]	(ii) Privilege does not exist if proceedings are not publicly heard.[32]

(The privilege in India is, thus, wider).

It may be necessary to examine the *rationale* upon which the existing privilege regarding publication of judicial proceedings is based. In the words of Sir Gorell Barnes "The privilege given to reports of proceedings in courts is based upon this, that as everyone cannot be in court, it is for the public benefit that they should be informed of what takes place substantially as if they were present."[33]

In an English case[34], Pearson, J., collected from the cases five reasons for the existing privilege relating to reports of proceedings in courts :

(i) the court proceedings being open to the public;

(ii) the administration of justice being a matter of public concern;

(iii) the education of the public on such matters ;

(iv) the desirability of fair and accurate reports rather than rumours; and

(v) most important, what may be called the balancing the advantages to the public of the reporting of judicial proceedings against the detriment to individuals of being incidentally defamed.

The reporting of proceedings in the court has been said to be simply an "enlargement of the audience" that hears them in court. For this reason, this is not a privilege at common law peculiar to newspapers, but extends to all persons who desire for any legitimate reason

31 See the wide language of section 499, Exception 4, Indian Penal Code.

32 Section 3, 1888 Act.

33 Sir Gorell Barnes P. in *Furnish v. Cambridge News Ltd.* (1907) 23, T. L. R. 705 (Court of Appeal) referred to in Gatley, *op. cit* note 15, at 282, paragraph 502.

34 *Webb v. Times Publishing Co.*, (1960), 3 W. L. R. 352, 363, 364. This was a civil case for defamatory statements published by an English newspaper. The statements were made by the plaintiff's husband in the course of his trial in a Swiss court, and were indirectly defamatory of the plaintiff.

to put the outside public in the same position as the portions of the public that happened to be within the walls of the court.[35]

The privilege is thus founded upon the considerations of benefit and advantage to the community.

The legitimate interest in the administration of justice which every citizen must have, may sometimes, degenerate into a morbid interest in scandal. Apart from cases where the pleadings themselves are based on such matters, the examination of witnesses creates occasions for going into matters which might injure the reputation of witnesses. Such questions may be relevant to the facts in issue,[36] or might have to be put in cross-examination for impeaching the credit of a witness.[37]

Further, the publication of such matters outside the court may be done not with the object of informing the public as to what goes on in the courts, but with "malice" as understood in the law of torts.

It is true that there are certain safeguards provided by law at present. Thus, so far as cross-examination of witnesses is concerned, section 148 of the Evidence Act imposes on the *court* the duty of deciding whether the witnesses should be compelled to answer such question. In exercising the discretion, the court is to have regard to the considerations laid down in clauses (1), (2), (3) and (4) of the section, which are as follows :

(1) Such questions are proper if they are of such a nature that the trust of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies;

35 *Cf.* Lord Kyllachy in *Wright v. Outram*, (Court of Session), (1890) 17 R, at 599, cited in Gatley, *op. cit.* note 15, 281, paragraph 501.

36 Section 147, Indian Evidence Act, 1872, subject to section 132 of that Act and section 151, latter part.

37 See section 146(3) of the Indian Evidence Act and section 155 of that Act.

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer the inference that the answer if given would be unfavourable.

Again, section 151 of that Act authorises the Court to forbid any questions or inquiries which it regards as indecent or scandalous unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. Section 152 also authorises the Court to forbid any question apparently intended to insult or annoy or needlessly offensive in form.[38]

This is the duty thrown on the *court*. In addition, the Bar has also a duty under sections 149 and 150 of the Act. A reasonable ground for thinking that the imputation conveyed is well-founded should exist before the question can be put; and if the question is asked without reasonable grounds, the court may report the circumstances of the case to the High Court or other authority for disciplinary action against the legal practitioner concerned.

As has been observed,[39] "it is for the Judge when he sees that the counsel is harrassing or *browbeat* a witness, to intervene and protect the witnesses in the interest of justice."

Another safeguard under the law is the holding of the proceedings *in camera*. Under section 352, proviso, to the Criminal Procedure Code, the presiding officer has power to hold an inquiry or trial *in camera*, if he thinks fit. By certain statutes relating to matrimonial causes—for example, section 22 of the Hindu Marriage Act, 1955 (25 of 1955), the court has power to hold proceedings *in camera*. Under section 53 of the Indian Divorce Act, 1869 (4 of 1869) the whole or any part of any proceedings under the Act may, if the Court thinks fit, be heard with closed doors. Similar provision exists in section 33 of the Special Marriage Act, 1954 (43 of 1954). As was observed by Lord Haldane (Lord Chancellor) in *Scott* v. *Scott*,[40] the broad principle of

38 See discussion in *Ayesha Bibi v. Peer Khan*, A. I. R. 1954 Mad. 741, 750, paragraph 20.

39 *Nibaran v. Emperor*, A. I. R. 1917 Pat. 437, 440, (left-hand column).

40 (1913) A. C. 417, 437, See also discussion in *Naresh v. State of Maharashtra*, A. I. R. 1967 S. C. 1, at 9 to 12.

publicity can be modified where the Court thinks that "justice could not be done at all, if it had to be done in public."

Proceedings held *in camera* cannot be published. If published, the publication would amount to contempt of court.[41]

Even where the proceedings are not actually held *in camera*, the court may prohibit their publication. Publication of proceedings in violation of such prohibition will presumably be contempt of court. This was assumed by the House of Lords in *Scott* v. *Scott*.[42]

The Press (Objectionable Matter) Act, 1951 (56 of 1951) made certain provisions for "objectionable matter." Section 3(vi) of the Act, in so far as is relevant for the present purpose, defined objectionable matter as meaning any words, signs or visible representations which are grossly indecent or are scurrilous or obscene or intended for blackmail. Explanation II to the section provided, that in judging whether any matter is objectionable, the *effect* of the word "signs" etc. and not the *intention* is to be taken into account. Section 11 of the Act, then gave powers to the State Government to declare newspapers, news-sheets, books and other documents, containing any objectionable matter, as forfeited to Government; the declaration was to be issued only in the certificate of the Advocate-General or the principal Law Officer, and had to state the grounds for the order. There was provision for an appeal to the High Court. The Act has expired, and has not been renewed. There were provisions authorising the Sessions Judge to demand security from the Press also. Apparently, there was no exception in respect of matter published from judicial proceedings.

The above *resume* discloses that the present law relating to *criminal* liability in respect of defamatory matter in judicial proceedings published outside the Court, as contained in section 499, Indian Penal Code,

(i) does not exclude malice;[43]

(ii) makes no exception for proceedings held *in camera*;[44] and

(iii) makes no exception for proceedings the publication whereof is prohibited by the Court.[45]

41 *Cf. Purshotam v. Navnit Lal*, (1926) I. L. R. 50 Bombay 275, 283.

42 (1913) A. C. 417.

43 *Supra*, at 1 and 2.

44 *Ibid.*

45 *Ibid.*

As regards civil liability, it is only the common law rule that prevails in India.[46]

II Indecent or Obscene Matters

The publication of indecent matter is covered in England by the common law offence of obscene libel (to be distinguished from defamatory libel). The publication of obscene and indecent matter is an indictable misdemeanour at common law. The test of obscenity at common law is that enunciated in *R.* v. *Hicklin*,[47] which is, "whether the tendency of the matter published is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands the publication might fall."

Certain difficulties have been experienced in applying this definition, and some provisions have been made by way of reform by the Obscene Publications Act, 1959.[48]

A lot of literature also exists on the subject and in recent times, courts have to some extent adopted a view consistent with changes in social and moral notions of the community; the judgment of Stable, J., in an oft-cited case[49] emphasises that the main issue to be considered is whether the book tends to "deprave and corrupt" (and not merely shock and disgust). Detailed discussion of that subject, however, is out of place here.

So far as obscene libel is concerned, there is no privilege as regards publication of proceedings of a Court of Justice. Thus, in *Steele* v. *Brannan*,[50] the pamphlet "The Confessional Unmasked" was sought to be destroyed under the Obscene Publications Act, 1857.[51] The pamphlet was a substantially correct report of the trial of an indictment for a misdemeanour in selling an obscene work, but set out that work in full, though a part only was referred to in the trial. It was held that there was no privilege.

46 *Supra*, at 2 and 7-8.

47 *R. v. Hicklin*, (1868) 3 Q. B. 360, 371 (Cockburn C J.).

48 The Obscene Publications Act, 1959 (7 & 8, Eliz. 2, c. 66).

49 *R.* v. *Martn Secker and Warburg Ltd.*, (1954) 2 A. E. R. 683; (1954) 1 W. L. R. 1138.

50 *Steele* v. *Brannan*, (1872) L. R. 7 C. P. 261, cited in 2 Russell on Crime, 7426 (1964).

51 The Obscene Publications Act, 1857 (20 & 21 Vict. c. 83) now repealed by section 3 (8) of the Obscene Publications Act, 1959 (7 & 8 Eliz. 2, c. 66).

The facts of this case, of course, are peculiar, and it may not be safe to rely only on this decision as supporting a general conclusion that a fair and accurate report of judicial proceedings is not privileged in relation to obscenity.[52] However, section 3 of the Law of Libel Amendment Act, 1888,[53] lends support to the view that indecent matter from judicial proceedings published outside the court is not protected. The section runs as follows :

> A fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged :
>
> Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.

In 1926, the Judicial Proceedings (Regulation of Reports) Act, 1926,[54] was passed which clarifies the position on the subject. Section 1(1) of the Act is as follows :

> 1 (1) It shall not be lawful to print or publish or cause or procure to be published or printed—
>
> (a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details, the publication of which would be *calculated to injure public morals*;
>
> (b) in relation to any judicial proceeding for dissolution of marriage, or for nullity of marriage, or for judicial separation or for restitution of conjugal rights, any particular other than the following, that is to say—
>
> (i) the names, address and occupation of the parties and witnesses;
>
> (ii) a concise statement of the parties' defences and counter-charges in support of which evidence has been given;

52 The other decisions cited in 2 Russell *op. cit.* note 50, at 1426 (n. 24)—*R.* v. *Creevey*, and *R.* v. *Carlile*—are not relevant for judicial proceedings in relation to obscenity.

53 The Law of Libel Amendment Act, 1888, (51 & 52 Vict. c. 64).

54 The Judicial Proceedings (Regulation of Reports) Act, 1926 (16 & 17 Geo. V, c. 61).

(iii) submission of any point of law arising in the course of the proceedings and the decision of the court thereon;

(iv) the summing up of the judgment etc.

The penalty for contravention of the provision is imprisonment up to 4 months and fine up to £ 500 or both. Prosecution for the offence cannot be commenced in England and Wales without the sanction of the Attorney-General. There is an exception for law reports and matters circulated for the medical profession etc.

As there were doubts as to whether the Act of 1926 applied to Magistrates' courts holding domestic proceedings,[55] an Act was passed in 1937—the Summary Jurisdiction (Domestic Proceedings) Act—to make similar provision for reports of such proceedings. It has now been replaced by section 58 of the Magistrate's Courts Act, 1952,[56] applicable to domestic proceedings in a Magistrate's court. The domestic proceedings are defined in section 56 of the Act. In England under section 39 of the Children and Young Persons Act, 1933,[57] the Court may, in relation to any proceedings in a court which arise out of an offence against or any conduct contrary to decency or morality, direct that no newspaper report of the proceedings shall reveal the name, address etc. of the child or publish a picture of the child except as permitted by the court. Section 49 of this Act prohibits publication of newspaper reports of proceedings in *juvenile* courts.

In India, the sale, letting to hire, distribution etc. or circulation of any obscene book, pamphlet, paper, drawings, painting, representation of figures or any other obscene *object* whatsoever is an offence.[58] There is no specific exception for publication of matter contained in judicial proceedings. The test of obscenity laid down in *Hicklin*[59] has generally been followed in India.

55 See the discussion in Abrahams, *The Law for Writers and Journalists* 154 (1958).

56 The Magistrate's Courts Act, 1952 (15 & 16 Geo. VI and 1 Eliz. II c. 55).

57 The Children and Young Persons Act, 1933 (23 and 24 Geo. V, c. 12).

58 Section 292 (a), Indian Penal Code.

59 For example, see *R.* v. *Parashram*, (1896) I. L. R. 20 Bom. 193; *R.* v. *Sarat*, (1904) I. L. R. 32 Cal. 247 and *Sankar* v. *State*, A. I. R. 1955 Mad. 498, at 501, and the Supreme Court's decision in *Ranjit Udeshi* v. *The State*, A. I. R. 1965 S. C. 881.

The provisions of the Press (Objectionable Matter) Act, 1951 (56 of 1951) (which has now expired and has not been renewed) were relevant to the question of indecency also. Section 3(vi) defined 'objectional matter', *inter alia*, as meaning any words, signs or visible representations which are grossly indecent or are scurrilous or obscene or intended for blackmail. Explanation II to the section emphasised that it was the effect of the words etc. and not the intention of the keeper of the press or the publisher etc. which was to be taken into account. Section 11 gave power to the Government to forfeit (on the certificate of the Advocate-General etc.) publications containing objectionable matter, subject to an application to the High Court[60] under section 24.

The State of Bombay (before the re-organisation of the State) enacted the Bombay Judicial Proceedings (Regulation of Reports) Act, 1955.[61] The Act is mainly drawn on the lines of the English Act[62] of 1926, but is wider in some respects than that Act. It prohibits the publication of

(i) indecent or *obscene* matter or indecent or obscene medical, surgical or physiological details (in relation to judicial proceedings) calculated to injure public morals, and

(ii) as respects matrimonial proceedings and *proceedings under section 497, Indian Penal Code*, all particulars except the names of the parties and the order of the court;

(iii) as respects proceedings in connection with cases under sections 354, 366, 366A, 366B, 376, 377, or 498, Indian Penal Code any particulars except the name etc. of the accused and the order of the court so as not to disclose identity of the victims.

The incidental provisions and the exceptions regarding circulation to legal and medical professions need not be considered.

The Madras Act on the subject may also be noted, i.e., the Madras Judicial Proceedings (Regulation of Reports) Act, 1960 (Madras Act 21 of 1960). Like the Bombay Act,[63] it regulates the publication

60 See, further, *supra*, at 11.

61 Bombay Act 18 of 1955.

62 The English Act has been discussed separately. See *supra*, at 13-14.

63 *Supra*, note 61.

of reports of judicial proceedings of obscene or indecent matter and other matters.[64] The main scheme of the Act follows that of the Bombay one, but a few points of difference may be noted as follows :

(i) The Madras Act provides also for prohibiting the publication of proceedings for maintenance of wife, husband or children or alteration in the rate of such maintenance or cancellation or modification of the order or decree for maintenance. See the definition in s.2(e) of "matrimonial matters." This is not covered in the Bombay Act.

(ii) The Madras Act, section 3(1) (a), is not limited to medical, surgical or physological details in its provisions mentioning "indecent or obscene details." In the Bombay Act, section 3(a), indecent or obscene details "whether medical, surgical or physological" are stated, apparently with the intention of limiting the words "indecent or obscene details."

(iii) The Madras Act, section 3(1) (c), prohibits publication of particulars (except the permitted particulars) of judicial proceedings under the Suppression of Immoral Traffic in Women and Children Act, 1956. This is not mentioned in the Bombay Act which was passed in 1955.

(iv) The Madras Act, section 5, makes offences under the Act cognizable. There is no such provision in the Bombay Act. Cognizance by the court is, of course, provided under both the Acts, with the previous sanction of the State Government.

There are a few points of difference in phraseology, which need not be enumerated.

The Parliament has enacted The Young Persons Harmful Publication Act, 1956 (93 of 1956), to prevent the dissemination of harmful publications as defined in section 2(a) of the Act. The definition speaks of stories which (with or without the aid of pictures or in pictures) portray the commission of offences, acts of violence or cruelty or incidents of repulsive or horrible nature in such a way that the publication would tend to corrupt a young person by inciting him to commitment of offences or cruelty etc. in any other manner. As the Act is primarily intended for "horror comic," we need not go into its details.

64 Other matters are described in the preamble as matters the publication of which will not be in the public interest, as in the Bombay Act.

In India, section 36 of the Children Act, 1960 (60 of 1960), which is confined to Union Territories, prohibits the publication of certain proceedings. It runs as follows :

> (1) No report in any newspaper, magazine or news-sheet of any inquiry regarding a child under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the child, nor shall any picture of such child be published :
>
> Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure if in its opinion such disclosure is in the interest of the child.

(b) Provisions in the Children Act of some States may be noted. Thus, section 27B of the Bombay Children Act, 1924[65] (now repealed) provided :

> No report in any newspaper or news-sheet of any offence by or against a child of any proceedings in any Court relating to such offence shall disclose the name, address or school, or include any particulars calculated to lead to the identification of any such child, nor shall any picture be published as being or including a picture of any such child.

The section came up for consideration before the Bombay High Court a few years ago.[66] The Court held that "calculated" in this section meant, "fitted, suited, apt, that is, proper or likely to lead." The intention behind the section was that the future of a child should not be marred by any report likely to lead to its identification.

Incidentally, the Court pointed out that the provisions of the section were wider, compared with section 39 of the English Act (the Children and Young Persons Act, 1933). The English Act was confined to offences against or conduct contrary to decency or morality, and left the discretion *to the court* to prohibit publication. The High Court suggested that the Bombay Act should be similarly restricted.

In the Bombay Children Act, 1948 (which has repealed the above Act), section 23 dealing with the subject, has been enacted in somewhat different terms. It runs as follows :

65 Bombay Act 13 of 1924, now repealed by the Bombay Children Act, 1948.

66 *Emp.* v. *Rustam Karanjia*, A. I. R. 1946 Bom. 115, 117.

No report in any newspaper, magazine or news-sheet of any case or proceeding in any court under this Act in which a child is involved shall disclose the name, address or school or include any particulars calculated to lead to the identification of any such child, nor shall any picture be published as being or including a picture of any such child :

Provided that for reasons to be recorded in writing the court trying the case or holding the proceeding may permit the disclosure of any such report, if in its opinion such disclosure is in the interests of child welfare and is not likely to affect adversely the interests of the child concerned.

So far as obscene matter is concerned, the provisions of section 292 of the Indian Penal Code, which contain no exception to judicial proceedings, cover it.

Indecent matter or indecent medical, surgical or physiological details, which are calculated to injure the public morals as in the United Kingdom Act and in the Bombay Act, would also be obscene in most cases and thus covered by section 292, Indian Penal Code.

What, therefore, remains to be covered is indecent matter or indecent medical, surgical or physiological details, the publication of which, though not likely to corrupt those into whose hands it is likely to fall, would offend *decency*.

Thus, so far as the gap in the law as regards *indecent* matter is concerned, it is a small one. The requirement indicated by the expression "calculated to injure the public morals" in the Bombay Act brings the matter very near to obscenity.

When one talks of "indecent matter," the anti-thesis is decency. When one speaks of "obscene matter," the anti-thesis is morality, in view of the interpretation placed by Courts on the word "obscene." In many cases, the two would be overlapping. The distinction between obscene and indecent is often not maintained very precisely. Thus, while in the Concise Oxford Dictionary "indecent" has been explained to mean "unbecoming, immodest, obscene," "obscene" has been explained as meaning "indecent, lewd." In Halsbury,[67] under the topic of indecent publications, the paragraphs entitled "publishing

67 3rd edn. Vol. 10, page 666, paragraph 1274.

indecent matter," state the law in these terms : "Any one is guilty of a common law misdemeanour who publishes any obscene matter, that is, matter tending to deprave and corrupt those whose minds are open to immoral influences and into whose hands the publication may fall." The second paragraph states that it is a misdemeanour to procure indecent prints with intent to publish them, but it is not an offence to have possession of obscene prints innocently acquired.

In one English case,[68] however, the difference between the two expressions seems to have been hinted at. In that case, the bye-law issued by the local authority provided that no person should in any public place use any "profane, obscene or indecent language to the annoyance of passengers." The language used was "You are too b...y keen; you can report what the b...y hell you like." The following observations made in the judgment are of interest.

> The first point taken is that the language used was not indecent, but I do not think that upon the facts it is possible to say that the Magistrates were wrong in law in holding that it was, for, I do not think that the word "indecent" is to be taken as *ejusdem generis* with 'profane' and 'obscene.' Again, I do not think that all language that is not decent is within the bye-law, because in that case the word 'obscene' would be surplusage. But when one considers that the person who used it was a publican in his own house, no words seem to me less appropriate than to say that it was the use of indecent language in a public place to the annoyance of Passengers.

III Matters Violating Personal Privacy

Matter brought out in a judicial proceeding may, (apart from being defamatory or indecent) violate the personal privacy of a particular individual. Publication in a newspaper (or other media) of sensational matter relating to the personal affairs or conduct of an individual, while it may not injure his reputation, may cause him distress or embarrass him. It is this philosophy which is at the basis of the recent movement for the protection of privacy. It must be remembered that such a right to privacy has not yet come to be recognised in England or in India. Hence, in the discussion that follows, the word 'right' to

68 *Ruson* v. *Dutton*, No. 1 (1911) 104 L. T. 601, at 602 (D. C.) cited in 3 Burrows, *Words & Phrases Judicially Defined* 91 (1944).

privacy should be understood as referring to the right for which a movement is going on and not to any existing right.

This right is not concerned with an injury to reputation or with the corruption of morals. Its object is to give every individual protection against invasion of his privacy. The matter may not necessarily affect the reputation of that person. It is simply the right of the individual to enjoy his private life untroubled by publicity—in other words, "the right to let alone"—which is sought to be protected.

A famous article published in the United States of America—"The Right To Privacy"—by Warren and Brandeis laid the foundation of the movement in that country for the recognition of a right to privacy. The growing importance and excesses of the press made "a remedy upon such a distinct ground essential to the protection of private individuals against the unjustifiable infliction of mental pain and distress." The article was occasioned by the undesirable publicity which the Boston press gave after the wedding of Mr. Warren's sister. The article stated :

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[70]

This article was powerful enough to induce courts to recognise the right to privacy in some of the States of the United States.

69 Warren and Brandeis, "Right To Privacy," 4 *Harvard Law Review* 193 (1890).

70 *Id.* at 196.

In one form or other, the right has been recognised in 20 States[71] by judicial decisions. In three States, New York, Utah and Virginia, the right has been limited by statute. Interferences with privacy which are serious and outrageous, or beyond the limits of common ideas of decent conduct, are regarded as a tort. The right covers intrusions upon the plaintiff's solitude; publicity given to his name or likeness or to private information about him; placing him in a false light in the public eye; and the commercial appropriation of elements of his personality.[72]

The right is subject to a privilege to publish matters of news value, or of public interest of a legitimate kind.

The rule was thus given in the first Re-statement of Law of Torts prepared by the American Law Institute :

> A person who unreasonably and seriously interfers with another's interest is not having his affairs known to others or his likeness exhibited to the public, is liable to the other.[73]

The comment on the rule went on to say that while the rule gives protection to the interest which a person has in living with some privacy, the protection is relative to the customs of the time and place and to the habits and occupation of the plaintiff. Thus, a person has to suffer the casual observations of his neighbours; a person who submits himself or his works for public approval must pay the price of unwelcome publicity (apart from defamation). A person who comes in the public eye because of his own fault, and even a person who is unjustly charged with a crime of is the subject of striking catastrophe, is subject to the same limitations on the "right to be left alone."

It is not, however, very clear if publications of judicial proceedings would be regarded as a violation of the right of personal privacy, even in those States of the United States of America where it is otherwise recognised. Publication of fair and accurate reports is privileged in relation to the law of defamation, and it has been stated that "it is probable that privacy does not prohibit publication under

71 Prosser, *Law of Torts* 636 (1955), (right-hand column).

72 *Id.* at 635, Article 97.

73 4 Restatement of Law of Torts (1939), paragraph 867.

circumstances which would be privileged under the law of defamation.[74] In fact, Warren and Brandeis themselves stated that the right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of Libel and Slander. As they observed :

> Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies or the committees of those bodies...and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege.[75]

A movement for the recognition of the right of privacy has been going on in England also. In fact, it was an English case, *Prince Albert* v. *Strange*,[76] which gave rise to and provided the material for a discussion of the subject even in America. In that case, the defendant had been able to collect impressions of a number of etchings made by Queen Victoria and Prince Albert, and proposed to exhibit the collection and to distribute the catalogue. The decision rested primarily on the plaintiff's proprietary rights. But the decision did bring out the fact that sometimes privacy may be invaded in a distressing manner.

Winfield, in an article[77] published in 1931, pointed out the insufficiency of the law of defamation and observed that offensive invasion of personal privacy ought to be an independent tort classified under "Torts to the person," and actionable without proof of special damage. He suggested that where it takes the shape of representation, its truth should be immaterial. On an examination of the existing law, he regarded as uncertain whether invasion of personal privacy existed as an independent tort, but he submitted that as the matter had not yet gone up to the House of Lords, that House had a free hand and "social exigencies at the present day would justify them in recognising such a tort".

The Committee appointed in England under the Chairmanship of Lord Porter to consider the law of defamation and to report on the

74 Prosser, *op. cit.* note 71, at 642 (n. 97).

75 Warren and Brandeis, *op. cit.* note 69, 216-217.

76 (1840) 2 De G. and Sm. 652.

77 Winfield, "Privacy," (1931) 47 *L. Q. R.* 23, 41.

changes desirable,[78] briefly considered the question of matter amounting to invasion of privacy, but pointed out that such a matter, though in bad taste, would not be defamatory. Further, the Committee regarded the matter as one of internal discipline and good taste on the part of the press, and outside its terms.[79]

In 1961, The Right Of Privacy Bill was introduced in the House of Lords by Lord Mancroft. The Bill secured a majority of 74 to 21 in the House of Lords at the second reading.[80] It seems that Lord Mancroft withdrew his motion that the House may resolve itself on the Committee into the Bill.[81] Thereafter, the Bill appears to have died a natural death at the end of the Session.[82] The Bill gave a right of action to a person

> against any other person who without his consent publishes of or concerning him in any newspaper or by means of any cinematograph exhibition or any television or sound broadcast any words relating to his personal affairs or conduct if such publication is calculated to cause him distress or embarrassment.[83]

The Bill provided certain defences, which may be summarised as follows :

(a) Unintentional references to the plaintiff;

(b) publications on an occasion of absolute or qualified privilege, for example, *fair and accurate report of court* proceedings;

(c) publications relating to persons temporarily in the public eye, for example, criminals or persons involved in some general or personal calamity, or persons who had deli-

78 Report of the Committee on Law of Defamation Cmd. 7536, paragraph 24 (1948). This has been cited in the Lord Chancellor's speech in Parliamentary Debates, House of Lords, Vol. 229, columns 625 and 626 also.

79 *Id.* paragraph 26.

80 Parliamentary Debates, *op. cit.* note 78, columns 607 to 660, and Vol. 232, columns 289 to 299.

81 *Op. cit.* note 78 vol. 232, column 299.

82 See "The Protection Of Privacy," 25 *Modern Law Review* 393 (1962).

83 The words "if such publication...embarrassment" were sought to be added latter. Parliamentary Debates, *op. cit.* note 78. Vol. 232, column 291.

berately courted publicity, which made them, for the time being, the subject of "reasonable public interest."

In the debates in the Lords,[84] on the second reading of the Privacy Bill, Lord Mancroft explained that the object of the Bill was to give every individual such further protection against invasion of his privacy as may be desirable for the maintenance of human dignity while protecting the right of the public to be kept informed in all matters in which the public may be concerned. The Bill, he said, was an extension of the "age-old protection against eavesdropping, Peeping Toms and Paul Prys,'' and was a logical development in a crowded and sophisticated community. He cited a number of individual cases—harrying of Princess Margret and Mr. Armstrong-Jones on their holiday in Ireland; the harrying of Sir John Huggins, former Governor of Jamaica, on his contemplated re-marriage; the attempt of photographers of the late Mr. Aneurin Bewan in the hospital; and the rushing down of press photographers on Colonel Hunter whose daughter committed suicide after an unhappy love affair. As to the argument that he was attacking the freedom of the press, he replied, by quoting from the words of Mr. Crozier, Editor of the Manchester Guardian, who said :

> It is the job of the Press to provide news, but not to poke and pry into things a person can rightfully and decently wish to keep to himself.

He admitted that it was difficult to draw a line between the public and private interest. But he submitted that in 9 cases out of 10, the line could be drawn very clearly.[85]

The Bill was supported by Lord Goddard :

> It has always seemed to me to be a blot on our jurisprudence that there is no remedy for a person whose privacy is invaded in the way that gossip writers and unscrupulous reporters too often do.[86]

He did not regard the Bill as unworkable.

Lord Denning[87] strongly supported the Bill, and said that "if the law of England gives no remedy for an infringement of privacy

84 Parliamentary Debates *op. cit.* note 78, column 807.
85 Parliamentary Debates *op. cit.* note 78, columns 611, 612.
86 Parliamentary Debates *op. cit.* note 78, column 621.
87 Parliamentary Debates *op. cit.* note 78, column 632.

then it becomes a duty at once to implement some Bill to put it right." He pointed out that the right had been recognised in many States in America. He quoted from a recent judgment of an American Court, which granted damages against a photographer who had taken surreptitiously the photograph of a couple when the husband was leaving :

> the unwarranted...publishing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering; shame or humiliation to a person of ordinary sensibilities...

was a tort. He even thought that there is nothing to prevent the House of Lords (acting judicially) from giving such a remedy in a fit case.

Viscount Kilmuir[88] (Lord Chancellor), was, however, strongly opposed to the Bill. While he had sympathy with the objects of the Bill, he did not regard it as workable. He regarded "reasonable public interest" as an expression difficult to define, and said that he personally would not feel confident in saying whether the matrimonial affairs of a film star or the financial misfortunes of a clergy-man, were or were not matters of public interest.

As he pointed out[89] in the debate on the resolution for referring the Bill to Committee, the defence of public interest had to be allowed to newspapers and it was not possible to define that defence precisely.

> I do not think it is possible to define in an Act of Parliament the circumstances in which that defence is to be available, without either destroying the effectiveness of the right of action or imposing a new and severe restriction on publication generally and the freedom of the Press... The application of this defence would mean conferring on the courts a discretionary power so wide that it must in effect constitute them in this field virtual consors of the Press. My own view is that such a course is neither acceptable nor desirable.

He pointed out that in the only three States in America (New York, Virgina and Utah) in which legislation had been passed, that legislation

88 Parliamentary Debates *op. cit.* note 78, column 827.
89 Parliamentary Debates *op. cit.* note 78. vol. 232, column 293.

was practically confined to the use of a person's photograph or name without his consent in connection with advertising or for other commercial purposes.

As already, pointed out,[90] the Bill did not become law.

One English statute which comes nearmost to the subject under discussion may be noted. That is, section 3(1) of the Television Act,[91] which requires the Independent Television Authority to satisfy themselves, so far as possible, that nothing is included in the programmes which "offends against *good taste* or decency or is likely to be offensive to public feeling or which contains any offensive representation of or *reference* to a *living person*."

As the Right of Privacy Bill did not become law, and as there is no other statute recognising the right in general terms, the existing position in England (apart from statutes relating to particular subjects), is that there is no remedy for the invasion of privacy. In *Tolley* v. *J. S. Fry*,[92] a famous amateur golfer brought an action for libel against a firm of chocolate manufacturers who had published (without his knowledge or consent) as an advertisement of their goods, a caricature of him in which he was depicted as playing golf, with a packet of their chocolate protruding from his pocket. The gist of the claim was that the advertisement reflected adversely on him, for it implied that he had allowed his portrait to be used for advertising purposes, which would injure his reputation as an amateur. Acton, J., held that the advertisement was reasonably capable of bearing the meaning alleged; the Court of Appeal held that the defendants were not liable, as there was no evidence of any special facts known to the persons to whom the advertisement was published, causing them to attach to it the alleged meaning. (Scrutton L. J. dissented). The House of Lords held that there was evidence on which a jury would be entitled to regard the advertisement as defamatory, and ordered a new trial on the issue of damages. The decision of the House, it may be noted, did not proceed on the right of privacy. It would be of interest to note that in the Debate on the Right of Privacy Bill,[93] Lord Denning raised a query whether in this

90 *Supra* notes 80-82.
91 The Television Act, 1954.
92 *Tolley v. J. S. Fry*, (1930) 1 K. B. 467; on appeal, (1931) A. C. 333 (H. L.).
93 Parliamentary Debates *op. cit.* note 78, column 639.

case the damages would have been given even if Mr. Tolley had been a professional golfer.

One important point must, however, be emphasized. Whereever the right of privacy has been dealt with, an exception usually seems to have been made for publication of reports of judicial proceedings. In America, the privilege available in relation to defamation appears to be available in relation to the claim based on this right.[94] Lord Mancroft's Bill[95] also made an exception for such publication. The view of Winfield[96] seems to be different. After noting the suggestion that privilege as understood in the law of defamation ought to be a defence to invasion of privacy, he observed that any attempt to import wholesale into the law of privacy principles of the law of defamation is likely to confuse both topics.

There is no general right of privacy in India, in the sense in which it is now being discussed, that is to say, in relation to publication of sensational (non-defamatory) matters concerning the personal affairs or conduct of individual. The right of privacy arising as an easement and recognised in some parts of India by custom is in a different context, and relates to the enjoyment of property. Again, section 509 of the Indian Penal Code, punishes a person who, intending to insult the modesty of any woman, utters any words or makes any sound etc. or intrudes upon the "privacy of the woman." But this is not relevant to the topic now under discussion. The Children Act, 1960 already discussed,[97] contains provisions prohibiting the publication of certain proceedings involving children; but that is a special law. Until, in future, the law of torts in India takes a new turn in this respect, there is no remedy for the publication of such matters.

———

94 Prosser, *op. cit.* note 71, at 642 (n. 97).
95 See, *Supra* notes 80-82.
96 Winfield, *Supra* note 77.
97 *Supra* note 65.

Marriageable Age, Consent and Soundness of Mind in Indian Matrimonial Law : A Plea for Rationalization*

B. N. Sampath†

I Introduction

In recent years voice of concern is being raised in the social and political circles about the population explosion in India and the need to contain that process. Enhancement of marriageable age as an essential remedial measure has often been suggested in various forums including the Parliament. Though such a measure takes notice of an important requirement of matrimonial law, legislative thinking seems to consider marriageable age as an independent requirement. The complementary relationships of the requirements, marriageable age, consent and soundness of mind in matrimonial law can hardly be gainsaid. In order to give valid consent a person should not only have attained sufficient age but also be of sound mind. A measure dealing with any of these provisions in matrimonial law has necessarily to take into account the other two if a coherent picture has to emerge out of it. The prevalence of different personal laws,[1] the enacting of piece-meal legislation and the disregard for the afore-mentioned relationships of the three requirements have resulted in a heterogeneous jumble of provisions. This paper attempts to analyse the provisions relating to marriageable

* The materials for this article and for his forthcoming book on Matrimonial Law in India were collected by the author during his stay at the School of Oriental and African Studies, University of London and Harvard Law School as a visiting research scholar. The author owes a debt of deep gratitude to Professor J. D. M. Derrett, Professor of Oriental Laws, University of London for his keen interest in the author's work and for his valuable suggestions.

† B. Sc., B. L. (Mysore), LL. M. (Osmania), Lecturer in Law, Law School, Banaras Hindu University, VARANASI-5, India.

1 Hindus, Muslims, Christians, Parsis and Jews in India are governed by their respective personal laws in matters of domestic relations. These laws are to be gathered from a mass of traditional materials and statutory enactments.

age, consent and soundness of mind in Indian matrimonial law, indicate their complexities and suggest measures to rationalize these provisions.

II Restrictions relating to age limits and the practice of child marriage.

Marriage, while bringing physical intimacy between two individuals, effectuates an important change in the legal and social status of the parties. Consequently, every system of law requires that the parties should have attained sufficient age to be capable of physical union as well as to raise the presumption that they understand the nature of the status and the obligations attached to it. Marriages of persons of nonage, quite apart from being deleterious to the health of the parties, have created numerous social problems.[2] Child marriage in India, especially in the lower strata of the society, is an inveterate practice, the reasons for it being varied and complex. Though economic factors have influenced the practice, it is indeed the price Indian society has to pay for the preservation of premarital chastity [2a], a theme that has been nurtured from ancient times.[3] Further the practice received positive encouragement from the institution of joint family which relieved the child spouse of any physical or economic responsibilities.[4]

Hindus : The orthodox Hindus of all castes have, until recent times, insisted upon marrying away their girls before the attainment of puberty, a practice that has been adhered to even to the detriment of the parties. However it is interesting to notice that the early Dharma Sastraic materials lean in favour of adult marriages. The Vedic literature in general and the Vedic marriage ceremonies in particular[5]

2 The child wife may soon become a widow on account of the high incidence of infant mortality. The status of widowhood of the young girl is extremely painful in the Indian society on account of the social taboo against widow remarriages. The permissive provisions of the Hindu Widows' Remarriage Act, 1856 have made little impact on this social problem.

2a Prof essor Derrett does not seem to agree. See Derrett, *Religion, Law and the State in India*, *Faber*, at 106 (1968).

3 *Manu* IX, 89-94; *Yajnavalkya* I, 52, see the emphasis on 'ananya purvikam' in Yajnavalkya which means that the girl should not have belonged to some one else.

4 The reprimand a recalcitrant adolescent used to receive a decade ago from his parents for refusing to marry was "Do you mean to say that you have to feed your wife ?"

5 2 Kane, *History of Dharma Sastra* pt. 1, 439 and 526 (1941).

presuppose the adulthood of the parties. But for some unaccountable reason the age limit in the case of the girls dwindled down in the period of the Sutras[6] and it was enjoined that a girl should be given away when she was a mere 'nagnika' or a girl of tender years who is unmindful of her nudity.[7] This trend received further commendation in the hands of Manu and his followers and what began as a preference was transformed into a religious duty on the part of a father to dispose off his daughter before her puberty.[8] However in the case of boys, it is significant that no writer on Dharma Sastras has ever mentioned of pre-puberty marriages;[9] indeed, there has been a unanimous presupposition of adulthood in their case. It is because of this reason that the writers on Dharma Sastras confine the enumeration of marriage guardians only with respect to girls.[10] In the light of such an attitude of the Sastras, the practice of marrying away the boys of nonage appears to be puzzling. But it is not inexplicable if the Hindu sociological background is taken into account. The boys of the three higher castes, namely, the Brahmins, the Ksatriyas and the Vaisyas were enjoined to marry only after the completion of their Vedic studies which necessarily meant after the attainment of majority.[11] Since such a prescription was inapplicable to the Sudras (the majority community that was disqualified from undertaking the Vedic studies) probably they adopted the practice of marrying away their boys of nonage, a practice that was neither forbidden in the Sastras nor discouraged by the three higher castes. It is likely that this practice emerging from the Sudras influenced in bringing down the age limit of the boys belonging to the three higher castes also.

6 Approximately from the eighth century B. C. to the third century B. C.

7 Fick, "Child Marriage" in *8 Encyclopaedia of Religion and Ethics (Hastings)* 522-523 (1910). See also Williams, *Sanskrit-English Dictionary* 465 (1872) and Apte, *Sanskrit- English Dictionary* 534 (1912) Kane, *op. cit.* note 5, at 440.

8 *Manu* IX, 89-94; *Yajnavalkya* I, 52. Yajnavalkya goes to the extent of laying down that if the father fails to marry away his daughter before puberty, he will be committing the sin of 'killing an embryo' *Yaj* I, 64.

9 *Sivanandy v. Bhagavanthyamma*, A. I. R. 1962 Mad. 400.

10 *Yajanavalkya* I, 63; *Narada* XII, 20-22; Visnu XXIV, 38, 39.

11 It is ordained in the Sastras that a boy of 8-12 years should undertake the Vedic studies the duration of which would extend to a minimum period of 8 years. Therefore, the boy will be completing the age of 16 years even if he takes the minimum period for his studies. Under ancient Hindu Law a person attained majority by the completion of his 16th year.

Modern India has made repeated attempts to eradicate the practice of child marriage by raising the marriageable age under various statutes[12] the Child Marriage Restraint Act, 1929 being the general enactment. This Act, while laying down the age limits, namely, fifteen years for the bride and eighteen years for the bridegroom,[13] also prescribes penalties for the contravention of the provisions of the Act.[14] But, significantly, it does not interfere with the validity of a marriage solemnized in contravention of the provisions of the Act.[15] The application of the doctrine of factum valet to uphold the validity of such marriages has rendered the Act an innocuous piece of legislation.[16] The Hindu Marriage Act, 1955 has merely reiterated[17] the provisions of the Child Marriage Restraint Act, 1929. It may, therefore, be stated that despite the penalties prescribed under the Child Marriage Restraint Act and the Hindu Marriage Act, marriages of persons of nonage are valid both under the traditional Hindu law and the Hindu Marriage Act.[17a]

Muslims : The prescription of marriage guardians[18] in the case of minority of the parties and the provision of 'Khiyar-ul-bulgh'

12 Section 60 of the Indian Christian Marriage Act, 1872, section 2 of the Child Marriage Restraint Act, 1929, section 4 of the Special Marriage Act, 1954 and section 5 of the Hindu Marriage Act, 1955.

13 See the definition of the 'child' under sec. 2 (a).

14 Sections 3-6.

15 *Munshiram v. Emperor*, A. I. R. 1936 All. 11, 12.

16 The ineffectiveness of the provisions of the Child Marriage Restraint Act, 1929 typifies a sad commentary on the Indian social legislation. During a period of forty years a little over hundred cases are reported at the High Court level. Presuming that not all the convictions under the Act have been taken in appeal to the High Court, we may say that a few hundred prosecutions have been launched under the Act while millions of child marriages have taken place. Even where the parties have been prosecuted, the motivations have come from family feuds and factional fights rather than from the diligent enforcement of the provisions of the Act by the executive machinery.

17 *Naumi v, Narotam*, A. I. R. 1963 H. P. 15. The wife was below the age of 15 years and the husband over 60 years at the time of the marriage.

17a See Sections 5(iii) and 18(a) of the Hindu Marriage Act, 1955.

18 Fyzee, *Outlines of Muhammadan Law* 200 (Oxford 1964); Mulla, *Principles o Mahomedan Law* 260 (1968).

or the option of puberty[19] which gives the right to rescind the marriage on the attainment of puberty, indicate that child marriages are permitted under the traditional Muslim law. Such marriages are voidable (to use modern terminology to sum up the effect of the option of puberty) on the attainment of puberty and under stated circumstances.[20] Even though a Muslim attains majority at the age of fifteen years under his personal law for the purpose of contracting a marraige independently,[21] he is still deemed to be a 'child' under the Child Marriage Restraint Act, 1929.[22] It is interesting to note that the superimposition of the provisions of the Child Marriage Restraint Act on Muslim personal law creates a curious situation. For instance, let us assume that when a Muslim boy of seventeen weds, his parents are mere onlookers. As noticed above, such a boy can validly contract a marriage under his personal law without the concurrence of his parents or even despite their dissent. In spite of the fact that the parents have no locus standi in such a marriage, they come within the purview of the penal clauses of the Child Marriage Restraint Act for merely participating in the ceremony.[23]

Christians : Child marriages are rare among the Christians except those who are converted from the lower strata of the Hindu society. The Indian Christian Marriage Act, 1872, a singularly inept enactment, states in Sec. 60 that the bridegroom and the bride must have completed the age of eighteen and fifteen years respectively. The tenor of the section indicates that a contravention of the provision renders the marriage void.[24] But, significantly Sec. 60 is not applicable to Roman Catholics[25] and non-Indian Christians domiciled in India. Probably the framers of the Act have presumed that the practice of child marriage is unknown to these two communities.

