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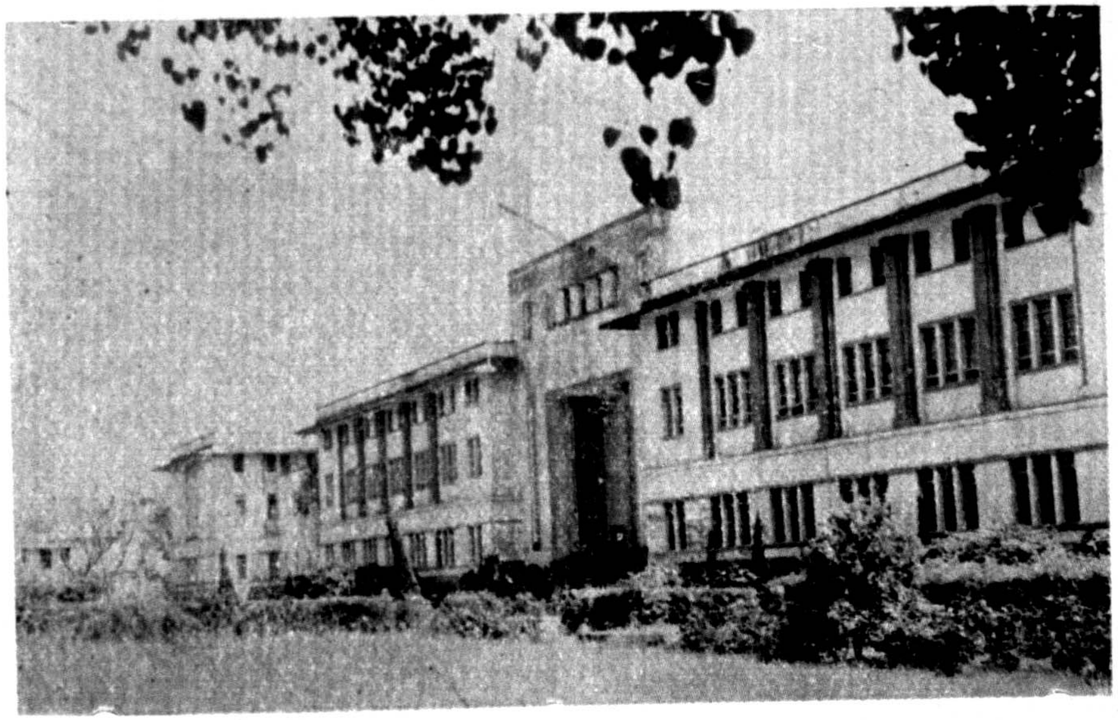

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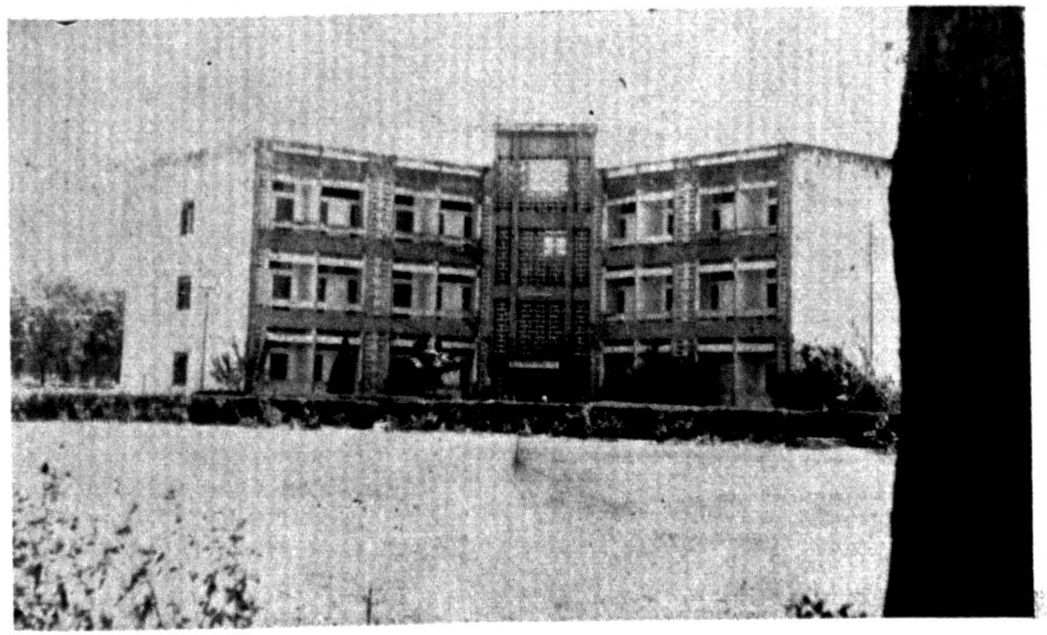

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EDITORIAL NOTE

Banaras Law School : A Pioneer and The Hope for the Future of Indian Legal Education

The Faculty of Law, under the Deanship of Sri Rash Behari Ghose, was one of the earlist Faculties to be established in the Banaras Hindu University, though arrangemets for teaching were made only after the establishment of the Law College during 1923-24 academic session. The College had a very interesting infancy, for, the classes were held only on Saturday evenings and Sunday mornings, the reason being that the Part time lecturers, who were all leading practitioners of the Allahabad High Court, had to commute between Allahabad and Varanasi. Subsequenty, in consonence with the goal of the University to have a residential character the Law College was one of the first few institutions of legal education in the country in the twenties which had full time teachers on its staff to conduct the graduate classes in law, a tradition which bloomed fully in the 1960's[1] to establish its reputation as one of premier centres of legal studies in India.

As late as 1960, the Law Callege was housed in a few rooms of the Central Hindu College, of the Banaras Hindu University the classes being held in the evening between 5 and 8 P. M. The Law Library comprised only the Collections of the Central Library of the University. Today, the Law School is located at a prominent place on the first semicircle around the Central Registry office and is housed in a number of beautiful buildings constituting the complex. It consists of five distinct wings, viz, the academic wing on the ground floor housing the well furnished chambers of the Dean and members of the teaching staff and the lounge linseed by the offices of the Faculty administration with the Lecture theater, class rooms and seminar rooms; the entire first floor comprising the faculty library having a comprehensive collection of Books and Reports and Journals and excellent general reading Hall with a seating arrangement for more than 300 readers.

The community wing comprising students' lounge, cafeteria kitchen and dining hall; and, lastly, the Ashutosh Mukherjee Hostel, the construction of which has not yet been fully completed but has only reached the first stage of its development and provides for living

1. Today, the Law School hassanctioned strenght of There Professors, Nine Readers, Nineteen Lecturers, Three Part-time Lecturers and Five Reserch Assistants.

accommodation for only 60 students. However, the Bhagwandas Hostal in the University complex provides further accommodation for 230 students.

The Law School has on its staff eminent teachers specialised in various branches of Law with particular expertise in Constitutional Law, Public International Law, Administrative Law, Personal Laws, Taxation Law, Labour Law, Mercantile Law, Criminal Law, Law relating to Business Organization, Copyright, Patents and Trade Marks. They have to their credit number of research papers published in the Indian as well as foreign periodicals of repute and some of them have published their books both in this country and abroad. The teachers have initiated several innovations which *inter alia*, includes preparation of cases and materials in various subjects and efforts are being made to introduce the case-cum-problem method of teaching with a view to improving academic standards. Several members of the staff are engaged in higher research both in this Law School and in foreign Universities. The Law School has its "Current Law Forum" in which teachers of the Law School and distinguished Scholars of other disciplines are welcomed to read their research papers or to deliver lectures on contemporary problems relations to the law and society.

The traditional law teaching comprised only transmission of information about various laws to the students whose primary objective was to secure a law Degree which helped them in bettering their professional prospects. Yet, only a small percentage of the Law graduates trickled into the legal profession and if some of them have proved to be outstanding men of law, the credit does not go entirely to the legal education they happen to have received in the law schools. The image and the role of a lawyer in the Indian Society as it is need a total transformation if his leadership and effective role in the socio-politico-economic processes of the society are recognized. It is in this context that the contribution of Banaras Law School in initiating a thoughtful change in the legal education of the country needs to be evaluated. In 1960s' the Banaras Law School launched a movement to reform legal education in this country under the dynamic leadership of Dean Anandjee and a band of dedicated law teachers.[2] What appeared to be a difficult task, namely, to introduce law teaching on a full time basis with a duration of three years, was pioneered by the Banaras Law School when the traditional courses of study were completely overhauled by it in...and tailored to fullfil the new objectives of legal education.

2. Dean's Report published in (1965) 1 Ban. L. J., 1-32 depicts the glorious efforts made by the Law School to bring about a renaissance in the field of legal education.

The new goals to be pursued were : Several new courses, like were introduced for the first time and with an imaginatively planned Semester system and the new scheme sought to provide the students a career-oriented training in law so as to equip them fully to face the challenges of the legal profession, teaching, research, parliamentary career, industrial and commercial managements, public services and, among other things, international assignments. Although the plan was considered by many a legal educationists as too ambitious to be practical, the Banaras Law School proceeded ahead with a grim determination in order to achieve the objectives it had formulated. The Bar Council of India, the premier body relating to legal profession and legal education in the country, being convinced of the importance and utility of the Banaras Scheme, adopted it as an all India pattern to be followed by the law School following the statutory changes made with a view ensuring reorganization of legal education on the pattern of the Banaras Law School, Law Schools in the country have fallen in line with it.

The Banaras Law School has not looked back since the lead given by it had an all India impact and has made continuous efforts to keep pace with the changing needs of the society by incorporating in the courses of studies such challenging courses like, Law and Consumer, Law and Environment, Law and Population, and Law and Religion as elective courses. The Faculty has under its serious consideration a scheme of Clinical Legal Education Programme which is contemplated to combine clinical legal aid to the poor and the needy with the practical professional training of the selective and limited number of students at the outset who opt for the CLEP course as an integral part of the LL B. syllabus. Again, this will be the first Law School in the country to integrate clinical legal with practical professional training as a part of the syllabus of courses of study of LL. B.

The Law School, while effectuating radical reform in LL.B. programme, has also taken due care to bring about a qualitative change in the Postgraduate programmes as well. It has provided for adequate facilities for higher studies leading to LL. M. and Ph. D. degrees. In the areas like Constitutional Law, Administrative Law, International Law, Labour Law, Taxation Law and the Law of Crimes. The course contents of the LL. M. programme have been so planned as to help the student to develop their pedagogic talents and test their research capabilities.

The Law School is publishing a first rate Law Journal in the country. Eminent Indian and foreign scholars have been contributing their research papers for publication in the Banaras Law Journal. Dispite the fact that at times and intermittantly the Journal has fallen into

backlog, owing to circumstances beyond the control of the Editores, efforts have been continuously made by them to bring the Banaras Law Journal upto date. The Ban. L J. has just completed the tenth year of its publication and we assure our readers that no efforts will be spared to maintain the quality of the Journal and its periodicity. With a dynamic Dean, dedicated band of teachers, a select student body, and a well-equipped library the Banaars Law School is determined to take great strides in the near future towards the goal of making law a genuine intellectul discipline by teaching it as a science and not merely as a practical technique. It aims towards developing a great teaching tradition which becomes a great reforming tradition by inculcating in the students such a senses that the legal problems are vital tract of human experience the solution of which definitely adds to the sum of human goods, so that they become missionaries for new ideas.

The Supreme Court of India stands at the apex of the India Judicial System and has been assigned the role of a sentinel on the *qui vive*. During last two decades or so, since its inception, it has played a significent role in applying and developlng principles of law with respect to the major fields : Constitutional law; Administratize law; Personal Law; Law of Crimes; Law of Contracts; Law of Torts; Law of Taxation; Law of Property; Labour Law; Commercial Law; Private International Law; and Public Intenational Law. Yet comprehensive not only there seems extremely meagre institutional appraisal of the organization and functioning of the Supreme Court, but also, no attempt has been made to evaluate its decisions, including the judicial philosophy and goals which the bar and the bench have believed to be important for the Indian Society. It may be useful to assess both the positive contribution of the Indian Supreme Court and the difficulties standing in the way of its fuller accomplishment. Perhaps, with a view to bringing specia persprectives of the specialsts in diverse fields of law to bear in a culminatin study of the impact of Supreme Court's most significant and vital decisions since its establishment, it may be possible to underline its con-l tribution in vital areas by way of leading and creating national public opinion rather than merely following and reflecting it.

The Law Faculty of the Banaras Hindu University, in order to suitably commemorate completion of its fifty years, brings out a special Golden Jubilee issue of the Banaras Law Journal, a collection of essays on the Indian Supreme Court and its contribution to Law.

SUPREME COURT DECISION MAKING

GEORGE H. GADBOIS, JR.*
University of Kentucky

Introduction : Judges and Politicians

The elevation of Ajit Nath Ray, at the time the fourth ranking puisne judge on the Supreme Court, to the chief justiceship in 1973 was the boldest and most controversial step ever taken by a Prime Minister to attempt to influence the Supreme Court's decisional processes and policy output. From 1950, when the Court began functioning, to the appointment of Ray, the Court had been led by no fewer than thirteen chief justices. Every one of these men had acquired that highest judicial post in the land simply by virtue of being next in line, *i. e.*, by being the seniormost puisne judge on the Court when mandatory retirement at age sixtyfive forced the departure of the sitting chief justice.[1] Whatever disadvantages this convention (and it certainly was a convention by 1973) may have posed, it did offer one distinct advantage in a country where various political, communal, caste, regional and other similar considerations are publicly perceived as criteria employed by the executive when appointments are made. That is, one could not argue very effectively that such "extraneous considerations" played any obvious role in selecting India's highest-ranking judicial officer[2]. A major tenet of the Indian legal culture holds that political hands,

* The author acknowledges gratefully the financial support he has received at various times from the American Institute of Indian Studies, University of Kentucky Research Foundation, and International Legal Center.

1. There was once a partial exception to this statement, for when Chief Justice B. P. Sinha reached retirement age in 1964,the next in line was Syed Jafer Imam However Imam had been in poor health for some time, and he resigned from the Court effective the same day as Sinha's retirment. Then P. B. Gajendragadkar, the next in line after Imam, became chief justice.
2. George H. Gadbois, Jr., "Selection Background Characteristics, and Voting Behaviour of Indian Supreme Court Judges, 1950-1959," In Glendon Schubert and David J. Danelski (eds.), COMPARATIVE JUDICIAL BEHAVIOUR (New York; Oxford University Press, 1969), p. 227. One need not necessarily assume however that no thought went into the selection of chief justices from 1950-1973 Anyone offered a puisne judgeship could easily calculate whether he would ever become chief justice, and how long he would serve in that position. B. P. Sinha, for example, in relinquishing the chief justiceship of the Nagpur High Court in 1954 to become the most junior judge of the Supreme Court, knew that when Chief Justice S. R. Das reached retirement age on September 30, 1959, he would then be the most senior judge and therefore become Chief Justice of India. Presumably the Government makes similar calculations before making Supreme Court appointments.

neither clean nor soiled, should touch the process of selecting judges, for otherwise the independence of the judiciary would be eroded. As one perceptive journalist put it at the time of the "supersession": "The independence of the judiciary is viewed by Indians as something sacrosanct and, over the years, the notion that judges should not be political appointees has acquired the status of a seemingly inviolable principle."[3]

Largely as a result of this seniority convention, there had been neither criticism of the choice of any of the first thirteen, nor even a hint of controversy prior to 1973 over the procedure whereby a chief justice acquired that office. The first thirteen eased into the chief justiceship unobtrusively and literally automatically. In departing from this tradition, Mrs. Gandhi triggered an enormous furore, for in elevating Ray she had to jump him over three more senior puisne judges, each of whom expected to serve some time as chief justice. In "superseding" Shelat, Hegde and Grover, Mrs. Gandhi injected into the selection process a big dose of politicization that had not been present before, and this is what provoked the controversy. Whereas previous chief justices were viewed as separated from the political leadership by a wide chasm, Ray, although his credentials were as impressive as any of his predecessors, came to be identified as the first clearly political appointee to assume the office of chief justice, simply because the Prime Minister saw fit to bypass three more senior judges in order to have Ray as her chief justice.

Why did Mrs. Gandhi do this. Surely we can assume that in choosing Ray over Shelat, Hegde and Grover, she believed that there was something about Ray that she liked better, or in the least there was something about each of the superseded three that she did not like, or liked less. To a far greater extent than had been done before, she drew our attention to the *individuals* who fill judicial roles, and to characteristics that distinguish one judge from another, for there would have been no point in stirring up such a ruckus if she didn't feel that there were some important differences between Ray on the one hand and the superseded three on the other. Shortly, an attempt will be made to determine whether this indeed was the situation.

Another, and as will be evident later, related reason for Mrs. Gandhi's forthright and precipitous action was that she, or perhaps more accurately, policies enthusiastically espoused by her, had not fared well in the Supreme Court. In virtually all of what are consi-

3. "The Sword Under the Scales" FAR EASTERN ECONOMIC REVIEW, May 7, 1973, P. 10.

dered to be the "landmark" Supreme Court rulings during her administration, Mrs. Gandhi had been confronted with decisions which she found either totally unacceptable (*Bank Nationalization* and *Privy Purses*, both in 1970), or considerably less than completely satisfactory (*Golak Nath* in 1967, and *Kesavanand* in 1973). Moreover, by 1973 the Supreme Court was the only remaining major element in the whole political system which continued to cause serious problems for the Prime Minister, and judges of the Court were the only remaining members of the national decision-making elite who rather routinely demonstrated that they were not beholden to her. Except for the Court and judges, by the early 1970 Mrs. Gandhi's position seemed otherwise strong and secure. She had cleansed the Congress of her major opposition and doctrinal impurities in 1969, had scored major victories in the 1971 national election[4] and in the war with Pakistan later that same year, had a comfortable majority in Parliament, and Congress had fared especially well in the 1972 state elections.

The losses Mrs. Gandhi suffered when the Supreme Court rejected her Bank Nationalisation and Abolition of Privy Purses schemes were at once humiliating and politically damaging. These had been two of the most enthusiastically and loudly trumpeted of her new moves to reduce inequality and uplift the masses. At the time of these decisions, the Congress leadership and political spokesmen farther to the left did not conceal their exasperation and displeasure over what they considered to be a conservative paramount judiciary that was not only behind the times, but which seemed to be on the side of the rich bankers and the old aristocracy. Implicit in much of the criticism directed at the Court was that the genre of constitutionalism it seemed to insist upon would mean a continuation of social injustice and economic inequality. Correctly or incorrectly, the Government was pictured as the spokesmen of the progressive Left, and the Supreme Court the most prominent institutional supporter of the retrograde Right. This disdain for judges who had thwarted what the Government insisted was the popular will was often articulated in the form of expressions of a need for "committed judges," *i.e.*, committed to the social, economic, and perhaps even political goals of the Government. Before the particularly controversial *Bank Nationalization* decision in early 1970, the committed judiciary argument was more often whispered than shouted. By the end of that year, when the *Privy*

4. A precipitating cause of which was her defeat at the hands of the Supreme Court in the *Privy Purses* decision in December, 1970.

Purses decision was announced, attacks on the Court's alleged conservatism were more vituperative and commonplace. The late Mohan Kumaramangalam, a distinguished barrister who was at the time Union Minister for Steel and Mines, and who earlier had been Attorney-General of Tamil Nadu offered a fairly mild version of the committed judiciary argument in the course of defending the promotion of Ray to the chief justiceship :

> "Before appointing a judge (to the Supreme Court) we can not ask him whether he would uphold the validity of a particular law or constitutional amendment. That would be to get a committed judiciary. But we as Government, having the power to appoint the judges, have also the right to see whether a judge has been forward-looking or backward-looking before he is promoted."[5]

Kumaramangalam did not venture any definition of the "forward-looking" and "backward-looking" concepts, but presumably he was referring to indications a candiate's political and legal philosophy or ideology, reflected in *e.g.*, his lower court opinions, votes on critical issues, and off-the-bench writings and speeches. Whereas in earlier years it was often said that only those in possession of such attributes as "legal acumen," "learning in the law," and "proper legal equipment" were deemed suitable for appointment to high judicial office, the thrust of Kumaramangalam's comments is that a prospective judge's personal views and political philosophy will hereafter be the predominant consideration for appointment to the Supreme Court.

While Mrs. Gandhi was the first Prime Minister to very pointedly make her preferences known in the selection of a chief justice, she certainly was not the first to be disenchanted with Supreme Court decisions and features of the judicial process. Indeed, the Court has been a troublesome thorn in the side of the Government from the commencement of constitutional government in 1950. And in the intervening years, except for some brief, placid hiatuses, the Court and the Government have been on what might be termed a collision course. The late Prime Minister Nehru was no less happy than his daughter with many Supreme Court decisions, especially those which he felt reflected out-dated views on the sanctity of private property. But whatever the reason (that he was a stronger and more tolerant liberal democrat, perhaps), and despite his autocratic style and his

5. A. Hariharan, "Judging the Judges," FAR EASTERN ECONOMIC REVIEW, May 14, 1973, p. 22.

exasperation with aspects of the judicial process,[6] there is no evidence of which I am aware to indicate that the late Prime Minister was very interested in who was appointed to the Supreme Court, or who became chief justice. Indeed, most of the evidence dealing with Supreme Court appointments indicates that those ultimately appointed were nominated and recommended by chief justices.[7]

Of course, it must be acknowledged that ultimately the Government won virtually all the major disputes with the judiciary. Ultimate primacy of the political branches was secured by a combination of two factors, Firstly, the Constitution may be (and was) amended with relative ease, and secondly, ever since 1950, with the exception of the 1969-1971 period, the Congress, with usually unneeded help from various friendly parties to its left, has enjoyed the kind of substantial parliamentary majority that has assured relatively easy passage of constitutional amendments. The result has been more than three dozen amendments since 1950, many of which have been in response to decisions rendered by the Supreme Court which the Government chose to circumvent, sometimes by restoring to pristine

6. Exemplified, for example, by his sarcastic remark in 1957 that the function of a judge "is not merely to sit in wig and gown for a number of hours a day and look very learned," PROCEEDINGS OF THE CONFERENCE OF LAW MINISTERS (New Delhi ; Library of Parliament, September 18, 1957), mimeograph, p. c-1.

7. Some such evidence is discussed in Gadbois, "Selection, Background Characteristic, and Voting Behavior...," op. cit., p. 222. One of the more fascinating vignettes about the selection process is found in M.C. Chagla's autobiography. According to Chagla, just before the Constitution came into force, then the Chief Justice of the Federal Court, H. J. Kania, offered him a Federal Court judgeship, and assured Chagla that "in the ordinary course I should succeed him as Chief Justice when he retired." Chagla declined the offer "because I thought I was doing more useful work as Chief Justice of Bombay, than I would be doing as a puisne judge in the Supreme Court. Among others, I consulted Setalvad. He agreed with me that I should not accept a puisne judgeship, but should accept the Chief Justiceship if it was offered to me after Kania retired." Further according to Chagla, Setalvad "strongly pressed my claim with Nehru. Nehru seemed agreeable." In the end, however, "the judges of the Supreme Court threatened to resign if the seniority rule was not followed, and the Government yielded to the threat." ROSES IN DECEMBER (Bombay : Bharatiya Vidya Bhavan, 1974), p. 171.

But had Nehru appointed Chagla as the Chief Justice at the time, it is unlikely that such action would have precipitated anything like the supersession crisis of 1973, for what was an established custom by 1973 was only a tradition in-the-making in the early 1950s.

status legislation found wanting by the judiciary, and other times by seeking to eliminate the Court's jurisdiction over particular issue areas. From the Government's perspective, these amendments have not always been unqualified successes, for there have been occasions when, in spite of apparent bars to judicial scrutiny of what the Government believed was exempted legislation, lawyers for the affected private interests were successful in convincing responsive judges that there were loopholes enabling the Court to become involved. In general, however, these two factors have meant that while the Government suffers defeats at the hands of the Supreme Court in the short run, in the long run the Constitution has come to mean what the Government—the Congress Party since 1950—says it means.

While the Government almost invariably does win, its political costs have been substantial. Land reform measures, for example, which were a major plank in the Congress platform at least as far back as the 1920s, and which were very vigorously pursued by Congress-dominated State Goverments in the 1950s, were delayed by litigation, and then often softened after the judiciary determined that they were in one way or another constitutionally unacceptable. Indeed, it has been the matter of property rights, broadly construed, where the Court has sought either to prevent implementation of particular policies, or has delayed implementation, that has sparked most of the major Court-Government altercations. But also in the areas of civil and political liberties, Court decisions have hurt the Government. Since 1950 the Union and State Governments have passed or promulgated various preventive detention, public safety, public order, and internal security acts and ordinances, in each case imposing restrictions on political and civil liberties, and these have precipitated heavy traffic to the judiciary by those detained under such measures. More often than the Government found palatable, the detention without trial of such persons was declared unconstitutional or otherwise invalid by the judiciary. Indeed, it appears that every act or ordinance making provision for detention without trial was litigated, often several times, and the judiciary often managed to discover procedural flaws which led to the release of those in jail. Furthermore, categories of litigants with whom the governing elite seemed to have least in common—especially the landlords and the big businessmen—parties who had been rather emphatically defeated in the national and state legislatures, seemed to be doing very well in the Supreme Court. Businessmen, particularly, fared especially well, winning nearly 43 percent of their litigation against the Government from 1950 to 1967,

and rural landlords won over 40 percent of their legal encounters with the Government during those years.[8]

Not completely without reason, the Government rankled at the periodic blows it suffered at the hands of the Supreme Court. Few political leaders will be enthusiastic about any genuinely independent body which thwarts acts or policies they enthusiastically promote, or whose decisions create the impression that the political leaders are behaving unconstitutionally, illegally, or simply badly. While systematic survey research on public attitudes towards the Supreme Court vis-a-vis the Government has not been undertaken, a Government which loses frequently, and is often found guilty of arbitrary behaviour (especially by a tribunal publicly perceived as composed of judicial priests immune from sin), must be viewed with increasing cynicism and alienation. No government will get much pleasure from being called frequently to the bar of its highest court, especially one in full control over all other organs of government. Losing was, of course, even more disagreeable. And the Government did indeed fare very poorly before the Supreme Court. As was reported elsewhere,

> "In slightly over two-thirds (2,186) of the [3272] reported decisions (from 1950 to 1967 in the *Supreme Court Reports*], the disputants were some level of the government on one side, and an individual or private party on the other. The government lost fully 40 per cent of this litigation, which is substantial proof that the judges do not cower before the ministers and legislators. Few, if any, other governments in the world fare as poorly in encounters with their citizens before the nation's highest tribunal. Moreover, in 487 of these 32,72 decisions, the validity of legislation was explicitly attacked by the private party to the dispute, and in 128 of these instances the legislation was held unconstitutional or otherwise invalid in its entirety (27 State laws, 4 Central laws), or in part (70 State laws, 27 Central laws)."[9]

These data indicate emphatically that Supreme Court judges have made extensive use of their review powers, and have been anything but solicitous with the Government. When the Government enters the

8. George H. Gadbois, Jr., "The Supreme Court of India : A Preliminary Report of an Empirical Study," JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES, Vol IV, No. 1 (January-March, 1970), p. 46.
9. George H. Gadbois, Jr., "Indian Judicial Behaviour," ECONOMIC AND POLITICAL WEEKLY, VOL. V, Nos. 3, 4 and 5 (Annual Number, 1970), p. 153.

Supreme Court, the odds are only about six to four that it will find support from the judges for what it has done. Government in India is ubiquitous and powerful, and the fact that it loses 40 percent of its encounters with its citizens before the highest judicial tribunal of the nation has to be significant.

There is no doubt that the Supreme Court has been a very important institution in India during the past quarter century. Indeed, because of the central role the Supreme Court has come to occupy in the political system since independence; the higher judiciary in India probably stands apart from all other paramount judiciaries in developing countries, and apart from judicial structures in many developed political systems. Most new nations included provision for strong, independent judiciaries in their new constitutions, but in most instances these institutions have been shown to be too fragile, resting on weak cultural foundations, not sufficiently differentiated from and autonomous of executives and legislatures, and generally in possession of only formal power, and not effective, substantive authority. Post-independence governing elites, flushed with victory after long colonial struggles, and anxious to get on quickly with the tasks of nation-building and economic development, have usually demonstrated an intolerance of the judiciary, particularly of the judicial process, especially if the courts have attempted to exhibit authority and independence by expressing disapproval of executive and legislative actions. Often when judicial institutions attempted to do the latter, they were ignored, emasculated, relegated to a weak role in the system, or simply closed down. Not so in India though. The strength and independence of the higher judiciary had been effectively institutionalized during the long period of colonial rule, and by 1950 well-defined rules of procedure had an all-India application, a hierarchy of courts had been established, and a competent judiciary was functioning. Judicial structures were by 1950 quite highly differentiated and autonomous from the executive, and courts and judges were objects of awe and respect. And the attitude of the political elite was then, and to a very large extent has continued to be for the first two and one-half decades, most favourable for the further institutionalization of a strong, independent judiciary, The governing elite has often been deeply distressed by particular decisions, and they have effectively overcome, especially via the amendment route, many decisions they found objectionable. But the governing elite hasn't ignored decisions, has continued to make use of the judicial process, and hasn't sought in any gross way to undermine the higher judiciary.

From time to time Supreme Court decisions have led to "clashes" with the executive or legislature, and occasionally these clashes have escalated into constitutional crises and confrontations between the judiciary and the other branches. In retrospect, these clashes have, again because the resulting amendments have usually reduced the Supreme Court's jurisdiction, cost the Court some in actual, even measurable, *power* and *jurisdiction*. However, and this is a key point, the Court seems to have lost little, if any at all, *authority* and, particularly, *prestige*. Indeed, it could be argued rather persuasively that the Supreme Court is on stronger footing now, is more institutionalized now, is held in higher esteem by the public, and generally enjoys a stronger position in the political and legal cultures, than it did in 1950.

The clashes may in fact have hurt the Government more than the Court, for while the former's powers have been enhanced (by further delimiting the Court's review powers), this increase has been quite marginal, and its prestige and overall authority losses, caused mainly by the major rebukes (e. g., *Privy Purses, Bank Nationalization*), were probably greater. What little the Supreme Court has lost in a raw power sense is virtually insignificant when compared with the increased prestige and the even stronger image the judges have acquired as bedrocks of forthright honesty, integrity, rectitude, and particularly fearlessness of the governing elite. Controversial decisions have often resulted in clashes and diminished Court jurisdiction, but the accompanying criticism of these decisions, and often of the Court itself, serves also to underline the gulf between politicians and judges, and emphasizes and reiterates the fact that the Court and the judges are not simply adjuncts of the Government. Indeed, the view is widespread that the judges are characterized not only by the absence of subservience, but also by a willingness to stand firm and do battle with the politicians. The clashes, in sum, have increased the Court's visibility and strengthened the view that judges are independent and detached from the Government of the day, and this has resulted in enhanced prestige and national authority.

Indian Supreme Court decisions clearly do have significant political consequences,[10] which is to say also that judges exercise power, and that judgeship are desirable objects in themselves. Moreover, as will be evident shortly, the judges have considerable discretion in

10. If they did not, the interests of the political scientist in Indian judges and courts could not be justified. See further, Walter F. Murphy and Joseph Tanenhaus, THE STUDY OF PUBLIC LAW (New York : Random House. 1972), p. 30.

their decision-making. Had they little or no discretion, or little power, there would have been little reason for Mrs. Gandhi to move Ray abruptly up to the front of the line. Indeed, implicit in Mrs. Gandhi's decision to promote Ray are at least the following three considerations, which we will treat (and test) as hypotheses: (1) Chief justices can have a greater impact than puisne justices in the decisional process and overall policy output of the entire Court; (2) Ray is different from Shelat, Hegde, and Grover; and (3) Ray's attitudes and values are more consistent with Mrs. Gandhi's conception of the nations's best interests than the superseded judges.

ASPECTS OF JUDICIAL BEHAVIOUR

Earlier research on Indian judicial behaviour suggests that these hypotheses, especially the first two, are not only plausible, but can be tested systematically and empirically. This earlier research, published in 1969 and 1970[11] focussed on the voting behaviour of Indian Supreme Court judges in primarily non-unanimous decisions from the Court's inception in 1950 to 1968. This work was exploratory and, because it utilized explicitly quantitative techniques, was very unconventional (in India, not in the West). Every effort was made to be entirely objective. In attempting to meet this goal the nature of the data utilized, the hypotheses tested, the assumptions made, the methods used, and the terms employed, were very explicitly, hopefully and clearly, defined and explained.[12] Indeed, it is believed that any other analyst could examine these same decisions and, utilizing the same assumptions, hypotheses and methods, arrive at identical conclusions.[13]

11. Gadbois, "Selection, Background Characteristics and Voting Behaviour.....," *op. cit.*, and "Indian Judicial Behaviour," *op. cit.* Others written by this author about the same time dealt with the political sociology of the first 36 Supreme Court Judges—"Indian Supreme Court Judges: A Portrait, "LAW AND SOCIETY REVIEW, Vol. III, Nos. 2 and 3 (November 1968—February 1969), pp 317-336; with who uses the Supreme Court, for what reasons, and who wins—"The Supreme Court of India: A Preliminary Report of an Empirical Study," *op. cit.* (fn. 8); and a case study—"Keshav Singh: Contemptuous Judges and Contumacious Legislators," in Theodore L. Becker (ed.), POLITICAL TRIALS (Indianapolis and New York: The Bobbs-Merrill Company, Inc., 1971), pp. 34-48.
12. This having been done before, it will not be repeated here. The interested reader is referred particularly to the ECONOMIC AND POLITICAL WEEKLY piece
13. The articles referred to were the first published efforts which attempted to describe, explain, and analyze Indian Supreme Court decision-making behaviourally. Because of the novelty of the approach, which inevitably tends to disrobe the judges to a far greater extent than is customary in mainstream writing dealing with Indian courts and judges, the expectation was that these articles would generate, if not controversy, at least scholarly dialogue and critical comment, hopefully leading to improvements in the conceptualizations, employed, competing or additional hypotheses and attitudinal variables to be tested, more careful scrutiny of the explicit and implicit assumptions made, discussion of alternative research strategies, and, finally, acceptance or rejection of the findings. None of this was forthcoming. As far as I am aware, only one other study of Indian judicial behaviour, utilizing essentially quantitative techniques, was published in the intervening years. This was V. S. K. Haranath's "Supreme Court of India, 1950-1970: An Empirical Inquiry into Judicial Behaviour," JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES, Vol. VII, No. 4 (October-December, 1973), pp. 94-116. Haranath's article covers a somewhat longer period of time than my work, and relies more on a single methodological technique scalogram analysis. Perhaps the most important intellectual concern raised by Haranath's article is that of at what point does replication become plagiarism.

As a result of the relative silence with which these articles were greeted we are left with a host of concepts, variables, hypotheses and assumptions which really have not been adequately tested in the Indian academic marketplace.

Disagreement among judges over some issue, substantive or procedural, is manifest in non-unanimous decisions. Were there no disagreement among judicial decision-makers, every decision would be unanimous. Thus the major question that this earlier research sought an answer to, was "Over what do they disagree, and how does one account for the disagreement ?"[14] Here the researcher's task is first attempting to find recurring patterns, uniformities and consistencies in the choices each judge makes in divided decisions and then, if patterns or regularities are observable, indentifying the variables sufficient to explain the observed patterns. As was said earlier:

> "This is a search for the presence of stable attitudes in the behavioural patterns of the individual judges, and this is a search which requires one to observe the judge's behaviour in many decisions over a substantial period of time.
>
> If these Indian judges are at all akin to judicial decision-makers in other countries; then it is highly likely that their individualistic bahaviour, in split decisions generally, will reveal that there are recurring patterns in the choices that most judges make.....And the expectation is (unless one has some basis for

14. "Indian Judicial Behaviour," *op. cit.*, p. 153.

the prediction that such bahaviour will be arbitrary or whimsical) that analysis of such opinions and decisions will show that particular pairs of judges may not only differ over time in the outcomes they prefer, but that each will be consistent—though consistently different—in the choices he makes. Such consistently different judicial behaviour, if indeed present, suggests the possibility that personal attitudes and values are operative in such decisions".[15]

During the 1960s, for example, when Koka Subba Rao and Raghubar Dayal were members of the Court, they were on the same panel or bench in a total of twentynine divided decisions. However, they disagreed (were on opposite sides) in twentythree of these. They participated together in fourteen divided civil liberties decisions, and they were in disagreement concerning the outcome in all but one of them, they were on the same bench in fifteen divided economic freedom decisions, disagreeing ten times and agreeing in five. It should be emphasized that in these twentynine divided decisions in which they participated conjointly, but on opposite sides of the outcome in twentythree, the facts, the law and the Constitution involved in all of these, were identical. When any pair of judges, confronted with the same stimuli, differ so sharply over how to decide cases, it is obviously quite reasonable to hypothesize that personal values are operative.[16]

Examination of all non-unanimous decisions reported from 1950 to late 1968 revealed that about seventyfive percent of them involved some kind of encounter between a private party and the state *i. e.*, between an individual or private interests on one side, and some level of the Government (Union, State, other) on the other. Moreover, all but a few of these disputes were found to raise questions of the scope of extent of *either* personal rights and freedoms, *or* of economic or property rights and freedoms. The former were designated as "civil liberties" cases, and included such familiar civil liberties issues as free speech and preventive detention. The latter were labelled the "economic freedom" cases, and included such familiar economic regulation issues as land reform, taxes, the regulation of business, and nationalization of various sectors of the economy.

Thus we had two categories of non-unanimous decisions—civil liberties and economic freedom. Each of the cases was considered

15. *Ibid*, pp 153-154.
16. *Ibid.*, p. 163.

as a stimulus which evoked a response by the participating judges. In this earlier research, we were concerned principally with the judge's *voting* response, that is, with what he *did*, and not with what he *said*. Determining the direction of a judge's vote is an entirely objective undertaking for, no matter how much he might waver in his written opinion, he is obliged ultimately either to accept or reject the appellant's or petitioner's claim.[17] In utilizing votes rather verbalizations, the intent is not to underestimate or discredit the importance of what judges say in their written opinions. But since opinions may often simply be professionally and publicly acceptable reasons which explain why each judge voted as he did, the use of votes does enable the researcher to avoid the problem of having to assume some correlation between words (opinions) and deeds (votes).

So the votes were simply partitioned (for the appellant, for the respondent) and the content of the opinions was not at this stage analyzed. If the appellant was an individual pressing a civil liberties claim, and the respondent was the Government which had imposed restrictions on his liberty, a judge whose vote supported this appellant would be scored as having cast a liberal (pro-individual) civil liberties vote, while the judge who supported the respondent in this instance was scored as having cast a conservative (pro-government, in support of the restriction) vote. In the economic freedom/regulation cases, the judge whose voting behaviour indicated support for the private interest in, *e. g.*, land reform, tax, of business regulation cases, would be denoted as having cast a conservative vote, and the judge who supported land reform, regulation of bu iness, etc.) would be considered as having cast a liberal vote.

There being thus two categories of cases, and no more than two response possibilities, the result is a fourfold classification scheme. For the sake of convenience, and also in order to describe what each of the four possible voting behaviour patterns represent in commonly used ideological terms, the following four labels were employed :

17. Occasionally, however, there is confusion over precisely what positions of view the judges' votes did support *Kesavananda*-the Constitution amendment case (AIR 1973 SC 1461 , was one such case, and hence some analyst discretion was necessary in determining what each judge, in fact voted for and against in that dispute *Kesavananda* is discussed below, and other analysts may not agree with the manner in which the votes of the thirteen participating judges have been partitioned. My understanding of that decision follows closely that of T. R. Andhyarujina, "Constitution Amendment Case : What it Decided," ECONOMIC AND POLITICAL WEEKLY, Vol. VIII, No. 25 (June 23, 1973), pp 1098-1099.

modern liberal : support for the individual in civil liberties cases, but rejection of the individual or private interest claim in economic freedom/regulation cases.

modern conservative : acceptance of restrictions on civil liberties, but rejection of economic regulation.

classical liberal : rejection of governmental regulation of both civil and economic freedoms.

classical conservative : acceptance of governmental regulations or restrictions of both civil and economic freedoms.

Having established the framework for analyzing the non-unanimous decisions, the earlier research then reported a "policy position" or location for each judge on a two-dimensional plot. This policy position was determined solely according to the nature of his voting responses to the stimuli presented by the civil liberties and economic freedom cases. A number of hypotheses were tested, and many findings were reported. Since these are in print elsewhere,[18] there is no need to repeat them here. However, one of the earlier graphic representations is reproduced here (Figure I)[19] in order to subject it to additional analysis. *(See Fig. I)*

All judges for whom we had at least six behavioural observations (*i. e.*, votes) were plotted in this figure. Of the thirtyseven judges who served on the Supreme Court from 1950 through late 1968, thirtythree met this criterion [20] Of these thirtythree, all but Hegde and Mitter, who had participated in non-unanimous economic regulation but not civil liberties and economic freedom dimensions. Two other (Shelat and Ayyangar), though having participated in both categories of decisions, exhibited what was termed "neutral" behaviour in one of the two categories,[21] and therefore did not fit neatly into any of the four quardrants. So we were able to plot a total of twenty-nine judges in one or another of the four quadrants.[22] This does not mean, however, that one can feel confident that all of them are precisely where they

18. "Indian Judicial Behaviour," op. cit., pp. 157-166.
19. What is indentified as Figure I here was indentified as Figure V in *ibid.*, p. 163.
20. Omitted were Menon, Raju, Grover and Bhargava.
21. Ayyangar participated in 14 divided civil liberties cases, and his votes were evenly split (7 for the individual, 7 for the Government). Shelat's two civil liberties votes were split also.
22. For an elaboratee xplanation on how the precise policy position for each judge was determined, see "Indian Judicial Behaviour," op. cit., pp. 155-156.

"belong," for while there was very ample data or some (*e. g.*, 91 behavioural observations of Subba Rao, and 83 of Sarkar), there was very litile data on others (*e. g.*, Vaidialingam with 6, and Hasan with 7).[23]

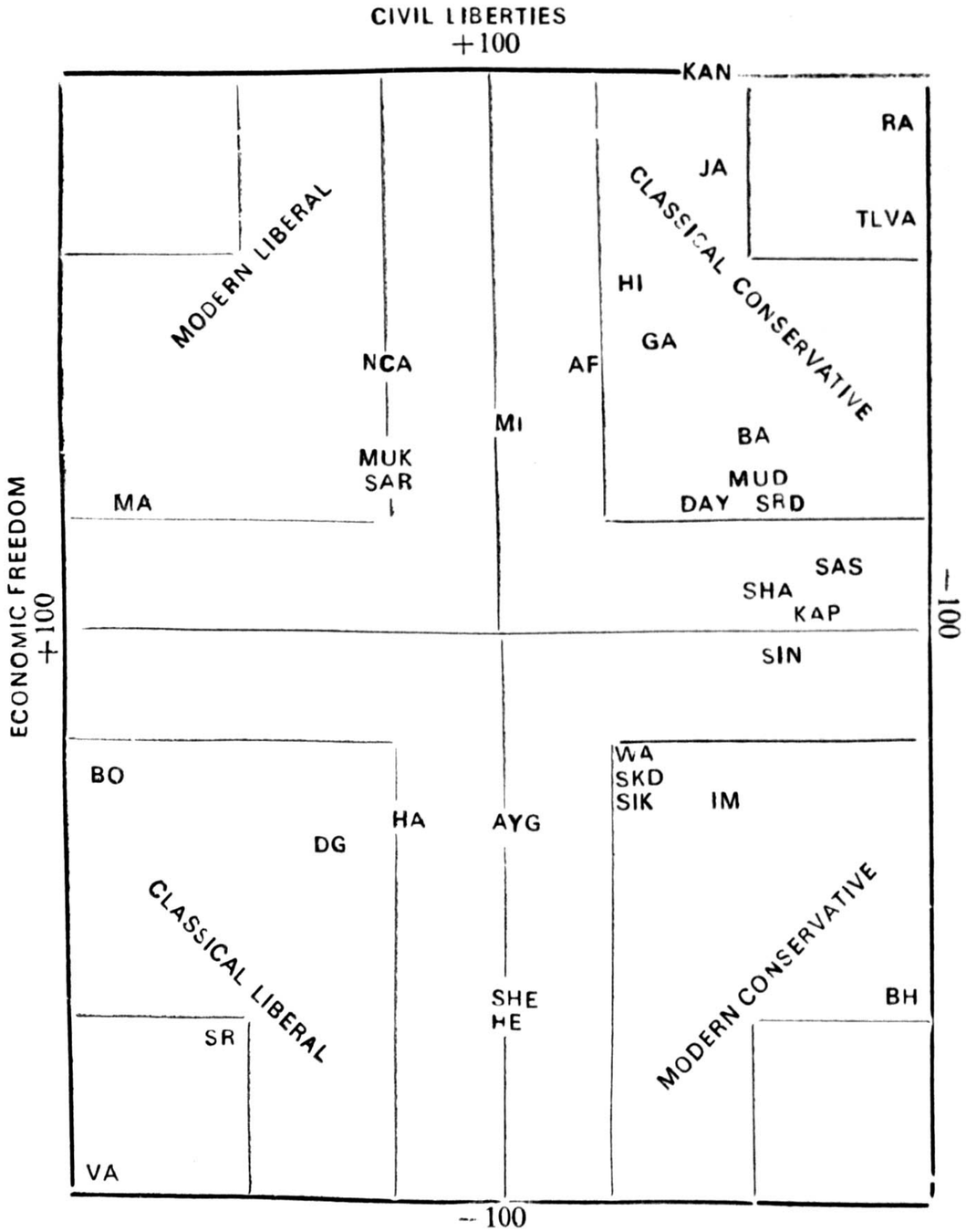
Preliminary analysis indicated that the most heavily populated quadrant was the classical conservative, with 14 of the 29 judges located within it. Looking more closely, it can be seen that the location of every judge reveals attitudes on one dimension which are stronger than his attitudes on the other. Sastri, for example, is found in the classical conservative quadrant. His location in the bottom right hand corner of that quadrant shows that while he was a rather extreme political conservative (in 15 divided civil liberties decisions, he supported the curtailment of liberty 13 times, and the libertarian position only twice), his voting behaviour in the economic regulation cases (6 liberal, 5 conservative) places him almost squarely on the median, *i. e.*, almost on the netural line. Thus when it comes to attaching labels, one cannot really attach any significance to Sastri's votes in the economic regulation cases, and should describe him as a political conservative, a label appropriate to his votes in the civil liberties cases only.