19 See Fyzee, *op. cit.* note 18, at 91; Mulla, *op. cit.* note 18, at 263.

20 A person married during minority can rescind his or her marriage after attaining the age of majority, namely, the age of fifteen years but before attaining the age of eighteen years provided no consummation has taken place.

21 See Fyzee, *op cit.* note 18, at 91; Mulla, *op cit.* note 18, at 249.

22. Section 2(a).

23 Section 6.

24 The usage of the expression "shall not be under the age of eighteen years..." indicates that the provision is obligatory.

25 Section 65 of the Indian Christian Marriage Act, 1872.

However, it leaves the legal position of the marriages of persons of nonage in these two communities in vagueness.

Parsis : It cannot be stated with certainty whether the ancient Iranians, namely, the ancestors of the Parsis of India, permitted child marriages or not. But judicial decisions have recorded that even though "the Zoroastrian system did not contemplate marriage in infancy...there has grown up in India a custom amongst Parsis which validates and renders binding marriages between Parsis though contracted between children of tender age."[26] This position has not been altered, in any way, by the Parsi Marriage and Divorce Act, 1936. Section 3(c) of the Act merely lays down that where the parties are under the age of twenty one years, the consent of the parent or guardian has to be obtained, which means that a marriage of persons of nonage is valid provided the consent of the parent or guardian has been obtained.

Jews : The traditional Jewish law, while specifically prohibiting[27] the performance of 'nissuin' or nuptial ceremonies[28] for a girl of tender years, requires that the parties to a marriage must have attained the age of puberty, namely, thirteen years in the case of a boy

26 *Peshtom v. Meherbai,* (I. L. R.) 13 Bom. 309, 311; *Bai Shirin Bai v. Kharshedji,* (I. L. R.) 22 Bom. 430, 437.

27 *8 Jewish Encyclopaedia* 47 (ed. 1925); Kadushin, *Jewish Code of Jurisprudence,* Pt. III & IV, 393, 394 (New York 1917); Mielziner, however, cites the practice of middle ages which allowed the fathers to marry away their minor daughters on account of the wide spread persecution. See Mielziner, *The Jewish Law of Marriage and Divorce p.* 72 (New York 1901).

28 Marriage under Jewish system takes place in two stages, namely, 'Kiddushin' or betrothal and 'nissuin' or nuptial ceremony. Kiddushin, which literally means consecration, is something more than a betrothal as understood in other systems. Betrothal in other systems is a mere agreement to marry at a future date, and it does not effectuate a nexus between the parties. Betrothed parties may, if they like, ignore the betrothal and enter into matrimony with any body else. But under the Jewish law 'Kiddushin' brings into existence a frail bond between the parties affecting, especially, the status of the girl betrothed. If some misunderstanding arises between the parties and 'nissuin' does not come off, the girl will be landed in an unenviable position, for she cannot marry someone else unless the person who has betrothed her gives her a 'get' or deed of release. See for interesting details, *David Sassoon Ezekeil v. Najia Noori Reuben.* (I. L. R.) 55 Bom 803.

and twelve years in the case of a girl.[29] It may, therefore, be stated that child marriages wherein the parties are below the aforesaid age limits, are invalid. Where the parties have attained the age of puberty under the Jewish personal law but have not completed the age limits laid down under the Child Marriage Restraint Act, the parents or guardians are liable to penalties prescribed under the Act, even though the marriage itself is valid. *The Special Marriage Act, 1954*[30] : Section 4 (c) of the Act lays down the age limits of 21 and 18 years for the bridegroom and the bride respectively. A contravention of this provision renders the marriage void under section 24 of the Act.

III Consent

Express or implied agreement of the parties to enter into the state of marriage appears, in modern times, to be an indispensable requirement for a valid marriage. However, a marriage solemnized without such consent under certain circumstances is not invalid in Indian matrimonial law. Absence of consent contemplated in the present context does not include the presence of dissent which, undoubtedly, affects the validity of a marriage;[31] it connotes inaction on the part of the actual parties which may be due to their incapacity to give such consent or due to the social norm of ignoring such consensus. It may be stated, in general, that where the formalities of marriage are contractual in character, the consent of the parties is indispensable; but where the formalities are sacramental in nature, consent *may not* be essential.

Indian matrimonial law admits, as noticed above, the validity of the marriages of minors, though the persons responsible for such

29 Mielziner, *op. cit.* note 27, at 71. Horowitz, *The Spirit of Jewish Law* 270. (New York 1953).

30 A personal law requires that the parties to a marriage must belong to the religion whose law it regulates. But where the parties are of different religions (except the Christian law and to some extent the Muslim law) the personal laws do not make provision for the solemnization of their marriage. For instance, where a Hindu intends to marry a Muslim, such a marriage can be solemnized neither under the Hindu law nor under the Muslim law. The Special Marriage Act, 1954, lays down the procedure for the solemnization of marriages irrespective of the religious affiliation of the parties.

31 See Section 12(c) of the Hindu Marriage Act, 1955 and Section 25(iii) of the Special Marriage Act, 1954.

marriages are liable to penalties under relevant enactments. The parties to such marriages are incapable of giving consent due to their minority and therefore, the requisite consent is supplied by their parents or guardians. This provision of the law which empowers the parents or guardians to constitute a valid marriage on behalf of their wards has two inherent disadvantages. First, in spite of the bona fides of the parents or guardians to safeguard the welfare of their wards, in most of the Indian marriages considerations that are extraneous to the interests of the actual parties to the marriage, are bound to play a prominent role in influencing the consent of the guardians.[32] Second, since such a marriage under some of the personal laws creates an irrevocable tie between the parties, it gives rise to several other problems.[33] Further, not all the personal laws have enumerated specifically[34] the marriage guardians and this poses some difficulty in ascertaining the validity of marriages brought about by persons having no locus standi.

Where the parties have attained majority, their consent is essential for the validity of their marriage. Here again, the requirement of express consent has not been laid down by all the personal laws, the reason being that under certain systems such as that of the Hindus, the social norm prevents the eliciting of express consent at the time of marriage. Absence of express consent is not fatal to the validity of the marriage for law presumes implied consent except where there is the element of force or fraud.

Hindus : Traditional Hindu marriage involves essentially the participation of the father or guardian of the bride and the bridegroom, the bride irrespective of her age being a mere passive participant in the whole transaction.[35] Though 'Kanyadana' (giving away of the bride) which results in the acceptance of the bride by the bridegroom could

32 The emphasis on "good family background" which may not have any relevance to the actual accomplishments of the parties or their likes and dislikes is well known.

33 See the problem created in *Peshtom v. Meher Bai*, (I. L. R.) 13 Bom. 302.

34 Traditional Hindu Law (see, for instance, *Yaj.* I, 63) and Hindu Marriage Act (*Sec.* 6) have enumerated the guardians in the case of a bride. Muslim Law also gives the list of guardians with respect to both the parties. While the enumeration under the Christian Law is defective, Parsi Law omits it completely.

35 Sarkar, *Hindu Law* 122 (1927).

be taken to signify the consent of the bridegroom, there is no ceremony which denotes the assent of the bride. It will not be difficult to discern the reason for the relegation of the bride to a secondary position if it is borne in mind that the traditional marriage ceremonies have come down, without any material change, from the Sutra period[36] which was necessarily dominated by patriarchal notions. Since these ceremonies were formulated at a stage when fathers were enjoined to give away their daughters in marriage before they attained puberty, it is no wonder that the bride became a mere object of the marriage having no say in the transaction.

The usual marriage contemplated under the traditional Hindu law was one between a bride who had not attained puberty,[37] consequently a minor, and an adult bridegroom.[38] The consent of the parent or guardian of the minor bride, and the bridegroom was required and sufficient; and such a marriage created an irrevocable tie between the parties. Traditional Hindu law also enumerated the guardians who were enjoined to give away the girl in marriage.[39] The Hindu Marriage Act, 1955, has reiterated the aforesaid provisions to the extent that a girl between the age of fifteen and eighteen can be validly given away in marriage and it has stated the guardians[40] empowered to supply consent to such marriages which are valid and irrevocable.

It is significant that neither the traditional Hindu law nor the Hindu Marriage Act has taken notice of the marriages wherein both the parties are minors. It is for this reason that the enumeration of guardians has been confined only with respect to the bride. In spite of the absence of provisions in this regard such marriages have taken place in large numbers and the community has presumed the validity of such marriages. The omission of the list of guardians in the case of the bridegroom under the Hindu Marriage Act has given rise to certain anomalies. If, for instance, the marriage of a minor boy is caused to be solemnized by a *de facto* guardian, say for instance a

36 See *supra* note 6.

37 See *supra* note 7.

38 See *supra* note 11.

39 *Yajnavalkya* I, 63-64; *Visnu* XXIV 38, 39; *Narada* XII, 20, 21.

40 Section 6.

distant kinsman having the custody of the boy, who is desirous of making a bargain of the transaction, can the boy on attaining the age of majority plead that his marriage is invalid since neither had he the capacity to enter into marriage nor his guardian the authority to supply the requisite consent. It is submitted that such marriages are of doubtful validity even though they have been presumed to be valid[41] in the past. It is doubtful whether such marriages could be validated by the application of the doctrine of *'factum valet'* especially when the bridegroom lacks the capacity and the guardian the authority.

Regarding the priority of the guardians whose consent is required for the marriage of a minor girl, it is well settled that a mere supersession of a prior guardian by a subsequent guardian would not affect the validity of a marriage unless it is grossly prejudicial to the interests of the girl. The courts have upheld the validity of such marriages under the doctrine of *'factum valet'* by considering guardianship in marriage more as a duty than as a right.[42] The reluctance of the courts to interfere with the validity of such marriages which have otherwise been properly solemnized is due to social as well as religious reasons. The annulment of such a marriage puts an end to the prospects of the girl finding a match a second time in the present state of the Hindu society and further from the religious point of view, it does not restore the *'status quo ante'* since the effect of the *Sacrament* cannot be annulled by the decree of a court.

It is interesting to note that neither traditional Hindu law nor the Hindu Marriage Act has any provision relating to express consent even where the parties have attained majority; their consent is presumed in the absence of force or fraud.

Muslims : Where one or both the parties are minors, the consent of the parents or guardians is necessary to constitute a valid marriage; but such a marriage is not, as under Hindu law, irrevocable. Muslim law has safeguarded the interests of a minor married during minority by permitting him or her to repudiate such a marriage on attaining majority. Such an option could be exercised on attaining puberty, namely, the age of fifteen years but before the age of eighteen provided

41 *Sivanandy v. Bhagavathyamma*, A I. R. 1962 Mad. 400, 402.

42 *Venkatacharyalu v. Rangacharyalu*, (1891) I. L. R. 14 Mad. 316; *Kasturi v. Chiranjilal*, (1963) I. L. R. 35 All. 265.

consummation has not taken place. The traditional Muslim law had imposed a restriction on the exercise of such a right by laying down that where a minor had been given away by the father or the paternal grandfather, the marriage could not be rescinded. The reason for such a restriction was obvious, namely, that a father or a grandfather would not be deemed to enter into a marriage that is detrimental to the interests of the minor. Even this restriction has been done away with by the Dissolution of Muslim Marriages Act, 1939.[43] The Option of Puberty, though available to both the parties, is a more important right to a girl to free herself from a prejudicial marriage than to a boy because the rights of a husband and wife are unevenly balanced especially in the branch of divorce.

As regards the order of relations entitled to be marriage guardians, Shia law lays down that father and paternal grandfather are the only marriage guardians. On the other hand Sunni law enumerates the persons in the order of inheritance as capable of contracting a marriage on behalf of the minors. A question of considerable importance arises when a relation other than the father or the grandfather under the Shia law or a remoter guardian under the Sunni law supersedes the right of a prior guardian by entering into a contract of marriage on behalf of the minor. Is such a marriage void or voidable ? Ameer Ali when he says that under Shia law "a marriage contracted by any other relative, even a mother is wholly inoperative unless expressly ratified by the infant on attaining puberty,"[44] refers to the consent supplied by a guardian when the father or grandfather is dead. When the marriage contracted by a person other than the father or grandfather is inoperative, it may be stated by parity of reason that a marriage contracted by a person superseding the right of a father or grandfather is also void. Under Sunni law, "a marriage entered into by a guardian (other than the father and the grandfather) is operative until it is rescinded on the attainment of puberty,"[45] that is to say,

43. Section 2(vii). It is submitted that Mr. B. Sivaramiah in his notes on 'Convention on Consent to marriage, minimum age for marriage and registration of marriages' 1962 with special reference to India, 8 *J. I. L. I.* 402, 407 (1966), has made a mis-statement of law. The change brought about by the Dissolution of Muslim Marriages Act which Mulla has noticed in the very next section, has unfortunately escaped his attention.

44 2 Ameer Ali, *Mahomedan Law* 420 (1917).

45 *Id.* at 422.

such a marriage is voidable. Will the consequence be the same when a subsequent guardian supersedes the right of a prior guardian ? The question is of considerable significance for if the marriage is merely voidable, in the event of the death of the minor spouse, the other spouse is entitled to inherit the property of the deceased. It appears that such a marriage is void under Sunni law also. Since Muslim marriage is a contract, the rules relating to the capacity of the parties and the authority of the guardians have to be strictly construed. When the actual party to the marriage has no capacity and the guardian supplying the consent has no authority, the marriage should be treated as void. It may be categorically stated that the doctrine of *factum valet*, as applied under Hindu law, cannot be invoked to validate such marriages.

Where the parties have attained majority, consent has to be given by them or their agents.[46] An exception to this rule is to be found in the Maliki, Shafei and the Fatimid Shia Schools[47] according to which, even after attaining puberty a Muslim girl cannot contract her marriage independently since the '*Jabr*' or the potestas of her guardian continues until her marriage. The only alternative for the girl to evade this provision is to change her school and marry according to that school. Consent under Muslim law is necessarily express consent and in the absence of express consent marriage cannot be constituted.

Christians : The Christian marriage ceremonies as well as the Indian Christian Marriage Act[48] have laid down the requirement of express consent for constituting a valid marriage. The parties to a marriage have to declare at some part of the transaction that each is accepting the other as his or her spouse.[49] Where the parties to a marriage are minors or one of them is a minor, the consent of the parents or guardian (testamentary ?) is required to constitute the marriage. It may be noticed in this connection that the Christian Marriage Act has not laid down who can be the guardians of the minor in the absence of father, guardian (testamentary ?) and mother for supplying the requisite consent. It is also not certain whether the marriage is valid where the mother supersedes the right of the father. Since the Christian marriage involves the elements of both contract

46 See Fyzee *op. cit.* supra note 18, at 88; Mulla, *op. cit.* note 18, at 249, 250.

47 See Fyzee, *op. cit.* supra note 18, at 201.

48 Sections 51 and 60.

49 *Ibid.*

and *sacrament*, it is difficult to say if the doctrine of *factum valet* could be invoked to validate such marriages.

Where the parties have attained majority, they have to give express consent at some part of the transaction.[50]

Parsis : The position under Parsi law is similar to that under Hindu law. Where the parties are minors, the consent is supplied by their parents or guardians and such a marriage is valid and irrevocable. But it is interesting to note that the Parsi Marriage and Divorce Act has nowhere given the list of marriage-guardians and the omission resembles that of the Christian Marriage Act.[51]

Where the parties have attained majority, the consent is given at the time of marriage and at the instance of the priest. It is significant that for the purposes of contracting a marriage independently, a Parsi must have attained the age of twenty one years.[52] So a Parsi of eighteen years, even though he could enter into other contracts independently, requires the consent of his or her guardian to enter into a contract of marriage. A disregard of this provision renders the marriage void.[53]

Jews : Jewish law, as noticed earlier, prohibits the marriage of persons who have not attained the age of puberty.[54] Since the marriage of children of nonage is void, the question of parents or guardians supplying consent for such a marriage does not arise. But where the parties have attained puberty, express consent of the parties is essential for the validity of the marriage.[55]

The Special Marriage Act, 1954 : Since the Special Marriage Act requires the bride and the bridegroom to have completed the age limits of 18 and 21 years respectively[56] and declares marriages of

50 Sections 51 and 60.

51 Even though Section 3(c) lays down that where the party is below the age of twenty one years, the consent of the father or guardian has to be obtained, it has not specified the guardians who are competent to give such consent.

52 Sec. 3(c).

53 See the wording of the section, namely, "No marriage shall be valid if..."

54 See *supra* note 27.

55 See Mielziner, *op. cit. supra* note 27, at 66, 67; Kadushin, *op. cit. supra*, note 27, at 397, 398.

56 Section 4(c).

persons below those age limits void,[57] the question of minors getting married under the Act and the guardians supplying the consent does not arise. The Act also lays down the requirement of express consent to constitute a valid marriage.[58]

IV Soundness of Mind

Soundness of mind is essential for entering into any contractual engagement that gives rise to rights and obligations. The law, therefore, requires that the parties to an engagement should not only understand the nature of such a transaction but also be capable of discharging the obligations arising out of it. It may be stated analogically that soundness of mind is a necessary requirement for a valid marriage, for, apart from giving rise to rights and obligations, marriage effectuates status as well. Though this statement appears to be incontrovertible, it has, indeed, been contested in numerous cases with a view to establish that marriages of persons of unsound mind are not invalid. It has been urged that because marriage under certain systems such as that of the Hindus is a sacrament and not a contract, consenting mind is not required. Since some of these systems recognise child marriages, the insistence on the requirement of "the knowledge of the transaction" loses much of its force. Further it is emphasised that the essential purpose of marriage being procreation, it can be accomplished even when one of the parties to the marriage is unsound in mind. This fallacious logic has been so convincingly canvassed before the courts that the validity of such marriages has been assumed in several cases.[59]

Legislation[60] in modern times is inclined to declare such marriages voidable. It may, however, be questioned why the legislature instead of rendering such marriages void, as under the Special Marriage Act,[61] has made them voidable. It will not be difficult to understand the reason if the social attitude of the community is taken into account. Even at present there is a fairly high percentage of people

57 Section 24(1) (i).

58 Section 12.

59 *Amirthammal v. Vallimayil*, A. I. R. 1942 Mad 693 (F. B.), *Bhagawati Saran v. Rameshwari*, I. L. R. (1942) All. 518.

60 Section 12(ii) of the Hindu Marriage Act, 1955; see also the Christian Marriage and Matrimonial Bill, 1962, Section 25(a).

61 Section 24.

in India who take the fatalistic view of life.[62] However reprehensible it might appear to a modern mind, it will not be surprising to find many a spouse who is prepared to bear the cross of unhappy married life even with a spouse who is unsound in mind. It becomes imperative, especially, in the case of a woman since the chances of her getting a better match a second time are dim under the prevailing Indian social conditions. It is perhaps by taking into account these factors that legislation has not declared such marriages void, but has rendered them voidable at the option of the aggrieved party.

Hindus : The validity of the marriages of persons of unsound mind remained in a state of uncertainty until the passing of the Hindu Marriage Act, 1955.[63] The complexities of the question under the traditional Hindu law arose on account of several factors :

(1) Since Hindu marriage is a sacrament and not a contract,[64] it was generally presumed that the consenting mind was not required[65] and from this assumption the validity of the marriages of persons of unsound mind and nonage was presumed;

(2) While the requirements of consent and soundness of mind could easily be deduced from the formalities of marriage under other systems, namely, Muslim and Christian, it is not possible to gather these requirements from the formalities of a Hindu marriage.

(3) The original texts relating to the property rights of disqualified coparceners from which the capacity of a person of unsound mind to contract a valid marriage is indirectly deduced, are equivocal.

62 Even an elightened writer like Golapchandra Sarkar attempts to justify the practice of arranged marriages on the ground that while an individual has no choice to select his or her parents, or brothers or sisters, and yet can lead a happy life with them, why should one have the right to select one's spouse; see Golapchandra Sarkar *op. cit.* note 35, at 123, 124. The fallacy of this argument is so apparent that its refutation is superfluous.

63 See Sections 5 (ii) and 12.

64 It is indeed a debatable point. Many are inclined to hold that even though Hindu marriage is a sacrament, it has contractual elements as well. See Mayne *Hindu Law* 136 (1950). For contrary view see *Sivanandy v. Bhagavathyamma*, A. I. R. 1942 Mad 400, 402.

65 This again is a controversial issue. Even if it is presumed that Hindu Marriage is pure and simple sacrament and not a contract, it does not necessarily follow that consenting mind is not required.

It is urged that a Samskara (sacrament) is a set of ceremonies performed to accomplish a specific objective and it is not necessary that the person with respect to whom it is performed should understand the nature of it. It is significant that except marriage, the observance of all other Samskaras take place at a time when the individual concerned cannot understand the nature of the ceremonies. For instance, a few of the Samskaras are performed even before the birth of the individual,[66] some during his minority[67] and some after his death.[68] Therefore, it will not be correct to infer that "knowledge of the Samskara ceremony" is required in the case of marriage, which after all is one of the thirteen Samskaras prescribed by the Sastras. They, therefore, conclude that the marriages of persons of nonage and unsound mind are valid under traditional Hindu law.

It is interesting to observe that while examining the validity of marriages of persons of unsound mind analogy is often drawn from the marriages of persons of nonage. It must be pointed out in this connection that in spite of the common element, namely, the absence of capacity to understand the nature of the transaction in both, the question of their validity has to be tested on entirely different grounds. The practice of child marriage, as seen earlier, wherein both the parties are of nonage is alien to the Dharma Sastraic literature; the validity of such marriages has been recognised by virtue of usage and not due to Sastraic injunction. Therefore, if the validity of the marriages of persons of unsound mind has to be tested on the analogy of child marriages, it can only be on the basis of custom. Merely because there is the "absence of knowledge of the transaction" in both, the validity of the latter cannot be presumed. In fact the validity of marriages of persons of unsound mind can only be upheld on the ground that the capacity to understand the nature of the marriage Samskara is not required under the Sastras.

While the formalities of marriage under other systems are simple and contractual in character, the Sastras have laid down numerous, elaborate and complex ceremonies. Whenever the validity of a Hindu

66 *Garbha Dana* (Conception), *Pumsavana* (ceremony to secure a male child), *Simantonnayana* (Parting of the heir of the mother during pregnancy).

67 *Jatakarma* (Ceremony at the time of birth), *Namakarana* (Naming of the child), *Nishkramana* (Taking the child out of the house), *Annaprasana* (First feeding), *Chudakarma* (Tonsure), *Upanayana* (Initiation into the Vedic studies).

68 *Antyesti* (Funeral ceremonies).

in India who take the fatalistic view of life.[62] However reprehensible it might appear to a modern mind, it will not be surprising to find many a spouse who is prepared to bear the cross of unhappy married life even with a spouse who is unsound in mind. It becomes imperative, especially, in the case of a woman since the chances of her getting a better match a second time are dim under the prevailing Indian social conditions. It is perhaps by taking into account these factors that legislation has not declared such marriages void, but has rendered them voidable at the option of the aggrieved party.

Hindus: The validity of the marriages of persons of unsound mind remained in a state of uncertainty until the passing of the Hindu Marriage Act, 1955.[63] The complexities of the question under the traditional Hindu law arose on account of several factors :

(1) Since Hindu marriage is a sacrament and not a contract,[64] it was generally presumed that the consenting mind was not required[65] and from this assumption the validity of the marriages of persons of unsound mind and nonage was presumed;

(2) While the requirements of consent and soundness of mind could easily be deduced from the formalities of marriage under other systems, namely, Muslim and Christian, it is not possible to gather these requirements from the formalities of a Hindu marriage.

(3) The original texts relating to the property rights of disqualified coparceners from which the capacity of a person of unsound mind to contract a valid marriage is indirectly deduced, are equivocal.

62 Even an elightened writer like Golapchandra Sarkar attempts to justify the practice of arranged marriages on the ground that while an individual has no choice to select his or her parents, or brothers or sisters, and yet can lead a happy life with them, why should one have the right to select one's spouse; see Golapchandra Sarkar *op. cit.* note 35, at 123, 124. The fallacy of this argument is so apparent that its refutation is superfluous.

63 See Sections 5 (ii) and 12.

64 It is indeed a debatable point. Many are inclined to hold that even though Hindu marriage is a sacrament, it has contractual elements as well. See Mayne *Hindu Law* 136 (1950). For contrary view see *Sivanandy v. Bhagavathyamma*, A. I. R. 1942 Mad 400, 402.

65 This again is a controversial issue. Even if it is presumed that Hindu Marriage is pure and simple sacrament and not a contract, it does not necessarily follow that consenting mind is not required.

It is urged that a Samskara (sacrament) is a set of ceremonies performed to accomplish a specific objective and it is not necessary that the person with respect to whom it is performed should understand the nature of it. It is significant that except marriage, the observance of all other Samskaras take place at a time when the individual concerned cannot understand the nature of the ceremonies. For instance, a few of the Samskaras are performed even before the birth of the individual,[66] some during his minority[67] and some after his death.[68] Therefore, it will not be correct to infer that "knowledge of the Samskara ceremony" is required in the case of marriage, which after all is one of the thirteen Samskaras prescribed by the Sastras. They, therefore, conclude that the marriages of persons of nonage and unsound mind are valid under traditional Hindu law.

It is interesting to observe that while examining the validity of marriages of persons of unsound mind analogy is often drawn from the marriages of persons of nonage. It must be pointed out in this connection that in spite of the common element, namely, the absence of capacity to understand the nature of the transaction in both, the question of their validity has to be tested on entirely different grounds. The practice of child marriage, as seen earlier, wherein both the parties are of nonage is alien to the Dharma Sastraic literature; the validity of such marriages has been recognised by virtue of usage and not due to Sastraic injunction. Therefore, if the validity of the marriages of persons of unsound mind has to be tested on the analogy of child marriages, it can only be on the basis of custom. Merely because there is the "absence of knowledge of the transaction" in both, the validity of the latter cannot be presumed. In fact the validity of marriages of persons of unsound mind can only be upheld on the ground that the capacity to understand the nature of the marriage Samskara is not required under the Sastras.

While the formalities of marriage under other systems are simple and contractual in character, the Sastras have laid down numerous, elaborate and complex ceremonies. Whenever the validity of a Hindu

66 *Garbha Dana* (Conception), *Pumsavana* (ceremony to secure a male child), *Simantonnayana* (Parting of the heir of the mother during pregnancy).

67 *Jatakarma* (Ceremony at the time of birth), *Namakarana* (Naming of the child), *Nishkramana* (Taking the child out of the house), *Annaprasana* (First feeding), *Chudakarma* (Tonsure), *Upanayana* (Initiation into the Vedic studies).

68 *Antyesti* (Funeral ceremonies).

marriage is in issue, the Courts generally take into account three important ceremonies, namely, the Kanyadana, or gifting away of the girl, the Panigrahana or *dextarum junctio*, and the Saptapadi or the taking of the seven steps around the sacred fire installed for the occasion. It may be argued that Kanyadana wherein the father makes a gift of his daughter to the bridegroom involves the mental element[69] and unless the bridegroom is sound in mind, he will not be able to accept the gift of the bride. Therefore, there cannot be a valid Kanyadana when the bridegroom is unsound in mind. This appears to be a valid and formidable objection. But it is interesting to note that acceptance is not essential for the validity of a gift, at least, according to one school of Hindu law, namely, the Dayabhaga which holds the view that the gift is complete when the owner abandons his control over the object of gift.[70] In view of such an attitude of the leading school of Hindu law, it may be suggested that since the gift is beneficial to the bridegroom, his guardian may supply the consent. It is significant that even though the ceremonies of Kanyadana and Saptapadi might have involved, to begin with, the mental element, they are treated in modern times as mere physical acts. Therefore, those who are inclined to uphold the validity of marriages of persons of unsound mind may urge that even such persons may be made to go through these physical acts.

The texts of Manu,[71] Yajnavalkya[72] and Narada[73] do not lay down explicitly that a person of unsound mind can contract a valid marriage; but the validity of such a marriage has been inferred from these texts.[74] Since a leading commentator like Medhatithi has concluded that a person of unsound mind cannot marry, these texts cannot be pressed in support of the validity of such marriages.

69 For the interesting comments of a seventeenth century Bengal writer, see Derrett, "The Discussion of marriage by Gadhadhara, A preliminary investigation," XXVII *Adyar Library Bulletin* 171 (1963).

70 Sen, *Hindu Jurisprudence* (1909 T.L.L.) 66 (1918).

71 *Manu* IX, 201-203.

72 *Yajnavalkya* II, 140.

73 *Narada* XIII, 21-22.

74 The texts while laying down that certain persons such as impotent, outcaste, idiot, lunatic, etc., are excluded from inheritance, merely say that the offsprings of such persons are entitled to take their share. From this the inference is drawn that disqualified persons, including a person who is unsound in mind, are competent to enter into a valid marriage.

Another incongruity that may be pointed out in this connection is that even if it is presumed that soundness of mind is essential in the case of a bridegroom, the requirement of soundness of mind in the case of a bride is nowhere thought of in the Sastras. As noticed earlier, a bride in a Hindu marriage is a passive participant in the whole transaction and it can be categorically stated that the marriage of a girl of unsound mind is valid under Hindu law. It is indeed an anomalous situation that if the bride is unsound in mind, the marriage is valid, but when the bridegroom is unsound in mind, the marriage is invalid.

The Courts while taking notice of the prevalent complexities had always been reluctant to invalidate marriages on the ground of unsoundness of mind of one of the parties.[75] The Privy Council declared in *Moujilal's case* [76] that the objection to a marriage on the ground of mental incapacity must depend upon the degree of unsoundness which in effect meant that if the person was totally unsound in mind, the marriage was invalid. But as rightly observed by the Madras and the Allahabad High Courts,[77] the question of the validity of the marriage of a lunatic or an idiot was not directly in issue before the Judicial Committee and, therefore, the above observations of Their Lordships were mere *obiter*.[78]

The Hindu Marriage Act has put an end to the confusion by laying down that the parties to a valid marriage should be sound in mind, [79] and in the event of unsoundness of mind of one of the parties, the marriage is voidable at the option of the aggrieved party .[80] It is interesting to observe in this connection that the Act has not defined the terms 'unsound in mind,' 'idiot' or 'lunatic.' Therefore, the question

75 Both in *Moujilal's case*, (1911 I L.R. 38 Cal 700) and *Bhagvati Saran's case* (1942 I.L.R. All. 518) the Courts should have pronounced a verdict on the capacity of a lunatic or a person of unsound mind to marry, but in both the cases, the issue was evaded.

76 (1911) 38 Cal. 700.

77 *Amirthammal v. Vallimayil*, A.I.R. 1942 Mad. 693 (F.B.) 697, *Bhagavati Saran v. Parameswari* (1942) I. L. R. All. 518, at 589.

78 In *Ratneswari Nandan* v. *Bhagwati* (1949) F.C.R. 715 (the appeal from 1942 A.I.R. All 518) the remarks of Mukherjea, J., (807) agreeing with the view of G. Banerjea that such marriages are invalid are also *obiter dicta*.

79 Section 5(ii).

80 Section 12.

whether a party to a marriage is mentally incapacitated or not, has to be established as a question of fact.[81] It may also be noted here that the mental capacity required to contract a marriage may be different from the capacity to enter into a contract or execute a will.[82]

Muslims : Since the formalities of a Muslim marriage are contractual in character, soundness of mind of the parties is a necessary pre-requisite to a valid marriage. Therefore, a marriage contracted by a person of unsound mind is invalid. A question of importance that has to be considered in this connection is whether a guardian can validly contract a marriage on behalf of his lunatic ward. It has to be examined under two different circumstances, namely, when the lunatic ward is a minor and when he has attained majority. As noted earlier, a guardian can validly contract a marriage on behalf of the minor irrespective of the mental capacity of the minor. Since the two disabilities merge, it is not possible to state with certainty whether the right of a guardian to contract the marriage arises out of the minority or the unsoundness of mind of the ward. In the case of a lunatic or an idiot who has attained puberty two distinct situations have to be considered; (i) unsoundness of mind might have commenced during the minority of the ward and continued even after the attainment of puberty; (ii) unsoundness of mind might have supervened after the attainment of puberty. The saying of the Prophet that "there is no 'nikah' except by means of a guardian, and the existence of a guardian is a condition for the validity of the marriage of minors...and those who are insane"[83] is so general that it can cover both the situations. Though jurists have agreed on the right of the guardian to contract a marriage on behalf of a lunatic ward whose unsoundness of mind has continued even after the attainment of puberty, they have differed where the unsoundness of mind has supervened after the attainment of puberty.[84] In the light of disagreement among jurists of authority and the remarks of Wazir, C. J.,[85] that "if a boy or girl has attained the age of puberty, if he or she is devoid of understanding there could not be any valid marriage under any circumstances whatever," it is

81 See the extremely interesting facts situation in *Titli* v. *Jones*, (1934) I. L. R., 56 All. 428.

82 See for comments Derrett, *Hindu Law* 155 (1963).

83 3 Khan, *Mahomedan Law*, 1891-92, T. L. L. 86 (1896).

84 *Id.* at 96, 97.

85 *Mt. Khatji* V. *Rehman Wani*, A.I R. 1952 J.K. 43.

difficult to uphold the validity of a marriage contracted by a guardian on behalf of his ward who has become unsound in mind after attaining puberty.

It has also been provided under Muslim law that where one of the parties to the marriage is insane "the marriage can be cancelled."[86] If the modern terminology is used to sum up the legal effect, it can then be stated that the marriage of a person of unsound mind is voidable.

Christians : The formalities of a Christian marriage being contractual in character, consent of the paries, as observed earlier, is an essential requirement for the validity of the marriage. Therefore, a person who is unsound in mind and who is incapable of giving consent[87] cannot contract a valid marriage. The Indian Christian Marriage Act, despite its great length, is silent regarding the requirement of soundness of mind. But the Indian Divorce Act, the supplemental legislation, has laid down that a decree of nullity may be obtained where one of the parties to the marriage is unsound in mind.[88] But unfortunately the wordings of the relevant sections are ambiguous. Section 18 of the Indian Divorce Act states that "any husband or wife *may present* a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void."[89] Now, does it mean that if the aggrieved party does not choose to obtain the judicial relief under sections 18 and 19, the marriage is valid in spite of the unsoundness of mind of the other party ? Can it then be said that the marriage of a person of unsound mind is merely voidable ? If a strict literal interpretation is placed upon these two sections,then such a marriage would be voidable. But it is significant to add in this context that the distinction between void and voidable marriage was unknown to matrimonial law at the time of the passing of the Indian Divorce Act,

86 Saksena, *Muslim Law* 206 (4th ed. 1963).

87 Even though a person may generally be unsound in mind, if he can understand the nature of the promise, he can enter into a valid marriage. A lunatic can, therefore, contract a marriage during lucid intervals. The Catholic Encyclopaedia Vol VIII (Universe Edn.) 42.

88 Section 19(3).

89 Compare it to the expression used in Section 11 of the Hindu Marriage Act, 1955, "marriage...*shall be null and void...and may on a petition*...be so declared."

whether a party to a marriage is mentally incapacitated or not, has to be established as a question of fact.[81] It may also be noted here that the mental capacity required to contract a marriage may be different from the capacity to enter into a contract or execute a will.[82]

Muslims : Since the formalities of a Muslim marriage are contractual in character, soundness of mind of the parties is a necessary pre-requisite to a valid marriage. Therefore, a marriage contracted by a person of unsound mind is invalid. A question of importance that has to be considered in this connection is whether a guardian can validly contract a marriage on behalf of his lunatic ward. It has to be examined under two different circumstances, namely, when the lunatic ward is a minor and when he has attained majority. As noted earlier, a guardian can validly contract a marriage on behalf of the minor irrespective of the mental capacity of the minor. Since the two disabilities merge, it is not possible to state with certainty whether the right of a guardian to contract the marriage arises out of the minority or the unsoundness of mind of the ward. In the case of a lunatic or an idiot who has attained puberty two distinct situations have to be considered; (i) unsoundness of mind might have commenced during the minority of the ward and continued even after the attainment of puberty; (ii) unsoundness of mind might have supervened after the attainment of puberty. The saying of the Prophet that "there is no 'nikah' except by means of a guardian, and the existence of a guardian is a condition for the validity of the marriage of minors...and those who are insane"[83] is so general that it can cover both the situations. Though jurists have agreed on the right of the guardian to contract a marriage on behalf of a lunatic ward whose unsoundness of mind has continued even after the attainment of puberty, they have differed where the unsoundness of mind has supervened after the attainment of puberty.[84] In the light of disagreement among jurists of authority and the remarks of Wazir, C. J.,[85] that "if a boy or girl has attained the age of puberty, if he or she is devoid of understanding there could not be any valid marriage under any circumstances whatever," it is

81 See the extremely interesting facts situation in *Titli* v. *Jones*, (1934) I. L. R., 56 All. 428.

82 See for comments Derrett, *Hindu Law* 155 (1963).

83 3 Khan, *Mahomedan Law*, 1891-92, T. L. L. 86 (1896).

84 *Id.* at 96, 97.

85 *Mt. Khatji* V. *Rehman Wani*, A.I R. 1952 J.K. 43.

difficult to uphold the validity of a marriage contracted by a guardian on behalf of his ward who has become unsound in mind after attaining puberty.

It has also been provided under Muslim law that where one of the parties to the marriage is insane "the marriage can be cancelled."[86] If the modern terminology is used to sum up the legal effect, it can then be stated that the marriage of a person of unsound mind is voidable.

Christians : The formalities of a Christian marriage being contractual in character, consent of the paries, as observed earlier, is an essential requirement for the validity of the marriage. Therefore, a person who is unsound in mind and who is incapable of giving consent[87] cannot contract a valid marriage. The Indian Christian Marriage Act, despite its great length, is silent regarding the requirement of soundness of mind. But the Indian Divorce Act, the supplemental legislation, has laid down that a decree of nullity may be obtained where one of the parties to the marriage is unsound in mind.[88] But unfortunately the wordings of the relevant sections are ambiguous. Section 18 of the Indian Divorce Act states that "any husband or wife *may present* a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void."[89] Now, does it mean that if the aggrieved party does not choose to obtain the judicial relief under sections 18 and 19, the marriage is valid in spite of the unsoundness of mind of the other party ? Can it then be said that the marriage of a person of unsound mind is merely voidable ? If a strict literal interpretation is placed upon these two sections,then such a marriage would be voidable. But it is significant to add in this context that the distinction between void and voidable marriage was unknown to matrimonial law at the time of the passing of the Indian Divorce Act,

86 Saksena, *Muslim Law* 206 (4th ed. 1963).

87 Even though a person may generally be unsound in mind, if he can understand the nature of the promise, he can enter into a valid marriage. A lunatic can, therefore, contract a marriage during lucid intervals. The Catholic Encyclopaedia Vol VIII (Universe Edn.) 42.

88 Section 19(3).

89 Compare it to the expression used in Section 11 of the Hindu Marriage Act, 1955, "marriage...*shall be null and void...and may on a petition*...be so declared."

1869.[90] It is for this reason that in Section 19 grounds which would render the marriage voidable[91] under modern law have been mixed up with grounds that render the marriage void.[92] If, by adhering to literal interpretation, the marriage of a person of unsound mind is rendered voidable, then a similar construction has to be placed on clauses (2) and (4) of section 19 which deal with marriages offending the prohibited degrees and those that are bigamous. With no stretch of imagination can we declare that marriages vitiated on the grounds of prohibited degrees and bigamy are voidable. On the other hand, since the marriages vitiated under clauses (2) and (4) have always been deemed to be void, on sound principles of interpretation it has to be concluded that marriages vitiated under clauses (1) and (3) are also void. The Christian Marriage and Matrimonial Causes Bill, 1962, (which is yet to become law) intends to put an end to these difficulties by prescribing soundness of mind as one of the conditions of a valid marriage[93] and making the marriage voidable [94] when one of the parties is unsound in mind, thereby falling in line with the provisions of the Hindu Marriage Act. Even though these provisions are a departure from the traditional Christian view, perhaps the fact that the bulk of the Indian Christians being converts from Hinduism share the same common sentiment of the Hindus with respect to such marriages might have influenced the authors of the Bill.

Parsis : Parsi law is also unsatisfactory on this point. Though the priest ascertains the consent of the parties at the time of the marriage provided they are adults, it is not certain whether such consent is the *sine qua non* of a valid marriage. The Parsi Marriage and Divorce Act which lays down the conditions of a valid marriage[95] is silent regarding the requirement of soundness of mind. But surprisingly, section 32 of the Act which enumerates various grounds of divorce states "unsoundness of mind *at the time of marriage.*"[96] as a ground for obtaining divorce. The conclusion we can draw from this provision is interesting. Since divorce presupposes the existence of a valid marriage, it can be stated, by implication, that the marriage of a person of unsound mind is valid under Parsi law.

90 In *Titli v. Jones*, (1934) 56 All 428, at 441, Mukerji, J., expresses surprise at the concept of voidable marriage. See also the remarks of Sulaiman, C.J., at 468.

91 Clauses (i) and (ii) deal with the grounds of impotency and idiocy which render the marriage voidable under modern law.

92 Clauses (ii) and (iv) deal with the grounds of prohibited degrees and bigamy which render the marriage void under modern law.

93 Section 4(iii).

94 Section 25(a).

95 Section 3.

Jews : A person who is unsound in mind is not capable of "willing" and as the Rabbis put it "he has action but no thought.[97] Such a person cannot enter into any transaction which requires consent. Since the Jewish law insists on the requirement of 'mutual consent of the parties' to a marriage, a person who is unsound in mind cannot contract a valid marriage.[98] But a lunatic can contract a marriage during lucid intervals.

The Special Marriage Act, 1954 : Section 4 (b) of the Act lays down soundness of mind as an essential requirement of a valid marriage. If one of the parties to the marriage is unsound in mind, the marriage is void.[99]

V Appraisal

The above survey indicates the complexities of the three requirements in the Indian Matrimonial Law and the chaotic pattern may be projected in the tabular form given at next page.

Before venturing to suggest legislative changes to reorganise the existing provisions, it is necessary to emphasise the importance of implementing the provisions of the Child Marriage Restraint Act, 1929. It has been, as pointed out earlier,[100] a sad commentary on Indian social legislation that follow up action is seldom taken to implement such legislative measures which indeed reflects the lack of coordination between legislative thinking and executive action. The executive which is saddled with the responsibility of implementation seems to have ignored the simple truth that mere legislative prescription[101] is no panacea for deep rooted social evils. The Child Marriage Restraint

96 Mere unsoundness of mind of the other party is insufficient to obtain divorce. Some curious qualifications have been inserted in the proviso.

97 6 Jewish Encyclopaedia 605 (1925).

98 Horowitz, *The Spirit of Jewish Law* 270 (1953).

99 The Special Marriage Act, 1954, section 24.

100 See *supra* note 16.

101 The Dowry Prohibition Act, 1961, is another exercise in futility. The Government has neither the intention nor the will to implement the provisions of this Act.

1869.[90] It is for this reason that in Section 19 grounds which would render the marriage voidable[91] under modern law have been mixed up with grounds that render the marriage void.[92] If, by adhering to literal interpretation, the marriage of a person of unsound mind is rendered voidable, then a similar construction has to be placed on clauses (2) and (4) of section 19 which deal with marriages offending the prohibited degrees and those that are bigamous. With no stretch of imagination can we declare that marriages vitiated on the grounds of prohibited degrees and bigamy are voidable. On the other hand, since the marriages vitiated under clauses (2) and (4) have always been deemed to be void, on sound principles of interpretation it has to be concluded that marriages vitiated under clauses (1) and (3) are also void. The Christian Marriage and Matrimonial Causes Bill, 1962, (which is yet to become law) intends to put an end to these difficulties by prescribing soundness of mind as one of the conditions of a valid marriage[93] and making the marriage voidable [94] when one of the parties is unsound in mind, thereby falling in line with the provisions of the Hindu Marriage Act. Even though these provisions are a departure from the traditional Christian view, perhaps the fact that the bulk of the Indian Christians being converts from Hinduism share the same common sentiment of the Hindus with respect to such marriages might have influenced the authors of the Bill.

Parsis : Parsi law is also unsatisfactory on this point. Though the priest ascertains the consent of the parties at the time of the marriage provided they are adults, it is not certain whether such consent is the *sine qua non* of a valid marriage. The Parsi Marriage and Divorce Act which lays down the conditions of a valid marriage[95] is silent regarding the requirement of soundness of mind. But surprisingly, section 32 of the Act which enumerates various grounds of divorce states "unsoundness of mind *at the time of marriage.*"[96] as a ground for obtaining divorce. The conclusion we can draw from this provision is interesting. Since divorce presupposes the existence of a valid marriage, it can be stated, by implication, that the marriage of a person of unsound mind is valid under Parsi law.

90 In *Titli v. Jones*, (1934) 56 All 428, at 441, Mukerji, J., expresses surprise at the concept of voidable marriage. See also the remarks of Sulaiman, C.J., at 468.

91 Clauses (i) and (ii) deal with the grounds of impotency and idiocy which render the marriage voidable under modern law.

92 Clauses (ii) and (iv) deal with the grounds of prohibited degrees and bigamy which render the marriage void under modern law.

93 Section 4(iii).

94 Section 25(a).

95 Section 3.

Jews : A person who is unsound in mind is not capable of "willing" and as the Rabbis put it "he has action but no thought.[97] Such a person cannot enter into any transaction which requires consent. Since the Jewish law insists on the requirement of 'mutual consent of the parties' to a marriage, a person who is unsound in mind cannot contract a valid marriage.[98] But a lunatic can contract a marriage during lucid intervals.

The Special Marriage Act, 1954 : Section 4 (b) of the Act lays down soundness of mind as an essential requirement of a valid marriage. If one of the parties to the marriage is unsound in mind, the marriage is void.[99]

V Appraisal

The above survey indicates the complexities of the three requirements in the Indian Matrimonial Law and the chaotic pattern may be projected in the tabular form given at next page.

Before venturing to suggest legislative changes to reorganise the existing provisions, it is necessary to emphasise the importance of implementing the provisions of the Child Marriage Restraint Act, 1929. It has been, as pointed out earlier,[100] a sad commentary on Indian social legislation that follow up action is seldom taken to implement such legislative measures which indeed reflects the lack of coordination between legislative thinking and executive action. The executive which is saddled with the responsibility of implementation seems to have ignored the simple truth that mere legislative prescription[101] is no panacea for deep rooted social evils. The Child Marriage Restraint

96 Mere unsoundness of mind of the other party is insufficient to obtain divorce. Some curious qualifications have been inserted in the proviso.

97 6 Jewish Encyclopaedia 605 (1925).

98 Horowitz, *The Spirit of Jewish Law* 270 (1953).

99 The Special Marriage Act, 1954, section 24.

100 See *supra* note 16.

101 The Dowry Prohibition Act, 1961, is another exercise in futility. The Government has neither the intention nor the will to implement the provisions of this Act.

Personal Law	Marriageable Age			Consent		Soundness of mind
	Prescribed Age limit		Effect of nonage on marriage	Both the parties adults	One or both minors	Effect of unsoundness of mind
	Bride	Bride-groom				
Hindu Law	15	18	Valid	Consent presumed	Supplied by parents or guardians	Voidable
Muslim Law	15 Under traditional law 15 (Under Ch.Mg. Rt. Act @)	15 18	Voidable on attaining majority	Express consent required	Supplied by parents or guardians	Void where both the parties are adults
Christian Law	15 (Under Ch.Mg. Rt. Act @)	18	Doubtful	Express Consent required	Doubtful	Probably Void
Parsi Law	15 (Under Ch.Mg. Rt. Act @)	18	Valid	Express Consent required	Supplied by parents or guardians	Valid but entitled to divorce
Jewish Law	12 (Under traditional law) 15 (Under Ch.Mg. Rt. Act @)	13 18	Void under traditional law	Consent required	Cannot be supplied by parents or guardians	Void
The Special Marriage Act 1954	18	21	Void	Express Consent required	Cannot be supplied by parents or guardians	Void

@The Child Marriage Restraint Act, 1929, is applicable to all communities.

Act, 1929, is on the statute book for over forty years and the number of prosecutions initiated under the Act is infinitesimal as compared to the number[102] of child marriages that have taken place during this period. Moreover, where the prosecutions have been launched, they are motivated more by factional feuds rather than a keen desire to implement the provisions of the Act. It is submitted that an effective implementation of the Child Marriage Restraint Act, 1929, is a precursory requirement for any further legal reform.

Another measure, namely, the registration of marriages provided under the Hindu Marriage Act, 1955,[103] which would have discouraged the practice of child marriage, in an indirect way, has been unceremoniously ignored. Registration of marriages would obviously require the parties or their parents to furnish all the details, including the age of the parties to the concerned authority. Indeed, obligatory registration would ensure compliance with the provisions of the Child Marriage Restraint Act, for, the parents would think twice before arranging the marriages of their children if they know that the data they are required to furnish for registration would enable the authorities to prosecute them under the provisions of the Act.

It may, however, be doubted whether compulsory registration of marriages and effective implementation of the provisions of the Child Marriage Restraint Act could be accomplished in the context of the existing social attitudes. Though there is some substance in such a suspicion, it is submitted that the difficulties foreseen are not insurmountable, if the measures are handled with a sense of imagination. The Government has to launch a wide publicity drive through the mass media with a view to mould the social attitudes for a legal change. The maxim which presumes the knowledge of the community no sooner a legislation is enacted, though theoretically tenable, is practically unsound. Legislation which aims at eradicating inveterate social evils must be given the maximum publicity. It is not inapt in this regard to refer to the family planning programme of the Government of India. It is gratifying to note that while some of the Western countries are debating as yet the religious and ethical implications of the programme, India with its high percentage of illiteracy and all pervading religiosity has accepted it as an article of faith. Public

102 It may run into astronomical figures.

103 Section 8.

Personal Law	Marriageable Age			Consent		Soundness of mind
	Prescribed Age limit		Effect of nonage on marriage	Both the parties adults	One or both minors	Effect of unsoundness of mind
	Bride	Bride-groom				
Hindu Law	15	18	Valid	Consent presumed	Supplied by parents or guardians	Voidable
Muslim Law	15 Under traditional law 15 (Under Ch.Mg. Rt. Act @)	15	Voidable on attaining majority	Express consent required	Supplied by parents or guardians	Void where both the parties are adults
Christian Law	15 (Under Ch.Mg. Rt. Act @)	18	Doubtful	Express Consent required	Doubtful	Probably Void
Parsi Law	15 (Under Ch.Mg. Rt. Act @)	18	Valid	Express Consent required	Supplied by parents or guardians	Valid but entitled to divorce
Jewish Law	12 (Under traditional law) 15 (Under Ch.Mg. Rt. Act @)	13 18	Void under traditional law	Consent required	Cannot be supplied by parents or guardians	Void
The Special Marriage Act 1954	18	21	Void	Express Consent required	Cannot be supplied by parents or guardians	Void

@The Child Marriage Restraint Act, 1929, is applicable to all communities.

Act, 1929, is on the statute book for over forty years and the number of prosecutions initiated under the Act is infinitesimal as compared to the number[102] of child marriages that have taken place during this period. Moreover, where the prosecutions have been launched, they are motivated more by factional feuds rather than a keen desire to implement the provisions of the Act. It is submitted that an effective implementation of the Child Marriage Restraint Act, 1929, is a precursory requirement for any further legal reform.

Another measure, namely, the registration of marriages provided under the Hindu Marriage Act, 1955,[103] which would have discouraged the practice of child marriage, in an indirect way, has been unceremoniously ignored. Registration of marriages would obviously require the parties or their parents to furnish all the details, including the age of the parties to the concerned authority. Indeed, obligatory registration would ensure compliance with the provisions of the Child Marriage Restraint Act, for, the parents would think twice before arranging the marriages of their children if they know that the data they are required to furnish for registration would enable the authorities to prosecute them under the provisions of the Act.

It may, however, be doubted whether compulsory registration of marriages and effective implementation of the provisions of the Child Marriage Restraint Act could be accomplished in the context of the existing social attitudes. Though there is some substance in such a suspicion, it is submitted that the difficulties foreseen are not insurmountable, if the measures are handled with a sense of imagination. The Government has to launch a wide publicity drive through the mass media with a view to mould the social attitudes for a legal change. The maxim which presumes the knowledge of the community no sooner a legislation is enacted, though theoretically tenable, is practically unsound. Legislation which aims at eradicating inveterate social evils must be given the maximum publicity. It is not inapt in this regard to refer to the family planning programme of the Government of India. It is gratifying to note that while some of the Western countries are debating as yet the religious and ethical implications of the programme, India with its high percentage of illiteracy and all pervading religiosity has accepted it as an article of faith. Public

102 It may run into astronomical figures.

103 Section 8.

awareness of a social problem paves way for the effective implementation of legislative measures.

The mess in the legal provisions may, however, be cleared up by enacting that the parties to a marriage must give their consent in some part of the ceremony with a proviso that only a person who has attained the age of eighteen years and who is of sound mind could give such a consent. Such a provision would, indeed, accomplish basic uniformity in an important area of matrimonial law with minimum offence to the sentiments of the orthodox sections of the various communities. A necessary adjunct to such a change is the validity or the otherwise of a marriage wherein a party is of nonage or unsound mind. It may appear to be a simple and efficacious solution to declare such marriages void. But such a measure would be very drastic for, social change in a traditional society has to be effectuated gradually. Marriages of persons of nonage may, instead, be rendered voidable at the option of the parties on attaining majority. Such a legal provision would go a long way in discouraging the practice of child marriage, for the parents would undoubtedly hesitate to marry their children at great expense when they realise that such a union may be opted out by one of the parties on attaining majority. Further, marriages of persons of unsound mind may, without any fear of vehement opposition, be declared void. These changes, while accomplishing the much needed rationalisation, would also be a meaningful step in the direction of coordinating the programme that aims at controlling the population explosion in the country.

The Succession of States and International Treaties

Vladimir Paul*

1 Introduction

The succession of States and its relation to international treaties is of great interest to the theory of international law and to the contemporary politics. The changes in sovereignty over big areas of whole continents, the development of new states, the self-determination of many nations brought into reality, all that puts forward the question what norms of law should govern the new situation, especially with regard to international obligations included in treaties.

Many writers in international law saw the remedy for these problems in the institution of succession, having mostly the character known in European civil law; however, the new economic trends and political relations have made them revise their ideas considerably.

The notion "succession of states" has kept its position in international life, but its meaning and significance are no more the same as they were a hundred years ago. A new important aspect has been brought into by the Briand-Kellog Pact of 1928. The States—parties to this treaty-have taken on the obligation not to use armed forces in their mutual relations and have outlawed any annexation in this way. Aggressive war has been forbidden and this principle has become part of the general international law and has been taken over by the United Nations Charter. In the sense of these changes, all historical events and cases have to be newly evaluated since many of them took place in times when states were loosing their existence in annexation and the question of successive rights arose. That is why in the following pages we shall try to find out what the position of the institute of succession of States with regard to present-day international treaties is.

---

* A scholar from Czechoslovakia.

II The notion "Succession of States"

The notion "succession of states" has often been used in two different ways in international law. On the one hand, it gives name to the changes in sovereignty over a certain territory, without mentioning the legal consequences at all; on the other hand, it indicates a norm of law according to which the State having acquired a certain territory or having just come into existence, takes over the rights and obligations of the State whose territory it formerly was.

In the last mentioned form, this idea has been introduced into international law by Grotius[1] in the 17th century as a parallel to Roman law. Most significant in his conception was the character of universal succession, i. e. that the new state should take over *all* rights and duties of the former state. This theory of universal succession has influenced several learned authors, but has not found its place in international law owing to different conditions by which this branch of law, in comparison with civil law, is being affected.

We may, therefore, confirm that there does not exist any customary rule of international law according to which in any case *all* rights and obligations of the extinct state pass over to its territorial successor. There may exist, however, some rights and duties, which seem to have changed the subject-analogy of singular succession. The answer to this question shall be given in the following pages.

III Views of the theoretists

The theory of international law has very thoroughly studied the influence of changes in sovereignty over a certain territory on previously concluded treaties. The works or monographs[2] of Huber, Keith,

1 2 Grotius, *De jure billi ac pacis*, chap. 14, 11; chapt. 9, 12. (Amsterdam 1931).

2 Huber, *Die Staatensuccession. Volkerrechtliche und Staatsrechtliche Praxis im 19. Jahrhundert* (Leipzig 1898); Keith, *The Theory of State Succession with special reference to English and Colonial Law* (London 1907); Schonborn in *Stier-Somlo Handbuch des Volkerrechts*, 72 (Berlin 1913); Muralt, *The Problem of State Succession with regard to treaties.* (Den Haag 1954); O'Connell, *The Law of State Succession*, (Cambridge 1956); O'Connell, *State Succession in Municipal Law and International Law* (London 1967); Castren, "*La succession d'Etasts*," *Recueil des Cours*, 379 (1951); Mochi Onory, "Les aspects recents du problem de la suceession aux traites." 72 *Revue Generale de Droit international public* 565 (1968).

Schonborn, O'Connell or Muralt and others are of great value and have contributed much to remove many doubts about this problem. At first the theory followed the old line that treaties should be kept in force, even if the party to the treaty has disappeared, with the aim that all the rights and duties included in the treaty should bind the successor state. In this connection the names like Phillimore, Liszt, Lariviere, Chailley may be mentioned.[3] Later on, the theory acknowledged that bilateral treaties loose their binding force fully if one of the contracting parties ceases to exist, or partly, if a certain territory looses its sovereign and obtains another one.

This point of view concerns all kinds of treaties, political, administrative, commercial etc. as all of them express the will of an existing state and have to disappear if the state looses its existence. In this connection, only localised obligations will be treated separately in this paper.

Of the many authors supporting this view, mention may be made of[4] Anzilotti, Bartos, Brierly, Kiatibian, Krylov, Keith, Garner, Guggenheim. Mc Nair, Outrata, Rousseau, Verdross. The best definition has been, however, given by Hall, who writes :

> When a new State splits off from one already existing, it necessarily steps into the enjoyment of all rights, which are conferred upon it by international law in virtue of its existence as an international person, and becomes subject to all obligations,

3 Phillimore, *International Law* 137.
Liszt, *Das Volkerrecht systematisch dargestellt* 276 (12 ed. 1925).
Lariviere, *Des consequences des transformations territoriales des Etats sur les traites anterieurs* 78 (Paris 1892); Cailley, *La nature juridique des traites internationaux selon le droti contemporain* 155 (Paris 1932).

4 Anzilotti, *Corso di diritto internazionale* 290 (Roma 1912).
Bartos, *Medijunarodno Javno pravo Beograd* 324 (1954).
Brierly, *The Law of Nations* 136 (4th ed., 1249).
Kiatibian, *Consequences juridique des transformations territoriales sur les traites* 60 (Paris 1892).
Dudrdenevskij-Kryloy, Mezdunarodnoje pravo 153 (Maskva 1947).
Keith, *op. cit.* note 2 at 5; Garner, 32 *Am. J. Int' l L.* 434 (1938); Guggenheim, *Beitrage zur volkerrechtlichen Lehre vom Staatenwechsel* 138 (Berlin 1925); Mc Nair, *The Law of Treaties* (London 1961); Outrata, *Mezinarodni pravo verejne* 114 (Praha 1961); Rousseau, *Droit international public* 283 (Paris 1953); Verdross, *Volkerrecht* (Wien 1963).

which are imposed upon him in the same way. With rights, which have been acquired and obligations, which have been contracted by the old state as personal rights and obligations, the new state has nothing to do.[5]

The opinion of O' Connell[6] is not too different from that mentioned above, but according to him the effects of changes in sovereignty have not got their basis in the general international law concerning the succession of States, but are obviously a matter of law of treaties. As we shall presently see, this view has been discussed in the International Law Commission with different results.

The Harvard Law School has mentioned this problem in its codification draft on law of treaties. It avoids completely the word succession, but in the commentary to Article 26 and 33b it is stated that bilateral treaties loose their validity if one of the parties becomes extinct.[7]

Multilateral treaties must be mentioned apart. The question of succession has been raised namely in cases, where basic problems of international law were dealt with. The cause of some hesitation has been the fact that the provisions of international law, coming out of custom or/and of treaty, mutually very often cover the same field of activity and law; moreover, many institutions—treaty law in origin—are becoming norms of customary international law after a certain period.

As it is generally taken for granted that the new states are bound by existing norms of customary international law, this situation must not be confused with succession of new states into old treaties; the obligations are imposed on the new states not because of a treaty, but by virtue of customary law. Even if Jenks and O'Connell[8] are not of the same opinion and many authors do not touch this problem at all, it cannot be said, that as far as multilateral treaties are concerned, another view could be adopted in the matter of succession. On the contrary, international practice supported the view that new states are not accorded membership in international organisations automatically.

5 Hall *A Treatise on International Law* 114 (8th ed. Oxford 1924).

6 O'Connell, *op. cit.* note 2, at 15.

7 29 *Am. J. Int'l L. Suppl* 1066, 1165 (1935).

8 Jenks, 29 *Brit. Y. B. Int'l L.* 111 (1952).
O'Connell, *op. cit.* note 6, at 275.

In this connection, it must be pointed out, that further application of international treaties, namely of the multilateral ones, has very often been regulated in relation with important international events and has been incorporated into corresponding international acts, e. g. peace treaties. This is, however, no proof of state succession in the matter of treaties. No rule generally valid, supported by the legal opinion of the states, can be formulated and no conclusion from this fact can be drawn that in similar conditions there has to be taken the same course of action.

Another important question arises if the new state desires to accede to international multilateral treaties to which its predecessor has been a party. New states often observe such treaties in fact or refer to them; if it is not contradictory to the provision of the treaty itself, it can be said that the legal situation has been solved by tacit consent of all parties. In this connection it is useful to mention the view, which has been taken by the United Nations Secretary-General in his position as depositary of international treaties. Because of its great significance it may be quoted at length :

> The changes which have come about in the last few years in the status of number of States have presented some delicate juridical and technical problems. In conformity with the provisions of some conventions, the contracting parties excluded the application of the conventions to territories for the administration of which they were at that time responsible. Some of these territories, however, have since acquired a status of full and complete independence and have even become members of the United Nations.—As the protocol amending former conventions provided that they were open for signature only to States-Parties to these conventions, the question has arisen whether the new States should be regarded as parties to the conventions in virtue of the undertakings assumed by the Powers which were formerly responsible for their administration.—Admittedly the treaties or instruments establishing the independence of a new State usually deal with the problem of that State's succession to international rights and obligations. Nevertheless, it had to be determined whether the new State had to notify the Contracting Parties expressly in writing that it considered itself bound by the conventions covering those rights and obligations. Actually, the protocols amending former conventions were signed by the

new States, to which the conventions were applicable in virtue of declaration made by the Powers which formerly had authority over these territories. In view of the clause limiting to certain States the right to become Parties to the protocols, signature by the new States constituted an implicit acknowledgment vis-a-vis the international community that they regarded themselves as still bound by the conventions in question. In some cases, moreover, an express declaration to this effect was made under the signature of the State concerned.[9]

It must be stated that in several international organisations the practice has developed that new States have to hand in their own documents on accession or ratification.

The statements of the different authors of international law do not allow an unambiguous answer; most of them do, however, support the view that succession of states into the existing treaties is not a matter provided for by international law.

IV Activity of the International Law Commission

The problem of the relation of state succession to international treaties has been considered by the ILC (International law Commission) at two different occasions.

In connection with the preparatory work for codification of the law of treaties the ILC prepared in 1958 a draft where in the special case of impossibility of performance disappearance of one of the parties had been brought about.[10] It has been treated by many authorities as such and has so been made by the Special Rapporteur as well, although he recognized its relation to the law governing state succession. He felt some hesitation owing to the link between both spheres, but he assumed that where succession does not take place, the extinction of a party is a ground for the automatic dissolution of a treaty or, in the case of a multilateral treaty, for the application of the treaty to cease with respect to the extinguished State. It seems necessary to exempt from it only the case of a State extinguished by means contrary to the Charter.

9 9 U. N. Doc. (1949) 3-4, Signature, Ratification, Acceptance, Accessions etc. covering the Multilateral Conventions and Agreements in respect of which the Secretary General acts as Depository.

10 (1958) 2 *Y. B. Int'l L. Comm'n* 16.

The decision has been taken by the ILC that all questions concerning international treaties and succession of states should be solved within the codification work on succession of States and Governments. The ILC put the last mentioned problems already in 1949 into the list of topics apt for codification and the General Assembly recommended in 1961 to the ILC that it should be accorded priority.[11]

After some time, having been fully occupied with the work on the law of treaties, the ILC nominated Special Rapporteurs in 1967 and has given an important impulse to start the preparatory work on the codification of rules on Succession of States and Governments. The ILC has divided the topic into two parts. Sir Humphrey Waldock, as its Special Rapporteur, has been appointed for the preparation of draft articles concerning succession of rights and duties in respect of international treaties. Professor Muhamed Bedjaoui was nominated as another Special Rapporteur for succession of States and Governments in rights and duties having its source in non-treaty relations.

As already mentioned, the ILC has supported the opinion that succession in respect of treaties should be dealt with in connection with the succession of States rather than with the law of treaties. Waldock, on the contrary, believes that the "succession" in respect of treaties belongs to the framework of the law of treaties. His view, as he contends, is especially founded on the modern practice of States, of international organisations and of the depositaries of treaties, as well as on doubts as to how far any specific legal institution of succession has been recognised in international law.

Waldock, nevertheless, prepared his report in the form of a draft of a group of articles and left the decision on the form to a later stage. His report was accepted by the ILC at its 20th session.[12] The ILC agreed with his ideas, some members only stressed that he is not right in asserting that the boundaries established by or in conformity with a treaty prior to the occurance of a succession should not be affected by the proposed articles. In some cases, the Afro-Asian States did not want to accept the boundaries fixed by the colonial Powers many or several years ago.

11 16 G. A. Res. 1686 (1961).

12 U. N. Doc. A/CN. 4/202.

Waldock's second report on succession in respect of treaties for the 21st session of the ILC in 1969 gave a new formulation of the first four articles of the draft.[13] In Article 1, he defines succession as the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory. Article 2 concerns the application of a rule which is often referred to by writers as the "moving treaty frontiers" rule. It has been used in cases where an area of territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State.

In article 3 he deals with the legal effect of agreements by which, upon a succession, the predecessor and successor State have sought to make general provision for the devolution to the successor of the obligations and rights of the predecessor under treaties formerly applicable in respect of the territory concerned. According to Waldock the treaty rights and obligations of a predecessor State do not become applicable between the successor State and third States in consequence of the fact only that the predecessor and successor States have concluded a devolution agreement. The devolution agreement seems to be an expression of the succesor State's policy in regard to continuing its predecessor's treaties in force, but does not by itself create any legal nexus between the successor State and third States. When a devolution agreement has been concluded, the obligations and rights of the successor State under treaties formerly in force in respect of its territory shall be governed by the principles of the novation of treaties or of succession in the matter of treaties, if any exist in general international law.

Article 4 deals with the unilateral declaration by a successor State with regard to the maintenance in force of treaties valid for the successor State's territory prior to independence. Such declaration having been made, the obligations and rights of the successor State shall be governed by the principles of the novation of treaties or of succession in the matter of treaties, if any. The successor State may declare as well that it consents to the provisional application of such treaties pending a decision with regard to their maintenance in force, modification or termination.

The declaration invites an agreement for provisional application pending determination of the question whether each individual treaty

13 U. N. Doc. A/CN. 4/214, Add. 1, 2.

is to be considered as in force with respect to the new State either by virtue of a succession or novation. The new State may announce definitively that it considers itself or desires to have itself considered as a party to all or certain treaties of its predecessor. Since the declaration would not, as such, be binding on other States, its legal effect would be analogous to that of a devolution agreement as mentioned above. From the effect of this paragraph, Waldock excludes such treaties that the Commission may consider to be automatically binding upon a successor State; he emphasizes that the insertion of such provision is purely precautionary pending the ILC's conclusions as to whether any, and if so what, treaties are succeeded to automatically by a newly independent State.

It seems clear to Waldock that from the date of independence the treaty obligations of the predecessor State cease automatically to be binding upon itself in respect of the territory now independent. This follows from the principle of moving treaty frontiers which is as much applicable to a predecessor State in the case of independence as in the case of the mere transfer of territory. The territory of the newly emerged State having ceased to be part of the "entire" territory of the predecessor State, the latter's treaty cannot and does not apply any longer in respect of the territory now independent.

It may be said that Waldock bases his views on the traditional theory and practice of international law that the newly independent State begins its life in international community without any treaty obligations. Nevertheless, he is aware that a decision of the ILC should be made whether to keep this principle or to follow the ideas brought forward by the International Law Association at its sessions in Helsinki in 1966 and in Buenos Aires in 1968. The ILA adopted 8 resolutions, the content of which may be characterized as follows : A State on attaining independence may invoke and may have invoked against it a treaty which was internationally in force with respect to the entity or territory corresponding with it prior to independence, if the newly independent State has been notified or otherwise knows that the treaty has been internationally in force with respect to the territory in question and if it has not declared within a reasonable time after the attaining of independence that the treaty is no more in force with respect to it.

The ILC has started its work on succession with intensity. It has not been done too much, but it may be said that the ideas of

Waldock seem to respect the valid rules of international customary law on this point with the intention to adapt them to the new conditions in the life of international community without being influenced by theoretical standpoints only, but respecting mostly the international practice.

There is, however, one question which Waldock wished to have cleared up and which is really of theoretical and practical importance. The ILC and its sub-committee had prepared the first standpoint to the question of succession and stressed that special attention should be paid "to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II" and that the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter. The General Assembly supported this idea. But several jurists have maintained that the precedents of earlier years such as independence of American colonies of Spain and Portugal or the territorial changes at the end of the First World War, were of limited or no relevance for the solution of the contemporary problems of succession.[14]

Waldock lays emphasis on the point that the problems of succession which arise in respect of treaties, involve old States no less than those newly established and even a very large number of them in cases of multilateral treaties. The problem must not be seen from the viewpoint of the new states alone. The basic elements of the situation having given rise to the question of succession in earlier precedents and the attitudes of the States concerned were much the same as in modern cases. To attach no value to the earlier precedents would not be correct. It must, however, be taken into consideration that the more recent practice will be most significant as evidence of the *opinio juris* of today and that the frequency of modern cases will overhelm the earlier precedents. It has to be borne in mind that even greater interdependence of states and their relations under the principles of the Charter of UN will nowadays affect the policy of succession.

Waldock is right in stressing these ideas; the basic problems he sees in distinguishing with sufficient clearness, how far and in what points lies an expression of legal right or obligation in regard to succession. To this aim is even the older practice of some significance, as we shall see it in the following pages.

14 U. N. Doc. A/CN. 4/214.

V Practice of States

In international life, several cases have brought forth different problems of succession. New States arise or parts of territories are ceded from one state to the other under different conditions :

(a) new State separates from another State

(b) new State appears as the old becomes extinct

(c) new State comes into existence as a consequence of fusion of two or more states

(d) existing State merges into another one already existing

(e) part of territory of one State becomes part of another State

(f) two or more States form a union or federation

(g) a State separates from existing union or federation

All these cases are a normal phenomenon in international life. In this paper, however, we shall confine ourselves to only a few examples bearing significance to international practice.

(i) Belgium separated from Netherlands in 1830. As far as the Netherlands was concerned, this change was taken only for a loss of territory and treaties concluded by the Netherlands continued to be valid for the Netherlands in its new frontiers. These treatie sceased, however, to be valid for the territory of Belgium.[15]

A similar situation developed when USA separated from Great Britain in 1776,[16] Greece from Turkey in 1830,[17] Panama from Columbia in 1903,[18] Finland from Russia in 1919,[19] Indonesia from Netherlands in 1949.[20]

The separation of former British colonies and dominions has been done in a similar way, but in untypical form, so that no generalisation should be made. They are not, therefore, object of our detailed study.

15 Muralt, *op. cit.* note 2, at 98-102.

16 Jones, 24 *Brit, Y. B. Int'l L.* 360 (1347).

17 Muralt, *op. cit.* note 2, at 97,

18 5 Hackworth *Digest of International Law* 362.

19 Mc Nair, *op. cit.* note 5, at 454.

20 Panhuys, *Nederlans Tijdschrift Voor international Recht* 55, 62, 68 1955).

Waldock seem to respect the valid rules of international customary law on this point with the intention to adapt them to the new conditions in the life of international community without being influenced by theoretical standpoints only, but respecting mostly the international practice.

There is, however, one question which Waldock wished to have cleared up and which is really of theoretical and practical importance. The ILC and its sub-committee had prepared the first standpoint to the question of succession and stressed that special attention should be paid "to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II" and that the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter. The General Assembly supported this idea. But several jurists have maintained that the precedents of earlier years such as independence of American colonies of Spain and Portugal or the territorial changes at the end of the First World War, were of limited or no relevance for the solution of the contemporary problems of succession.[14]

Waldock lays emphasis on the point that the problems of succession which arise in respect of treaties, involve old States no less than those newly established and even a very large number of them in cases of multilateral treaties. The problem must not be seen from the viewpoint of the new states alone. The basic elements of the situation having given rise to the question of succession in earlier precedents and the attitudes of the States concerned were much the same as in modern cases. To attach no value to the earlier precedents would not be correct. It must, however, be taken into consideration that the more recent practice will be most significant as evidence of the *opinio juris* of today and that the frequency of modern cases will overhelm the earlier precedents. It has to be borne in mind that even greater interdependence of states and their relations under the principles of the Charter of UN will nowadays affect the policy of succession.

Waldock is right in stressing these ideas; the basic problems he sees in distinguishing with sufficient clearness, how far and in what points lies an expression of legal right or obligation in regard to succession. To this aim is even the older practice of some significance, as we shall see it in the following pages.

14 U. N. Doc. A/CN. 4/214.

V Practice of States

In international life, several cases have brought forth different problems of succession. New States arise or parts of territories are ceded from one state to the other under different conditions :

(a) new State separates from another State

(b) new State appears as the old becomes extinct

(c) new State comes into existence as a consequence of fusion of two or more states

(d) existing State merges into another one already existing

(e) part of territory of one State becomes part of another State

(f) two or more States form a union or federation

(g) a State separates from existing union or federation

All these cases are a normal phenomenon in international life. In this paper, however, we shall confine ourselves to only a few examples bearing significance to international practice.

(i) Belgium separated from Netherlands in 1830. As far as the Netherlands was concerned, this change was taken only for a loss of territory and treaties concluded by the Netherlands continued to be valid for the Netherlands in its new frontiers. These treatie sceased, however, to be valid for the territory of Belgium.[15]

A similar situation developed when USA separated from Great Britain in 1776,[16] Greece from Turkey in 1830,[17] Panama from Columbia in 1903,[18] Finland from Russia in 1919,[19] Indonesia from Netherlands in 1949.[20]

The separation of former British colonies and dominions has been done in a similar way, but in untypical form, so that no generalisation should be made. They are not, therefore, object of our detailed study.

15 Muralt, *op. cit.* note 2, at 98-102.

16 Jones, 24 *Brit, Y. B. Int'l L.* 360 (1347).

17 Muralt, *op. cit.* note 2, at 97,

18 5 Hackworth *Digest of International Law* 362.

19 Mc Nair, *op. cit.* note 5, at 454.

20 Panhuys, *Nederlans Tijdschrift Voor international Recht* 55, 62, 68 1955).

(ii) Czechoslovakia became a sovereign state in 1918 on the territory of the former Austro-Hungarian Monarchy. It did not succeed automatically to any treaty previously concluded by this monarchy. Wherever Czechoslovakia took over some rights and duties of such treaties, it happened voluntarily on the ground of its own decision.[21] The same situation was in Poland in 1918.[22]

(iii) The Kingdom of the Netherlands was founded in 1815 in uniting the Belgium and Dutch provinces. This new State, even if generally recognised as a successor, was different from the previous State in name. territory and form of government. The Government of this new State proclaimed that the old treaties were no more valid and this standpoint was accepted after some minor complications by other states.[23]

In this connection we may mention the uniting of Italian States/ Sardinia, both Sicilies, Toscany etc. into Italy in 1861. In that case, however, all previous treaties lost their force with the exception of those concluded by Sardinia, as they were taken as a basis for legal relations to other States for the whole Italy.[24]

(iv) Algiers was annexed to France in 1830 and all its treaties were held as having lost their validity.[25] Of other cases we mention Texas/to USA/in 1845,[26] Hannover/to Prussia/in 1866,[27] Zanzibar/to Germany/in 1888,[28] Madagascar/to France/in 1896,[29] Hawai/to USA/in 1898,[30] Korea/to Japan/ in 1910,[31] Austria/to Germany/in 1938.[32]

21 Hackworty, *op. cit.* note 18, at 168.

22 Muralt, *op. cit.* note 2, at 106.

23 5 Moor, *A Digest of International Law* 344 (Washington 1906).

24 Kiatibian, *op. cit.* note 4, at 81-103; Crandall, *Treaties, their Making and enforcement* 427 (2nd ed. Washington 1916).

25 Mc Nair, *op. cit.* note 5, at 390.

26 Crandall, *op. cit. note 24, at* 434.

27 Kiatibian, *op. cit.* note 4, at 30.

28 Jones, *op. cit.* note 16, at 363.

29 Mc Nair, *op. cit.* note 5, at 399.

30 Moore, *op. cit.* note 23, at 347-9.

31 Mc Nair, *op. cit.* note 5, at 406-411.

32 Hackworth, *op. cit.* note 18, at 371.

(v) In 1918 Yugoslavia came into existence. To the former Kingdom of Serbia two territories were annexed/Croatia and Slovenia/, having previously been part of Austro-Hungary. The treaties of Serbia became valid for the whole territory. The treaties, formerly concluded by the said Monarchy and valid for the two territories mentioned, lost their validity.[33]

Many other cases show that changes in sovereignty over certain parts of territory were not rare. We could quote all territorial changes in Europe after World War II, e. g. the Carpatho-Ukraine from Czechoslovakia to USSR in 1945 etc. In all cases like that, the treaties of the former sovereign lost their validity as far as the ceded territory was concerned, and all treaties of the new sovereign extended their validity over it.

(vi) Iceland formed with Denmark a union in 1918. Both States kept their independence in international relations. It was agreed upon that treaties concluded by Denmark would be valid for Iceland as well, if properly promulgated and being of concern to Iceland.[34]

(vii) The Swedish-Norwegian Union was dissolved in 1905.[35] Foreign governments were informed about the proceeding concerning international treaties as follows:

1 The treaties which were made by the Union specifically for one member of it or which although not specifically so made, concerned only that member, were no longer binding on the other member.

2 Subject to the above, both States continued to be bound by treaties made by the Union.

3 Nevertheless both States might wish to revise treaties falling into category 2.

The governments accepted this standpoint. In this connection the change of the Swiss constitution in 1848, the federation in Germany between 1815-1879, the extinction of the Austro-

33 Hackworth, *op. cit.* note 18, at 375.

34 Guggenheim, *op. cit.* note 4, at 139.

35 Jones, *op. cit.* note 16, at 368.

Hungarian Monarchy, the federation between United Arab Republic and Syria, between Iraq and Jordan may be mentioned.

The practice of States may be evaluated on the basis of the aforesaid cases. After some hesitation in the practice of the USA in 19th century and in Act of Berlin of 1871 the view has been supported that a new State is not bound by treaties of its predecessor. Any State begining its life in international community after having split off from another State is, generally speaking, without any conventional duties and is free to enter into whatever treaties it considers appropriate.

No succession in former treaties has been accepted as a rule by international community. In several cases, however, it has been concluded that the rights and duties pass over to the new State; this happened as a consequence of the consent given by the parties to such proceeding. It cannot, however, be concluded that this is the constant practice of States and that through such practice the norm of international customary law is in *statu nascendi*. For a case of succession sometimes occurred in a situation where new States did not become parties to treaties of the old state formally, but observed them in fact. This is not a case of succession; it is usually the situation in which the new State derives profits or fulfills some provisions of the treaty without being legally bound. Only after such a situation lasts for sometime it may be acknowledged, in view of the real practice, that a treaty has been concluded by tacit consent. The international practice is not uniform on this point, particularly as far as multilateral treaties are concerned. On the one hand, the informal declarations that the state feels itself bound by certain treaties are recognised; on the other hand, formal accession and notification are very often required.

More constant practice of states appears in cases where only a part of the state territory is taken over by another state. The legal situation of the territory in question changes radically; the territory leaves the legal sphere of one state and is fully subordinated to the authority of the other. The international treaties have a similar fate. The validity of them is extended within the state's boundaries, unless anything else is expressly stated in the treaty itself, by virtue of the so called principle of moving treaty frontiers.

When considering the federation or union of states and their relation to international treaties, we must mention two possibilites.

If one state enters into federation and looses at the same time its capacity to conclude international treaties, this case resembles fusion. If it keeps, however, this capacity, it naturally continues to be bound by its former treaties as far as such treaties are not influenced by the change of circumstances or are not incompatible with the principles of federation or union. Nevertheless, it cannot be said that the validity of any treaty of one partner will spread to the whole federation or union.

If a federation or union ceases to exist and the single state obtains the full sovereignty again, the treaty obligations are usually taken over by this state. This effect is, however, the result of an act of international validity/declaration etc./, by which the dissolution of the federation or union has been realised and not the result of a provision prescribed by international law. An exception can be made only in cases where the treaties have been concluded on behalf of certain states/ they continue to be binding for them/or where they concerned the federation or union as a whole/they disappear with the end of the federation or union/.

VI Localised obligations

The notion "localised obligations" or "real rights" relates to treaties, the subject of which is the establishment of boundaries, the transport on certain rivers or roads, the common use of natural resources or waters at the border, the joint construction of bridges or power-stations etc. All these have one feature in common : a certain part of the territory of one or several states is closely concerned. The question of succession arises, if one of these states disappears or a territory is ceded by one state to the other.

International practice has brought several typical cases in this matter, some of them having given start to long discussions.

(i) The United States bought Alaska from Russia in 1867. The question was, whether the US Government was bound by the Anglo-Russian treaty of 1825, by which the boundary between Great Britain and Russia was set up and Canada was granted the right to navigate certain rivers. The standpoint of Great Britain was not explicit; in 1867 it inclined to the view that this treaty was not obligatory for The United States; in 1877 Great

Britain stressed that the United States should be bound by it unless the treaty of Washington of 1871 had changed its provisions; in 1898 Great Britain proclaimed that real rights were concerned in the treaty of 1867 and should not be influenced by the change of the sovereign.[36]

(ii) The United States bought from Spain the islands of Zulu in 1898. Germany stressed that the treaties signed between Germany, Spain and Great Britain in 1877 and 1885 continued to be in force as they were local in character. The United States rejected this view on the pretext that the character of the treaties was commercial and had no close connection with the territory.[37]

(iii) Another problem presented itself in connection with the Panama Treaty of 18. 11. 1903, where we may read in article 24 para 2 that in the case that the Republic of Panama later becomes part of another state, so that its sovereignty and independence is abolished, the rights of the United States according to this treaty shall not be touched in any way. The problem is the validity and effectivity of such a provision. A third state, not having been party to this treaty, can easily refuse its application. It may be interpreted in that way that the states had bound themselves not to cede the territory to any other state which would not respect this treaty provision. Here is a case of rather complicated legal construction with the aim of exclusive dispositive rights in Panama Canal in background.[38]

(iv) In 1920 the Council of the League of Nations accepted the report of the Commission of jurists in the case of Aaland Islands. They declared that by the treaty concerning Aaland Islands and annexed to the Peace Treaty of Paris of 1856, an "objective law" had been formed. According to them, Sweden was entitled to apply it against Finland and by this "law" any state would be bound when getting in possession of these islands any time in the future. It was an isolated case in the international practice and from the legal point of view not well founded.[39]

36 Muralt, *op. cit* note 2, at 58.

37 Muralt, *op. cit.* note 2, at 59.

38 Crandall, *op. cit.* note 24 at 431.

39 Report of the Committee of Jurists in the Aaland Islands question, *League of Nations Off. J.* 19 (1920).

(v) In the case of Free Zones of Upper Savoy and the District of Gex the Permanent Court of International Justice in 1932 took the decision on the obligations of France in respect to the territories which France had obtained from Sardinia in 1860. According to it, France as a successor of Sardinia had to respect the Treaty of Turin of 1816. The Court emphasized that real rights connected with the territory and formed in favour of the neighbouring state were binding on any other sovereign power into whose hands this territory might come. The Swiss Government declared in this connection that real rights in international law were those rights that were attached to any territory and that they were principally binding on any state.[40]

(vi) The real rights were the subject of discussion by the International Court of Justice in 1950 in the case of status of South West Africe. Judge McNair states in his dissenting opinion that from time to time it happens that a group of big powers or a great number of other states form a new international regime or statute by international treaty that receives such a degree of acceptance and durability that it exceeds the range of the actual treaty parties and achieves the level of objective existence. He assumes that the territory to which such an obligation is attached does not loose it when legally annexed to another state.[41]

The theory of international law often refers, in this connection, to international servitudes, using the analogy of civil law: as active servitudes are designated: the right of passage, transport, fishing, navigation etc.; as passive servitudes can be taken : right of demilitarisation, rights of certain services to be accorded etc. The concept of international servitudes, has, however, its origin in different economical conditions and a thorough study of this problem would be needed.

Many authors support the view that localised obligations having their source in treaties should be passed over to the new sovereign

40 Schwarzenberger, *International Law as Applied by International Courts and Tribunals* 87 (London 1949).

41 (1950) I. C. J. 128-192.

according to the principle *res transit cum onere suo* McNair writes as follows :

> The effect upon treaties of changes in the sovereignty exercised over territory shows that general treaty obligations cease to apply to territory which has passed out of the sovereignty of the contracting party. In many or most of these cases of cessation of treaty obligation an exception exists in favour of those obligations, which are of a purely local or real character affecting some particular piece of territory, such as a right of transit, the navigation of a river etc. and that these obligations continue to benefit or burden the same territory under a new sovereignty.[42]

McNair himself does not call this situation a succession. Principally, many scholars such as Accioly, Bartos, Garner, Jones, Kozevnikov, O'Connell, Vali, Verdross etc.[43] agree with him.

O'Connell emphasizes that the legal effect of the treaties including real rights, lies in the aim to impose on the territory a permanent obligation, independent of the personality of the state. According to him, the change in sovereignty is neither a case of succession nor of law of treaties. The limitation imposed by the treaty is not of treaty character, but represents an ownership of legal successor. It could be abolished neither by the change of sovereignty nor by the extinction of the treaty.