For the same reasons, we should ignore all the other "weak" or neutral positions. No judge's position is in the weak range on both dimensions, but seven are weak on the civil liberties dimension, and four others are weak on the economic freedom dimension. This step results in a revised distribution of ten classical conservatives, five classical liberals, five modern conservatives, and two modern liberals.

23. In this 1970 conceptualization of "individualistic" behaviour, five distinct forms were distinguished (*ibid* p 153). Four were varieties of minority (dissenting) behaviour, and the fifth was concurring (with the outcome) opinions. Further consideration of this conceptualization of individualistic behaviour leads me to the conclusion that while concurring opinions most certainly are expressions of individualistic behaviour, the other four forms are probably more readily revealing of judges' attitudes Concurring opinions usually, it is believed, indicate a reluctance to accept the full thrust of the outcome as decreed by whomever wrote the opinon of the Court. Occasionally, it is true, they express a stronger position than is found in the Court's opinion, but this is less common In any event, they are less easily apportioned than any of the four forms of minority behaviour, and probably tell us less about a judge's values than do both minority and majority votes in divided decisions. In any future research of this nature, I would not continue to make use of concurring votes as facilely as I did in 1970, and would probably subject them to systematic content analysis. However, for the purposes of this paper, they were taken into consideration in constructing Figure I.

Figure I

Policy Positions of Indian Supreme Court Judges, 1950-1968



Abbreviations used in Figure I

NCA	Alyar, N. C.	GA	Gajendragadkar, P.B.	MUK	Mukherjea, B K.
AYG	Ayyangar, N. R.	HA	Hasan, G.	RA	Ramaswami, V.
TLVA	Ayyar, T.L.V.	HI	Hidayatullah, M.	SAR	Sarkar, A.K.
BA	Bachawat, R.S.	HE	Hegde, K.S.	SAS	Sastri, M P.
BH	Bhagwati, N.H.	IM	Imam, S.J.	SHA	Shah, J C.
BO	Bose, V.	JA	Jagannathdas, B.	SHE	Shelat J. M.
SKD	Das. S.K.	KAN	Kania, H J.	SIK	Sikri, S M.
SRD	Das, S.R.	KAP	Kapur, J.L.	SIN	Sinha, B
DG	Das Gupta, K.C.	MA	Mahajan, M.C	SR	Subba Rao, K.
DAY	Dayal, R.	MI	Mitter, G.K	VA	Vaidialingam,C,A.
FA	Fazl Ali, S.	MUD	Mudholkar, J.R.	WA	Wanchoo, K N.

Perhaps it should be stressed that the labels are employed largely for the sake of convenience, and are intended only to describe, and not explain or account for the various configurations of voting behaviour. Thus in identifying Subba Rao as a classical liberal, the intention is not to imply that he consistently (47 times in 57 cases) rejected economic regulation because he was deeply imbued with the *laissez-faire* economic doctrines popular in the nineteenth century. Indeed, though Subba Rao's written opinions were not systematically analyzed, I don't recall finding much evidence that he did express explicitly *laissez-faire* economic views. Subba Rao may have rejected regulation of the economy for quite different reasons. So the classical liberal label does not imply a third dimension, *i. e.*, the intent is not to suggest that Subba Rao voted as he did because he was a classical liberal. That label, as well as the others, is used only because of its descriptive convenience. Subba Rao's voting behaviour was certainly very consistent with classical or nineteenth century liberalism, but careful opinion analysis would be required before one could have reason to observe that he voted as he did because he was a classical liberal. This proviso applies, of course, to the other ideological labels as well.

This preponderance of classical conservatives (the term "authoritarian" is more in vogue today) raises an interesting point. If it can be assumed that the Government is anxious to win each case to which it is a party, then it would follow that the Government would be most happy with the classical conservatives, for they are the judges with a propensity to support civil liberties restrictions and economic regulation, *i. e.*, the position of the authorities. By the same reasoning, the Government would be least happy with the classical liberals (perhaps better known today as "libertarians" or "individualists") for the tendency of these is to look with disfavour on both subtractions from civil liberties and regulation of the economy.[24] Continuing this reasoning, the Government would presumably find the modern liberals and modern conservatives, each of whom accept restrictions in one area but not in the other, more palatable than the classical liberals, but less desirable than the classical conservatives.

Interestingly, in view of all the clashes between the Government and the Court, and the Government's dissatisfaction with many decisions

24. One might test the hypothesis that being happier with the classical conservatives, it is those that the Government appoints to lucrative or prominent post-retirement positions. See further, my "Indian Supreme Court Judges : A Portrait," *op. cit.*, pp. 332-334.

of the Court, this analysis of the divided decisions shows that while the Court hasn't quite been dominated by classical conservative judges, they are the most numerous of the four types. Indeed, after eliminating from consideration those judges whose behaviour on one of the two dimensions resulted in location in the neutral zone, we found that nearly half of those remaining – ten of twenty-two – were located in the highly populated authoritarian, or classical conservative, quadrant. Then how can one account for the fact that in most of what are generally considered the "landmak" decisions, the Government loses ? Perhaps the answer is that in these cases, the restriction the Government had imposed on the civil or economic rights went so beyond what the Constitution permits, or was so arbitrary or so procedurally unacceptable, that even judges disposed towards accepting government-imposed restrictions felt compelled to find against the Government and in favour of the private interest. Another plausible explanation is that perhaps in many of these landmark decisions the particular panels which decided these cases happened then to be dominated by a subset of judges disposed towards rejecting the restrictions imposed by the Government.[25] But equally plausible—indeed, I think most persuasive—is third possible explanation. Most of the landmark cases seem to have involved economic regulation (land reform, privy purses, bank nationalization, etc.) rather than civil liberties. If we compare the positions of the judges in Figure I on the economic dimension with their position on the civil liberties dimension, we see that while 16 are economic liberals and 13 are economic conservatives, only 7 are political liberals. and 19 are political conservatives.[26] In short, restrictions on civil liberties tend to find sanction among considerably more of the judges in these divided cases than does regulation of the economy. There are almost twice as many (13) economic conservatives as there are political liberals (7), and this may be part of the reason that the Government seems to lose most of what we have termed, not very elegantly, the landmark disputes.

Before leaving this discussion of the policy positions of the judges, it must be understood that Figure I does not purport to measure precisely that relationship between or among any pair of the judges. Thus, although Ramaswami and Gajendragadkar are both located in the classical conservative quadrant, with the former apparently a

25. In the discussion of the role of the chief justice below, we shall be dealing with the possibility of chief justices biassing policy outcomes.

26. The remainder in each case are in the neutral zone.

"stronger" classical conservative than the latter, we have provided no basis upon which to make that observation. This is because we did not observe explicitly the relationship between these two judges. In short, the policy positions represent approximations of the attitudes of each judge, and these were determined solely on the basis of each judge's voting responses to the stimuli presented by the litigation in which he was a participating judge, but without regard for the identity of the other judges who happened to be participating on the same panel. Before one can show that one judge is a stronger liberal or conservative than another, additional analysis, making use of more powerful tools, must be undertaken.[27]

One such technique is scalogram analysis, and this was employed earlier to investigate the possibility of significant attitudinal differences among the judges who served from 1950 to 1954.[28] The relatively small number of non-unanimous cases, the rapid turnover of judges, and particularly the use of the divisional bench system, combine to pose serious data difficulties for the behavioural scientist using quantitative methods. As a result, the scales reported in that research, one of which is reproduced in Figure II, were identified as quasiscales, *i. e.*, they did not satisfy the requirements of cumulative scale theory.

Embraced in this scale are all of the non-unanimous civil liberties and economic regulation decisions during the approximately five-year period from the Court's beginning in 1950 up to Chief Justice Mahajan's retirement on December 22, 1954. The scalability of these twenty-three (15 civil liberties and 8 economic regulation) decisions seemed worth testing because they all had one thing in common : the Government was on one side of each of the disputes, and a private interest (an individual, landlord, privately-owned business) was on the other side. The attitudinal dimension hypothesized for investigation by cumulative scaling was individualism (versus Government authority).

This scalogram analysis, perhaps even more graphically than the two-dimensional plot, reveals very clear differences between the judges in their responses to the stimuli presented by the litigation. Indeed,

27. See further, "Indian Judicial Behaviour", *op. cit.*, pp. 159-163.

28. "Selection, Background Characteristics, and Voting Behavior.....", *op. cit.*, pp. 242-247. The discussion here of scalogram analysis follows closely that found in this 1969 article. The latter, however, subjects the voting data to analysis with other methodological tools as well.

Figure II

Scalogram Analysis of Civil Liberties and Economic Freedom Cases
January 26, 1950 to December 22, 1954.

Cases **	Bose	Mahajan	Aiyar, N. C.	Mukherjea	Hasan	Kania	Ali	Das, S. R.	Sastri	Jagannadhadas	Bhagwati	Ayyar, T. L. V.	Votes
50/605		+		+		+	⊖	+	+				5-1
50/594		+		+		+	⊖	+	+				5-1
52/284	+	+	+	+			+	+	−				6-1
52/710	NP	+	+	+			NP	+	−				4-1
51/167		NP	+	+		+	+	−	−				4-2
55:1/313*	+	+		+	+			−		NP	NP	NP	4-1
54/933	+	+		+	+			−		NP	NP	NP	4-1
52/889*	NP	+	+	+			NP	−	−				3-2
50/519		+		+		−	−	NP	−				2-3
50/621*		+		+		−	−	−	−				2-4
50/869*		NP		−		−	−	⊕	⊕				2-3
50/88		+		−		−	⊕	−	−				2-4
52/435	+	+	+	−			−	−	−				3-4
51/451	+	+	NP	NP		−	NP	−	−				2-3
54/842*	+	+		NP	−			−	−				2-3
54/30	+	NP		−	−			NP	−	−	NP		1-4
53/1069*	+	NP		−	−			NP	−		−		1-4
52/612	NP	+	−	−			NP	−	−				1-4
53/589	+	NP	−	−	⊕			NP	−		NP		2-3
50/459*		+		−		−	−	NP	−				1-4
50/435*		+		−		NP	−	−	−				1-4
51/621	+	−	NP	NP		−	NP	−	−				1-4
51/228		−	−	⊕		−	⊕	−	−				2-5
Total participations	10	18	8	20	6	11	12	18	21	1	1	0	126
Inconsistent votes	0	0	0	1	1	0	4	1	1	0	0	0	8

Coefficient of scalability ; 75

Legend : + For the individual claim (anti-government)

− Against the individual claim (pro-government)

NP Non-participation

Blank Retired, deceased, not yet appointed

* Economic issue

** Case citations from SUPREME COURT REPORTS

one need not be familiar with the methods of quantitative analysis nor share all the assumptions of behavioural research (the key assumption here being that attitudes are logical inferences from sets of decisional responses) to see in this scalogram obvious differences between the judges, differences that are best accounted for by competing economic, political, and perhaps also social, philosophies.

What this graphic presentation clearly shows is that there is one consistent ordering for seven of the nine judges (excluding Jagannathdas, Bhagwati, and Ayyar) on political (civil liberties) and economic issues. Ranging from the most individualistic (classical liberal) judge, that ranking includes in the sequence indicated : Bose, Mahajan, N. C. Aiyar, Kania, Fazl Ali, Das and Sastri. The first two are the most consistently individualistic and the last two the most collectivistic. Both of the two remaining judges (Mukherjea and Hasan) of this group of nine whose participation is sufficient to permit this tentative interpretation are in the middle of the scale.

Bose participated in ten of the cases (seven civil liberties, three economic regulation), and voted in support of the individual claim every time. Mahajan participated in eighteen, and in sixteen of these he too rejected the Government's action and supported the individual or private interest claim; moreover, in all six of the cases raising predominantly economic issues, he rejected the Government position. Sastri and, to a slightly lesser extent Das, represent what we earlier termed classical conservative (or authoritarian) behaviour. In eighteen cases out of twenty-one, Sastri upheld whatever action the Government took to restrict individual freedoms. And in thirteen cases out of eighteen, S. R. Das acted similarly. Das participated in six of the eight economic regulation cases, and in only one of these did he vote against governmental action restrictive of claimed property rights; Sastri participated in seven, and he also departed only once from his customary predisposition toward accepting whatever the Government had done.[29]

29. Above at page 16 it was noted that Sastri's policy position close to the economic freedom axis of the two-dimensional plot was based on *six* liberal and *five* conservative votes. The other four indications of conservative behaviour were concurring with the outcome opinions authored by Sastri. The fact that including these concurring votes "softened" Sastri's position on economic issues illustrates the point made earlier (footnote 23) which questioned the wisdom of using such data, or of considering it equivalent in value to votes in divided decisions.

Thus cumulative scale analysis is a very useful technique for determining whether there is a systematic ordering of voting inter-agreement. But we should reiterate that for the reasons already mentioned, we can not assert with complete confidence that we have a reliable scale, for all the requirements of scale theory simply are not met by the data from this 1950-54 period, nor for any other period in the Indian Supreme Court's brief existence. Yet there is every indication that had we more data, a scientifically valid scale could have been constructed.

JUDICIAL BACKGROUNDS AND JUDICIAL ATTITUDES

Having established that there are clear differences among the judges reflected in their responses to the stimuli presented by disputes raising civil liberties and economic freedom issues, and having partially demonstrated, via scalogram analysis, that such differences appear to be reflected in consistently different attitudes,[30] the question arises : How do we account for these attitudinal differences ? Why are some judges liberals, and others conservatives ?

The answer, in a few words, is that we simply do not know, at this juncture at any rate. Behavioural differences there surely are, but these differences appear virtually impossible to explain. Discovering the presence of attitudinal differences is much easier than explaining why there are such differences.

Scholars elsewhere, particularly in the United States, have attempted to find significant correlations between selected social background characteristics of American judges (*e. g.*, party affiliation, age, religion, region, length of service on the bench, and educational qualifications) and the attitudes and values they exhibit in their decision-making behaviour.[31] But these studies have not been particularly successful in accounting for the differences among the judges. Political party affiliation has turned out to be the variable most strongly associated with voting, but it provides no passkey. Sociological background factors simply have not been found to be very helpful in predicting voting patterns of judges. Of course, if it could be demonstrated that the

30. For example, Figure II shows that there were obvious differences between Bose and Sastri (they disagreed in every one of the eight non-unanimous cases in which they were on the same panel). Their behaviour was also *consistently* different in that Bose did not support the Government in any of the scaled decisions, and Sastri was almost as consistent in the other direction, *i. e.*, he supported the Government 18 times out of 21.

31. Several of these studies are discussed in Murphy and Tanenhaus, *op.cit.*, p. 103-111.

social and political backgrounds of those selected as judges make real differences in their behaviour on the bench, then these background factors would become very critical topics for examination and analysis.

Elsewhere, we have carefully examined the background attributes of Indian Supreme Court judges, and have noted how striking is the homogeneous character and similar socialization experiences shared by these men :

"The prototypic judge was the product of a socially prestigeful and economically advantaged family, was a Hindu (most often a Brahmin), was educated at one of the better Indian universities or in England, spent twenty years in private law practice before the High Court in his home State, refrained from participation in the nationalist movement before 1947 and in post-independence politics thereafter, was appointed to the High Court before which he practiced when he was forty-seven, spent ten years as a High Court judge by which time he was the Chief Justice or seniormost puisne judge of that Court, and then was promoted to the Supreme Court when he was fifty-seven years of age."[32]

The easiest, though not necessarily accurate, conclusion to draw from this composite picture of the typical judge, is that their relative sameness in social backgrounds and socialization experiences is the best explanation for the astonishingly (by comparison with judges on collegial court elsewhere) high degree of unanimity found in Indian Supreme Court decisions. Of a total of 3,272 decisions reported (in the *Supreme Court Reports*) from 1950 to 1967, all but 274 were unanimous benches. In short, in terms of their backgrounds and pre-Supreme Court experiences the judges look remarkably alike, and do indeed behave alike when voting in cases before them for resolution. They appear to be virtually interchangeable part of a judicial decision-making machine.

But this seems simply too facile a conclusion, for though most of them do not appear to disagree with their peers very often, we have shown empirically that there are marked differences in the voting

32. "Indian Supreme Court Judges : A Portrait", *op. cit.*, p. 3 17. In view of our special interest in Chief Justice Ray, it is appropriate to point out that this portrait of a typical Supreme Court judge fits Ray exceptionally well. Evidently Ray is an English-trained barrister, spent about 19 years in private practice before the Calcutta High Court, was appointed to that Court in 1958, when he was about 46 or 47 years of age, and then was appointed to the Supreme Court in 1969, at about age 57 or 58. Thus there appears to be nothing at all unusual about Ray's background.

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behaviour of many of the judges, and that these voting differences appear to spring from attitudinal differences.

In an effort to find some explanation for the attitudinal differences, we isolated several of the background variables and sought to determine whether any of them were connected with the judicial policy positions (Figure I). Though we did not proceed in a very methodologically sophisticated way, we found nothing that seemed of much significance. Thus, for example, though about half the judges received some of their education in England, and the remaining half were schooled entirely in India, both barristers and advocates are found in all four quadrants, which seems to indicate that place of education does not explain anything. With other variables our experience was similar. Five of the judges plotted were ICS men, yet they are found in three different quadrants. Similarly, the four Muslim judges are found in three different quadrants, which suggests that religion is probably not a significant variable. There is no striking evidence either that region explains anything, for judges from North and South India seem almost randomly distributed in the Figure. Although five of the six from the Calcutta High Court are economic liberals, this is not necessarily significant.

Before drawing any firm conclusions that background variables seem unrelated to the attitudinal differences, multivariate analytical techniques ought to be employed with more refined hypothesized independent (background) and dependent (attitude) variables. But on the basis of this armchair view, it doesn't appear that one will find strong background-behaviour connections.

ROLE OF THE CHIEF JUSTICE

In the remainder of this paper, the three hypotheses stated above at page eleven will be subjected to some testing. The first was that the Chief Justice's role is the central one, *i. e.*, that chief justices have the power to influence markedly the Court's decisional process and its policy, output, sufficient power, in fact, to bias the output of the Court. Implicit in the elevation of Ray over Shelat, Hegde and Grover was Mrs. Gandhi's belief that the Chief Justice can make some kind of difference in the policy output of the Supreme Court. Ray had been a member of the Court since 1969, and it would not have made political sense to trigger the supersession crisis unless she believed that as Chief Justice he would be in a position to accomplish more than he could as an ordinary puisne judge.

Perhaps the area in which a Chief Justice has the greatest power to affect Supreme Court decision-making is in deciding which judges are to serve on the several panels, or division benches. The Chief can assign all thirteen to hear a particular case, but this is done exceedingly rarely.[33] Indeed, there are usually three or four subsets of judges functioning simultaneously on separate benches, ranging usually from two to five judges in size. The size and composition of these benches are determined at the discretion of the chief justice; the only constitutional constraint is that at least five judges must sit to decide any case involving a substantial question of constitutional law, or for an advisory opinion. In practice this means that virtually all of what are generally regarded as the important cases are decided by a five-judge panel. When a tribunal's work is divided among several benches, and the chief justice has the authority to determine who sits on each bench, "the choice of which judges are to hear which cases can be a critical factor in the outcome."[34] In short, the power of the chief justice to manipulate the composition of each bench is the power to bias both the decision-making process, and also the decisional output.

The scientific testing of this hypothesis is a major undertaking, and requires more time and space than is available here. Particularly necessary would be inter-agreement scores between each judge who later became a chief justice (but before he assumed that role) and each of his peers, for then one could test very precisely the hypothis that chief justices bias both the process and the outcomes by maximizing the participation of those with whom they agree most, and minimizing the participation of those with whom they disagree most, especially on panels in which the chief himself participates. While the conditions of the data at present do not permit doing this here, it can be demonstrated indirectly, but nontheless rather persuasively, that the chief's role is a critical one, and surely deserving of more attention from researchers than it has received todate.

If there is anything to the hypothesis that chief justices do indeed bias outcomes, *i. e.*, that through manipulation of bench assignments, or perhaps by over-participating themselves in particular kinds of disputes, or perhaps by virtue of the "extra weight" the chief may have in persuading his colleagues to support his own views, then we

33. In 1950, when the Court was composed of only six judges, it was not uncommon for all to participate together as the constitutional bench. But since then there probably have been no more than eight or ten decisions in which all members of the Court participated *en banc*.

34. Murphy and Tanenhaus, *op. cit.*, p. 159.

should expect to find some correlation between the outcomes the chief prefers, measured by his own votes cast first as a puisne judge, and later as chief, and the outcomes preferred by his Court. In other words, if before becoming chief he was a classical liberal (individualist), one would have reason to expect that after he became chief the decisions of his Court would reflect greater support for private party claims than was the norm, or than would courts of chiefs whose own behaviour indicated less favourable attitudes towards personal or economic rights.

Some data relevant to testing the hypothesis are found in Table I. In column one we have utilized again the same split decision data

Table I

Chief Justices and Their Courts. 1950—1967

Chief Justice	1 Chief Justice's Support for Individual in Non-Unanimous Decisions	2 Chief Justice's Support for Individual in All Govt. vs. Individual Decisions	3 Supreme Court's Support for Individual in All Govt. vs. Individual Decisions	4 Legislation and Ordinances Declared Invalid/ Attacked as Invalid
Subba Rao	82.4	54.1	49.7	47.4
Mahajan	66.7	54.2	46.1	54.3
Mukherjea	50.0	44.1	37.0	20.0
Sinha	43.9	32.8	36.1	19.3
Sarkar	41.0	30.6	42.3	25.0
Das, S. R	31.3	34.3	28.4	13.5
Gajendragadkar	30.0	31.9	48.7	23.4
Sastri	26.9	35.0	46.6	33.3
Kania	22.2	24.2	32.7	37.5

All data presented in percent

that were employed in determining earlier the policy position of the judges,[35] but this time we have simply computed a single percentage score for the frequency with which their votes supported the individual's claim in both economic regulation and civil liberties decisions. Thus, *e. g.*, there were 91 behavioural observations of Subba Rao, and because he supported the individual's claim in 75, or 82.4 per cent of these, the latter percentage score is found in column one. For each of the nine chiefs listed, the score is based upon their individual participation in decisions before and during their chief justiceship. An extremely wide range of variation in support for the individual claimant is revealed in this column.

35. For a complete breakdown of these data, see "Indian Judicial Behaviour", *op. cit.*, p. 165.

In column two a similar computation was made, but here the score indicates the percentage of times each of them supported the individual claimant in *all* disputes between the Government and a private party, unanimous and divided, in which they personally participated as puisne judges or as chief justices. Thus in this column we make use of a vastly expanded subset of data; Subba Rao, *e. g.*, is observed in 543 decisions.

In column three we have computed a percentage score which reflects the extent to which the *courts* of each of the chief justices supported the individual in all Government versus private party disputes during the seventeen year period. There were over two thousand such decisions, and all are included here. Because the cases were not coded in such a way as to isolate conveniently the votes of the chief justices alone during each of the nine periods, the figures in column three mean that, *e. g.*, during Subba Rao's tenure as chief justice, benches constructed by him, but not always concluding him, upheld the individual's claim 49.7 percent of the time.

Finally it was indicated above that during this seventeen year period, there were 487 cases in which the validity of legislation or ordinances was explicitly attacked by the private party to a dispute. In 128 of these instances the Court found such legislation unconstitutional or otherwise invalid in its entirety (27 State laws, 4 Central laws), or in part (70 State laws, 27 Central laws). In column four we have computed what might be termed a failure ratio for legislation and ordinances under attack during the stewardships of each of the nine chiefs, for the scores in this column represent the frequency with which attacked legislation was declared invalid under each of the nine chief justices. Using Subba Rao again for illustrative purposes, the validity of 38 acts or ordinances was explicitly attacked during his period as chief justice. Eighteen of these, or 47.4 per cent, were declared partly or wholly invalid by a bench constructed by Subba Rao.

This Table confirms some of our intuitive expectations, but also raises perplexing questions. As one would have predicted from the policy positions plotted in Figure I above, column one confirms that Subba Rao, as measured by his individualistic behaviour and votes in divided decisions generally, ranks as the most intractable foe of governmental restrictions on civil liberties and economic freedoms. And Kania, again as we expected, ranks as the least receptive to

claims of such individual freedoms. Although we had anticipated roughly this rank order of the nine judges, these simple scores serve to emphasize better than did the policy positions the vast differences between classical liberal Subba Rao and modern liberal Mahajan on one hand, and Kania and Sastri, two of the classical conservative (or authoritarian) judges on the other.

It can be seen that there is quite a relationship between columns one and two, which serves to provide additional evidence of the predictive value of individualistic behaviour.[36] That is, there is a strong relationship between the kinds of choices a judge makes in the non-unanimous cases, and the choices he makes in the unanimous decisions also.[37] Mahajan and Subba Rao remain as the most strongly individualistic or libertarian, and Kania as the most authoritarian.

Of the data presented in Table I, that in column three, and particularly its relationship to culumns one and two, is probably the most germane to the testing of the hypothesis, for in this column we have percentage scores which indicate the frequency with which panels constructed by each of the nine chiefs found in favour of the individual in private party versus Government disputes. A chief justice can assign anyone he wishes to any particular bench, and this column enables us to compare the kinds of preferences his Court pereferred with those that he personally preferred. If there is a significant relationship between the two, we will have evidence to conclude that there is considerable support, but not necessarily sufficient support, for the hypothesis that chief justices bias the decisional process and policy output.

There is a positive relationship between column three and columns one and two, but it is not as strong as the relationship between columns one and two, and is not significant at the conventionally accepted .05 or below level.[38] Given Subba Rao's rank in the first two columns, it is not surprising that benches constructed by him handed down the highest percentage of pro-individual, anti-government decisions. Similarly, Mahajan's Court is about where it was hypothesized to be, as is Kania's, who ranks ninth in columns one and two, and eighth in column three. And the courts of Sinha and Sarkar correlate reasonably well with their scores in one of the first two

36. A lengthy discussion of the predictive value of individualistic behaviour is found in *ibid.*, pp. 155-159.

37. Kendall's rank correlation (tau) =.556, significant at the .02 level.

38. Kendall's tau for column one – column three is .333, significant at the .11 level, and for column two – column three it is .278, significant at the .15 level.

columns. The biggest surprise is the 48.7 percent pro-individual output, second only to Subba Rao's court, of panels constructed by Gajendragadkar, for one would have expected, on the strength of columns one and two, that Gajendragadkar's Court would rank low in pro-individual output. Similarly, Sastri's Court was considerably more libertarian in output than was Sastri himself. There is no ready explanation for this. However, it may be relevant to note that although Gajendragadkar participated in more decisions (993) than any other judges during the first seventeen years, only once did he exhibit individualistic behaviour, and that was a simple vote with the minority in one decision.[39] Not once did he write a minority opinion, and not once a concurring with-the-outcome opinion. Perhaps this indicates a reluctance to assert himself with his peers, and perhaps this may account for the fact that while he was disposed towards accepting what the authorities did, panels constructed by him were 16.8 percent more pro-individual in output than Gajendragadkar himself was. In any event, if he did attempt to steer the Court along the lines reflected by his own behaviour, he was the least successful of the nine chief justices.

It will be recalled that in all Government versus private party encounters, and there were over two thousand of these from 1950 to 1967, the individual or private party won 39.6 percent of the time. But there is a considerable range in the success ratios of the private parties before the courts of these nine chief justices, ranging from winning almost half the time under Subba Rao's stewardship, to just over one-quarter of the time before benches constructed by S. R. Das. Finally, it may be observed that while the panels set up by the three most libertarian chief justices (Subba Rao, Mahajan, and Mukherjea) handed down decisions generally less libertarian than these chiefs had preferred themselves, and while the panels appointed by the three most authoritarian chief justices (Kania, Sastri, Gajendragadkar) handed down decisions generally less authoritarian than these chiefs had preferred in their own behaviour, it was the former—the libertarians, who were most successful in biasing the output of their Courts. That is, when we compare columns two and three, we see that panels constructed by Subba Rao, Mahajan and Mukherjea were 4 4, 8.1, and 7.1 percent, respectively, less libertarian than their stewards, while panels constructed by Kania, Sastri, and Gajendragadkar were 8.7, 11.6, and 16.8 percent more libertarian than their chiefs. This would

39. A. I. R. 1961 S. C. 751.

seem to be suggestive of the conclusion that the libertarians were more successful in dominating their courts than were the authoritarians.

The expectation we had in constructing column four was that the more libertarian the chief justice, *i. e.*, the more predisposed he was towards looking critically at what the Government does, the more likely his Court would be to find legislation and ordinances unconstitutional or otherwise invalid. And the Courts of the more authority-disposed chief justices were expected to be less critical of, *i. e.*, to sustain more often, legislation and ordinances attacked as unconstitutional.

During the seventeen year period, 26.3 percent of the legislation and ordinances attacked by private parties was held to be invalid, in part or entirely. Benches constructed by Subba Rao and Mahajan declared legislation and ordinances unconstitutional more often than did panels of the other seven chief justices. This is precisely what one could have anticipated from these two most libertarian of the chief justices. However, column four reveals also that Kania's Court ranked third in declaring legislation and ordinances invalid, and this is not what we had anticipated, in view of his rank at (columns one and two) or near (column three) the bottom elsewhere in the table. But there may be an adequate explanation for Kania's and Sastri's also, relatively high rank in column four. They were the Republic's first two chief justices (Kania, 1950-51; Sastri, 1951-54), and during these early years litigants often raised the question of whether legislation met the standards of the new Constitution, especially those in the chapter on Fundamental Rights. India's legislators were inexperienced in working within the new constitutional framework, and litigants adversely affected by new laws were quick to turn to the judiciary for redress. As a result of these, and perhaps other factors, a relatively large amount of legislation was declared invalid in these early years. Indeed, during the tenures of Kania and Sastri, in 6.4 percent of all cases decided (18 of 282) some legislation was declared invalid. Mahajan served as India's third chief justice, and during his relatively brief (less than one-year) tenure as chief, legislation was declared invalid in 15.1 percent of all cases decided (19 of 126), more frequently than under any other chief justice. But during the next dozen years, from late 1954 when Mukherjea became chief, through the chief justices of Das, Sinha, Gajendragadkar, and Sarkar, up to mid-1966 when Subba Rao became chief, in 2,610 reported decisions only 73 acts or ordinances were held partly or wholly unconstitutional or

invalid. So during these middle years, in only 2.8 percent of all decisions was legislation ruled invalid.[40] Under Subba Rao's tutelage, this trend was reversed, for in 18 of the 254 decisions (7.1 percent) handed down by his Court, legislation or ordinances were declared invalid.

Apart from the data in Table I, other evidence that points in the direction of confirming the hypothesis is the fact that chief justices are very rarely in the minority themselves in non-unanimous decisions. Indeed, of the nine chief justices whose behaviour we are examining, only three (Sastri, Sinha, and Sarkar) were *ever* on the losing side in a divided decision handed down by one of their benches. Most noticeable among the six non-dissenters is Subba Rao, for as a puisne judge he had been in the minority in 48 decisions, which earned him the distinction of being the greatest dissenter in the Court's history. But during his nine and one-half month tenure as chief justice, he never found it necessary to write a dissenting opinion, nor was he once in the minority in the 77 reported decisions in which he participated himself. This does not mean that Subba Rao was any less an individualist as chief justice, for it will be recalled that before his Court the private party in the Government versus private interest disputes won nearly half of the time, which was more often than under any of his eight predecessors. Moreover, there was dissensus during Subba Rao's stewardship—sixteen decisions were made by divided panels—but Subba Rao was always in the majority himself, a position he was not often in as a puisne judge in non-unanimous decisions. When chief justices achieve outcomes consistent with their individualistic behaviour, and are almost never in the minority themselves, surely we have powerful evidence that the chief's role is a critical one.

This focus on unanimity and dissensus takes us to related question of whether the high degree of monolithicity might be, in part at least, contrived. Compared with constitutional courts elsewhere, there is an astonishing high ratio of unanimity (91.6 percent for the 1950-67 period in Indian Supreme Court decision-making.[41] Is it possible that some chief justices so value consensus that they would tend to exclude from benches judges who have demonstrated a tendency towards dissenting behaviour ? (Whether or not this is true, given the fact that the constitution bench is usually composed of only five of the fourteen-thirteen puisne judges plus the chief—judges, it

40. Individually, the breakdown was Mukherjea 2.3 percent, S. R. Das 2.0 percent, Sinha 3 4 percent, Gajendragadkar 2.3 percent, and Sarkar 2.1 percent.

41. See further, "Indian Judicial Behaviour", p. 151.

would be impossible for many decisions to reflect actual attitudinal differences among all the judges. Even if the bench assignments were determined by lottery or by some rotation scheme, there would still probably be more apparent unanimity reflected in the decisions than there is a genuine consensus among all the judges.

Data pertinent to this dissent and participation hypothesis is presented in Table II. Here we have included such data for all judges

Table II

Dissent and Participation, 1957—1964

Judge	Dissent Ratio[a]	Judge	Participation Ratia[b]
Sikri	0.3	Shah	41.6
Wanchoo	1.2	Sikri	40.0
Shah	2.4	Wanchoo	37.6
Das Gupta	2.4	Hidayatullah	31.3
Ayyangar	2.7	Das Gupta	30.8
Kapur	3.7	Ayyangar	30.4
Hidayatullah	4.2	Kapur	30.0
Mudholkar	4.5	Bachawat	25.9
Bachawat	5.9	Dayal	24.8
Dayal	6.2	Mudholkar	24.4

All data presented in precent

a. Dissents ÷ Participations

b. Participation ÷ Availability for Assignment

Kendall's tau—.667, significant at .004

appointed to the Court during the 1957 through 1964 period, except for Gajendragadkar, Sarkar and Subba Rao, each of whom served a segment of this time span as chief justice.[42] Thirteen judges were appointed during this period, so after excluding those that served part of the period as chief, ten judges remain for consideration. The participation and dissent data are extracted from the same universe of data we have employed in most of this paper, *i. e.*, it is complete only to Subba Rao's retirement in April of 1967. Five of the ten judges had

42. There was no special reason for selecting this particular time period, it was selected randomly. Since we are looking for a relationship between dissent and participation, and the latter is determined at the discretion of the chief justice, it seemed essential to remove the chief justices from this table, even though each of them was chief justice for only a portion of the period.

retired by the end of the period, so the data is complete for each them. The other five (Wanchoo, Hidayatullah, Shah, Sikri, and Bachawat) were still serving in 1967, so the data does not include their remaining years on the Supreme Court.[43]

The hypothesis, then, is that judges with high dissent ratios will have low participation ratios and conversely, that infrequent dissenters will be appointed by chief justices to panels more frequently than those who have demonstrated a propensity to dissent frequently. Table II reveals a very strong correlation between dissent ratio (the independent variable) and participation ratio (the dependent variable), thus confirming the hypothesis. The three judges who dissented the least (Sikri, Wanchoo, and Shah) are also the same three who had the highest rates of participation. And the same three who dissented most often (Dayal, Bachawat, and Mudholkar) also participated least frequently.

This relationship between high levels of dissent and low levels of participation may perhaps be illustrated more strikingly by the following examples. Although Hidayatullah was appointed to the Supreme Court ten and one-half *before* Shah, and was accordingly available for panel assignment that much longer, Shah, who dissented relatively infrequently, participated in 185 *more* decisions than did Hidayatullah, who was more inclined towards dissenting behaviour. Dayal and Ayyangar were appointed to the Court on the same day in 1960, and although Ayyangar reached mandatory retirement age almost a year *before* Dayal, the latter, who dissented much more frequently than Ayyangar, participated in fewer (422 to 449) decisions than Ayyangar.

These findings certainly indicate that the rules of decision-making within the Indian Supreme Court do not include a random procedure for selecting judges to participate on the several panels. There are in fact rather extreme differences among the judges in the frequency with which they are assigned to benches, differences which can be explained at least in large part by the judge's propensity to dissent.

43. Occasionally a Supreme Court judge will be on leave, perhaps because of illness, perhaps to take a temporary off-the-bench assignment. When a judge is on leave, our coding system scored him as being a non-member of the Court for the period of his absence. That is, he was not considered a non-participating judge in the computation of non-participation ratios. The participation index utilized in this discussion is based upon each judge's participation in panels that handed down decisions when he was an "on duty" member of the Court.

It is believed that sufficient evidence has been presented in this discussion of the role of the chief justice to enable one to conclude that the chief justice occupies a particularly pivotal and powerful position. Here we have focussed on just one aspect of his power, the authority he has to assign puisne judges to the several simultaneously functioning benches. We have not explored other dimensions of his power, such as that of recommending High Court judges for appointment to the Supreme Court when vacancies occur.[44] And although there are more precise and systematic ways to test the major hypothesis, powerful evidence has been adduced here suggesting that chief justices have indeed had a considerable impact on both the decision-making process (by seeking to minimize dissent and maximize unanimity) and the Court's policy output (by biasing or otherwise influencing the panels in policy direction they favour themselves). Largely because of the panel system, chief justices in India are in a position to dominate their courts to a greater extent than in judicial systems where the panel system is not used. From this analysis we can conclude that the extent, to which a puisne judge is chosen by the chief justice to be a member of a panel, is apparently related both to the former's propensity to dissent, and to his and the chief's own policy preferences. Surely it is entirely plausible that chief justices would be interested in maximizing not only their own values, but also consensus, if not unanimity on the Court as well.

We hasten to add, however, the observation that there undoubtedly are certain norms that serve as constraints on the latitude that a chief justice has in making panel assignments. Moreover, any chief justice must also bear the heavy weight of a tradition of integrity that must be highly institutionalized by now. Departure from such norms would probably provoke considerable peer pressure on the chief. Surely, in short, there are some norms governing bench assignments, and we would do well to become better informed of these.

FROM SUBBA RAO TO RAY

Remaining to be tested are the hypothesis that there are observable differences between Ray on the one hand, and Shelat, Hegde and Grover on the other, and that Ray's attitudes and values appear to be more consistent with Mrs. Gandhi's conception of the nation's best

44. The appointment process is discussed in "Indian Supreme Court Judges : A Portrait", *op cit.*, pp. 317-318, and "Selection, Background Characteristics, and voting Behaviour ...", *op. cit.*, p. 222.

interests than were those of the superseded judges. The data for the testing of these hypotheses are drawn from the almost exactly six-year span from Subba Rao's resignation from the chief justiceship in order to enter the contest for the Presidency of the Republic in April of 1967, to the promotion of Ray to the chief justiceship in April of 1973.[45] In examining the behaviour of the justices during this more recent period, we shall employ a similar set of assumptions, conceptualizations and methods as were used earlier. The one exception to this is that, for reasons discussed above,[46] separate opinions concurring with the outcome in otherwise unanimous decisions, will not be examined.[47] That is, we shall focus exclusively on decisions characterized by manifest dissent.

One is struck by the uncommonly high turnover of judges during this half-dozen years' period. Indeed, not a single judge on the bench in mid-1967 was still on the Court in mid-1973. No less than 23 judges served at one time or another during the period, including those serving as the period ended. Moreover, four chief justices (Wanchoo, Hidayatullah, Shah, and Sikri) served their entire tenures as chief justice during these six years.

Noteworthy also is the marked reduction in dissensus during the period, compared with most earlier years. From 1950 to 1967, there were 274 divided decisions, an average of about 15 per year. From 1967 to 1973, there were only 43 non-unanimous decisions, or an average of about seven per year. These 43 decisions reveal only 62 instances of individualistic (dissenting) behaviour. Twenty-nine were characterized by a lone (solo) dissent—the most extreme manifestation of individualistic behaviour—so, as in the earlier years, the solo dissent continues to be the most striking characteristic of divided decisions. During this period there were no "great" solo-dissenters to match Subba Rao and Sarkar of earlier years, although Shah, Shelat, and Hegde, each with five, accounted for over half of the total. Table III lists the judges and presents the pertinent data.

45. In "Indian Judicial Behaviour", *op. cit.*, for purpose of determining the judicial policy positions, I made use of all reported Supreme Court decisions up to what was at that time of writing the most recently published volume of the SUPREME COURT REPORTS (1969 2 S. C. R.), which reported decisions announced through early December, 1968. Therefore, there is some overlap of data (ten divided decisions from April 1967 to December 1968) in this paper with that earlier one.

46. See footnote 23.

47. Such individualistic but not minority behaviour was found in 26 decisions during the period.

Table III

Voting in Non-Unanimous Decisions, 1967-1973

Judge	Individualistic (Dissenting) Behaviour	In Majority in Divided Decisions	Total Behavioral Observations
Shelat	9	12	21
Hegde	7	9	16
Ray	7	9	16
Mitter	5	11	16
Sikri	4	12	16
Khanna	3	8	11
Dua	1	10	11
Shah	6	4	10
Mathew	5	5	10
Vaidialingam	4	6	10
Grover	1	8	9
Hidayatullah	0	9	9
Reddy	0	9	9
Bachawat	1	7	8
Palekar	2	5	7
Ramaswami	2	4	6
Bhargava	1	4	5
Wanchoo	0	5	5
Beg	2	2	4
Dwivedi	1	1	2
Chandrachud	1	0	1
Roy	0	1	1
Mukherjea	0	1	1
TOTALS :	62	142	204

The next steps undertaken were identical to those taken (and carefully explained) earlier,[48] *i. e.*, locating the divided cases in which some level of the Government was one side, and a private party on the other, and classifying these as raising questions of either personal rights and freedoms (the civil liberties cases), or of economic or property rights (the economic freedom cases). Thirty-four (79 percent) of these decisions remained after completing step one (the remaining nine were put in a residual category and not dealt with any further in

48. "Indian Judicial Behaviour", *op. cit.*, pp. 154-155.

this analysis), and the second classificatory step resulted in twelve being identified as civil liberties cases, and the remaining twenty-two as economic freedom cases.[50] The decision concerning whether a decision fits into the civil liberties, or into the economic freedom, category is usually quite easily made. Hence the ***Bank Nationalization*** decision (A. I. R. 1970 S. C. 564) raised a major economic regulation issue, and therefore fits neatly in the economic freedom category. The ***De-recognition of Princes*** decision (A. I. R. 1971 S. C. 530) was somewhat less easy to classify because although Mrs. Gandhi and Parliament treated the issue as primarily an economic (Privy Purse) one, the judges seemed to emphasize the legal, *i. e.*, political aspects of the controversy; we conceptualized it as an economic freedom decision. The ***Kesavananda*** decision (A. I. R. 1973 S. C. 1461), concerning Parliament's power to amend the Constitution was less difficult to classify, for although the issue was the amendability of the Fundamental Rights, and although these embrace both civil and economic freedoms, it is clear that the rights that both the Government and the Court were most concerned about, were property rights. Hence the placement of this decision in the economic freedom category.

Examination of the civil liberties decisions resulted in a judgment to forego any further quantitative analysis of them. There were simply too few such cases,[51] and too many different judges participa-

49. Five were clearly disputes between private parties—the right to succession in Hindu law, A. I. R. 1968 S. C. 209, over a disputed mortgage, A I. R. 1970 S. C. 659; over a mining lease, A. I. R. 1970 S. C. 1354; between a Soviet and Indian firm, A. I. R. 1970 S. C. 1; and over dissolution of a partnership, A. I. R. 1972 S C. 1181. Two others were sales tax disputes involving a claim from a unit of government that they were exempt from payment of the sales tax –A. I. R. 1967 S. C. 1826 and A I. R. 1971 S. C. 870. The remaining two raised questions of contempt of court (A. I. R. 1970 S. C. 1694), and disbarment (A. I. R. 1971 S. C. 385).

50. On classifying decisions, see further "Indian Judicial Behaviour", p. 154. The fact that there are some problems in determining how to classify a decision indicates that the categories must be more carefully defined

51. Four raised very similar questions concerning detention under authority of the West Bengal (Prevention of Violent Activities) Act of 1970, and in each of these Shelat dissented from the views of Khanna and Mathew that the claims of the petitioners should be rejected (A I. R. 1972 S. C. 926, 1256, 2140, and 2141). Three others were public servant disputes (A. I. R. 1971 S. C. 178, A. I. R. 1971 S C. 1667, A I. R. 1972 S. C. 2639, and A. I. R. 1973 S. C. 1). The remaining one concerned the Government's newsprint policy, and because it raised essentially freedom of speech questions, was classified as a civil liberty case (A. I. R. S. C. 106).

Shelat, Khanna and Mathew participated more often than any of their colleagues in these divided civil liberties cases. Shelat was involved in all but one of them, and was usually (eight times) found supporting the individual's claim against the State. On the other hand, Khanna, who supported the Government in six of his seven participations, seemed to be indicating what analysis by alternative research strategies might reveal as politically conservative propensities.

ting too infrequently in them to make anything but the most tentative inferences from the voting behaviour exhibited.

We are left, therefore, with the twenty-two divided decisions which have in common the raising of what we have conceptualized as an economic freedom or economic regulation issue for resolution by the judges. The next step was to ascertain whether there was evidence of consistent patterns in the voting behaviour of the judges in these cases. If such consistent judicial behaviour can be discerned, there is some likelihood that attitudes and values of judges are operative in these decisions.

Before proceeding any further with this analysis, we must acknowledge explicity three factors, or features of Indian Supreme Court data, that place very serious handicaps before the behavioural scientist who seeks to gain a real understanding of Indian judicial behaviour. The first is the rapid turnover of the judges; they often simply are not on the bench long enough to observe very extensively. Secondly, the use of the panel or division bench system has the result of institutionalizing the non-participation of most judges in the decisions of the Court. Most decisions are handed down by very small, often two or three judges, panels, with the result that one does not get the opportunity very often to view the simultaneous or joint interaction of most or all judges. During the period under consideration, for example, although Hegde and Vaidialingam were colleagues on the bench for about five years, and although Hegde participated in fourteen divided economic freedom cases and Vaidialingam participated in six, they were on the same panel in divided economic freedom decisions only twice. And while it is true that they were in agreement in these two decisions, one can not venture any reasonable inferences from so little joint participation.

The third problem confronting one who seeks to gain meaningful insights using quantitative methods, and this is really the most serious and virtually insurmountable of the hurdles, is the very small number of non-unanimous decisions. Divided decisions enable one to observe very objectively differences among the judges, differences manifested in majority and minority votes. It is, of course, impossible to do this with unanimous, single judgement, decisions. Yet, as we have seen, a prominent norm of Indian Supreme Court decision-making is consensus, and departures from this norm are very rare. But though clearly rare, dissent is found in almost all of the landmark, controversial decisions. Disagreement among judges is thus found where one would expect to

find it—in those cases where questions of profound and pervasive significance for the Indian polity are before the Court for judicial resolution.

These three "problems" are more severe in this recent period than earlier because of the more rapid turn-over of judges, and the reduction in observable dissensus on the Court. In view of the explicitly and almost exclusively quantitative methods we are utilizing, and the focus on non-unanimous decisions, the more serious are the data problems, *i. e.*, quantitative weaknesses, the more cautious one must be about making inferences about attitudinal differences between the judges.

Keeping these reservations in mind, the relevant data from the twenty-two divided economic regulation cases are presented in Fig. III.

Figure III

Non-Unanimous Economic Freedom Cases, 1967—1973

CASES	Wanchoo	Hidayatullah	Shah	Sikri	Bachawat	Ramaswami	Shelat	Bhargava	Mitter	Vaidialingam	Hegde	Grover	Ray	Reddy	Dua	Khanna	Roy	Palekar	Mathew	Beg	Dwivedi	Mukherjea	Chandrachud
(1968)1 SCR 661	-				+	+			-		-												
(1968)2 SCR 33	+				+	+			+		-												
(1968)2 SCR 62	+				+	+			+		-												
(1968)3 SCR 41	+				+		-		+	-													
(1968)3 SCR 251	+	+	-	+		+	+			-													
(1969)2 SCR 481				+	+						-												
(1969)2 SCR 727			+		-						-												
(1969)2 SCR 824		+		-	+				+		-												
(1970)2 SCR 760				+					-		-		+	+									
(1970)3 SCR 383		+					-			+		-	+										
(1970)3 SCR 467		+	+								-	+	+		+								
(1970)3 SCR 530			-	-			-	-	-	-	-	-	+	-	-								
(1971)1 SCR 452			+								-	-											
AIR 1971 SC 530		-	-	-			-	-	+	-	-	-	+		-								
AIR 1972 SC 1061				+			-		+				-		-		+	+					
AIR 1972 SC 1690											-	-				+							
AIR 1973 SC 318				+			-		-							-							
AIR 1972 SC 1177										-								-	+				
AIR 1973 SC 281													-		-				+				
AIR 1973 SC 2172											+			-	-	-							
AIR 1973 SC 602				-									-					+		+	+		
AIR 1973 SC 1461				-			-				-	-	+	-		-		+	+	+	+	-	+
Total Participations	5	5	6	10	7	4	8	2	10	6	14	7	9	4	6	4	1	4	3	2	2	1	1

Legena: + Against the individual claim (pro-Government)
— For the individual claim (anti-Government)
Blank Retired, not yet appointed, deceased

This Figure underlines all three data problems just discussed—too many judges participating too infrequently in too few divided decisions.

If all twenty-three judges had participated in each of the twenty-two decisions (which would have been impossible, of course, for there were never more than fourteen judges, including the chief, on the Court at any one time during the period); there would have been 506 (22×23) participations to observe and analyze. What we have, however, is only 121 participations, which in the broadest sense indicates that 76 percent of the "potential" data are "missing".

In Figure III the twenty-two non-unanimous economic freedom decisions are listed from the data of the earliest of the period to the latest of the period. And the justices have been listed and their responses indicated according to their seniority on the Court. Thus Wanchoo is listed first because he was the most senior, and accordingly the chief justice, when the period commenced, and Chandrachud is in the last column on the right, for he was the newest appointee when the period ended. Although these data are presented in scalogram format, this device is employed only for convenience in observing the judges and their responses. There is so much "missing data", with consequent indeterminancy, that the requirements of cumulative scale theory are not met.

Half of these split decisions were won by the private interest, and the other half by the Government, with the latter winning nine of the first eleven, but only two during the latter half of the period. Perhaps a more important observation is that the liberal (+) votes are clustered mainly to the left, and to the right, of the Figure, with the bulk of the conservative (−) votes cast by a group of judges in and around the middle. That is, the votes of the judges who were most senior when the period began, and of those who were most junior when the period ended, generally supported the Government's position over the party's claim. It is the judges in the centre, from Shelat through Khanna, appointed during the mid to late 1960s, that account for the large majority of conservative votes cast during the entire period. There are two exceptions from among the ten judges located in the centre—Mitter, whose votes are classified as liberal sixty percent of the time, and Ray, two-thirds of whose votes are liberal, *i. e.*, supportive of the economic regulation.

The next step was to rearrange the order of judges and decisions in an effort to group or cluster judges according to the criterion of apparent similarity in decisional responses. Since Hegde participated

in more split economic freedom decisions (14) than any other judge,[52] and since there is more apparent consistency of direction in the choices he made (13 of the 14 were conservative—supportive of the private interest-votes), we decided to align the others on Hegde, with those whose voting behaviour seemed most alike his near him, and those whose voting behaviour seemed to be the most unlike Hegde's, farthest away from him.

The result is found in Figure IV. Because of the vast amount of non-participation, each judge's distance from Hegde had to be deter-

Figure IV

Non-Unanimous Economic Freedom Cases, 1967-1973

Cases	*Hegde*	*Shelat*	*Grover*	*Vaidialingam*	*Dua*	*Khanna*	*Reddy*	*Mukherjea*	*Bhargava*	*Mitter*	*Sikri*	*Shah*	*Ray*	*Palekar*	*Hidayatullah*	*Wanchoo*	*Bachawat*	*Roy*	*Chandrachud*	*Dwivedi*	*Beg*	*Mathew*	*Ramaswami*
(1968)1 SCR 661	-									-						-	+	+					+
AIR 1972 SC 1177	-			-										-								+	
AIR 1973 SC 281					-								-									+	
AIR 1973 SC 602											-		-	+						+	+		
(1970)3 SCR 530	-	-	-	-	-		-		-	-	-	-	+										
AIR 1971 SC 530	-	-	-	-	-				-	+	-	-	+		-								
AIR 1973 SC 1461	-	-	-			-	-	-			-		+	+					+	+	+	+	
(1969)2 SCR 727	-											+					-						
(1971)1 SCR 452	-		-									+											
(1969)2 SCR 824	-									+	-				+		+						
AIR 1973 SC 318		-				-				-	+												
(1969)2 SCR 481	-										+						+						
(1970)2 SCR 760	-						+			-	+		+										
AIR 1972 SC 1061		-			-					+	+		-	+				+					
(1968)3 SCR 41		-		-						+						+	+						+
(1968)2 SCR 33	-									+						+	+						+
(1968)2 SCR 62	-									+						+	+						
AIR 1972 SC 1690	-		-			+																	
(1970)3 SCR 383		-	-	+									+		+								
(1970)3 SCR 467	-		+		+							+	+		+								
(1968)3 SCR 251		+		-							+	-			+	+							+
AIR 1973 SC 2172	+				-	-	-																
Liberal	1	1	1	1	1	1	1	0	0	4	5	3	6	3	4	4	6	1	1	2	2	3	4
Conservative	13	7	6	5	5	3	3	1	2	6	5	3	3	1	1	1	1	0	0	0	0	0	0

***Legend*:** + Against the individual claim (pro-government)
− For the individual claim (anti-government)

Blank Retired, not yet appointed, deceased

52. Hegde also caused more divided economic freedom decisions than any of his peers, for he was the lone dissenter in five of the twenty-two, more than any of the others who served during the period.

mined in a very arbitrary manner. Indeed, if one can speak of Hegde's relative agreement/disagreement with any of his peers, it could be only those with whom he participated in a reasonably large number of divided decisions. Thus while a cursory look may give the impression that Hegde's and Ramaswami's responses were radically different, we have only slender evidence here upon which to reach that conclusion, for they participated together on the same panel in only three of these non-unanimous decisions. Ramaswami's location in column 22 means only that in the few decisions in which he participated, he took what has been labelled a consistently liberal posture. But for all we know, had he participated in another dozen, we could hardly feel very confident that he would have continued to make liberal choices, supportive of the Government. In short, this Figure tells us little about the individual decisional patterns of the majority of the judges listed, and permits us to say very little with confidence about the relationships among or between various pairs of these judges.

Of the justices who interacted most frequently, the behaviour of Ray and of the superseded three attract our attention. Surely we must assume that Mrs. Gandhi believed there was something different about Ray in comparison with Shelat, Hegde and Grover, for why else would she have jumped Ray over the other three, and departed from the tradition of promoting to the chief justiceship whoever happens to be the seniormost puisne judge ? Hence the question, "Do these divided economic regulation cases reveal any differences between Ray on the one hand, and the superseded three on the other ?" The data difficulties discussed above will prevent a conclusive answer to this question, but perhaps we can arrive at a tentative answer.

Even a cursory glance at Figure IV indicates striking behavioural differences, for while Ray cast six liberal votes in his nine participations, the other three account for only one liberal vote each in a combined total of twenty-nine participations. A closer look reveals that there were five decisions in which at least three of these four participated conjointly. In Figure V we have extracted just those five decisions, and ignored the other justices who participated in them.

While a small handful of non-unanimous decisions are not sufficient to permit one to infer economic or political philosophies of the participating judges, it seems to us that this little Figure is very suggestive of what additional evidence from other sources might confirm, is real disagreement between Ray and the other three. For we here see Ray disagreeing with what looks like an almost completely solid Shelat-Hegde-Grover bloc. Moreover, it is especially important to

note that included among these five decisions are the "big three" landmark decisions since *Golak Nath* was handed down by Subba Rao's Court in 1967—*Bank Nationalization*, *Privy Purses*, and *Kesavananda*. In each of these Ray was in the minority upholding the Government's actions, and Shelat, Hegde, and Grover were members of the majorities which rejected what the Government had done.

Figure V

Conjoint Participation of Shelat, Hegde, Grover and Ray

Case	Ray	Grover	Shelat	Hegde
AIR 1970 SC 1108	+	+	NP	–
AIR 1970 SC 564[a]	+	–	–	–
AIR 1970 SC 1133	+	–	–	NP
AIR 1970 SC 530[b]	+	–	–	–
AIR 1973 SC 1461[c]	+	–	–	–

Legend :

+ Against the individual claim (pro-government)
– For the individual claim (anti-government)
NP Member of court, but not participating
a Bank Nationalization case
b Privy Purses case
c *Kesavananda* [Constitution Amendment] case

In short, while Figure V does not "prove" very much in a systematic social science sense, it surely does suggest that something distinguishes Ray from the other three. And while it is tempting to conclude that the "something different" is a different set of attitudes and values concerning economic freedoms and regulation of the economy, we simply do not have enough evidence here to reach that conclusion. The evidence we have may be of especially high quality (because of the presence of the big three decisions of the period), but this does not sufficiently offset the smallness in the quantity of the data.

Returning to the hypotheses we have been examining, we are compelled to be tentative and cautious in our conclusions. Our data certainly show that Ray is different from Shelat, Hegde, and Grover,

but we cannot effectively measure the magnitude of these apparent attitudinal differences. We can, however, be somewhat more confident in concluding that Ray's attitudes and values are more consistent than those of the superseded with Mrs. Gandhi's conception of what's best for the nation, for the economic liberal posture of Ray is clearly closer to what Mrs. Gandhi has been attempting to do than are the apparently conservative postures of Shelat, Hegde, and Grover. If in reaching over Shelat, Hegde, and Grover in order to tap Ray for the nation's topmost judicial post Mrs. Gandhi was in fact seeking a chief justice who seemed to share some of her economic views, this analysis confirms that on the basis of the kinds of choices each of the four judges made in the divided economic freedom cases, she did indeed the right choice.

CONCLUSIONS

We began with a discussion of the 1973 supersession crisis within the context of some observations concerning the role of the Supreme Court in the Indian political system. Courts and the judicial role are highly institutionalized and rest upon strong foundations within the political and legal cultures. Supreme Court decisions on many occasions during the first generation of national independence have been of enormous political significance. Thus it is patently clear that judges exercise considerable power in the political system. The exercise of this power has resulted in several well-known clashes between judges and political office-holders. The supersession of Ray over three more senior judges was the most dramatic intersection of political power and judicial power since independence. This act by Mrs. Gandhi served to inject political criteria into the process of selecting the chief justice, and was viewed in some circles as an ominous step in the direction of undermining the independence of the judiciary. However, in view of the immense powers that the judges wield, it is not surprising that the appointing authorities would want "right thinking" men on the Supreme Court. What is surprising is that the selection process was not more overtly politicized many years earlier.

Some earlier empirical research on Indian judicial behaviour was reviewed. Our aim was to describe as accurately as possible, and explain as fully as the data and methods employed permitted, some of the major features of Supreme Court decision-making. Explicitly quantitative techniques were employed in a search for judicial attitudes and values that we believe are disclosed in the votes cast by the judges, particularly in the non-unanimous cases. Disagreement among the

judges is obviously manifest in non-unanimous decisions and, rejecting the view that the votes of judges are somehow whimsical or arbitrary, we sought to discover the apparent causes for the readily observed disagreement. The very presence of dissensus on the Bench is indicative also of the fact that judges have discretion in fostering one policy rather than another. We sought to determine whether the personal values of individual jurists seemed to be reflected in the ways they perceived and selected alternatives. For our research purposes, the judges were treated as the respondents to questions raised in cases before the Court for resolution, and the attitudes of the judges were inferred from sets of decisional responses. Clearly, the major assumption of this approach to understanding judicial behaviour is that attitudes are logical inferences from the voting behaviour of the judges.

Upon discovering that about three-quarters of all divided decisions involved an encounter between an individual and the State, and that the vast majority of these involved the value-laden issues of either governmental regulation of the economy or restrictions on civil liberties, we utilized a four-fold scheme for classifying the votes of the judges. Judges whose votes supported the Government in both categories of decisions were designated as classical conservatives (contemporary authoritarians), and those who rejected what the Government had done in both types of cases were designated as classical liberals (libertarians or individualists). Those whose voting behaviour indicated support for economic regulations (an economically liberal posture), combined with rejection of civil liberties restrictions (a politically liberal posture) were termed modern liberals. Finally, those who rejected economic regulation (economic conservatives) but condoned restrictions on civil liberties (political conservatives) were designated as modern conservatives. This mode of analysis enabled us to demonstrate that there is unmistakable, prima facie evidence of striking differences among the judges revealed by their voting behaviour—differences that are best accounted for by different attitudes and values brought to bear on the decision-making process by the judges. In a broader sense, these competing attitudes and values are probably incorporated in competing economic political, and social philosophies.

After an unsuccessful attempt to find correlates of the observed behavioural differences in the social and economic background characteristics of the judges, we undertook an exploration of several hypotheses to the role and power of the chief justice, focussing particularly on how the first nine chief justices exercised their discretion in making

bench assignments. We found powerful evidence that chief justices have had a major impact on the decision-making process, particularly by maximizing unanimity and minimizing dissent. And less powerful but nonetheless persuasive evidence was found to reveal that some of the chief justices have biased or otherwise influenced their Court's overall policy output. We were able to reach the conclusion that the extent to which a puisne judge is tapped by the chief justice to be a member of a decision-making panel is apparently related both to the former's propensity to dissent, and to both his and the chief's own policy preferences. Thus, although "the Court" is credited with deciding each case, the real situation is that the Court in an *en banc* sense (*i. e.*, all judges participating) has decided only a tiny fraction of the thousands of cases resolved since 1950. Almost all decisions of the Court are made by rather small subsets of the judges available for bench assignment. And since it is the chief justice who decides which judges will hear which cases, it is the chief justice who decides who "the Court" is. Moreover, as this analysis shows, the power to determine bench assignments is tantamount to the power to bias the decisional output of the entire Court. In short, it does indeed make a very big difference who sits in the centre of the Bench.

Finally, we made an empirical analysis of the divided decisions from 1967 to 1973, *i. e.*, from Subba Rao to Ray, and discovered quite marked voting differences between Ray on the one hand, and the three superseded judges on the other. The evidence we found, and we were compelled to emphasize that while it was high in quality, it was at the same time quantitatively weak, was that Shelat, Hegde, and Grover seemed disposed towards rejecting regulation of the economy, while Ray sanctioned governmental intervention in the economy in each of the major non-unanimous decisions of the period. From the evidence we gathered from the divided economic regulation cases over the six years, and considering Mrs. Gandhi's perspective, the unavoidable conclusion was that Ray's attitudes towards economic regulation are probably much closer to the Prime Minister's than were those of Shelat, Hegde, and Grover.

Intended or not, the supersession trigerred the resignations of the latter three judges. Their departure from the Bench deprived us of the opportunity to observe whether economically liberal decisions might have nonetheless resulted from a Ray-led Court that included Shelat, Hegde, and Grover. That is, we cannot know whether Ray, in making

panel assignments, would have excluded, or minimized the participation of the superseded three in important economic regulation cases. However, now that Ray is in his fourth year as chief, one could, using methods similar to those employed in this paper, systematically examine how Ray has in fact exercised the very significant power at his disposal.[53] The answer to that question would enable one to judge whether Mrs. Gandhi's bold politicization of the selection process was worth the political costs she incurred in so doing.

It is hoped that this chapter has demonstrated that empirical and theoretical knowledge of Supreme Court decision-making can be attained by quantitatively oriented research strategies. However, as mentioned earlier, there seems to be no entirely satisfactory way to overcome several factors that handicap the behavioural scientist who seeks to understand Indian Supreme Court decision-making. Under ideal research conditions, the Court should have a common membership during the entire period selected for analysis. Yet the norm is to appoint to the Court men in their mid to late fifties, and a few years later mandatory retirement at age sixty-five forces them off the Court. Short tenures result inevitably in a high turnover of judges. Compounding the problem is the division bench, or panel, system of deciding cases, for the result is that all judges, whether members of the Court for long or short periods, participate in only a fraction of the cases decided during their tenures on the Bench. Interaction among all the judges is all too infrequent for our purposes; the decision-making panels are almost invariably very small and unstable in membership. Finally, to the extent that unanimity characterizes the Court's decisions, attitudinal differences among the judges can not be observed because they are in apparent agreement with one another. From the standpoint of analyzing judicial votes, the more disagreement among the judges the better. In order to construct reliable scales, it is necessary that a large portion of the Court's decisions be unanimous.[54] The small number of divided decisions relative to unanimous rulings poses a very serious problem for this type of analysis, for small handfuls of divided decisions do not provide sufficient data for arriving at very reliable conclusions. Taken together, there is simply no escape from

53. At this time of writing, we have access only to decisions of the Supreme Court through 1973; otherwise we would have examined that question here.

54. See further, David W. Rohde and Harold J. Spaeth, SUPREME COURT DECISION MAKING (San Francisco : W. H. Freeman and Company, 1976). This book is a superb introduction to judicial behaviour research and methodology.

the observation that these data problems pose serious reliability and validity questions about conclusions drawn.

Perhaps, then, the point at which additional significant leaps forward in the direction of a better understanding of judicial attitudes and values, via analysis of judicial voting behaviour, may be close at hand. But before that conclusion can be reached, and we remain too convinced at this stage of the insight generating capabilities of the approach to abandon it, other avenues of related analysis need to be explored.

The most potentially productive next step is to expand the data base, and one way to do this is to move beyond simply the analysis of votes into a systematic content analysis of the written opinions of the judges. The most useful of these are probably the dissenting and concurring opinions although, since the authorship of even the unanimous opinion is always indicated, these may be of some value also. Many of the judges have been especially candid in revealing their personal feelings in their written opinions[55], and thus systematic content analysis[56] holds the promise of being able to provide the means for more penetrating knowledge of judicial values and attitudes. A further source of potentially useful information about the values of the judges is found in their off-the-bench writings and speeches. This type of data lends itself well to content analysis also.

Another essential next step is experimentation with conceptualized value dimensions different than, or in addition to, economic liberalism/conservatism, and political liberalism/conservatism. Conflict between classical conservative and classical liberal judges does get to the heart of perhaps the most fundamental of political issues—the conflict between authority and freedom. But in part because we may not have adequately operationalized these value dimensions, and in part because of the above-mentioned data problems that prevent the construction of refined category scales, and finally, owing partly to the fact that we have not experimented sufficiently with alternative value dimension conceptualizations, we cannot be entirely confident that we have perceived the cases as the judges did. That is, what we have conceptualized as an issue of economic freedom versus economic regulation may have been perceived by the judges as an issue of, *e. g.*,

55. "Indian Judicial Behaviour", *op. cit.*, p. 166.

56. See, for example, Ole R. Holsti, CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND THE HUMANITIES (Reading, Mass. : Addison-Wesley Publishing Company, 1969). The differences between systematic content analysis and subjective, unsystematic rumination are made clear in Holsti's book.

State versus Central Power. Even with more and better data, we may never be able to solve this dilemma conclusively, but there is a need for exploring and experimenting with other possible attitudinal value dimensions[57]. In this paper, what we have emphatically and we believe persuasively demonstrated is that regardless of what other values may be present, some judges (*e. g.*, Subba Rao) are far more willing to vote in support of the claims of the individual claimant than others (*e. g.*, Dayal).

We found no obviously apparent relationship between the attitudes of judges, and their social and other background attributes. Nor have we even attempted to examine very carefully patterns of judicial training and recruitment. Moreover, we have not demonstrated the importance and relevance of such data. Yet it is certainly plausible that had we more information about the backgrounds and socialization experiences of the judges, we would be in a stronger position to attempt to account for their judicial behaviour. Hence this is another research priority for the agenda. Such data is always very difficult to find; in fact, it seems to be more fugitive for judges appointed during this decade than it was for judges appointed in the 1950s and 1960s.

There are many other avenues that behavioural research on the Supreme Court of India can take, for this paper has left unanswered, or has answered less than conclusively, a number of key questions. And while there are many pitfalls and problems involved in pursuing such research, it holds greater promise than conventional, legalistically oriented analysis for the discovery of insights and knowledge that will enable us to explain more accurately and scientifically how the judges make up their minds.

57. The social liberalism/conservatism variable may be a key one. See further, "Indian Judicial Behaviour", *op. cit.*, pp. 163-166.

THE SUPREME COURT OF INDIA

A Comparative Study of its Constitution, Organization, Powers and Functions with Historical Background.

HARIHAR PRASAD DUBEY*

It may be mentioned at the outset that the Supreme Court of India is not a continuation of the erstwhile Supreme Courts of the three Presidency towns of this country, nor it is comparable to a theoretical court of the same name existing in England since 1875, or to the Supreme Courts of the American and Australian States or of the Soviet Republics; for all of these, corresponding to our High Courts, are only the highest judicial courts of their respective States.

The English system of administration of justice in its real sense was introduced into this country with the establishment of the Supreme Court of Judicature at Calcutta in 1775 by the British Crown under the Regulating Act of 1773. But that Court, in reality, was only a court of first instance and not the Supreme Court of the country, nor did its jurisdiction extend throughout the country. It remained confined, to the last, for all kinds of cases, civil or criminal, to the Presidency town of Calcutta. That Court had also a special original jurisdiction in certain matters which, though it extended to the entire Presidency of Bengal, could be exercised only over European-British subjects residing therein and the native Indians in the employ of the East India Company. It had also jurisdiction to issue writs that could be issued by the Court of Kings' Bench in England. An appeal from this Court lay to the Privy Council, with its leave, in criminal matters and with the leave of either court in civil cases.

Also, the Presidencies of Bombay and Madras had their own Supreme Courts on the model of the Calcutta Supreme Court, all of which continued to administer justice in the three Presidencies till after the government of India was taken over by the British Crown from the East India Company in 1858. Then, in 1862. these three Crown Courts of original jurisdiction, which were manned by English judges appointed by the Crown from among English barristers and in which only English barristers could practise with the solicitor's system. The Company's three highest courts of appeal, i.e. the *Sadar Adalats*, which had Company's covenanted civil servants as their judges and where generally Indian pleaders did practise, were amalgamated into the Presidency towns' three High Courts established by a Charter granted by Queen Victoria. Though the jurisdictions of both the Supreme Court and the *Sadar Adalat* were vested in one High Court, the old Supreme Court continued on the original side of the High Court with almost the same ordinary original jurisdiction, extending to the same territory, and the same variety of judges and legal practitioners. The decisions of the High Courts, like those of the Supreme Courts and *Sadar Adalats*, were made appealable to the Privy Council which continued to be the highest court for British India upto 1949. It was for the first time in 1937 that, by the Government of India Act, 1935 (hereinafter also called the 'Constitution Act'), a kind of semi-supreme court, an intermediate appellate tribunal between the High Courts and the Privy Council, was established in the country by the name of the Federal Court.

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Politically speaking, upto 1935, India consisted of two parts, namely, a British India ruled by the British Crown and administratively divided into several 'provinces', and an Indian India comprising a large number of princely vassal States under the suzerainty of the British Crown. In the British India there was a High Court or a Chief Court or a Court of Judicial Commissioner for every province, from which an appeal lay to the Privy Council. Similarly, every princely State had its own High Court or Chief Court, but an appeal from it lay to the Prince's own Privy Council modelled somewhat on the English Privy Council. By the Government of India Act, 1935, the British Parliament provided a plan for a 'Federation of India' consisting of all the then British provinces, and those princely States that chose to join the Federation. But, since none of the Indian States joined the proposed Federation, the scheme as envisaged in the Act could not materialize. However, as the Act had established a federal system of government in India, it also established a Federal Court with the duty, as in other federal countries, to interpret and safeguard the constitution and to act as the highest organ for the determination of disputes between the Federation and its constituent units.

The jurisdiction of the Federal Court was original as well as appellate. In the exercise of its former jurisdiction, it was empowered to settle legal and constitutional disputes between any two or more of the member states of the Federation or between any of them and the federal government. But, in the exercise of this jurisdiction, the Federal Court could not pass any other judgment than that of a declaratory nature. One result of this was that, during its entire existence

the Federal Court was called upon to settle only four disputes : two between the British provinces and the Federation[1] and the other two, at the suit of two princely States claiming to have acceded to the Dominion[2]. In addition, on its original side, the Federal Court also performed its advisory function, assigned to it by the Act, in the exercise of which it gave its 'opinion', by a majority vote of the Judges present at the hearing, on any legal question of public importance that was referred to it for its opinion by the Governor-General in his discretion. By this, the Federal Court exercised a sort of 'advisory jurisdiction' though this term was not expressly mentioned as such in the Act. There were only four such references during the life-time of the Federation—one of them being in 1940 concerning the Hindu Women's Right to Property Act[3]. Any opinion given by the Federal Court on any constitutional or legal issue upon such reference was technically not binding either on the High Court or on itself.

The appellate jurisdiction conferred upon the Federal Court over the High Courts in British India and the Federated States by the Constitution Act, Sec. 205, was also very much limited. Firstly, though it was applicable also to criminal cases[4], it could only be exercised upon a certificate granted by the High Court. Secondly, it could be invoked only when the 'judgment, decree or final order' of the High Court sought to be appealed from, involved a substantial question of law as to the interpretation of the Constitution Act, or, the Indian Independence Act, 1947, or any order made thereunder. However, in such cases, if the appellant was also entitled to bring an appeal to the Privy Council on some other grounds without the certificate of the High Court in British India, he could file his appeal also on those grounds in the Federal Court with its leave instead of going to the Privy Council with a separate appeal on those grounds alone. The federal legislature, however, had been empowered to enlarge the appellate jurisdiction of the Federal Court in civil cases by providing that an appeal from any 'judgment, decree or final order' of the High Courts could be taken to the Federal Court without any such certificate as above, provided (i) the value of the subject-matter in dispute was not less than fifty thousand rupees or such other sum not less than fifteen

1. *The United Provinces* vs. *The Governor-General*; 1939 FCR 124; *The Governor-General* vs. *The Province of Madras*, 1943 FCR 1.
2. *Ramgarh State* vs. *Province of Bihar*, AIR 1949 FC 55; *State of Seraikalla* vs. *Union of India*, 1951 SCR 474.
3. See AIR 1941 FC 72.
4. See AIR 1939 FC 43.

thousand rupees, as might be specified, or (ii) the Federal Court gave special leave to appeal.

The decisions of the Federal Court were appealable to the Privy Council without any leave, if the same were made in the exercise of its original jurisdiction and, in any other case, either with its leave or with the leave of the Privy Council. The law declared by the Federal Court was binding on all courts in British India and, after Independence, throughout the Dominion of India. All the authorities therein, civil or judicial, were to act in aid of the Federal Court.

Though modelled upon the Supreme Court of Australia, called the 'High Court', Indian Federal Court's original and appellate jurisdictions, were not so wide as those of the Australian Court. However, in matters of judicial review of legislation, its powers were identical with those of the Australian Court. It could pass upon the validity of any law in the exercise of its both original and appellate jurisdiction but, unlike Australia, not at the instance of a private citizen on its original side. Also, unlike the Australian, American and Indian Supreme Courts or even the High Courts of the Presidency towns, it had no power, either in the exercise of its original or appellate jurisdiction, to issue any writ, order or direction, in the nature of *certiorari, mandamus, quo-warranto, prohibition or habeas corpus,* to any court or tribunal or administrative authority.

The Federal Court, to begin with, had been established with a 'Chief Justice of India' and two puisne judges which composition of the court continued throughout the life of the Federation even though the Constitution Act had empowered the appointment of as many puisne judges as was deemed necessary but not exceeding six unless the federal legislature presented an address to the Governor-General to that efiect. It was only after Independence of India that the number was increased to four and ultimately to six. Its judicial work remained mainly constitutional in nature upto 1947 ; thereafter it was also considerably increased.

The Federal Court, though it started functioning from the 1st of October, 1937, was formally inaugurated two months later on the 6th of December, 1937. It was a Court of Record and empowered to punish its contempts. Any person who had been, for atleast five years, a judge of a High Court or a barrister or advocate or pleader of atleast ten years' standing, could be appointed judge of the Federal Court; but no person could be its Chief Justice unless he was a barrister, advocate or pleader of at least fifteen years' standing or had been a barrister, advocate or pleader when first appointed as its judge. Thus, though

an I. C. S. High Court puisne judge could be its puisne judge, he could not become its Chief Justice even if he was the seniormost judge. This rule was obviously inspired by a similar practice in vogue since 1862 with regard to the office of a High Court Chief Justice. But, curiously enough, the same Act, *viz.* the Government of India Act, 1935, which barred the office of Chief Justice of India to the members of the Indian Civil Service, opened the office of the High Court Chief Justice to the same category of persons. Judge of the Federal Court, like those of the High Courts, were appointed by the British Crown and, after Independence, by the Governor-General of the Indian Dominion; but, unlike the latter, who were made to retire at the age of sixty, they held their offices upto the age of sixty-five. They could not be removed unless so recommended by the Privy Council on reference by the Crown on the ground of 'misbehaviour or mental or physical infirmity'. During the thirteen years' life of the Court, none of its judges was so removed from office. The Chief Justice got Rs. 7,000, and the puisne judges Rs. 5,500 per month as salary.

On the partition of India the Federal Court was formally reconstituted on the 15th August, 1947, for the 'Dominion of India' which status was conferred on Independent India by the same Act of the British Parliament, *viz.* the Indian Independence Act, 1947, under which the re-constitution of the Federal Court was considerably enlarged by the Federal Court (Enlargement of Jurisdiction) Act, 1948[5] by stopping the flow of civil appeals from the Indian High Courts to the Privy Council. Further, by the Indian Constituent Assembly's Act, No. V of 1949 (the Abolition of the Privy Council Jurisdiction Act), the Federal Court was invested with the same jurisdiction to entertain and dispose of appeals and petitions from the decisions of the High Courts of the former British India as the Privy Council possessed on the date of enforcement of the aforesaid Act[6], and, the jurisdiction of the Privy Council to entertain and hear any Indian appeal, except those set down for hearing during its next sessions, was abolished and all other appeals pending before it were transferred to the Federal Court. However, the jurisdiction of the Privy Council to deal with appeals from the princely States which had, since the Indian Independence Act, joined the Dominion of India and from which appeals had been taken to that Court, continued till it too was abolished by the present constitution transferring all such appeals to the Supreme Court.

5. W. e. f. February 1, 1948.
6. Oct. 10, 1949.

The Supreme Court of India, as established under the present Constitution, is coeval with the 'Sovereign Democratic Republic of India'. It was inaugurated at New Delhi on the 26th January, 1950, in the same building in which the Federal Court had sat, with all the six judges of that Court[7] as its judges along with all the suits and proceedings pending therein. Also, all judgments and orders delivered or made by that Court upto that date were ordained to have the same force and effect as if they had been delivered or made by the Supreme Court. Thus, in effect, the 'Federal Court of the Dominion of India', as of the 25th January 1950, became the 'Supreme Court of the Union of India' the very next day. But, from this, it may not be thought that the Supreme Court merely stepped into the shoes of the Federal Court. As a matter of fact, it was constituted to be much more powerful as a court than, as we shall presently see, any other court or tribunal of any other country. It became the highest court of the largest democracy in the world. It was invested not only with all the powers and jurisdictions of the Federal Court but also with the appellate jurisdiction of the Privy Council as respects India and with so many other powers as were never enjoined by any other court or tribunal of this country. Powers that are wielded in some countries by several courts separately were all vested in our country in one single Supreme Court.

The Supreme Court of India is a court of record with power to punish contempts of itself. Empowered to sit in Delhi or in such other place or places in India as its Chief Justice, with the approval of the President, may from time to time appoint, the Supreme Court has so far sat only in New Delhi and the proposals for its segmentation into benches have been ignored[8].

7. Sir Maurice Gwyer was the first, and Sir Harilal J. Kania, the last, Chief Justice of the Federal Court. The six judges of the *Federal Court* who became judges of the Supreme Court and were as such sworn on the 28th of January, 1950 were : Chief Justice Kania and Justices Fazl Ali, Patanjali Sastri, M. C. Mahajan, B. K. Mukherjea and S. R. Das. The *Supreme Court* has had 14 Chief Justices from 1950 to 1975. They are in chronological order : Sir Harilal J. Kania, Patanjali Sastri, M. C. Mahajan, B. K. Mukherjea, S. R. Das, B. P. Sinha, P. B. Gajendragadkar, A. K. Sarkar, K. Subbarao, K. N. Wanchoo, Mohd. Hidayatullah, J. C. Shah, S. M. Sikri and A. N. Ray.
8. None of the Supreme Courts of the world sit in more than one place, nor are their judges itinerant, except those of the Criminal Chamber (Kriminalkammer) of the Swiss Supreme Court, who sit, from time to time, in each of the three federal assize districts (assizenbezirke) for trying criminal cases with being at Lausanne. The Fifth Criminal Division of the Supreme Court of West Germany which, with its President and 5 judges, sits in West Berlin, the principal seat of the Court remains at Karlsruhe. The practice in the United States of the Supreme Court judges going on circuits and sitting in the Courts of Appeals was also abandoned after 1891.

The Supreme Court of India consists of a 'Chief Justice of India' and 13 other judges[9], the maximum number fixed by the Parliament by Act No. XVII of 1960. But this strength of the Court, seeing its vast jurisdiction and the volume of work before it, is highly inadequate.[10]

Every judge of the Supreme Court of India is appointed by the President in consultation with such of its sitting judges and of the High Courts as the President may deem necessary for the purpose; but, in the case of appointment of a puisne junge, the Chief Justice of India must always be consulted. From this, it may not be concluded that the Indian Prime Minister has no say in judicial appointments. The President is required to act on the aid and advice of the Council of Ministers headed by the Prime Minister. In England also, the Lord Chancellor—the highest judicial dignitary of the country and a member of the Cabinet—who enters and goes out of office with every ministry, must be appointed on the advice and recommendation of the Prime Minister. The other judges of the House of Lords are also appointed similarly and further, as in India, in consultation with the Lord Chancellor. They are appointed by the Crown from among Barristers of England and Northern Ireland, and Advocates of Scotland, of atleast 15 years' standing and judges of the Court of Appeal in England and the Court of Session in Scotland of atleast two years standing.

In the United States neither the U. S. Constitution nor an Act of

9. At the time of writing, there are two vacancies caused by the sad demise of Justice S. N. Dwivedi in December, 1974 and the retirement of Justice Reddy in January 1975. For a complete list of the present judges, see the last page of this Article.

10. The House of Lords, with only an appellate jurisdiction extending to the United Kingdom with a population of only sixty million and to which mostly civil appeals go—largest of them being from the Court of Appeal in England, some 25 a year has almost the same number of judges as our Supreme Court, i. e. 11 'Lords of Appeal' and the Lord Chancellor who sit only 4 days a week and dispose of only 35 appeals a year. In Japan, whose population exceeds that of our Uttar Pradesh by a few million only, the Supreme Court with not so wide a jurisdiction as that of our Supreme Court has since 1960 as many as 17 judges. Under the same conditions as in Great Britain, France with a population of fifty million has provided her Supreme Court with 75 judges, and the Federal Republic of Germany with as many as 100. The Supreme Court of the United States with about one-third of the Indian population has nine judges—one 'Chief Justice' and 8 'associate justices'. Similarly, the High Court of Australia has 7 judges, that of Canada 10, and that of the Soviet Union more than 16. The Supreme Federal Tribunal of the Swiss Confederation with a population of about six million has 30 judges and about a crore of 'substitutes' who are required to sit when the regular judges are unable to serve.

Congress lays down any qualification for the U. S. Supreme Court judgeship nor is there any system of judicial promotions. In practice, persons who have been lawyers and belong to the political party of the President are appointed with the advice and consent of the Senate. The Senate, however, does not turn down the President's nomination[11]."

In France, judges of the Supreme Court of Cassation are appointed by the President on the nominations presented by the Superior Council of the Magistracy (*Counseil superieur de la magistrature*), and, in Italy, on the proposal of the Minister of Justice after consultation with the Council of Ministers and on the previous advice of the High Council of the Magistracy. Selections are made on the basis of seniority and merit from among the judges of Courts of Appeal; it is rare that any one goes to the Court of Cassation direct— though there is a rule in both the countries that a law professor or a barrister of outstanding merit may also be appointed on the recommendation of the above Council. In the absence of a system of judicial control over legislative and administrative acts in France and Italy, appointments to the Supreme Court are seldom influenced by political considerations. Similarly, judges of the Supreme Federal Court of West Germany are largely, career judges and appointed on the selections made jointly by the Federal Minister of Justice and a committee consisting of the Land Ministers of Justice and an equal number of members elected by the Federal Assembly (Bundestag).

In Japan, the 'Chief Justice' of the Supreme Court is appointed by the Emperor as designated by the Cabinet, and its other judges are appointed by the Cabinet itself. About two-third of Judges are drawn from the legal profession, professors of law and diplomates and the rest are career judges. However, after their initial appointment, their retention in office is 'reviewed' by the voters at the first general election of the lower chamber (Shugiin) of the Parliament held after their respective appointments; and, in case the majority of voters do not approve their appointments, they are dismissed from their offices. But, in case they are not thus recalled, they serve for ten years, after which their appointment is again 'reviewed' by the

11. So far it has directly rejected only 11 nominations for the Supreme Bench—the latest being in 1969 for the first time in 39 years. It was that of Clement F. Haynsworth—a nominee of President Nixon—on the ground of his being pro-segregationist and having conflicts of interests In 1930, it had rejected President Hoover's nomination of Judge Parker of North Corolina for the Supreme Bench on the ground that, from his judgments, it appeared that he was a strong Conservative against the organised labour. 12 other nominations lapsed due to the Senate postponing their considerations indefinitely.

voters at a similar election; and, in case they survive this election too, they continue to hold their offices until they retire, or are removed earlier by impeachment by a court composed of 14 members elected equally from the two chambers of the Kokkai, the Japanese diet, or are judicially declared incompetent to discharge their official duties.

Judges of the Supreme Courts of Switzerland and the U.S.S.R. are elected by the federal legislature for 6 and 5 years' terms respectively, generally, from among lawyers and jurists; though no qualifications for judgeship are prescribed by the Constitution of either country, except that the Swiss Constitution lays down that the judical candidates must be eligible for the federal lower chamber and that regard must be had to the representation of the three national languages-German, French and Italian. However, the President and Vice-President of the Swiss Supreme Court are elected by the Assembly from among its judges every two years without being eligible immediately for re-election; but the other judges are customarily re-elected so long as they care to serve. The organization of the Court and its divisions, number of its judges and 'substitutes', their terms of office and emoluments, are all determined by ordinary legislation in both the countries.

In India, the necessary qualifications for judgeship of the Supreme Court are prescribed by the Constitution, which ordains that no one shall be appointed a judge of the Supreme Court unless he is a citizen of India and has been for at least five years a judge of the High Court or for at least ten years an advocate of the High Court or is a distinguished jurist in the opinion of the President of India. In effect, the qualification for appointment as Supreme Court judge has remained the same as had been in the case of the Federal Court, except that, now even a 'distinguished jurist' can be appointed to the Supreme Court. Though in fact, no such appointment has so far been made solely on this consideration; nor has any legal practitioner ever been raised to the Supreme Bench direct, except, of course, Shri Sikri who later rose to the office of Chief Justice of India. The present Constitution had also opened the office of Chief Justice and puisne judges to the members of the Indian Civil Service but due to stoppage of recruitment to the service this service has practically dried up. The last I.C.S. Chief Justice of India was Shri Wanchoo who retired in 1968.

Today, most of the judges of the Suprem Court of India are persons who had been eminent members of the bar, prior to their being raised to the bench of the High Courts from where they were in due course elevated to the Supreme Bench. However, in England,

Canada, Australia and the United States, as a practical matter, mostly members of the bar are directly appointed to the Supreme Bench, and the Lord Chancellor of England and the Chief Justice of the United States are almost invariably appointed from outside the House of Lords and the U. S. Supreme Court respectively. Only two Chief Justices of the United States, White (in 1921) and Stone (in 1946), have so far been appointed from among the 'associate justices' of the U. S. Supreme Court and all the remaining 13 of the 15 Chief Justices that Court has had during its one hundred and eighty-six years' life came from outside it. The great Chief Justice Warren, who retired in 1969, was the Governor of California prior to his appointment as Chief Justice in 1953 and has run for the U. S. vice-presidency in 1948. In India, on the other hand, all the Chief Justices had until recently been appointed from among the sitting judges of the Supreme Court itself strictly in order of seniority. Theory apart, in practice India had preferred the French system in the matter of actual selection of judges and Chief Justices of the Supreme Court.

Any judge of the Supreme Court of India may resign his office by writing under his hand addressed to the President. So far only six judges have so resigned–the first being Chief Justice B.K. Mukherjea in 1956 and the second, Justice Madholkar in 1966. The third judge, Chief Justice Subbarao, resigned in 1967 in order to seek election to the Presidency. The remaining three judges (Shelat, Hegde and Grover) resigned in 1973 in protest against their being passed over for the office of Chief Justice when the present Chief Justice A.N. Ray was appointed to succeed Chief Justice Sikri. In America and England, such an occasion, as already noted, rarely arises, and even when it has arisen, as in the solitary case of Justice E. D. White who was made Chief Justice of the United States[12] in 1910 in perference to his senior colleague, J.M. Harlan, the latter did not resign. It appears only a few judges of the U. S. Supreme Court have so far resigned, for other and different reasons.[13]

12. This designation was officially adopted with the eighth Chief Justice. The first seven Chief Justices were officially designated the 'Chief Justice of the Supreme Court'.

13. Justice Jughes (later Chief Justice 1930-41) resigned in 1916 to run for the U.S. Presidency, and Justice Rutledge had resigned in 1971 to become Chief Justice of a State. Later, in 1795, he was appointed Chief Justice of the U.S. Supreme Court in a casual vacancy; but, even then, no associate justice resigned. However, after a few months, when his nomination for permanent chief justiceship was turned down by the Senate, he had to go. Lately, Justice A. Fortas had to resign under pressure in 1969 as a sequel to a public scandal about his financial activities.

In the matter of removal of judges of our Supreme Court from their offices, their position is constitutionally better than that of the judges of the Federal Court or of the House of Lords. No judge of the Indian Supreme Court can be removed unless a resolution to that effect is adopted not only by an absolute majority of the total membership of each house of Parliament but also by a majority of at least two-thirds of its members present and voting, on the ground of 'misbehaviour or incapacity'. In England, Judges of the House of Lords can be removed only by an ordinary resolution adopted by a simple majority of both houses of Parliament for any reason the Parliament may be induced by and need not confine to such grounds alone as in India. In the U.S.A., on the basis of impeachment for and conviction of treason, bribery or other high crimes and misdemeanours before the Senate judges may by removed from office by a two-thirds mojority of the Senators present.[14] In India, no judge of the Supreme Court has so far been impeached or removed from office. Judges of the Australian High Court and the Canadian Supreme Court also can be removed only on an address of both the houses of parliament for 'proved misbehaviour or incapacity' and 'misbehaviour' respectively. Judges of the Irish Supreme Court are similary removable for stated misbehaviour or incapacity. Judges in France and Italy are irremovable from office but their tenure is subject to any disciplinary proceeding taken against them by the High Council of the Judiciary to be presided over, on such occasions, by the First President of the Supreme Court of Cassation, of which no judge can be removed by the French Parliament. Judges of the Supreme Courts of the U.S.S.R. and the G D.R. can be 'recalled' by the same body that elects them, that is, the federal legislature.