Vali assumes that the international servitude has an absolute character; it is, therefore, not important by which instrument it has been created; it affects in many respects third States, not parties to the treaty concerned. Any state is obliged to respect the servitude and its attitude to it cannot be as to *res inter alios acta*. Kozevnikov draws the attention to the succession in fact; it concerns states that have appeared in territories where the nation could make only limited use of power in international relations. He acknowledges that the

42 Mc Nair, *op. cit.* note 5, at 469.

43 Accioly, *Tratado de derecho international publice* 219 (Madrid 1958); Bartos, *Medjunarodno Javno pravo* 324 (Beograd 1954); Garner, *supra* note 4; Jones, *op. cit.* note 16, at 362; Kozevnikov, *Mezdnunarodnoe pravo* 120 (Maskva 1957); O'Connell, *op. cit.* note 6, at 52-9, Vali, *Servitudes of International Law* 319-322 (London 1958); Verdross, *op. cit*; note 4, at 266.

succession does not take place with the exception of treaties, fixing the boundaries or economic treaties, closely connected with the territory in question, e. g. obligations in connection with the mutual aid in construction of power-stations etc.

A fully negative approach to the above mentioned points may be found with Schonborn.[44] He denies the applicability of the principle *res transit cum onere suo* in international law. He lays emphasis on the fact that real rights cannot result from any international treaty. Even if the state undertakes an obligation that might look like real right, it has only a character of personal obligation. The new state appears in the international community without any treaty obligation whatsoever and the other states can derive their rights and duties towards him only in harmony with the norms of international customary rules generally valid. Kelsen[45] also denies the automatic transfer of rights and obligations to the new subject in this matter and points out that there is no support given to such effect by valid international law. Strupp and Castren are of the same opinion.[46]

If we wish to review the opinions found in theory and practice, we may see that localised treaties were according to the former internatinal practice usually accepted by the new sovereign. Only these cases would justify the statement that a singular succession really exists in international law if the common consent and usage of long duration could be proved. In the theory we may find both views nearly equally supported. In view of all that we come to the conclusion that it cannot be proved that the conditions for the birth of a norm of customary international law have already been fulfilled. Moreover, it cannot be said that the further development follows just this line. There must be taken into consideration the opinion of newly arising states that are not willing to be bound even by this kind of treaties. It is, therefore, difficult to say that the succession of rights and duties coming out of treaties containing localised obligations is part of present international law.

44 Schonborn, *op. cit.* note 2, at 45-7, 73-6.

45 Kelsen, 42, 4 *Recueil des Cours*, 339 (1932).

46 Strupp, *Les regles generales du droit de la paix* 232 (Paris 1935); Castren, *op. cit.* note 2, at 436.

VII Conclusion

The succession of States is one of the most controversial problems in international law. The changes in sovereignty over different territories arise very often and norms of international law generally valid are needed for regulating its consequences. So far, however, they have not been successfully formulated.

Within the scope of succession of states a very wide range of rights and duties is involved. The main point of our interrest is, however, only a small part of it, concerning the international treaties. On this point we may arrive at the following conclusions :

The customary international law of nowadays gives no ground for the statement that universal succession of states exists. Both theory and practice of international law are of the same opinion in this matter. As far as singular succession, i. e. the succession of only certain rights and duties, is concerned, the writers, after some hesitation, inclined later to the view that so far not even in this case had there been formed any norm of international law. This initial hesitation was due to the historical influence of civil law. The new tendency mentioned owes, however, its origin much to the principle of sovereignty and of self-determination, both accepted and supported in international life.

The international practice follows nearly the same line as the views of authors have done. In several cases the states argued, basing their opinions of international law, that no territory could get rid of the obligations accepted by the State and that the change in governmental or organisational system could not influence the rights of other states.

But mostly the practice acknowledged the view that a new state is not bound by the treaties of its predecessor without its consent being expressly given as a consequence of its independence and sovereignty.

This problem must be considered separately in cases of federation or union of states. There were treaties in international practice that did not loose their validity with the formation of a federation or union. It happened in cases where the single states continued to keep at least partly the capacity to conclude international treaties. This capacity

was, however, given to them by a treaty and was not derived from valid international custom.

International multilateral treaties, namely the treaties concerning some principal questions of international law of general interest, pose in this connection particular problems. On the one hand, it may be said, that along with the extinction of the state one party of such treaty disappears and the new state does not become automatically a contracting party. On the other hand, it must be emphasized that the treaties in question regulate important spheres of international law. Their influence in the international community of states is very similar to the valid norms of international customary law. There were some hesitation about it, but this fact alone gives no right to conclude that these treaties should be binding on the new state without its consent on the strength of the fact that they had bound its predecessor. In the treaty the real will of State finds its expression and without this the validity of the treaty is always questionable.

It has already been pointed out that all kinds of bilateral treaties loose their validity with the extinction of one of its parties. No exception has been made as far as political, commercial, administrative or some other treaties are concerned. The only treaties, the further validity of which has been questioned, are those containing localised obligations. These treaties, concerning "real rights," i. e. rights and obligations connected very closely with a certain territory, were considered as having a different règime in international life on account of their character. It may be a treaty fixing boundaries, navigation of rivers etc. Owing to certain traditions, supported by the theory and practice of international law, we should be able to speak about continued validity of such treaties but for the relatively low number of international cases. That is the main reason, why this view cannot be accepted; the common practice of states cannot be proved and as yet no reliable rule of international law has been found or settled in convention in this matter. On the contrary, there exists a strong influence of the right of self-determination and independence that will perform a negative effect on the birth of any such norm.

In the light of the above discussion, it may be stated that the fate of international treaties is closely connected with the existence of

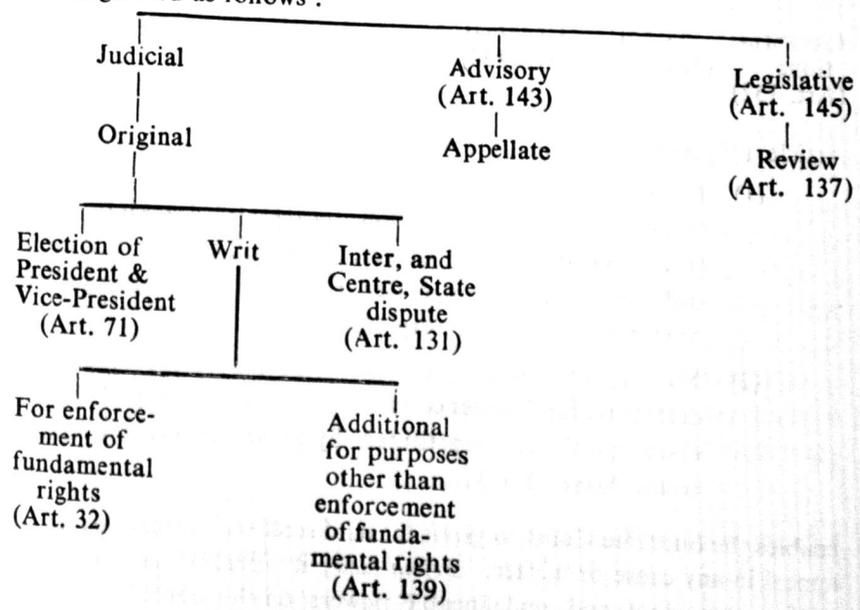
the state contracting party-and that the treaties are not subject to the succession of states. It would be, no doubt, of great interest for international jurists and politicians if the old problems of succession of States could be solved in a multilateral international convention that would at the same time respect the rights of the newly formed and independent states. The International Law Commission has an important and responsible task.

The Province of Article 136*

D. K. Srivastava**

I Introduction

The Constitution of India, built on the bed rock of justice, created a Supreme Court at the apex of our integrated judicial system to act not merely as the sentinel for the preservation, maintenance and promotion of Rule of Law but also to act as the final dispenser of justice. Broadly speaking, the functions[1] of the Supreme Court may be categorised as follows :



---

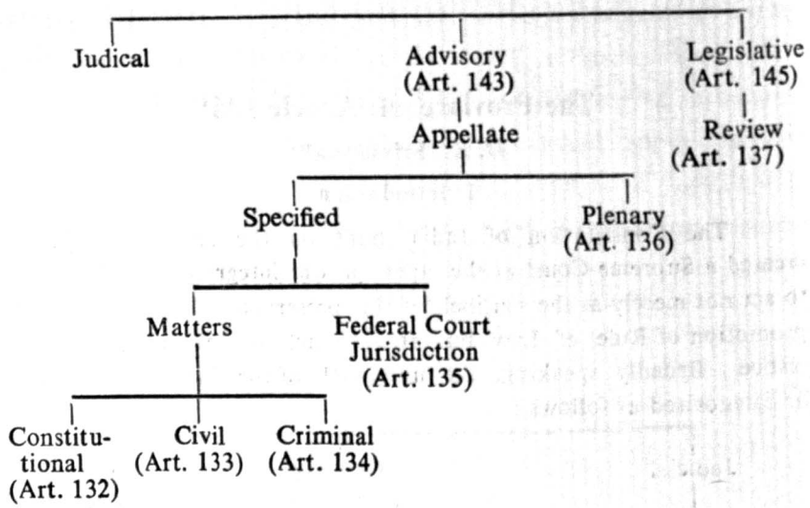
* This paper is primarily based on Chapter III of the author's dissertation for LL.M. degree of the Banaras Hindu University. The author wishes to express his deep debt to Dean Anandjee under whose supervision the dissertation was prepared.

** M.A., LL.M. (Banaras), Research Assistant, Law School, Banaras Hindu University, Varanasi.

1 Article 138, namely,

> The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

provides for further enlargement of the jurisdiction of the SupremeCourt.



Article 136, namely,

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (i) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

enables the Supreme Court to grant in its discretion, special leave[2] to appeal in any cause or matter. *Prima facie*, it appears that the Article confers overriding and undefineable powers on the court, and makes it as omnipotent as a human court could be. No doubt, the Article is couched in the widest terms possible, yet a critical study of the Article will show that the exercise of the Supreme Court's jurisdiction under the Article depends upon the nature of decision appealed against the subject-matter raised therein, the authorities from whom it emanated, the territorial limit within which the decision was pronounced and, lastly, the date on which it was rendered. Besides, the Supreme Court Rules, *inter alia*, lay down certain procedural requirements. Unless these

2 Unless otherwise indicated the expression 'special leave' has been used in this paper to denote an appeal under Article 136(1).

conditions precedent concur no appeal by special leave can be granted by the Supreme Court. This paper is an attempt to discuss those limitations which are given below in seriatum.

II Nature of Decision

Article 136 is available to a litigant only against "any judgment, decree, determination, sentence or order" of any court or tribunal. Decisions falling outside the rubric of these expressions would be beyond the purview of the Article. The Constitution does not explain these terms. Save "determination," all other words, "judgment," "decree," "sentence" and "order" have, however, acquired definite connotations under the various statutes.[3] Statutory definitions, though helpful in determining the broad characteristics of these terms, are not very relevant.

Generally speaking, "judgment" means a decision pronounced by a court in a case which it hears on merits and conclusively determines the rights of the parties. Advisory and consultative opinions are thus not judgments. The Code of Civil Procedure[4] defines the term "judgment" to mean "the statement given by the judge of the grounds of a decree or order."[5] But in Article 136, it has been used in a wider sense so as to include any judicial pronouncement.[6] It would include not only a decision made by a court in any civil or criminal cause or matter but also decisions made in revenue matters and determination of quasi-judicial tribunals,[7] which are outside the ordinary hierarchy of courts.

3 See, for example, Sections 2(l), (2) and (14) of the Civil Procedure Code, 1908, and Rule 2(i) (h) of Order(l) of the Supreme Court Rules, 1966.

4 See Section 2(l).

5 The definition of the word "judgment" given in Civil Procedure Code does not circumscribe the scope of this word used under the Constitution : (See *Indo Devi* v. *Board of Revenue*, A.I.R. 1957 All. 116).

6 In *Hansk Kumar* v. *Union of India*, A.I.R. 1958 S.C. 947, the word "judgment," occurring in Article 133, was liberally construed to mean "a decision pronounced by the court in a case which it hears on merits." This meaning can also be attributed to the word 'judgment' occurring in Article 136.

7 See, for example, *Durga Shankar* v. *Raghuraj Singh*, A.I.R. 1954 S.C. 520, at 522, wherein the word 'judgment' has been used for the decision of an election tribunal. The Supreme Court Rules, 1966, uses 'judgment' in its widest possible connotation: judgment includes decree, order, sentence or determination of any court, tribunal, judge or judicial officer : (See Rule 2(i) (h) of Order(l).

"Decree" is a technical term. It is defined to mean a formal adjudication made by a civil court.[8] Decree is not passed in criminal proceedings, hence the omission of the word decree in Article 134[9] and its inclusion in Article 132[10] and 133[11] besides Article 136.

"Determination" is an end of controversy by the decision of a tribunal.[12] In *Bharat Bank* v. *Employees of Bharat Bank*,[13] the Supreme Court had to delineate the *contrours* of this term. On the one hand, on the principle of *ejusdem generis*,[14] its strict judicial character was emphasized, and, on the other, on the strength of its absence from the original Draft Constitution, its quasi judicial character asserted[15] so that the Supreme Court may have jurisdiction under Article 136 to hear appeals also from the decisions of quasi-judicial tribunals. The majority in the *Bharat Bank* leaned in favour of the latter view.[16] It is however, difficult to appreciate either of the two views. Even if the

8 See Section 2(2) of the Code of Civil Procedure.

9 Article 134 deals with *criminal jurisdiction* of the Supreme Court.

10 Article 132 enables the Supreme Court to hear appeal in any *civil*, criminal or other proceedings involving a substantial question of law as to the interpretation of the Constitution.

11 Article 133 deals with *civil jurisdiction* of the Supreme Court.

12 Justice Mukherjea's remarks are apposite :

> The word "determination" means and signifies the ending of a controversy or litigation by the decision of a Judge or Arbitrator : (See *Bharat Bank* v. *Employees of Bharat Bank*, A.I.R. 1950 S.C. 188, at 210 ; see also *(Jaswant Sugar Mills* v. *Lakshmi Chand*, A.I.R. 1963 S.C. 677, at 680). Wherein Shah J., observed :
>
> The expression "determination" in the context in which it occurs in Article 136 signifies an effective expression of opinion which *ends a controversy* or a dispute by some authority to whom it is submitted under a valid law for disposal.

13 A.I.R. 1950 S.C. 188.

14 *Id.* at 192, 209.

15 *Id.* at 210.

16 *Id.* at 190. It appears that the majority view appositely read the mind of the Constitution-makers. It was categorically stated in the Constituent Assembly that by virtue of Article 136, the Supreme Court would have power to grant appeal from the decision of an industrial tribunal. The nature of the determination of an industrial tribunal was no secret to the members of the Assembly, for, the Industrial Disputes Act, 1947, was already there : (See VIII *Constituent Assembly Debates* 637 (1946) hereinafter cited as C.A.D.,

word 'determination' is interpreted on the principle of *ejusdem generis*, the determination of a quasi-judicial tribunal would not cease to be appealable. The term "judgment" is wide enough to include such a determination.[17] Further, in the relevant Article of the original Draft Constitution, the word 'tribunal' was there though the expression 'determination' did not occur.[18] Nevertheless, it does not mean that the word "determination" is a surplusage. It was added by way of caution to overcome the technical difficulties in the application of words 'judgment,' 'decree' etc.[19] But 'determination' does not include every determination; it must be a judicial or quasi-judicial one.[20]

Generally speaking, the word 'sentence'[21] is used to denote an order of punishment made in criminal proceedings.[22] There is no question of a sentence being passed in a civil proceeding. This view is fortified by the fact that only Article 134, which delineates the ordinary *criminal jurisdiction* of the Supreme Court (besides Article 136), uses this word.

"Order"[23] may be defined to mean the decision of an authority, whether judicial or quasi-judicial, in any cause or matter.

17 See, for example, Rule 2(i) (b) of Order (I) of the Supreme Court Rules, 1966.

18 See Article 112 of the original Draft Constitution which corresponds to Article 136 of the present Constitution.

19 See, for example, *Collector of Varanasi* v. *Gauri Shankar*, A.I.R. 1968 S.C.384, at 387.

20 In the words of Justice Shah, "determination" :

> ...must be judicial or quasi-judicial : purely administrative or executive direction is not contemplated to be made the subject-matter of appeal to this Court. The essence of the authority of this Court being judicial, this Court does not exercise administrative or executive powers, i. e. character of the power conferred upon this Court, original or appellate, by its constitution being judicial, the determination...sought to be appealed from must have the character of a judicial adjudication : *(Jaswant Sugar Mills* v. *Shyam Sunder*, A I.R. 1963 S.C. 677, at 680).

21 'Sentence' has not been defined either by the Civil Procedure Code, or by the Criminal Procedure Code, or by the Indian Penal Code.

22 See *Law Lexicon*, p. 1174.

23 Code of Civil Procedure says :

> Order means the formal expression of any decision of a Civil Court which is not a decree : (Section 2(14).

Under Article 136 the Constitution does not use this word in such a limited sense.

In Article 136 the expression "order" has been used in two senses. First, it covers not only final orders but also inter-locutory ones.[24] This follows as a necessary corollary from the fact that unlike preceding Articles, the word "order" in Article 136 is not qualified by the adjective 'final.' However, decided cases show that the Supreme Court as a matter of policy does not encourage special leave from such orders.[25] Second, the word "Order" has been used for the determination of quasi-judicial bodies also.[26]

The collocation of the words judgment, decree, determination, sentence and order on the one hand appears to be aimed at considerably widening the jurisdiction of the Supreme Court but, on the other, delimits the areas of its jurisdiction. All the possible expressions employed for the decisions of judicial or quasi-judicial bodies have been used so that any case coming from any court or tribunal may be heard under Article 136. But each and every decision of a court or tribunal cannot be appealed against. The terms "judgment etc.," indicate that only that matter is appealable which decides a 'justiciable issue.'

III Subject-Matter

Under Article 136 the Supreme Court is empowered to grant appeal in "any cause or matter." But the generality of the expression "any cause or matter"[27] eludes any attempt to particularise with precision the proceedings which would come under its coverage. The

24 See *Bharat Bank v Employees of Bharat Bank*, A.I.R. 1950 S.C. 188; *Harinagar Sugar Mills v. Shyam Sundēr*, A.I.R. 1961 S.C. 1669. *Engineering Mazdoor Sabha* v. *Hind Cycles*, A.I.R. 1963 S.C. 874 at 877.

25 *Dhananjay* v. *M.Ś. Suppadava*, A.I.R. 1960 S.C. 745, *Madanraj v. Jalane Nand*, A.I.R. 1960 S.C. 744, *Himansu Kumar v. Jyoti Prakash*, A.I.R. 1964 S.C. 1636, at 1640.

26 See, for example, *Durga Shankar v. Raghuraj*, A.I.R. 1954 S.C. 520, 522, *Jaswant Sugar Mills v. Lakshmi Chand*, A.I.R. 1963 S.C. 677; *Engineering Mazdoor Sabha v. Hind Cycles*, A.I.R. 1963 S.C. 874.

27 In *Green v. Lord Penzance*, 1881, 6 App. Cases 657, 671, Lord Selborne observed :

> It is not a technical word signifying one kind or another, it is *causa jurisdictionis*, any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular Court.

For other definitions of "cause," see *Pocket Law Lexicon*, 7th Ed. p. 69, *Wharton's Law Lexicon* 60, 1930 [14th ed. 1930 Reprint 1946] *Law Lexicon of British India* 182.

Constitution does not give any glossary for these expressions. In common legal parlance they are referred to denote a judicial proceeding.[28] The use of these terms in juxtaposition with each other appears to have been made with a view to widen the amplitude of Article 136.

The words 'cause' and 'matter' bear similar, though not the same connotation and are, hence, used interchangeably. Sometimes, cause is referred to include matter and *vice-versa*.[29] Matter is segregated from the cause in the sense that it might include proceedings which are not incidental to a case.[30]

It may be noted that other constitutional provisions[31] dealing with the Supreme Court's appellate jurisdiction do not use the terms 'cause' and 'matter.' The critical question here is why in contradistinction to the preceding Articles, which mention civil, criminal and other proceedings, the expression 'cause' or 'matter' has been used in Article 136 ? Have they been used to circumscribe the Supreme Court's jurisdiction only to such 'causes' or 'matters' which are not covered by civil, criminal or other proceedings, for the express mention of something implies the exclusion of others (*expressio unius est exclusio alterius*), or have they been employed to enable the Supreme Court to hear special appeal not only in 'civil,' 'criminal' or 'other proceedings' but also in any 'cause' or 'matter' (not included in these expressions) ?

Reading into the Constituent Assembly Debates are not sufficient to give any categorical answer.[32] In the Constituent Assembly high sounding expressions were used to explain the terms "cause or matter." Dwelling upon the significance of their use in Article 112[33] of the Draft Constitution, Pt. T. D. Bhargava observed :

28 *Ibid.*

29 See, for example, Section 2 of the Australian Judiciary Act, 1903; Law Lexicon of British India 182.

30 See, for example, Section 2 of the Australian Judiciary Act.

31 Article 132 uses "civil, criminal and other proceeding," Article 133 "civil proceeding" and Article 134 "criminal proceeding."

32 See VIII *C. A. D*, 638 (1949).

33 Article 112 of the Draft Constitution corresponds to Article 136.

> ...article 112 is exceptionally wide.... Supreme Court shall be fully omnipotent as far as a human court could be and it shall have all kinds of cases and I think that so far as the other courts of other jurisdictions are concerned, for instance, if there is an International Court sitting in India, if there is a Court Martial,[34] if there is an Industrial tribunal, if there is an Income-tax tribunal, if there is a railway tribunal, all kinds of cases will come before the Supreme Court.[35]

The statement appears to be much exaggerated. It cannot be accepted without some emendation. It is difficult to understand how "any cause or matter" will also include any matter decided by an international court. Could the award of Kutch tribunal be appealed under Article 136 if it would have been rendered in India ? The answer is in the negative. It is imperative for a tribunal in order to be one within the meaning of Article 136 to be constituted by, and invested with, the inherent judicial power of the State.[36]

The words "cause or matter" have been construed very widely to enable the Supreme Court to hear appeals not only in civil, criminal or other proceedings but also in a variety of other matters.[37]

34 Draft Constitution did not contain clause (2) of Article 136.

35 VIII *C. A. D.*, p. 638 (1949).

36 See *Bharat Bank v. Employees of Bharat Bank*, A. I. R. 1950 S. C. 188, at 193; *Durga Shankar v. Raghuraj Singh*, A. I. R. 1954 S. C. 520, at 522; *Harinagar Sugar Mills* v. *Shyam Sunder*, A. I. R. 1961 S. C. 1669; *Jaswant Sugar Mills* v. *Lakshmi Chand*, A. I. R. 1963 S. C. 677; *Engineering Mazdoor Sabha v. Hind Cycles*, A. I. R. 1963 S. C. 874; *Indo-China Steam Navigation Co.* v. *Jasgit Singh*, A. I. R. 1964 S. C. 1140; *A. C. Companies v. P. N. Sharma*, A. I. R. 1965 S. C. 1595.

37 Justice Gajendragadkar, delineating the contours of these words, opined :

> Causes or matters covered by Article 136(1) are all causes and matters that are brought for adjudication before Courts or Tribunals.

See *Engineering Mazdoor Sabha* v. *Hind Cycles*, A. I. R. 1963 S.C. 874, at 877. In *Bharat Bank* v. *Employees of Bharat Bank*, A. I. R. 1950 S. C. 188, at 190, it was pointed out that the phraseology "cause or matter" was used to enlarge the area of Article 136 so that matters coming from any tribunal may also be reviewed by the Supreme Court. In *Pritam Singh* v. *The State*, A. I. R. 1950 S. C. 169, at 171 Justice Fazal Ali detailed the meaning of these words :

> By virtue of this article, we can grant special leave in civil cases, in criminal cases, in cases which come up before different kinds of tribunals and in a variety of other cases.

In fact, the Supreme Court has granted special leave in a wide range of causes and matters,[38] irrespective of whether decision therein have been pronounced by a court or a tribunal. Apart from the ordinary civil, criminal and revenue cases it has heard special appeal from the decisions of the High Court in various other matters.[39]

The words "any cause or matter" are not so wide as they are supposed to be. Adjective "any" does not confer unfettered powers on the Supreme Court to hear special appeal in any case. The context in which these words have been used itself restricts their scope. It will be noticed that Article 136 empowers the Supreme Court to grant appeal only from the decision of "any court or tribunal." Thus, causes or matters which do not come from "any court or tribunal" would be outside the pale of these words. Further, not all causes and matters emanating from a court or tribunal can be agitated under Article 136. Only the "judgment, decree, determination, sentence or order of "any court or tribunal" can be the subject matter of the special appeal : legislative actions, administrative decisions and advisory opinions are thus excluded.

Moreover, since the Constitution, by separate Articles, authorises the Supreme Court to exercise jurisdiction in respect of constitutional,[40] civil[41] and criminal[42] matters, it does not appear to be the intendment of the Constitution to make available to a litigant

38 For example, civil, criminal, revenue and other special matters.

39 To quote only few, from the decision of High Court rendered under section 12 of the Bar Council Act, (*Nageshwar* v. *Judges*, A. I. R. 1955 S. C. 223), or in a reference under Section 66(1) of the Income-Tax Act, 1922 (*Oriental Investment Co.* v. *Commr. of I. T.*, (1958) S. C. R. 49), or Section 162, 153C of the Companies Act (*A. S. Krishna* v. *State of Madras*, A. I R. 1957 S. C. 297), or Section 57 of the Stamp Act (*R. E. S. Corpn.* v. *Nageshwar*, A. I. R. 1956 S. C. 213), or Section 21 of the Bihar Sales Tax Act (*Raghubar v. State of Bihar*, (1958) S. C. R. 37), and similar provisions of Business Profit Tax Act, 1947 and Excess Profits Tax Act (*J. K. Trust* v. *Commr. of I. T.*, (1958) S. C. R. 45) etc.

40 Article 132.

41 Article 133.

42 Article 134.

Article 136 in such causes or matters. The Judicial response, however, does not favour this line of approach.[43]

IV Authorities

Under Article 136 the authority whose judgment, decree, determination, sentence or order can be reviewed by the Supreme Court must either be a court or tribunal. Other Articles,[44] dealing with

43 For example, notwithstanding the injunction of Article 133(3) that no appeal shall, unless Parliament otherwise provides, lie to the Supreme Court from the judgment, decree, final order of one judge of a High Court made in a civil proceeding, the Supreme Court has heard special appeals in such cases: (*See Union of India v. Kishorilal*, A. I. R. 1959 S. C. 1262, *Ramappa* v. *Bojjappa*, A. I. R. 1963 S. C. 1633, *Raruha Singh* v. *Achal Singh*, A. I. R. 1961 S. C. 1097, *Bala Krishna* v. *Ramaswami*, A. I. R. 1965 S. C. 95, *Baldota Bros.* v. *Libra Mining Works*, A. I. R. 1961 S. C. 100, *Mohan Lal* v. *Tribhuwan*, A. I. R. 1963 S. C. 358, *Laxmidas* v. *Nanabhai*, A. I. R. 1964 S. C. 11). Likewise in the absence of an enabling clause in Articles 133 or 134 like the one contained in Article 132(2) (which empowers the Supreme Court to grant special leave to appeal from any judgment, decree or final order of a High Court if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, even where the High Court has refused to give such a certificate), refusal to grant the certificate of fitness by the High Court under Article 133 or 134 or grant of an erroneous certificate such as to be no certificate at all, appears to be fatal to the maintenance of special appeal under Article 136, but there are volumes of the Supreme Court decisions (needless to quote) under Article 136 rendered in cases where the High Court has refused to grant the certificate either under Article 133 or under Article 134: The Supreme Court has also *sou motu* granted special leave to appeal finding or assuming that the certificate by the High Court under Article 134 (i) (c) had wrongly been granted: (See, for example, *Nar Singh v. State of Uttar Pradesh*, A. I. R. 1954 S. C. 457; *Baladin v. State of Uttar Pradesh*, A. I. R. 1956 S. C. 181; *Haripada Dey v. State of West Bengal*, A. I. R. 1956 S. C. 757; *Sunder Singh v. State of U. P.*, A. I. R. 1956 S. C. 411; *Pershadi v. State of U. P.*, A. I. R. 1957 S. C. 711; *Khushal Rao v. State of Bombay*, A. I. R. 1958 S. C. 22). Even it has held that where a certificate under Article 134 has been refused, the proper course for the litigant is to invoke Article 136: (See *Haripada Dey v. The State of West Bengal*, A. I. R. 1956 S. C. 757. Further, the Supreme Court has observed that the grant of an erroneous certificate does not end the appeal and that the court should consider "whether in the circumstances of this case this Court could have thought fit to grant special leave in terms of Article 136(1) of the Constitution": (See *Sunder Singh* v. *State of U. P*, A. I. R. 1956 S. C. 411).

44 Articles 132 to 135.

the appellate powers of the Supreme Court, only provide for an appeal from the decision of a High Court. Two changes have, thus, been made. First, instead of High Court reference, in Article 136, is made to "any court," and second, the word "tribunal" which does not find place in the preceding Articles, occurs in Article 136.

In common legal parlance 'court' means a place where justice is judicially administered, and is derived from the expression *cura quia in curlis publicis curas qere baut*. In several statutes, this term has received a definition of its own. According to Halsbury Laws of England,[45] the word 'court' originally meant the King's Palace but subsequently acquired the meaning of a place where justice was administered, and the person or persons who administered it. The Indian Evidence Act,[46] includes in the term 'court,' "all judges and magistrates and all persons legally authorised to take evidence."

The appellation 'court' as also 'tribunal' may be used for any number of bodies. But whether or not they are courts or tribunals, whose decisions can be appealed against to another court, depends upon whether they exercise or do not exercise the judicial power of the State under some express statutory provisions or by necessary intendment thereof.[47] Thus, a court is considered to be a body vested with the judicial power of the State to decide disputes *inter partes* on the basis of evidence adduced.[48]

45 3rd ed., Vol. 9, p. 342.

46 See Section 3.

47 See generally *Bharat Bank v. Employees of Bharat Bank*, A. I. R. 1950 S. C. 188, at 195 (per Mahajan, J.); *Harinagar Sugar Mills v. Shyam Sunder*, A. I. R. 1961 S. C. 1669, at 1680; *Engineering Mazdoor Sabha v. Hind Cycles*, A. I. R. 1963 S. C. 874, at 878; *A. C. Companies* v. *P. N. Sharma*, A. I. R. 1965 S. C. 1595, at 1599. See also the following Australian Cases: *New South Wales* v. *The Commonwealth* (1915) 20 C. L. R. 54, 62, 89, 90, 108, 109; *Waterside worker's Federation of Australia v. J. W. Alexander Ltd.* (1918) 25 C.L.R. 434; *British Imperial Oil Co., Ltd. v Federal Commissioner of Taxation* (1925) 35 C. L. R. 422; *Shell Co. of Austra'ia Ltd. v. Federal Commissioner of Taxation*, (1931) A.C. 275; *Silk Bros. Pty. Ltd. V. State Electricity Commission* (1943) 67 C.L.R.1; *Rola Co. (Australia) v. The Commonwealth*, (1954) 90 C.L.R. 353; *The Queen v. Bioler Makers Society of Australia* (1955-56) 94 C. L. R. 254.

48 One authority beautifully describes the constituent elements of a court:

> In every Court, there must be at least three constituent parts-the *actor*, the *reus* and *judex*; the *actor* or plaintiff who complains of an injury

The words "any court," occurring under Article 136, require consideration of three important questions: *First*, has the expression "any court" been used in such a wide sense as to include all tribunals which go under the nomenclature of court or has it been used in a narrower sense ?

According to the Supreme Court[49] the expression 'court' in Article 136 has been used for a court of civil judicature and bodies falling outside that hierarchy are beyond the purview of the Article. It is true, that "court" in Article 136 includes within its ambit a court of civil judicature, but this does not mean that certain other bodies which are also designated as such and perform judicial functions would not come within the confines of the word. The latter part of Article 136, namely :

> (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

evidently points out that in the absence of clause (2) of the Article, the Supreme Court would have been fully competent to grant special leave from a court constituted by or under any law relating to the Armed Forces. And there is no doubt that such a court does not fall within the ordinary hierarchy of courts of civil judicature.

Second, are all the actions of a court appealable under Article 136 ? Though the primary task of a court is to dispense justice but it performs certain legislative[50] and administrative functions,[51] too.

done, the *reus*, or defendant, who is called upon to make satisfaction for it, and the *judex*; or judicial power, which is to examine the truth of the fact and to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and by its officers, to apply the remedy : (See *Wharton's Law Lexicon*, p. 254).

49 See *Harinagar Sugar Mills v. Shyam Sunder*, A. I R. 1961 S. C. 1669, at 1680, *A. C. Companies v. P. N. Sharma*, A. I. R. 1965 S. C. 1595, at 1599.

50 When the Supreme Court or High Courts make Rules to prescribe procedure for institution of cases before them, their acts tantamount to legislation rather than adjudication : (See Articles 145 and 225 of the Constitution).

51 In making appointment to a few posts, the courts act administratively.

The legislative actions and administrative decisions of a court, however, do not come within the ambit of the Article.[52]

Third, why does Article 136 use the words "any court" in contradistinction to the words "a High Court" employed in other Articles[53] of the Constitution which deal with the Supreme Court's ordinary appellate jurisdictions ? Seemingly, the change appears to empower Supreme Court to grant special appeal not only against the decision of a court subordinate to the High Court[54] but even against its own decisions. Since the Supreme Court is empowered to review "any judgment pronounced or order made by it,[55] and has not considered itself bound by its own previous judgments,[56] the possibility of its granting special leave against its own decisions, w ether rendered in the exercise of original or appellate jurisdiction or otherwise, though little, cannot be completely ruled out.

Another authority mentioned in Article 136 whose actions are appealable before the Supreme Court is 'tribunal.'[57] *Prima facie*,

52 Investigating bodies like a Court of Inquiry constituted under the Industrial Disputes Act, 1947, which do not give judgment etc., would be outside the scope of Article 136. Justice Hidyatullah's remarks are apposite :

> The word "Courts" is used to designate those tribunals which are set up in an organised State for the administration of justice. By administration of justice is meant the exercise of judicial power of the State to maintain and uphold rights and to punish "wrongs." Whenever there is an infringement of a right or an injury the Courts are there to restore the *vinculum juris*, which is disturbed : (See *Harinagar Sugar Mills v. Shyam Sunder*, A I. R. 1961 S. C. 1669, at 1680).

Chief Justice Gajendragadkar also opined :

> The powers which these Courts exercise are judicial powers, the functions they discharge are judicial functions and the decisions they reach and pronounce are judicial decisions : (*A. C. Companies v. P. N. Sharma*, A. I. R. 1965 S. C. 1595, at 1599).

53 See, for example, Articles 132 to 135.

54 See *Bharat Bank v. Employees of Bharat Bank*, A. I. R. 1950 S. C. 188.

55 See Article 137.

56 The latest case in which the Supreme Court has overruled its own previous decision is that of *Golak Nath v. State of Punjab*. A. I. R. 1967 S. C. 1643.

57 Neither the Privy Council nor the Federal Court had any power to sit in judgment over the decisions of any tribunal apart from the court.

qualification of "tribunal" by the adjective "any" brings within its jurisdiction, all varieties of tribunals save those "constituted by or under any law relating to the Armed Forces."[58] Law courts are undoubtedly judicial tribunals. "All tribunals are not courts though all courts are tribunals.[59] Since both the expressions "court" and "tribunal" have been used in Article 136, the expression "tribunal" under the Article should be deemed to refer to those bodies which are not courts,[60] to wit, an administrative tribunal will be included within the meaning of the expression "tribunal."

The judicial review of the decisions of administrative tribunals has evoked considerable amount of theoretical conflict.[61] The conflict not infrequently affects thinking and leads to semantic confusion, sometimes to diverse interpretation of the word 'tribunal.'

It was contended that the word tribunal occurring in Article 136, in juxtaposition to the word court could only mean a tribunal which,

58 See clause (2) of Article 136.

59 *Harinagar Sugar Mills v. Shyam Sunder*, A. I. R. 1961 S. C. 1669, at 1680.

60 Justice Mahajan observed :

> If by use of the word tribunal in Article 136 the intention was to give it the same meaning as 'Court,' then it was redundant and unnecessary to import it in the Article because by whatever name described such a tribunal would fall within the definition of the word 'Court' :

See *Bharat Bank v. Employees of Bharat Bank*, A. I R. 1950 S. C. 188, at 194-195. See also *Durga Shankar v. Raghuraj Singh*, A. I. R. 954 S. C. 520, at 522.

61 The conflict arises due to various factors. *First*, the advocates of the doctrine of separation of powers are not prepared to concede that an administrative wing of the State can also exercise judicial functions. *Second*, administrative tribunals are mainly created to subserve administrative policy and convenience. In reaching their decisions, they seldom, if ever, follow strict legal standards. Judicial review of such decisions is considered to be an intrusion upon the prerogative of the administration to make policy decisions and hence vehemently opposed by the administration. *Third*, the constitution, character and composition of administrative tribunals do not resemble that of law courts. They are armed with for greater powers th n the latter. A law court reach s the height of its power when it enforces existing rights and liabilities. It always looks for some law to guide itself whereas administrative tribunals sometimes create rights and liabilities which they enforce. Further, unlike courts, they are not bound by too many procedural technicalities; their decisions are also often made final and conclusive.

like an ordinary court of civil judicature, chiefly performed judicial functions of the State and did not include within its ambit an administrative tribunal which exercised some judicial power.[62] In view of the unambiguous words and phraseology used by Article 136, the Supreme Court did not favour this line of argument.[63] It may, however, be noted that though the use of the word tribunal in juxtaposition to the word court does not indicate that the tribunal should conform to the descriptions of the court, it indisputably reveals that only judicial actions of a tribunal can be the subject matter of special appeal.

A sovereign State exercises judicial, as it wields executive and legislative, powers by virtue of its being a State. There is a broad separation in between the authorties who share these powers, and none of them is exclusively attributable to one organ of the State or the other. Whether or not a body wields judicial power rests upon its constitutions and character and not upon the organ-court or tribunal-through which it is used. But the concept of judicial power is unnecessarily mixed up with the idea of the institution through which it is exercised. The decisions of courts are described as judicial and of tribunals as quasi-judicial because the latter exercises more discretion than the former. It is difficult to approve of this approach. Basically, there is no difference between the functions of the two.[64] Whether judicial power can be exercised by courts only or by courts and tribunals both is to be determined by the relevant constitutional and statutory provisions.[65] So far as our Constitution is concerned, it confers judicial power not only on courts but also on tribunals.[66]

62 See Mr. Alladi's argument in *Bharat Bank* v. *Employees of Bharat Bank*, A. I. R. 1950 S. C. 188.

63 *Ibid.* The Supreme Court's response is in conformity with the intention of the Constitution-makers : See VIII *C. A. D.* 638 (1949).

64 See Markose, *Judicial Control of Administrative Action In India* 319 (1936), Report of the Committee on Minister's Power in England, at p. 73, see also Justice Hidayatullah's remark in *Harinagar Sugar Mills v. Shyam Sunder Jhunjhunwala*, A. I. R. 1961 S. C. 1669, at 1680, 1681.

65 See, for example, Section 72 of the Australian Constitution wherein judicial power has been conferred only on courts.

66 See, for example, Articles 136 and 227. In *A. C. Companies v. P. N. Sharma*, Chief Justice Gajendragadkar emphasised :

> Under our Constitution, there is no rigid separation of powers as under the Australian Constitution, and so, it would not be constitu-

Broadly speaking, the term judicial power involves a three dimensional concept. *First*, whether, the decisionmaking body exercises the inherent judicial power of the State ? *Second*, whether the decision-making process is judicial ? *Third*, whether the matter decided is justiciable ? Unless these requirements concur, there is no question of a special leave being granted. The requirements appear to be simple and logical but there is a tremendous amount of confusion about the precise scope of the terms like 'inherent judicial power of the State,' 'judicial procedure' and 'justiciable issue.'

The expression inherent judicial power of the State denotes the substantive aspect of the judicial power. Conferment of this power on an authority implies that it has been invested with the power to decide disputed questions between the State and its subjects or between its subjects *inter se*.

The Committee on Minister's Powers in England has very well described the substantive test of judicial power. It has pointed out that a body, whether court or not, exercises judicial power if it conclusively determines a controversy between two or more parties "by finding upon the facts in dispute and application of the law of the land."[67]

Parenthetically, if the decision is guided by policy considerations it would cease to be judicial.[68] Another point stressed is that the authority considered to be the wearer of judicial power must have *power* to give a binding decision,[69] which by its own force must be capable

tionally inappropriate or improper to say that judicial power of the State can be conferred on the hierarcy of Courts established under the Constitution as well as on tribunals which are not Courts strictly so called.

See also *Ram Jawaya* v. *State af Punjab*, A. I. R. 1955 S. C. 549, at 556; *In re Article 143, Constitution of India, etc.*, A.I.R. 1951 S.C. 332, at 335; *Ujjam Bai* v. *State of Uttar Pradesh*, A. I. R. 1962 S. C. 1622; *Jayantilal Amratlal* v. *Union of India*, A. I. R. 1964 S. C. 648, at 655 (per majority); *Udai Ram* v. *Union of India*, A. I. R. 1968 S. C. 1138, at 1152 (per majority); *Delhi Municipality v. P. C. S. and W. Mills*, A. I. R. 1968 S. C. 1232, at 1251; VIII *C. A. D.* 219-220, 223, 224; Tewary, *the Making of the Indian Constitution* 244 (1947).

67 See p. 73 of the Report.

68 *Labour Relations Board* v. *John East Iron Warles*, A.I.R. 1949 P. C. 129, at 133.

69 See *Huddart, Parker & Co.* v. *Moorehead*, (1910) 8 C. L. R. 330, at 357.

of imposing liability and affecting rights.[70] Many of these features, which were considered to be essential characteristics of judicial power have in course of time, been rightly rejected. The dichotomy of policy decisions and legal decisions is not much maintained.[71] Further, inability to give binding decisions is not considered to be fatal to the existence of judicial power.[72] In sum, judicial power indicates the competence to resolve a controversy through the application of legal standards.

Decided cases reveal that in considering the question about the status of any authority as a tribunal under Article 136, the Supreme Court has consistently relied on the substantive test. In *Bharat Bank* v. *Employees of Bharat Bank*,[73] Justice Mahajan, who rendered the principal majority judgment of the Court, considered the constitution of a tribunal by the State and its investiture with the State's inherent judicial power as a condition precedent for bringing a tribunal within the ambit of Article 136. This view was unanimously approved by the Court in *Durga Shankar Mehta v. Raghuraj Singh*.[74] The majority of *Harinagar Sugar Mills v. Shyam Sunder*[75] also approved the ratio of *Bharat Bank*. In *Engineering Mazdoor Sabha v. Hind Cycles*,[76] the aforesaid conditions have been considered basic and essential to make an authority or a body a tribunal under Article 136. And in *Associated Cement Co. v. P.N. Sharma*,[77] Chief Justice Gajendragadkar in deciding whether the State Government, exercising its appellate jurisdiction under the Punjab Welfare Officer's Recruitment and Condition of Service Rules, 1956[78] was a tribunal within the meaning of Article 136, emphasised :

70 See *King* v. *The Electricity Commissioners*, (1924) 1 K. B. 171, at 205.

71 See Robson, *Justice and Administrative Law*, 432-77, (2nd ed. 1962); *Sirsilk, Ltd.* v. *Govt. of Andhra Pradesh* (1963)2 L. L. J. 647.

72 See, for example, *King* v. *Electricity Commissioners*, (1924) 1 K. B. 171, 207; *Bharat Bank* v. *Employees of Bharat Bank*, A. I. R. 1950 S. C. 188.

73 A. I. R. 1950 S. C. 188.

74 A. I. R. 1954 S. C. 522.

75 A. I. R. 1961 S. C. 1669.

76 A. I. R. 1963 S. C. 874.

77 A. I. R. 1965 S. C. 1595.

78 See Rule 6 of the Rules.

> The main and the basic test, however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and may be described as a part of the State's inherent power exercised in discharging its judicial function.[79]

The Supreme Court has heard special appeals from the decisions of a number of authorities. Presumably, such authorities possess the substantive characteristic of judicial power. In *Engineering Mazdoor Sabha* v. *Hind Cycles*,[80] however, Justice Gajendragadkar held that an arbitrator appointed under Section 10-A of the Industrial Disputes Act, 1947, was not a tribunal within the meaning of Article 136 because :

> ...he lacks the basic, the essential and fundamental requisite in that behalf because he is not invested with the State's inherent judicial power...he is appointed by the parties and the power to decide the dispute between the parties who appoint him is derived by him from the agreement of the parties and from no other source.[81]

The observation raises the question whether arbitrators are really appointed by the parties or constituted by the State to exercise its inherent judicial power. It needs scrutiny in the light of statutory provisions, past decisions and policy considerations.

The provisions of Section 10A[82] of the Industrial Dispute Act, 1947, tend to demonstrate that the parties play some part in the settlement of industrial disputes through arbitration but they do

79 *Associated Cement Co.* v. *P. N. Sharma*, A. I. R. 1965 S. C. 1595, at 1609.

80 A. I. R. 1963 S. C. 874.

81 *Id.* at p. 882.

82 (1) Where any industrial dispute exists or is apprehended and *the employer and the workmen* agree to refer the dispute to arbitration, *they may*, at any time before the dispute has been referred under section 10 to a Labour Court or Tribunal or National Tribunal by a written agreement, *refer the dispute to arbitration and the reference shall be to such person or persons (including the presiding officer of a Labour Court or Tribunal or National Tribunal) as an arbitrator or arbitrators as may be specified* in the arbitration agreement.

(2) *An arbitration agreement* referred to in sub-section (1) shall be in such form and *shall be signed by the parties* thereto in such manner as may be prescribed.

not show that the parties perform any decisive role. The significant point is, do arbitrators assume jurisdiction over the dispute because of the reference made by the parties or on account of subsequent governmental action ? The study of relevant statutory provisions reveals that arbitration is "theoretically a three-tier decision making process." And reference of a dispute by the parties is only a part of the process of 'voluntary arbitration.' In other two stages, submission i.e., reference of dispute to arbitration,[83] and arbitrament,[84] which really determine the judicial character of the arbitrator, it is Government which performs the decisive role. Mr. Sule counsel for the appellant, contended that the latter portion of section 10-A that the reference will be made to such persons as specified in the arbitration agreement read with Section 10-A(3), which says that the appropriate Government shall publish the arbitration agreement, shows that it was appropriate Government which made the reference. Mr. Justice Gajendragadkar repulsed the contention of the learned counsel and observed :

> ...it would be noticed that just as in the case of proceedings before the Industrial Tribunal commencement of the proceedings is marked by the reference under S. 10, so the commencement of the proceedings before the arbitrator is marked by the reference made by the parties themselves, and that means the commencement of the proceedings takes place even before the appropriate Government has entered on the scene and has taken any action in pursuance of the provisions of S. 10A.[85]

However, "it will be appreciated that the arbitration agreement is for the reference of an industrial dispute. It is not a submission referring the dispute to arbitrators." Although the statutory provisions do not clearly make out a distinction between the stages of the reference by

(3) A copy of the arbitration agreement shall be forwarded to the appropriate Government and the conciliation officer and the appropriate Government shall, within one month from the date of the receipt of such copy, publish the same in the Official Gazette.

(4) The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be.

(5) Nothing in the Arbitration Act, 1940, shall apply to arbitrations under this section.

83 See clause (3) of Section 10-A of the Industrial Disputes Act, 1947.

84 See clause (4) of the Industrial Disputes Act, 1947.

85 *Engineering Mazdoor Sabha*, A. I. R. 1963 S. C. 874, at 880.

the parties and submission of the dispute for arbitration by the appropriate Government, it is to be noted that arbitrators assume jurisdiction not on account of the reference made under clause (1) of Section 10A but on account of subsequent governmental action envisaged in Section 10-A(3). It is when and when only the arbitration agreement is published that the arbitrator can proceed to investigate the industrial dispute. Lack of discretion in the government to initiate the reference of the dispute does not negative the fact that it is the Government that gives jurisdiction to the arbitrator over the dispute. Under clause(2)[86] Section 10 of the Act the appropriate Government has also to refer the dispute to a tribunal etc., in certain situations. In fact, the source of arbitrator's power is Governmental action under Section 10-A(3). Can we now say that an arbitrator is not constituted by the State ? Constitution by the State does not indicate that a body must be invested with the judicial power of the State only through the governmental action. The constitution of a body by the State means that the constitution of that body must be provided for by a statute.[87]

Further, arbitrators are under a duty to investigate industrial dispute.[88] Their awards have same binding force which an award of

86 Where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a Board, Court, Labour Court, Court, Tribunal or National Tribunal, the appropriate Government, if satisfied that the parties applying represent the majority of each party, shall make the reference accordingly.

87 Justice Gajendragadkar in *Indo-China Steam Navigation Co.* v. *Jasjit Singh*, A. I. R. 1964 S. C. 1140 observed :

> ...another test of importance is whether the body or the authority has been constituted by the State and the State has conferred on it, its inherent judicial power.

and continued :

> If it appears that *such a body or authority has been constituted by the Legislature* and on it has been conferred the State's inherent judicial power that would be a significant, if not a decisive factor.

The latter part of Article 136, which reads :

> Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

also emphasises the same point.

88 See section 10—A (4) of the Industrial Disputes Act, 1947.

industrial tribunal has. The award is binding on the parties to the industrial dispute.[89] The 1964 Amendment in the Act has further emphasised the statutory characteristics of an arbitrator. After the amendment arbitration award has been made binding not only on the parties to the dispute but on various other persons related to the dispute.[90] Strikes and lock-outs cannot be resorted to during the pendency of arbitration proceeding.[91] Moreover, arbitrators possess a number of the trappings of a court like powers to issue notice to the parties[92] and authority to proceed *ex-pare* etc.[93] The representatives of the parties can examine and crossexamine witnesses and address the arbitrator.[94]

Under the circumstances it is submitted that if an arbitrator under the Act possesses above characteristics it is difficult to hold that he is not a tribunal within the meaning of Article 136. It may be noted that in earlier decisions,[95] the Supreme Court heard special appeals from the decisions of Arbitrators. Even on policy considerations appeals against the decisions of the arbitrator should be entertained as the Arbitration Act, 1940, does not apply to their awards.

In reaching its decisions, tribunals, vested with the authority to decide a dispute, must follow a judicial procedure. By judicial procedure we mean that it must observe rules of natural justice. Sometimes, procedural aspect of judicial power is determined by examining whether the tribunal possesses the "trappings of a court."[96]

89 See Section 18(2) of the Industrial Disputes Act, 1947.

90 See Section 19(6) of the Industrial Disputes Act, 1947.

91 See Section 22(2) (bb) of the Industrial Disputes Act, 1947.

92 Industrial Disputes Rules, 1957, Rule 20.

93 Industrial Disputes Rules, 1957, Rule 22.

94 Industrial Disputes Rules, 1957, Rule 29.

95 See, for example, *United Salt and Industries* v. *Their Workmen*, (1961) 1 L. L. J. 93, and *United Salt Industries Ltd., Kandra* v. *Their Workmen*, (1961) 1 L. L. J. 131.

96 The phrase "Trappings of a Court" was first used by Lord Shankey in *Shell Co. of Australia* v. *Federal Commissioner of Taxation*, (1931) A. C. 275 wherein it was pointed out :

> ...a tribunal is not necessarily a Court in this strict sense because it gives a final decision, nor because it hears witnesses on oath, nor

Emphasis on the requirement of the 'trappings of a court' has varied from case to case. While in *Jaswant Sugar Mills*,[97] it was pointed out that in deciding whether an authority may be regarded as a tribunal "the principal incident is the investiture of the trappings of a court," in *Engineering Mazdoor Sabha*,[98] the presence of the trappings of a court was considered to be "a rough and ready test" of the character of a tribunal. And in *A.C. Companies*[99] Justice Bachwat, in an eloquent language, declared that the trappings of a court may well become "trap and snare for the unwary." Indeed, presence or absence of the "trappings of a court' does not conclusively determine or negative the judicial character of a body. The bestowal of 'judicial power' carries with it the guarantee that the power would be exercised through a judicial procedure. A particular statute while conferring judicial power on a tribunal may not indicate that it had to follow a judicial procedure but the tribunal will be under an obligation to follow such a procedure unless a contrary intention is shown in the statute[100] and an appeal from its decision may be granted by the Supreme Court under Article 136.

A tribunal vested with judicial power of the State may, by following a judicial procedure, resolve a justiciable or a non-justiciable matter. In our judgment only the justiciable causes can be the subject-matter of appeal under Article 136. Where it decides a non-justiciable issues like the determination of wage differentials and number of holidays to be granted to the workmen in a particular year etc., the Supreme Court's power under Article 136 cannot be invoked. The need of justiciable issue, however, has theoretically been seldom stressed. In *Jaswant Sugar Mills* v. *Shyam Sunder*[101] the Supreme Court had to decide whether an appeal lay, under Article 136, against the direction of a Conciliation Officer issued under the U.P. Industrial Disputes Act,

because two or more contending parties appear before it between whom it has to decide, nor because it gives decisions which affect the rights of subjects nor because there is an appeal to a Court, nor because it is a body to which a matter is referred by another body.

97 A. I. R. 1963 S. C. 677, at 685.

98 A. I. R. 1963 S. C. 874.

99 A. I. R. 1965 S. C. 1595, at 1609.

100 *Ibid.*

101 A. I. R. 1963 S. C. 677.

1947.[102] It will appear that the Conciliation Officer is constituted by the State under the provisions of the said Act. He has to act judicially to determine whether permission to alter the terms of employment of workmen should be granted or withheld, and possesses a number of "trappings of a court." The Supreme Court refused to hear special appeal against the direction of such a Conciliation Officer and observed that the Conciliation Officer was not invested with the judicial power of the State. The Court, however, did not elaborate as to what feature of the judicial power was absent in the Conciliation Officer. It should have been underlined that since grant or refusal of permission by the Officer to alter the terms of employment was not a determination of justiciable issue, no appeal could lie against his directions under Article 136.

V Territorial

The words "territory of India," occurring in the latter part of Article 136 (1), place territorial limit on the jurisdiction of the Supreme Court. Clause (3) of Article 1, namely—

> The territory of India shall comprise—
>
> (a) the territories of States;[103]
>
> (b) the Union territories specified in the First Schedule;[104] and
>
> (c) such other territories as may be acquired.

defines the territory of India. Under the Article the territory of India means territories that come within the description of the above

102 S. 33 of the Act, *inter alia*, provides :

> During the pendency of any conciliation proceeding or proceedings before the tribunal or an adjudicator in respect of any dispute...an employer shall not—
>
> (a) alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the comencement of such proceedings; or
>
> (b) discharge or punish, whether such punishment is by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of a conciliation officer of the area concerned irrespective of the fact whether the dispute is pending before a Board or the Tribunal or an adjudicator.

103 See First Schedule (Part I) of the Constitution.

104 See First Schedule (Part II) of the Constitution.

Emphasis on the requirement of the 'trappings of a court' has varied from case to case. While in *Jaswant Sugar Mills*,[97] it was pointed out that in deciding whether an authority may be regarded as a tribunal "the principal incident is the investiture of the trappings of a court," in *Engineering Mazdoor Sabha*,[98] the presence of the trappings of a court was considered to be "a rough and ready test" of the character of a tribunal. And in *A.C. Companies*[99] Justice Bachwat, in an eloquent language, declared that the trappings of a court may well become "trap and snare for the unwary." Indeed, presence or absence of the "trappings of a court' does not conclusively determine or negative the judicial character of a body. The bestowal of 'judicial power' carries with it the guarantee that the power would be exercised through a judicial procedure. A particular statute while conferring judicial power on a tribunal may not indicate that it had to follow a judicial procedure but the tribunal will be under an obligation to follow such a procedure unless a contrary intention is shown in the statute[100] and an appeal from its decision may be granted by the Supreme Court under Article 136.

A tribunal vested with judicial power of the State may, by following a judicial procedure, resolve a justiciable or a non-justiciable matter. In our judgment only the justiciable causes can be the subject-matter of appeal under Article 136. Where it decides a non-justiciable issues like the determination of wage differentials and number of holidays to be granted to the workmen in a particular year etc., the Supreme Court's power under Article 136 cannot be invoked. The need of justiciable issue, however, has theoretically been seldom stressed. In *Jaswant Sugar Mills* v. *Shyam Sunder*[101] the Supreme Court had to decide whether an appeal lay, under Article 136, against the direction of a Conciliation Officer issued under the U.P. Industrial Disputes Act,

because two or more contending parties appear before it between whom it has to decide, nor because it gives decisions which affect the rights of subjects nor because there is an appeal to a Court, nor because it is a body to which a matter is referred by another body.

97 A. I. R. 1963 S. C. 677, at 685.

98 A. I. R. 1963 S. C. 874.

99 A. I. R. 1965 S. C. 1595, at 1609.

100 *Ibid.*

101 A. I. R. 1963 S. C. 677.

1947.[102] It will appear that the Conciliation Officer is constituted by the State under the provisions of the said Act. He has to act judicially to determine whether permission to alter the terms of employment of workmen should be granted or withheld, and possesses a number of "trappings of a court." The Supreme Court refused to hear special appeal against the direction of such a Conciliation Officer and observed that the Conciliation Officer was not invested with the judicial power of the State. The Court, however, did not elaborate as to what feature of the judicial power was absent in the Conciliation Officer. It should have been underlined that since grant or refusal of permission by the Officer to alter the terms of employment was not a determination of justiciable issue, no appeal could lie against his directions under Article 136.

V Territorial

The words "territory of India," occurring in the latter part of Article 136 (1), place territorial limit on the jurisdiction of the Supreme Court. Clause (3) of Article 1, namely—

> The territory of India shall comprise—
>
> (a) the territories of States;[103]
>
> (b) the Union territories specified in the First Schedule;[104] and
>
> (c) such other territories as may be acquired.

defines the territory of India. Under the Article the territory of India means territories that come within the description of the above

102 S. 33 of the Act, *inter alia*, provides :

> During the pendency of any conciliation proceeding or proceedings before the tribunal or an adjudicator in respect of any dispute...an employer shall not—
>
> (a) alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the comencement of such proceedings; or
>
> (b) discharge or punish, whether such punishment is by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of a conciliation officer of the area concerned irrespective of the fact whether the dispute is pending before a Board or the Tribunal or an adjudicator.

103 See First Schedule (Part I) of the Constitution.

104 See First Schedule (Part II) of the Constitution.

clause.[105] It is obvious that any cause or matter arising outside such territory would be beyond the purview of Article 136.

The Supreme Court has refused to grant special appeal in cases coming from beyond the 'territory of India.'[106]

These cases have raised two important questions : *First*, should the Supreme Court acting under Article 136 examine as to whether the matter appealed against comes from a place within the territory of India at the time the special leave is asked for or, should it see as to whether the decision appealed from has been made in a place within the territory of India at the time of its rendition ? In refusing to grant special leave to appeal in some of the cases,[107] the Supreme Court has accepted the latter proposition. The view of the Court appears to be quite in harmony with the provisions of Article 136. Article 136 provides :

> ...the Supreme Court may, in its discretion, grant special leave to appeal *from any judgment, decree, determination, sentence or order...passed or made by any court or tribunal in the territory of India.* (Emphasis added).

and thereby prohibits granting of appeals from any judgment etc., passed or made outside the territory of India, at the time of its making. *Second*, should *de facto* possession of a foreign territory by India be considered a territory within the meaning of sub-clause (c) of clause (3) of Article l and decisions made by any court or tribunal within such territory be allowed to be appealed against under Article 136 ? The Supreme Court does not include within the "territory of India," a territory under the *de facto* possession.[108]

105 Justice Ayyangar appositely observed :

> The term 'territory of India' has been used in several Articles of the Constitution and we are clearly of the opinion that in every Article where this phraseology is employed it means the territory of India for the time being as falls within Art. 1(3)...(*Masthan Sahib* v. *Chief Commr.*, A. I. R. 1962 S. C. 797, at 803).

106 See, for example, *Janardhan Reddy* v. *The State*, A.I.R. 1951 S. C. 124; *Masthan Sahib* v. *Chief Commissioner*, A. I. R. 1963 S. C. 533; *K. S. Ramamurthy* v. *Chief Commissioner, Pondicherry*, A. I. R. 1963 S. C. 1464.

107 *Janardhan Reddy* v. *The State*, A. I. R. 1951 S. C. 124; *K. S. Ramamurthy* v. *Chief Commissioner, Pondicherry*, A. I. R. 1963 S. C. 1464.

108 *Masthan Sahib* v. *Chief Commissioner, Pondicherry*, A. I. R. 1962 S.C. 797; *Masthan Sahib* v. *Chief Commissioner, Pondicherry*, A. I. R. 1963 S. C. 533.

An anomalous situation would, however, arise if the place in which the judgment, sought to be appealed, was made was within the "territory of India" at the time of its delivery but happens to be outside it when the leave is asked for or after it has been granted.

VI Retrospective Operation

In the preceding pages of this work, we have discussed the "overriding nature of the Supreme Court's jurisdiction with its four constitutional limitations subject to which the Court exercises it. This Section deals with the commencement and application of Article 136. Article 394,[109] provides for the commencement of the constitutional provisions, except for a few provisions, which have been devised to be operative from 26th day of November, 1949, all other clauses of the Constitution have been made enforceable from 26th day of January, 1950. This provision suggests that application of the constitutional provisions is contemplated only from these dates.[110] Thus, as a general rule, judgment, decree etc., antecedent to the introduction of the Constitution, cannot be subject matter of appeal before the Supreme Court. However, certain Articles were inserted to authorise the Supreme Court to dispose of cases pending before the Federal Court[111] and Privy Councils[112] of the erstwhile princely States at the time of the

109 This Article and Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392, and 393 shall come into force at once i. e , twenty-sixth day of November, 1949; (see Preamble of the Constitution) and the remaining provisions of this Constitution shall come into force on 26th day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.

110 i. e., 26th of November, 1949 and 26th of January, 1950.

111 Clause (2) of Article 374, *Inter alia*, provides :

> All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same...

112 Clause (4) of Article 374 declares :

> On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.

clause.[105] It is obvious that any cause or matter arising outside such territory would be beyond the purview of Article 136.

The Supreme Court has refused to grant special appeal in cases coming from beyond the 'territory of India.'[106]

These cases have raised two important questions : *First*, should the Supreme Court acting under Article 136 examine as to whether the matter appealed against comes from a place within the territory of India at the time the special leave is asked for or, should it see as to whether the decision appealed from has been made in a place within the territory of India at the time of its rendition ? In refusing to grant special leave to appeal in some of the cases,[107] the Supreme Court has accepted the latter proposition. The view of the Court appears to be quite in harmony with the provisions of Article 136. Article 136 provides :

> ...the Supreme Court may, in its discretion, grant special leave to appeal *from any judgment, decree, determination, sentence or order...passed or made by any court or tribunal in the territory of India.* (Emphasis added).

and thereby prohibits granting of appeals from any judgment etc., passed or made outside the territory of India, at the time of its making. *Second*, should *de facto* possession of a foreign territory by India be considered a territory within the meaning of sub-clause (c) of clause (3) of Article l and decisions made by any court or tribunal within such territory be allowed to be appealed against under Article 136 ? The Supreme Court does not include within the "territory of India," a territory under the *de facto* possession.[108]

105 Justice Ayyangar appositely observed :

> The term 'territory of India' has been used in several Articles of the Constitution and we are clearly of the opinion that in every Article where this phraseology is employed it means the territory of India for the time being as falls within Art. 1(3)...(*Masthan Sahib* v. *Chief Commr.*, A. I. R. 1962 S. C. 797, at 803).

106 See, for example, *Janardhan Reddy* v. *The State*, A.I.R. 1951 S. C. 124; *Masthan Sahib* v. *Chief Commissioner*, A. I. R. 1963 S. C. 533; *K. S. Ramamurthy* v. *Chief Commissioner, Pondicherry*, A. I. R. 1963 S. C. 1464.

107 *Janardhan Reddy* v. *The State*, A. I. R. 1951 S. C. 124; *K. S. Ramamurthy* v. *Chief Commissioner, Pondicherry*, A. I. R. 1963 S. C. 1464.

108 *Masthan Sahib* v. *Chief Commissioner, Pondicherry*, A. I. R. 1962 S.C. 797; *Masthan Sahib* v. *Chief Commissioner, Pondicherry*, A. I. R. 1963 S. C. 533.

An anomalous situation would, however, arise if the place in which the judgment, sought to be appealed, was made was within the "territory of India" at the time of its delivery but happens to be outside it when the leave is asked for or after it has been granted.

VI Retrospective Operation

In the preceding pages of this work, we have discussed the "overriding nature of the Supreme Court's jurisdiction with its four constitutional limitations subject to which the Court exercises it. This Section deals with the commencement and application of Article 136. Article 394,[109] provides for the commencement of the constitutional provisions, except for a few provisions, which have been devised to be operative from 26th day of November, 1949, all other clauses of the Constitution have been made enforceable from 26th day of January, 1950. This provision suggests that application of the constitutional provisions is contemplated only from these dates.[110] Thus, as a general rule, judgment, decree etc., antecedent to the introduction of the Constitution, cannot be subject matter of appeal before the Supreme Court. However, certain Articles were inserted to authorise the Supreme Court to dispose of cases pending before the Federal Court[111] and Privy Councils[112] of the erstwhile princely States at the time of the

109 This Article and Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392, and 393 shall come into force at once i. e , twenty-sixth day of November, 1949; (see Preamble of the Constitution) and the remaining provisions of this Constitution shall come into force on 26th day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.

110 i. e., 26th of November, 1949 and 26th of January, 1950.

111 Clause (2) of Article 374, *Inter alia*, provides :

> All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same...

112 Clause (4) of Article 374 declares :

> On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.

commencement of the Constitution. Further, the Constitution empowers the Supreme Court to "have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law."[113]

Decided cases reveal that the Supreme Court has interpreted Article 136,[114] as also other constitutional provisions,[115] prospectively. In *Janardhan Reddy* v. *The State*,[116] it refused to invoke Article 136 against the decisions of Hyderabad High Court, rendered on 12th, 13th and 14th of December, 1949, respectively, because at the time of their rendition it was not a court within the "territory of India," Mr. Pritt's argument that Article 136 should be liberally construed as not to take away appellant's "valuable right of appeal," which they had to the Privy Council of Hyderabad before the commencement of the Constitution, was rejected. The learned counsel reinforced his contention by emphasising that if Article 136 was desired to have only prospective operation it would have commenced with the word "hereafter." The Supreme Court also repulsed this contention on the ground that :

> .. prima facie, every legislation is prospective and even without the use of the word hereafter, language of Article 136 conveys the same meaning.[117]

Although the observation sounds good for the surface, we are unable to appreciate it (as also Mr. Pritt's contention) in view of the clear provisions about the commencement of Article 136 from 26th of January, 1950, contained in Article 394.

113 See Articie 135.

114 *Janardhan Reddy* v. *The State*, A. I. R 1951 S. C. 124, *Lloyds Bank* v. *Lloyds Bank Indian Staff Association*, A. I. R. 1956 S. C. 745, *Masthan Sahib* v. *Chief Commissioner*, A. I. R. 1962 S. C. 797, *Masthan Sahib* v. *Chief Commissioner*, A. I. R. 1963 S. C. 533, *Ramamurthy* v. *Chief Commissioner, Pondicherry*, A. I. R. 1963 S. C. 1464, at 1468.

115 *Madhova Menon* v. *State of Bombay*, A. I. R. 1951 S. C. 128 (it involved interpretation of Article 13) : *Daji Saheb* v. *Shankar Rao Vithal*, A. I. R. 1956 S. C. 29, 31 and *Garikapati* v. *Subbiah Choudhary*, A. I. R. 1957 S. C. 540 (these cases involved interpretation of Article 133) : *K. S. Rnmamurthy* v. *Chief Commissioner, Pondicherry*, A. I. R. 1963 S. C. 1464, 1468 (it involved interpretation of Article 32 also).

116 *Supra* op. cit. note 107.

117 A. I. R. 1951 S. C. 124, at 126.

K.S. Rammurthy v. *Chief Commissioner Pondicherry*[118] posed that every question which arose in *Janardhan Reddy*.[119] The appellant challenged an order of the Chief Commissioner Pondicherry, dated September 9, 1960, through a writ petition under Article 32 and through special leave under Article 136. At the time the said order was passed, Pondicherry was not a territory acquired within the meaning of sub-clause(c) of Article l. But at the time of the hearing of the case, Pondicherry was within the territory of India. The Supreme Court, however, dismissed both, the appeal and the petition, on the ground that it had no jurisdiction to entertain cases from beyond "the territory of India." While dismissing the writ petition, the Court, speaking through Justice Wanchoo, observed :

> ...if no writ could issue to the Appellate Authority (Chief Commissioner of Pondicherry) at the time the order was passed, no writ could issue now after Pondicherry has become part of the territory of India, for that would be giving retrospective operation to the Constitution for this purpose which obviously cannot be done. (Emphasis added).[120]

The observation equally applies to Article 136.

Every rule is made with certain end. The object of the rule that a law should not have *ex post facto* operation is that a person may not be made to suffer for things unknown. Where application of this rule is tantamount to taking away existing rights, exceptions are created. Exceptions do not obscure the rule. Instead they make it more pronounced. Thus, the Constitution declares as a general rule[121] that the provisions of the Constitution will have prospective operation. Where, however, the working of the rule involves extinguishment of rights which had already accrued, it created exceptions[122] to save them.

Janardhan Reddy's[123] case did not fit in with any of those provisions and, we feel, that great hardship was caused to the

118 A. I. R. 1963 S. C. 1464.

119 A. I. R. 1950 S. C. 124.

120 A. I. R. 1963 S. C. 1464, at 1468. See also *Masthan Sahib* v. *Chief Commissioner*, A. I. R. 1962 S. C. 797 and *Masthan Sahib* v. *Chief Commissioner*, A. I. R. 1963 S. C. 533 which raised similar question.

121 See Article 394.

122 For example, clause (2) and (4) of Article 374 and Article 135.

123 A. I. R. 1951 S. C. 124.

appellants in this case. On 25-1-1950, they could appeal to the Privy Council of Hyderabad from a decision of Hyderabad High Court but the application of the Constitution to the Hyderabad State from 26-1-1950 cut short the remaining career of their suit. Our submission, therefore, is the Constitution having been made to Hyderabad the Supreme Court not only stepped into the shoes of Hyderabad's Privy Council in respect of matters pending therein or provided for by Article 374 (4), but by necessary implications also became an authority for matters which could have gone to it in due course. The institution of a suit implies that the provisions of appeals then governing the litigant would hold good until the last stage of the suit. Generally, charges in the law relating to appeals do not affect existing rights. There are a plethora of decided cases, both Indian and foreign, on the point.[124]

---

124 *Hough* v.*Windus*, (1884)12 QBD 224, at 237; *Leed & County Bank, Ltd.* v.*Walker*, (1883) 11 QBD 84, at 91; *Moon* v. *Durden* (1848) 2 x 22 : 76 RR 479, at 495; *Colonial Sugar refining CO., Ltd.* v. *Irving*, (1905) A. C. 369; *Nana Aba* v. *Sheku Andu*, ILR 32 Bombay 337; *Delhi Cloth and General Mills Co. Ltd.* v. *Income Tax Commissioner Delhi*, A. I. R. 1927 P. C. 242; *Ramakrishna Iyar* v. *Sithai Ammal*, A. I. R. 1925 Mad. 911; *Tata Iron & Steel Co. Ltd.* v. *Chief Revenue Authrority*, A. I. R. 1923 P. C. 148; *Daivanayaga Reddiyar* v. *Renukambal Ammal*, A. I. R. 1927 Mad. 977; *Bala Prasad* v. *Shyam Behari Lal*, A. I. R. 1928 All. 168; *Ram Singha* v. *Shankar Dayal*, A. I. R. 1928 All. 437; *Kripa Singh* v. *Ajaipal*, A. I. R. 1928 Lah. 627; *Sadar Ali* v. *Doliluddin*, A. I. R. 1928 Cal. 640; *Runjit Singh* v. *Meherban Koer*, I. L. R. 3 Cal. 662, at 665; *Chinto Joshi* v. *Krishnaji Narayan*, I. L. R. 3 Bom. 214, at 216; *In re Vasudeva Samiar*, A. I. R. 1929 Mad. 381; *Radhakrishan Laxminarayan* v. *Shridhar Ramchandra*, A. I. R. 1950 Nag. 177; *Nagendra Nath Bose* v. *Mon Mohan Singha*, A. I. R. 1931 Cal. 100; *Hoosein Kasam Dada (India) Ltd.* v. *State of Madhya Pradesh*, A. I. R. 1953 S. C. 221; *Ganpat Rai Hiralal* v. *Aggarwal Chamber of Commerce Ltd.*, A. I. R. 1952 S. C. 409; *R. M. Seshadri* v. *Province of Mad.*, A. I. R. 1954 Mad. 543; *In re Reference Section 5 of Court Fees Act*, A. I. R. 1955 Bom. 287; *Sawaldas Madhavdas* v. *Arati Cotton Mills Ltd.*, A. I. R, 1955 Bom. 332; *Nand Lal* v. *Hiralal*, A. I. R. 1950 Nag. 222; *Kamal Nayan* v. *Bira Naik*, A. I. R. 1951 Ori. 141; *Ramaswami* v. *Ramanathan*, A. I. R. 1951 Mad. 251; *Daji Saheb* v. *Shankar Rao*, A. I. R. 1952 Bom. 303; *Mr. Murtu* v. *Paras Ram*, A. I. R. 1952 Himachal Pradesh 14 and *Bhagwant Rao* v. *Viswas Rao*, A. I. R. 1953 Nag. 313, it has been held that notwithstanding Art. 133, the vested right of appeal, if any, had been in existence before the commencement of the Constitution, would continue to be governed by the provisions of the Civil Procedure Code then in force. See also *Garikapati* v. *Subbiah Choudhary*, A.I. R. 1957 S. C. 540.

VII The Supreme Court Rules

Apart from the constitutional limitations, there are certain procedural requirements, too, for invoking Article 136. By virtue of the power conferred upon the Supreme Court under the Constitution,[125] the Court has made certain Rules, called as the Supreme Court Rules.[126] They prescribe procedure for seeking any relief, including the one under Article 136,[127] from the Court.

In granting special appeal, the Court has sometimes dispensed with the observance of one rule or the other.[128] But such cases are few and far between. Further, while in early decisions[129] the Court emphasised on the strict observance of the Rules in a recent case[130] it has held that the observance of the Rule is "mandatory" and special leave if observed on contravention of any Rule, is liable to be revoked.

It is difficult to appreciate the response of the Supreme Court, particularly in cases arising under Article 136. Generally speaking, the object of the conforment of the Rule making power on the Court is three-fold, one, to regulate and facilitate the exercise of its various jurisdictions; two, to ensure that the filing of an appeal in the Court is not to be entirely left to the convenience and sweet will of the appellant and three, to bring to an end the pending litigation. An anomalous situation would arise if there will be no time limit for filing an appeal. Insistence on the observance of the Rules is good, but to make them mandatory even in cases filed under Article 136 would hardly be in tune with the Article.

---

125 See Article 145.

126 See the Supreme Court Rules (1966).

127 Rules 1 to 11 of Order XVI of the Supreme Court Rules, 1968, regulate appeals by special leave in civil matters. They prescribe the period of limitation for filing the appeal and the manner of its presentation and deal with certain incidental matters such as impleading of a legal representative, *ex parte* hearing, costs and court fees etc. Similarly Rules 1 to 11 of Order XXI prescribe the procedure for filing special appeal in criminal matters.

128 See, for example, *Vekataramma* v. *State of Mysore*, A. I. R. 1956 S. C. 255, at 262.

129 See, for example, *Aswani Kumar* v. *Arbinda*, A. I. R. 1952 S. C. 369, *Banarasi Das* v. *State of U. P.*, A. I. R. 1956 S. C. 112, *Nanavati* v. *State af Bombay*, A. I. R. 1961 S. C. 112.

130 *Hindustan Commercial Board* v. *Bhagwan Das*, (1965) 1 L. L. J. 466.

First, Article 136 confers residuary power on the Supreme Court to present injustice being perpetuated by the decision of any court or tribunal. The exercise of this power is not subject to any legislative rule or procedure.[131]

Second, it may be submitted that no Article of Chapter IV (Union Judiciary) of Part V of the Constitution can cast any fetter on the Supreme Court's jurisdiction under Article 136 (for it starts with the words "notwithstanding anything contained in this chapter...") much less any Rule made thereunder. Moreover, the special leave jurisdiction of the Court is not subject to any Rule made under Article 145.[132]

Third, the Supreme Court has itself held that Rules are in the nature of delegated legislation.[133] Doubtless there is no right of appeal under Articles 136 and even if any rule contravenes the provisions of the Article, it cannot be challenged as unconstitutional by the aggrieved party,[134] yet it will be observed that by strict construction of the Rules the Supreme Court has perhaps overlooked the object with which the plenary appellate jurisdiction was conferred on it. If the Constitution does not want to circumscribe the scope of the Court's jurisdiction under Article 136 by any legislative rule, why should the judges do it? In our judgment if a litigant has fulfilled all the conditions precedent for the exercise of Article 136, mentioned above, non-observance of any Rule should not be fatal to the maintenance of special appeal. The best thing would be to weigh the non-observance of the Rules against the nature of injustice complained of. If the injustice complained of is grave, the non-fulfilment of any Rule should not lead to the dismissal of the appeal.

131 See VIII *C. A. D.* 638 (1949), *Durga Shankar* v. *Raghuraj Singh*, A. I. R. 1954 S. C. 520, at 523, *D. C. Cotton Mills* v. *Commissioner of Income Tax*, A. I. R. 1953 S. C. 65, at 69.

132 *Cf.* Articles 133 and 137.

133 *Prem Chandra Garge* v. *Excise Commissioner*, A. I R. 1963 S. C. 996.

134 In *Prem Chandra Garg* (*Supra*) Rule 12 of Order 35 of the Supreme Court Rules, 1959, which provided for the deposit of costs and security was held so be *ultra vires* of Article 132. It was held that :

> If an order for security amounts to a contravention of Art. 32, there would be no power to make such a rule under Art. 145 (1) (f). After all, rules framed under Art. 145 are in exercise of the delegated power of legislation, and the said power cannot be exercised so as to affect the fundamental rights.

VIII Conclusion

Various expressions have been used by the Constitution-makers,[135] courts[136] and commentators[137] to show that the Supreme Court possesses extraordinarily wide powers under Article 136. The above discussion, however, reveals that there are certain contextual,[138] operational[139] and procedural[140] checks on the exercise of the Court's jurisdiction, and an attempt can be made to delineate the province of Article 136. In sum, the Article can be invoked by a litigant only against a judicial decision falling within the rubric of the expressions judgment, decree, determination, sentence or order. Such decision must have been rendered after the commencement of the Constitution by any 'Tribunal' exercising the inherent judicial power of the State, in a justiciable cause or matter within the territory of India.

---

135 See generally, VIII *C. A. D.* 634-639 (1949).

136 *Bharat Bank* v. *Employees of Bharat Bank*, A. I. R. 1950 S. C. 188, at 193, *Pritam Singh* v. *The State*, A. I. R. 1950 S. C. 169, at 171, *Durga Shankar* v. *Raghuraj Singh*, A I. R. 1954 S. C. 520, at 523, *Dhakeshwari Cotton Mills* v. *C. I. T., West Bengal*, A. I. R. 1955 S. C. 65, at 69, *Engineering of Mazdoor Sabha* v. *Hind Cycles*, *A. I. R.* 1963 S. C. 874, at 877.

137 See generally, Basu, *Commentary on the Constitution of India* 149-150 (4th ed. 1963), Shukla, *The Constitution of India* 292 (5th ed. 1969), Seervai, *Constitutional Law of India* 1318 (1967), Jain, *Constitutional Law* 154 (1962).

138 See *supra*, at 8.

139 See Article 394 and *supra*, at 99-102.

140 See Article 145 and *supra*, at 103.

Concession Contracts and International Law

Subhash C. Jain*

The history of Concessions is replete with exploitation of the resources of former colonies by Great Britain, France, the Netherlands and Belgium although vestiges of the same can in many cases be found via "neo colonialism" to which they continue to be subjected after independence. The term "concession" was not known in the medieval law. In general, liberty of economic activity was the exception and special permission the rule in medieval times.[1] Concessions originated in the need of some States for raw materials which were available in abundance in the countries of Latin America Africa and Asia. Most of them being under colonial rule had per force to part with their natural resources such as minerals, tea plantations etc. vital for their own economic life. Grant of concessions has either been the economic compulsion of the grantor or the grantee. Grantor's compulsion because it was in need of foreign know how and capital assistance. Grantee's compulsion because it needed raw materials for home. This process tends to bring prosperity and boost to the economy of the investor's State. In the pre-independence period in the majority of Asian and African countries, it was easy to get these concessions. They were mostly procured under duress and coercion. These were the periods of "State childhood"[2] and concessions were granted by "immature governments."[3] In Latin America, Concessions were sought in perpetuity known as "confirmatory concessions."[4] These were the days of extorting concessions. The importance and frequency of such concessions during the nineteenth century kept pace with the general industrial development, which made acquisition of overseas

* Indian Law Institute, New Delhi.

1 Feilchenfeld, *Concessions The Encyclopeadia of Social Sciences* 157 (New York, 1930).

2 Mughraby, *Permanent Sovereignty Over Oil Resources* 15 (1966).

3 Lenczowski, *Oil and State in the Middle East* 99 (1960).

4 Gaither, *Expropriation in Mexico : The Facts and the Law* 4 (1940).

raw materials increasingly important.[5] In the twentieth century also, concessions continue to represent the vital sector of the industrial economy. It has not been possible to make any systematic study of concessions relating to specific commodities except oil. Oil concessions in the Middle East have attracted considerable attention. History of oil concessions is dated back to 1901 when the Persian Government granted an oil concession to D'Arcy. It was followed by a concession to Iraq Petroleum Company in Iraq in 1925, to British Oil Company in 1932 and so on. Concessions continue to be granted till today.[6] Plantation concessions in Malaysia, Indonesia and Ceylon deserve a full-fledged study but no attempt seems to have been made. Some account is available in books of political economy. One finds some evidence of tobacco concession granted by the ruler of Deli (Indonesia) in 1863 and by the Sultan of Kelantan (Malaya) to one Mr. Duff. The latter concession involved an area of 3,000 square miles together with 'sole commercial rights of every description.'[7] A study of various African concessions reveals that some are just political instruments. There are numerous Latin American concessions incapable of being individually mentioned. They could be got for nominal commitments by the concessionaire.[8] Legal questions as to the status of these

5 Feilchenfeld, *op. cit.* note 1, at 158. Paradoxically, it is stated that "from an economic point of view concessions are inherently abnormal because they replace domestic management by foreign management without economic justification." At 159.

6 For details about oil concessions see generally, Cattan, *The Evolution of Oil Concessions in the Middle East and North* 173 (Oceana 1967). It is also stated in *Encyclopaedia of Social Sciences*, vols. III-IV, that oil concessions have received more attention than others on account of their "general and political importance." (at 158). Rubber concessions have obtained a certain notoriety because in some countries, as the Congo State and Liberia, their exercise is usually admitted to have been connected with objectionable labour conditions. *(Ibid)*. For an account of early origin of the concessions in general, see White, *Nationalisation of Foreign Property* 82 (London, 1961).

7 See Allen and Donnithorne, *Western Enterprise in Indonesia and Malaya* 69, 113-14 (New York, 1957).

8 "Nominal as these commitments were, concessionaires were known to bargain hard in order to get them lower still," Vermon, "Long-Run Trends in Concession Contracts," *Proc. A. S. I. L.* 83 (1967); *cf.* Friedmann, *The Changing Structure of International Law*, 23 (London, 1964) (He confirms that terms of the concessions were "extremely favourable to the Western economic interests.")

concessions in international law, applicable law, State's powers of revocation and review become naturally important for an international lawyer. In simple terms, a concession has been described as "an instrument of coordination whereby a State and a foreign investor establish a complementary system of relationships in the conduct of an enterprise for a defined period"[9] and it has been suggested that "the grant of privilege by the State is but an incident of the coordinated activity contemplated by the agreement."[10] Although the purpose of at least all the post-independence concessions is apparently[11] economic cooperation, nevertheless, the complex character and nature of these concessions quite often pose difficulties.

I Nature of Concessions

(*i*) *Concessions in general*

The nature of a concession has bearing on the rights and duties of the parties involved in a transaction. Rights and duties created by a concession are diverse and so are terms of a concession. The purport of a concession may be economic, political or even social.

9 Carlston, "Concession Agreements and Nationalization," 52 *Am. J. Int' l L.* 260 (1958).

10 *Ibid.* Buell in his *International Relations* 397-98 (1925) attributes the existence of concessions primarily to the insistence of foreign investors to control the money lent for industrial purposes.

11 Former colonies are quite skeptical and they often wonder after having been impoverished to a point of break whether they are offered foreign capital once again just for economic and political domination rather than for development. In fact, they are considered as "powerful foreign economic enclaves" and "perfect prototype of imperialism," Penrose, *Concessions Under Attack*, The Times (London), Sept. 11, 1969, at V (Supplement on World Petroleum). One might here refer to Lenin's approach in granting concessions to foreigners (for the sake of comparison). He said : "It would be a great mistake to think that concessions mean peace. Nothing of the sort, Concessions are nothing more than a new form of warfare. Previously, war was conducted in an area in which the imperialists were infinitely stronger, in the military sphere. However, in this field we have stood our ground, and we are undertaking to fight further by going over to an economic war....We shall learn from them how to erect model enterprises by setting up our own next to them." Achminow, "The Leninist Principle of Peaceful Coexistence," 4 *Studies on the Soviet Union*, 15-16.

Concessions of economic type are numerous[11a] and they create some sort of proprietary right in the concessionaire. Here the cooperative element is quite predominant although it will depend on the question whether "equivalence of advantages" has been maintained. It is found that most of the pre-independence concessions speak of "grant" of a concession by the ruler or the government concerned to a private party or even another government (and the latter may further grant it to some private party).[12] The phrase "grant" appears in several concessions.[13] This might give the impression of these concessions being unilateral in character which is not necessarily true in all cases. Unlike most of the Arab concessions, royalty was missing in African concessions but some share or profits were given to the ruler concerned in lieu of these concessions.