The age of retirement, judicial salary and pension of the judges of our Supreme Court are much less than in most other countries. Here the age of retirement is 65 fixed by the Constitution itself; whereas, in some countries, till a few years ago, there was absolutely no age limit for serving on the Supreme Bench. For example, in England, France, Canada and the United States, judges used to hold office for life during good behaviour and, as a result, the superior courts of these countries, barring exceptions, had highly experienced and seasoned

14. Only one judge of the U. S. Supreme Court—Justice Samuel Chase—was impeached in 1804-5 but was ultimately acquitted; since then no judge of that Court has ever been impeached.

judges. They remained on the bench even upto the age of 85 or 90[15]. Whereas the Supreme Court of the United States has had only 14 Chief Justices and 89 puisne judges during a period of eighteen decades since its creation in 1789, the Supreme Court of India had the same number of Chief Justices and about half of the puisne judges during a period of only twenty-four years since its establishment.

It was not too long ago that certain abuses of the old system led to the fixation of the age of retirement even in the countries referred to above. Nevertheless, the retiring age in these countries is higher than that in our country[16].

As concerns the judicial salary, in India, it is only Rs. 60,000 and Rs. 48,000 per year respectively for the Chief Justice of India and each of the other judges. Two hundred years ago their counterparts even in India used to get Rs. 80,000 and Rs. 60,000 per year, the real value of which was at least twenty times higher. In England, the Chief Justice and judges are paid £ 14,500 and £ 11,250 a year, in Canada $ 35,000 and $ 30,000 and in the United States, $ 40,000 and $ 39,5000 a year respectively. As regards pension in England it is equal to one-half of their salary in case they retire after 15 years in office and one-quarter after 5 years. In Canada, it is equal to two-thirds of their salary in case they retire at the age of 75 with 10 years' service or at 70 with 15 years' service. In the United States, it is equal, as already seen, to their full salary if they choose to retire or resign at the age of 70 after serving for 10 years. Upto 1932, their salaries and pensions were exempt from taxation but, now, since the Revenue Law of that year, the same have become subject to taxation, which is also the case in India, Canada and Australia. In almost all the above countries, their emoluments cannot be reduced during their terms of office while in India the judicial salary has remained the same over

15. Justice Holmes of the U.S. Supreme Court retired at the age of 90 after a combined total service of over 48 years of his judgeship including 30 years on the Supreme Bench (1902-32). Taney was Chief Justice for 28 years till he died at the age of 87 (1864), and Chief Justice Marshall, for about 34 years, till his death in 1835 at the age of 80. Justice Brandeis retired at the age of 82 after serving on the Supreme Bench for 23 years. Justice Field remained on the bench for about 35 years, and Justice Douglas, for 33.

16. It is 75 in England and Canada while 70 in France, Switzerland and Japan. In the United States, as a matter of fact, judges of the Supreme Court do not technically retire even today rather they accept 'inactive duty' at the age of 70 with 10 years' service with full salary under an act of Congress passed in 1937, A measure adopted by the U. S. Senate in 1954 making the retirement compulsory at the age of 75 not find favour with the other Chamber.

since it was fixed by the present Constitution in 1950, it has constantly been raised by appropriate law in other countries and so currently there is a move to raise the salaries of judges in India also.

The Constitution of India, unlike that of the United States, does not vest the 'judicial power' of the Indian Union in the Supreme Court or in any other court or tribunal established in this country. The U. S. Constitution, on the other hand, has vested the 'judicial power of the United States in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish'. It is by virtue of this provision that the federal government of the United States has established its own courts and tribunals, called the federal courts, at the apex of which is the national Supreme Court at Washington. Their function is to administer federal law and not to concern themselves with any of the State laws which exclusively fall within the domain of the State Courts created under the authority of the respective State Constitutions. In India, the Union Government has no judicial courts of its own except the Supreme Court, and it is the State courts themselves which, as can be seen in Switzerland, Australia, Canada or the Soviet Union, administer both the State and federal laws. It is, no doubt, true that, in India, as in Canada, judges of the State High Courts as well as of the Supreme Court, are appointed and can be removed by the Union Government acting through the President/ Governor General and the Parliament respectively but, unlike in Canada where judges of both the national Supreme Court and the provincial superior courts are paid by the Dominion Government, judges of the Indian Supreme Court are paid by the Union Government and those of the High Courts by the respective States.

Powers and functions of no other Supreme Court are so meticulously defined by Constitution as those of the Indian Supreme Court. The Constitution of India has devoted nearly a whole Chapter and about a score of Articles for this purpose. Broadly speaking, powers and functions of our Supreme Court fall either within its appellate or original jurisdiction and some of them, within both. For example, it reviews the decisions of the High Courts and other courts and tribunals in the exercise of its appellate jurisdiction, and determines the legal disputes between the Union and the States and between the States *inter se* in the exercise of its original jurisdiction, within which also fall the references sent by the President for its advisory opinion, as well as Presidential and Vice-Presidential election disputes and the writ petitions filed before it for the enforcement of Fundamental Rights. But the writs can also be issued by it in the exercise of its

appellate jurisdiction while dealing with appeals arising out of writ petitions filed in the High Courts. It exercises its power of judicial review both in appeal as on its original side.

The exclusive original jurisdiction of the Supreme Court as expressly conferred by the Constitution extend to only legal disputes (a) between the Union Government and one or more States, (b) between the Union Government and State or States on one side and one or more other States on the other, and (c) between two or more States. And even this limited jurisdiction cannot be exercised by it in respect of any such dispute as above arising out of any treaty, agreement, covenant, engagement, *sanad*, or other similar instruments, entered into or executed prior to the enforcement of the Constitution and still in operation, or barring the original jurisdiction of the Supreme Court. Thus, the original jurisdiction as expressly conferred by the Constitution upon the Supreme Court is highly restricted. It also cannot be invoked by a private citizen; nor is it in the nature of an ordinary original jurisdiction such as that endowed upon the High Court of Australia or the Federal Tribunal of Switzerland.

In Australia, not only 'all matters arising under a treaty or affecting consuls and ambassadors and all disputes between the States, but also any case in which the Commonwealth or a State is a party, and any dispute between the residents of different States or between a State and a resident of another State, as also a case in which a writ or *mandamus* or prohibition or an injunction is sought against an officer of the Commonwealth, have been expressly placed within the original jurisdiction of the High Court. In addition, the commonwealth, Parliament may assign the following matters to the original jurisdiction of the High Court, namely, those arising under the Constitution or involving its interpretation or arising under any law of the Parliament or relating to Admiralty and Maritime jurisdiction. All cases involving constitutional issues or federal questions must be initiated and heard in the High Court and, even if validly instituted in the State Supreme Courts, must be removed to the High Court. However, notwithstanding such a wide original jurisdiction endowed upon the Australian Supreme Court, cases on its original side are not so numerous, the great bulk of its business being appellate.

The original jurisdiction conferred upon the Swiss Supreme Court (*Bundesgericht*) is wider than of the Australian Court. The Swiss Supreme Court has been made a court of ordinary original jurisdiction in both civil and criminal, as well as constitutional, matters. Its original civil jurisdiction includes disputes between the Confederation

and the Cantons; between the Confederation on the one hand, and corporations or individuals on the other, when these latter are plaintiffs and the amount involved is at least 3,000 francs; between the Cantons *interse* or between the Cantons on the one hand and corporations or individuals on the other, when the amount involved is the same as above and one of the parties so 'demands'; controversies between the communities of different Cantons on questions of citizenship; and, in addition, cases concerning railways, bankruptcy, and other matters assigned to it by legislation and in respect of which the parties agree and lodge security. Its original criminal jurisdiction extends to high treason, rebellion, violence against the federal authorities, political crimes, offences against the law of Nations, and charges, if brought before it, against federal officials, all of which it tries with the aid of a jury. Its constitutional jurisdiction extends to conflicts of jurisdiction between the federal and cantonal authorities, constitutional and political disputes between the Cantons *inter se* in matters of Public law, and complaints of individuals about the violation of constitutional rights of citizens or of concordats and treaties. On the whole, the original jurisdiction of the Swiss Supreme Court is plenary in character not enjoyed by any other Supreme Court.

The original jurisdiction of the U. S. Supreme Court cannot be abrogated, diminished or enc.. nced by legislation and is not so wide as that of its Australian counterpart. It only extends to cases affecting ambassadors and other public ministers and consuls, and to controversies in which a State shall be a party provided the State does not sue its own citizens. Also unlike Australia and Switzerland, one of the States cannot be sued in the U. S. Supreme Court by any citizen of another State or of a foreign country. The original jurisdiction of the U. S. S. R. Supreme Court extends to both civil and criminal cases but it is not as wide as that of the Swiss Federal Tribunal. As a court of first instance, it is empowered to decide all disputes involving the Union Republics and other matters of all-Union importance, and to try cases of high treason and other criminal offences of sufficiently grave nature. Similarly, the Supreme Federal Court of West Germany is endowed with an original jurisdiction in matters of treason and other similar offences. So, like the Swiss Federal Tribunal those of the U. S. S. R. and West Germany too are courts of original criminal jurisdiction. But the House of Lords and the Supreme Courts of Canada, France and Italy have no original jurisdiction in any matter. However, the supreme administrative courts of France, Italy, Switzerland and

West Germany have an original jurisdiction with final judgment but only in administrative matters.

Though the original jurisdiction of the Indian Supreme Court as created by the Constitution is, as already noted, highly restricted and has so far been exercised in a handful of cases but the Supreme Court, in disposing of references and a large number of writ petitions under Article 32 of the Constitution, also acts within original jurisdiction. In the exercise of its writ jurisdiction, the Supreme Court issues directions, orders and writs incluning writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever is appropriate, for the enforcement of the fundamental rights guaranteed by the Constitution. This power and jurisdiction of our Supreme Court cannot, unlike that of the U. S. Supreme Court, be abrogated or restricted or suspended except as otherwise provided by the Constitution. In the United States, even this jurisdiction of the Supreme Court, as its appellate, is entirely dependent upon the legislative will of the Congress. Even as empowered by the latter, it can issue writs only in aid of its original and appellate jurisdictions possessed by it and their use on the original side is not so extensive as it is in our country under Article 32 of the Constitution. The High Court of Australia, in the exercise of its original jurisdiction, can issue writs but only of *mandamus* and prohibition and injunctions and that too against the Commonwealth officers only. The House of Lords, the Privy Council and the Supreme Court of Canada do not entertain writ petitions directly; they can issue them when they reach them in appeal from the courts over which they have appellate jurisdiction. In the U. S. S. R., France and Italy, even this is not possible ; for none of the judicial courts in these countries including their Supreme Courts can issue any of the Common Law writs. However, the French and West German administrative courts issue certain writs in administrative matters.

The Supreme Court of India, on its original side, also decides all doubts and disputes arising out of or in connection with the election of the President or Vice-President and its decisions thereon are final. Election disputes about the Presidential and Parliamentary elections in the Fifth French Republic are decided by the Constitutional Council with final judgment and the French Supreme Court has no concern with any such election disputes. In India, on the other hand, even the Parliamentary and State legislative election disputes reach the Supreme Court in appeal, and its verdict is final in such cases.

The Supreme Court of India also performs its consultative

function on the original side. In the exercise of its advisory jurisdiction, which is similar to that of the erstwhile Federal Court and of the Canadian and Irish Supreme Courts, it gives its opinion, upon a reference made by the President, on any question of law or fact of public importance including the one arising out of any treaty, covenant, *sanad*, etc., which have otherwise been excluded from its specific 'original jurisdiction' as created by Article 131 of the Constitution. Though it is not obligatory upon the Supreme Court to give its opinion on any question so referred to it, but it must answer all questions referred to it relating to any treaty, convenant, or *sanad*, etc. The Supreme Court has given its opinion so far in about half a dozen references; but legally its opinion on any such constitutional or legal question, not being a judicial pronouncement, is not binding on the President nor on itself in a subsequent proceeding or on any party or court in India, though it has a great persuasive force. Also, the Supreme Courts of Canada and the Eire are required by the Constitution to give their opinion on constitutional questions, but the latter only on the constitutionality of the Bills before their passing. In the United States, Australia, England, Japan, France, Italy, Germany, Switzerland and the U. S. S. R. there is no constitutional provision requiring the Supreme Court to give any such advisory opinion. The Supreme Courts of the United States, Australia and Japan and the House of Lords in England have refused to give any advisory opinion on the ground that they are only competent to settle a live issue and an actual controversy between two or more parties coming before them in a properly constituted appeal.

In fact, the advisory function of the Indian, Canadian and Irish Supreme Courts is reminiscent of an analogous function performed by the Privy Council as successor to the ancient *curia regis* whose one of the duties was to advise the King on all affairs of state. The Crown, many a time in the seventeenth and eighteenth centuries when England was acquiring territorial sovereignty overseas, referred constitutional issues relating to colonial administration for the opinion of the Privy Council. The Judicial Committee Act, 1833, sec. 4, even now empowers the Queen to consult the Privy Council upon 'any matter whatsoever as Her Majesty shall think fit'. And the same 'law lords', who refuse while sitting in the House of Lords to advise the Crown on any constitutional or legal question, do consider such questions sitting in the Privy Council and report their opinion thereon to the Crown. A somewhat similar function was performed by the Japanese Privy Council under the Meiji Constitution (Teikoku Kempo, 1889-1946), and is now entrusted to the French Constitutional Council under the Fifth Republic since 1959.

Coming to the appellate jurisdiction of the Indian Supreme Court, it may be noted that it is wider than that of any other Supreme Court. Indian Supreme Court is expressly empowered by the Constitution to entertain and hear, in its discretion, any appeal from 'any judgment, decree, decision, sentence or order' passed in any case by any court or tribunal in the territory of India. Further, on the certificate of a High Court or by its own leave, it can entertain and hear an appeal from any 'judgment, decree or final order' of the High Court in any civil, criminal or other proceeding if the same involves a substantial question of law as to the interpretation of the Constitution. In addition, an appeal in civil matters, without regard to the amount in controversy, may also be taken to it if the High Court only certifies that the case involves a substantial question of law of general importance which in the opinion of the High Court needs to be decided by the Supreme Court. Prior to 1972, only such, as were valued at not less than Rs. 20,000, could reach the Supreme Court in appeal upon the certificate of the High Court but now[17], the Supreme Court may be approached even in small matters provided there is some substantial question of law involved. Similarly, now, in criminal cases, appeals may be taken as of right without any leave of the High Court or of the Supreme Court, if the former on the trial held by itself, or in appeal from acquittal, has sentenced the accused to death or imprisonment for life or ten years or more. An appeal in any other criminal matter may be taken to it when the High Court certifies that it is a 'fit case' for appeal to the Supreme Court. This provision, like the one already noted, enables the Supreme Court to entertain and hear an appeal even from an order of acquittal passed in any case. This is unlike in England where no order of acquittal is appealable either to the House of Lords or even to the Court of Appeal.

In fact, till a few years ago, the House of Lords could not entertain an appeal in its discretion from any court other than the court of Appeal, the Court of Session and the Courts-Martial Appeal Court. For the first time it was empowered in 1960 to entertain direct criminal appeals from the Queen's Bench Division in certain cases; and, then, in 1969, direct civil appeals from the High Court. However, the latter, which are generally called the 'leap-frog appeals', can be taken only by agreement of parties and on the certificate of the High

17. Since the Constitution (XXX Amendment) Act, 1972, sec. 3.

Court or of itself granted on the ground that the case involves a statutory interpretation of general public importance or requires a re-consideration of some previous precedent of a higher court binding upon the High Court. However, all in all, the House of Lords is primarily a court of civil appeals, and hardly 5 or 6 criminal appeals go to it each year. Moreover, its criminal appellate jurisdiction does not extend to the whole of the United Kingdom—no criminal appeals go to it from the Scottish Courts. But, unlike Indian Supreme Court which can review the decisions of the military tribunals only by way of writs under Article 32 of the Constitution, it is also empowered, as already seen, to hear appeals from the highest military tribunal. However, both the House of Lords and the Supreme Court of India, and for that matter all Supreme Courts of the Common Law countries, hear appeals on merits and may finally terminate the litigation by completely disposing of the appeals instead of adopting the French Supreme Court's practice of *cassation avec renvoi.*

The Supreme Court of India thus, is a general court of appeal with power to deal with any case arising out of any law, Central or State. Its appellate jurisdiction as conferred by the Constitution, though it may be enhanced by the Parliament as provided by the Constitution, can not be abridged or abrogated by an ordinary legislation. But, if the Parliament so chooses, it may by this process considerably squeeze the appellate jurisdiction of the Supreme Court by simply making all the judgments and orders of the High Courts final and non-appealable, and simultaneously barring the High Court's power to certify cases for appeal to Supreme Court, all of which the Parliament is competent to do under the authority granted to it by the Constitution.

In other countries, the Supreme Courts, like other courts and tribunals, exercise their appellate jurisdiction solely at legislative will. For example, the U. S. Supreme Court owes its entire appellate jurisdiction to acts of Congress and can not exercise it—though conferred by the Constitution—unless defined and specified by the Congress. If the Congress so likes, it may strip the U. S. Supreme Court of all its appellate powers given by it and thus reduce it to a mere court of first instance with a very limited function. Appeals go to it by one of the two methods, viz. (i) by way of *appeal proper* as of right, (a) from the State Supreme Courts where they have invalidated a federal statute or upheld a State law or constitutional provision alleged to be in conflict with the federal Constitution, laws or treaties, (b) from the federal Courts of Appeal when they have annulled a federal law, treaty or a State law or constitutional provisons as repugnant to a federal law or constitutional provision, and (c) direct—but rarely from the federal District Courts in certain cases involving the constitutionality of a federal statute, and (ii) by *certiorari* at the discretion of the U. S. Supreme Court, (a) from the State Supreme Courts in all cases involving federal questions, and (b) from the federal Courts of Appeal where their decisions involve interpretation of the federal Constitution, laws or treaties, or they have upheld the validity of a State law against a federal law. The bulk of cases– upto 85 percent of the about 25,000 filed annually—on its appellate side reach it by *certiorari*, and of them upto five-sixths are dismissed summarily; for a review on a writ of *certiorari* is not a matter of right and can be granted only when there are important reasons for it. So, the U. S. Supreme Court, although its appellate jurisdiction extends to both law and fact, is not a general court of appeal from the State Supreme Courts, nor can it impose on them a uniform interpretation of the general law.

The Australian High Court has jurisdiction to hear appeals, subject to the laws of parliament, from any judgment or order of the High Court, itself passed in the exercise of its original jurisdiction and of all other federal courts and the State Supreme Courts. But it has no exclusive appellate jurisdiction over all kinds of cases decided by the State Supreme Courts, from which appeals in respect of State jurisdiction and not involving federal questions or legal issue between the States *inter se* can be taken direct to the Privy Council without first going to the High Court; and such appeals can only be abolished by the British Parliament. Moreover, the Australian High Court is not a final court of appeal for its decisions are further appealable to the Privy Council; and the Commonwealth Parliament, which alone is empowered to abolish such appeals, does not still seem to be in a mood to make its supreme court the highest appellate tribunal of the country. The appellate jurisdiction of the Canadian Supreme Court is more similar to that of the Indian Supreme Court. But the Canadian Constitution does not mention the word 'Supreme Court', nor does it define its powers and jurisdictions. It only states that the Canadian Parliament may 'from time to time provide for the constitution, maintenance and organization of a General Court of Appeal for Canada'.

Though the Swiss Constitution, too, does not specifically speak a word about the appellate jurisdiction of the Swiss Supreme Court (*Bundesgericht*), the same extends to all cases decided by it on its original side subject to federal legislation. In addition, since Article

114 of the Constitution lays down that the 'Confederation may by law place' such 'other matters within the jurisdiction of the Federal Tribunal as to give it powers' to ensure the uniform application of the federal laws, and since in the absence of separate federal courts in the Swiss Confederation the Cantonal courts themselves have to administer both the Cantonal and the federal laws, the federal parliament (*Bundesversammulung*) has by law empowered the Federal Tribunal to entertain and hear civil appeals from the Cantonal Supreme Courts in all cases involving a sum of 4,000 francs or more and decided by them in appeal and in some cases by agreement of parties.

The Supreme Court of the U. S. S. R. has an appellate jurisdiction *sui generis* - *sui generis* in the sense that it is unique and peculiar to the Soviet legal system which terms it the 'supervisory jurisdiction'. The three *Collegiums* of the U.S.S.R. Supreme Court—Civil, Criminal and Military—exercise this jurisdiction over the Supreme Courts of the Union Republics and the military tribunals by considering what are called the 'protests', and not 'appeals' lodged by the U. S. S. R. Procurator-General and the Chairman and Vice-Chairman of the U. S. S. R. Supreme Court against the decisions of the aforesaid courts violating an all Union legislation or the interests of the other Union Republics. Such a 'supervision' is also exercised by the *Plenum* or plenary session of the U. S. S. R. Supreme Court in the case of similar decisions of its three Collegiums on a 'protest' being lodged by the same persons as above. Thus, no private party has a right of appeal to the U. S. S. R. Supreme Court. So is the case in the G. D. R. where the *Presidium* of the Supreme Court (*Oberstesgericht*), consisting of its President, Vice-President, several senior judges and judges of its three *Collegiums* and the head of the Supreme Court Inspectorate, exercises a similar jurisdiction. The Supreme Federal Court (*Bundesgerichtshof*) of the Federal Republic of Germany does not wield any such power. Its appellate jurisdiction, on the other hand, is an amalgam of the French and American systems. It is empowered to hear an appeal from the *Land* supreme courts including the Federal Patent Court on points of federal laws only and in cases where the decision is of fundamental importance for the uniformity of the administration of justice of the higher federal courts.

The French Supreme Court of Cassation (*cour de cassation*), like the Indian Supreme Court, is a general court of appeal and acts as such in order to secure a consistency of legal decisions in all ordinary cases, civil and criminal. But, none of the three different

Constitutions that the French Republic has successively tried over a period of the last one century attempted to define the constitution, organization and jurisdiction of this Court, which was first established by the French revolutionaries in 1970 and then re-organized by Napoleon in its present form in 1804. Entirely governed, in every respect, by legislation, it is empowered to hear an appeal from any decision of any court without regard to the amount in controversy, provided only that the decision in question is not appealable to any other court and raises a basic issue of law. Thus, it hears an appeal not only from the twenty-seven Courts of Appeal and the Courts of Assize (courts of session) but also from the Indictment Section of the Courts of Appeal (a unique system of appeal not to be found in the Common Law world) and the State Security Court (trying political offences). It hears an appeal even from the Courts of Justices of the Peace and the Police Courts in minor civil and criminal cases in which no appeal is provided to the higher courts. Such appeals are entertained in the interest of the law (*pourvi dans l' interet de la loi*) and can be preferred by any party or by the Procurator-General as the head of the *Parquet*, whose one of the duties is to keep watch over the decisions of the lower courts and have them corrected if legally erroneous or contrary to law. In India also, the Supreme Court may entertain and hear appeals from any of the lower courts in cases in which their judgments are not appealable to a higher court; but, generally in actual practice, the litigants, in such cases, instead of going to the Supreme Court direct, first invoke the extraordinary jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

In France there is no system of appeal, as in Common Law countries, by special leave or certificate. The Court of Cassation entertains an appeal direct, provided only that the case involves some question of law or procedure. But, as the name of the Court implies, it only *cassers* the impugned judgment in case it is found violating some rules of procedure or substantive law and, without deciding the case finally, remands it back for fresh decision. However, the lower court, on such remand, is not bound to follow the recommendation of the Supreme Court or the principle of law enunciated by it—a unique procedure of the French system. In case an appeal is filed a second time on the same legal ground as before, then a Full Court (*Assemblee pleniere*) hears the appeal and, if the case is again remanded, the lower court has now to follow the opinion of law expressed by the Supreme Court. In certain cases, *e. g.*, where members of a bench are

equally divided in their opinion in an appeal, or where there is a possibility of a conflict of decisions between the different Chambers of the Supreme Court, or where there is a question of law of public importance to be determined in an appeal, mixed Chambers (*les chambres reunies*) are constituted, each consisting of a Senior President, the Presidents and Deans of all the six Chambers of the Supreme Court and two judges (*conseillers*) from each Chamber. The Italian Supreme Court of Cassation (*corte suprema di cassazione*) wields an appellate jurisdiction similar to that of the French Supreme Court but, in addition, it also determines controversies as to the jurisdiction of ordinary and administrative courts—a function attributed in France to a different court, the Court of Conflicts. It may, however, be noted that none of the continental supreme courts have jurisdiction in administrative matters, nor can they hear any case against the government or an officer thereof acting in his official capacity.

The most important role that the Indian Supreme Court plays while exercising its various jurisdiction is the power of judicial review of legislation; it is this function of our Supreme Court to which it does owe much of its populatity and prestige. Its power of judicial review is wider in some respects, and narrower in others, than that of the U. S. Supreme Court. It can pass upon the constitutionality of any law, enacted not only by the Union Parliament but also by any of the State legislatures, to ensure its compatibility with the Constitution, and to see that it is not beyond the legislative competence, or does not take away or abridge any fundamental right of citizens as secured by the Constitution, or does not violate, in any other manner, any provision of the Constitution. The Indian Supreme Court and High Courts, even in the absence of any provision in the Constitution expressly authorizing them so to do, had to assume this function because of the constitutional mandate that any law made in excess of legislative powers shall be ineffective and inoperative and, if made in contravention of the constitutional provisions which make the fundamental rights inviolate, it shall be void to the extent of the contravention. Thus, the Indian Supreme Court may examine and pronounce upon the validity of any law whatever; and it does so not only in the exercise of its appellate and original jurisdictions but also in references and in writ petitions under Article 32 of the Constitution. Any party, either a private citizen or a State or Union Government or an official thereof, may invoke its power of judicial review, and the Supreme Court, even in the absence of any such formal request, may exercise this power *suo moto* if in its opinion that is necessary in any case.

However, unlike the Constitutional Court of West Germany, it cannot review legislation abstractly or in principle; nor unlike the U. S. Supreme Court, can it pass upon the constitutionality of a law from the standpoint of its own opinion about the reasonableness or propriety of the law or the ideals of the Constitution; neither has it the power to review the legislative policy or nulify a law with reference to general principles of jurisprudence. Moreover, matters concerning the 'Directive principles of State Policy' as enumerated in the Constitution, as well as some other matters prohibited by a recent constitutional revision, are not justiciable in any court whatsoever. So, the Indian Supreme Court—though it can declare a law invalid if the same is found to be discriminatory cannot annul it on the ground of it being unreasonable, harsh or arbitrary; for, unlike the Amendment to the U. S. Constitution ordaining that no one shall 'be deprived of life, liberty, or property without *due process of law*, and thus enabling the U. S. Supreme Court to invalidate a law even on these grounds, there is no provision in our Constitution from which our Supreme Court can derive such power. The terms 'save by authority of law' and 'except according to procedure established by law', occurding in Articles 31 and 21 of our Constitution, have been held to have no such wide scope as the term 'without due process of law' in the U. S. Constitution. In fact, the Bill of Rights embodied in the I to X Amendments to the U. S. Constitution is a limitation upon all legislative action, and no American law can be sustained which trenches upon the rights guaranteed, or conflicts with any limitation placed, thereby. So far as concern the State laws, the U. S. Supreme Court reviews them in virtue of the XIV Amendment to the Constitution which, in similar terms, provides that 'no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person equal protection of the laws'.

As in the United States and India, there is no express provision in the Constitutions of Australia and Canada for the judicial review of legislation. The Australian High Court, relying on Section 55 of the Constitution Act, which (like Art. VI, sec. 2 of the U. S. Constitution that lays down that 'this Constitution' shall be the supreme law of the land and the judges in every State shall be bound thereby) provides that 'this Act' and all laws made by the Commonwealth Parliament under the Constitution shall be binding on the courts, judges and people of every State, notwithstanding anything in the laws of the State, has been pronouncing upon the validity of any law, federal or

State. It and the Canadian Supreme Court are empowered also to see whether a State or provincial Constitution is consistent with the Constitution of the Commonwealth or the Dominion. But the decisions of the Australian Court on some constitutional questions are still subject to an appeal to the Privy Council; whereas the Canadian Supreme Court has now last word even on such questions since the abolition of the Privy Council appeals in 1949. However, although, in this respect the power of the Australian and Canadian Courts is at least analogous to, if not broader than, that of the American Court, their power of judicial review, like that of the Indian Supreme Court but unlike that of the United States, is confined to constitutional issues and an enquiry into legislative competence, and does not extend to a political controversy nor to a scrutiny of legislative policy or wisdom or expediency of legislation. Moreover, the Canadian Supreme Court can also not anuul a law on the ground unlike in India or the United States, that it violates any fundamental right of the citizens—not even after the adoption, by the Canadian parliament, of a Bill of Rights in 1960; for this Bill of Rights neither forms part of the Canadian Constitution nor does it provide, unlike Article 13 (2) of our Constitution, that any such law as above shall be void. It also does not empower the courts to nullify a law on the above ground.

In the Eire and Japan, the Supreme Courts are expressly empowered to review the constitutionality of legislation. The Irish Constitution of 1939 not only ordains that every law enacted by the Parliament (*oireachtas*), which is, in any respect, repugnant to the Constitution, shall be invalid, but also invests the High Court with power to examine, in the exercise of its original jurisdiction, the validity of any law having regard to the provisions of the Constitution, and prohibits the making of any law excepting the questions as to the validity of any law from the appellate jurisdiction of the Supreme Court. The Irish High Court and Supreme Court can examine the validity of laws only on the ground of legislative competence. In Japan, where prior to the present Constitution of 1945 (*Nihonkoku Kempo*) there was no system of judicial review of legislation, the present Constitution which like the U. S. Constitution, declares itself to be 'the supreme law of the nation'. Not only does it ordain that 'the people shall not be prevented from enjoying any of the fundamental human rights', and that no law contrary to the provisions of the Constitution shall have legal force or validity, but also expressly invests the Supreme Court 'with power to determine the constitutionality of any law, order, regulation or official act'. But the Japanese

Supreme Court rarely invalidates any law in the exercise of its recent power of judicial review—so great has been the impact on its judicial attitude of the French system which it had followed for three quarters of a century prior to its rejuvenescence in 1947.

The Swiss Federal Supreme Court is not assigned the role of guardian of the federal Constitution which empowers it only to determine the conflicts of jurisdiction between the federal authorities and the cantons and to decide complaints of violation of the constitutional rights of citizens. It can only invalidate the laws and Constitutions of the Cantons in case they conflict with the federal laws and the Constitution. As regards the federal laws, they must be accepted as valid even by the Supreme Court, even though they may have trenched upon any Cantonal subject or violated the federal Constitution, in which case they can be annulled only by the people at a referendum held on the demand of 30,000 voters or of 8 Cantons. Thus, the duty, in the Swiss Confederation, of seeing that the federal Constitution remains inviolate has been cast upon the people themselves, as also upon the Federal Council (*Bundesrath*) which is required to ensure that the federal and Cantonal Constitutions, as well as federal laws, ordinances and concordats are observed.

A somewhat similar function is attributed to the *Presidium* in the U. S. S. R., where, however, neither the Supreme Court nor any other court or tribunal wields the power of judicial review of any law, federal or State. One can very well understand the reason for a complete absence of such power and function in the United Kingdom where, because of a unitary government, and a sole omnipotent legislature unbridled by any constitutional restraint, no question of repugnancy in laws ever arises. But no plausible explanation can be offered for such a complete absence in the Soviet Union with a *quasi*-federal Constitution; and the right accorded to the U. S. S. R. Supreme Court to initiate legislation is hardly a recompense for the same.

Similarly, in the Federal Republic of Germany, and also in France, Italy, Greece and Turkey, each with a unitary government, no courts whatever wield the power of judicial review of legislation, but they have each a Constitutional Council—a non-judicial body to guard the Constitution and pass upon the validity of certain laws. It would, however, not be possible here to attempt a detailed discussion on the organization and jurisdiction of these bodies, which would, therefore, be alluded to in brief. The French Constitutional Council (*conseil constitutional*) established in 1959 ensures the separation of powers and decides disputes regarding the delimitation of legislative

powers between the parliament and the executive which too is empowered by the Constitution of the Fifth French Republic (1958) to legislate by decree in certain spheres. All organic laws, and only such ordinary laws as the President of the Republic, the Premier, and the Presidents of the two Chambers of parliament may refer to it, are treated by it to ensure their compatibility with the Constitution. But, though the Council's decisions on the constitutionality of laws are final and binding on all, its power of judicial review is circumscribed by various limitations. Firstly, it cannot exercise that power after the laws have been promulgated; secondly, even before their promulgation, the validity of ordinary laws can be tested only on, and not without, the reference of any of the four high dignitaries named above; and, thirdly, it has no power to pass upon the constitutionality of legislation at the instance of a private individual. It has no doubt, some other important functions also but this is not the place to discuss them.

Powers of judicial review of its counterpart in Italy and Germany are relatively wider. The Italian Constitutional Court (*Courte Constituzionale*) established under the Constitution of 1947, can pass upon the constitutional legality of any law or act having the force of law enacted by the State or a Region and decide any conflict of jurisdictions between the different organs of the State and between the State and the Regions. The Italian courts and tribunals are required to refer all constitutional questions arising before them to the Constitutional Court for its decision thereon to defer their judgments in such cases until its decision. A law or Act pronounced by it unconstitutional becomes invalid from the next date of such pronouncement, and its decisions are final.

The Federal Constitutional Court (*Bundesverfassungsgericht*) of the Federal Republic of Germany, established in 1951, is composed, at present, of 24 members elected half and half by the *Bundestag* and *Bundesrat*—more than one-third of these from among judges of the Supreme Court and other federal superiormost tribunals and the rest from among university professors, lawyers and government officers, but not belonging to any legislative body or the federal government. It is empowered to examine the validity of any law, *land* or federal, except the Berlin laws, to ensure its compatibility with the Basic Law—the Bonn Constitution (*Grundgetz*) and that of a *land* law with the federal laws. It can review legislation on the application of the federal or *land* government or of one-third members of the *Bundestag* or of any court or individual. At the instance of an individual citizen it can pass upon the constitutionality of legislation whenever any

violation of the fundamental rights or discrimination is alleged by means of *constitutional complaints* which form the great majority of cases brought before it. It also can examine the validity of a law *suo moto* in case it considers that a violation of the Constitution is involved in any case whatsoever. It can do so in principle even without waiting for any one to assail its constitutionality. It can thus rule on the validity of legislation, both concretely and abstractly, and anyone whosever may ask it to review legislation. Moreover, it determines the constitutional issues and public law disputes between the Federation and the *Laender inter se*, as also election disputes coming to it in appeal from the decisions of the *Bundestag*. It can even declare, on an application being made, a political party unconstitutional on the ground of its being engaged in undemocratic activities, as it recently decreed the outlawing of the Communist Party of Germany on the ground that it violated the federal Constitution. In addition, it has to decide, on the application of the *Bundestag*, whether a federal judge should be removed to another or dismissed for violating the principles of the Constitution. Lastly, it tries impeachments against the federal President, judges and other high officers. Its decisions in all these matters are final and binding on all courts and authorities. Thus its powers are much broader than those of its counterpart in any other country. Its contributions in the realization of the political and ideological aims of the federal constitution have been very great and its prestige and popularity is very high, It commands greater respect than the French Council of State, or the Indian and the American Supreme Courts.

The judgements of the Indian Supreme Court are binding on all courts and authorities within the territory of India. But the Supreme Court itself is not bound by its own decisions; and, though generally it follows the Common Law principle of *Stare decisis*, it may reverse any of its previous rulings-as it has done in a number of cases, especially on constitutional questions when it is convinced of its error and its baneful effect on the general interest of the public The Supreme Court has, in this regard, preferred the practice of the Privy Council and the U. S. Supreme Court and not of the House of Lords where the practice has been to adhere to the precedents established by itself and not to overrule the same. Very recently (1966) however, the House of Lords too decided to depart from its previous decisions in cases where it appears right to do so. But its rulings have always been binding on all courts it the United Kingdom except the Privy Council, which as well as the House of Lords (though both are presided

over by the same judges) are not bound by each other's decisions on legal and constitutional questions. On the other hand, since the French system does not admit the doctrine of *stare decisis*, the Court of Cassation cannot create precedents, and neither it nor any of the lower courts is bound by its previous decisions. In fact, all of them are free to disregard any of the rulings of either themselves or of any higher court. They cannot even base their decisions upon any precedent, nor can they cite it in their judgments[18] and, if they violate this principle, their judgments are reversed in appeal.

This is, perhaps, one of the reasons for the brevity of judgments of the Court of Cassation which are generally extremely terse and dry. The French practice of giving brief and succint judgments is also followed in most other continental countries such as Spain, Portugal, Italy and Belgium. Even the judgments of the Supreme Federal Court of West Germany follow the French pattern, though reasonings therein are more clearly expressed· On the other hand, judgments of the Supreme Courts of the Common Law countries are long and make interesting reading. Relatively, the American judgments, though they too are quite illustrative and abound in citations, do not generally reach the English standard. Judgments of the House of Lords and the Privy Council can be matched. in their style, expression and erudition, only by those of the Indian Supreme Court, some of which particularly on constitutional questions are indeed of high quality.

The Supreme Court of India sits five days a week except on holidays and during long vacations which it observes annually for about 2¼ months commencing generally with the second week of May and ending with the second week of July. It sits every day from 10-30 A. M. to 4 P. M. with a lunch break from 1 to 2 P. M. It sits for two weeks from Monday to Thursday for hearing arguments and then recesses during the next two weeks for consultations and writing judgements. Fridays are the Conference days when judges generally meet behind closed doors for deliberations on cases argued during the week. It sits in benches of at least two or three judges each. However, the constitution benches must consist of at least 5 judges each, though sometimes they have comprised 9, 11 and even 13 judges. The opinion of the majority forms the judgement of the Court. The

18. Though the counsel can and often do, cite precedents in support of their arguments and the Court may implicitly follow them without mentioning the same in its judgment.

Court pronounces its judgements on Monday which is known as the 'decision day.' Its judges, unlike their counterparts in Australia and America who are addressed, like the Members of the House of Lords and the Canadian Supreme Court, as 'Your Lordships' or Their Lordships'. Recently the Supreme Court Bar Association of India, has resolved that the judges be addressed as 'Your Honours' or 'Their Honours' as is the mode of address prevalent in District Courts.

In the U. S. S. R. Supreme Court, three judges sit together to hear an appeal and one judge with three People's Assessors to try a case on the original side—judgment of the Court being delivered by a simple majority vote in all cases. The Plenum of the Court hearing a 'protest' against the decisions of any of its three Collegiums, however, consists of the Chairman, two Vice-Chairmen and members of the Court : the quorum generally complete with at least two-thirds of all its members and judgements are given by a simple majority vote. Though the U. S. S. R. Procurator General and Minister of Justice also participate in the sittings and deliberations of the Plenary Session, they have no right to vote. The composition of the Presidium of the G. D. R. Supreme Court, too, as already noted, is similar to that of the Plenum of the U. S. S. R. Supreme Court. The Japanese Supreme Court hears appeals generally by 3 or more judges, and sometimes even by all its judges, sitting together. The Supreme Court of the Federal Republic of Germany hears every case by a bench of atleast 5 judges and, in cases where a Division of the Court disagrees with the rulings of another Division, special benches, known as *Grosse Senate or Uereininte Grosse Senate*, each consisting of a President and 8 judges, are constituted, which alone can overrule the other Division. In the Supreme Courts of France and Switzerland, 7 judges sit to hear an appeal in civil matters and 5, in criminal. Sometimes, even upto 15 upwards sit *en banc* in certain cases as already noted; but the judgement in all cases must be rendered by majority vote. Like the practice in Privy Council, all judgments in France are delivered *per curium*—no dissenting or minority or concurring opinions are permitted to be written or pronounced. The French judges are bound by their oath of office not to make it public, and no one ever knows which one of them wrote a particular judgment or who did concur with it or whether it was unanimous or dissented from by any one. The French practice of anonymity of decisions is also followed in criminal cases in the U. S. S. R., Germany and Spain, where, though the dissenting opinion may be reduced in writing for the perusal of a higher court, if any, it cannot be made public. The plurality of judges

and anonymity of decisions are characteristic of the French system and rarely provoke that wild praise or vehement criticism to which their counterparts in other countries with federal Constitutions are open. Their selections, are also not, generally, by political and regional considerations.

Most continental Supreme Courts, as those of France, Italy, Norway, Switzerland, Soviet Russia, West and East Germany, are organized into several Sections or Divisions each with its own judges and President or Vice-President but their counterparts in the Common Law countries, as the House of Lords and the Supreme Courts of the United States, Canada, India and Australia, constitute one single compact court, of which every judge hears almost all types af cases instituted therein. Further, unlike the U. S. S. R. and Australia (where the judgments of the Supreme Court given in the exercise of original jurisdiction have no finality attached to them and are appealable to the same very Court) there is no system of appeal in India from any judgment, order or decision whatsoever of the Supreme Court to the Supreme Court itself, except that it has power, subject to the provisions of any law made by Parliament, to review any of its judgments or orders, and that on order passed by the Registrar of the Court in certain miscellaneous matters is appealable to the 'Judge in Chambers' and in case it raises a constitutional question it may be heard by a constitution bench of not less than 5 judges.

Though the Parliament of India, is empowered by the Constitution to make laws as to the Constitution, organization, powers and jurisdiction of the Supreme Court, it cannot as opposed to England abolish the Supreme Court altogether or as in some other countries reduce the number of its judges to any extent it likes. In Australia, it cannot be reduced to less than two and in India to less than seven. But, by reducing that number to, say, seven and, at the same time, substituting the figure '5' by '9' in Article 145 of the Constitution, the Indian Parliament may indirectly if it so likes, prevent our Supreme Court, without expressly prohibiting it, from passing upon the constitutionality of legislation; for, unlike Article 34 (4) (d) of the Irish Constitution, there is no provision in the Indian Constitution forbidding the enactment of any law excepting, cases which involve questions as to the validity of any law having regard to the provisions of the Constitutian from the jurisdiction of the Supreme Court. Also, like the U. S. Congress, our Parliament can change the time and the place of sittings of the Supreme Court and the rules of practice and procedure as to constitution of its benches and entertaining and hearing of

appeals and applications, and as to the persons practising before it though, in actual practice, the Supreme Court itself has been making rules about all these matters under the authority granted by the Constitution. Unlike the U. S. Supreme Court, which is empowered by Congress to prescribe rules of practice and procedure for the federal District Courts and exercises administrative supervision over lower federal courts as to expending of cases and staffing of their personnel through its administrative officer acting in collaboration with its judges, our Supreme Court has no such power over any of the courts, nor can it prescribe rules of practice and procedure for any of them even though their decisions are subject to its appellate jurisdiction. This is also unlike Japan where the Supreme Court determines the rules of practice and procedure, internal discipline of the courts and administration of judicial affairs and matters relating to the Attorneys and Public Prosecutors, and also submits nominations for judicial appointments by the Cabinet *(Naikaku)* to the 8 High Courts and 50 District Courts in the country.

The Supreme Court of India is also not a court of general original jurisdiction such as the Federal Supreme Court of Switzerland and its original jurisdiction cannot be invoked by a private citizen except through writ petitions and that too for the enforcement of fundamental rights. It also cannot, unlike the Swiss and Soviet Supreme Courts, try an offience as a court of first instance. Also, unlike the Supreme Courts of the United States and Japan, it is neither vested with the 'judicial power' of the Union of India nor has it got, unlike its American counterpart, its own officers to enforce its judgments, However, the President of India as authorized by the Constitution has made the Supreme Court Decrees and Orders Enforcement Order. 1950, providing rules for the execution of its appellate decrees and orders in accordance with the law applicable to the execution of decrees and orders of the court or tribunal from which an appeal is taken to the Supreme Court. This Order shall remain operative until the Parliament, by or under a law made by it, prescribes any other rules for the same.

In addition, as ordained by the Constitution, all authorities, civil and criminal, in the territory of India must act in aid of our Supreme Court. It is also empowered by the Parliament to transfer any criminal case or appeal[19] though not civil from any court to any other court. It is also empowered by the Constitution to hold an

19. See the Code of Criminal Procedure.

enquiry, on the reference of the President, into an allegation of misbehaviour against the Chairman or any other member of any Public Service Commission who can be removed from his office only when the Supreme Court has so recommended after finding him guilty of misbehaviour.

All in all, powers and jurisdiction of the Indian Supreme Court are broader than those of any other Supreme Court on earth; and, so long as the present Constitution of India endures, it is hoped that the Supreme Court shall continue to play the role of the sentinel *qui vive* of the fundamental rights of the citizens of this sub-continent which is the largest democracy of the world. Its judicial independence and its bold judgments have become known all over world ; and its decision, especially on constitutional questions, are viewed with respect in the common Law countries. The life liberty and property of the Indian citizens cannot but subsist so long as this august palladium of our constitutional rights is there unwrecked by the political wranglings.

The Present Judges of the Supreme Court of India.

	Names in order of seniority	From which High Court	From Bar or Service	Due to retire on
1.	Ray, A. N., Chief Justice	Calcutta	Bar	29-1-77
2.	Khanna, H. R.*	Delhi	Judl. Service	3-1-77
3.	Mathew, K. K.	Kerala	Bar (Adv.Gen)+	3-1-76
4.	Beg, M. H.*	Him. Prad.++	Bar	22-2-78
5.	Mukherjea, A. K.*	Calcutta	ICS-Bar	20-1-80
6.	Chandrachud, Y. V.*	Bombay	Bar	12-7-85
7.	Alagiriswami, A.	Madras	Judl. Service	17-10-75
8.	Bhagwati, PN*	Gujarat	Bar	21-12-85
9.	Iyer, V. R. K.	Kerala	Bar	15-11-79
10.	Goswami, P. K.	Assam	Bar	1-1-77
11.	Sarkaria, R. S.	Punj.-Hary.	Judl. Service	16-1-80
12.	Gupta, A. C.	Calcutta	Bar	1-1-81

* Those whose names are thus marked are the future Chief Justices of India in order of seniority.

\+ Chief Justice M. Hidayatullah (retd. in 1970); also was Advocate-General when appointed a Judge of the Nagpur High Court.

—— Justice M. H. Beg, Bar-at-Law, first became judge of the Allahabad High Court and then Chief Justice of Himanchal Pradesh from where he went to Supreme Court.

RIGHT TO AVOCATION AND BUSINESS AND THE SUPREME COURT

Dr. C. M. JARIWALA, LL. M., Ph. D. (London)*

Freedom to follow any avocation or to carry on any business is provided in article 19 (1) (g) of the Indian Constitution. It is one of the important rights to practise any profession or to carry on any occupation, trade or business. This freedom is not absolute, it has to be balanced with the provision of article 19 (6) which safeguards the social interests. The first part of article 19 (6) permits the State to impose reasonable restriction in the interests of the general public. The second part exempts from the purview of article 19 (1) (g) any law relating to : firstly, the professional or technical qualification necessary for practising any profession or carrying on any occupation trade or business : and secondly, the carrying on by the State, or by a corporation owned or controlled by the State, of any trade business, industry or services, whether to the exclusion, complete or partial, of citizens or otherwise. Thus the provisions of article 19 (1) (g) read with article (6) show that on one hand the Constitution provides for the protection of the individual's right and on the other, it takes care of the social interest. And so whenever the protection of article 19 (1) (g) is claimed the Court has to balance the conflicting interests. In this paper a study is made as to how far the Supreme Court of India has successfully balanced the conflicting interests or favoured any particular interest.

Scope of the Right :

Article 19 (1) (g) guarantees the freedom to practise any profession or to carry on any occupation, trade or business. The word used is 'any' : does it mean that any type of avocation or business is protected under the said article ? in *Cooverjee* v. *Excise Commr , Ajmer*,[1] the question before the Supreme Court was whether a citizen had and inherent right to carry on trade in intoxicating liquors. Though the Court held that the citizen had no inherent right to carry such a trade, yet it did not restrict the scope of the fundamental

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1. A. I. R. 1954 S. C. 220.

right of avocation and business because it examined the reasonableness of restriction in the instant case. The question of examining the reasonableness of restriction arises only when the provision of article 19 (1) (g) is attracted.

In *State of Bombay* v. *R. M. D. Chamarbaugwala*[2], some resttrictions on the prize competition were challenged as unconstitutional infringing article 19 (1) g). But the Court did not allow the contention on the ground that gambling activity as such was not trade, commerce or business and so no question of application of article 19 (1) (g) arose. Chief Justice Das took the view that the words 'and profession' or any occupation, trade or business, if taken in its widest sense would include business or hiring out goondas to commit assault or even murder, of selling obscene picture, of trafficking in women and so on. He further pointed out that those activities which encouraged a spirit of reckless prospensity for making easy gain by lot or chance, which led to the loss of the hard earned money of the undiscerning and improvident common man and thereby lowered his standard of living and drove him out into a chronic state of indebtedness and eventually disrupted the peace and happiness of his humble home, could not be given the status of trade.[3] Thus in the *Chamarbaugwala* case the Court went a step ahead and kept out of the purview of the word 'trade', *extra commercium* activities. And so such activities would not attract the application of the article.

In *Krishna Kumar* v. *Jammu and Kashmir State*,[4] again, the Court applied the reverse gear where the question before the Court was whether selling of liquor was a trade or business protected by article 19 (1) (g). The Court held that the dealing in liquor was business and a citizen had a right to do business in that commodity, and the state could impose reasonable restriction on the said right in public interest. Chief Justice Subba Rao speaking for the Court pointed out that when dealing in *ghee* was a business, then dealing in liquor could not cease to be so. He further observed that the status of an activity could not depend on the standard of morality; at the most standards of morality could afford a guidance to impose restriction but they could not limit the scope of the right.[5] It is submitted that such an approach would favour individual interest against the social interest and would allow article 19 (1) (g) to operate

2. A. I. R. 1957 S. C. 699.
3. *Id* at 720.
4. A. I. R. 1967 S. C. 1368.
5. *Id.* at 1371

in cases of immoral activities like hiring out goondas, carrying on the keeping of brothel, etc. Moreover, the State would be helpless in controlling those activities unless it fulfils the conditions in article 19(6). If the opinion in the *Chamarbaugwala* case is adhered to, which the Supreme Court has followed in recent cases,[6] then the State will have free hand in dealing with those activities. This was also the intention of the Constituent Assembly, as one of the members Sri Algu Rai Shastri, while discussing the freedom clause, pointed out that though in our country the practice of prostitution and begging was a common profession, yet it could not get the protection of article 19 (1)(g).[7]

Further, the right to carry on business cannot attract article 19 (1) (g) where such a right arises under a contract. The state is competent enough to supersede by legislation contractual rights and obligations, and so a breach of contract, if any, may entitle the aggrieved party to sue for damages or in appropriate cases, even specific performance but he cannot claim protection of the Article.[8] The idea behind such a refusal is that when the State gives some concessions to the individual, he cannot claim the same protection as he would have claimed otherwise.

Article 19 (1) (g) uses the words 'to practise' or 'to carry on'. Does it mean that the negative right to close down the avocation or business will not get the protection under the article? The High Courts of Madras[9] and Bombay[10] were of the opinion that the right to carry on business included the right to close it down. When the *Joglekar* case came in appeal, the Supreme Court did not consider this point and reversed the appeal on some other point.[11] In *Hathising Mfg. Co.* v. *Union of India*,[12] the Supreme Court, without giving any authority, pointed out that the article guaranteed freedom to 'start, carry on or close their undertakings' and the state could impose some condition precedent on their closer of busines, provided it came within the purview of article 19(6). Such an extension of article 19(1) (g) would give the State power to impose restriction

6. *Nashiwar* v. *State of Madhya Pradesh* A. I. R. 1975 S. C. 360 ; *Har Shankar* v. *Dy. E. T. Commr.*, A I. R. 1975 S. C. 1121.
7. C. A. D. (1949) Vol. XI, pp. 768-769.
8. *Achutan* v. *State of Kerala*, A. I. R 1959 S C. 490.
9. *Indian Metal and Metallurgical Corpn.* v. *Industrial Tribunal* A. I. R. 1953 Mad 98.
10. *Joglekar* v. *B. L. Railway Co.*, A. I. R. 1953 BOM. 294.
11. *Hariprasad* v. *Divelkar*. A. I. R. 1957 S. C. 121 See Seervai, Constitutional Law of India (1968), pp. 397, f. n. 55.
12. A. I. R. 1960 S. C. 923, 931.

contemplated under article 19(6) on one's freedom to close down his business. And thus no citizen would have absolute liberty to close down his avocation or business whenever he chose.

Can a corporation, consisting of members who are citizens, claim the protection of article 19(1)(g)? This question was raised in *State Trading Corporation* v. *Commr. Tax Officer*[13], where the Supreme Court (by a majority of 9 : 2) held that an artificial person could not claim the protection of the article. But Das Gupta and Shah, JJ., dissenting, took the view that a corporation consisting of all citiens as its members, could claim protection of the right to avocation or business. The minority Court came to this conclusion by lifting the veil of the corporate personality. It is submited that the lifting of the veil for the purpose of the operation of article 19(1)(g) was not justified. When article 19(1 expressly confines the rights mentioned therein for the citizens only how it can be extended to an artificial person. Moreover, the rights attached to the citizenship and the rights flowing from the nationality or domicile of a corporation are two different things; and so, the nationality of a corporation should not be confused with the citizenship of a natural person. If the minority view is allowed then the shareholders would achieve indirectly what they could not do directly being a corporation.

The Supreme Court has further restricted the scope of article 19 (1)(g) in case the freedom of interstate trade is infringed[14]. The Court has made a distinction between the right to carry on any avocation or business and the freedom of interstate trade. And thus a citizen would be required to go to article 301 for the protection against trade barriers; whereas, under article 19(1)(g) by itself, he will have so such right. This view of Supreme Court is in conformity with the provision of the Constitution. No doubt both the articles take care of trade and commerce but article 19(1)(g) is confined to individual's right to carry on these activities, whereas, article 301 takes care of trade barriers within a federation. To this extent the scope of article 19(1)(g) is limited.

Exception of the Freedom

The provision of article 19(1)(g) is subject to the exceptions

13. A. I. R. 1963 S. C. 1811. See also *Barium Chemicals* v. *Company Law Board* A. I R. 1967 S· C 295.
14. *Atiabari Tea Co.* V. *State of Assam*, A. I. R. 1961 S. C. 232, 247, See also *State of Bombay* v. *R. M D. Chamarbaugwala.* A. I. R. 1957 S.C. 699, 718. But see *S. Ahmad* v. *State of Mysore*, A. I. R. 1975 S. C. 1443 where it seems that the court is not following the above distinction.

mentioned under article 19(1)(i) and (ii). Article 19(6) says that the state may impose reasonable restriction in the interest of the general public. The word 'restriction' was atfirst interpreted by the Supreme Court to mean 'partial control'[15]. But in *Narendra Kumar* v. *Union of India*[16]. the Court did not stick to this restricted meaning. In this case the Non-ferrous Metal Control Order, 1958 required that the trade in copper could only be carried on in accordance with the permit system. Because the petitioners were refused permits, they claimed that article 19(6) allowed the state to impose restriction only and not the total prohibition on the right to carry on trade. The Court, rejecting the contention, held that in the light of the words 'takes away or abridges' in article 13(2) there could not be any doubt that 'restriction' also included 'prohibtion'. Thus the state is empowered to impose not only restriction but also total prohibtion on the freedom of avocation or business whenever it deems fit provided that other conditions of article 19(6) are satisfied.

Reasonable Restriction

The word 'reasonable' ordinarily means what is just or agreeable to reason. What is just or agreeable to reason cannot be subject to any hard and fast rules. It depends on each individual case, In *State of Madras* v. *V.C. Rao*[17], Patanjali Sastri, C. J., laid down a general test of reasonableness which has been repeatedly cited with approval in subsequent cases. He pointed out that the test of reasonableness, whenever prescribed, should be applied to each and individual statue impugned, and no abstract standard could be prescribed as applicable in all cases. He further observed that the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied t ereby, the disproportion of the imposition and the prevailing conditions at the time, should all enter into the judicial verdict. Moreover, the court requires that a restriction to be reasonable should be reasonable from the substantive as well as the procedural standpoint.[18]

15. *Gopalan* v. *State of Mad.*, A. I. R. 1950 S. C. 27, 37. This question was left open in *Saghir Ahmed* v. *State of U.P.*, A. I. R. 1954 S. C. 728 : *State of Bombay* v. *R. M. D. Chamarbaughwala* A. I. R. 1957 S. C. 699.
16. A. I. R. 1960 S. C. 430. See also *Daruka & Co.* v. *Union of India*, A. I. R. 1973 S C. 2711.
17. A. I. R. 1952 S. C. 196, 200. See also *Hanif Quareshi* v. *State of Bihar*, A. I. R. 1958 S. C. 731; *Lord Krishna Sugar Mills Ltd.* v. Union of India, A. I. R. 1959 S. C. 1124. *Quaraishi* v. *State of Bihar*. A. I. R. 1961 S. C. 448.
18. *Dwarka Prasad* v. *State of U. P.*, A. I. R. 1954 S. C. 224; *C. Lingam* v. *Government of India*, A. I. R. 1971 S. C. 474.

So far as the substantive reasonableness is concerned, the Supreme Court has not taken any fixed line of approach. It has varied from case to case. If the legislation which excessively invaded the right, the Supreme Court held that it could not be said to contain the quality of reasonableness.[19] Whereas in other line of cases the Court concentrated on the nature of business. If the trade was illegal, immoral or injurious to the public health then excessive restriction would not be called unreasonable restriction.[20] The Court has further diluted this condition in case of emergency where excessive or drastic restriction is justified.[21] In *Cooper* v. *Union of India.*[22] the Supreme Court took the stand that where restrictions were so stringent that the business could not in practice be carried on, the Court would regard such impositions unreasonable. Does it mean that when the restriction is such that it reduces the quantum of profit and thereby the businessman feels unable to run his business, would such restriction attract the application of Article 19 (1) (g)? In *Nazeria Motor* v. *State of A. P.,*[23] the Court took the stand that merely reduction of profit was no ground of attack under article 19 (1) (g). This means that if the restriction is such that the trader is not able to make profit even then he will not get protection of article 19 (1) (g). If that is so, then the freedom of business which has the object of earning profit or gain, would lose much of its importance.

Now coming to the question of procedural reasonableness, this was discussed in *Dwarka Prasad* v. *State of U. P.*[24] In the instant case the licensing authority was given absolute power of granting or withholding licences or of fixing prices of goods in any way he chose for reasons to be recorded. The Supreme Court declared such a provision unreasonable on the ground that it committed to the unrestrained will of a single individual such a power and that there was nothing which could ensure check on the licensing authority. Mukherjea, J., speaking for the Court, made a distinction between vesting of discretionary power in case of commodity essential to the community and the commodity normally available. He pointed out that in case of commodity being essential to the community some

19. *Dwarka Prasad* v. *State of Uttar Pradesh*, A. I. R. 1954 S C. 224, 227.
20. *Cooverjee* v. *Excise Commr., Ajmer*, A. I. R. 1954. S. C. 220.
21. *M. B. Cotton Ass.* v. *Union of India*. A. I R. 1954 S. C. 634.
22. A. I. R. 1960 S. C. 430, 436.
23. A. I, R. 1970 S. C. 1964; See also *L K. Sugar Mills Ltd.* v. *Union of India*, A. I. R. 1959 S. C. 1124.
24. A. I. R. 1954 S. C. 224.

amount of discretionary power could be vested in certain public officers or bodies, whereas this could not be possible in the case of commodity normally available. In *Harishankar Bagla* v. *M. P. State,*[25] the Supreme Court took the stand that even in the normally available commodities the executive authorities could be vested with the discretionary power provided that there were some principles or guidelines on which the outhorities were required to function. In the instant case the policy was laid down and the executive authority was required to act thereon and so, the Court held that the vesting of discretionary power was reasonable.

It may be pointed out that in the *Dwarka Prasad* case the licensing authority was merely required to record reason for the action taken and no opportunity to be heard was given to the person concerned. The Court held such provisions unreasonable. But in later cases the Court has waived the application of the principles of natural justice on the ground that the power was given to the highest authority[26]. Further, in the *Dwarka Prasad* case the Court did not put emphasis on the rank of the executive authority. The Court simply said that the discretionary power could be conferred on certain public officers but it should not be left to the unrestrained will of a single individual. But in subsequent cases this line of thinking was modified and the Court insisted that the discretionary power should not be vested in some minor officers[27]. It could be conferred on some top-ranking or highest officers[28]. Such an attitude would put a check on the abuse of the discretionary power. But in the first category of cases it would restrict the application of the principles of natural justice because if the authority is top-ranking in that case it did not have to follow the principles. Moreover, i will be difficult to draw any clear distinction between the top-ranking authority and other authorities. Further, even the highest authority some time may not follow the principles of natural justice; in that case an aggrieved person will be helpless.

The second requirement in article 19 (6) is that the restriction should be in the interests of the general public. Sub-articles (2), (3) and (4) of article 19 do not use the words 'in the interests of the

25. A. I. R 1954 S. C. 465.
26 *C. Lingam* v. *Govt. of India*, A. I. R. 1971 S. C. 474; see also *K. L. Gupta* v. *Bombay Municipal Corpn.*, A. I. R. 1968 S. C. 303.
27. *Pannalal* v. *Union of India*, A. I. R 1957 S. C 397.
28. *Babul Chandra* v. *Chief Justice and Judges*, A. I. R. 1954 S. C. 524. See also *C. Lingam* v. *Govt. of India*, A. I. R. 1971 S. C. 474.

general public'. These sub-articles use specific heads as the ground for imposition of restriction. And thus article 19 (6) gives the state a wider power to impose restriction on the freedom of avocation and business. The words 'in the interests of the general public' do not mean that the restriction should be in the interests of the total population of India or in the national interest. In America the Supreme Court had taken the stand that the State in the exercise of the police power had the power to control a business where the public had interest[29]. But the Supreme Court of India did not follow the American precedent in the light of the specific provision in the Constitution[30]. The Court has taken the view that the phrase means nothing more than 'in the public interest[31]'. So far as the word 'public' is concerned no rigid number can be laid down to constitute the same. But the Court laid down that if the restriction was for the benefit of the large number of population in that case it would be considered in the interest of general public[32].

When the restriction is in the interest of the general public, is it still open to the Court to examine its reasonableness ? In *L. K. Sugar Mills* v. *Union of India*[33], the owners of the sugar factory were required by law to deliver to the export agency sugar produced in their factories in such a quantity as may be required by the agency. This was done in the national interest to stabilise the sugar market so that the production of sugarcane could be maintained at a reasonable level, and also for the national economy by earning foreign exchange. The question before the Court was whether such a piece of legislation was subject to judicial review on the ground of the reasonableness of restriction. Subba Rao, J., concurring, was of the opinion that when once it was conceded that the Act served the national interest, in that case no question of examining the test of reasonableness arose[34]. But Sarkar, J, dissenting, was of the opinion that however laudable the object might be, simply on that ground the Court could not say that the restriction was reasonable.[35]. The

29. *Ribnic* v. *Mc Brida*, (1928) U. S. but overruled in *Clsen* v. *Nebraska*, (1941) 313 U. S. 236
30. *Chintamanrao* v. *State of M. P.*, A. I. R. 1951 S. C. 118; see also *Collector of Custom* v. *Sampathu*, A. I. R. 1962 S. C. 316.
31. *Glass Chatons Assoc.* v. *Union of India*, A. I. R. 1961 S. C. 1514.
32 *Tika Ramji* v. *State of U. P.*, A I. R. 1956 S. C. 676.
33. A. I. R. 1970 S C. 1157.
34. *Id.* at 1140.
35. *Id.* at 1143.

Court followed the strict approach in earlier cases also[36], where the Court held that the ultimate *responsibility* for determining the validity of the law should rest with the Court and it could not shirk that solemn duty cast on it by the Constitution. It may be pointed out that when article 19 (6) specifically requires two conditions to be fulfilled, then in that case no condition can be avoided. It is a different matter that if a legislation specifically says that it adopts a particular measure in the public interest, then in that case the Court may be slow in striking down such a statute on the ground that it was not in the interest of the general public.

State Trading Laws

State trading is favoured so that the economic system may cater to the needs of the socialistic pattern of society. When there is concentration of wealth in the individual hands it results in common detriment. This point of view was not visualised in its broader perspective by the Constituent Assembly while framing the free avocation clause. In *Motilal* v. *State of U. P.*,[37] the Full Bench of the Allahabad High Court for the first time pointed out the lacuna. All the judges concurred in holding that the state trading law would probably attract article 19 (1) (g) unless it satisfied the conditions in article 19 (6) Immediately after this decision, the Constitution (First Amendment) Act, 1951 was passed. The Amendment Act enables the state to nationalise partly or wholly any industry or a trade without the risk of being declared unconstitutional for reason of infringement of article 19(1)(g). In *Sagir Ahmed* v. *State of U. P.*[38] the Supreme Court examined the validity of state monopoly in road transport under the unamended article as the amended article 19 (6) was not retrospective. The Court took the stand that the state monopoly which resulted in loss of livelihood to a large number of people, and as there was nothing noxious about the business of road transport, it was unreasonable restriction on the freedom. Mukerjea, J.[39] explained the effect of the amended article, that the state monopoly law could not attract article 19 (1) (g) at all and so no question arose for the application of the test of reasonableness. It may be mentioned that in the instant case the Court was not given any material to

36. See for example, *Saghir Ahmad* v. *State of U. P.*, A. I. R. 1954 S. C. 738; *M. H. Qureshi* v. *State of Bihar*, A. I. R. 1958 S C. 731.
37. A. I. R. 1951 All. 257 (F. B.)
38. A. I. R. 1954 S. C. 728.
39. *Id.* at 739.

establish that the state monopoly could be conducive to the general welfare of the public. But the Court simply took the view that because of the state action some citizens would be deprived of the means of supporting themselves and their families and that they would be left with their buses without any further use and thus it constituted unreasonable restriction. It is submitted that the Court did not adopt a micro-balancing approach in balancing the conflicting interests. Mere fact that some persons' families may be affected by the state action cannot be considered as the powerful factor to weigh against the interest of public

In *Akadasi* v. *State of Orissa*[40] the Supreme Court did not follow the observation of Mukherjea, J. In the instant case the Court took the view that : firstly, the second part of article 19 (6), as amended by the Constitution Amendment Act, was an illustration of reasonable restriction imposed in the interest of the general public ; and secondly, only those provisions which were basically and essentially necessary for creating the state monopoly were exempted from the requirement of the first part of article 19 (6). It is submitted with respect that the decision is favouring more the individual interest by adopting a literal rule of interpretation. When the Constitution Amendment Act introduced an exception to the general provision then the mere fact that there is some defect in drafting would not make the subsequent provision simply an illustration of reasonable restriction And secondly, it has been recognised that the power to legislate on a particular subject includes the power to legislate on incidental and ancillary matters also, and so everything necessary to the exercise of a power comes within the grant of the power[41]. When this is accepted for the legislative power then even for the fundamental right the theory can not be denied. And thus that part of a law relating to state trading, which is ancillary or incidental, may not attract the operation of the first part of article 19 (6). Moreover, this article does not deal with the legislative power. This interpretation would protect the social interest against the private interest, which was the intention of Parliament which passed the Amendment Act to protect the social interests[42].

Article 19 (6) (ii) authorises the state by law to carry on any

40 A. I. R. 1963 S. C. 1047.

41. *Edward Mills* v. *State of Ajmer*, A. I. R. 1955 S C. 25; *Board of Rev.* v. *Jhaver*, A. I. R. 1968 S. C. 59.

42. *Rasbihari* v. *State of Orissa*, A. I. R. 1969 S. C. 1081. See also *State of Raj.* v. *Mohanlal*. A. I. R. 1971 S. C. 2068.

trade, business etc., or it can authorise a corporation owned or controlled by the state to do so. On the basis of this provision the Supreme Court took the view that where the state created a monopoly in favour of third parties from out of its own monopoly such a scheme attracted the application of article 19 (1) (g). In the instant case the State of Orissa acquired a monopoly to purchase and sell kendu leaves used in the manufacture of bidis and offered to certain old contractors the option of purchasing leaves. Thus except to whom the leaves were offered, all other traders were shut out from purchasing the same. The Supreme Court held that the scheme was unconstitutional on the ground that article 19 (6) (ii) did not allow the state to create middlemen; on the contrary it requires the state to get the entire benefit of the monopoly and so it did not satisfy article 19(6). Though the contractors had long experience in the field and the government was satisfied with their performance, yet the Court insisted that the scheme should fetch the government the entire profit of the monopoly.

Labour Law

Article 19 (6) imposes on the judiciary a difficult task of balancing of conflicting interests. The Indian society is moving towards the socialistic pattern of social structure. And this raises the question as to how far the Supreme Court of India has successfully balanced the competing interests as to suit the needs of the changing society. In order to examine this question the balancing of the interests of the employer and the employee may be taken as an illustration.

Article 19(1)(g) guarantees right to the employers to carry on their business, at the same time the employees, being in profession, also get some right. In such a circumstance there is bound to be some conflict. There are some directives in Part IV of the Constitution which imposes obligations on the state to safeguard the interests of the working class of the society. Article 39(c) says that the state shall, in particular, direct its policy towards securing that the health and strength of workers are not abused. Article 42 provides that the state shall make provision for securing just and humane conditions of work. Article 43 further imposes on the state an obligation to secure, by suitable legislation or economic organisation or in any other way, to all workers agricultural, industrial or otherwise work, a living wage, condition of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. Moreover looking to the Indian economic system the labour class can be covered in the weaker section of the society. The

state is required under article 46 to promote their educational and economic interests and protect them from social injustice and all forms of exploitation. These directives are the aspirations for a socialistic pattern of society.

These postulates came in conflict with the individual's interest to carry on trade or business. In *Bijoy Cotton Mills Ltd.* v. *State of Ajmer*[43], the employer was required under the Minimum Wages Act, 1948 to pay a minimum wage to his employee. The employer claimed protection of article 19(1)(g) on the ground that if he paid the minimum wage, he would not be in a position to run his business; and moreover, this would restrict the right of the employee to work on the terms agreed to between the employer and the employees. But the Court rejected this contention on the ground that in the light of the directive provided in article 43 it could not be disputed that securing of living wages to the labourers which secured not only bare physical subsistence but also the maintenance of health and decency, was conducive to the general interests of the public. Moreover, securing the employees a minimum wage and protecting them against exploitation by their employer could not be deemed to be unreasonable restriction even if the employer might find difficult to carry on his business or the employees were not allowed to work on lesser wages. The Court in this case mainly concentrated on the living wage.

Again in *U. Unichovi* v. *State of Kerala*[44], a notification issued by the Government of Kerala under the Minimum Wages Act, 1948 prescribing minimum rates of wages was challenged on the ground that it infringed article 19(1)(g). But the Court did not accept the contention that the minimum wages prescribed were above the level of what may be properly regarded as minimum wages and looking to the capacity of the employer, such scheme imposed restriction on his right to carry on trade or business. Gajendragadkar, J., did not accept it to include the word 'bare' in the phrase 'minimum wage'. He warned that if this was the meaning, then the employer would pay to his employees a wage which enabled the worker to cover his bare physical needs and keep him just above starvation. Justice Gajendragadkar rightly pointed out that the minimum wages should ensure for the employee not only his subsistence and that of his family but also must preserve his efficiency as a worker. And so a minimum wage which ensured subsistence and some measure of

43. A. I. R. 1955 S. C. 33.
44. A. I. R. 1962 S. C. 12.

education, medical requirement and amenities fulfilled the requirement of article 19(6). Thus the Court allowed the prescription of a fair wage from the scope of article 19(1)(g). The effect would be that the employee would get a fair portion from the earnings of his employer and this in turn would maintain his efficiency which would subserve the common good and thereby the social justice contemplated in the Preamble to the Constitution could be achieved.

In *Hathising Mfg. Co.* v. *Union of India*[45], the main question before the Supreme Court was whether prescribing retrenchment compensation offended article (19) (1) (g). Shah, J. on behalf of the Court, took the stand that such a measure was protected under article 19 (6) and it did not attract article 19 (1) (g). While examining the validity of the above scheme the Court took into consideration not only the effect of termination of services because of no fault of the employees but also the existing conditions in the employment market. This may be against the notion of the *laissez faire*, but in the socialistic pattern of society such an approach will strive to attain social justice.

Under article 19 (1) (g) every employer has the right to manage the internal working of his business in such a way that he gets maximum profit out of it. But maximum profit is not the only factor. There are other statutory conditions that he has to be observed. For example, the Punjab Shops and Commercial Establishment Act, 1958, provided the hours of employment of the employees and the hours of opening and closing of the establishment. The question was whether such conditions attract article 19 (1) (g). This was the question in *Ramdhandas* v. *State of Punjab*[46], where the Court answered the question in the negative. Justice Ayyangar, speaking for the Court, held that to ameliorate the conditions of work of the employees was a problem of human relationship and social control for the advancement of the community and the social interests demanded that the health and efficiency of the workers should be protected. He left the question open as to what the welfare of the labour included. No fixed or static contents could be given which would grow according to the social conscience. The approach of the Court in the instant case seems to reorient the master and servant relationship. The employees are one of the important components of the commercial enterprise and thus a family or a community type tie is developed and so the employer cannot neglect their interests.

45. A. I. R. 1960 S. C. 923
46. A. I. R. 1961 S. C 1559

The reoriented approach was applied in the case of a commercial enterprise where the employer and the employees were members of the same family. In *Manoharlal* v. *State of Punjab*[47], the question before the Court was whether the regulation of working hours for the business where all the employees were relatives of the employer, could attract the application of article 19 (1) (g). The Court held that such a regulation was reasonable and it was in the social interest and it was immaterial whether the employees were the family members of the employer. The Court pointed out that the health and welfare of his employees, even though they were his family members, was a matter of interest not only to the employer but also to the community as a whole.

Apart from the above discussions, some data may be helpful to know the Supreme Court's trend in protecting the freedom guaranteed under article 19 (1) (g). On the basis of the cases reported upto Sept. 1975, the following data may be given :

(a) From the year 1950 to 1954 there were as many as ten judgements of the Supreme Court. Only in four cases the Court favoured the individual's interest and allowed the petition against the state. In two cases the Court struck down the legislations and in the other two the executive action was under attack.

(b) In the subsequent five years (1955-59) the Supreme Court delivered twenty judgements, out of which in three cases only the Court struck down state restrictions on the freedom of avocation and business. In one case the Court declared some of the provisions of the Act bad and did not strike down the whole of the statute as the said provisions were severable from the rest of the Act. In rest of the cases the Court did not allow the executive restrictions of the said freedom. In majority of the cases where the Court favoured the state interest, the major trade restrictions were in the form of elimination of the middlemen, licensing system or tax on business.

(c) The period between 1960 to 1964 can be considered as the peak period of the Supreme Court's decisions on article 19 (1) (g) when fourty-one judgements were delivered. In eight cases the Court gave rulings in favour of the business class. There was only one occasion when the Court declared a statute unconstitutional and in other cases the Court did not allow the executive actions. As compared to the previous years, apart from the trade restrictions mentioned above, in the instant period at least 30% petitions were against trade restrictions favouring the labour class.

47. A. I R. 1961 S. C. 418.

(d) The period between 1965-69 is interesting in the sense that there was not a single judgement which favoured the individual's interests. There were in all twelve decisions and in two cases the Court was divided. The major trade restriction of this period was the taxation measures.

(e) In subsequent five years (1970-74) there were twenty-six cases under article 19 (1) (g). In eight cases the Court allowed the petition against the State. In the year 1970 there were five decisions of the Supreme Court out of which four judgements went against the State. In this period the Court struck down an important Legislation passed by Parliament. In this case the Court mainly concentrated on article 14 and the opinion of the Court was not unanimous. The effect of the judgement was that Parliament had to rush to pass another Legislation in order to undo the effect of the ruling. In another case the Court declared only a part of a statute unconstitutional on the ground of excessive delegation of the legislative power. Another remarkable year was 1974 when out of eight judgements not even in a single decision the Court allowed the petition in favour of the business class.

(f) Now coming finally to the year 1975, the Supreme Court decided eight cases and in seven cases the Court dismissed the petitions of the businessmen. In this period the trade restrictions included : curb on anti-social activities, tax on business, introduction of trade competition, etc.

From the above data following points emerge : First, the Supreme Court was extremely slow in invalidating parliamentary legislation, but in the case of a few state legislations the Court did declare them unconstitutional. Second, the main source of attack was on the executive authorities and here the Court adopted a careful approach in examining the test of procedural reasonableness. Third, in majority of cases where the Court gave judgement in favour of the business class, the business normally was involved with the public interest. Fourth, the first and foremost restriction which mainly attracted article 19 (1) (g) was the taxation measure and only in one case the Court allowed the petition against the state ; the second was the elimination of the middlemen or introducing state monopoly ; then came restrictions for the benefit of the labour class ; and finally, apart from other trade restrictions, came the measures to maintain the supply of the essential commodities. Fifth, so far as the approach of the judges is concerned a broad generalisation can be made. Ray, J., and also as C. J. delivered in all 12 judgements and in two cases only he gave judgements against the State. Shah, J., delivered eleven

decisions and in nine cases the judgement favoured the State interests. Gajendragadkar, J., and also as the C. J., gave nine judgements and in one case only turned down the State plea. Subba Rao J., and also as C. J. protected the individual's interest in three out of nine cases. He was also in minority in three cases where the majority of the Court gave judgement in favour of the State. Wanchoo, Ayyangar, Mukherjea and Mahajan, JJ., delivered five to six judgements. In case of Wanchoo and Ayyangar JJ., in one or two cases the petitions were allowed against the State. In the case of Mukherjea and Mahajan JJ., not a single case was allowed against the government.

There were in all 117 cases decided by the Supreme Court whereas in 22 cases the Court went against the State. Even out of 22 cases, in five cases the Court was divided and in four cases the Court only partly allowed the petition against the State.

Concluding Remarks

The Constitution of India gives social justice a place of pride not only in the Preamble but also in Parts III and IV of the Constitution. This is one of the basic tenets of the socialistic pattern of society. The above discussion shows that the Supreme Court while balancing the conflicting interests, recognised the altered social conditions, the mood of the society and the avowed policy of the government to promote social justice and has made efforts to march in consonance therewith. The Court successfully administered social justice on the one hand by restricting the scope of the article 19 (1)(g), and on the other hand by giving liberal interpretation to the provision of article 19 (6). Normally the Court did not interfere with the State action when it protected and ensured social interests. But at times the Court struck down any misuse of power either by the executive or the legislature, not leaving the individual's freedom completely at the mercy of the State. The social justice approach of the Supreme Court can also be seen from the decisions of the labour law, State Trading Law and other laws protecting the public interests, where the Court tried to best subserve the greatest good of the greatest number. This also gets support from the approaches of the judges, either as the captain of the team or as an individual. Thus it can be said that the Court, while balancing the conflicting interests, made important contributions in building up the socialistic pattern of society by leaning in favour of the social justice approach.

MATRIMONIAL CAUSES AND THE SUPREME COURT OF INDIA

—A CRITIQUE

RAJ KUMARI AGRAWALA*

I

Matrimonial issues reach the Supreme Court not directly but as second appeals. Appellate forum of the court and the nature of matrimonial causes do not encourage frequent use of the court in this area. The High Courts (the first appellate court) have better opportunity for playing the role of the final decision-maker in marital disputes and have, by and large, performed the role with talent, tact and good sense[1]. Resultingly only a handful of cases that reached the Supreme Court and were decided, are not really sufficient to determine 'the role' of the court in the development of the law in this area.

May that as be, any analytical assessment of the case law should not, *inter alia*, attempt to locate any single specific motive or policy incentive behind the role or contribution of a judicial body in a given time span, because even the most elaborate and diligent enquiry will not take one beyond some presumptive conclusions. Supreme Court is an institution, but it is composed of individuals with distinctive and varying outlooks and philosophies. Therefore, there are bound to be cross-currents of opinions and opposing approaches regarding issues and their legitimate and right solutions. At best one can discern a general trend than an unvarying line of purpose[2]. The structural method adopted for this review is to first spell out the character of litigation in question; second, to state how the Court has acted; and third, to suggest how it ought to have acted to meet the demand of justice as expected and anticipated today in the Indian society. The review will naturally include possible explanations for typical responses of the court. It will mean exploring and stating a range of probable causative factors that might explain the background of these responses.

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1. See Raj Kumari Agrawala, *Matrimonial Remedies under Hindu Law* (1974), N. M. Tripathi, Bombay, a study mostly based upon High Court opinions
2. As explained in case of the American Supreme Court by Robert G. McCloskey, *The Modern Supreme Court*, (1972, Harvard University Press), pp. 130-131.

Matrimonial Law and Causes

Matrimonial law is generally understood in terms of marital failure. To a great extent the understanding is correct, because normal healthy behaviour of spouse is beyond the law. Yet, to assume matrimonial law as exclusively related with marital failure is an incorrect assumption. Marital law begins from the beginning, i.e. it takes over control from the moment one decides to marry. Who can marry ? With whom ? Under what conditions ? In what manner ?—is all determined by law. It regulates the conditions of performance, duration and suspension or dissolution of marriage and im oses penalties (usually deprivations) for non-observance of the prescribed regulations.

In the old world the Church and the state were one, but gradually the two got separated with the latter retaining the position of power in controlling people's conduct. For reasons enveloped in the political history of India, religion continued to retain the position of authority and control over people's conduct in the area of familial relationships. Recent initiative by the state to dissociate familial relationships (specially in marriage) from religion is generally termed as secularisation. The process actually is neither anti-religious nor even irreligious. However, it has been an uphill task for the state in India where (a) for centuries religion has held a commanding position of relevance socially, politically and historically, (b) temperamentally people's responses are more habitual and intuitive than planned and reasoned and (c) the population is of plural[3] character. The consequence has been that the institution of marriage and marital relationships is today only partly and for part of the population compulsorily divorced from religion. Marital law of the Indian Muslims, Christians, Parsis and Jews is still religion based, though now they have the alternate choice of marrying under the secular Law[4]. Hindu law of marriage, to a great extent, has been separated from religion and modernised since the passing of the Hindu Marriage Act of 1955. The Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 establish monogamy, conditional divorce and equality between sexes in marriage. The attempt is part of the elaborate

3. All major religions of the world are represented in the Indian population.
4. The Special Marriage Act, 1954, permits all citizens of India to marry under this statute. It is commonly referred to as the 'registered marriage law' because it substitutes registry of the marriage before a magistrate for religious ceremonies. Persons belonging to different religions can validly marry under this law.

legislative programme of social revolution planned and directed by the state since independence.

Claims and obligations arising out of these laws are still a new experience for the society. The observation by social scientists cannot be ignored that the opposition to change attempted through formal law is very strong in areas of personal relations based upon belief, e. g. in family life and marriage habits[5]. It is also a fact that marital disputes are distinctive in nature in that they are essentially an emotional conflict. Other civil actions are generally public, tangible, material propositions and essentially affecting the interests of the parties to the dispute. Quite to the contrary, matrimonial actions are intimately private, tangible but non-material (except in case of maintenance claim) crucially affecting the interest of society as a whole. Dispute-resolving in matrimonial cases is, therefore, rather a subtle task and goes beyond the direct task of determining legal rights of the contending parties. A court dealing with marital claims is required and expected to appreciate the psychology of the parties, the societal mores and goals of law. Judicial action inattentive to the first two will fail to promote both justice and goals of law even though it might be technically correct.

Proposed Enquiries

This review of the labours of the Supreme Court in the stated area is directed towards the exploration of the following basic questions and attitudes :

One, has the Supreme Court exhibited acceptance of the non-autonomous nature of law ? To what extent has it been aware of the 'extra-legal elements at play in social ordering'[6], and sensitive to their pressure in decision-making ? Two, what has been its attitude to the complexities of the phenomenon of social control through law ? Has it put forth its decisive opinion on this crucial issue while dealing with reform legislation controlling and directing marital relationships ? Three, as the highest appellate jedicial tribunal, one of its major tasks is to make a choice for or against the modification of the law by its actions[7]. Has it decided in favour of directing law by its action ? In

5. See Yehezkel Dror's comments on Law and Social Change in Sociology of Law by Vilhelm Aubert (editor), pp. 90-99 (1969), (Penguin Modern Sociology Readings).
6. Referred to as the accepted pressures upon the precepts and institutions of the law in modern systems by Julius Stone in *Law and the Social Sciences in the Second Half Century*, (1966, University of Minnesota Press), p 4.
7. Stated as the area of 'the judgement of justice' by Julius Stone, *ibid.* p. 53.

case it has, then to what extent and in which direction is the modification geared to ? Four, has the Supreme Court attempted policy making viz., has its role been simply interpretative (of the letter of the law) or also policy formulative ? Has it concentrated only upon the obvious statutory guarantees and declared social interests or also tried to assert and promote ideas and issues on the ground that these are right and not to uphold them would be wrong ? Has this august body determinedly stuck to the tradition of judicial restraint or sometimes shaken off the reserve and given the lead by expressing resentment and disapproval in the face of shockingly discordant situations ? Five, has the court evidenced appreciation of the fact that each matrimonial problem is distinctive and unique in itself depending upon the parties' individual temperament and psychology of reaction to a given experience ? Six, to what extent has the Supreme Court kept in view that the Hindu society is not as yet used to the phenomenon of matrimonial reliefs through law and resultingly Hindus as participants to a marital dispute are still inexperienced and not aware of their expected roles in a given situation ? Seven, has the Supreme Court offered human touch or maintained solemn aloofness by scrupulous adherence to the legal rules ? In short, has the Supreme Court found its role in the field of matrimonial jurisdiction ; and if it has, then what are its determinative norms ?

II

Appreciation of the psychology of the parties and societal realities :

Despite an extremely limited number of matrimonial disputes reaching the Supreme Court, it has been called upon to discuss and determine practically each marital relief and almost all the grounds available for seeking the reliefs.

Causes of action in matrimonial disputes may be broadly classified into two categories. One, where due to some defect in its formation, the marriage itself is in dispute : and two, where some omission, commission, accident or situation during the pendency of a valid marriage is the basis for claiming a relief.

(i) Validity of Marriage

Most of the disputes brought to the Supreme Court relate to the validity of marriage.[8] They have been raised in connection with

8. On the basis of reported cases one-third of the entire matrimonial litigation can be said to relate to disputed validity of the marriage.

bigamy,[9] devolution of property,[10] claim to maintenance[11] and declaration of nullity.[12]

(a) In *Bhaurao Shankar Lokhande v. State of Maharashtra*[13] and twice[14] later the issue before the court was prosecution for bigamy and (each time) the defence raised by the accused was that the second marriage could not be said as established because of the defective ceremonies performed for the said marriage. In each instance the parties were Hindus and the second marriage was a fact in the sense that the parties had gone through marital ceremony in the presence of others, had been living for a considerable time as man and wife, were treated as married by relations and others, at occasions had formally admitted (in some legal context) the marriage by verbal or written statements and the first wife had been fully discarded. Yet the court meticulously set out to ascertain if the ceremonies gone through for the second marriage were absolutely thorough and proper. And each time on the strength of some lacuna in the ceremonial aspect of the second marriage, it was declared as not proved and thereupon the charge of bigamy as not made out. Referring to section 17 of the Hindu Marriage Act, 1955 (under which the charge had been made) the Court held that the bigamous marriage should be a a valid marriage solemnised (celebrated) with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married will not be substitutive for ceremonies prescribed by law or approved by established custom applicable to the parties.

Undoubtedly, concubinage is not marriage and the line of demarcation between the two is satisfaction of the legal prescriptions. For Hindus, the legal requirement is that total absence of ceremonies is not possible, and performance of the *Saptapadi* and the *Homa* or any other ceremonies accepted by the community of the parties is essentia-

9. Bhaurao Shankar Lokhande v. State of Maharashtra, A. I. R. 1965 S. C. 1564 ; Kanwal Ram v. Himachal Pradesh Administration, A. I. R. 1966 S. C. 614; Priya Bala Ghosh v. Suresh Chandra Ghosh, A I. R. 1971 S. C. 1153.
10. Neelakantan Damodaran Namboori, A. I. R. 1958 S. C. 832; Veerappa v. Michael, A. I. R. 1963 S. C. 933; Gurdit Singh v. Mst. Angre of Kaur, A. I, R. 1968 S. C. 142; Gokal Chand v. Parvin Kumari, A. I. R. 1952 S. C. 231.
11. Deochand v. State of Maharashtra, A. I. R. 1974 S. C. 1488.
12. Lakshmi Sanyal v. Sachit Kumar Dhar, A. I. R. 1972 S. C. 2667.
13. A. I. R. 1965 S. C. 1564.
14. Kanwal Ram v. Himachal Pradesh Administration, Priya Bala Ghosh v. Suresh Chandra Ghosh, see footnote 9 *supra*.

to create a valid marriage.[15] Consequently, in the absence of the necessary ceremonies even the most determined, well intentioned and prolonged relationship as man and wife will be concubinage and not marriage. Under law the situation shall be adultery but not bigamy. Therefore, the Court apparently seems to be right in rejecting the argument (forwarded by the other party) that it is not necessary for the commission of bigamy that the second marriage be a valid one and that a person going through any form of marriage during lifetime of the first wife would commit bigamy even if the later marriage be void according to the law applicable to that person.[16]

Yet, it is submitted, scrupulous adherence to the letter of the legal rule and being oblivious of societal realities does not achieve justice. Law is a means, not the end of justice. It seems the court totally and repeatedly failed to perceive the societal and psychological aspects of the situation. In the Hindu society even in the same community, group or sub-group there exist two modes of performing the marriage, the elaborate and the simple. Even prior to the prohibition of bigamy, second marriage in the lifetime of the first wife usually was never an elaborate affair. To avoid anger and criticism of the first wife, relatives and others, more often than not, the bigamous marriage was generally on the sly performed somehow somewhere. Proof of these marriages was more *de facto* than *de jure*. Not, that no ceremonies were performed, but normally some short-cut device was adopted. Anyone aware of the several tiers of the Hindu cultural order knows well that the later can be bereft of much ceremony and ritual, and is not a much advertised affair. Among non-caste Hindus if the bride also is getting married for the second time (the widow or the divorcee), normal procedure is to do away with most of the ceremonies (sometimes without any ceremonies), bring the lady to the house and establish the fact of marriage by feeding the *Biradari* (the community), i. e. propitiating the social gods. And quite a practical thing to do because the approval of the *Biradari* is the law and its disapproval more dangerous than that of any other agency. This is the practice approved in their world. Prohibition of bigamy since 1955 must have been an additional incentive to perform the second marriage wiih minimum ceremony and formality. In the situation insistence of the Court to trace perfect ceremonial performance in case of the second marriage is obviously contrary to

15. See R. K. Agrawal, note *Supra*, pp. 225-229.
16. Note 13 *supra*.

social and psychological reality. It also does not subserve the state policy and legislative efforts to combat the practice of bigamy.

Decisions of the Supreme Court do not merely decide claims between the parties before it, but also determine the course of conduct of other parties in future in similar circumstances. The court thus guides societal conduct. The Supreme Court, thus, may be accused to have encouraged bigamy by accepting an easy and lame defence in the *Lokhande case*. Nothing is easier than declaiming the bigamous marriage on the ground of defective ceremonies and nothing more difficult than to produce evidence to the contrary. Repetition of the same approach in two subsequent cases is totally inexplicable and inexcusable.