Some concessions are political in nature because of the very weak position of the tribal chiefs who granted concessions or they expressly protected the interests of a few powers.[14] A Political Administrator was appointed in a concessional area of the British South Africa Company which is again a pointer to the political nature of the concession.[15]

In the category of concessions of social nature fall such concessions as the ones granted by the queen of Madagascar to English mission societies for the erection of hospitals etc.[16]

It is said that "almost any kind of economic activity may be the subject of a concession."[17] Main categories of such economic activity are stated as (1) public utilities and (2) the exploitation of natural

11a For example, see O'Connell, "Economic Concessions in the Law of State Succession," 93 *Brit. Y. B. Int' l L.* 93 (1950).

12 Article 11 of the Concession of Benadir Ports, granted by the government of His Highness the Sultan of Zanzibar to the Government of His Majesty the King of Italy, 12th August, 1892, makes a provision to this effect, 3 Hertslet, *The Map of Africa by Treaty* 1095 (3rd ed. 1967).

13 For example, see *Id.* vol. 1, at 266, 339, 351, 365, vol. II, at 463, vol. III, at 1089, 1094. *Cf.* White, *op. cit.* note 6, at 83.

14 *Id.* at 1095.

16 *Id.* vol. 1, at 266.

16 See *supra* note 11a.

17 Huang, "Some International and Legal Aspects of the Suez Canal Question," 51 *Am. J. Int'l L.* 292 (1957).

resources. Wetter and Schwebel have observed that case law on concessions has centred on the following problems :

(1) The juridical character of a concession contract.

(2) The principles governing the interpretation of State Contracts.

(3) The general principles of law recognized by civilized nations.

(4) State succession to concessionary obligations.

(5) The assignment of concessionary rights.

(6) The right of independent management of the concessionary enterprise.

(7) The scope of the regulatory authority of the State and its relation to acquired rights.

(8) Tax exemptions.

(9) Expropriation of Contractual rights and the State's power to renounce its contractual obligations.

(10) The application of *rebus sic stantibus* to concession contracts.

(11) The nature of the compensation due upon breach or revocation of a concession contract.[18]

This list is comprehensive but not exhaustive. In the course of this study additional problems of review and revision of concessions will also be considered. Starting with the examination of juridical character of a concession, one might observe that it has received considerable attention from the jurists. Numerous problems are posed in this connection. Is concession unilateral in character or bilateral ? Is it a contract, an economic development agreement or an international agreement ?

(*ii*) *Concession whether Unilateral or Bilateral ?*

It is possible that a concession may be bilateral in form but unilateral in character and *vice versa*. Where the concessionaire's reciprocal commitments are nominal or nil, it should be considered

18 "Little-known Cases on Concessions," XL *Brit. Y. B. Int' l L.* 183 (1964).

unilateral in character. There is hardly any consideration involved. A concession may have been made under duress[19] or extracted in a similar way. In these circumstances it is doubtful whether any international obligations are incurred. Though bilateral in form, the concession in such a case will be unilateral in character. A concession unilateral in form, on the other hand, might create some benefits or rights in favour of the grantor in lieu of the concession. The phrase "grant" of concession, it is said, creates the impression that it is unilateral in character. But it would be binding in international law if the rights and obligations are mutual. The use of the term 'concession' itself is criticised on the ground that "it is apt to conceal the bilateral character of the transaction."[20] Sometimes, however, the term used is "concession contract." It, *prima facie*, indicates the bilateral character of the concession. It is, therefore, preferable to free 'concession.' It is also preferable to J. N. Hyde's 'economic development agreement' for the reason that while pinpointing the bilateral feature it tends to overemphasise "benevolent aspects of the relationship."[21] According to one observer Hyde's phrase would be

19 See Lissitzyn, "Iranian Oil, Foreign Investments and the Law," II *Foreign Affairs Reports* 33 (1953). A Nigerian representative said in the Second Committee : 'In point of fact the majority of such agreements were like agreements 'between a lion and a rabbit;' and it is a universally accepted principle that agreements concluded under duress should be regarded as invalid," quoted in Mughraby, *op. cit.* note 2, at 24. The term "unilateral concession" is also used by Delson.

20 Hyde, "Economic Development Agreements," Recueil Descous 283n (1962-1). *Cf. Saudi Arabia* v. *Arabian American Oil Company* (Aramco). Arbitration Tribunal August 23, 1958, (hereinafter referred to as *Aramco case*) where it was stated that "the concession remains a unilateral act of wills between the State and the individual." The reason stated is that State has only a supervisory role. 27 *International Law Reports* 159. Hyde's objection, however, is that concession "emphasizes the grant of a host State, but not the interrelated obligations of the private and government parties." *Id.* at 282. Professor Je'ze of France also considers it as a "unilateral administrative act."

21 Siksek, *The Legal Framework for Oil Concessions* 5 (1960) "Economic Development Agreement" is freely used by the later Dr. Darja in his thesis, *Toward Improving Legal Conditions of Viability of Economic Development Agreements* [With special reference to Government—Oil Company Relationships in Middle East and India) (Unpublished S. J. D. thesis in Harvard Law School Library, submitted to the Harvard University. Ray, Jr. also prefers the term "economic development agreement" to concession as, according to him, it is "clearer and more descriptive." *Proceedings of the 1960 Institute on Private Investments Abroad* 13 (Texas).

appropriate to describe government to governments agreement such as the Development Loan Fund, the International Development Agency, and the World Bank.[22] Moreover, it would not seem to embrace pre-independence concessions as development-motive was then lacking. A possible solution may be to term them as "investment agreements."

(*iii*) *Concession whether a contract ?*

Verdross is of the view that economic development agreements "being neither contracts governed by municipal law nor treaties governed by law contracts governed by law nor treaties governed by international law, form a third group of agreements, characterised by the fact, that the private rights established by them are governed by a new legal order, created by the concurring wills of the parties, i. e. the agreed *lex contractus*."[23] Thus, he does not deny their contractual character. No distinction has been made between a concession and a contract by many. They have been used as synonymous. A committee draft of 1929 codification conference, Harvard Draft Convention on "Responsibility of States for Injuries to the Economic Interests of the Aliens" and OECD Draft Convention on the Protection of Foreign Property provides a few examples. The 1929 Conference contains a provision as follows : "A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession *granted* or a contract made by the State."[24] This distinction is maintained throughout. Article 12 of the Harvard Draft Convention, (Draft No. 12) also does not make any distinction. An explanatory note to the Article states : "It does not appear possible either on logical grounds or in terms of policy to make a distinction between contracts and concessions, for the latter are nothing more than a species of the former."[25]

22 Siksek, *op cit.* note 21.

23 IX *Austrian Journal for Public Law* 452 (1959).

24 Basis of Discussion No. 3, Preparatory Committee of the Conference for the Codification of International Law. See (1956) 2 *Y. B. Int'l L.* Common 223. (Emphasis added).

25 Sohn and Baxter in 55 *Am. J. Int'l L.* 567 (1961). See generally, Mann, "State Contracts and State Responsibility," 54 *Am. J. Int'l L.* 72-91 (1960). *Cf.* White, *op. cit.* note 6, at 83. She thinks that concession "is not a purely contractual instrument since the authority *unilaterally* grants certain rights...." (Emphasis added).

The language of Article 12 of the Harvard Draft Convention (Draft No. 11) is, however, different. But there is no substantial difference to warrant the conclusion in Draft No. 12 that contract and concession are synonymous and in Draft No. 11 that they are different. Hyde, speaking before the American Society of International Law, pointed out that "the Draft distinguished between contracts and concessions" and asked Professor Baxter to comment on the same. In his comments he made no distinction. But Professor Sohn stated "that the purpose of the distinction between government concessions and contracts and other contracts is to point out the difference in treatment."[26]

The above example is an indication of the confusion prevailing in this field. Commentory to OECD Draft Convention on the Protection of Foreign Property provides as follows : "An undertaking may be embodied in a contract or in a concession-it is not possible on legal grounds to draw a distinction between the two, and such an undertaking may represent a consensual or a *unilateral* engagement on the part of the party concerned."[27] This incidentally seems to coincide with what we have stated above about the unilateral and bilateral character of concessions. Many publicists have also tended to treat concessions as contracts. O'Connell uses the term "concessionary contracts."[28] The position of Gidel and Keith is similar.[29] In the *Anglo-Iranian Oil Co.*

26 See *Proc. A. S. I. L.* 117 (1960).

27 Note and comments (3) (a) to Art. 2, *International Legal Materials* 247 (March, 1963). (Emphasis added). Contractual character of the concessions is doubted where they are effective even against third parties. *Aramco case, supra* note 20.

28 *Op. cit.* note 11a, at 93; see *The Teak Forest Concession case* cited in *Brit. Y. B. Int'l L.* 213 (1964), for identical view. See also Dr. Sultan, "Legal Nature of Oil Concessions," 21 *Revue Egyptienne De Droit International* 73 (1965) where he expresses himself against treating oil concessions as international agreements; Mughraby, *op. cit.* note 2, at 170.

29 See Huang, *op. cit.* note 17, at 291 Amador has observed that "concession contracts are not substantially different from ordinary contracts. There is... almost unanimous agreement that they merely constitute one variety of contract which States may conclude with private individuals." (1959) 2 *Y. B. Int'l L. Comm'n* 25. Where a concession contains a provision barring its premature termination it cannot be regarded as an ordinary contract, according to White, *op. cit.* note 6, at 88.

also, the International Court of Justice stated that the concession agreement was nothing more than a contract.[30]

(iv) Concessions whether international agreements

In the context of relations between States and aliens what instruments are international in character? Garcia Amador in his fourth report on "International Responsibility" excluded concessions from the category of "International" instruments. He observed :

> There appears to be no sound basis for adding, as has been suggested by some writers, a third category comprising those contracts or concessions which, because of their nature, object or importance to the world economy, involve 'international interest.'[31]

He further asserted that the presence of such interests in a concession does not have the effect of "internationalizing"[32] the contractual relationship. Speaking about oil concessions, Mughraby expressed the view that they "cannot be classified as international agreements."[33] Dr. Darja was equally critical of the view that concessions could be considered as international in character. He says : "In their anxiety to salvage the agreements, from the peril of 'exclusive localisation,' they [developed States] have tended to push the solution to the other extreme of 'exclusive internationalisation.' The latter is apt to be as disquieting and unsatisfying to the new States as the former is to the alien investors."[33a] On the other hand, while criticising the judgment of the International Court of Justice in *Anglo-Iranian Oil Co. case,* Fawcett observed "It is surprising that the intention of the parties, so expressly declared, to 'internationalize' the

30 Lissitzyn, *op. cit.* note 19, at 22.

31 (1959) 2 *Y. B. Int'l L. Comm'n* 31. According to traditional thinking even though a concession is devoid of any international character initially, it would seem to acquire this character on denial of justice etc., to alien.

32 This term is attributed to Mann in "*The Law Governing State Contracts,*" 21 *Brit. Y. B. Int'l L.* 11 (1944) Mann poses some interesting questions on "internationalization" e. g., what are the circumstances in which "internationalization" may be implied. *Id.* at 22n. 3.

33 See Mughraby, *op. cit.* note 2, at 169.

33a See Darja, *op. cit.* note 21, chapter 11, at 4.

contract should be defeated...."[34] Similarly, George W. Ray would concede their international character as "they are international by nature, not in the sense of being between States (although two States may be involved in their enforcement) but in the sense that their performance will require action in more than one State."[35] Still further, a concession agreement has been likened to a treaty by some writers. The United Kingdom in the *Anglo-Iranian Oil Co. case* contended that a dispute under the concession agreement would be a dispute under a treaty within the meaning of the declaration. According to the United Kingdom the doctrine of *pacta sunt servanda* was applicable to the agreement in question.[35a] The Court held that concession agreement did not enjoy the status of a treaty. J.N. Hyde is of the view that a "development agreement can be assimilated to a treaty"[36] and questions the approach in the American Law Institute and Harvard Drafts which discarded the possibility of assimilating "development contracts" to treaties. These Drafts have adopted a *via media* between the assimilation of the contract to a treaty and the view that international law is not applicable as between a State and an alien.[37] In consonance with this attitude Professor Baxter has pointed out that Article 12 of the Harvard Draft "attempts to bridge the gap between the extremes."[38] For the same reason he stated that "International Law does not enter

34 Fawcett, "The Legal Character of International Agreements," 30 *Brit. Y. B. Int'l L.* 400 (1953). According to the parties, in case of a dispute, Art. 38 of the I. C. J. Statute was to be applicable. Fawcett reaffirms his view in the Hague Academy of International Law Collaquium on *International Trade Agreements* 366 (eds. Sijthoff, Leiden, 1969).

35 Ray, "Law Governing Contracts between States and Foreign Nationals," *Proceeding of the 1960 Institute on Private Investments, Texas* 14.

35a In the case of the *Losinger & Co.*, P. C. I. J., Series C, No. 78 where circumstances were similar, (dispute between a Swiss firm and Yogoslavia) Switzerland invoked *pacta sunt servanda.* The matter was, however, settled by negotiation. White feels that writers subscribing to the view that *pacta sunt servanda* applies even to concession contracts belong to a new school of thought. See *op. cit.* note 13, at 86. She does not seem to share views of this new school of thought. See also Fatouros for a similar view in Friedmann, *Legal Aspects of Foreign Investment* 70 (1959).

36 Hyde, *op. cit.* note 20, at 322.

37 See Hyde, *op, cit.* note 20, at 319.

38 *Op. cit.* note 26, at 118. Huang takes somewhat similar view. According to him concession is not a treaty but it is somethlng more than a contract. *Supra* note 17.

the scene until the applicable system of law fails to protect the minimum international rights."[39] One may also bear in mind the warning of Gillian White which is as follows :

> Many members of that society [the international society of States] are for various reasons reluctant to admit foreign capital to exploit mineral and other resources within their borders, and this reluctance would be greatly increased if it became generally accepted that concession agreements with aliens are a direct source of international rights.[40]

The better view, therefore, seems to be against internationalizing concession rights. Moreover, an application of *pacta sunt servanda* by the concessionaire will invite the host State to invoke *rebus sic stantibus*[41] with of course understandable consequences. In many cases there may, in fact, be more justification which calls for something like *rebus sic stantibus* though not necessarily with all its legalistic implications. Decolonization itself involves *de facto* application of *rebus sic stantibus*. Whether one of the two doctrines is applicable also impinges on the question of applicable law.[42]

Another important problem is whether concession contract is a proprietory right like any other proprietary interest. For, an answer to this question will depend on a State's right to expropriate concessions which it no doubt has in case of any kind of property.

(v) *Concession whether a proprietary interest ?*

Draft 12 of the Harvard Law School relating to "Responsibility

39 *Ibid. supra* note 25.

40 See White, *op. cit.* note 6, at 90. Delson also holds the view that concession is not a treaty "Nationalization of the Suez Canal Company : Issues of Public and Private International Law," 57 *Colum. L. Rev.* 762 (1957).

41 Possibility of *rebus sic stantibus* being invoked is not ruled out by White, *op. cit.* note 6, at 88 or by Professor Penrose, *supra* note 11. Hyde thinks that it is "not to be assumed to be correlative principle, siphoning all conceptual reality from the principle of the performance of agreements." *Op. cit.* note 20, at 312. It appears that commerce-oriented States are prone to reject *rebus sic stantibus*. See the view of Grotius cited by Nussabaum, *A Concise History of the Law of Nations* 108 (1947). *Cf* Siksek, *op. cit.* note 21, at 85; Delaume *Legal Aspects of International Lending and Economic Development Financing* 129 (New York, 1967).

42 See *supra* note 31.

of States for Injuries to the Economic Interests of Aliens" places the concessions in the category of contracts but does not recognize it as a property right. Sohn and Baxter in their explanatory note to Article 12 of the Draft observed as follows :

> It has on occasion been suggested that a concession constitutes a property right as well as a contract and that in the former aspect it is subject to expropriation or nationalization....The logical consequence of the adoption of such a view would be to place a concession in the category of "property of an alien".... This theory has, however, been rejected in the present draft which proceeds instead on the theory that concessions should be treated in the same way as contracts.[43]

This view of the contract, however, seems to stem from an oversensitive attitude towards protection of alien property. There is hardly anything to suggest that a concession cannot at the same time be treated both a contract as well as a property right. Another example of extreme view is the attitude of the Mexican courts. The Mexican Supreme Court considered that the owner of a concession had the right to discover and to produce oil, but because he acquired ownership only of oil which he produced and had no *ownership* of oil still in subsoil, his right to produce was of *no value*.[44]

Most of the writers from developing and developed countries alike seem to support the view that a concession is like any other proprietary interest. In the context of succession to financial and economic acquired rights the Special Rapporteur Bedjaoui observed, "States had no obligation, on the international plane, to distinguish between acquired rights and other property rights, which could be modified by their legislation when the general interest so required."[45] This makes it clear that for the purposes of expropriation of concessions, the latter have to be treated like other property rights. Taking

43 55 *Am. J. Int'l L.* 567 (1961).

44 See Gaither, *op. cit*, note 4, at 149. Before this decision of December 2, 1939, the law in Mexico was similar to American law (see *id.* at 41).

45 U. N. Doc. A/7370 quoted by Bedjaoui, *op. cit*, note 7, at 45. "One of the categories of private ownership in land was concession obtained from native rulers. Some *properties* of this type can trace their origin to the early nineteenth contury...." Allan and Donnithorne, note 7, at 69 (emphasis added).

the same view Baade stated, "It (concession) does not differ from any other proprietary interest. The local sovereign is just as competent to expropriate such concessions as it is to expropriate land or industrial enterprises."[46] To support this view a United States decision may be cited with profit. In *West River Bridge Co.* v. *Dix*[47] it was held that there was "nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property." Taking the clue from the judgment of the International Court of Justice in the *Anglo-Iranian Oil Co. case*, Gillian White observed, "Whatever may be the dominant feature of a concession, it is *generally accepted* that the sum total of the rights acquired under it by the concessionaire constitute a legal interest of a proprietary nature."[48] This position is clearly accepted by the United Kingdom in its recognition that "a State is entitled to nationalise and, generally to expropriate concessions granted to foreigners to the same extent as other property owned by foreigners."[49] In the light of the above discussion the view taken by Baxter and Sohn seems to be unrealistic. An unequivocal statement by Delson at an International Law Association Conference vindicates our view in the following terms; "the right of the State to take property for public use is so fundamental that it cannot even be surrendered by contract...."[50]

There can be only one exception to the proprietary nature of the concession i.e., where a State expressly denies any right of ownership as is done by many States regarding any particular or all means of production. Here the contract will be devoid of any proprietary content and it will be a contract pure and simple. Here the State concerned has expressly reserved such a right for itself. The concessionaire in this case may not be able to complain of infringement of

46 Baade in Miller and Stanger (eds.), *Essays in Expropriations* 20 (Ohio, 1967). Similar view is held by Foighel when he observes : "There is no rule in international law that gives a greater degree of protection to rights secured by contract than to other rights of property," *Nationalisation* 74 (London, 1957).

47 47 U. S. (6 How.) 507, at 533-34 (1948).

48 White, *op. cit.* note 6, at 84 (emphasis added).

49 Memorial of the U. K. Government in the *Anglo-Iranian Oil Co. case*, I. C. J. Pleadings 85. "A lawfully concluded public contract is a property...." Schwarzenberger, *Foreign Investment and International Law* 6 (London, 1969).

50 Quoted in (1959) 2 *Y. B. Int'l L. Comm'n* 14. For somewhat similar view see O'Connell, *op. cit.* note 11a, at 118-19. Contra, Huang, *supra* note 17.

his proprietary interest. It will be a case of breach of contract and the remedy will depend on the applicable law.

It would follow from the discussion of the proprietary nature of concessions that a State's sovereign right to expropriate concessions is not affected as Baxter and Sohn seem to conclude.

II Can the Concessions be Unilaterally Altered ?

One answer to this question is in relation to the distinction between pre-independence and post-independence concessions which is discussed elsewhere.[50a] The General Assembly Resolutions of 1962 and 1966 seem to give a free hand to the States regarding pre-independence concessions.

Another answer to the question depends on the applicable law. There are several examples of concessions having been unilaterally terminated by the States.

Past Practices

O'Connell has given several examples where concessions were either not recognized or drastically changed before they were recognized. Thus, a British Harrison Smith & Co. possessed mining concessions in Madagascar. The latter was annexed by France in 1896. France stated that it did not attach any value to ancient contracts and asked the Co. to "regularize" its concession. The United States has in some cases followed the doctrine of "odious" concessions and repudiated its obligations unilaterally. In Cuba Telegraph Co.'s concession it did not consider itself bound by the concession contracts. In a concession claimed by one Bennett, the British Government invoked Transvaal Concession Commission's Report to reject the claim and contended that "international law is not settled on the point." Many of the concessions have been abrogated by the States in their capacity as successor States[51] or as annexing powers (annexation of Boer Republic in 1900) or as dominant States. The British Government while cancelling concessions justified the action on the ground of France's precedent in Madagascar.

50a See *infra* note 63a.

51 Examples in this section have been taken from O'Connell, *op. cit.* note 11a, at 99, 103, 113. Examples of some developed States terminating the concessions can also be found in Bedjaoui, U. N. Doc. A/CN 4/216, 51-55 (2 May, 1969).

Strange as it may seem, the British Government in its claims against the United States in the case of Spanish concessions took just the opposite position [52]

Reasons for past practices

Reasons for above practices followed by some of the leading powers are quite obvious. Taking a contrary view would have meant great economic loss or ruin.[53] Where economic involvement is great, cases of such kind are bound to be more frequent.

Recent Examples

Some recent examples of concessions or contracts of concessionary nature having been recently terminated can also be found. Take, for instance, Argentina's decree annulling oil production contracts,[54] Indonesia's action against Caltex, Shell and Stanvac,[55] Congolese

52 Bedjaoui, *op. cit.* note 51, at 54.

53 In *Company General of the Orinoco* (1912), the France-Venezuela Mixed Claimed Commission held "As to the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and cancelled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefore the duty of compensation." (1964) 2 *Y. B. Int'l L. Comm'n* 280.

54 See Int. Legal Materials 1-12 (Jan. 1964). It read as follows, "In its absence (power to annul), the private interest of speculators and seekers of easily won advantages, generally so devoid of scruples and patriotism, always in wait for favourable opportunities for enrichment, would assure the success of their illicit enterprises carried on through the error, deceit, or connivance of officials granted that once a concession was obtained, now ever, illegal, there would be no means of cancelling it." The decree claimed that it did not affect *legitimate* rights of aliens although irrational exploitation of its resources was given as one of the reasons for termination of the contract. Ghana's Concession Act of 1962 envisages its President cancelling land concessions held by foreign investors when public interest so demanded. See Elias, "Law of Foreign Investment in Africa : An Outline," 7 *Nigerian Bar Journal* 17 (1966).

55 *Ibid.* May 1965, pp. 435-50. *Cf.* Staff *Regulations Case* (Govt. of *Greece* v. *Hellenic Electric Railways Ltd.* 1928) in *Brit. Y. B. Int'l L.* 203 (1964). Where the Government argued that a public utility concession "did not abolish legislative sovereignty, and the conditions attached to the convention could be *unilaterally* modified by a law...." (*Emphasis added*).

(Leopoldville) decree cancelling Belgian Co's. rights to grant mining concessions,[56] Petroleum Law Amendment by Libya,[57] Congolese (Kinhasa) Ordinance nationalizing Union Miniere du Haut Katanga,[58] Peru's decree law declaring I.P.C. contract void,[59] Moroccan cancellation of 30 year old concession to the port of Tangier Company.[60] The examples can be multiplied.[60a] In fact, it may be true to say that most of the cases of expropriation usually involve a unilateral action on the part of a State. Compensation may, however, be negotiable as illustrated by the global settlements. The States have usually legislative competence to regulate the concessions and amendments are frequently passed in respect of original enactments.[61] Hendryx has relied on six United States cases—*B. Northen Co.* v. *Thomas* (1934); *Pierce* v. *New Hampshire* (1847); *Mugler* v. *Kansas* (1887); *New York & New England Rly.* v. *Bristol* (1894); *Douglas* v. *Kentucky* (1897); *Marus Brown Holding Co.* v. *Feldman* (1921)—to show that in the overriding interests of their peoples the Governments can be released from their contractual obligations. This is on the condition that there should be substantial public interest involved and not merely repentance of the former bargain.[61a] In any case, contractual obligations being of economic nature even their unilateral termination should be capable of reimbursement. The

56 *Ibid.* March, 1965, at 232. The decree *inter alia* concluded "Being free to change the former juridical order it was competent to put aside the remnants of the colonial regime, and notably to bring to an end to the existence of C. S. K., a legal person under Congolese Law." This decree like Argentina's claimed that it did not affect legitimate investments.

57 *Id.* May 1966, at 442-61.

58 *Id.* 1967, at 915.

59 *Id* 1968, at 1255.

60 See *Africa Research Bulletin*, Dec. 15, 1966, Jan. 14, 1967 (at 655).

60a See generally, Friedmann, *op. cit.* note 8, at 23.

61 For example, *The Teak Forest Concession Case*, a Thailand case, where concessionaire had submitted to the future exercise of legislative power under Article 1 of the concession. *Brit. Y. B. Int'l L.* 215 (1964). *Greek Telephone case*, *Ibid.* at 220-21.

61a Siksek, *op. cit.* note 21, at 54. Friedmann in suggesting solution for the controversy whether a concession is to be treated as a civil contract or "as a non-negotiable aspect of the power and duty of governments to serve the social and economic welfare of their peoples" recommends adoption of French *contract administratif.* The latter has certain unilateral powers to suspend, vary or rescind the contract. See Friedmann, *op. cit.* note 8, at 201. According to Carlston a concession can be terminated only as an incidence of contractual right and not by the exercise of sovereign power, *op cit.* note 9, at 261.

reason for some of the recent practices relating to concessions is neatly stated by one commentator as follows :

> The fact is that a considerable part of the problems of concessionaires is a reflection of nothing more than the transition of host governments from an initial condition of half-sovereignty to a condition in which the state feels competent to exercise the normal powers of government.[62]

This is, however, not the sole reason for the new States expropriating alien property. They do not find much to share in the economic goals of their erstwhile colonial bosses. "The peoples of these countries have largely inherited outmoded institutions from their past and their colonial masters that are out of tune with their contemporary demands. This explains the ineffectuality of law in bringing about a rapid social and economic progress in these societies."[63] The essentially different processes of economic development during the alien rule and after attaining independence create a legal dichotomy between pre-independence and post-independence concessions.[63a]

III The Problem of Revision of Concessions

According to Vernon, in the process of negotiations four stages are involved : the first stage where the government negotiates from the position of weakness, the second stage where the hitherto half-impotent sovereign begins to exercise some of the attributes of sovereignty, the third stage where the host State puts pressure for linkage of the concession with the local economy, and the fourth stage described as a new stage is one in which the government "becomes interested in taking over some of the prerogatives of the concessionaire."[64] We

62 See *supra* note 8. Examples are not lacking where by mutual agreement contracts have been terminated. Thus, a purely technical assistance contract was terminated prematurely because of "the ability of the Government to take over the operation." Friedmann, *Joint International Business Ventures* 112 (1961).

63 Rao, *PROC. A. S. I. L.* 106 (1969).

63a See present writer's "Legal Dichotomy of Concessions," 9 *Indian Journal of International Law* 512-24 (1969).

64 *Op. cit.* note 8, at 83-89. Feilchenfeld rightly points out that "If the concession is likely to outlast the economic and political conditions under which it has been granted, stipulations concerning the liquidation and possibly the repurchase of the concession become important." *Op. cit.* note 1, at 156. See also Mousse, Chapter on "Fifty-Fifty," *The Underprivileged Nations* 23-39 (London, 1962).

have more or less covered the first two stages earlier. Not all host States have gone through the first stage. Libya is one such exception, the weaker and less fortunate ones were Iran, Iraq, Saudi Arabia and Venezuela etc.

In this section we are mainly concerned with the third and fourth stages of negotiations relating to concessions. The third stage requiring linkage of concessions with the local economy is very important. "This urge has been translated into action by governments along a number of different lines."[65] The concessionaires are required to train and finance the new indigenous entrepreneurs, use local trading houses to handle import of materials, to give a portion of their output such as rubber etc. to local processors and so on. Many of the old concessions have culminated into joint business ventures.[66] The terms of old concessions have undergone drastic changes in many cases and they have thus been regularised as voluntary agreements. It would appear that by the time the fourth stage is reached the concessions might lose much of their character as concessions. It is very important to avoid breakdown of the fourth stage of negotiations otherwise the State may use its last remedy of outright expropriation. Incidence of unilateral revocation of concessions can be reduced if the viability of concessions is ensured through either their periodic review[67] or when the need so arises. The unfortunate fact has been that the foreign concessionaires suffer from a "*status quo* complex" and it is alleged that they are congenitally incapable of showing a proper appreciation of the host countries' rights. The ultimate result being that they are led to take unilateral action.

The Need for Revision

If mutual equivalence of advantages is absent in concession contracts it is bound to pose a threat to its viability at some stage or the other, leading to inevitable necessity of revising them. As Huang observes :

65 *Id.* at 86.

66 See generally, Friedmann, *suppra* note 62. The joint-venture model has replaced the older model of profitsharing.

67 Distinction has been made between review and revision. See 13 I.C.L.O. 444 (1964). Review might be a preparatory stage for revision.

reason for some of the recent practices relating to concessions is neatly stated by one commentator as follows :

> The fact is that a considerable part of the problems of concessionaires is a reflection of nothing more than the transition of host governments from an initial condition of half-sovereignty to a condition in which the state feels competent to exercise the normal powers of government.[62]

This is, however, not the sole reason for the new States expropriating alien property. They do not find much to share in the economic goals of their erstwhile colonial bosses. "The peoples of these countries have largely inherited outmoded institutions from their past and their colonial masters that are out of tune with their contemporary demands. This explains the ineffectuality of law in bringing about a rapid social and economic progress in these societies."[63] The essentially different processes of economic development during the alien rule and after attaining independence create a legal dichotomy between pre-independence and post-independence concessions.[63a]

III The Problem of Revision of Concessions

According to Vernon, in the process of negotiations four stages are involved : the first stage where the government negotiates from the position of weakness, the second stage where the hitherto half-impotent sovereign begins to exercise some of the attributes of sovereignty, the third stage where the host State puts pressure for linkage of the concession with the local economy, and the fourth stage described as a new stage is one in which the government "becomes interested in taking over some of the prerogatives of the concessionaire."[64] We

62 See *supra* note 8. Examples are not lacking where by mutual agreement contracts have been terminated. Thus, a purely technical assistance contract was terminated prematurely because of "the ability of the Government to take over the operation." Friedmann, *Joint International Business Ventures* 112 (1961).

63 Rao, *PROC. A. S. I. L.* 106 (1969).

63a See present writer's "Legal Dichotomy of Concessions," 9 *Indian Journal of International Law* 512-24 (1969).

64 *Op. cit.* note 8, at 83-89. Feilchenfeld rightly points out that "If the concession is likely to outlast the economic and political conditions under which it has been granted, stipulations concerning the liquidation and possibly the repurchase of the concession become important." *Op. cit.* note 1, at 156. See also Mousse, Chapter on "Fifty-Fifty," *The Underprivileged Nations* 23-39 (London, 1962).

have more or less covered the first two stages earlier. Not all host States have gone through the first stage. Libya is one such exception, the weaker and less fortunate ones were Iran, Iraq, Saudi Arabia and Venezuela etc.

In this section we are mainly concerned with the third and fourth stages of negotiations relating to concessions. The third stage requiring linkage of concessions with the local economy is very important. "This urge has been translated into action by governments along a number of different lines."[65] The concessionaires are required to train and finance the new indigenous entrepreneurs, use local trading houses to handle import of materials, to give a portion of their output such as rubber etc. to local processors and so on. Many of the old concessions have culminated into joint business ventures.[66] The terms of old concessions have undergone drastic changes in many cases and they have thus been regularised as voluntary agreements. It would appear that by the time the fourth stage is reached the concessions might lose much of their character as concessions. It is very important to avoid breakdown of the fourth stage of negotiations otherwise the State may use its last remedy of outright expropriation. Incidence of unilateral revocation of concessions can be reduced if the viability of concessions is ensured through either their periodic review[67] or when the need so arises. The unfortunate fact has been that the foreign concessionaires suffer from a "*status quo* complex" and it is alleged that they are congenitally incapable of showing a proper appreciation of the host countries' rights. The ultimate result being that they are led to take unilateral action.

The Need for Revision

If mutual equivalence of advantages is absent in concession contracts it is bound to pose a threat to its viability at some stage or the other, leading to inevitable necessity of revising them. As Huang observes :

65 *Id.* at 86.

66 See generally, Friedmann, *suppra* note 62. The joint-venture model has replaced the older model of profitsharing.

67 Distinction has been made between review and revision. See 13 I.C.L.O. 444 (1964). Review might be a preparatory stage for revision.

> Due to the disparity of the legal and 'real' status of the parties to a concession agreement, the continuing relationship over a long period of time, and the mutual interest in the prosperity of the parties in the 'joint venture' there are imponderables which no legal virtuosity can guard against. A concession agreement transcends the bounds of mere legal rights and obligations. The balance between theoretical *de jure* power and *de facto* financial power requires clearly established equitable principles for the guidance of the parties....[68]

He, however, does not advert to what these equitable principles should be. Under the existing international law, there are some principles like sovereign equality of States and permanent sovereignty of States over natural wealth and resources. They are usually sacrificed at the alter of economic compulsions or political expediences. It is hardly ever realised as Dr. Darja puts it that :

> ...the strength of a long-term agreement lies not mainly in the original black and white terms as such but the extent to which their content continues to embody reciprocity in interest, and the extent to which the parties realise that it is their joint responsibility to see that the agreement works, and that the relationship endures and is viable—a responsibility which they owe to those whose interests are in their charge . .[69]

The problem is often bogged down on the question of whether the States have a right to demand revision of a particular concession agreement but enough attention is not paid to dealing with their claims.

There are very few instances where foreign concessionaires have willingly revised the original concession agreements, even where concrete circumstances so demanded. By passage of time, as the bargaining power of the developing countries is increasing and they are attaining sophistication in negotiations with the big companies, the foreign concessionaires are relaxing their rigid attitude. The OPEC in the Middle East is performing a valuable service by facilitating the

68 *Op. cit.* note 17, at 296. Johnson attributes instability of concessions to the "lack of appropriate legal methods to effectively deal with differences." "A Legal Alternative to Instability in International Oil," 6 *Natural Resources Journal* 371 (1966).

69 Darja, *op. cit.* note 21, chapter V, at 82.

task of equitable revision of concession contracts. A similar need for the other developing countries of Asia, Africa and Latin America can hardly be overemphasized. Dr. Mughraby visualises the need for revision of concession agreements in the following circumstances :

1. Where a gross inequality of bargaining power had prevailed at the time of signing the agreement leading to a state of unequivalent contractual advantages.[69a]

2. Where changes in circumstances render such terms of already executed concession agreements impracticable, or necessitate the addition of new terms without which the equivalence of the contractual advantages is greatly impaired.[70]

The first category would cover many of the pre-independence[70a] concessions regarding which the power of the decolonized States has been repeatedly affirmed by the United Nations General Assembly and other bodies. Examples of the second category are numerous. Take, for example, the arrangement between Saudi Arabia and Aramco. By reason of the passage of time and increase in the value of oil in relation to gold the arrangement had become uneconomic and was hence revised in 1950. Under the revised arrangement the concept of equal sharing of profits was accepted for the first time in the Arab world (taking the clue from Venezuela).[71] This example was followed in several agreements later. Shell's Omani Agreement was revised on 30th March, 1967, in Sultan's favour. The agreement which previously provided for a flat-rate royalty of three rupees a ton was revised to incorporate 50/50

69a "A bargain with a drowning man to save his life for a million dollars would not be a valid contract," 2 Ely, *Property and Contract in their Relations to the Distribution of Wealth* 569 (New York, 1944).

70 *Op. cit.* at 9, 176. Three foreign oil companies namely, Esso, Burma Shell and Caltex have recently reduced the price of imported crude oil after much pressure from the Indian Government. The reduction was demanded in view of the declining trend in the international market.

70a "The ending of the era of colonialism left many privileged situations which needed *revision* in a number of the newly independent states. The changed circumstances called for flexible solutions. . . . ." (*Emphasis added*) Yasseen, (1963) 2 *Y.B. Int'l L. Comm'n* 230.

71 Paradoxically this arrangement was also to the advantage of the oil companies because it involved no additional tax cost and income tax payments to Saudi Arabia could be offset against the companies' tax liability to the United States Treasury impose higher taxes was also restricted.

profit sharing arrangement.[72] The philosophy underlying the increasing expectation of the host States is that a "landlord, hitherto content with collecting the rental, is seeking to participate in the management of his own property."[73] Gradually the governments have become more knowledgeable about their national development and their right to control their own resources. Efforts are, therefore, being made by them in the direction not only of increased profits but also towards greater partnership in the ownership, and management of the concessionaire companies. These developments indicate that a balanced approach to the problem of stability and change in relation to concessions is of fundamental importance and has attracted attention from the Secretary-General of the United Nations himself :

> ...the wide scope of the rights granted the foreign concessionaires has become the target for the marked political and popular reaction in many underdeveloped countries against domination by foreign companies of the exploitation of local mineral resources...what has been most evident is a constant groping towards variations which will best satisfy the local demands for increased local participation in the ownership and control of, and profits from, mineral exploitation and the foreign company's demands for a profits margin, commensurate with the risks involved.[74]

Yet another statement of significance and similar purport comes from Consultative Assembly of Council of Europe according to which :

> experience has abundantly shown that it would be somewhat unrealistic to expect undertakings of unspecified or long duration

72 XI *Middle East Economic Digest* (April, 1967). For amendment of concession contracts due to changed circumstances Libya passed Petroleum Law Amendment in 1961. See 5 *International Legal Materials* 442 (1966). Professor Penrose observes : "Originally, there were reasonably good economic and political reasons why the concessions took the form they did, but it was inevitable that the terms would have to change as circumstances changed." *Supra* note 11.

73 Hirst, *Oil and Public Opinion in the Middle East* 64 (1966). Professor Penrose admits that in some of the agreements the position of the foreign companies is similar to that of contractor to the government. *Supra* note 11. Foreign companies are, however, resentful of the governments wearing two hats- as regulator and partner. Friedmann, *supra* note 62.

74 U. N. Doc. E/3492 (May 18, 1961).

> to be indefinitely observed by the parties concerned, in spite of the pressure of events and changes affecting the political, economic and social life of the peoples concerned. It therefore appears to be more realistic to assume that difficulties might arise and to set up appropriate procedure to enable undertakings to be amended and to ensure that such procedure shall accord a minimum of satisfaction to the parties concerned.[75]

It is rightly observed that a concession company "must become more politically sensitive and the government must become commercially sensible."[76] Renegotiation and revision of some concessions, therefore, becomes vital. If all contracts and concessions could be made at terms that were fair, not only in the light of facts and circumstances then existing, but also in relation to all pertinent developments occurring later, renegotiation would hardly be required. Since that is not possible revision of the original concession may become essential. To the extent that this process eliminates inequalities, it may be said to adjust[77] the terms of concession to a level that is, once again fair and proper to the existing facts and circumstances. It is often contended that where concessions require reconsideration the matter should be submitted for adjudication. However, to expect major conflicts under the concession contracts to be resolved by adjudication alone, under ordinary rules of contract law may prove not only unrealistic but militate against considerations of justice.

Expropriation

Supposing the case for revision of a concession is quite strong but the parties are unable to reach a just settlement and the inevitable happens i. e., concession is expropriated then what is next ? This expropriation of concession is not in the usual sense of the term, that is, taking

75 11th Session-Ordinary-Sept. 1959, Part II, 14-18, Vol. IV Doc. 1027, paras 3 & 4. *Cf.* Friedmann's *op. cit.* note 8, solution of *ad hoc* agreements, *The Changing Structure of International Law* 360-61 (1964).

76 Johnson, *op. cit.* note 68, at 405.

77 It may be noted that under Article 14 of the U. N. Charter the General Assembly can "recommend measures for the peaceful *adjustment* of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations. . . ." A parallel but more specific provision existed in Article 19 of the League of Nations Covenant.

over of the property of some one. It is the act of annulment, rescinding or modification of the concession contract, usually by a legislative measure. Although it is argued by Sohn and Baxter that concession is not a property right and therefore cannot be expropriated the majority of the juristic opinion seems to be against such a view as already observed. If the law were to be otherwise :

> it would mean that each nation possessed a veto on the legislature and courts of every other nation insofar as its nationals had rights that were affected. This theory that the vested rights of aliens are immutable and superior to the acts of the sovereign, would mean, if it were accepted, that in proportion to the size of alien holdings, a nation's social developments would be frozen in *status quo*. If this were the law of nations then no people which cherished its independence would ever again permit foreigners to acquire property.[78]

This being the logic of the legislative measures taken by the host State one can only say that concessions can be expropriated. Whether and what compensation is payable on such expropriation will depend on merits of the case. Cancellation of the concessions on the grounds of irrational exploitation of the host State's resources as alleged by Argentina[79] or adamant refusal to revise the concessions or refusal to renew exploitation contracts[80] may all have to be viewed differently necessitating different criteria of compensation. Although some writers favour giving compensation for the unexpired term of the concession on the basis of various arbitral decisions it would seem unrealistic in the prevailing conditions. This would be treating the legislative act as international tort and awarding damages on that basis rather than compensation.

---

78 Lippmann, "Vested Rights and Nationalism in Latin America," *Foreign Affairs* 360 (1927). See also White, *op. cit.* note 6, at 170, for the view that a concession can be expropriated before the term expires. *Cf. Norwegian Loans Case*, /1957/I. C. J. 9 37; Metzger, 50 *Virginia Law Review* 607 (1964).

79 See *supra note* 54.

80 Algeria gave a prior warning to the concession holders that if exploitation contracts were not renewed and plans for future development were not submitted it would nationalize them. *Africa Research Bulletin* 305 (May 15—June 14, 1965).

Conclusion

Concessions are predominantly related to economic activities of the exploiter party. They are usually to be treated like contracts and are bilateral in character. They may be said to be unilateral when real will of the host State is lacking. Such may be the case of some pre-independence concessions fate of which, in any case, is in the hands of newly independent countries as recognized by several General Assembly Resolutions reiterated from time to time. Concessions cannot possibly be likened to treaties or international agreements. They are like any other proprietary rights and as such capable of being subjected to expropriation by a State. State's power to take unilateral action regarding the concessions is often contested but it is submitted that expropriation by a State is invariably unilateral in character (except where this right is reserved by a treaty) and no one challenges a State's right to do so. Pre-independence concessions cannot be treated at par with freely concluded post-independence concessions and are voidable. A legal right to compensation is recognized in the latter case dependent on its merits but compensation in the former might be rather exceptional. Need for periodic review or at times revision is stressed to maintain the viability of concessions. This will help in avoiding ultimate resort to expropriation of concessions.

Gulf of Aqaba in International Law

Subhash Nagpal*

With the very birth of the Jewish homeland-Israel-there came into being a potential danger to the peace on the world scene. And this danger, with the passing of time, has been becoming more and more terrifying so that today, i. e., after more than two decades of the emergence of the so-called Arab-Israeli problem, the situation has reached to those heights from where it can throw the whole world into, what President Nasser of the United Arab Republic (U. A. R.) calls, the rivers of the blood and the sea of the fire. The present-day situation, no doubt, is the result of different and opposite claims and views taken by the parties concerned, by the international lawyers, and no less by the interested nations of the world, on the legal issues involved in the problem. But, in fact, the explosive situation which we face today is not the result only or even mainly of these differences on legal issues, rather these legal issues have been dwarfed by other over-riding political considerations.