(b) Contrary to this approach, while determining the validity of the form or factum of marriage in connection with devolution of property, claim to maintenance and declaration of nullity, the Supreme Court exhibits the expected sensitivity and appreciation of societal and psychological context of the litigants (that are again Hindus).

In *Neelkantan Damodaran Namboori v. Velayudhan Pillai Narayan Pillai* and also in *Veerappa v. Michael*[17] claim to the family property depended upon the form in which certain marriage was performed. In the first case the appeal raised a simple question viz., whether the appellants were married in *Sarvasvadanam*[18] form. The issue is determined with minute observation and perceptive reading of cultural implications of ordinary acts and incidents. The mode and factum of marriage is established by fine interpretation of small events keeping in view the habits and code of conduct of the community in question. Fact of bride's father borrowing substantial amount of money on the eve of marriage, conduct of the parties before they claimed the marriage to be in Sarvasvadanam form and relationship of the witnesses to the parties and like matters are given a fine interpretation keeping in view the habits and psychology of the litigants and their community. In the second case again, marriage of a deceased ancestress was alleged to be in the *Asura* form. It is one of the unapproved forms of marriage among Hindus which does not strictly affect the validity of the marriage, but restricts the succession rights of the issues born out of the marriage. After explaining the

17. See note 10 *supra*.
18. In a *Sarvaswadanam* marriage the daughter retains all the rights in the family properties in spite of her marriage, in the same way as a son does, and if there is an agreement to that effect the son-in-law also becomes a member of the family. If the marriage is in the ordinary form the daughter loses all rights in the family property.

essential characteristics of the *Asura* form, viz., giving of money or presents by the bridegroom or his family to the father or parental kinsmen of the bride (in other words, sale of the girl by her father or guardian in marriage in consideration for money's worth paid to them by the intended husband or his family), the court meticulously spelt out the normal attitudes, reactions, ambitions and expectations of Hindu parents related with the performance of their children's marriage. It tried to show that as a general rule sale of the girl in marriage is not considered as respectable or moral and, therefore, is not acceptable. *Asura* form of marriage is an outmoded form ; it is contrary to the grain of the Hindu mind and does not comply with the strict standards of Hindu law. Accordingly it rightly rejected the suggestion that bearing of the expenditure wholly or in part by the bridegroom or his parents is *prima facie* proof of the marriage being in the *Asura* form. It explained that prestige, vanity, social custom, the poverty or the disinclination of the girl's family or any other factor could be the reason for incurring of expenditure by the bridegroom's father on the marriage, but the money so spent is not necessarily consideration for marriage. The Court atttached a lot of weight to the fact that the bride's father was extraordinarily affluent and she was his only child.

Gurdit Singh v. Mst. Angrez Kaur[19] may also be mentioned in this context. In this case also succession to property was the primary issue, calling for the determination of the validity of a divorcee's marriage by *Chadar Agdazi* among Jats of Jullunder in Punjab. Opponents' contention that remarriage of a divorcee was not permitted in their community, was considered by the court in the light of ascertained marriage habits and customs of the Jats. The contention was rejected and marriage upheld as valid on the ground, *inter alia*, that permission for divorce, withholding the right of remarriage, appears as incongrous, therefore relevance of such a custom cannot be accepted. How can a formally divorced woman not be allowed to secure means for proper living ?

These three cases are examples of patient probing of the psychological and social aspects of the case, so very essential for determining marital disputes. Subba Rao, J. delivered the judgement in the earlier two cases and hailing from South India he did have the advantage of knowing the societal background of the litigants' community, *Gokal Chand v. Parvin Kumari*[20], an early decision of the Supreme Court,

19 A. I. R. 1968. S. C. 142.
20. A. I. R. 1952 S. C. 321.

involved the appellant's claim to inherit his deceased woman, on the ground that the appellant was never married to her mother. The primary issue before the court there, was determining the validity of the suggested marriage. The parties in this case were Hindus of Punjab and the judgement was delivered by Fazal Ali, J. hailing from Bombay. Despite the different religious and regional backgrounds of the judge and the litigants, the decision is an excellent precedent for judicial sensitivity and perception of the psychological and social ethos surrounding the litigants.[21] Authenticity of marriage is tested by observing small but pertinent facts. Issue is determined by the court in view of the socio-economic conditions and cultural traditions of the parties and also in the light of human responses normally expected between husband and wife or father and daughter. Inspite of the fact that the appellant and the woman in question were shown to have lived together and declared themselves as man and wife for sometime., the court declined to accept the fact of marriage as established. The liasion was regarded as elopement. Among other things, the major consideration that weighed with the court was its inability to believe that a Rajput of high caste could marry a Gurkha girl of questionable character who was very poor. This was very observant of the court. High caste Rajputs are very proud and meticulous to marry within the caste, therefore in the absence of some singularly attractive allurement, normally a Rajput will not demean himself by marrying out of caste in such circumstances. It was also perceptive of the court to observe that if the marriage did take place there should be some explanation for the wife to have abandoned the paramour husband shortly after marriage and for the husband never to have attempted to contact her or his own child, i. e. the respondent. The fact of the appellant supporting the younger brother of the deceased woman and his addressing the appellant as 'brother-in-law' is explained by the court as the result of the extreme poverty of the young boy's family, poor and unable to feed for themselves they were obliged to accept and approve the love affair between their daughter and the appellant while it was materially advantageous to them. The family belonged to the menial class and economic compulsion has many a time helped dilution of parental scruples in this class, specially among the hill tribes. Explanatory, content of these considerations is obviously more psychological and social than purely legal.

Ready willingness of the court is recognising validity of the

21. In Gurdit Singh's case, discussed above, details of marital conduct of Jats of Punjab were so intimately analysed by Bhargava J. coming from Uttar Pradesh.

second marriage of the husband when it is forwarded as the ground for claiming separate maintenance by the first wife, deserves special mention. It stands in sheer contrast to the court's attitude in cases where the remarriage is the basis for the direct charge of bigamy. In *Deochand v. State of Maharashtra*[22] the petitioner wife claimed separate maintenance on the ground that the husband neglected and refused to maintain her and that he had contracted another marriage. The charge of second marriage was denied by the husband on the ground that there was no legal evidence to prove the said marriage. Supreme Court did not enter into the slightest argument over the factum of the said marriage. It readily agreed with the finding of the High Court that evidence of the petitioner wife, her father and of a neighbour was enough to establish validity of the remarriage. As the Supreme Court did not deliberate upon the point at all it is difficult to assess its processes of reasoning actuating it in accepting the validity of the second marriage. Sympathy for the first wife certainly could be a possible consideration as it appears that the charge of neglect and refusal was not made out and if the fact of remarriage was also disproved she would have been left out in the cold without any relief. It is otherwise difficult to comprehend readiness of the court to accept legal validity of the alleged marriage on the basis of the evidence produced. There were only three witnesses, two of them were interested parties i. e. the first wife and her father and the third witness was a neighbour. Contrary to this, upon much stronger evidence legal validity of the alleged second marriage was held as not established in cases involving charge of bigamy.[23] Sympathy for the neglected Hindu wife is in vogue and in a manner is the key-note of the modern Indian social and legal attitudes. So it could well have been the consideration that influenced the decision of the court.

It is to be noted that the context of husband's second marriage is not the same in the two situations viz. claim for maintenance etc. and bigamy. Bigamy is made illegal and punishable for all Hindus since 1955, therefore remarriage of the husband prior to 1955 was at best a social wrong and psychological injury to the first wife. Section 17 of the Hindu Marriage Act, not being retrospective did not control the *Deochand case* whereas the incidence of remarriage in *Priya Bala's case* having taken place later than 1955 was within the purview of Section17 and is therefore a matrimonial wrong punishable with impri-

22. A. I. R. 1974 S. C. 1488.
23. See cases cited in note 9 *supra*.

sonment. This difference in legal consequences may probably have made the Supreme Court stricter in the later case.

(c) *In Lakshmi* v. *Sanyal Sachit Kumar Dhar*[24] the court was confronted with a situation where the appellant wife challenged the validity of her marriage on every conceivable ground under law. She sought declaration of nullity due to minority, force, fraud and duress, absence of guardian's consent and the fact that the parties were within prohibited degrees of relationship. Only feature in favour of the validity of the marriage was that it was duly solemnised by a proper Criest and an authentic dispensation from the authorities of the Roman Church for removing the impediment of consanguinity had been obtained. Parties being Christians, the Indian Divorce Act and the precepts of the Canon law were resorted to for determining authenticity of the marriage. Force, fraud and coercion was held as not proved; minority not established in view of age prescribed in the Indian Divorce Act and the impediment of consanguinity as removed by virtue of the authoritative dispensation given by the Roman Church. Therefore the marriage was declared as legal and valid. Court expressed full agreement with the view[25] that a union where a man and woman intended to become husband and wife and a ceremony of marriage is performed between them by a competent clergyman the presumption in favour of everything necessary to give validity to such a marriage, is one of very exceptional strength and unless rebutted by evidence strong distinct, satisfactory and conclusive, must prevail.

The view in question apparently is in the interest of society because it favours stability; maintenance of status quo of family relationships once accepted minimises illegitimacy and negates irresponsiblity in marriage. Yet, unwavering adherence to this view can sometimes result in creating marital deadlock as happened in the case in question.[26] A common romance of an inexperienced Hindu minor girl becomes complicated as she finds herself pregnant by her first cousin who had become a Christian. Anticipating terrible sanction of her relatives and the orthodox Hindu society she panicks; being told that the Christian Church can give her a valid marital status she gets baptised and the next day is married to her paramour accoding to Christian rites, Evidently, conversion

24. A. I. R. 1972 S. C. 2667.
25. As held in (1886) I. L. R. 12. Cal. 706 and repeated in (1905) I. L. R. 32 Cal, 187, with Christians as parties.
26. A. I. R. 1972 S. C. 2667.

and marriage were 'compulsive voluntary' conduct to ward off imminent calamity. Soon the reality comes to surface, and the marriage was on the rocks. Probably, the dispensation granted by the church to waive the inhibition of consanguinity was not sufficient to satisfy her conscience. Recapitulating the circumstances, she wished freedom out of a marriage she was duped into by the boy or by her own foolishness. Whatever the reason, she found herself unable to withstand the marriage any further, a fact which is obvious from her tenacity for fighting the case upto the Supreme court. Seeking nullity of marriage by a woman is a rare phenomenon, and rarer for an Indian woman burdened with two children. Her injury must be genuine. Decision of the Supreme Court in the circumstances even if technically correct was not just. Her tender age (but insufficient to classify her as a minor under Christian law) and the circumstance of pregnancy may not be compulsion according to the rule in the book but these facts certainly limited her freedom not to marry. The Court failed to appreciate that compulsion can be subtle, and that these subtle compulsions are extremely relevant in marital relations.

(*ii*) *Matrimonial Wrongs*

Disputes directly based on commission of a matrimonial wrong meet no better fate at the Supreme Court. Its laborious meticulousness in interpreting the legal rule and scrupulous efficiency for resolving legal technicalities in neutralised by its non-perception of the societal and psychological realities.

(a) Take for instance desertion from *Bipin Chandra*[27] in 1957 to *Rohini Kumari*[28] in 1972 Supreme Court's judgements on desertion[29] put together will form a dignifiedly bulky document describing the term desertion and its myriad variations as understood by English courts. Undoubtedly these decisions are an excellent compedium of case law, cliche and doctrine pertaining to desertion under English law, but they crucially lack slightest innovative thinking and the applicatory part is quite unconvincing.

The age-old four point formula- animus- actus- consent conduct- for establishing desertion is repeatedly quoted and meticulously relied upon. Formula in itself is basically logical yet, with the changed socio- legal attitudes for appreciating and resolving marital entanglements, the Supreme Court was expected to rise above and look

27. Bipin Chandra Jai Singhbhai Shah v. Prabhavati, A. I. R. 1957 S. C. 176.
28. Rohini Kumari v. Narendra Singh, A. I. R. 1972 S. C. 459.
29. See specially, Lachman v. Meena, A. I. R. 1964. S. C. 40.

beyond the strict technical limits of the animus-actus-consent-conduct paradigm while interpreting desertion. Accepting the formula as sacrosanct and striving to satisfy it literally has, at times, resulted in unnecessary enquiry, obscuring reality. Whatever the prescribed paradigm in law of desertion might be, the spouse who without sufficient reason puts an end to the marriage is reasonably the deserting spouse. If the court had viewed desertion in this plain practical manner it would not have been obliged to unnecessarily expend so much energy in ascertaining the incidence of 'consent, (one of the paradigm elements) for finding desertion in Lachman v. Meena.[30] Dissenting opinion of Subba Rao, J. is much more realistic and just. Absence of consent of the husband while Meena left the matrimonial home to go abroad with her father is not accepted ipso facto sufficient to establish desertion on her part by Subba Rao, J.. Without attempting piecemeal examination of individual event (on the touchstone of the prescribed animus-actus-consent-conduct paradigm) the entire situation is viewed as a composite whole. The conduct and reactions of the parties are assessed keeping in view their personal habitual experience and expectation and knowledge of life, society and law. To start with, it was pointed out that desertion for two years made a ground for judicial separation with retrospective effect under the Hindu Marriage Act, 1955. Resultingly, a Hindu spouse who never anticipated any serious consequences of desertion, suddenly found himself on May 18, 1955 in the predicament of his or her marriage being put in peril. If by that date the prescribed period of two years had run out, he or she legally had no locus standi and could retrieve the situation only by mutual consent. It was further made clear that judicial separation decree under the Hindu Marriage Act is a successful stepping stone for dissolution.[31] Intention clearly was to give benefit of doubt to spouses accused of desertion shortly before the passing of the Hindu Marriage Act, i. e. when they could not forsee dire consequences of desertion. To do otherwise would most of the times be wrongly imputing the deserting party with the intention to end the marriage. Meena's departure with her father without specific permission of the husband and refusal to return immediately when commanded by him is explained in the context of the difference in social, cultural and economic status between the two families. Meena, the fond child of affluent and progressive parents, felt oppressed by the ill-treatment meted out by her orthodox and

30. A. I. R. 1964 S. C. 40.
31. Section 13.

middle class in-laws. In this tense atmosphere once she was allowed by the husband to go abroad with her people for a vacation she insisted on going. Her refusal to postpone her intended visit of return soon in accordance with the husband's instructions are treated by the learned judge as normal reactions of a fed-up daughter-in-law and not proof of her intention to desert the husband. On the contrary, insulting letters written by the husband imputing her of u. chastity and material-mindedness, attempts of his parents to arrange another marriage for him, neglecting to invite her to his sister's wedding and not sending someone to bring her back upon her arrival in India,[32] are pointed out as exhibiting the wish of the husband and his people to quit her. At the opportune moment the Hindu Marriage Act came into force and the husband got the excuse that the statutory period of two years had expired from the date she left India, and he rushed to the court. In these circumstances Subba Rao, J. refused to hold the wife guilty of desertion. Marital relations require to be viewed as a whole and not in bits and pieces. This *dissenting opinion* stands apart for its merit in handling marital disputes as human conflicts in their proper societal setting.

On the other hand, *Rohini Kumar* v. *Narendra Singh*[33] is a classic example of Supreme Court's unrealistic in appreciating and determining marital disputes. The court views that remarriage of the husband in itself is not conclusive proof of creating an adverse impact upon the first wife compelling her to continue desertion nor the incident necessarily becomes proof of constructive desertion on the part of the husband. Inclination to treat remarriage of the husband as a neutral incident is surprising. If remarriage by the husband does not shut the door in the face of the first wife, what else does? The court admits that remarriage by the husband is a ground for the suspended wife to obtain divorce or separate maintenance. So if she had come to seek either of these reliefs she would have been granted the relief sought, but as the case before the court was to examine the fact of desertion it had to concentrate on that alone and in the given set of facts it could not be stated that the husband's remarriage was responsible for the wife to continue desertion. The argument is sharply technical and the entire approach is anomalous, contradicts basic tenets of the Hindu Marriage Act[34] and is contrary to commonly

32. In orthodox families the daughter-in-law has to be formally invited back by the in-laws through an escort when she has to return from the people.
33. A.I.R. 1972 S. C. 459.
34. Section 23 clearly prohibits relief to a person not coming with clean hands.

understood human psychology. Besides the general inequity of the argument, by no stretch of imagination can even the most coarse or submissive wife be expected not to resent the existence of a co-wife. However, the parties in this case were highly educated, cultured and sophisticated; to attribute such insenstiveness to the appellant is really inexplicable.

(b) While discussing condonation of adultery in *Chandra Mohini Srivastava v. Avinash Prasad Srivastava*[35] the court relying upon *Perry v. Perry*[36] viewed that resumption of relationship at the instance of friends amounts to condonation. As an observation the view does no harm but read as a guiding rule to be followed as precedent it will be misleading in India in most instances when the condoning party happens to be the wife. Marital affairs in India are not strictly spouse's private concern and friends' and relatives' opinion is quite compulsive in our society. A wronged wife in the Hindu society, more often than not, is not a free agent in condoning the erring husband. To hold that resumption of relationship *ipso facto* implies condonation in our society is being oblivious to societal reality and marital temperament in India. It is hoped that the Supreme Court did not intend its view to be read without reservation in appropriate situations.

(c) Determination of impotence in *Yuvraj Digvijaya Singh* v. *Yuvrani Pratap Kumari*[37] is another instance of marital dispute being viewed piecemeal and with legalistic meticulousness but devoid of appreciation for situational realism. To anticipate consummation of marriage in future when it could not be consummated inspite of mature age, ample opportunity and close proximity for three years is a persumption contrary to marital psychology. Each party charged the other as being responsible for non-consummation of the marriage but medically neither spouse was found physically deficient. The Supreme Court refused to grant nullity to the appellant husband on the ground that he had failed to satisfy the requirement of the law, i. e. had not established the respondent as impotent. It agreed with the opinion held in *G.* v. *G.* (1912) P. 173 that once it is proved that even without any specific reason consummation of marriage in impossible, it is justifiable for the court to annual the marriage without going into the question as to who is the guilty party; but at the same time it refused to believe that future consummation of the marriage was impossible. Optimism of the court is contrary to anticipated human psychology. It is clearly a case of particular or psychological impotency at least on one side. Not to realise that impotency

35. C. I. R. 1967 S. C.
36. (2962) I All ER 1066.
37. AIR 1970 S. C. 137.

can also be non-physical[38] and that this kind of impotency does not improve but worsens by argument and challenge is to be oblivious of the psychology of sex relations.

Without preparing an exhaustive list,[39] these decisions may be taken as illustrative of the fact that the Supreme Court can not be given credit for being duly appreciative of psychological subtleties and societal pressures and realities that surround marriage in India.

(d) Undoubtedly, there are instances when the court has exhibited fine sensitivity for psychology and sociology of marriage in general and with special reference to the Indian context. *Bipin Chandra Jai Singh Bhai Shah v. Prabhawati*[40] by any standards is an excellent example, of sensitive judicial appraisal of parties' fears, inhibitions and passions and also reactions and impact of the role of relatives in marriage. For establishing adultery in *Earnest John White v. Kathleen White*[41], among other things, taking into account and describing the willing lax and encouraging attitude of the co-respondents mother as a false shield is another example of shrewd observation of the situation. While determining quantum of maintenance allowance for the deserted wife in *Dr. Kulbhushan Kunwar v. Raj Kumari*[42] the court very observantly spelt out indifference and apathy of the husband, details of his assets and liabilities, and her needs and possible sources of income. With special human touch the court appraised the entire situation. Without slightest apathy towards the deserting husband or trying to penalise him, damaging impact of desertion upon the neglected wife was admitted very explicity and expansively.

Request for using habeas corpus by the husband for regaining his wife wrongfully detained by another person was also examined in a very subtle and realistic manner, in *Ikram Husain v The State of Uttar*

38. See Raj Kumari Agrawala, *note 1 supra*, discussion on types of impotancy. Also refer to Tolstoy on *Divorce* (6th ed. 1967), p. 114. For Indian High Courts' view on the point refer to *Rangaswami v. T. Arvindanmal*, A. I. R. 1957 Mad. 243. *Jagdish Lal v. Smt. Shyama Madan*, A. I. R. 1966 All. 150; *Arun Kumar Patra v. Sudhaushu Kumar Patra*, A. I. R. 1962 Orissa 65; *Jagdish Kumar Kaur v. Smt. Sita Devi*, A. I. R. 1963 Punj 114; *Shantabai v. Trarachand*, A. I. R. 1966 Madh. Pra. 8; *Chaman Lal Bhat v. Rupa Devi*, A. I. R. 1966 J. & K. 68.
39. *Chandra Mohini Srivastava v. Avinash Prasad Srivastava*, A. I. R. 1967 S. C. 581 determining adultery and *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati* pertaining to the charge of pregnancy of the woman at the time of the marriage by some other man are specially referable.
40. A. I. R. 1957 S. C. 176.
41. A. I. R. 1958 S. C. 441
42. A. I. R. 1971 S. C. 234.

Pradesh.[43] The issue was not determined as an isolated legal and constitutional right but as a means for obtaining a marital relief, viz. society of the wedded wife. Permission for using the writ was considered out critically assessing the normal legal action to which a husband thus wronged is used to. Attendant dangers of allowing the writ in favour of a person whose status as husband is not fully clear were also neatly pointed out. In short, habeas corpus as a matrimonial measure was discussed in the context of Indian spouses and the institution of merriage.

Unfortunately such instances are too few to be taken as the rule. Moreover, surprisingly, either by design or by accident, decisions expressing appropiate appreciation of parties' reactions and the social realities in Indian marriage are generally those where the central issue, instead of being some direct marital relief, is either a succession claim or some pecuniary benefit.[44] Does it imply that as compared with marital issues property interests have more weight with the Supreme Court.

III

The Institutional Role of the Court in Matrimonial Causes.

Whether one agrees with the behaviourists all the way or not, it is commonly accepted that appellate decision-making is more than mere application of the existing rule to the disputed situation. It stands for judicial finality and institutionally its determinations extend beyond the strict limits of hitherto finally settled law, so that it does not merely declare what the existing law is, but rather decides what justice demands the law to be. It creates law providing due stability and needed dynamism to the legal order by contributing intuitive legal norms based upon experience, insight and emotion.[45] Reason obviously tells that even the best designed, elaborate, and formulated body of precepts constantly fall short of giving clear and adequate or even acceptable answer; the area falling short is the area which demands 'judgment of justice,' i. e. it also depends on emotive reactions, evaluations and preference. "They are a product of heart as well as mind, of analysed and even intellectualised experience of present living, as well as of the

43. A. I. R. 1964 S. C. 1625.
44. See for instance, *Neelkantan Damodaran Namboori v. Valayaudhan Pillai Narayan Pillai*, A. I. R 1958 S. C. 832; *Veerappa v. Michael*, A. I. R. 1963 S. C. 933; *Gurdit Singh v. mst. Angrez Kaur*, A. I. R. 1968 S. C. 142; *Gokal Chand v. Parvin Kumari*, A. I. R. 1952 S. C. 321 relate primarily to property right. *Kulbhushan Kunwar v. Rojkumari*, A. I. R. 1971 S. C. 734 relates to maintenance claim of the wife and *Ikram Husain v. The State of Uttar Pradesh* A. I. R. 1964 S. C. 1625 relates to the use of habeas corpus to regain custody of wife.
45. See Julius Stone in *Law And The Social Sciences*, p. 74,

analysed and intellectualised account, ranging from history to myth, of man's past activities."[46] This is essential to preserve the beat of human justice in the core of the ongoing legal order.[47] In short, appellate judge's awareness of his personal choice and responsibility setting new or changed directions for legal growth is essential for sound justice. Judicial action now is not expected to be computerised conduct computed according to the declared formal or/and accepted rules without any concern for human and normative consequences of the computed result.

It has to be appreciated that the area of matrimonial relations is one of the priority areas in which law requires constant direction from judicial labours because one, temperamentally marital relations are intimate and personal; marital conduct is vitally emotive, intuitive and habitual and the institution of marriage is deep rooted in traditional values; these are extremely resistant factors for concordant responsiveness to innovative legal imposition;[48] two, modern matrimonial law lacks firm footed assurance and is constantly a little apologetic as at best it stands as a compromise between established familiar socio-religious ideal of permanent union and the recognition of the individual's right to personal happiness;[49] these, the closeness and intimacy of the marital tie makes the relationship between state and marriage a problem of special dimension and importance opening a value enquiry, viz., the extent of authority of the state to control this area of personal and private relationship through legislative action; four, data supplied by modern social statistics; junvenile delinquency, psychological, sociological studies, assertively suggests, if not actually establishes, that the cost of an unhappy marriage forcibly maintained because of non-availability of legal provision (or due to lack of ingenuity or resourcefulness to circumvant the legal hurdle) may lead to an increase in several minor and major forms of social maladjustments; five, the social scientists believe and the lawyers do not contradict that matrimonial proceedings are not just another type of litigation and that these ought to be determined as a social and therapeutic problem than in terms of the success or failure of a legal action[50]; six, traditional concentration

46. *Ibid*, pp. 79-89
47. *Ibid*, p. 85
48. See Yehezkel Drar's note on Law and Social Change in *Sociology of law* by Vilhelm (ed.), pp. 90-98.
49. Refer to Margaret Puxon, *Family Law* (1971) pp. 54-58, Section on the broken marriage and changing attitudes.
50. Refer to Fowler Harper, *Problems of Family* Life (1952), Ch. VII also see W. Friedmann, *Law in a Changing Society* (Abridged Edition 1964), pp. 190-191.

of attention on availability or non-availability of the legal right to divorce for promoting marital stability is being suspected as over-simplification of the issue. Attempt now is to venture into other directions and search totally different brand of effective remedies for marital breakdow;[51] seven, in India matrimonial action, in a manner, is a new experience both for law and the people. Socio-legal conditions till recently did not offer much opportunity for familiarity with matrimonial action in the country. Therefore, recent legislative attempt in the area calls for special judicial attention as guidance.

(a) Inspite of these compelling reasons the Supreme Court did not take on the expected leadership role in the area. While evaluating evidence its approach is rigidly technical and formal often resulting in extremely irrational conclusions, e. g. finding bigamy as not established due to inadequate ceremanies inspite of parties' intention and conduct to marry, the union accepted as marriage by them and relatives and acquaintances and the wife shown to be suffering all the adverse impact of bigamy by this alliance.[52] *In Yuvraj Digvijai Singh v. Yuvrani Pratap Kumari* strict adherence to legal technicalities led the court in refusing nullity upon mutual psychological impotency. Inspite of total failure to consummate marriage the medical examination showed neither spouse to be physically unfit; the court argued that the requirement of the law is that the party seeking nullity should establish the other party to be impotent and as that fact was not exactly established the relief could not be allowed. It also led the court not to accept that husband's remarriage is sufficient to terminate first wife's desertion.[53] In view of the court termination of desertion with reference to judicial separation has to be strictly interpreted within the framework of section 10 of the Hindu Marriage Act, 1955 and with no ulterior references. Any conduct of the deserted spouse can be said to end desertion only when it is clearly and specifically proved that the alleged conduct has deleterious impact on the deserting spouse it is immaterial that husband's remarriage as an incident is a good ground for the first wife to obtain separation and maintenance from the husband under the Hindu Adoptions and Maintenance Act and divorce under the Hindu Marriage Act. Resultingly, anomalous as it is, judicial separation was thrust upon a reluctant wife

51. Refer to discussion of the issue by Max Rheinstein in *Marriage Stability, Divorce and the Law*, (1972) pp. 3-7.
52. *Bhaurao Shankar Lokhande* v. *State of Maharashtra*, A. I. R. 1965 S. C. 1564; *Kanwal Ram* v. *Himachal Pradesh Administration*, A. I. R. 1966 S. C. 614; *Priya Bala Ghosh* v *Suresh Chandra Ghosh*, A. I. R. 1971 S. C. 1153; *Narumal* v. *State of Bombay* A. I. R. 1960 S. C. 1329.
53. *Rohini Kumari* v. *Narendra Singh*, A. I. R. 1972 S. C. 459.

at the instance of a husband against whom she was legally entitled to secure divorce on those very facts under the same Act.

Aforementioned instances illustrate denial of justice due to narrow and technical approach of the court.

(b) Further, inspite of the fact that matrimonial action, in a manner, is a new socio-legal experience in the country, the Supreme Court did not make any effort to help it to mature and become meaningful. Without posing to be the super legislature, Supreme Court could have offered constructive critical assessment of the legal precepts, and without being pedantic, its determinative opinions could have been policy directives both for the society and the law. As it happens, the court desisted from ever commenting upon the legal provisions in any manner. Barring a few cases, most of the matrimonial litigation brought before the Supreme Court relates to the Hindus[54] Reported decisions do not show more than half a dozen cases pertaining to non Hindus Therefore, mostly labours of the court were concentrated on the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. Neither statute is free from some obvious limitations[55], but the Supreme Court treated them unquestionably perfect, requiring no comment The difficult situation in *Swarajya Lakshmi v. Dr. G. G. Padma Rao*[56] ought to have prompted the court to mention that insistence upon virulent character of leprosy is unreasonably harsh and unjust Or the deadlock faced in *Yuvraj Digvijay Singh V. Yuvrani Pratap Kumari*[57] reasonably ought to have activised the court in mentioning that the legal requirement regarding impotency as a ground for nullity needs to be made more open and elastic. These two cases are specially mentioned because Mukherjea, J. in *Swarajya Lakshmi* represents the psychologically aware and sensitive court and Vaidialingam, J. in *Yuvraj Digvijay Singh* exhibits judicial aloofness for sentiment. Reluctance to comment upon legal precepts thus appears to be the uniformly common approach irrespective of individual attitudinal differences between one judge and another.

(c) Uncritical reverence for the established legal precepts is equally un-equivocal in case of customary law. The Supreme Court has had no

54. It is natural because they are the majority community in the country and because the personal laws of some other communities do not offer an opportunity to reach the Supreme Court, e. g. the Parsis have their own family court and the Muslim law of marriage is so onesidedly favourable to the man that it leaves little room for conflict formation and resolution by courts.

55. Refer to Raj Kumari Agrawala, note 1 *Supra* for a detailed discussion of the inadequacies and limitations of these two statutes.

56. A. I. R. 1974 S. C. 165.

57. A. I. R. 1970 S. C. 137.

difficulty in accepting inequitable erroneous customary law of divorce.[58] The approach is technically correct but wrong in principle and certainly gives little credit to the Supreme Court.[59]

(d) Exaggeratedly formal approach has resulted in judicial reserve taken to the extreme, never expressing shock or approval even in the most unexpected situations. The Supreme Court's reluctance to pronounce any policy opinion reflecting upon the institution of marriage, its object and role in modern India, marital relations and matrimonial reliefs, is conspicuous. Latest trend in matrimonal law in the country strongly concenrates on monogamy, equality between sexes and dissoluble form of marriage.[60] The newly established norms are part of the plan of social revolution we have been experiencing in the country since independence. The court has applied individual rules promoting these norms without prejudice, precisely and generally correctly, but has withheld any involvement with the norms as such either by commentatory statements or in decision making.

Quite a few cases involving the charge of bigamy came before the court[61] but not on a single occasion did the court make any policy statement condemning bigamy and approving the new norm of monogamy. Bigamy decisions of the Supreme Court actually may be said to encourage bigamy since in none of the cases before it did the bigamous conduct result in any damaging consequences for the bigamist. Even judges like Gajendragadkar, J.[62] and Hidayatullah, J.,[63] whose enthusiasm for normative observations in judgement writing is so well-known have refrained from any comments on plurality in marriage as reprehensible marital conduct.

(e) Again, several time facts of the case before the court showed the marriage to have totally failed without the least probability of repair

58. Customary practice among Reddis of South to divorce the wife without any formal evidence was accepted in *Chukka Reddy* v. *Lachma Reddy*, 2 S. C. W. R. 605 (1969).

59. The point is discussed in detail by J. D. Derrett in *A Critique of Modern Hindu Lam*, in the introduction, specially refer to pp. 6-3.

60. The Special Marriage Act, 1954, The Hindu Marriage Act, 1955 and various legislative and other attempts at individual state levels promote these norms.

61. *Narumal* v. *State of Bombay*, A. I. R. 1960 S. C. 1329; *Bhaurao Shankar Lokhande* v. *State of Maharashtra*, A. I. R. 1965 S. C. 1564; *Kenwal Ram* v. *Himachal Pradssh Administration*, A. I. R. 1966; S. C. 614 *Ashwin Nanubha Vyas* v. *The State of Maharashtra*, A. I. R. 1967 S. C. 983; *Priya Bala Ghosh* v. *Suresh Chandra Ghosh*, A. I. R. 1971 S. C. 1153; *Rohini Kumari* v. *Narendra Singh*, A. I. R. 1972 S. C. 459; *Deochand* v. *State of Maharashtra* A. I. R. 1974 S. C. 1488.

62. *Narumal* v. *State of Bombay*, A. I. R. 1960 S. C. 1329.

63. *Ashwini Nanubhai Vyas* v. *State of Maharashtra*, A. I. R. 1967 S. C. 983.

in future. Pronouncements in these cases exhibit absolute unconcern for the fact of breakdown in decision making.[64] Apparently, the court did not treat the factual failure of marriage as a legally significant issue. To illustrate, when a middle class husband accuses his wife of adultery, immediately remarries after the decree of divorce is passed in his favour by the High Court and obstructs her from appealing to the Sureme Court, failure of the first marriage is more than established. But wholly ignoring these set of factual facets of case, the Supreme Court metiouslously spelt out the legal position, found allegation of adultery not proved and thereupon upset the divorce decree of the High Court. Not a hint, suggestion or reference is made to the inevitable futility of the relief granted to wife. Similarly, when the marriage between two mature and physically fit persons is not consummated after three years of living together and the parties have escalated upto the final rung of the judical ladder with counter allegations of impotency, it is obvious that the marriage has failed.[65] However, the Supreme Court did not grant annulment, leaving the parties tied up together for the rest of their lives in a state of misery. Even if it felt obliged by legal rules to pronounce the futile decree, it could at least have admitted the reality or shown some discomfiture. Its absence to do so implies that the Supreme Court has failed to appreciate that in marriage claims are inseparably entwined with individual attitudes, emotions and reactions of the parties that get dried up, satisfaction of the claims impossible or at least meaningless. The Supreme Court conducts matrimonial proceedings like just another type of litigation purely in terms of success or failure of a legal action.

Stability of marriage at any cost is also a norm which has much to commend itself no doubt, since marital cause in any society involve not only the interests of the parties to the marriage but also those of the children and the society at large. Thus the most crucial, universal and still undecided problem of matrimonial law is to strike a balance between these two opposite demands of marital conflict viz., individual happiness and societal good. Further, in India, easy divorce under customary law among Hindus[66] or the Muslim male's right to unilateral, unconditional and instant divorce on the one hand and the rigid Christian law of divorce mentioning adultery as the only ground for terminating marriage represent the two extreme stands. Hindu Marriage Act, 1955 stands in between prescribing suspension and dissolution of marriage on

64. For example see, *Chandra Mohini Srivastava* v. *Avinash Prasad Srivastava* A. I. R. 1967 S. C. 581; *Yuvraj Digvijay Singh* v. *Yuvrani Pratap Kumrri*, A. I. R. 1970 S. C. 137.
65. A. I. R. 1970 S. C. 137.
66. See Raj Kumari Agrawala, note 1 *supra*, pp. 70-75.

specified grounds essentially fault based but spreading over to breakdown situations also.[67] The Special Marriage Act, 1954 is the nearest in recognising factual break down in marriage as sufficient to permit legal dissolution by adding 'mutual consent' to the specified grounds for divorce.[68] Clearly enough legal permission to terminate marriage is not uniform and at times even contradictory within a single system in India yet, even within the framework of a pluralistic society as ours certain primary values could be (and should be) installed and encouraged in common. The situation, therefore, was provocative enough for the Supreme Court to express its opinion on the issue. Being free from certain outside compulsive pressures associated with legislative action, the Supreme Court's opinion or observations would have been free from passion and purely rational. Its opinion trends would have prepared the ground for legislative action in future. Even if it may be assumed that the court has faith in continuing apparently broken marriage it ought to have explained its stand. Not to express any view leads to only two assumptions: one, the court did not appreciate gravity of the situation; or two, it did not realise the demand on its institutional role in the situtation. Neither gives credit to the court.

(f) Directly or indirectly Supreme Court never deemed it relevant and necessary to comment upon the increased role of the state in regulating familial relations. Modern state generally and specially in developing countries recently freed from foreign rule is actively engaged in planning and commanding regulation of family life. Authority or/ and efficacy of state interference through legislative action to control and shape personal relationships like marriage and family is both a debatable value enquiry and a factual query. As the process of social control through state sponsored law is by and large a recent experiment in India it would have been extremely relevant for the final appellate judicial institution in the country to express its opinion on the point while applying such laws. Determination of marital disputes according

67. See sections 10, 11, 12 and 13 of the Hindu Marriage Act, 1955 that include desertion, cruelty, leprosy, veneral disease, unsoundness of mind, adultery, plurality of marriage, prohibited relationship, impotency, idiocy or lunacy, force or fraud in gaining consent of the guardian, pregnancy by another person at the time of marriage, conversion to another religion, renunciation, not being heard of for seven years and on failure to resume cohabitation for two years. Since the passing of a decree for restitution of conjugal rights or for judicial separation either party to the decree can seek divorce.
68. See sectians 27 and 28
69. *Bipin Chandra ji Singh Bhai Shah* v. *Prabhavati*, A. I. R. 1957 S. C. 176; *Laekman* v. *Meena*, A. I. R. 1964 S. C. 40.

to newly planned reform legislation provided good opportunity for the court to perceive and evaluate impact and role of deliberate legal reform in personal areas. But the court did not make use of the opportunity.

IV

Aids of References

(a) The court's excessive and at times, uncalled for reliance on English case law for solving marital friction also is very discouraging. Spelling out desertion and contributory desertion,[71] proof of bigamy, condonation, explaining that status issues are more important than other issues, establishing cruelty and nature of proof required,[72] what is satisfaction of the court and, ridiculously enough, even to assess and examine psychological reactions of a Hindu wife,[73] the Supreme Court seeks guidance from and approval of an English precedent. To a point reference to English practice is to be expected by Indian courts because deciding marital disputes is a new experience for them. Yet, marital conduct is so much the product of indigenous social soil of the parties that it cannot be properly assessed by foreign yardstick. Heavy reliance on English case law reflects diffidence of the court to think on its own.

(b) Lack of initiative to open up new paths is also evidenced by practice of referring to decisions pronounced half a century or more ago on issues that have quite a changed context today. For determining quantum of maintenance[74] court goes all the way back to *Ekradeshwari Devi*[75] undoubtedly is one of the finest pronouncements of the Privy Council in the area of family law keenly alive to marital psychology and sociology and does offer a logical and fair formula for fixing quantum of maintenance. Yet, it could well be left alone and some new thinking initiated after all these years when an entirely changed socio-legal context of marital relations has arisen. Right to support in marriage also is now viewed a little differently from the time of *Ekradeshwari Devi*, for instance (theoretically at least) right to support is no more regarded as the exclusive privilege of the wife, instead it is considered to be the claim of either spouse whosoever may be in need of the support.

70. *Kanwal Ram* v. *Himachal Prades Administration*, A. I. R. 1966 S. C. 614.
71. *Chandramohini Srivastava* v. *Abhinash Prasad Srivastava*, A.I. R. 1967 S.C. 581.
72. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, A, I. R. 1975 S. C. 1534.
73. See dissenting opinion of Madholkar j. in *Nanawati* v. *Nanawati*, A. I. R. 1965 S. C. 364.
74. *Dr Kulbhushan Kunwar* v. *Raj Kumari*, A. I. R. 1971 S. C. 234.
75. *Ekradeshwari Devi* v. *Homeshwar*, (1929) 56 A. A. 182.

(c) As for other sources of reference, academic opinions either from the field of law or other social sciences are conspicuous by their absence. Court's fascination for foreign guidance has not reached to any other field than standard text books like Tolstoy or Ryden and judicial opinions. Such excellent foreign social science studies on marriage (including on Indian marriage) are available that to have ignored these is a pity. In case of Indian material too the court has not ventured beyond case law and text books.

(d) Again, tendency to be stereotype is also at times evidenced, in the sense that following in the footsteps of the early English judges in India. The Supreme Court does not mind occasionally relying upon Rattigan or Steele[76] for establishing a custom, but will not refer to any other recent work of sociology or anthropology. The court obviously needs rejuvenation of its hackneyed outlook to make it more liberal and expansive and open to extra-legal relevant influences, institutions and impressions.

V

Probable explanations for the court's approach and attitudes

To probe into the causative explanations for a judical institutions typical conduct is neither easy nor wholly plausible. Yet, the following may reasonably account for the aforementioned limitations in Supreme Courts approach while determining marital disputes :

(a) The Federal Court, the predecessor of the Supreme Court, rarely dealt with marital issues; therefore the Supreme Court has no precedent heritage in the matter. It has to confront and handle marital jurisdiction on its own without any guidelines regarding role expectancy from a predecessor judical institution.

(b) Excessive regard for the sanctity of statutory action reflecting a feeling that once legislative action has taken charge of a situation judicial initiative is out of place.

(c) Lack of critical social, political and religious opinion in modern India active enough to comment upon judicial action relating to marital relations. It may be due to unawareness, inertia, preoccupation with other issues or for any other reason. But absence of dynamic public criticism, constantly sitting in judgement upon the judiciary in a given area, is bound to make the judiciary too not so careful in that area of human relationships, the area becomes neglected.

76. These two Englishmen compiled regional customary practices about a century ago.

(d) Preoccupation with other areas considered by the court as priority areas, e. g. constitutional freedoms, labour and taxation laws.

(e) Less than required consciousness of the significance of marital relations and its impact upon society.

(f) Sincere ignorance of the responsibility of leadership attached with its institutional role.

Concluding remarks

The Supreme Court has been oblivious to the extra-legal elements at play while determining marital disputes. Decision-making, resultingly, is ahistoric, asocial and apsychological. Inexperience of the Indian society in adjusting marital friction by means of formal legal redress and other societal realities have been consistently ingored.

Dispute-decision of marital causes has been totally anormative. It has neither provided policy direction to law nor to society. The Supreme Court does not seem to believe that modification of law and direction of societal conduct by its action is part of its institutional role and responsibilities.

Legal precepts are read and applied in a manner that is unreasonably formal and unnaturally technicalistic concentrating on the apparent without being meaningfully interpretative and policy formulatative. Deliberations and opinions consequently suffer the limitation of mathematical exactitude. Marital claims of one spouse vis-a-vis other are measured meticulously but exclusively in terms of pronounced legal guarantees. Never an attempt is made to uphold, assert and promote a claim, sub-claim or even an issue on the ground that it is right and its avoidance will be wrong.

Inspite of the fact that it is a new and recent experiement made in our socio-legal system the Supreme Court refrains from expressing any opinion on the complexities of the phenomenon of social control through law, particularly in areas of intimate and emotive relationships like marriage.

Attitudinal approach of the court signifies extraordinary objectivity, impersonality and non-involvement in the larger issue at stake in marital causes viz, familial stability, one of the essential factors in the superstructure of society.

Reference tools used by the court for adjudicating marital friction are strictly and often foreign. As a body or indrividually, no member of the court has ever attempted to combine juristic resources with those

of social—sciences in decision-making. Heavy reliance on English case law is more often than not unnecessary.

Regrettably, it has to be admitted that the Supreme Court has missed to grasp essential context of marital causes and has slipped in recognising just demands on its institutional role in the area.

The Supreme Court's failure to perform its expected role satisfactorily in the field of marital causes may be attributed to absence of an Institutional precedent in the country, habitual regard for statutory prescriptions, preoccupation with other priority (in its view) areas of conflict, and inadequate evaluation of the gravity of the issue of marital disputes.

A conscious effert to overcome these, by and large, attitudinal limitations giving due importance to marital relationship on which both the happiness of the individual and the stability of the social order depends, is imminent on the part of the Supreme Court before it can perform its institutional role adequately in this highly emotive field.

THE JURIDICAL CONCEPTS OF 'PROPERTY' AND ITS 'TRANSFER'

G. M. SEN*

I

Introduction

"WITHOUT PROPERTY AND INDIVIDUAL ECONOMIC RIGHTS" says Sir Keith Joseph, the British Conservative Party leader, "all other rights are insecure". Obviously it appears to be no new proposition, for, from time immemorial man has cherished 'property and other economic rights' as the *sinequa non* of his existence on this earth, and has ever held them to be sacred. By the law of nature and human reason he who first began to use it acquired therein a kind of 'transient property' that lasted so long as he was using it and no longer. The right of possession continued for the same time only so long the act of possession lasted. Thus it is clear that at first 'property' was identified with purely material things, and that too the very essential things required to support human existence.

The history of human society it will be observed that it has all along been mainly 'property of some kind or other' which has served as the common bond which bound together the members of the various types of the 'units of society'—the village community, the gens, the clan, or the still later family.[1]

At first the Romans used the term *res* to denote property according to Dr. R. W. Leage, such objects are *res* if they form an item in anyone's wealth.... The test is whether a right has an economic content or not. If it is worth money it is a *res*, not otherwise...It is with *res* as items of an individual wealth that the *jus quod ad res pertinet* is concerned.[2] Yet the Romans themselves used to speak of *res nullius*, *res communes* etc. which could never be the subject of individual ownership. Again a *pater-familias*, i. e., the head of a Roman family, at least in the early law, had the right of selling a *filius familias*, i. e., any subordinate member like a

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1. According to Sir Henry Maine the village community is the earlier form and the family was a later development. This theory is disputed by Baden Powell as a result of his researches on the land systems of British India : *ibid* p. 140-41.
2. *Ibid.* Also see Buckland *Roman-Law*, pp. 182-183.

son, into slavery or something akin to slavery. But this right was never considered to be a *res*.

It is perhaps the same law which had been the forerunner in laying down juristically what a 'transfer of property' meant, and insisting upon certain essential formalities so as to make it legally effective. The first thing to be emphasised by them was that a transfer of property was intended to create certain consequences, legal and otherwise. They seemed to have clearly understood that 'ownership' was a relation between the person who may be called the owner and the subject—matter of such ownership. And a 'transfer of property' was a juristic concept which meant a changing of this relationship, and if it was to be effective it could be achieved only by some physical acts creating publicity.

The Romans divided *res* into : '*res mancipi*' and '*res nec mancipi*, According to Sir Henry Maine:[3] The distinction between *res mancipi* and *res nec mancipi* is the type of the class of distinctions to which civilisation is much indebted, distinctions which run through the whole mass of commodities, placing a few of them in a class by themeselves, and relegating the others to a lower category.

Under the English law, Section 2 of the law of Property Act, 1881 attempted to give a definition in the following terms :

> "Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest."

There has been a slight modification of the above definition when the law of Property Act (English) of 1925 came to be enacted. According to section 205 of the Act :

> "Property includes anything in action and any interest in real or personal property."

However the English law also understood that "property" is the most comprehensive of all terms in law which can be used in-as-much as it is indicative and descriptive of every possible interest which the party can have.[4]

3. Sir Henry Maine, "*Ancient Law*" cited by Sengupta in his work "*Ancient Law*" 5th Ed. p. 144.
4. *Jones* V. *Skinner*, (1885) 5 L. J. Ch. 87, 90 (*per* Lord Iangdale) According to *Halsbury's Laws of England*, (3 rd Ed. Vol. 32, p. 205) : The term "property" is used to denote either rights in the nature of ownership or the corporeal things, whether lands or goods, which are subject of such rights.

Any way, it is neither proposed, nor is it necessary, in the present context to make a detailed inquiry into the results obtained by the intrusion of the "English type of feudalism" there in England and its course of historical development subsequent to that.

The common law "estates of freehold" represented "real property" and were subject to "real property law" in the strict sense of that term, and as such were subject to all the consequences of the feudal tenure; while on the other hand leaseholds (together with some few other rights in land) were not so subject, and for this reason were neither affected by the incidents of feudalism, nor governed by the same legal rules as freeholds. And the net result was that the Law of Property as a whole used to fall into three divisions :

The Law of Real Property strictly so called, i.e., the rules that govern freehold interests in land the fee simple, the entailed interest and the life interest.

The Law of Chattels Real, i.e., the rules that govern leaseholds.

The Law of pure personality.

"Of these three departments of law, first and the last stand furtherest apart, for the law of real property has been constructed on feudal principles, while the law of pure personlity has drawn its inspiration from a variety of non-feudal sources, such as the Roman and the Cannon law and the custom of merchants. Midway between the two comes the law of chattels real, which Blackstone describes as having "mongrel amphibious nature", since it has derived its rules partly from real property law and partly from the law of pure personality. *The*

And according to the same authority, this dual meaning of the work "property" arises from a tendenoy to identify the corporeal thing with the aggregate of rights which makes up the entire right of ownership, including the right of exclusive possession or enjoyment; and it is confined to cases where the right involves possession. Thus, where a person is entitled to land in fee simple in possession, the thrm "property" is appropriate to describe both the land itself and his interest in the land; but where the right does not involve possession of a corporeal thing, where, for example, it is an easement or rent charge, the term denotes a right onlr; see *Austin's Jurisdrudence*, 5th Ed. 391, 777; *Williams* on the Law of Property, 24th Ed 4.

Thus acoording to English Law, "property" is either corporeal or incorporeal. These in our Indian Law are designated by the terms 'tangible things" and "intangible things". Sec. 54 of the Transfer of proyerty Act, 1882, for example, speaks of "tangible immovable property" and "intangible immovable property".

In any case what is really owned is either a right or an aggregate of rights. (See *Salmond's Jurisprudence*).

tendency, however, for several centuries has been to bring freeholds into conformity with chattels real, and the process of assimilation has been carried to such lengths, especially by the legislation of 1925, that we now have substantially a common and uniform system of law for real property and chattels real".[5]

And further the legal concepts of 'tenure' and the 'doctrine of estates', which were the off-shoots of feudalism lost all their importance in due course of time and ultimately the stage came when 'land' and interests in land' could be subjects of complete ownership. The real distinction therefore has now come to be as between "corporeal property" and "incorporeal property."

There is one more distinguishing feature of the English Law of Property of the distinction between "legal and equitable interests."

An equitable interest is one which is enforceable against the whole world except a purchaser for valuable consideration of the legal estate which is subject to the equitable interest, provided that, when the purchaser acquired the legal estate, he had no notice either actual or constructive, of the equitable interest.[6]

Now coming to the Law of Property in India according to D. F. Mulla there was practically no law as to real property in India before the Transfer of Property Act, 1882. The Courts adopted the English Law as the rule of justice, equity and good concience.[7] But in due course the English Law were not always applicable to social conditions in India and the case law became confused and conflicting. This led to the enactment of the Transfer of Property Act, 1882. This Act also did not profess to be a complete and exhaustive code in itself[8] as it primarily intended to define and amend the then existing law and not to introduce any new principles.[9] And the net result was that the courts still applied the rules of English Law which were not inconsistent with the Act as the rule of justice, equity and good conscience.[10]

5. Sss Cheshire, *The Modern Law of Real Property*, 8th ed. p. 39.
6. Chashire, *The Modern Law of Real Property*, 8th Ed. p. 66.
7. See "Introduction" to the *Transfar of Property Act* 6th Ed. p. XV. (thereinafter referred to as *Mulla*).
8. See the preamble of the Act which reads : 'Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act to parties; It is enacted as follows : "See also *Irrawady Flotilla Co.* V. *Bhugwandas*, (1891) 18 I. A. 121, 129 (a case on the India Contract Act, 1872, where also the preamble is exactly in the same terms). *H. V. Low & Co. Ltd.*, V. *Pulin Beharilal*, (1933) 59 Cal. 1372 and other cases.
9. *Tajjo Bibi* V. *Bhagwan*, (1894) 16 All. 295.
10. *Maharaja of Jeypore* V. *Rukmani* (1919) 46 I. A. 109 : AIR (1919) P. C. 1. And in relation to the Law of Contract in a recent decision, *Bhagwandas* V. *Girdharilal & Co.*, (1966) 1 S. C. R. 656 ; A. I. R. (1966) S. C. 543, 549, the Supreme Court (per Shah, J.) said ;

Any way, it is neither proposed, nor is it necessary, in the present context to make a detailed inquiry into the results obtained by the intrusion of the "English type of feudalism" there in England and its course of historical development subsequent to that.

The common law "estates of freehold" represented "real property" and were subject to "real property law" in the strict sense of that term, and as such were subject to all the consequences of the feudal tenure; while on the other hand leaseholds (together with some few other rights in land) were not so subject, and for this reason were neither affected by the incidents of feudalism, nor governed by the same legal rules as freeholds. And the net result was that the Law of Property as a whole used to fall into three divisions :

The Law of Real Property strictly so called, i.e., the rules that govern freehold interests in land the fee simple, the entailed interest and the life interest.

The Law of Chattels Real, i.e., the rules that govern leaseholds.

The Law of pure personality.

"Of these three departments of law, first and the last stand furtherest apart, for the law of real property has been constructed on feudal principles, while the law of pure personlity has drawn its inspiration from a variety of non-feudal sources, such as the Roman and the Cannon law and the custom of merchants. Midway between the two comes the law of chattels real, which Blackstone describes as having "mongrel amphibious nature", since it has derived its rules partly from real property law and partly from the law of pure personality. *The*

And according to the same authority, this dual meaning of the work "property" arises from a tendenoy to identify the corporeal thing with the aggregate of rights which makes up the entire right of ownership, including the right of exclusive possession or enjoyment; and it is confined to cases where the right involves possession. Thus, where a person is entitled to land in fee simple in possession, the thrm "property" is appropriate to describe both the land itself and his interest in the land; but where the right does not involve possession of a corporeal thing, where, for example, it is an easement or rent charge, the term denotes a right onlr; see *Austin's Jurisdrudence*, 5th Ed. 391, 777; *Williams* on the Law of Property, 24th Ed 4.

Thus according to English Law, "property" is either corporeal or incorporeal. These in our Indian Law are designated by the terms 'tangible things" and "intangible things". Sec. 54 of the Transfer of proyerty Act, 1882, for example, speaks of "tangible immovable property" and "intangible immovable property".

In any case what is really owned is either a right or an aggregate of rights. (See *Salmond's Jurisprudence*).

tendency, however, for several centuries has been to bring freeholds into conformity with chattels real, and the process of assimilation has been carried to such lengths, especially by the legislation of 1925, that we now have substantially a common and uniform system of law for real property and chattels real".[5]

And further the legal concepts of 'tenure' and the 'doctrine of estates', which were the off-shoots of feudalism lost all their importance in due course of time and ultimately the stage came when 'land' and interests in land' could be subjects of complete ownership. The real distinction therefore has now come to be as between "corporeal property" and "incorporeal property."

There is one more distinguishing feature of the English Law of Property of the distinction between "legal and equitable interests."

An equitable interest is one which is enforceable against the whole world except a purchaser for valuable consideration of the legal estate which is subject to the equitable interest, provided that, when the purchaser acquired the legal estate, he had no notice either actual or constructive, of the equitable interest.[6]

Now coming to the Law of Property in India according to D. F. Mulla there was practically no law as to real property in India before the Transfer of Property Act, 1882. The Courts adopted the English Law as the rule of justice, equity and good concience.[7] But in due course the English Law were not always applicable to social conditions in India and the case law became confused and conflicting. This led to the enactment of the Transfer of Property Act, 1882. This Act also did not profess to be a complete and exhaustive code in itself[8] as it primarily intended to define and amend the then existing law and not to introduce any new principles.[9] And the net result was that the courts still applied the rules of English Law which were not inconsistent with the Act as the rule of justice, equity and good conscience.[10]

5. Sss Cheshire, *The Modern Law of Real Property*, 8th ed. p. 39.
6. Chashire, *The Modern Law of Real Property*, 8th Ed. p. 66.
7. See "Introduction" to the *Transfar of Property Act* 6th Ed. p. XV. (thereinafter referred to as *Mulla*).
8. See the preamble of the Act which reads : 'Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act to parties; It is enacted as follows : "See also *Irrawady Flotilla Co.* V. *Bhugwandas*, (1891) 18 I. A. 121, 129 (a case on the India Contract Act, 1872, where also the preamble is exactly in the same terms). *H. V. Low & Co. Ltd.*, V. *Pulin Beharilal*, (1933) 59 Cal. 1372 and other cases.
9. *Tajjo Bibi* V. *Bhagwan*, (1894) 16 All. 295.
10. *Maharaja of Jeypore* V. *Rukmani* (1919) 46 I. A. 109 : AIR (1919) P. C. I. And in relation to the Law of Contract in a recent decision, *Bhagwandas* V. *Girdharilal & Co.*, (1966) 1 S. C. R. 656 ; A. I. R. (1966) S. C. 543, 549, the Supreme Court (per Shah, J.) said ;

II

The Supreme Court's Contribution

Having thus elaborated the background in somewhat detail we ultimately come to examine the contribution made by the Supreme Court in this sphere of the law.

(i) Meaning of "Property", Classification etc.

In *Ananda Behera* v. *the State of Orissa*[11] the Supreme Court has given a very clear exposition of what "property" means and the distinction between "moveable property" and "immoveable property". Further the Court also clarified and re-emphasised the legal position that whatever might be the intention of the parties, and however clearly it might have been proved, a transfer of property will be ineffective unless it is done in the manner prescribed by the Act.

The dispute, where the Supreme Tribunal of the land was thus called upon to adjudicate, arose out of certain grants of "fishery rights" in the Chilka lake situated in what was once the estate of the Raja of Parikud in Orissa. This estate alone with others vested in the State of Orissa under the Orissa States Abolition Act, 1951 (Orissa Act I of 1952) of the 24th of September, 1953, the Act having come into force on the 9th of February, 1952. But long before the vesting of the particular estate, the petitioners had entered into certain transactions, viz., they had obtained rights to catch and appropriate all the fish from certain specified parts of the lake, which had in fact been divided into sections. All the rights were acquired, on payment of heavy sums, before the said vesting of the estate but they were all for future years, all after the date of the vesting. The State of Orissa refused to recognise the petitioners as having any right for such fishing operations after the date when the estate vested in the State and were about to re-auction the right to future fishing whereupon the petitioners filed the instant petition on the ground that their fundamental rights under articles 19 (1) (f) and 31 (1) were, or were about to be, infringed.

"In the administration of the law of contracts, the Courts in India have generally beer guided by the rules of English common law applicable to contracts where no statutory provision to the contrary is in force. The Courts in the former Presidency towns by the terms of their respective letters patents, and the Courts outside the Presidency towns by Bengal Regulation III of 1993, Madras Regulation II of 1802 and Bombay Regulation IV of 1827 and by the diverse Civil Courts Acts were enjoined in cases where no specific rules existed to act according to "law and equity" in the case of chartered Pigh Courts and elsewhere according to justice.

11. AIR 1956 SC. 17.

The Supreme Court consisting of five judges[12] heard the matter and gave a unanimous verdict.

Bose, J., in the course of the judgment delivered on behalf of all the judges said : "The first question what we have to decide is whether the petitioners acquired any rights or interests in "property" by their several "purchases", as Articles 19(1) (f) and 31(1) are dependent on that".

As a matter of fact the petitioners in their petition had claimed that the transactions were sale of "future good", namely of the fish in these sections of the lake, and that as fish was moveable property, Orissa Act I of 1952 was not attracted as that Act was confined to immoveable property.

About this claim the Court said that if that was the basis of their right, then their petition under Article 32 was misconceived because until any fish was actually caught the petitioners would not have acquired any property in it.[13] And that there could be no doubt that the lake was immoveable property and that it formed part of the Raja's estate which vested in the State of Orissa and with it vested the right that all owners of land have to bar access to their land and the right to regulate and control and sell the fisheries on it. So if it were that the petitioners had only the right to obtain "future goods" under the Sale of Goods Act, then that would only be a personal right arising out of contract to which the State of Orissa was obviously not a party. In the event of a non-performance of a contract there would arise only a claim for damages for breach of contract or other appropriate remedies against the party who made the contract. There would not then be any claim against the State of Orissa and certainly there would not have been any breach of any fundamental right for which action could be brought against that State.

But the Court rightly pointed out :

> The facts disclosed in paragraph 3 of the petition make it clear that what was sold was "*the right to catch and carry away fish in specific sections of the lake over a specified future period.* That amounted to a licence to enter on the land coupled with a grant to catch

12. Das, Ag. C.J , Jagannadhadas, Nose, Syed Jafer Imam and Chandrasekhara Iyer, JJ.
13. Where by a contract of sale the seller purports to effect a present sale of "Future goods", the contract operates as an "agreement to sell the goods". (Sec. 6 (3) of the Sale of Goods Act, 1930). & where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer until the goods are ascertained (*Ibid.* Sss. 18).

and carry away the fish, that is to say, it was a *profit* a *prendre*[14] In England it is regarded as an "interest in land[15] because it is a right to take some profit of the soil for the use of the owner of the right. In India it is regarded as a benefit arising out of the land as such it was "immoveable property

And the Court further explained that :

> Section 3 (26) of the General Clauses Act defines "immoveable property" as including benefits that arise out of the land. The Transfer of Property Act does not define the term except to say that "immoveable property" does not include standing timber, growing crops or grass.[16] And as fish do not come under that category of the definition in the General Clauses Act applies and as a *profit a prendre* is regarded as a benefit arising out of land it follows that it is "immoveable property" within the meaning of the Transfer of Property Act.

Ultimately, therefore, since the "sales" in the instant case were merely oral, no title or interest passed to the petitioners and the Court held that the petitioners had accordingly no fundamental right to any property which they could enforce against the State or any body else.[17]

It is significant to note that "the right to fish in specified sections of the lake at a future date" was in fact recognised as "property", though intangible, and it was "present property" to which the grantees were entitled but they failed to acquire title to it in so far as the formalities prescribed by the statute were not complied with. Thus the Court fully explained the concept of "property" as understood by the Act.

There had been another subsequent occasion, rather more recently, for the Supreme Court[18] to elaborate and explain the concept of 'property' under the Act and to underline that it is used in the widest sense possible.[19]

14. *Halsbury's Laws of England* (Hailstram Ed.) Vol. 11, pp. 382-383.
15. *Ibid.*, p. 387.
16. See section 3 of the Act.
17. Sec. 54 of the Act : "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and partpromised.
    Such transfer in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing can be made only by registered instrument.
    Thus in *Anand Behera's case*, in any view of the matter, a registered intrument was necessary to effect the transfer the absence of which negatived any elaim of the petitioners for any "property".
18. *Vasudev Ramchandra Shelat* v. *Pranlal Jayananda Thakur*, AIR 1975 S C. 1728. (Decided by a Division Bench consisting of Beg and Sarkaria JJ.)
19. See note 35 supra.

The matter arose under the following circumstances. A lady executed a registered gift deed in favour of her brother, the appellant in the case, purporting to gift certain specified shares in various limited companies details of which were given in the deed. She had also signed a number of blank transfer forms apparently for the purpose of enabling the donee to fill them up and present before the companies concerned for getting the name in the Share Registers transferred. But before the transfers could be effected she died. The respondent who was a nephew of the deceased lady's predeceased husband disputed the claim of the appellant to the said shares, in an administration suit in so far as the shares still stood in the name of the lady at the time of her death.[20]

Repelling the above contention the Supreme Court held that the gift was complete and had become irrevocable even during the life time of the donor. The court observed that the registered document was signed by the donor as giver of 'property' and was also signed by the donee as the acceptor of the same and that it was also attested by six witnessess. Though therefore the donor continued to be the legal owner of the shares in so far as the shares still continued to be borne in the respective Share Registers[21] there was a completed gift of 'property' even before the death of the doner.

What then was the 'property' gifted and which was accepted by the donee during her lifetime itself ?

20. Sec. 122 T. P. A. reads : "Gift" is the transfer of *certain existing* moveable or immoveable property made voluntarily and without consideration by one person, called the donor, to another, called the done, and accepted by or on behalf of the donee.
    Such aceeptance must be made *during the lifetime* of the donor nnd while he is still capable of giving.
    If the donee dies before acceptance, the gift is void,
    Sec 123 of T. P. A. reads : For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
    For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
    Such delivery may be made in the same was as goods sold may be delivered.
21. Sec. 153 of the Companies Act, 1956 provides :
    "No notice of any trust, express, implied or constructive, shall be entered on the register of members or of debenture holders".
    This in effect means that until the name is got changed the legal and equitable ownerskip of the shares will remain with the donor (the deeeased lady in this case)

It was observed by the Court that by delivering the registered gift deed together with the share certificates and blank transfer forms the donor purported to transfer to the donee the *'right to get the share certificates made out in the name of the donee'* which in itself was 'property' for the purposes of making a gift in accordance with the provisions of the law laid down in the Transfer of Property Act. In other words, the Court further said, a transfer of 'property' rights in shares recognised by the Transfer of Property Act may be antecedent to the actual vesting of all or the full rights of ownership of shares and exercise of the rights of shareholders in accordance with the provisions of the company law.[22]

In sum, even such a 'right to get the share certificates made out in the name of the transferee at a future date' is in accordance with law 'existing property' which could form the subject-matter of a present 'transfer'. This is in conformity with the widest acceptation of concept of property.

In a still later case : *Union of India* v. *Iqubal Singh*[23] a full bench of the Supreme Court found occasion further to elucidate the definition of property. The Court observed that the statutary right of a claiment to compensation under the Displaced Persons (Compensation and Rehabilitation) Act, 1954 is 'property' covered by the 'wide' definition of 'property' under the Transfer of Property Act, 1882. Though the exact compensation may crystalize only on assessment and verification the claiment's right is his 'property' which would not evaporate or vanish suddenly with the death of the man.

(ii) "Future Property" Actionable Claims

Earlier in another case, *Chhotabai Patel* v *State of Madhya Pradesh*[24] the Supreme Court had already recognised that a "present incorporeal right" to a "corporeal thing" at a future date is "present property" and that a person possessing such a right is in fact the owner of a *"right in rem"* and not merely a *right in personam"*, though the corporeal thing itself has not yet taken shape or has not come into existence.

22. Sec. 8 of the Transfer of Property Act, 1882 is of significance in this context which reads :
"Unless a different intention is expressed or necessarily implied, a transfer of property patses forthwith to the transferee all the interest which the transferor is then capable of passing in the property, *and in the legal incidents thereof*"
23. AIR 1976 S. C. 211 (A. N. Ray, C. J., M. H. Beg, R. S. Karkaria and P. N. Bhagawati, JJ).
24. AIR 1953 g. C. 108.

Benjamin in his classical work on 'Sales' explains :[25]

> Things not yet existing which may be sold (that is to say, a right to which may be immediately granted) are those which are said to have a potential existence, that is things which are the natural produce, or expected increase of something already owned or possessed by the seller. A man may sell the crop of hay to be grown in his field, the wool to be clipped from his sheep at a "future time", the milk that his cows will yield in the "coming month", and similar things. Of such things there could be according to the authorities, an 'immediate grant or assignment', whereas there could only be an agreement to sell where the subject of the contract is something to be afterwards acquired, as the wool of "any sheep", or the milk of "any cow", which the seller might buy within the year, or any goods which he might obtain title within the next six months.

Citing the above dictum with approval, the Supreme Court held that the rights conferred on the petitioners, in payment of substantial amounts to the proprietors of the land, in terms of which they were entitled to pluck, collect and carry away tendu leaves; to cultivate, culture and acquire lac, and to cut and carry away teak and timber and other species of trees were existing "property", and in so far as the transactions took place before the vesting of the "land" in the State of Madhya Pradesh Select Abolition of Proprietor Rights (Estates, Mahals, Alienated Lands) Act, 1950, the State had no right to interfere with such rights. A writ was issued in favour of the petitioners and against the State under Article 32.

But the Supreme Court seems to have dissented from the decision in the above case in some subsequent case.[26] Not only the interpretation as to what "future property" means in law derived by the Court is correct, but also the whole decision itself seems to be unassailable, provided the things for the collection of which the petitioners had acquired rights were considered to be "growing crops" and "standing timber." Without stating this clearly the Court stated that the petitioners, were "not proprietors nor persons having any interest in the proprietory rights". In other words the petitioners were only owners of "goods or moveable property" which did not vest in the State of Madhya Pradesh. In this view of the matter *Chhotabai Patel's* case is

25. *"On Sales"*, 8th Ed. p. 136.
26. e. g. *Shantabai v. State of Bombay*, AIR 1958 S. C. 532; *Mahadeo v. State of Bombay*, AIR 1959 S. C. 735; *State of Madhya Pradesh v. Yakunuddin*, (1963) 3 SCR. 13 etc.

quite in conformity with law and the subsequent decisions in *Ananda Behera* and other cases.

However in *Jugalkishore* v *Ram Cotton & Co.*[27] it seems that the Bombay High Court have had some lack of clarity as regards the exact significance of what is "Future property" in the legal sense, though the decision ultimately was sound. The confusion was also partly created by the intermingling of substantive law with procedural law.

In that case two persons constituting a partnership firm had filed a suit against the appellant, Jugalkishore, for the recovery of a specified amount with interest due from him under certain transactions with them. The plaintiffs, after the institution of the said suit, transferred to the respondents, Messrs. Raw Cotton & Co., their entire business together with all their book and other debts due to them. The debt in respect of which the suit had been filed also was one among them Subsequently the original plainttffs migrated to Pakistan.

The respondent company however did not take steps under 0.22, R. 10, Civil Procedure Code, to get themselves substituted as plaintiffs in the place and stead of the transferors and the suit continued in the original names of the plaintiffs. And ultimately a decree was also passed in the name of tho original plaintiffs enabling them to recover the amounts from the defendent Jugalkishore. But when Raw Cotton & Co. sought to execute the decree against him, he objected that under 0.21, R. 16 they were not entitled to do so.

On reading the judgment, one cannot escape the feeling that in the High Court[28] the learned judges were looking at the respondent company as transferees of the decree in which case they would have been incompetent to execute it.[29] To get over the difficulty, and the obvious inequity they took the document executed by the original plaintiffs as amounting to a "contract to transfer future property" and had to rely on the equitable rule of *Holroyd* v *Marshall* in English law.[30]

27. AIR 1955 S. C. 376.
28 The High Court of Bombay.
29. For example in the High Court, Dixit, J. conceded—
"If the language of 0 21, R. 16 is strictly construed, it seems ro me that the Respondents have no case."
And so did Chagla, C J. when he said—
"...and it is perfectly clear that if one were to construe R. 16 strictly there is no aseignment of the decree in favour of the first respondent." AIR (1955) S. C. p. 381.
30. (1862) 10 HLC. 191 : 33 L. J. Ch. 933. There Lord Westbury at pp. 210-211 (10 HLC. 191) stated the principle that a purported transfer of non-existing property will be deemed by equity as a contract to transfer such property, when it comes into existence in the possession of the

When the matter ultimately came up in appeal before the Supreme Court consisting of three judges[31] it clarified the position and it upheld the decision of the High Court on other grounds.

Das, J., said :[32]

> I have already held that the document (transferring all the business assets, book and other debts) under consideration did not transfer the future decree, and therefore, the equitable principle did not apply and, therefore, the respondent company did not become a transferee of the decree within meaning of 0.21, R. 16. What then is the legal position of the respondent company ? They had undoubtedly, by the document of 7-2-1949, obtained a transfer of the debt which was the subject-matter of the then pending suit. The transfer, under the Transfer of Property Act, carried all the legal incidents and the remedies in relatian to that debt The transferors no longer had any right, title or interest in the subject matter of the suit.
>
> ... ...

In the premises, in the eye of the law, the position of the transferors, *'vis a vis'* the respondents, was nothing more than that of 'benamidars' for the respondent company and when the decree was passed for the recovery of the debt it was the respondent company who were the real owners of the decree...."

Bhagwati, J. was still more outright. He said:[33]

"In cases of transfer of book debts or property coming within actionable claim there is therefore necessarily involved also a transfer of the transferor's rights in a decree which may be passed in his favour in a pending suit and the moment the decree is passed in his favour by the Court of law, that decree is also automatically transferred in favour of the transferee by virtue of the assignment in writing already executed by the transferor.

It is submitted that even though the Court did not say in so many words, it ultimately mean that the document of 7-2-1949 effected a transfer of property, namely, the transfer of an actionable claim, that is,

transferor, and becomes capable of specific performance. Since equity treats as done what ought to be done, the moment the property comes into the possession of the transferor the beneficial interest in it instantly passes to be transferee with all the consequences thereof. The difficulty in applying the above principle in the above ease is twofold : (1) Equitable ownership as such is not recognised by our law. See *Tagore v. Tagore*, 1872 I. A. Supp. 47. (2) Can such equitable rule be applied in the face of the express provisions of 0.21, R. 16 ?

a present right to some beneficial interest in moveable property not in the possession either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such beneficial interest be existent, accruing, conditional or contingent (here in this case a decree accruing in the pending suit).

It is only in this view of the matter, it is submitted, that the view of the learned judges that the original plaintiffs were more benamidars in respect of the decree ultimataly passed in their names, could be substantiated.

There were also some further clarification of the law in the same judgment. For example the Court stated and explained[34] that transfers "by operation of law" are not intended to be confined to cases of death, devolution or succession. There is also no warrant for confining transfers "by operation of law" to transfers by operation of statutory laws. When a Hindu or a Mohammadan dies intestate and his heirs succeed to his estate there is a transfer not by any statute but by the operation of their respective personal law.

It has also been held that the equitable principle of assignment is as good as any rule of law and that where it applies the transfer ought to be regarded as one by operation of law.[35]

The Court also said that the words "in present or in future" appearing in section 5 of the Act relate only to the word "conveys" and not to the word "property" and that a transfer of property not in existence only operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence.[36]

31. S. R. Das, Bhagwati & Jaffer Imam, JJ.
32. AIR 1955 S. C. 376 at p. 394.
33. *Ibid.* p. 400.
34. per Das, J. (pp. 390-393).
35. per Das, J. (pp. 390-393).
36. per Bhagawati, J. (p. 398). This is the English rule as enunciated by Westbury, J. in *Holroyd v. Marshall* (note 73 supra).
Being a rule of equity, the same will not apply in a case where the purported transfer of future property is without consideration, that is to say in cases of gift. The provision, therefore, in section 124 of the Act that "a gift comprising both existing and future proaerty is void as to the latter" is in perfect consomance with the rule.
But an 'actionable claim' is present property and not future property; and a transfer of an actionable claim is a 'conveyance' and not a contract to convey In this context see *Raja Dhruv Den Chand v. Raja Harmohinder Singh*, AIR 1968 S. C 1024, where the Supreme Court has given a clear exposition of the distinction between a contract and conveyance.

In fact an "actionable claim" is a difficult legal concept. The Supreme Court, it is submitted, has further clarified its real legal significance by pointing out in more than one decision[37] that the interest of a partner in partnership assets, for example, is only moveable property, being only an actionable claim, even if the assets of the partnership consists of land and other immoveable items as well. This is in accordance with the principles of English law[38] and the prior judicial decisions in India.[39] The Supreme Court has put its stamp of authority on the dictum.

(iii) Trees; 'Standing Timber'

Trees rooted in the land are obviously part of the land[40] and as such by the provisions of section 8 of the Act they also pass, when the land is transferred, to the transferee. And the Supreme Court has held that this is in fact the law.[41] So also is the case with subjacent items like mines, quarries and minerals.[42] But "immoveable property shall not include standing timber, growing crops or grass".[43] What then is the distinction between "trees" and "standing timber" ? This had

A completed conveyance involves the creation of an interest in favour of the transferee in the subject-matter of the transfer. The Court held in that, case that, as a result, events which discharge a contract by operation of law, as for example under s. 56 of the Contract Act, do not necessarily invalidate a concluded transfer.

37. *A. Narayanappa v. B. Krishnappa*, AIR 1966 S. C. 1300; Commissioner *of Income Tax, West Bengal v. Juggi Lal Kamalnpat*, AIR 1967 SC 401.
38. See *Halsoury's Laws of England*, 3rd (Simmonds) Ed., Vol. 4, p. 482. Also *Re Bainbridge, Ex parte Fletcher*, (1878) 8 Ch. D. 218.
39. *Thakerdas* v. *Seth Vishindas*, (1925) 79 I. C. 72; *Ajudhia Pershad Ram Pershad* v. *Sham Sunder*, ILR (1947) 28 Lah. 417 etc.
40. See section 3 (26) of the General Clauses Act, 1897 and the definition of "attached to the earth" under section 3 of the Transfer of Property Act.
41. *Divisional Forest Officer, Sarahan Forest Division of Simla Forest Circle, Himachal Pradesh* v. *Daut and others*, AIR 1968 S. C. 612 where Sikri, J. held that trees standing on the land passed to the transferee on a transfer of the "right, title and interest of the landowner in the land" under section 3 of the Transfer of Property Act.
42. *Raja Anand Brahma Shah* v. *State of Uttar Pradesh*, AIR 1967 S. C. 1081 where Ramaswamy, J., in the course of the judgement said : (at p. 1088) "*Prima facie* the owner of a surface of the land is entitled *ex jure* everything beneath the land in the absence of any reservation in the grant. Minerals necessarily pass with the rights of the surface (*Halsbury's Laws of England*, 3rd Ed. Vol. 26, p. 325). ...A contract, therefore, to sell or grant a lease will generally include mines, quarries and minerals beneath with it : *Mitchell* v. *Mosley*, (1914) 1 Ch. 438, 450."
43. See section 3 of the Act.

continued to be a vexed problem in our law. (See Mulla, 6th Ed. pp. 18 & 25).

In a well considered judgment, of late, the Supreme Court has removed all the difficulty in the matter.[44]

The matter arose under the following circumstances. The petitioner before the Supreme Court was one Shantabai whose husband was the Zamindar of Pandharpur, one Balirambhau Doye. He had executed an unregistered document, entitled a lease, to his wife in terms of which she was given the right, in consideration of the payment of Rs. 26,000 made by her, to enter upon certain areas in the zamindary, and cut and take out bamboos, fuel wood and teak for more than twelve years. According to the petitioner she had worked the forests till 1950 when the Madhya Pradesh Abolition of Propritary Rights (Estates, Mahals and Alienated Lands) Act, 1950 was passed. Under a notification issued under the Act the proprietary rights of the zamindar henceforward vested in the State of Madhya Pradesh from March 31, 1951. Thereafter she was prevented by the State Forest Officers from carrying on with the cutting operations. Thereupon she moved the Supreme Court under Article 32 of the Constitution alleging infringement of her fundamental rights guaranteed under Articles 19(1) (f) and (g).

Bose, J. during the course of his separate judgment[45] said :

> Now, what is the difference between 'standing timber' and a 'tree' ? It is clear that there must be a distinction because the Transfer of Property Act draws one.....'standing timber' must be a tree that is in a state fit for these purposes (i. e. suitable for building houses, bridges, ships etc. whether on the tree or cut and seasoned) and, further, a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber for all practtcal purposes eventhough it is still standing. If not, it is still a tree beeause, unlike timber, it will continue to draw sustence from the soil.

44. AIR (1958) S. C. 532.

45. Das, C. J. who delivered the other judgement on behalf of himself and Venkatarama Iyer, S. K. Das, and Sircar, JJ. stated that they did not consider it necessary to examine or analyse the document minutely or to finally determine the true meaning and effect thereof, for, according to them in whatever view the petitioner could not complain of the breach of any of her fundamental rights.

Bose, J, on the other hand, examined the problem in detail and arrived at the true nature of the petitioner's alleged right before dismissing the petition.

> Now, of course, a tree will continue to draw sustence from the soil so long as it continues to stand and live; and that physical fact of life cannot be altered by giving it another name and calling it "standing timber". But the amount of nourishment it takes, if it is felled at a reasonably early date, is so negligent that it can be ignored for all practical purposes and though, theoretically, there is no distinction between one class of tree and another, if *the drawing of nourishment from the soil is the basis of the rule, as I hold it to be,* the law is grounded, not so much on lagical abstractions as on sound and practical commensense. It grew empirically from instance to instance and decision to decision until a recognisable and workable pattern emarged; and here, this is the shape it has taken.
>
> ... ...
>
> *Before a tree can be regarded as "standing timber", it must be in such a stote, that if cut, it could be used as timber; when in that state, it must be cut resaonably early.... The legal basis for the rule is that trees that are not cut continue to draw nourishment from the soil and that the benefit of this goes to the grantee.*

Then His Lordship examined the provisions of the document where it was stated that the duration of the grant was for twelve years. It was evident therefore that trees that will be fit for cutting twelve years hence would not have been fit for felling at the time when the grant was begin to be operative. The trees of the category were to grow further and then ought to be cut when they would have attained a particular growth. That meant that it was not a mere sale of "standing timber" but a sale of trees, which, according to the classification, is immoveable property. Since the total value was Rs. 26,000, the deed required registration in the absence of which no "property" passed to the petitioner under the transaction in respect of such trees. As such there was no infringement of any fundamental right and the petition was dismissed.

The above well considered judgement has therefore thus clarified the position beyond all doubt.

There has since then been another case decided by the Supreme Court where also the facts were almost similar and the decision was also likewise.[46] But the reasoning adopted seems to have been slightly different, and it is submitted, not on exactly sound lines. The Court could have disposed of the case in the same manner as in *Shantabai's* case

46. *Ram Narain* v. *State of Madhya Pradesh,* (1970) 2 SCJ. 367.

on the ground that as the cutting operations were spread over a period of years the transaction did not amount to sale of goods (standing timber) and as there was no registered deed the purchaser did not get any "property." Instead of that the Court took it to be a transaction by way of future goods which it does not appear to be, considering the definition of "future property" we have already seen.[47] Any how the decision itself is correct.

(iv) *'Spes Successonis'*

A mere 'expectancy' like the chance of an heir-apparent succeding to an estate of his predecesser, which in law is known as a *'spes successonis'*, is not considered to be "property" for purposes of transfer. A purported transfer of such a *'spes'* would be treated as nulity even if the transferee acts bonafide and pays value,[48] and in such cases even the rule in *Holroyd* v. *Marshall* enunciated already before[49] will not apply though the position in English law is otherwise.[50] And though an express contract by an heir-apparent to transfer the property which he expects to inherit could not obviously be hit by section 6 (a) of the Act, and is also not expressly prohibited by any other statute, such a contract would be covered by the provisions of section 23 of the Contract Act, and would be declared void as being a contract "which if permitted would defeat the provisions of law." It has also been held so judicially.[51]

The Courts in India and the Privy Council have consistently held that by Hindu Law the right of a reversionary heir expectant on the

47. See *supra* nete 68.
48. See section 6 (a) : *Anand Mohan* v. *Gour Mohan*, AIR 1921 Cal. 501 : on Appeal AIR (1923) P. C. 189 note 73,
49. See *supra*
50. Even in English law such a possibility not an interest or even a contingent title (*re Pearsons*, 1890-45 Ch. D. 51, 55 where it was said : It is indisputable law that no one cau have any estate or interest at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such person, During the lifetime of such person no one can have more than a *spes successionis*). But there being no strtutery prehibition there similar to sec. 6 (a), if the transfer is for value, it will operate as a contract to assign if an when the expectancy becomes an interest (*Tailby* v. *Official Receiver*, 1888, 13 APP. Cas. 523; *re Ellenberough*, (1903) 1 Ch. 697)
51. *Ananda Mohan* v. *Gour Mohan* (supra note 91), where the Privy Council said that "it is impossible for them to admit the commonsense of maintaining a an enactment which would prevent the purpose of the contract, while permitting the contract to stand as a contract".

death of a Hindu female inheriting a 'limited estate' is a mere *spes successionis* of the sort referred to in section 6 (a).[52] The Supreme Court has in its turn upheld this position recently in *Jumma Masjid, Mercara* v. *Kodimandra Devaiah.*[53] But the importance of the decision is otherwise; it is in that it explains clearly and unambigueously the exact relation between section 6 (a) *(spes successionis)* and section 43 (title feeding the estoppel) of the Act about which there had previously been some want of clarity. It also settles the prior judical conflict regarding the question whether the illustration to section 43 is repugnant to the substantive part of the section.[54]

The Supreme Court held, overruling the prior decisions to the contrary, that section 43 applies to all transfers which fulfil the conditions prescribed therein and that it makes no difference in its application, whether the defect in title in the transferer arises by reason of his having no interest what so ever in the property, or of his interest therein being that of an expectancy heir (*spes successionis*).[55] The Court referred to the dictum of Sir Sulaiman, C. J., and Rachhpal Singh, J., of the Allahabad High Court in *Shyam Narain* v. *Mangal Prasad*[56] where it was stated :

> Section 6 (a) would, therefore, apply to cases where professedly there is a transfer of a mere *spes successionis*, the parties knowing that the transferer has no more right than that of a more expectant heir. The result, of course, would be the same where the parties knowing the full facts, fraudulently clothe the transaction in the garb of an out and out sale of the property, and there is no erroneous representation made by the transferer to the transferee as to his ownership.
>
> But where an erroneous representation is made by the transferer to the transferee that he is the full owner of the property transferred and is authorised to transfer it and the property transferred is not a mere chance of succession but inmoveable property itself, and the transferee acts upon such erroneous representation, then if the transferer happens later, before the contract of transfer comes to an end, to acquire an interest in that property, no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee

52. See Mulla, 6th Ed. p. 58 and the series of cases referred to there.
53. AIR (1962) S. C. 847.
54. See e. g. *Official Assignee* v. *Sampath Naidu*, AIR 1933 Mad. 795 *Bindeshwari Singh* v. *Har Narain Singh* AIR 1929 Oudh 185, etc.
55. (1962) Supp. 2 SCR 554 at p. 561.
56. AIR 1935 All. 244 at p. 246.

operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer.

The Supreme Court also examined other decisions of various other High Courts as well[57] and arrived at the conclusion that the preponderence of judicial opinion was in favour of the above dictum and finally upheld it to be correct.

Then again in another case relating to *spes successionis*[58], the Supreme Court held for the first time that though section 6 (a) prohibited the transfer of the bare chance of the surviving widow taking the entire estate of her husband as his next heir on the death of the co-widow, but that it does not prohibit the transfer by the widow of her present interest in the properties inherited by her (as limited heir) together with the incidental right of survivorship. The widows were competent to partition (by metes and bounds) of the properties (inherited by them as their 'widows' estate) and allot separate portions to each, and as incidental to such an allotment, each could agree to relinquish her right of survivorship in the portion allotted to the other.[59]

In that case two co-widows A, B, jointly inherited a limited estate according to the Hindu law as it stood in 1924, of their deceased husband's properties which they subsequently partitioned between them by metes and bounds. The question arose when one of them died whether her share would be taken by her daughter or by the surviving widow. The learned counsel Shri Vishwanath Sastri contended that when the properties were partitioned either of them could not relinquish her right to inherit the entire property by survivorship as the next heir of their husband, it being only a *spes successionis*. The Supreme Court repelled this contention as stated above, though the Court held that there should clearly be such relinquishment which there was not in that case. So the surviving widow succeeded to the part allotted to the deceased widow.

(v) Contract for purchase of immoveable property and the Rule against Perpetuity.

Anoher important contribution made by the Supreme Court in relation to 'transfer of property' is by its decision in *Ram Baran Prasad*

57. *Vithabai* v. *Milhar Shankar* (Bombay High Court). AIR 1938 Bom. 228; ILR (1938); *Ram* v. *Jagesara Kuer*, AIR 1939 Pat. 116 (Patna High Court); *Bismilla* v. *Manulal Chabildas*, AIR 1931 Nag. 51 (Nagpur High Court) etc.
58. *Karpagathachi* v. *Nagarthinachi*, AIR 1965 S. C. 1752.
59. *Ibid*. p. 1754.

v. *Ram Mohit Hazra*[60] which settles for the first time the previous judicial conflict in relation to one of its aspects.

Though section 54 of the Act clearly states that a contract for the sale of any immoveable property does not of itself create any interest, legal or equitable, on such property, there was a lot of judicial conflict whether such a contract would or would not be affected by the rule against perpetuity. The confusion was evidently created by the rules of English law, that it would be so effected.[61] The Court said :[62]

> There is a superficial kind of resembalance between the personal obligation created by the contract of sale described under section 40 of the Act which arises out of the contract, and annexed to the ownership of immoveable property, but not amounting to an interest therein or casement thereon, and equitable interest of the person purchasing (agreeing to purchase ?) under the English law, in both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further and the rule against perpetuity, which applies to equitable estates in English law cannot be applied to a covenant of pre-emption (and generally in relation to any contract for the purpose of immoveable property) because section 40 of the Act does not make the covenant enforceable against the assignee *on the footing that it does create an interest in the land.*

The Supreme Court thus overruled a series of cases which held it otherwise[63] and upheld these decisions to the same effect.[64] It has also further held that certain rulings of the Privy Council no longer represent the law after the enactment of the Act.[65]

(vi) General cases

In *Commissioner of Income Tax, Andhra Pradesh* v. *Motor sand General Stores (Private) Ltd.*[66] the parties described their transaction as one of sale. The owership in respect of a concern called "Sree Rama Talkies" with all its assets and goodwill valued at Rs. 1,20,000, was transferred by a deed calling itself a 'sale deed' in consideration of the transfer in return

60. AIR 1967 S. C. 744.
61. *London & S. W. Railway* v. *Gomm.* (1882) 20 Ch. D. 562.
62. AIR 1967 S. C. 744 at p. 749.
63. *Wobin Chandra* v. *Nabab*, (1901) 5 Cal. W. N. 343 etc.
64. *Ali Hossain* v. *Raj Kumar*, ILR (1943) 2 Cal. 605 etc. (See also Mulla, 5th Ed. p. 119 in this context).
65. AIR 1922 P. C. 165 etc.
66. AIR 1968 S. C. 200.

by the vendee of shares of the same face value. But the Court held it to be really a deed of exchange.[67]

In *Commissioner of Income Tax, West Bengal* v. *Jaggi*,[68] the Supreme Court has also explained the consequences, and the difference in that respect, between a dead of gift and a deed of partition. For example in a deed partition it is not possible to hold it valid partly and invalid with regard to the other; whereas in a deed of gift, the invalidity of the deed in respect of one item of property need not necessarily invalidate another. Also a 'relinquishment' might actually mean 'a gift'. But on the other hand the Court pointed out in a latter case[69] that the extinction of a legal right under the laws of limitation would not amount to a 'transfer' of property in terms of the Transfer of Property Act, 1812. Therefore even in such extinguishment happens during the pendency of a suit in respect of the immoveable property where such a right is not in question, it would not be affected by *lis pendens*.[70]

In another recent case[71] the Supreme Court indirectly emphasised the importance of the 'formalities' prescribed to effectuate a transfer by pointing out that a deed of sale when executed is a solemn document, prima facie evidencing the transaction as apparent from the face of it. The inference is that without such a solemn document there would not be even a prima facie presumption of the transaction at all. Of course the question that arose in that case was in what way that a particular sale deed could be shown to be benami and that the apparent purchaser is not the real owner. And in so far as benami transactions are recognised in India and apparently not prohibited by the Transfer of Property Act such proof is admissible. But the Court stressed that the burden of proof is on that person who alleges it, and then it is very heavy a burden.

We have already seen[72] that in terms of section 5 of the Transfer of Property Act, a transfer may take place either in *presenti* or in *future* provided the property itself is in existence.[73] This aspect of the law seems to have been explained by the Supreme Court once again recently in *Rajan* v. *Gopal*.[74]

67. 'Exchange' is defined in section 118 of the Act. There the problem arese because according to the Income Tax Act, the real profit could not be taxed if it was an exchange
68. AIK 1967 S. C. 401.
69. *Rajendra Singh* v. *Santa Singh*, AIR 1973 S. C. 2537.
70. See S. 52 of Transfer of Property Act, 1882.
71. *Jayadayal Poddar* v. *Mst. Bibi Hazra*, 1975 B. L. J. R. 387.
72. See note 52 *supra*
73. A present transfer of future property will be deemed to be only a contract to transfer such property as and when it comes into existence. See note 73 *supra*.
74. AIR 1975 S. C. 261.