The legal status of the Gulf of Aqaba and the Straits of Tiran is a major legal issue of the Arab Israel problem. As we shall see, international law here is not so controversial as it is made to appear. And in this case also, as in the Arab-Israel question generally, the parties are guided by, for the most part, the other considerations rather than the legal alone. Such considerations have brought the super powers on the opposite sides of this problem. Both the parties have sought the use of force to resolve this issue. But it must be noted that any solution by force, if at all feasible, is bound to be temporary. It is the law to which we can look for an ultimate and peaceful solution of this issue, like other legal issues.

Geographical Features of the Gulf of Aqaba

The Red Sea at its northern extremity is split by the Sinai Peninsula into two arms-the eastern arm and the western arm. The western arm of the Red Sea is the Gulf of Suez which leads to the Suez

* Research Scholar, Indian School of International Studies, New Delhi.

Canal and which in turn meets with the Mediterranean Sea. Its eastern arm is the Gulf of Aqaba. The Gulf of Aqaba penetrates deep-about hundred miles long - in between the territories of Egypt (Sinai Peninsula) and the Saudi Arabia, and ends at the Jordan and the Israeli shores. Its width varies from twelve to seventeen miles.

The Gulf is enclosed by four coastal States—viz., U.A.R., Israel, Jordan and Saudi Arabia. A great part of its coastline at the two sides of the Gulf is under U.A.R.'s and Saudi Arabia's respective jurisdictions. At the head of the Gulf six miles long coastline is possessed by Jordan and eleven miles by Israel.[1] There are in all four anchorages on the Gulf, namely : Dehab in Egypt, Eilat in Israel, El Aqaba in Jordan, and Maqneh in Saudi Arabia.

At the mouth of the Gulf are two islands—Tiran and Sanafir. The distance from the Saudi Arabian coast to Tiran is about four nautical miles and that between Tiran and the Egyptian coast, three nautical miles. Because of several smaller coastal islets and rocks the only navigable channel to the Gulf lies between the island of Tiran and the Egyptian coast, known as the Strait of Tiran. The other entrance to the Gulf passes between the two islands and the Arabian mainland, which is not navigable by ships because of reefs therein. These two entrances together are referred to as the Straits of Tiran. Since this second entrance is also an access to the Gulf and can be used by small boats we would use the latter term, viz., Straits of Tiran, of course, barring certain exceptions.

All the four coastal States claim different length of territorial waters in the Gulf and the Straits. The narrowness of the Gulf and the claims of the territorial sea by the coastal States therein have given rise to an acute problem. Moreover, the only navigable access to the Gulf, the Strait of Tiran, according to Egyptian claim, comes under U.A.R.'s territorial sea.

History of the claims

It is interesting, and in a sense necessary, to study the history

1 Regarding the width of the Gulf, length of the coastline at the Gulf, there is no strict uniformity in the various geographical accounts of the Gulf. In this essay we have depended on Bloomfield, *Egypt, Israel and the Gulf of Aqaba*, (Toronto, Canada, 1957).

of the claims of both the sides, though in brief, since it affects the legal issues involved in the present problem.

The U.A.R. and the other Arab States maintain the view that the whole issue of birth of Israel is controversial, including the authority of the United Nations General Assembly to partition the mandated territory of Palestine. They have not recognized Israel and therefore her rights. Moreover, Israel's occupation of the coastal strip at the Gulf, in the first place, was illegal, as it was achieved through aggression.

A short time after the entry into force of the Egyptian–Israeli Armistice Agreement of February 24, 1949, the U.A.R. assumed, with Saudi Arabia's consent, *de facto* control of the Sanafir and Tiran islands, hitherto uninhabited. The U.A.R. assured the U.S.A. (in January, 1950) that it did so in order to forestall any possible violation of its (or Saudi Arabia's) rights regarding these islands and not for any interference with the right of passage in the Gulf or the Straits. But difficulties between Egypt and Israel arose when Egypt actually declared her visit and search measures to the Gulf of Aqaba in the summer of 1950. "In an exchange of letters with Britain in July, 1951, Britain had officially accepted Egypt's right to visit and search in the Gulf . .For the first few years during which the port of Elath (Eilat) remained undeveloped, few neutral vessels sought to use the Gulf to reach Elath, and incidents were rare. Between 1951 and early 1955, according to Egyptian authorities, "only three" out of the 267 vessels which entered the Gulf were actually visited and searched, and no ship or cargo was seized."[2]

Eilat was declared a harbour on June 25, 1952. In fact, this port was not a new one. Bloomfield states that : "During the period of the ancient Jewish Kingdom, notably in the days of King Solomon, a port and community, situated near the present site of Eilat, served as an important centre for trade with Africa and Asia. After the decline of the Jewish commonwealth the port lost its importance and became an anchorage point for local fishing...."[3] By 1955, Israel, because of inadequate transport facilities by land, took great interest in developing the port Eilat, and to use it for which it was used in ancient Jewish Kingdom.

2 Khouri, *The Arab-Israeli Dilemma* 209 (Syracuse, 1968).
3 Bloomfield, *op. cit.* note 1, at 3.

In the meanwhile in February, 1954, Egypt, in accordance with its declared rights regarding the two islands and waters surrounding them, declared certain regulations regarding the passage of ships (in its territorial waters) in the Straits of Tiran. And on July 3, 1955, Egyptian shore batteries, mistaking the destination of a British ship carrying pilgrims as port Eilat, fired on it. Israel anticipating further future Arab control on ships in these waters bound for Eilat, warned to use force against Egypt if she intervened with Israeli bound ships through the Gulf. In August-September, 1955, Egypt declared further controls on all ships in her "territorial waters" by making it necessary for the ships to take her permission 72 hours prior to a planned passage.

When in 1956, after the nationalization of the Suez Canal by the U.A.R , Israel atacked the U.A.R., her forces occupied certain Egyptian coastal areas in the Sinai Peninsula, and in the Sharm al-Sheikh area overlooking the Strait of Tiran, which she vacated only when an United Nations Emergency Force was stationed there.

Until President Nasser of the U.A.R. raised the issue of the Straits of Tiran in the end of May, 1967, it had not figured at all in the slow-simmering crisis that has been building up in the Middle East since the Suez operation in 1956. It was the Sinai campaign (Israeli attack on U.A.R. in 1956) that enabled the Israelis to prise open the Straits and to develop the port of Eilat. The Egyptians did nothing in the next nine years to challenge Israel's position.[4]

Simultaneously, collective peaceful efforts continued to bring out some solution of the problem. The United Nations, inspite of Israel's request, could not do anything concrete. Western powers, particularly the U.K. and the U.S.A., gave individual and joint support to Israel's demands and rights in the Gulf in particular and to rights of all States in general. They were able to provide for this particular situation in the form of Article 16(4) of the Convention on Territorial Sea and the Contiguous Zone, adopted at the Geneva Sea Conference, 1958. This Article extended the generally accepted definition of a strait by the addition of the words "or the territorial waters of a foreign State," and thereby covering the Straits of Tiran and the Gulf of Aqaba under the category of international waters.

4 *Hindustan Times* (Delhi) June 1, 1967.

The U.A.R. Government objected to this on the grounds that she did not participate in the Sea Conference and that, even if accepted, it was applicable in time of peace alone, and sought and got the withdrawal of the United Nations Emergency Force from her territory on May 18-19, 1967. The closure of the Straits and the Gulf on May 22, to all Israeli ships and to all other vessels carrying strategic materials to Israel, a declaration which was made under extremist popular and Arab leader's pressure in order to avert the prevailing Israeli threat of an attack on Syria, was almost inevitable in the chain of previous incidents. Reaction of these incidents on Israel resulted on June 5, in an actual warfare from her side. She justified her act on the ground that the closure of waterway vital to her interests amounted to aggression and gave her the right of self-defence under Article 51 of the U.N. Charter. Consequently, Israel again occupied vital areas for the safe exercise of her navigational rights in the Straits and the Gulf and now refuses to withdraw from those areas until all her rights were affirmed and guaranteed.

Factors affecting past history

Even a cursory look on the Arab-Israeli problem as it has shaped during the last two decades would make one realize that it is not a problem of law alone. Several other factors, usually overriding, have contributed to the present-day sensitive, explosive and consequently controversial situation.

Among such factors the basic one seems to be the continued insistence on the part of the Arab States not to recognize Israel as a sovereign political entity. For them it is an imperialistic thrust. Whereas Jews had always been trying to acquire their rights by having their separate home State. The situation is described by a journalist as follows : "what is the genesis of the Arab-Israeli conflict ? Israel was created in 1947, but the Arabs have never reconciled themselves to it. To them Israel is Arab country and Israelis are people imported from outside by imperialist powers. To the Jews Palestine is their cherished Fatherland."[5] The hatred towards each other has, naturally, increased because of recent wars and consequential sufferings, thereby seriously affecting their outlooks towards the real issues.

5 *Free Press Journal* (Bombay), June 8, 1967.

Another factor and which now appears to most of the people to be the only worsening factor is the Big Power intervention. As soon as Israel came into existence, the two super-powers took sides—one pro-Arabs and the other pro-Israel. Notwithstanding some fluctuations in the super powers' policies towards the West Asian crisis, this has been the normal course upto present-day. West Asian war today is called "the result of Big Power rivalries," and that it is "one major area where the capacity of the major powers to wage 'war by proxy' is being tested."[6] In fact, it has become one of the Big Power arenas where they have brought war and where they are trying for peace. But they cannot succeed in the latter attempt unless they try to undo the former attempt, at least in future. It is very true that without the Big Power intervention, in any form, there would have not been so much of wars and sufferings, and of course controversies, between the Arab States and the Israeli State.

What has been equally affecting the situation, and which has been becoming more powerful with the passage of the time, is the question of prestige. For Arab leaders, like Nasser, it is not worth to sacrifice his insistence on some issues on which he is holding on prestigeous and emotional grounds, even at the cost of being destroyed. Equally Israel has taken initiative in attacking Arab States to save its national honour when it could have restrained without any harm.[7] This prestige issue has equally affected the stands of super powers towards the Arab-Israeli question.

Thus we see that the past history of the claims of both the parties, affected as it is by emotional factors, has resulted in regarding the subjective considerations the ruling ones in any attempt of understanding and solving the legal issues.

Claims of the Parties

The Arab States exclude Israel in any consideration of the rights and duties of the coastal or other States in the Straits and the Gulf waters, on one ground or the other. The Arab States, however, as we

6 Parasuram, "Tension Rises in West Asia," *The Indian Express* (Delhi) Feb. 17, 1970.

7 For example, see Khouri, *op. cit.* note 2, at 248. Also refer to French stand in 1967, June War when she criticised Israel for starting war.

will see presently, have not made, strictly speaking, an entirely consistent and a strong case.

First, the Gulf of Aqaba, on geographical reasons, is regarded primarily an internal and not an international body of water. It is said that the Gulf, because of its narrowness, comes under the complete territorial jurisdiction of the coastal States—the U.A.R., Jordan, and Saudi Arabia, and hence cannot be declared as international waters. The Arab States do not recognize Israel in general and particularly as a coastal State on the Gulf. Moreover, they claim, the mouth of the Gulf—i.e. Straits of Tiran—is less than six miles and therefore falls in the territorial waters of Egypt and Saudi Arabia. Also, these Straits cannot be regarded as international waterways (or straits) because they do not join the two (parts of the) high seas. Hence, the Arab States hold the view that the accepted definition of strait in customary international law is not applicable to the Straits of Tiran which join a high sea with the territorial waters of a foreign State.

Secondly, this argument is supplementary to the first one and is the expression of their extreme position on the issue, the Gulf and the Straits waters constitute an Arab *mare clausum* because of historical reasons. Historic gulfs and bays—i.e., on which an exlusive control is being exercised by one or more States since times immemorial and with the consent, direct or indirect, of other States—are exceptions to the general rules of international law of such bodies of waters.[8] Claiming the Gulf as "of the category of historical Gulfs that fall outside the sphere of international law" Saudi Arabia maintained that the Gulf is

> the historical route to the holy place in Mecca. Pilgrims from different Muslim countries have been streaming through the Gulf, year after year, for fourteen centuries. Ever since, the Gulf has been an exclusively Arab route under Arab sovereignty.[9]

8 See, e. g., Colombos, *International Law of the Sea* 180-181 (6th ed. 1967). Arab States refer to the case of Fonseca Gulf, decided by the Central American Court of Justice.

9 Statement in the U. N. General Assembly by Saudi Arabian delegate in April, 1957. Quoted in Gross, "The Geneva Conference on the law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba," 53 *Am. J. Int'l L.* 567 (1959). See also, for historical nature of the Gulf in detail, Selak, "A Consideration of the Legal Status of the Gulf of Aqaba." *Am. J. Int'l L.* (1958).

Thirdly, Israel, in law, does not have a stretch of the coast of the Gulf. The coastal territory at the Gulf under the Israeli occupation is the result of aggression–and an aggression which Israeli launched two weeks after the signing of the Egyptian-Israeli Armistice Agreement on February 24, 1949. And that this claim "is in conformity with the well-established doctrine in international law that belligerent occupation cannot legally be converted into sovereignty over the occupied territory."[10]

Moreover, after the World War I, hastily drawn mandate boundaries were established by Britain by which Eilat was included in the Palestine mandate.[11]

Fourthly, even if the right of innocent passage being granted in the Gulf and through the Straits, the Arab States maintain, Israel cannot be allowed to exercise this right. This stand is taken on the ground that since the very birth of Israel there has been a continued state of war between her and the Arab States. To substantiate their view they maintain that since there has not been concluded a peace treaty between the belligerents, simple truce and armistice do not end the belligerent rights on their parts.

Fifthly, since the geographical position of the Gulf and the Straits is unique and different from international gulfs and straits, there is no universally recognized rule of international law on freedom of navigation applicable in this case. And that, as the Indian delegate put it in a speech in the U.N. General Assembly on 29 June, 1967, "the U.A.R. is not a party to any agreement recognizing the Gulf of Aqaba as an international waterway or guaranteeing freedom of passage to Israeli ships...."[12]

Israel, supported by the Western States, on the other hand, has continuously taken the view that the Gulf is an international body of waters and the Straits giving access thereto an international waterway. A Gulf surrounded by two or more States, however narrow their entrance

10 Statement in the U. N. Security Council on May 29, 1967, by the U. A. R. delegate. (Quoted in Gross, "Passage Through the Straits of Tiran and in the Gulf of Aqaba," XXXIII, *Law and Contemporary Problems* (Winter, 1968).

11 See Ghobashy, "Tiran and Aqaba," 5 *Egyptian Economic & Political Review* 20 (1959).

12 For the text of the speech, see *the Patriot* (New Delhi) June 30, 1967.

may be, is non-territorial and is open for navigational rights of all ships.[13] Moreover, an access by sea to Eilat port in Israel is only possible through the Straits of Tiran.

Israel has the legal rights of navigation through the Straits and in the Gulf, since it is one of the four coastal States on the Gulf. The port of Eilat and the Southern Negev which is the port's hinterland were allocated to Israel by the 1947 U.N. General Assembly Partition Resolution. This gives Israel a legal title to Eilat, and disposes of the Egyptian argument that Israel cannot have territorial waters in the Gulf of Aqaba because she has no right to Eilat and its coastline.[14]

The U.A.R. herself in an Aide-Memoire, dated 28 January, 1950, to the American Embassy in Cairo, recognized the international character of these waters and right of the (States') ships to navigate therein. Clearly by its own admission Egypt denied herself any right to intervene with the free and innocent passage in these waters.

Again, this self-admitted right of passage, Israel claims, was affirmed with the international community's seal by the adoption of the Security Council Resolution of September 1, 1951, which, declaring that the Egyptian-Israeli Armistice of February 28, 1949, is "a permanent and irrevocable renunciation of all hostile acts," "incorporates what amounts to a non-aggression pact," according to Israel, reiterated and affirmed her description of the Armistice.

And thus any unilateral closure of the Gulf would be an act of belligerence, since "blockade practices are universally recognized by internationalists as acts of hostility."[15]

Lastly, it is important to note, says Israel, that besides the individual affirmation of, and support to, the right of passage, through the Straits and in the Gulf, of all ships including those of Israel by almost all the maritime powers of the world, the right of navigation, particularly through these waters, has been formally acknowledged by the Geneva Sea Conference, 1958, which expressly extended the generally accepted definition of the Straits and clearly brought the Straits and the Gulf waters under the category of international waters.

13 See Oppenheim, *International Law* 508-9 (8th ed.).

14 See Khouri, *op. cit.* note 2, at 208 ff. See also Bloomfield, *op. cit.* note 1, at 4.

15 Bloomfield, *op. cit.* note 1, at 45.

Appraisal

How far the claims of the opposite sides in this conflict are valid in international law and what is the status of the Straits of Tiran and the Gulf of Aqaba in international law ?

Whether the Straits and the Gulf constitute the territorial or internal waters or the international waters is to be assessed on the general standing of gulf and straits in international law. The following opinion of Oppenheim is significant on the point :

> ...as a rule, all gulfs and bays enclosed by the land of more than one littoral state, however narrow their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated; they are in time of peace and war open to vessels of all nations including men of war....[16]

Applying this view to the Gulf and the Straits, Selak acknowledges that—

> By these criteria the Gulf of Aqaba would appear to be non-territorial in character, with respect to which each coastal state possesses a belt of territorial sea, but which, as an entity, with the exception of such belts, would be a part of the high seas.[17]

The objection now comes from the Arab States that the Straits of Tiran are not straits in the accepted sense of the term, since they do not join the two (parts of the) high seas. It is very much clear that the mouth of a gulf surrounded by more than one State, however narrow it is, is open for the passage of ships. What is meant by this is that the access to the territorial waters, or port, of one of these littoral states through the mouth of the gulf is not denied. Thus, it does not matter whether the Straits of Tiran join the two high seas or not, since the passage through them is to be innocent. Making this very much clear the World Court declared :

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that states in time of peace have a right to send their warships through Straits used for international navigation between two parts of the high seas

16 *Supra* note 13. See also Colombos, *op. cit.* note 8, at 198.

17 Selak, *op. cit.* note 9, at 689.

without the previous authorization of a coastal state, provided that the passage is innocent.[18]

As the former U.S. Secretary of States, Dulles, explaining the above view said that "it is also a principle of international law that even though waters are territorial, if they give access to a body of water which comprehends international waterways, there is a right of free and innocent passage."[19]

The Arab States and more particularly Saudi Arabia and later on also the U.A.R. claim that certain gulfs, even if surrounded by more than one State, are exceptions to general principles of International Law, on historical grounds. Here it must be noted that International Law does not define the 'historical' gulfs and the only guiding principle or precedent, which is often quoted by the Arab States to support their view that the waters of the Gulf are internal waters of the several Arab coastal States, is the decision in the case of the Gulf of Fonseca, given by the Central American Court of Justice (1907). Continuous, peaceful (with the acquiescence of other nations) and exclusive possession since times immemorial—as the characteristics of a historical gulf set in Fonseca decision—are not substantiated in the case of the Gulf of Aqaba.[20] In fact, contradictory facts and figures have been brought out in various researches to prove the historical character of the Gulf.[21]

What is material and more significant here is, not the assessment of the nature of the Gulf by painstaking studies of the history of its possession, but the present nature of the Gulf. It is absurd to talk of the Gulf as historic and under the exclusive jurisdiction of the U.A.R., Jordan and Saudi Arabia, as if Israel does not exist at all. The Arab supports Jordan's share in the waters of the Gulf without Israeli share, is not understood, since both are parts of the one and the same old land at the coast of the Gulf, i.e., Palestine. Selak quotes a special correspondent of the *London Times* with approval : "At a time when the whole area was subject to Turkish sovereignty this argument (i.e. the Gulf as closed sea) might have been tenable.

18 *Corfu Channel case* (1949), I. C. J. 23.

19 Quoted in Selak, *supra* note 9.

20 See Gross, *op. cit.* note 9, at 569 ff. See also Selak, *op. cit.* note 9, at 693.

21 See e. g. Selak, *supra* note 9; see also Melamid, "Legal Status of the Gulf of Aqaba," 52 *Am. J. Int'l. L.* 412-13 (1959).

This is no longer the case. The Gulf is enclosed by the shores of four independent states—Egypt, Israel, Jordan, Sudi Arabia."[22] Speaking in this context Selak himself writes :

> Water areas surrounded by the territory of a single coastal state and thus having the status of the "closed sea," which subsequently, because of political changes resulting in the establishment of more than one state on their shores become multinational in character, generally have come to be regarded as essentially parts of the high seas, regardless of the narrowness of their entrances. Special treaty arrangements, however, usually have been necessary to establish this character.[23]

Thus, keeping in view the present-day geographical position of the Gulf and the coastal States to say that the Gulf is an Arab *mare clausum* is to be the victim of partiality and deliberate ignorance of facts. Israel like other Arab coastal States does have her rights in these waters.

The Arabs do not question Israel's presence on the Gulf coast only on historical grounds, but on factual and legal grounds also. The coastal strip at the Gulf under Israeli occupation is the result of aggression which she launched in defiance not only of the Egyptian-Israeli Armistice Agreement but of the U. N. Charter also Hence that occupation is not valid in law. Here it must be made clear that it is not the possession of the territory (at the Gulf coast) itself, but the *manner* of its possession or occupation, which is disputed. since the Israeli coastal strip at the Gulf was clearly given to her under the General Assembly Palestine Partition Resolution. This fact is not denied even by those scholars who have supported Arab cause in this controversy.[24] Even it is said that "in terms of Armistice Agreement, a strong argument can be made for Israel's right to possession of its coastline of the Gulf of Aqaba," because "the Armistice Demarcation line, as indicated on the map, follows the Wadi al-Arabah and hence the historic boundary between Palestine and Jordan."[25]

The Arab objection is that this territory was occupied after the Egyptian-Israeli Armistice Agreement was signed, which bound the

22 Selak, *op. cit.* note 9, at 693.

23 *Ibid.*

24 See, for example, Murti, "The Legal Status of the Gulf of Aqaba," *Indian Journal of International Law* 204 (1967). Also Selak, note 9, at 680-81.

25 Selak, *op. cit.* note 9, at 681; and Bloomfield, *op. cit.* note 1, at 4.

parties not to violate the "Armistice Demarcation Line set forth in Article VI of this Agreement." The coastal boundary of Israel is drawn according to the partition plan of the Palestine and is not covered by the Egyptian-Israeli Armistice Agreement. Moreover, when this coastline was occupied by Israel there were no soldiers of Egypt but only of Jordan. And "this incident occurred prior to the signing of the Jordan-Israeli Armistice Agreement on April 3, 1949, and in an area covered by it." [26] As professor Misra says that to say that "the belated occupation by Israel of an area which was given to it at the time of the termination of the mandate amounts to "invasion" sounds queer." [27] In spite of all these facts the manner of Israeli occupation of territory at the Gulf coast may not seem a fair attempt.

We may now turn to a claim constantly made by the Arab States to justify their controls in the waters of the Gulf and the Straits and with equal vehemence refuted by Israel and her western allies. It is contended that there has been in existence a continuous state of war between the Arab States and Israel since the day when Israel was born. The Arab States maintain that though there has been small clashes and open wars between the two sides, there has not been concluded a peace treaty formally ending these every-day clashes. Truces and armistices mean ending of hostilities and do not amount to the conclusion of peace. This argument, though at variance with arguments like that the Gulf constitutes an inland, closed sea, is a sound one. Here it must be noted carefully that the objection from Israeli side comes not to the argument that the Arab States in case of threat to their national interests or security can exercise certain rights in these waters, but to the Arab claim that a state of continuous war is in existence which implies belligerent rights of their part.

Israel along with her western allies, particularly the U.S.A. and the U. K. refute Arab world's above claim on the ground that the Egyptian-Israeli Armistice Agreement of 1949 is of permanent character and amounts to a non-aggression pact. This fact, they maintain, was sufficiently affirmed by the Security Council Resolution of September 1, 1951. The Resolution read, *inter alia* :

> ...that since the Armistice regime, which has been in existence for nearly two and a half years, is of permanent character neither

26 Gross, *op. cit.* note 9, at 132.

27 Misra, "India and the Legal Status of Aqaba and Tiran" 3.

> party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defense....[28]

It is a generally accepted principle of international law that armistice, truce or ceasefire are merely first, of course necessary, steps towards the conclusion of peace. Bloomfield in his book on this problem makes a difference between truce and armistice and says that ' in recent times there has been a general tendency for the armistice to be used as a step involving finality and termination of the war and in its more modern concept would appear to replace the old treaties of peace in international law." [29] This may be true in the present nuclear age when after fighting a 'small' war by conventional weapons belligerents agree to a ceasefire and because of fear of Big Power intervention and their overkill capacity come to a state of affairs where they are afraid to start further hostilities. This, no doubt, is true of the major war centres of the present world. But this does not mean that peace is established and in fact we find that in all such cases all manifestations of cold war remain in existence. There may be a little possibilty of an armistice replacing peace treaty only when the parties to the armistice adjust themselves to its realities and consent to it, even though tacitly. In Arab-Israeli case this is not at all so. As Colonel Howard S. Levie said in 1955 : "By now it has surely become fairly obvious that the Israel-Arab General Armistice Agreement did not create even a *de facto* termination of the war." [30] This is particularly true today when we can more accurately conclude that they have not adjusted to the realities of the Armistice.

Moreover, on following factual grounds we can again substantiate that the Armistice was not even supposed to be of permanent character. A cursory look at the text of Egyptian-Israeli Armistice Agreement reveals its temporary nature, and which was "dictated exclusively by military considerations;" and that the demarcation lines established by the Agreement were "not to be construed in any sense

28 For the text of the Resolution, see Bloomfield, *supra* note 1.

29 Bloomfield, *op. cit.* note 1, at 24. On page 29 he accepts that finality of the armistice, in a way, depends upon "the restoration of almost normal peaceful conditions" during the armistice regime. Also refer to Ch. VI, where Armistice seems, inspite of the complications of modern warfare, overinterpreted.

30 Levie, "The Nature and Scope of Armistice Agreement," *Am. J. Int'l L.* 886 (1956).

as...political or territorial" boundaries and they were "delineated without prejudice to the rights, claims and positions of either party to the armistice as regards the ultimate settlement of the Palestine question."[31] Therefore, "a technical state of war continues to exist between the Arabs and the Israelis, and both sides retained all the rights under the international law of war except those involving the use of military force."[32] In the face of Israel's continuous utterance that the Armistice is of permanent character her Premier's statement in 1967 that "the armistice agreement is dead and burried"[33] seems a great contrast, even though he might have been compelled to say so by the Arabs' provoking activities.

The Security Council Resolution of September 1, 1951, is often cited to substantiate that the Armistice was permanent and denied all belligerent rights. The U.A.R. Government objected to the Resolution on two grounds :

> First four of the nine states that voted for the adoption of the resolution were parties to the dispute, and according to Article 27, paragraph 3, of the Charter, 'a party to a dispute shall abstain from voting.'It follows that, according to the provisions of the Charter, the resolution should not have been adopted.... Secondly, the resolution was based on the assumption that for two and a half years no fighting had occurred between Egypt and the Israel authorities....[34]

Both these arguments are important and do affect the legality and effectiveness of the Resolution. And, rather "it is considered more likely that the Security Council's action was based upon a *desire* to bring to an end a situation fraught with potential danger to peace than it was attempting to change a long established rule of international law"[35]

31 Also in the text of the Armistice terms truce, armistice and ceasefire almost used interchangeably thereby implying the essence of any of these, i. e., it is the transitory stage towards final peace. See the text of the Egyptian-Israeli Armistice Agreement, Feb. 24, 1949. See also Articles 5 (2), 11, 12. Article 2 of the Agreement forbids the entry of Israeli ships into Arab coastal waters.

32 Khouri, *op. cit.* note 2, at 182.

33 Israeli Premier's statement on June 2, 1967.

34 Statement by United Arab Republic Delegation, 30 May, 1967. Quoted in Gross, *op. cit.* note 9, at 135.

35 Levie, *supra* note 26.

This intention was made very much clear by the U. N. Secretary-General who after reviewing the Resolution made a statement which is also quoted by Israel and her allies to support her position. The Secretary-General said that :

> ...it may be held that, in a situation where the armistice regime is partly operative by observance of the provisions of the Armistice Agreement concerning the Armistice lines, possible claims to rights of belligerency would be at least so much in doubt that, *having regard for the general international interest at stake*, no such claim *should* be exercised in the Gulf of Aqaba and the Straits of Tiran.[36]

In view of abovesaid, one cannot regard the U. A. R.'s blockade of the Gulf and the Straits in 1967, when there were continuous threats of attack from Israel, as illegal. The Aide-Memoire of 1950, which Cairo sent to American Ambassador there, is often quoted by Israel and her allies as contradicting the U. A. R.'s action of blocking the passage through the Gulf and the Straits. The Aide-Memoire, which was given at the time of Egyptian occupation of the Sanafir and Tiran islands at the entrance of the Gulf of Aqaba, read, *inter alia* :

> This occupation being in no way conceived in a spirit of obstructing in any way innocent passage through the stretch of water separating these two islands from the Egyptian coast of Sinai, it follows that this passage, the only practicable one, will remain free as in the past, in conformity with international practice and recognized principles of the law of nations.

This Aide-Memoire, when read as a whole, and as is clear from the above quotation, clearly mentions the U. A. R.'s rights in those waters. However, we are not concluding that these waters come under the territorial jurisdiction of the U. A. R. or Saudi Arabia or any other Arab State.

The U. A. R. Government also maintains that there is no universally recognized principle of International Law governing such body of waters as the Gulf and the Straits, and that their status is a matter of controversy. As we have noted, the Geneva Sea Conference, 1958, clearly provided for the regulations of such waters.

36 Emphasis added.

When this question of Straits was boosted to undeserving heights by the Aarb States in the context of the peculiar nature of the Straits of Tiran, the world community, including all the great maritime powers, came up with a precise and clear answer. In the Geneva Sea Conference, 1958, met eighty six delegations on the call of the U. N. General Assembly and adopted four conventions. The Convention on the Territorial Sea, adopted at the Conference, in Article 16(4) contained the following provision :

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

Since this Article clearly provided with a legal solution for the question of passage through the Straits and the Gulf of Aqaba, this Article has come to be called as Aqaba Article. Though A. H. Dean, Chairman of the U.S. delegation to the Conference, calls it "a new" rule in international law,[37] it was in fact, a new language for an old rule. As Jessup spoke of the conference generally, "the debates in the conference would naturally contribute further evidence of what state consider to be a general practice accepted as law."[38]

This is no argument that the U. A. R. was not a party to the convention adopted at the Conference. The individual concent of each nation to a principle of international law is neither possible nor desirable. Neither the U. A. R. argument that this rule applies to a single case and that the generally accepted principle of the Gulfs is not applied in her case, is valid. It is submitted that the classification for the purposes of law is necessary. A law if it applies to a single individual or case is not invalid on the ground, if the classification is reasonable and in the interests of the society. This is true of this so-called 'new' rule.

However, it is of interest and significance to note that this rule, adopted by a vote of 65 out of 67, not only represents the wishes of a majority of nations but also what we may call (the wishes) of a solid majority—i. e., including great maritime powers like the United States, the United Kingdom, the Soviet Union and France.

37 Dean, "The Geneva Conference on the Law of the Sea : What was accomplished," 52 *Am. J. Int'l L.* 623 (1958).

38 Quoted in Gross, *op. cit.* note 9, at 594,

Conclusion

It is clear from the above analysis that whereas the Arab States regard the Gulf under territorial jurisdiction of the coastal States (U.A.R. Jordan and Saudi Arabia) at tha Gulf and the Straits under the U.A.R. and Saudi Arabia, Israel on the other hand regards them as international waters. It must also be clear that these waters do not and cannot constitute a *mare clausum* or Arab inland sea. To regard them so on historical ground is neither consistent with Arab world's other claims, nor it has received general acceptance from the scholars. In a closed sea, passage of foreign ships depends upon the will of the surrounding States which can, jointly, give this right out of good and free will to foreign ships. But in this case it is not so. The U.A.R. in 1950 in an Aide-Memoire to the American Ambassador in Cairo accepted them as territorial waters—and not inland or closed sea—in which innocent passage of foreign ships was not denied by her, rather accepted in accordance with the principles of international law.

For Israel, as noted above, the Gulf constitutes international waters and the Straits an international waterway.

To sum up the above analysis of the claims of opposite sides and their assessment on the basis of the principles of international law, the Gulf of Aqaba as an entity constitutes international waters in which the right of innocent and free passage cannot be denied. The four coastal States at the Gulf-viz., U.A.R., Israel, Jordan and Saudi Arabia-have their territorial sea in the Gulf. Since their claims of the length of territorial sea overlap, they are to be decided and the waters in the Gulf to be divided in accordance with Article 12 of the Convention on Territorial Sea and Contiguous Zone, adopted by the Geneva Sea Conference, 1958. This Article deals with the situation, as in case of the Gulf of Aqaba, where the coasts of the two States are opposite or adjacent to each other.

The Straits of Tiran-the access to the Gulf-are the Strait in the accepted sense of the term in international law, and thus, constitute an international waterway through which, as in the Gulf, innocent passage of foreign ships is guaranteed. It is understood, yet must be made clear, that passage is to be innocent. The decision in *Corfu Channel case*, Article 16(4) of the Convention on Territorial Sea, (various statements by Israel and her allies), use the word 'innocent' passage. This would imply, in case of imminent danger to the national

security of the coastal States, the exercise of certain rights, but not such sort of controls which can, with ease and justifican, be exercised in the territorial sea.

Thus, now there should not appear any controversy regarding the legal status of the Straits of Tiran and the Gulf of Aqaba, and law is enough clear on them. Of course, it must be admitted, particularly so today, that a sort of peace treaty between Arab States and Israel is to be concluded soon in the interest of the world community. This would imply the recognition by the Arab States of the fact, what British Premier called in 1967 crisis that "Israel has the right to live." Peace is necessary to the full exploitation of these waters in the sense that they constitute not only Israel's outlet to the high seas, but also one of the most important international trade routes. From the Israeli point of view the closure of the Straits could mean economic disaster and that "severing this artery is an act as grave as trying to truncate part of our territory."[39] These considerations also, as Israel maintained, make the question immaterial, whether that Striat is or is not within the waters classed as territorial sea of one or more littoral states, or what is the legal nature (gulf or high seas) of the waters on which the harbour is situated. Bloomfield says: "If the Gulf of Aqaba is kept permanently open with no risk of blockade, Europe will breathe with two lungs instead of one."

---

39 Statement by Israel, *Hindustan Times* (Delhi), June 1, 1967.

NOTES AND COMMENTS

KELSEN'S "PURE SCIENCE OF LAW" AND THE INDIAN LEGAL SYSTEM

A legal theory in most cases derives inspiration from the local legal system and seeks to provide a juristic basis to such legal system and to the solution of the immediate problems. Not only national but international conditions also influence a particular legal theory or an approach to law. That Kelsen's "pure science of law" is no exception to the above fact is amply demonstrated by a perusal of the contemporary national and international conditions.

Kelsen expounded his theory nearly a century after (in 1911) the promulgation of the Austrian Code. The Austrian Code, prepared at a time (i. e., between 1713 and 1811) when "natural law" theory was at its height, was still in force in 1911 when Kelsen first expounded his theory. Though rejected in England by the 19th century, natural law had its footing in the Continent till the beginning of the 20th century. New theories in the 20th century started inflicting severe blows on "natural law" theories. It is interesting but not surprising, therefore, to find this 20th century analytical, Continental jurist displaying a great hostility to "natural law."

After the World War I most of the countries of the Continent adopted written constitutions reflecting the idea of a fundamental law as the basis of the legal system. Kelsen's idea of *grundnorm* which may be said to be the foundation stone of his "pure theory," and the definition of law as "hierarchy of norms" seems to be inspired by this development.

Lastly, the death and destruction caused by the diabolical activities of nations in the World War I made the people to think about some effective international organisation to control such activities. Kelsen, therefore, tried to establish the primacy of International Law.

In its origin this theory chiefly represented a revolt against 'ideological"[1] types of jurisprudence. He mercilessly attacked "ideology" in legal theory and made unsparing assaults on "Natural

1 Allen, *Law in the Making* 52 (7th ed., 1964).

Law."[2] Professor Kelsen also represents a reaction against modern legal theories which have widened the boundaries of jurisprudence so as to make it coincident with other social sciences. There is today hardly any single social science into whose province jurisprudence can not enter. The real science of law is lost, according to Kelsen, in such widening of the sphere of law. He, therefore, insists that law "properly so called" (in Austin's phrase) must be kept free from the elements which do not strictly belong to it. Such elements merely pollute and corrupt the law.

Before making an attempt towards the understanding of Kelsen's theory, it is necessary to study the premises from which he argues.

First, he insists that a theory of law must deal with law as it is and not as it ought to be and here we find Kelsen quite in agreement with Austin.

Second, a theory of law must be distinguished from the law itself. The reason being that the law itself consists of a mass of diverse rules, and the function of a theory of law is to corelate them in a logical pattern and to organize the whole field of law into a single unity.

Third, a theory of law should be uniform so as to be applicable at all times and in all places.

Fourth, a theory of law must reamin free from ethics, politics, sociology, history and like.

In sum, jurisprudence to Kelsen is a knowledge of norms. The fundamental quality of a norm is that it is positive, to wit, established or created by operation of human will and not by any super-human authority. In his opinion, jurisprudence consists of the examination of the nature and organization of the above normative propositions.[3]

According to Kelsen, law is a "normative science" and he describes his science of law as "pure" (*Sein*). This proposition immediately raises the question as to why should his theory be called a "pure theory of law ?" Kelsen would answer that it is "pure" because

2 Although Kelsen persists in excluding "natural law" from the theory of pure law, it should be recalled that Kelsen wrote extensively on the subject of "natural law." Kelsen, *Reine Rechtslehre* 402-444 (1934).

3 Hughes and Dias, *Jurisprudence* 455 (1957).

it is solely concerned with that part of knowledge which deals with law and law alone. It is a theory of law purified of all political ideology, social sciences and ethical element; a theory of law which is value-free (*wretfrei*) in the sense that the question whether a legal order is wise or just lies outside its scope.[4] But here the problem for Kelsen is how to separate the realm of jurisprudence from that of natural sciences and other normative orders. For this Kelsen relies on Kant's system of Pure Reason and adopts the sharp distinction between the sphere of the "Is" (*Sein*) and the sphere of the "Ought to be" (*Sollen*) which was the cardinal doctrine with Kant in the realm of thought.

To separate the realm of jurisprudence from that of natural science, Kelsen adopts the following tests :

(1) Kelsen asserts that propositions of science may be described as dealing with what necessarily does happen, i. e., what ' is." They relate to events which have been observed to occur as a matter of cause and effect. Propositions of law, on the other hand, deal with what ought to happen. To quote Kelsen :

> The principle according to which natural science describes its object is causality; the principle according to which law describes its object is normativity.[5]

(2) The rules of law may be violated and still they remain valid. That is to say, the proposition that "if X forges the signature of some one he ought to be punished" holds good even though X may go unpunished, or may escape arrest, or he may die. But it is meaningless to say of scientific laws that they can be broken or cannot be broken. If stars behave in ways contrary to the scientific laws, they lose the character of laws.

(3) A norm depends upon a certain initial assumption and is laid down by an operation of human will and reason. For example, let us assume that forging of one's signature is unlawful (a principle entirely created by man) then the forger must be punished. This is the world of *Sollen* and in that world norms are the rules of what human

4 Aufricht, "The Theory of Pure Law in Historical Perspective" (ed. Salo Engel, 1964) in *Law, State and International Legal Order : Essays in Honour of Hans Kelsen* (1964).

5 Kelsen, *General Theory of Law and State* 46 (20th Century Legal Philosophy Series, i).

reason and will say "shall be." The scientific laws, on the other hand, are not concerned with what "must" or "shall be," but only with what "will be." For example, an apple parts from a tree; it will fall to the ground by the forces of nature and not because of any process of human will, or because that the human reason had decreed.

We have seen above that legal norms to Kelsen are the expression of an "ought." But an "ought" imports a value-judgment and value-judgments are the very things which Kelsen wanted to avoid from his theory. Here Kelsen was involved in a great difficulty. For, he cannot deny that there are other "oughts" than "legal oughts," and, in fact, he does not deny this.[6] However, he finds a distinction between the legal "oughts" and other "oughts" in that the former is backed by force or sanction which is the characteristic of law and not of ethics. Thus in a single sentence Kelsen summarises his theory of law as—

> a structural analysis, as exact as possible, of positive law, an analysis free from all ethical or political judgments of value.[7]

Because it is concerned only with the actual and not the ideal law, it is described as *positivistic*. Because it claims to strip the law of all illusions and distractions, it styles itself *realistic*. And because it strives to free juristic theory from the "metaphysical mist," it claims to be *pure*.

To the question as to what is the source of the validity of the legal "ought" Austin had found a comparatively simple answer. For Austin, "law is the command of the sovereign" backed by sanction. Kelsen, however, asserts that the fact that somebody commands something is in itself no reason for considering the command as a valid norm. For example, the statement that "the child goes to the school because his father has commanded him to go," does not show by itself the reason for its validity. The validity of this norm, states Kelsen, is based upon another norm, namely, that the child should obey the father.

Kelsen agrees with Austin that legal norms are backed by force or sanction but he rejects the idea of command since it introduces a psychological element into the theory of law which should, in his view, be "pure."[8] To quote Kelsen :

6 Dias and Hughes, *Jurisprudence* 457 (1957).
7 Kelsen, "The Pure Science of Law," 50 *L. Q. R.* 498 (1934).
8 Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," 55 *H. L. R.* 54-56 (1941-42).

> Law is a dehumanized command, which does not imply a will in a psychological sense of the term.[9]

And even if the law be the expression of the human will, it is still the expression and not the supposed will that is important. A law may continue to be valid long after the wills of the person who passed it have perished with them. Moreover, it may be valid if the required procedures have been followed although the majority who voted for it do not even know its contents. Finally, the minority who voted against it can hardly be said to will it. Yet, the minority's participation in the law making process is essential for the will to become law.

From the above premises Kelsen concludes that a legal norm is an "ought" proposition, attached with a sanction, regardless of the will of those who issue it or who receive it. Continuing, he says that law is a depsychologised command.

Further, to Austin sanction was some thing outside the law which gave validity to law. But Kelsen finds the sanction for the law within the law itself. The validity of any legal "ought," says Kelsen, is derived from another legal "ought." We may refer for elucidation the example given by Kelsen himself. He asks why a certain act of coercion, for example, the fact that one individual deprives another individual of his freedom by putting him in jail, is a legal act ? His own answer is that it is a legal act because it has been prescribed by an individual norm, the judicial decision, i. e., the judgment of the Court that he ought to be imprisoned. Why is this judgment valid ? It is valid because it is in conformity with the criminal statutes. Why is this criminal statute valid ? It is so because it finally receives its validity from the constitution. Why is the constitution valid ? Here Kelsen assumes that there is a rule that the Constitution ought to be obeyed. And this *assumed* rule is the basic norm[10] or the *grundnorm*.

This *grundnorm* of Kelsen is the indispensable postulate to which all the roads of law lead, by however devious routes, observes Allen.[11]

9 Kelsen, *General Theory of Law and State* 35 (1946).
10 Kelsen's terminology classifying the basic norm is : "juristic hypothesis," "hypothetical," "a postulated ultimate rule," "a rule existing in juristic conscience," "an assumption." See *ibid.*
11 *Op. cit. supra* note 1, at 54.

Kelsen's picture of law emerges thus not just as a collection of "ought" norms or propositions, but as a hierarchy of "oughts," i. e., hierarchy of norms. The search for the validity of the legal norms leads us to the insight into the hierarchical structure of a legal system.

If all the norms of a system derive their validity from the basic norm, the nature and origin of that basic norm itself becomes the crucial question. Kelsen's answer would be that it is a pre-legal or meta-legal question with which a jurist as such is not concerned [12] In fact, Kelsen very explicitly states that he cannot scientifically demonstrate the validity of the basic norm.[13] According to him, this fundamental norm is itself not capable of deduction, it must be assumed as an "initial hypothesis." "The parliament in England is sovereign" is a fundamental norm, no more logically deducible. According to Kelsen, the task of legal theory is to clarify the relations between fundamental norm and all lower norms, but not to say whether this fundamental norm itself is good or bad. That is the task of political science or of ethics, or of religion.

Finally, Kelsen states that this basic norm is neither valid nor invalid, it is a "hypothesis," the usefulness of which depends on the extent to which the norms of the legal system of the particular society can be derived from it.

No fundamental norm can be recognised which has not a "minimum of effectiveness." Universal adherence to a fundamental norm is however not required but there should not be a total disregard of it either. On the whole, the norms of law must be by and large efficacious.

Kelsen is quite explicit on the relationship of diverse legal norms with the *grundnorm*. We can arrive at a basic norm by countless individual acts of deduction and application on the part of the legislators, judges and administrators. Thus the entire body of law is like a "pyramid"[14] or a "hierarchic structure" descending from the supreme positive norm to the smallest manifestation of it, i. e., descending down to the very last operation, legal execution, and satisfaction of the judgment. To quote Kelsen :

12 Stone, *The Province and Function of Law* 95 (1961).

13 *Ibid.*

14 *Supra* note 1, at 58,

> Law has the peculiarity of governing its own creation; a rule of law determines how another rule will be laid down; in this sense the latter depends upon the former, and it is this bond of dependence which links together the different elements of the legal order, constitutes the principle of unity.[15]

This "pyramidal" or the "hierarchic structure" of norms brings to light the dynamic character of law. Kelsen affirms that from the basic norm a legal system broadens down in gradations, becoming more and more detailed and specific as it progresses. It is a dynamic process, says Kelsen, for the application of the basic norm involves the creation of new lower norms. This process is termed by Kelsen as the gradual concretization of the basic norm and the focussing of the law to specific situations. And it is this process of concretization which perpetually renders the law "self-creative."[16]

To illustrate this dynamic or creative process, let us take the proposition that "a statute ought to be obeyed" as the "initial hypothesis." If we want that this rule should be obeyed or applied, we have to create by statute certain general norms, which may be described as rules of law as well as the machinery and the procedure for the application of these general norms. Judicial procedure is the machinery for the application of these general norms to a specific situation. This, in turn, involves the creative element in so far as the judge by his decision creates a specific norm addressed to one or the other of the parties. Thus, the judicial decisions mark a further stage in the process of concretization. Every judgment contains an act of creation in choosing one of the several possibilities of interpretation which the statute permits. Thus, a judgment at once applies and creates the law. The final stage is reached by carrying out the decision of the judge which further requires the creation of some rules and machinery for carrying out the decision.

We may take Kelsen's own example. From the constitution is derived the rule that parliament can legislate with respect to contractural transactions. The parliament passes the Contract Act containing general rules or norms. The general rules of the law of

15 Quoted by Starke in his book "*An Introduction to International Law* 70 (1963).

16 *Supra* note 1, at 58.

contract are further concretized by the agreement between A and B to carryout the terms of a certain contract, i. e., are made concrete from a general norm to a particular norm. This concretization is continued in administration, in private transactions, in judicial decisions, etc. A legal system is, therefore, never at rest.

Here we must note that Kelsen's approach stands in contrast with that of Austin. Kelsen calls Austin's theory as static. As to the reason why Kelsen calls the Austinian approach to law as static, we may quote a passage by Kelsen himself :

> Analytical jurisprudence as presented by Austin regards law as a system of rules complete and ready for application without regard to the process of their creation. It is a static theory of law. The pure theory of law recognizes that a study of the statics of law must be supplemented by the study of its dynamics, the process of its creation. This necessity exists because the law, unlike any other system of norms, regulates its own creation.[17]

The last and the final point about Kelsen's *grundnorm* is that before a basic norm is postulated for any legal system, this theory is inapplicable to any actual legal problems. Consequently, the discovery of the basic norm is a condition precedent to an application of Kelsen's theory to any legal system.

Principal Doctrines of the "PURE" Science of Law

(1) The basic norm, by virtue of its standing at the top, delimits the norms derivable from it in any or all of the following three ways :

First, it may apportion (or delegate) the norm making competence or power among different persons in the state. It lays down where the power to create norms resides. All norms created under the powers thereby given are valid. And, no norm not so created is valid.

Second, the basic norm may regulate the procedure to be followed in creating norms. The apex norm usually performs the function of designating the procedure, or "manner and form" in which the

17 Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," 55 *Har. L. Rev.* 61 (1941-42).

"delegated norm-creating power" is to be exercised, e. g., in rigid constitutions amendment provisions usually include special procedural rules.

Third, the basic norm may also limit the content for valid norms. The outstanding examples are the limitations upon the legislative powers imposed by the Bill of Rights. And in Kelsen's terms, that prohibition being a part of basic norm, no derivative norm inconsistent with it will be legally valid.

(2) Kelsen attacked the traditional distinction between public and private law. Austin, too, seems to have reached the same conclusion when he pointed out that on the one hand all the so-called "public" injuries were injuries to individuals, and on the other, that if there were no "public" interests involved in "private" injuries, the law would not interfere.[18]

Professor Kelsen says that since both derive their legal quality from the same *grundnorm*, two entirely different characters cannot be attributed to it on the ground of being a difference in certain respects. Contracts made between the parties stand on an equal footing with criminal law. Because in both cases the validity or power is derived from the same *grundnorm*. No distinction between them can be made on the ground that they protect interests of different nature. As Kelsen himself points out, that if there were no public interest in individual contractual relations, the society would not be interested either in enforcing or regulating them. Public law is in the ultimate analysis concerned with the individual interests. And these individual interests protected by "Public" law are indistinguishable in kind from those protected by "private" law. Private interests are protected in public interest.

(3) The above leads to the next part of his theory, the denial of any difference between "natural" and "juristic" persons. The difference between the two is irrelevant, says Kelsen, since all legal personality is artificial and derives its validity from superior norms. By a "person" Kelsen means only a totality or a collection of rights and duties. In other words, personality in law means entity capable of bearing rights and duties. The legal order confers personality where it wills. Consequently, we should not define personality by reference to some physical or

18 Two Lectures 783-84, 786-87 (3rd ed., 1869).

psychical entities. Lauterpacht has stated : "Juristic and physical persons are essentially on the same plane. The physical person is the personification of sum total of legal rules applicable to one person. The juristic person is the personification of the sum total of legal rules applicable to a plurality of persons."[19]

(4) Professor Kelsen's conception of law as a system of norm relations leads us to the conclusion that there is no such thing as individual right in law. The idea of duty is the essence of law, and indeed, that is quite evident in the "ought," of every norm. Kelsen goes on stating very emphatically that law is always a system of "ought." The concept of right on the other hand, is not basically essential for a legal system. To quote Kelsen :

> Legal right is merely the duty as viewed by the person entitled to require its fulfilment.

(5) Professor Kelsen denies the existence of sovereign as a personal entity, and also, the existence of State as a separate entity. Since all persons are the creations of the hierarchy of norms there can be no supreme or superior legal persons. All derive what power they have ultimately from the same basic norm. The power of the King-in-parliament, the statutory power of a Minister to make regulations, the power of an individual to make a binding contract and the like, argues Kelsen, all depend upon the devolution of the legal power under the basic norm. Professor Kelsen insists that the "State" is but a simple way of conceiving the unity of a legal order, just as a personal God is a simple way of conceiving the unity of the moral order of the Universe.[20] In fact, he views State as a system of human behaviour and an order of social compulsion. The law is also a normative ordering of human behaviour backed by force. The most natural and unavoidable conclusion is that State and law are indentical.[21] To quote Kelsen :

> This compulsive order (State) is not different from the legal order (Law), for the reason that within one community only one and not two compulsive orders can be valid at the same time.[22]

19 Lauterpacht, quoted by Stone in *The Province and Function of Law* 103 (1961).

20 Stone, *id.* at 104.

21 Kelsen, *General Theory of Law and State* 182 (1946).

22 Kelsen, "The Pure Theory of Law," 51 *L. Q. R.* 534 (1935)

We may elaborate the idea further.[23] State, according to Kelsen, is a system of norms. The State manifests itself in acts by which the national law is created and applied. These acts are performed, by definite human beings and are attributed to the "State." But an act performed by a human being is interpreted as an act of State only if this individual and the act performed by him are determined in a specific way by the national legal order. To attribute the performance of this act to the "state," and to consider the individiual performing the act as an "organ" of the State means to refer the act to the legal order by which the individual and his act are determined; that the State as an acting person is nothing else but the personification of the national order. But we may contend that the State is a real being because it has a territory, a population and a power. Kelsen meets this argument by contending that the 'territory' of the State is nothing but the *geographical area* within which the legal order would have validity; the 'population' of the state is the *personal sphere* within which this order would be valid and the 'power' of the State is the *effectiveness of this order* as a coercive order. Thus the pure theory of law dissolves the misleading dualism of State and national law.[24]

(6) Professor Kelsen applies this theory of hierarchical norms to International Law too. He insists that the International Law is to be considered as essentially a "juridical order." But we know that International Law lacks that "apparatus of compulsion" which Kelsen thinks to be indispensable to all law. How, then, we may very well ask, can this inchoate "juridical order" be described as law ? Here Kelsen saves his position by giving an analogy. And he is out to say that International Law is a type of, or at least an analogy to, primitive law. Continuing further, Kelsen says that International Law is at the same state of evolution as the legal systems of the early uncivilized communities. The legal system, such as these of the early uncivilized communities, also lacked the constitutional organs and the rules of the modern States. These were exclusively governed by customary law. But this analogy of Kelsen is not convincing. As observed by C. K. Allen :

23 Kelsen, *op. cit. supra* note 17, at 65, 66.

24 The distinction between "law" and "State" is an outgrowth of primitive belief in an anthromorphic concept of "State"—the "State" as a "superman" or "super person." But this distinction disappears as the State is disclosed to be a set of propositions determining governmental operations.

> This is an unconvincing similitude. Analogies of this kind are good servants but bad masters, and when they are made the basis of a juristic theory they exhibit the limitation of all analogies-namely, that they are apt to confuse similarity with identity.[25]

And even if we admit this analogy, we cannot base any juristic conclusion on the comparison between the modern and the primitive communities. To it, Allen[26] attributes the reason that modern societies are governed by their complex, planned organisation, and not by custom, superstition, priestly religion, tribal law and the like. The latter were the characteristics of the primitive societies and that these are quite extinct in the modern civilised world.

Let us assume for the time being that the analogy is correct. But, then, we must still look for the sanction. Kelsen says that they are two fold, war and reprisals. This proposition of Kelsen is still more strange. The war is not a sanction in the strict legal sense. C. K. Allen[27] observes that International Law is not concerned, except incidentally, with the causes of war and its "laws of war," are rules meant for the regulation of *de facto* conflicts. These rules have nothing to say about the war *de jure*. Indeed, we may go a little further and agree with Allen[28] that the present world war has only a *de facto* existence and is not a juristic phenomenon at all.

Further, war cannot be a sanction, for a legal sanction must always be imposed by a superior and an acknowledged authority. And this authority, we are quite sure, does not at present exist in the international community. Kelsen, however, escapes the difficulty by assimilating war and reprisals to the self-help which was common among the primitive communities. But history does not support his thesis. To quote Allen :

> History does not tell us of any society in which self-help has been a legal sanction in and of itself, that is, without reference to some higher authority which ultimately will enforce the individual's own means of redress. Indeed, a society in which

25 *Op. cit. supra* note 1, at 60.
26 *Ibid.*
27 *Id.* at 61.
28 *Ibid.*

> self-help was the sole legal sanction would not be a society in any recognisable sense of the term, but merely an animal condition of anarchy and in the most primitive societies of which we have any evidence...self-help is always subject to some superior regulating authority, however, rudimentary.[29]

Now, Professor Kelsen is ready to prove the existence of *grundnorm* in International Law also. He says that nations in practice recognise the equality of each other's legal order, and the doctrine of equality must mean that they recognise the existence of a *grundnorm* superior to their particular legal orders. He finds this *grundnorm* in the principle of *pacta sunt servanda*. This naturally raises the question whether this *grundnorm* comes into existence on the formation of an association of States, or States derive their validity and force from the *grundnorm*. Kelsen leaves both the possibilities open as it is not within the province of "pure theory" to investigate into it. But his line of approach seems to be in favour of the latter view.

Professor Kelsen goes on to remark that as soon as State recognises any principle such as *pacta sunt servanda*, one recognises the supremacy of international law over national sovereignty. And, in fact, in his zeal for establishing the primacy of International Law, Kelsen goes on forwarding arguments, but on the point of *grundnorm* his arguments explode and he is thrown on the horns of a dilemma. Professor Stone remarks :

> It is difficult to see what the pure theory of law can contribute to a system which it assumes to be law, but which it derives from a basic norm which it cannot find.[30]

However, even if we accept the *pacta sunt servanda* as the *grundnorm* of international order, we can question his theory on two grounds. First, whether the doctrine of *pacta sunt servanda* or the equality of the States has the minimum of effectiveness which Kelsen's theory demands (because the *grundnorm* is acceptable when it commands a minimum of support). We know that States talk too much about this principle but do not act according to it. Thus the principle lacks that element of effective compulsion which is indispensable to *grundnorm*. And the whole theory of Kelsen becomes meaningless unless

29 *Ibid.*
30 Stone, *op. cit. supra* note 12, at 108.

there is a minimum of effectiveness in fact and not in words, for a *grundnorm* is acceptable when it commands a *minimum of support.*

Second, even if the doctrine *pacta sunt servanda* is to be taken as the basic norm of international treaty law, it has no relevance to innumerable rules of customary law which have grown up by practice and have nothing to do with treaties.

Moreover, many recent examples cause us to say that as a principle of international morality, *pacta sunt servanda* is not firmly established as it was even in the days of Grotius.

Finally, to quote Dias and Hughes, "in postulating the primacy of international law Kelsen was, in effect, making an assumption as to what ought to be rather than what actually is the case."[31] In other words, he was making an assumption on the lines of natural law which he assailed so mercilessly.

Professor Lauterpacht says that Kelsen's choice of the primacy of international law over municipal law results from a secret resort to natural law.[32]

But these criticisms against Kelsen are not justified. Because Kelsen does not express any preference for any specific principle but puts it as a basis of an international order. He has, however, greatly observed the matter by introducing the historical factors into his plea for the characterisation of the present international structure as a legal order.

Limitations of the "Pure" Theory of Science

Perhaps the most debatable part of Kelsen's doctrine is his conception of the *grundnorm.* This *grundnorm* seems to be a little more than Austin's sovereign in a new guise and is open to all the objections to which Austin's sovereign is.

31 Dias and Hughes, *Jurisprudence* 465 (1957).

32 Kelsen's "Pure Science of Law" in Jennings' *Modern Theories of Law* 129-131 (1933). For similar criticisms of Kelsen's views on International Law see Stone, *op. cit.* at 108; Hagerstorm, *The Nature of the Law and Morals* (ed. Olivercrona, 1953) Ch. IV; Allen, *op. cit.* note 1, at 62.

(1) His conception of *grundnorm* is vague and confusing. His *grundnorm* is a fiction incapable of being traced in reality,[33] though its discovery is *a condition precedent* for a successful application of Kelsen's theory to a legal system. Kelsen seems to have propounded his thesis on the basis of written constitutions as Austin created his sovereign on the basis of the English system of Government. But even in written constitution, *grundnorm* is made up of many elements and any one of these elements by itself cannot have the title of "*grundnorm.*"

(2) Every rule of law or norm derives its efficacy from some other rule or norm standing behind it. But the *grundnorm* derives its efficacy from the fact of its minimum support, i.e., there are a certain number of persons who are willing to abide by it.[34] There must not be a total disregard of *grundnorm,* but there need not be universal adherence to it.

Kelsen, however, gives us no criterion by which the "minimum of effectiveness" is to be measured. Some writers like Stammler,[35] Stone[36] and Friedmann[37] have pointed out that in whatever way the "effectiveness" is measured, Kelsen's theory has ceased to be "pure" on this point. But how can the minimum of effectiveness be proved except by an enquiry into the political and social facts, which Kelsen so vehemently excluded from the scope of his study. For example, whether it is the obedience of the majority, or the obedience of an enlightened minority, or sheer physical force that will decide the "minimum of effectiveness" of the *grundnorm.* Whatever the answer, purity here ceases. In the discovery of the basic norm Kelsen excludes all sociological jurisprudence and theory of justice. To quote Professor Stone :

> Excluded though these are from all the side doors and back doors of his pyramid of norms, the front door is wide open to both.[38]

And that being so, it is argued, all other norms which are derived from the *grundnorm* must also be tainted with a similar impurity. In

33 Friedmann, *Legal Theory* 237 and 238 (1960).

34 Kelsen, *op cit. supra* note 9, at 118-122.

35 Friedmann, *supra* note 33, at 238.

36 Stone, *op. cit. supra* note 12, at 96 & 105.

37 Friedmann, *op. cit. supra* note 33, at 239.

38 Stone, *op. cit. supra* note 12, at 105.

other words, since that basic norm itself is obviously most impure, it must reproduce that "original impurity" in the inferior norms that emerge out of it. To quote Professor Stone again :

> Prof. Kelsen, then, is inviting us to forget the illegitimacy of the ancestor in admiration of the pure blue blood of the progeny. [39]

This criticism against Kelsen's view about the purity of legal norms has some truth. But, it, in no way, impairs the initial thesis of the theory, namely, the heirarchy of norms. The criticism touches not the theory, but his claim to its purity. Since he postulates the limitation that the basic norm is not determinable by the pure theory of law it is not appropriate to accuse him of observing it. The pure science of law is an attempt to display *the law as a logically self-consistent body of propositions*. It is, like Austin's theory, though on a more ambitious plane, a search for a logic in law. Once this fact is recognised, we cannot fail to observe that the pure theory must find its starting point outside itself. And this is not a ground for criticism; but only for stressing its limitations and its dependence for usefulness upon inquiries which are not "pure."

Again, for the same reason, Professor Laski's comment that "pure theory is an exercise in logic and not in life" need only be a statement of proper limits and not a criticism at all.

Even if we recognise the fact that the purity of the legal norms can not be maintained, the theory is not materially affected. Kelsen develops his theory from the philosophical premises of Kant and aims at establishing a universal theory of law. Therefore, it was not necessary for him to take into consideration other factors which affect and influence the law. It may be a limitation of the theory but it is not a defect or weakness of it.

(3) Sociological jurists criticise it on the ground that it lacks practical significance. Professor Laski says :

> Granted its postulate, I believe the pure theory to be unanswerable, but I believe also that its substance is an exercise in logic and not in life. [40]

39 *Ibid.*

40 *A Grammar of Politics*, Chapter VI (3rd ed. 1938).

The above criticism by Sociologists is out of point. Kelsen wanted to make his study a science, and therefore, took a strict positivist view. He purged many fallacies, such as "natural law" or "justice" and in this way his work carries a lot of practical value.

(4) Kelsen's idea of *grundnorm* has long been familiar to English lawyers in another form. The *grundnorm* is nothing more than a highly abstract term for what may be called the binding source of the law, or as Salmond put it, "legal source." [41]

(5) We have seen that "Coercion" constitutes the specific difference between law and morality. But, it can very convincingly be argued that coercion cannot constitute the "differentia specifica" between the two. The reason to be advanced is that the norms of ethics or *etiquette* or religion can also be formulated to include sanctions. [42] Indeed, no social rules could possibly do without sanctions to induce their application. It may also be maintained of all social norms, not only of the law, that their validity does not depend upon their recognition by those to whom they are applied even against their wishes.

Professor Kelsen's Contribution

If we say that Professor Kelsen was concerned only with an abstract conception of law, then, we are certainly misrepresenting him. His normative science led him to re-examine many of the traditional doctrines of jurisprudence. In this respect his contribution has been of great value and has had a notable effect on current jurisprudence. Particularly his theories of State and legal personality deserve utmost attention. Kelsen was undoubtedly one of the most vivid and courageous minds in recent legal thought.

He furnishes criteria for distinguishing between lawyer's law and the scientific laws and the law of morality and, ethics, etc.

His theory has demonstrated the unity of a legal system as well as the mechanics of its operation. His conception of law as a dynamic process of concretization is a very fruitful one and it gives a logical justification to conclusions which Gray and American realists on the

41 *Supra.*

42 "Logical and Epistemological Problems in Legal Philosophy" in *Australian Journal of Philosophy*, XXIV, at 81-97 (1951).

one hand and continental exponents of modern sociological theories on the other hand have reached from different angles.

Kelsen's work is also valuable in its emphasis that in executing the norms of law the judge has much discretion. As any general rule cannot provide for all contigencies, the general rules must be made precise and perfect by those who have the duty to apply them.

He has considerably influenced the modern legal thought. To quote Professor Paton :

> No one can doubt that Kelsen has made an original and striking contribution to jurisprudence. In 1832 Austin cleared away much dead wood, and a century later Kelsen with critical acumen exposed many fallacies. But the aim of the pure science of law is a narrow one, and it must be complemented by other and broader approaches.[43]

Though the practical corollary of Kelsenian jurisprudence may not be immediately apparent to us, it exists nevertheless. Kelsenism is an eminently practical instrument of legal analysis. The lasting value of Kelsenism lies in the usefulness of legal methodology which it introduces rather than in its merits as a theory of law.[44]

Relevancy of Kelsenian Philosophy of Law and Jurisprudence in the Context of Modern Indian Society.

At present our society is undergoing a huge transformation. Law has become the chief instrument of attaining social progress. The question before us is as to how far Kelsen's theory suits the needs and requirements of the contemporary Indian society. We have to examine this question in the light of emerging social reality, attitudes, ideals, etc. in the Indian society.

(1) Even a superficial analysis of the Indian legal system shows that the Constitution of India, in Kelsenian terminology, is the *grundnorm* and the Parliament along with other bodies is the next lower norm creating agency deriving its power from and subject to the limitations imposed by the Indian Constitution. If that be so, the decision

43 Paton, *A Text-Book of Jurisprudence* 18 (1964).

44 Silving, "The Lasting Value of Kelsenism" (ed. Salo Engel, 1954), *Law, State and International Legal Order : Essays in Honour of Hans Kelsen*, at 301.

in *Golak Nath's case*[45] brings the Indian legal system closer to the ideal type postulated by Kelsen in as much as this next lower norm creating agency is no longer in a position to bring about such changes in the *grundnorm* which serve as limitations on its norm creating capacity.[46]

(2) The Constitution is at the apex of our legal system which consists of Statutes enacted since the advent of the British rule, Privy Council decisions, various commands of the former Princes, varied customs and the like. On account of the multiplicity of sources, it becomes at times difficult to identify whether a particular rule is law. Therefore, some specific ultimate criterion of validity is needed and Kelsen's theory provides this. Further, his theory can be utilized to demonstrate the unity of our legal order.

(3) India has adopted parliamentary democracy as its form of government. Kelsen's theory of State is hardly consistent with this. Kelsen says that State and law are pure ideas and hence from this standpoint law and State are identified.[47] By identifying law and State, once this is seriously maintained, there would be a little room for the rule of law, without which no democracy can possibly function.

(4) The pure theory of law implicitly conflicts with the ideology of a welfare state being pursued in India since theoretically it excludes values and justice.[48] Overdose of logic already administered in the administration of law and justice during the British rule, has to be balanced with an emphasis on values and ideals. The philosophy of our Constitution is "Collectivism" and not "individualism" and State is under a duty to look after the social and economic well-being of the people. Today, the courts, therefore, take into account various extra-legal factors such as public policy, social considerations, political expediency, etc. Thus, Kelsen's theory is unsuited to the present Indian society as it tends to be legalistic rather than realistic.

45 *Golak Nath L. C. v. State of Punjab*, A. I. R. 1967 S. C. 1643.

46 The position before *Golak Nath's case* was that the Parliament could validly change (under its norm creating power) the contents of the *grundnorm* so far as the Fundamental Rights are concerned. But, now, after the decision in *Golak Nath's case* the Parliament cannot do so, i. e., it can not amend or modify the Fundamental Rights.

47 *Supra op. cit.* note 21.

48 *Supra op. cit.* note 7.

(5) The "pure theory" gives wide powers to the State which, in Kelsen's system, becomes the chief source of law. This is most suited to a welfare society wherein the responsibilities are many and varied and accordingly the State is all powerful. And yet on the whole the pure theory is illsuited to a welfare State. The pure theory of law is opposed to various forms of transcendentalism [49] and seeks to free the law, as completely as possible, from all moral and sociological elements. In a socialist society with a welfare State such as India, law and morals complement each other. Moral and social restraints play an equally important role in social regulation as law does.

To conclude, we may remark that pure theory contains in itself a basic tendency which is anti-democratic in spirit and effect. For emerging Indian society which aspires to be firmly democratic this is hardly advantageous.

However, in arguing so we are not inattentive to the fact that Kelsen himself was a great champion of democracy.[50] And, yet, we do not think that our interpretation of the logical tendencies and implications of Kelsenism is misleading.

The above discussion, however, suggests that India does not require a legal philosophy which is positivistically pure. On the other hand, in India juristic thinking has to have a sociological bias to comprehend the social values for an emerging society which is still at cross roads.

To sum up, briefly, an agreeable and adequate legal philosophy for India would be one which is neither positivistically pure nor merely sociological although it would have a strong sociological bias. We think it to be a safe suggestion.

R. A. Malviya*

---

49 Saran, "Implications of Kelsen's Pure Theory of Law in India" (ed. Sharma, 1964), *Essays in Indian Jurisprudence* 47.

50 See Kelsen's essay on Foundations of Democracy Contra Voegelin.

* Student of LL. M. (Final Class), Law School, Banaras Hindu University.

BOOK REVIEW

THE CODIFICATION OF INTERNATIONAL LAW. By R. P. Dhokalia, Manchester : Manchester University Press, 1969. PP. XIV, 367. Cost c. a. $ 12.00

Professor Ramma P. Dhokalia of the Faculty of Law, Banaras Hindu University, India, has a three fold purpose in favoring codified law rather than customary law. The First Part of the book[1] is devoted to the desirability of creating a universal legal order. From a basis of Greek and Roman philosophy, the attempts to create a world organization are reviewed. The attempts of the last several centuries—culminating in the founding of the League of Nations and the United Nations—were directed toward the preservation of world peace; and, within these peace plans seeking a global structure, there arose the desire to codify international customary law. Part Two of the book is devoted to a historical-critical survey of the main attempts to produce a universal legal code encompassing the entire *corpus* of law. Many of these plans also included private international law, admiralty law, and phases of municipal law. Within these draft codes were schemes for the pacific settlement of disputes. The author, in working up to the founding of the League, pays special attention to the plans for compulsory arbitration. Accordingly, considerable attention is devoted to the Hague Conventions of 1899 and 1907. He takes the view that the two Hague Conferences represent the culmination of the efforts of individual scholars, statesmen, private organizations, and even of governments. In addition these two Hague Conventions serve as the beginning of the codification efforts of this century.

Part Three comes to grips with the main problem : the codification of contemporary law by the International Law Commission. Yet he never loses sight of the broader issue, i.e., the relationship between the emerging principles of international law, customary law, jurisprudence, moral influences, and social forces that are simultaneously encouraging the cause of codification and, at the same time, hindering

---

1 This book is a condensed version of a Ph. D. thesis, presented to the Faculty of Law, The Victoria University of Manchester, 1964. The study was directed by Professor B. A. Wortley who wrote the Forward to the book. Dhokalia, *Codification of Public International Law* (1970) [Hereinafter cited as *Codification of International Law*].

its development. Relying upon the foundation laid in the first two parts of the book, the author moves into his main topic : the work of the International Law Commission—a choice necessitating that other current efforts to codify not be covered. This reviewer is of the opinion that the realistic alternative has been chosen, in order to : (1) keep the scope of the work within a reasonable length and (2), of primary importance, concentrate the major portion of the text toward a single subject.

Professor Dhokalia is the first author to approach the development of codification in this manner. Specifically, the historical roots of present-day efforts are explored in order to give some insight into current controversy. The author's purpose, the method to be followed, and the conclusions sought can be seen in the opening statement to Chapter Six :

> How optimistic one may be about the future prospects of the general codification of internationl law may be judged from an assessment of the achievements of the International Law Commission after some two decades of its work. A review of that work, made in the context of contemporary conditions and problems and seen against the history of the codification movement during the past hundred years, will also indicate the rate of progress in codification that has so recently been achieved.[2]

The forces working against codification—such as lack of cooperation from governments, the exercise of absolute state sovereignty at the expense of international law, the inadequate resources placed at the disposal of the International Law Commission, and the lack of support from the U.N. General Assembly—are examined, as a basis for subsequent recommendations.

The treatment of the ILC includes an analysis of its organization and structure, membership, and areas of activity. In this connection, the interrelationship (and indeed conflicts) with the Sixth Committee of the U.N. General Assembly is well handled. Following a discussion of the selection of topics for codification or special study, all of the ILC's work is reviewed. Similarly, the major international conferences and resulting conventions are, in turn, discussed in some detail.

2 *Id.* at 271.

Chapter Five entitled "The Functions of the Commission and Its Methodology" comes to grips with the main limitations facing this organ as it attempts to distinguish between the development of international law as opposed to codification. The author—as might be expected from the book's title—does not follow the more generally accepted view that the development of new law is a higher achievement than mere codification. He argues that codification involves considerably more than simply restating the obvious principles.[3]

Chapter Six, "The Achievements of the Commission : Work Completed," is one of the outstanding portions of the large treatise, in that positive results are studied against the larger background not only of the history of prior failures but of the difficulties overcome by the ILC. Perhaps this reviewer is a bit prejudiced. So often it is impossible to detect real and lasting accomplishment by international organizations. Indeed, the author tends to employ, very effeetively, a problem-solution approach, which adds realism to the mass of material. In this regard, one section proved particularly enlightening, namely "The Commission's Own Program of Codification."[4] One must distinguish between those topics selected by the Commission for codification, as contrasted with special subjects sent from the General Assembly. Frequently the General Assembly and its Sixth Committee are seeking an exposition of the status of the existing law, not codification. The value of these special studies (e. g., reservations to multilateral conventions, Nuremberg Principles, and Draft Code of Offenses Against Peace and Security) must not be underrated, for one of the Commission's main purposes is the clarification of customary law. On the other hand, a universal code, encompassing the entire corpus of the law of war and peace, is no longer capable of realization; consequently, a selection must be made of limited topics in need of immediate study. A value judgment, that is consistent with the attitudes of governments, must be made. The old criterion of the League's Commission of a topic "ripe for codification" has been abandoned in favor of a more pragmatic approach. That is to say, subjects are selected on the basis of need and on the assumption that no convention can be permanent. All codifications must be modified, or completely redrafted, so as to reflect changes.

3 See e. g., *id.* at 208-09.

4 *Id.* at 292-320.

The lengthy concluding chapter really constitutes a Fourth Part of the book. While the author brings together many of the ideas presented in the text for the purpose of advancing detailed conclusions and recommendations, he also breaks new ground. Such new topics as : the effect of the study of comparative law; the impact of social policy; and the shifting theories looking toward a new international, e. g., the "common law of mankind" (Jenks), transnational law (Jessup), and the influence of social policy on law (McDougal), are brought into the far reaching discussion. Indeed, this reviewer hopes that Professor Dhokalia will pursue this approach even further in his future publications, for the reason that the development of law by the ILC will be one of the major factors in the evolution of newly emerging World Law (including United Nations Law).[5] Moreover, the importance of this treatise to the field of human rights protection is recognized (even if a bit too briefly).[6] May it, therefore, be

5 *Cf.*, the approach of Professor Herbert W. Briggs. In addition to exploring the work of the ILC on the Law of Treaties, considerable attention is devoted to the codification efforts of "The Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States" in : *Reflections on the Codification of International Law by the International Law Commission and By Other Agencies*, 126 *Recueil des Cours* 233, 284-93 (1969 II). Such an approach, however, necessarily precludes an examination of all phases of the work of a particular institution; rather specific problems must be examined. In his *Hague Academy Lectures*, Professor Briggs deals with compulsory settlement of disputes. In effect, the treaties by Dhokalia and Briggs represent very able examples of these two approaches, each of which renders a specific contribution to legal scholarship.

A considerable number of attempts to codify law in specific fields are being undertaken by *ad hoc* conferences, often under the sponsorship of the U. N. or its specialized agencies, as for example ILO, WHO, or ICAO. As concerns the unsuccessful attempts to codify air law, see Wagner, *International Air Transportation As Affected By State Sovereignty* (1970); Gormley, *Book Review*, to be published by the *St. Louis Law Journal, U. S. A.* Professor Dhokalia has selected the area more likely to produce positive accomplishments.

6 In order to maintain a prohibition against the use of armed force it is imperative to substitute legal means for that force. The goal of human development, as the historical pattern of thought shows, and now so familiar and persuasive in large parts of the world, seems to be the gradual transformation of the world into a perfect legal community, where problems which formerly had been political could find a legal solution. In the words of Professor B. A. Wortley, 'in this modern age every attempt at international co-operation for

suggested that the great instruments protecting human rights such as the European Convention on Human Rights and Fundamental Freedoms, the Inter-American Convention on Human Rights, and the International Covenants on Human Rights are all examples of successful codification efforts.

"External Factors Bearing on Codification"[7] pays special attention to the forces hampering codification. One factor is particularly important, namely, the diversity of legal systems that must be considered by all members of the ILC. Since public international law is no longer exclusively Greco-Roman and Christian by way of orientation, legal systems such as the Hindu, Buddhist, Islamic, Jewish, African, and even Communist are part of the general principles of law. These systems are incorporated into contemporary international law through Article 38, Statute of the International Court of Justice.

> However, characteristic features of the present-day world are the interdependence of different communities and the interaction of legal systems. Codification of international law will require a sustained effort to find the elements of a universal legal order in the major legal systems of the world and thus to promote a wider acceptance of the principles and rules embodied in codified and developed international law.[8]

peace with justice must be regarded as more than ever desirable and, indeed, if humanity is to avoid the consequences of the destructive potentiality of modern science it is essential that social scientists and international lawyers should go forward with their unspectacular but essential task of promoting a blueprint for a peaceful and lawful future.' The programmes sponsored by the United Nations and other organizations for the promotion of human rights and the progressive development and codification of international law offer the most likely means by which the experts may work towards the achievement of that future.

Codification of International Law, supra note 1, at 33; quoting in part, *The United Nations—The First Ten Years* vii (B. Wortley ed. 1957). See also *id.* at 348 & n. 2; citing Lauterpacht, *An International Bill of the Rights of Man* (1945).

7 *Codification of International Law, supra* note 1, at 339 *et. seq.*

8 *Id.* at 339; citing Jenks, *Common Law of Mankind* 109-20 (1958); and "International Law in Time of Stress" in *Law, Freedom and Welfare* 68-69 (1963). Dr. Jenks carries forward these thoughts in : *Social Justice in the Law of Nations : The ILO Impact After Fifty Years* (1970). See generally,

The main recommendation offered is : the International Law Commission must be made a permanent U.N. agency rather than a temporary body, meeting several weeks a year in Geneva.[9] Proposals looking toward improvement are worthy of serious consideration, for the reason that adequate resources must be made available if the Commission is to fulfill its task. Codification of law is initself a difficult, indeed an almost impossible, task. Added to the inherent difficulties, are the hostile attitudes of governments and even of the General Assembly and its Sixth Committee. Much of the Commission's time has been occupied completing special assignments referred by the General Assembly, rather than the larger codification efforts. Lest the conflict be over-stressed by this reviewer, the high degree of cooperation between the Sixth Committee and the ILC was a major factor in producing the Vienna Convention on the Law of Treaties. Not only did the members of the Sixth Committee cooperate among themselves, they sought to aid the ILC's work, by means of their debates and insights.

The many earlier proposals touched upon in the historical survey, i.e., the creation of a universal peace enforced by an international league of states, the pacific settlement of disputes, humanitarian laws of warfare, a complete code of international law (both public and private), are as timely today as when originally advanced in the last century. Dhokalia's approach of exploring the legal foundations of the events leading up to the League of Nations and the United Nations necessarily involved an examination of related areas of international law. Not only is treaty law dealt with exhaustively, but also customary law and the general principles of law.[10] His purpose is to show the various

Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals* (1966) and Gormley, *The Use of Public Opinion and Reporting Devices to Achieve World Law* : Adoption of ILO Practices by the UN, 32 *Albany L. Rev.* 274, 278-84 (1968).

9 *Codification of International Law, supra* note 1, at 177-83 for the specific criticism of the ILC's organizational structure and financial resources.

10 *Id.* at 344 *et. seq.* See especially, "A Declaration of the General Principles of Law." The future need for such a study is stressed, as follows :

> This alone would be the best codification which would not only serve to orient international law but also to assist the International Court of Justice in the application and development of the great principles of international law. This pioneering experiment is worth-

interrelationships comprising the developing corpus of public international law. And, in advancing his recommendations he, in fact, suggests that a world-wide legal order giving "reasonable expression to mankind's sense of right and justice"[11] can best be achieved :

> If international law were codified and developed from the common elements of major lagal systems—the European, Latin-American, Islamic, Hindu, Buddhist, Jewish, African and Communist, all of which are still in a process of evolution—we may reasonably expect that by and large the great majority of the international community will accept codified international law as an essential element in the community life of the universal society.[12]

The wisdom of this recommendation cannot seriously be questioned by men of good will.

The book is extremely well written; the style is excellent and easy to read. Of special importance is the extensive documentation and carefully prepared index. As such, this volume will be indispensable in every international law library. Obviously, by presenting a systematic treatment, which is intended to be exhaustive, there is often a tendency to cover material already known (e.g., the explanation of the Harvard Research in International Law, the International Law Association, or the reviews of the U.N. codification conferences); nevertheless every reader will find new material. When exploring a new field, requiring an analysis of a particular phase of codification, any researcher will be wise to consider this text. The author was faced by a dilemma in presenting an exhaustive piece of scholarship; it was not feasible to slight any phase, even if fairly obvious. At the same time, it was essential that a concise exposition be presented. Unnecessary detail had to be eliminated. The reviewer submits that the delicate balance has been achieved. Items, frequently overlooked, are brought into proper perspective for the benefit of lawyers, desirous

> while as the knowledge of a common core of legal principles may create a feeling of solidarity for a better community of nations and of men.

Id. at 349 (footnote omitted).

11 *Id.* at 347.

12 *Id.* at 347.

of a comprehensive study of the International Law Commission and the long evolution leading up to present day accomplishments.[18] It can only be hoped that the suggestions made looking toward the improvement of the Commission will become a reality. The author has made a significant contribution to legal literature by dealing with the great mass of material in this unique fashion.

W. Paul Gormley*

---

13 Accord, Gormley, *The Codification of Pacta Sunt Servanda By the International Law Commission : The Preservation of Classical Norms of Moral Force and Good Faith*, 14 *St. Louis U. L. J.* 367 (1970).

* Simon Research Fellow at the Faculty of Law, University of Manchester, England. Member of the District of Columbia and United States Supreme Court Bars. A. B. San Jose State College; M. A. University of Southern California; Ph. D. University of Denver; J. D. (honors), LL. M. George Washington University; New York University, The Hague Academy of International Law.

RESEARCH WORK

Approved LL.M. Dissertations :

1.	Durga Prasad	Community Regulation of Management Prerogative to Terminate the Services of Workmen
2.	Rajni Kant	Community Prescriptions for the Settlement of Bonus Disputes
3.	Suresh Chandra Joshi	The Constitution is What the Judges Say It Is
4.	Maheshwar Nath Chaturvedi	Judicial Delineation of the Word "Civil Post" under Article 311(2) of the Indian Constitution
5.	Suresh Chandra Srivastava	Community Regulation of Managements' Economic Instruments of Coercion
6.	N. N. Verma	Law Relating to Strikes
7.	S. Parasuraman	Law Relating to Retrenchment
8.	M. Kamaraju	Government Intervention under Industrial Disputes Act, 1947
9.	B. P. Srivastava	Disarmament in International Law
10.	S. P. Singh	Bankruptcy in Private International Law
11.	S. K. Verma	Development Rebate (A technique of tax incentive to attract investment)
12.	K. P. Pandey	Compensable Harm Under the Indian Workmen's Compensation Act, 1923
13.	S. N. Jha	Enforcement of Statutory Provisions Regulating Exercise of Management Prerogative During Pendency of Proceedings
14.	R. L. Lyngdoh	Claims Adjustment Decisions Under the Industrial Disputes Act, 1947
15.	S. P. Sinha	A Study of the Industries (Development and Regulation) Act, 1951 : An Aspect of Public Control of Private Enterprise
16.	V. V. Somaraju	Beneficiarv's Right of Action Under the Indian Contract Act (Act No. IX of 1872)
17.	Raj Bahadur Srivastava	Protection of Minority Shareholders in Case of 'Oppression' under the 'Indian' Companies Act
18.	O. P. Singh	Continental Shelf : Legal Claims, Policies and Trends in Decision
19.	Dhirendra Kumar Srivastava	Plenary-Appelate Jurisdiction of the Supreme Court
20.	S. K. Bhatia	Principles of International Law on Friendly Relations & Cooperation Among States (Review of the work of the United Nations' Special Committee)
21.	Dinesh Kumar Srivastava	Public Control of Private Enterprise : Control of Sugar Industry
22.	N. S. Nahar	Government Control of Companies Under the Indian Companies Act

Statement of Particulars under Section 19D(*b*) of the P. R. B. Act read with Rule 8 of the Registration of Newspapers (Central) Rules, 1956.

FORM IV

1. Place of Publication	Law College, Banaras Hindu University, Varanasi-5.
2. Periodicity of its publication	Six Monthly
3. Printer's Name Nationality Address	R. K. Berry Indian Manager, Banaras Hindu University, Varanasi-5.
4. Publishers's Name Nationality Address	Surya P. Sharma Indian Reader in Law, Law College, Banaras Hindu University, Varanasi-5.
5. Editor's Name Nationality Address	Surya P. Sharma Indian Reader in Law, Law College, Banaras Hindu University, Varanasi-5.
6. Name and addresses of individuals who own the news papers and partners or shareholders holding more than one percent of the total capital.	Law College, Banaras Hindu University, Varanasi-5.

I, Sharma, Surya P. hereby declare that particulars given above are true to the best of my knowledge and belief.

Sharma, Surya P.

Edited and Published by Sharma, Surya P. for Law College
Banaras Hindu University
and
Printed by Eureka Printing Works P. Ltd. on behalf
of the Banaras Hindu University Press, Varanasi-5.