Where a lease of immoveable property provided, *inter alia*, that the period of lease is to commence from the date on which the lesses put in possession of the demised premises by the lessor, who at the time is not in possession, the transfer by way of lease is one to take effect in future though the demise is one in *presenti*.[75] Evidently in such a case section 110 of the Act will not apply.

These are some of the other areas of relative unimportance where also the Supreme Court has shed its illuminating light and has contributed to clarify the law.

III

Conclusion

Finally therefore we find that the concept of 'property' as understood in law is interesting though rather difficult to conceive. But it appears that there has not been much of a difference from the jurist's point of view in this concept in the developed laws from time immemorial to the present day though the classification of such 'property' might have varied at different times and in different systems of law. Surprisingly however many such systems do not attempt a definition of 'property' as it happens in our law for example. Curiously enough the absence of it has not been found to cause much practical difficulty anywhere. On the other hand a certain amount of flexibility has been found to be desirable in order to accommodate the different species of 'property' which might come to exist in course of the development of society.

So also is the concept of 'transfer of property', which is again to an extent variable in nature.

The Supreme Court has evidently contributed much in order to clarify and elucidate and shed more of illuminating light on these concepts. In this respect the changed attitude of the Court is significant to note.[76] The Court at present is of opinion that as regards the contents of 'justice, equity and good conscience' Courts in India have to part with the precedents of the British-Indian period of tying the non-statutory area of Indian law to vintage English law. Free India has to find its conscience in our rugged realities and no more in alien legal thought. So more and more of the leadership of the Supreme Court could be expected in such matters. However, what we have noticed already is that in several cases it has put its final stamp of authority thereby removing all the previous confusion and judicial conflicts. In other cases it has given its own authoritative interpretations in accordance with social change.

75. *Ibid*.
76. See note 31 *supra*. (*Rattan Lal* v. *Vardesh Chander*, (1976) 2 S. C. C. 103).

SUPREME COURT ON COMPUTATION OF NET WEALTH AND VALUATION OF ASSETS UNDER THE WEALTH TAX ACT 1957

SHAUKAT ALI*

I

Introduction

Wealth tax in India is a quirk of an irony because India is still struggling hard to attain the status of a developed country and it sounds strange to have a wealth tax in a country whose relatively greater population is underfed. But if we look inside the situation the ironical factor is exposed and the circumstances warranting the levy become crystal clear. Every tax entity must pay the required tax because it is the primary source of revenue of a government. When the danger of financial leading to economic crisis looms large at the horizon of a country then, if the comparatively well placed persons of the society are required to pay a little more to keep the danger at bay, there seems to be nothing unjustified so long as that levy is based on some reasonable ground. This was the main force which engineered the levy of wealth tax in India. The government was confronted with the developmental process with a short of revenue to meet the requirements of the second five year Plan. Prof. Nicholas Kaldar on the request of the Central Government made a study of the tax structure in India and proposed five new taxes including the wealth tax. The government of India accepted the recommendation which, primarily, was intended to strengthen the tax structure along with bringing in additional revenue but later on, in the process of its enactment the proclaimed goal to attain a socialistic pattern of society was specifically declared whereby it helped to reduce the accumulation of wealth.

Wealth tax is charged for every assessment year in respect of the net wealth of the assessee on the valuation date. For this purpose net wealth is defined under section 2(m) of the Wealth Tax Act 1957 to be the aggregate of all the assets wherever located belonging to the assessee on the valuation date including those assets which are required to be included in his asset, as reduced by the aggregate of all the debts owed by the assessee. Section 4 of the Act mentions certain types of transfers by the assessee and interests in certain types of properties which are

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included in his net wealth for the purposes of wealth tax. Apart from the general provisions under section 2(m) of the Act that all the debts owed by the assessee on the valuation date are to be deducted from the aggregate value of asset, there are other types of debts given under section 2(m) (i), (ii) and (iii) which are not deducted while computing the net wealth. In settling the dispute regarding the question involving the above problems very few cases have been brought before the Supreme Court. Nevertheless these cases expose the true concept of 'debt' as used in the Act regarding some of the specific species.

The necessary corollary of the computation of net wealth is the valuation of the assets because unless the value of the assets is determined the net wealth of the assessee in terms of rupees cannot be ascertained. Ever since the enactment of the Wealth Tax Act, 1957 this problem of valuation of assets has given rise to a series of further problems before the tax authorities. Since the wealth tax is a tax on the capital value of the assets the very natural consequence of this aspect is how to determine the valve of the assets. There is an infinite variety of the assets and one single rule is not suitable for the valuation of all the assets. The power to valuate the assets has been given to the wealth tax Officer by section 7 of the Act therefore the assessee always contends the genuineness of the value of its assets as determined by the officer because it is the opinion of the officer about the value of the asset that is final. Keeping in view this aspect of the problem and the variety of the assets the legislature has made a general provision under section 7 of the Act and various rules have been made for the valuation of the assets. Again in 1972 a separate chapter was added in the Wealth Tax Act whereby provisions for the appointment, powers and duties of the Valuation Officer were incorporated. The W. T. O. was authorised to refer to valuers for the valuation of a specified asset if he was of the view that the valuers could better ascertain the value of the asset. Naturally, there is bound to be a controversy from so many angles. Valuation made by the assessee, the officer and the valuer. There is another aspect of the problem—how the value of the business as a going concern will be determined.

The Supreme Court has been called upon to decide some of the above mentioned disputes and though the cases are very few, they lay down certain important guidelines which may be taken into consideration while valuing a specified asset. In this paper an attempt has been made to evaluate the contribution made by the Supreme Court in laying down the true scope of these statutory provisions relating to the computation of net wealth and valuation of the assets.

II

Net Wealth

Section 2(m) provides that the aggregate value of all the debts owed by the assessee have to be deducted from the aggregate value of all the assets. Nowhere in the Wealth Tax Act the term "debt owed" has been defined except clauses (i), (ii) and (iii) of section 2(m) which exclude certain specified debts. Whether a particular item may be said to be a debt owed by the assessee or not has attracted the attention of the highest judiciary of our country serveral times. *In Kesoram Industries Cotton Mills Ltd.* v. *C. W. T.*[2] the issue before the Supreme Court was whether dividend declared by the board of directors but not accepted by the general body meeting of the company on the valuation date and the provisions in the accounts of the assessee regarding payment of income tax was a debt owed by the assessee on the valuation date. The directors of the assessee company had shown in the profit and loss account a sum of Rs. 1529855 as the amount of dividend proposed to be distributed for that year. The dividend was declared after the valuation date by the Company at its general meeting. In its balance sheet the company had also shown a certain sum of amount as provision for payment of income tax and super tax.

The Supreme Court defining the word "owe" "to be under obligation to pay" and the term 'debt' as the liability to pay in presenti or in futuro an ascertainable sum of money" held that the proposed dividend was not deductiable in computing the net wealth of the assessee. It was observed that until the company in its general body meeting accepted the recommendation of the directors and declared the dividend the report of the directors in that regard was only a recommendation which might be withdrawn or modified. As on the valuation date nothing had happened beyond a mere recommendation by the directors as to the amount that might be distributed as dividend, there was no debt owed by the company to the shareholders on the valuation date.

Regarding income tax liability it was held that it was a debt owed within the meaning of section 2(m) of the Act. It was observed that the liability to pay income tax was a present liability though the tax became payable after it was quantified in accordance with ascertainable data. The Court did not accept the contention of the tax authorities that the tax liability was not an ascertainable liability on the valuation date because there was no rate of tax at which that liability would be determined. Arguments were advanced on behalf of the tax authorities

2. (1966) 59 I. T. R. 767 S. C.

that the amount of tax was determined in the assessment year which was always later than the valuation date and also that the liability was created after the enactment of the Annual Finance Act which also provided the rate. But the Court did not accept any of these contentions. It observed that the liability was not created by the Annual Finance Act but under the charging section of the Income Tax Act. No doubt the quantum of liability was fixed in the financial year, the liability was on the income of the previous year which ended on the valuation date. The Finance Act had nothing to do with the creation of liability but it merely provided the rate applicable in the financial year. The liability to pay income tax was a present liability though the tax became payable after it was quantified in accordance with ascertainable data. There was a perfect debt at any rate on the last day of the previous year and not a contingent liability. The rate was always easily ascertainable. If the Finance Act was passed, it was the rate fixed by that Act, if the Finance Act was not yet passed, it was the rate proposed in Finance Bill pending before Parliament or the rate inforce in the preceding year, whichever was more favourable to the assessee. All the ingredients of a debt were present, it was a present liability of an ascertainable amount.

The judgment in the case was a majority judgment by two to one, Shah, justice dissenting and Subba Rao and Sikri JJ. forming the majority. The majority judgment may be supported on one more ground. It was contended by the authorities and accepted by the minority judgment that liability was determined only in the financial year. If it were so, what could be said about payment of advance tax. As per the income tax provisions an assessee is required to pay by self calculation the advance income tax. Naturally it becomes a tax paid in the accounting year itself on the income of the accounting year. Was not the assessee under an obligation to pay that tax in the accounting year itself ? Take the case of salaried persons whose income tax is deducted at the source. In both these cases the importance of the financial year is only to ascertain the quantum of liability and not the liability itself. The liability is determined already in the accounting year in which the assessee earns income because it has to pay the tax on the income he earns. It is certainly a fact that the liability is determined in the accounting year and is quantified in the financial year and it may be quantified even at the end of the accounting year itself as per the method suggested by the Supreme Court. This fact is again supported by another example-the liability of a person leaving India. He has to clear his tax liability in the same year. If he happens to go on 31st of March and by then the Finance Act is not passed can we say that he is not under any liability

to pay tax ? Coming to a more concrete example--what about income tax liability for the assessment year 1977-78 when the Finance Act for this year is not yet passed. It is proposed to be presented by 23rd of May 1977 and no one knows whether it may be passed by 30th of June or not. Can we say that liability to pay income tax will arise after May 1977 or even if due to further politiical developments the Act is passed somewhere in the end of the year the assessee is not under obligation to pay any income tax ?

This case presents a really interesting picture of the discussion in the Supreme Court to arrive at a definite conclusion. The majority judgment followed the observations of the Privy Council in *Wallace Bros & Co. Ltd.* v. *C. I. T.*[3] regarding the time the liability to pay the income tax arises. The court observed :

> .....the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to pay tax arises by virtue of charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed.

In *Standard Mills Co. Ltd.* v. *C. W. T.*[4] the question before the Supreme Court was regarding deductability of gratuity to be paid to the workers by the assessee company In its assessment to wealth tax the assessee claimed that in computing its net wealth certain estimated amount should have been deducted on account of liability for gratuity to its workmen and staff in accordance with certain awards of the Industrial Court and Labour Appellate Tribunal made before the relevant valuation date. On this basis it was contended that the assessee had to maintain a reserve for that purpose and therefore it was a debt owed by it and should have been deducted from its net wealth.

The Court did not accept the assessee's contentions and held that liability of the assessee to pay gratuity to its emyloyees on determination of employment was a mere contingent liability which arose only when the employment of the employee was determined by death, incapacity, retirement or resignation. The liability did not exist in presenti but was dependent upon the happening of specified events.[5]

3. (1948) 16 I. T. R. 240, P. C.; See also *Chatturam Haritram v. C. T. I.* (1955) 27 I. T. R. S. C. 709; *Kalwa Devadattam v. Union of India,* (1963) 49 I. T. R. 165 S. C.
4. (1967) 63 I. T. R. 470 S. C.
5. *Bombay Dyeing and Manufacturing Co. v, C. W. T.,* (1974) 93 I. T. R. 603 S. C.

In *C. W. T. v. Standard Vacuum Oil Co. Ltd.*[6] the question arose whether amount of advance tax to be paid by the assessee which was due on the valuation date was a debt owed by it or not. By notices in May 1956 and 1957 demands for advance tax were made on the assessee for two years. The final instalment of the amount of Rs. 47, 69653 for each of the two years was outstanding on Dec. 31, 1956 and 1957 which were the respective valuation dates for the above assessment years. The assessee claimed that in computing its net wealth for purposes of wealth tax that amount ought to have been deducted as a debt owed by it within the meaning of sec. 2 (m).

Accepting the contentions of the assessee the court held that the amounts menioned in respect of advance tax were 'debt owed' within the meaning of sec. 2(m) on the valuation date and had to be deducted in computing the net wealth of the assessee.

It was contented on behalf of the tax department that there was a material difference between the notice of demand of tax under a regular assessment and a notice of demand for advance tax. While in the former case there was a liability which might be said as debt owed by the assessee because the amount of liability was fixed but in the latter case the liability was such that it could not properly be termed as debt owed because after a regular assessment the amount might differ. But in a unanimous decision (Subba Rao Shah and Sikri JJ.) the Court rejected the contentions of the tax department.

It was observed by the court that there was no substantial difference between the advance tax paid and tax due and paid under a demand notice passed after an assessment : the only difference being that, if the facts so warranted the assessee was enabled to pay less than the amount demanded by the Income Tax Officer. But till a new estimate was made by the assessee, the amount was ascertained and there was a statutory liability on the assessee to pay the amount mentioned in the notice of demand. A condition subsequent, the fulfilment of which might result in the reduction or even extinction of liability, would not have the effect of converting the liability which was attached under a notice of advance tax into a contingent liability. A debt is owed when an order for advance payment of tax is passed and a notice of demand sent. The amount mentioned in the notice is owed till a new figure is substituted by the action of the assessee.

Calcutta Tramways Co. v. C. W. T.[7] further produced an interesting example of a question regarding the scope of net wealth and the debt as

6. (1966) 59 I. T. R. 569 S. C.
7. (1972) 86 I. T. R. 133 S. C.

given under section 2(m) of the Wealth Tax Act. The assessee, in this case the Calcutta Tramways company, under an agreement with the Government of West Bengal, was to set aside certain sum of amount in an account called the Shareholders Reserve Account. The company was also required to accumulate any surplus of its profits, after providing for losses, if any, in a Special Reserve Account which was ultimately to accrue to the benefit of the government. The company had also issued, in United Kingdom, debentures to debenture holders who were residents there, secured by a floating charge on the assets of the company. The assessee claimed that the amounts set aside in the Special Reserve Account and in the Shareholders Reserve Account should not be treated as the assets of the company and the debentures loans should be deducted from the assets of the assessee.

Regarding the Special Reserve Account the Court held that the amount standing in the Special Reserve Account was an asset of the company. It was observed that no part of the asset of the company had been acquired by the government on the valuation date. There was only an agreement to acquire which could not have been done until the lst of Jan. 1972. As regards the amount in the Shareholders Account the company contended that the amount belonged to shareholders and therefore, it was not an item of the asset of the company. The Court rejecting this contention, held that the amount was an item of the asset of the company. Until a company in its general body meeting accepted the recommendations of the directors and declared dividend, no part of the profits of the company became debt owed to the shareholders. The fact that a separate Shareholders Reserve Account had to be maintained by the company, because of its agreement with the government did not change the charcter of the assets.

Regarding the debenture loans the Court held that those loans were situated in the U. K. and in view of the provisions of the Wealth Tax Act they could not be taken into consideration in ascertaining the net wealth of the company.

In *H. H. Setu Paravati Bayi* v. *C. W. T.*[8] the question related to the deductability of liability to pay wealth tax from the assets of the assessee while computing its net wealth. It was urged on behalf of the tax authorities that wealth tax amount was not a debt within the meaning of sec. 2 (m) of the Act because when net wealth was ascertained there the question of quantum of liability would arise. But the Supreme Court did not accept that reasoning and held that by virtue

8. (1968) 69 I. T. R. 864 S. C.; See also *Burma Oil Co. (India) Trading Co, Ltd. v. C. W. T.* (1977) 1 S. C. C. 196.

of sec. 3 of the Wealth Tax Act the liability to pay wealth tax become crystellised on the valuation date and not on the lst day of the assessment year though the tax was levied and payable in the relevant year.

III

Valuation of Assets

In the course of judlicial exposition of section 7 the controversy centres round mainly on two propositions. What is the true scope of the words used in clause (1) "price if sold in the open market" and in clause (2) what is the importance of entries made by the assessee in the balance sheet? Is the Officer bound to accept the enties or reject altogether or accept some and reject the other and make suitable adjustments ? Following are some of the illustrative cases the Supreme Court has had an occasion to opine at.

In *C. W. T.* v. *Tungabhadra Industries*[9] the question arose whether in valuing the assets of an assessee the value will be taken as per its written down value or balance sheet. The Supreme Court held that the written down value did not always present the real value and the W. T. O. may be justified in accepting the value shown in the balance sheet if the assessee failed to satisfy the officer by acceptable reasons that the written down was the real value of the assets. The burden is on the assessee to prove the value of the assets and if he fails to prove it the officer has no other way except to accept the value shown in the balance shect.

In *C. W. T.* v. *aluminium Corporation of India Ltd.*[10] the question arose whether the value shown in the balance sheet of the corporation or written down value as per income tax records should be the value of the assets for wealth tax purposes. The assessee in this case revalued its assets whereby increased value of assets was shown and a corresponding capital reserve was created against the increase in the value of assets. This was also voted by the Directors of the assessee company in the annual general meeting. Two questions were referred to for the consideration of the Supreme Court. Firstly, whether the value of the assessee's fixed assets as shown in the balance sheet should have been substituted by the written down value of those assets as per assessee's income tax records. Secondly, even if the value as shown in the balance sheet had to be taken, whether an adjustment should have been made on account of normal depreciation of the assets from the date of revaluation of the assets.

9. (1970) 75 I. T. R. 1961 S. C.
10. (1972) 85 I. T. R. 167 S. C.; See also *Calcutta Electricity Supply Corporation*

The assessee contended that the value of the assets shown in the balance sheet was not the real value. They were artificially increased so as to get maximum value at the time of sale. Therefore, it should not have been taken to be the real value of the assets for the purposes of wealth tax. Alternatively, they also contended that depreciation factor should have been taken into consideration between the period of revaluation and the valuation date. The Supreme Court did not accept the first contention. It held that in absence of evidence to show that the revaluation was incorrect, the value shown in the balance sheet after revaluation afforded a sound basis for valuing the assets, and therefore, the value as shown in the balance sheet was not to be substituted by the written down value as per the income tax records. Regarding the adjustment of depreciation of the assets the court held that the depreciation of the assets from the date of the revaluation to the valuation date should have been deducted from the value of the assets as shown after revaluation since those assets were subjected to wear and tear and there was no evidence to show that their market value had gone up after they were revalued.

This decision raises a question : how a person can claim two types of valuation for the same asset at the same length ? It is rediculous to have two types of values for an asset-one for the purposes of tax liability and the other for sale. However, there is another aspect of this problem which may sound intrigue. What will happen if the assessee in its revaluation of assets shows the value at a diminishing rate ? Will the taxing authorities accept the value shown by the assessee ? Will the court on the ground of foregoing discussion accept the value shown by the assessee ? In such cases it may be suggested that the taxing authorities will not accept this down trend valuation.

The question in reference in *C. W. T.* v. *Hindustan Motors Ltd.*[11] was whether an adjustment could be made in ascertaining the net value of depreciable assets of the assessee company by substituting the written dowe value of the assets computed under the Income Tax Act for the value shown in the balance sheet. The Wealth Tax Officer had assessed the assets U/s 7 (2) (a) at the figures shown in the balance sheet. The assessee contended that written down value of the assets should be taken to be the value of the assets for the purposes of inclusion in the value of net wealth and not the value shown in the balance sheet. The depreciation allowance could not be provided because of the smallness of the profit. The Supreme Court rejecting the contention of the assessee decided the value of the assets as shown in the balance sheet,

11. *v C. W. T.* (1972) 82 I. T. R. 154. S. C.

in Tungabhadra Industr ies case and observed that the onus was not discharged by merely stating that since profits in a given year were less or nil, little or less or no provision was made for depreciation of the assets in the balance sheet. The assessee must also show further to what extent the depreciation resulted in lowering down the value of the assets compared to that mentioned in the balance sheet and whether the written down value computed under the Income tax Act in fact represented the lower value.

The assessee had also contended that the *Aluminium Corporation*[12] case decided that the value of the assets shown in the balance sheet was not conclusive therefore, in their case also balance sheet value should also not be taken as conclusive. But the Supreme Court explained that the value of the assets shown in the balance sheet was not conclusive in the sense that it could be demonstrated to be more or less than what was shown therein and that was the case of determination of value of the assets under section 7 (2) (a) of the Act.

In *Ahamd G. Ariff* V. *C. W. T.*[13] the question arose regarding valuation of an asset which could not be sold in the open market. The asessee was entitled to receive an aliquot share of income of a wakf created by a Sunni Muslim. The Wealth Tax Officer assessed the net wealth and valued the right to receive the aliquot share by the assessee on a hypothetical basis under section 7 (1). It was contended by the assessee that the right to a share in the income was not capable of any valuation because there was restriction on its sale, and the price it would fetch, if sold in the open market could not possibly be ascertained. But the court held that the valuation made by the Wealth Tax Officer was correct. It was observed that when the statute used the words "if sold in the open market" it did not contemplate actual sale or the actual market, but only enjoyed that it should be assumed that there was an open market and the property could be sold in such a market and, on that basis, the value had to be found out. It was a hypothetical case which was contemplated and the tax officer must assume that there was an open market in which the asset could be sold.

Again the true scope of section 7(1) was explained by the Supreme Court in *Pandit Laxmikant Jha* v. *C. W. T.*[14] and the words "price if sold in the open market" as used in section 7(1) were analysed. The assessee had held zamindari estate which was acquired by the government under

12. (1970) 78 I. T. R. 483 S. C.
13. 1970) 76 I. T. R. 470 S. C.
14. (1973) 90 I. T. R. 97 S. C.

the Behar Land Reforms Act. The assessee was to receive a huge amount from the government as compensation in that connection. The question regarding valuation of this compensation arose whether in computing the market value of the shares the assessee was entitled to the deduction of sum of Rs. 2 50,546 by way of brokerage commission which he had to pay on the sale of those shares. The assessee contended that as and when he sold the shares and stocks in question he had to pay brokerage commission. As such, it was urged that in computing the value of the asset, the price which it would fetch in the market should be reduced by the brokerage which had to be paid on account of the transaction of sale.

It was held that in computing the market value of shares and stocks held by the asseessee, the assessee was not entitled to deduction of the brokerage commission from the valuation of the shares as given in stock exchange quotations furnished by well known brokers. It was observed :

> "There is nothing in the language of section 7(1) of the Act which permits any deduction on account of the expenses of sale which may be borne by the assessee if he were to sell the assets in question in the open market. The value according to section 7(1) has to be the price which the asset would fetch if sold in the open market. In a good many cases, the amonunt which the vendor would receive would be less than the price fetched by the asset. The vendor may, for example have to pay for the brokerage commission or may have to incur other expenses for effectuating the sale. It is not, however, the amount which the vendor would receive after deduction of these expenses but the price which constitute the value of the assets for the purpose of section 7(1) of the Act. To concede to the question advanced on behalf of the appellant would be reading in section 7(1) the words "to the assessee" although the legislature has not inserted those words in the statute. Such a course would not be permissible unless there is nothing in the relevant provisions which may show that the intention of the legislature was that the value of an asset would be the price fetched after the sale expenses".[15]

The court also observed in the same length :

> "It, no doubt, appears to be somewhat harsh that in computing the value of an asset only the price it would fetch if sold in the open market has to be taken into account and the expenses which would have to be borne in making the sale have to be excluded from consideration. This, however, is a matter essentially for the legislature. No resort, can be made to an equitable principle for there is no equity about a tax."[16]

15. *Id.* at 103.

This is purely a literal interpretation of statutes even if it goes against the assessee. The Court observed that it would be somewhat harsh on the assessee. The charging section 3 of the Wealth tax Act lays down that a wealh tax shall be charged annually on the wealth belonging to the assessee. It is very natural that what is belonging to the assessee after the sale of those shares is the value he is getting and not the prince at which it has been sold. The effect of the decision will be that the assessee will have to pay annually a tax on Rs. 240564 eventhough this is not his asset nor his net wealth.

Apart from the above cases still there is a category of asset which has attracted the judicial mind and it is the share of a company held by the assessee. On the valuation date if the company was wound up or it was carrying on business earning enormous profits declaring comparatively greater percentage of dividend then these factors may affect the valuation of the shares of that company. Again, there may be a restriction on the resale of the shares, company being a private one or these shares may be of such a company whose shares have been quoted in the stock exchange. These factors also affect the method of valuation of the shares. Whatever may be the case, one thing seems to be common—the real value of these shares is generally more than their face value. The Supreme Court, in some of the cases has considered over some of the above situations involved in the valuation of shares.

In *C. W. T.* v. *Sardar Ajaib Singh*[17] the assessee, an individual, held 650 ordinary shares of the value of Rs. 1000 each in a private company. Since the shares were not being sold in the market the Wealth Tax Officer valued them on the basis of the assets and liabilities of the company as disclosed in the balance sheet. The assessee claimed that in determining the value of the shares the tax liability of the company which had not been shown in the balance sheet should also have been taken into account. The Supreme Court held that the existing reserves of the company, the advance tax paid by it and the refund to which it would be entitled on the dividends, were sufficient to cover the tax liability of the company and the estimated tax liability not provided for in the balance sheet of the company need not be deducted in determining the breakup value of the shares of the comany.

In *C. W. T.* v. *Mahadeo Jalan*[18] the question referred to the High Court was whether the principle of 'break up value' adopted by the

16. *Id.* at 103.
17. (1971) 82 I. T. R. 842 S. C.
18. (1972) 86 I. T. R. 621 S. C.

Tribunal as the basis for the valuation of the shares in question was sustainable in law ? The Supreme Court, accepting the High Courts' opinion held that though the general method of valuation was the yield method it did not mean that other methods could not be taken into consideration.

After discussing various authorities on the subject the court laid down certain guidelines to be kept in view while determining the value of shares :

(1) Where the shares in a public limited company are quoted on the stock exchange and there are dealings in them, the price prevailing on the valuation date is the value of the shares.

(2) Where the shares are of a public limited company which are not quoted on a stock exchange or of a private limited company the value is determined by reference to the dividends if any, reflecting the profit earning capacity on a reasonable commercial basis. But where they do not, the the amount of yield on that basis will determine the value of the shares. In other words, the profits which the company has been making and should be making will ordinarily determine the value. The dividend and earning method or yield method are not mutually exclusive; both should help in ascertaining the profit earning capacity. If the results of the two methods differ, an alternate figure may have to be computed by adjustment of unreasonable expenses and adopting a reasonable proportion of profits.

(3) In the case of a private limited company also where the expenses are incurred out of all proportions to the commercial venture they will be added back to the profits of the company in computing the yield. In such companies the restriction on share transfers will also be taken into consideration in arriving at a valuation.

(4) Where the dividend yield and earning method break down by reason of the company's inability to earn profits and declare dividends, if the set back is temporary then it is perhaps possible to take the estimate of the value of the shares before set back and discount it by a percentage corresponding to the proportionate fall in the price of quoted shares of companies which have suffered similar reverses.

(5) Where the company is ripe for winding up then the breakup value method determines what would be realised by that process.

IV

CONCLUSION

In the process of valuation of assets it is always the attempt of the tax authorities to valuate the assets in such a way as to bring within the tax net as far as possible they can and judicial exposition of the statutory provision is not lagging behind. This is evident from several cases, i. e., the Tungabhadra Industries case determines that even if there was a written down value shown in the balance sheet the value shown in the balance sheet will be at its full price. While arriving at this conclusion the court did not advance any sound reasoning but it was only a procedural argument, i. e., the liability was imposed upon the assessee to satisfy the tax department beyond doubt and through acceptable means that the value of the assets was at written down value. And it is very difficult to believe that any assessee will ever satisfy a Wealth Tax Officer through acceptable reasoning regarding the value of his asset. No purchaser of those assets will give that price which have been estimated by the Wealth Tax Officer. The purchaser who is also in the field of production or manufacture where similar assets are used knows that assets diminish in their value with their use and passage of time and therefore he will always take into account this diminishing factor. The only purpose of section 7 is to arrive at a true valuation of the assets but the method adopted by the Wealth Tax Officer and accepted by the Supreme Court does not present the correct value of the assets.

The *Hindustan Motors Ltd* is also a link of the same series, i. e., question of valuation at written down value. Whether or not the depreciation is allowed the asset is bound to depreciate and lose its original value. In the light of the *Aluminium Corporation* case where the Supreme Court has agreed that adjustment should be made for wear and tear becaue "the assets were bound to depreciate" can we say that if in the next year when the present depreciation allowance is carried forward and profit is sufficient to meet this carried forward and the current depreciation allowance the court will permit it to be deducted while valuing the assets ? If so, then the only question is of the allowance and not the diminishing character of the asset. It means that the assets diminish in their value inspite of the allowance. After all, the Tungabhadra Industries case has not denied the fact that the assets depreciate in their value, the court has only shifted the burden of proof on the assessee to prove it.

A thorough study of the foregoing cases clearly points out that the Supreme Court has laid down certain important Rules of inter-

pretation in the field of wealth tax relating to the computation of net wealth and valuation of assets. There was no certainty about the income tax liability which was owed by the assessee on the valuation date. The *Kesoram Industries case*[19] laid down, for the first, time that income tax liability was determined under the Income Tax Act and not under the Finance Act and therefore it was a "debt owed" on the valuation date within the meaning of section 2(m) and had to be deducted while computing the net wealth of the assessee. It further laid down that the amount of dividend proposed by the directors and not yet declared by the general body meeting of the company on or before the valuation date was not a "debt owed" by the assessee. It was so decided because the company is not under a liability to pay the dividend unless it is approved by the company itself, the proposal made by the directors had no meaning.

The Standard Mills Co.[20] case removed the doubt regarding the liability of the assessee to pay gratuity to its employees. It laid down that the provisions for the payment of gratuity by an employer was merely a contingent liability based on the happening of certain specified events like the retirement of the employee after completing service or disablement or death. Unless one of these happenings occurred the employer was not under an obligation to pay and therefore the provisions made by the employer to pay future gratuity was not a "debt owed" by him on the valuation date and that could not be deducted while computing the net wealth.

Section 2(m) (iii) speaks of liability regarding payment of certain taxes but there was no provision or judicial pronouncement regarding deductibility of the wealth tax (to be paid) from the net wealth. *H. H. Sethu Paravati Bayi*[21] settles this problem and lays down that wealth tax liability is also a "debt owed" by the assessee because on the valuation date there is a perfect liability which the assessee is under an obiigation to pay and therefore this amount of tax will have to be deducted while computing the net wealth. Without deducting this liability a correct computation of net wealth cannot be made. *Moon Mills* case is a judicial recognition of the provisions of section 2(m) (iii) (a) which speaks of the non deductibility of the amount of tax or any demand made by the tax authorities if that demand is outstanding on the valuation date and is disputed by the assessee as not to be payable by him through an appeal, revision or reference.

19. (1966) 59 I. T, R. 767 S. C.
20, (1967) 63 I. T. R. 470 S. C.
21. (1968) 69 I. T. R. 864 S. C.

Calcutta Tramway Co.[22] case determined two things—the correct status of a wealth standing in the balance sheet under several accaunts and the situs of a debt. Regarding the first one the position is settled that so long as the amount shown in the balance sheet does not belong to another person it belongs to the assessee and the nomenclature attached to that account does not make a material difference. Regarding the situs of a debt it was held that the debt resided with the debtor and since the debtor was a non-resident the debt was also outside India and it would not be deducted while computing the net wealth.

Turning to the valuation of assets, the Supreme Court has explained the true scope of the provisions of section 7 and settled various disputed points. *In Ahmad Arrif case*[23] the court established that the "sale" and "open market" are not necessarily real ones. They may be hypothetical ones. It simply means that if an asset is not salable because there is no real market and no purchaser the Officer may assume that there was a market in which the said asset could be sold. *Laxmikant Jha case*[24] is also concerned with the interpretation of Sec. 7(1) where the words "price if sold" have been used. The court said that the meaning of these words is the gross price at which the asset is sold and not the net prich the assessee is getting after deducting several expenses incidental to sale. It was so decided because the words used in section 7(1) are "price if sold in the open market" and not the words "price the assessee will get if sold". And consequently the commission of a broaker or an auction sale agent or advertisement expenses are not deductible from the gross price.

So far as section 7(2) is concerned *Tungabhadra Industries* and *Aluminium Corporation Cases*[26] explain the true scope of this provision where the officer is authorised to valuate the assets as per balance sheet maintained by the assessee in a case where the assessee is carrying on a business and the valuation u/s 7(1) is not possibe. In *Tungabhadra Industries* case the Court observed[27] :

> "Under section 7(1) of the Act the W. T. O. is authorised to estimate for the purposes of determining the value of any assets, the price it would fetch, if sold in the open market on the valuation date. But this rule in the case of a running business may often be

22. (1972) 86 I. T. R. 133 S. C.
23. (1970) 76 I. T. R. 470 S. C.
24. (1973) 90 I. T. R. 97 S. C.
25. (1970) 75 I. T. R. 196 S. C.
26. (1972) 85 I. T. R. 167 S. C.
27. (1970) 75 I. T. R. 196 S. C. (200)

inconvenient and may not yield a true estimate of the net value of the total assets of the business. The legislature has, therefore, provided in section 7(2) (a) that where the assessee is carrying on a business for which accounts are maintained by him regularly, the Wealth Tax Officer may determine the net value of the assets of the business of a whole, having regard to the balance sheet of such business as on the valuation date and make such adjustments therein as the circumstances of the case may require. The power conferred upon the tax officer to make adjustments as the circumstances of the case may require is also for the purpose of arriving at the true value of the assets of the business. It is of course open to the assessee in any particular case to establish after producing relevant materials that the value given of the fixed assets in the balance sheet is artificially inflated. It is also open to the assessee to establish by acceptable reasons that the written down value of any particular assets on the relevant valuation date. In the absence of any material produced by the assessee to demonstrate that the written down value is the real value, the Wealth tax Officer would be justified in a normal case in taking the value given by the assessee itself to its fixed assets in its balance sheet for the relevant year as the real value of the assets for the purpose of wealth tax. It is a question of fact in each case as to whether the depreciation has to be taken into account in ascertaining the true value of the assets. The onus of proof is on the assessee who must produce reliable material to show that the written down value of the assets and not the balance sheet is the true value. If, therefore, the assessee merely claims that the written down value of the assets should be adopted but fails to produce any material to show that the officer is justisfied in rejecting the claim and adopting the values shown by the assessee himself in the balance sheet as the true value of his assets."

The *Aluminium Corporation case*[28] established that though the Wealth Tax Officer is empowered to valuate the assets as per balance sheet, he is not bound to accept the value shown in the balance sheet. Moreover, it also said that if the assessee himself has valued the assets and if the officer takes it granted the assessee cannot dispute it because it is the assessee who is in-charge of the assets and can know better the value of his assets. It observed :

"Wealth tax is levid on the value of the assets of the assessee on the valuation date. Section 7 (2) of the Act merely requires

28. (1972) 85 I. T. R. 167 S. C.

Wealth tax Officer to have regard to the balance sheet. It is open to the assesee to satisfy the authorities under the Act that the valuation shwn io the balance sheet is not correct. But in the absence of such a proof the wealth tax officer will be justified in proceeding on the basis that the value shown in the balance sheet is correct because no one can know the value of the assets of a business more than those who are in charge of the business. In other words, the value of the assets shown in the balance sheet can justifiably be made the primary basis of valuation for the purposes of Wealth Tax Act. In other words, it can be taken as primafacie evidence of the value of the assets."

The Supreme Court in *Mahadeo Jalan case*[29] adopted a liberal view that the yield method was not the only method for determining the true value of a share, any other methods could bc adopted provided the circumstances of a particular case may require so.

29. (1972) 86 I. T. R. 621 S. C.

THE RELATION OF INTERNATIONAL LAW TO INDIAN MUNICIPAL LAW AS DEVELOPED BY THE SUPREME COURT OF INDIA

S. K. AGRAWALA*

An article by Professor C. H. Alexandrowicz published in 1952[1] was the first attempt to elucidate the relationship of International Law to Indian Municipal Law in the context of Indian Independence and the Constitution of India (1950).[2] He concluded the article with the observation : "Thus we may conclude without fear of premature generalisation that the Indian judges adopt English concepts of public and private international law as introduced in India under British rule....." He had no decision of the Supreme Court of India before him then. During the last twenty five years, however, there have been some decisions on the sabject. This paper, as the title suggests, attempts to examine these decisions only with reference to the limited question of the relationship of international law with Indian municipal law. No reference has, therefore, been made to the role of the Supreme Court towards the development of international law rules generally, or to that of the High Courts even to the question of the basic relationship.

This relationship is considered, broadly under the following headings :

A. Interpretation of Indian statutes in the context of the principles of international law

B. Implementation of customary principles of international law

C. Implementation of Treaties

A. Interpretation of municipal statutes in the context of customary principles of international law

It is a salutary and well-established principle of statutory interpretation that statutes are to be interpreted, provided that their

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1. International Law in India. 1952 *Int. & Com. L. Q.*, pp. 289-300.
2. Article 51 (c) of the Constitution provides :
   "The state shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another."

language permits, so as not to be inconsistent with the comity of nations or with the established principles of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.[3]

I. Perhaps, on the occasions onwhich the Supreme Court gave an interpreation in complete disregard or exclusion of the principles of international law, it could not definitely be said that the language of the statute was plain and unambiguous and permitted of one interpretation only.

This writer has commented elsewhere[4] in detail that in the important case of *Ali Akbar* v. *United Arab Republic*[5] the Supreme Court completely surrendered the initiative of moulding the Indian law of sovereign immunity in conformity with the progressive thought and practice of states which undoubtedly favours the 'restricted view' of sovereign immunity, while interpreting section 86 (1) of the Civil Procedure Code, despite the openings which were made by the judgement of the Calcutta High Court[6] and also that of the trial judge.[7]

The Supreme Court held, "The effect of the provisions of section 86(1)[8] appears to be that it makes a statuory provision covering a field which would otherwise be covered by the doctrine of immunity under International law..... (I)t would be legitimate to hold that the effect of section 86(1) is to modify to a certain extent the doctrine of immunity recognised by International law....."[9]

It seems difficult to rationalise the judgement when viewed in the context of the judgements of the trial judge and the Calcutta High

3. Maxwell, *Interpretation of Statutes*, p. 183 (12th ed. 1969 N. M. Tripathi, Bombay).
4. See, S. K. Agrawala, The Plea of Sovereign Immunity and Indian State Practice, in *Essays of International Law* (in honour of Krishna Rao) 1975, by M. K. Nawaz (editor); S. K. Agrawala, India's Contribution to the Development of International Law..., in R. P. Anand (editor), *Asian States and the Development of International Law* (1972), pp. 74-77; S. K. Agrawala, *Annuol Survey of Indian Law 1966* (Indian Law Institute Publication) pp. 53-62. (That discussion in this literature is not being reproduced here.)
5. A. I. R. 1966 S. C. 230.
6. *United Arab Republic* v. *Mirza Ali*, A. I. R. 1962 Cal. 387.
7. *Mirza Akbar* v. *United Arab Republic*, A. I. R. 1960 Cal. 768.
8. Section 86 (1) of the Civil Procedure Code,
   "No ruler of a foreign state may be sued in any court otherwise competent to try the suit except with the consent of the Central Government certified in writing by the Secretary to that Government..."
9. A. I. R. 1966 S. C. 230, at pp. 236-237.

Court. The trial judge first restricted the scope of section 86(1) by holding that it covers only 'rulers' and not 'foreign states' as such thus making room for the introduction of international law principles so for as the immunity of foreign states was concerned. Then, while ascertaining what the rule of international law on the subject in international practice, he held that there is no principle of absolute immunity of the state in international law. The Calcutta High Court, in its turn, upheld the judgment of the trial judge on the interpretation of section 86(1) of the Civil Procedure Code, but reversed it on the second point. It did not accept the theory of restrictive immunity and came out in favour of absolute immunity on the ground that courts in India have adopted this rule of English law as the rule of international law applicable to this country, and on the ground that the distinction between acts *jure imperii* and *jure gestionis* is based on insecure foundation and so cannot be adopted. It had also held that restricted immunity of a foreign state cannot be based on the immunity of a domestic state as suggested by Lauterpacht since the two are based on completely different premises. These reasonings in rejecting the rule of restrictive immunty have been criticised by this writer elsewhere,[11] but the fact remains that even the judgment of the Calcutta High Court left room for the incorporation of the principles of international law. It is another matter that it did not ultimately conclude in favour of restrictive immunty.

II. Interpretation of statutes giving effect to an international Convention

(a) *V/o Tractoroexport* v. *Tarapore & Co.*[12] related to the interpretation of Foreign Awards (Recognition and Enforcement) Act, 1961 [section 3][13] which was enacted to enable effect to be given to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

10. Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, *B. Y. I. L.* 220 (1951).
11. See note 4 *supra*.
12. A. I. R. 1971 S. C. 1. The majority opinion was delivered by Grover J. on behalf of himself and Shah J. The minority opinion was that of Ramaswami J.
13. Section 3 of the Act reads : "Notwithstanding anything contained in the Arbitration Act, 1910, or in the Code of Civil Procedure 1908, if any party to a *submission made in pursuance of an agreement* to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceediug may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court unless satisfied that the agreement is null and void,

of 1858 to which India is a party. The Convention is set forth in the schedule to the Act.

The controversy centred round the interpretation of the phrase '*submission made in pursuance of an agreement*,' in the section. The contention of the respondents was that this section can be invoked by the appellant only if he had implemented the arbitration agreement by actually submitting the dispute to the arbitrators prior to the institution of the suit. The appellants, on the other hand, contended that section 3 of the Act should be interpreted in the context of the articles of the Convention set out in the schedule and it was not necessary that there should be an actual submission to arbitration before the institution of the suit. The argument was that article II[14] of the Convention makes it clear that under the Convention the court of contracting state must, when seized of such an action, refer the parties to arbitration.

The majority of the court favoured the former interpretation whereas the minority was for the latter interpretation. But it is interesting to examine the principles of interpretation on which they arrived at two different conclusions.

Both the majority and the minority agreed with the general principle of statutory interpretation enunciated in the beginning of this section.[15] The majority of the court relied on *Halsbury's Laws of England* (vol. 36, p. 414), and the minority (Ramaswami J.) on the words of Diplock L J. in *Saloman* v. *Commissioners of Customs and excise*'[16] to the same effect. But in the actual application of this principle to the facts of the case, the majority thought that the words of the statute (i. e. section 3 of the Act) have a clear, consistent and intelligible meaning, namely, an actual submission made in pursuance of an arbitration agreement or arbitral clause to which the convention set forth in the Schedule applies. Surprisingly, the majority conceded that by taking this view, the purpose and object behind the Protocol and the Convention may be fully carried out which undoubtedly appears to be that whenever the parties have agreed that their differences arising out of

inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings." (Emphasis supplied)
14. Article II (para 3) of the Convention reads : "The court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."
15. See p. 2 *supra*.
16. 1966 All E. R. 871, at pp. 875-876.

a commercial contract be referred to an arbitration, the court of a contracting state when seized of an action in the matter, shall refer the parties to an arbitration. But the Court found itself helpless in the face of words used by the legislature having a clear signification and meaning. This inference was also drawn by the court from the legislative history of the Act (Section 3), in as much as the legislature having known the meaning put on the word 'submission', and that it was abandoned in the Arbitration Acts and 'arbitration agreement' was used instead, still chose to use the word 'submission' in the Act.

Ramaswami J. (the minority opinion), after going through the legislative history in details, however, thought that the expression 'arbitration agreement' and the word 'submission' are synonymous; the expression in section 3 of the Act must be construed in its historical setting; that Article 11 of the Convention which is contained in the schedule imposes a duty on the court of a contracting state when seized of such an action to refer the parties to arbitration. He thought that section 3 of the Act, must, therefore, be read in consonance with this international obligation and any interpretation of section 3 which would restrict the obligation or impose a refinement one warranted by the Convention itself will not be justified. The contrary view, he thought, would be contrary to the avowed object and intention of the Act which is to give effect to the Convention on the Recognition and Enforcement of Foreign Awards. 'When there is ambiguity in the language of the section it is the duty of the court to adopt that construction which will effectuate the object of the Act and not nullify the intention of Parliament and make the provision devoid of all meaning'. He further observed "A statute should not be construed as a theorem of Euclid, but the statute must be construed with some imagination of the purpose which lies behind the statute. The doctrine of literal interpretation is not always the best method for ascertaining the intention of parliament. The better rule of interpretation is that a statute should be so construed as to prevent the mischief and advance the remedy according to the true intent of the makers of the statute.[17]

The Judge (Ramaswami J) was also not impressed with the argument that the legislature in re-enacting a section of the law must be presumed to have been aware of the intervening judicial interpretation and to have given its approval to it. He thought the presumption to be weak and an optimistic fiction.[18]

17. *Eastman Photographic Co.* v. *Comptroller General of Patents*, 1898 A. C. 571, relied on.
18. *Webb* v. *Outrim*, 1907 A.C. 81, at p. 89; and C. K. Allen, *Law in the Making*, pp. 508-09, relied upon.

The majority judgement, in the present submission, does not give a convincing answer to the point that fundamentally it is the intention of the Act which has to be given effect by the court, the object of the Act being clear and precise in the instant case, as was conceded by the majority opinion also. Further, it also seems difficult to agree with the majority of the court that the language of section 3 is unambiguous and permits only of one interpretation. The intervening history would indicate that an alternative construction of section 3 in keeping with the object of the Act was clearly possible. It is also supported by the decision in The *Merek*[19] and by Dicey and Morris.[20]

The majority opinion further states : "Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well established sense which they had in municipal law".[21] It is suhmitted, it would be queer construction indeed if the object of the Act, and the wordings of the Convention scheduled to the Act were all disregarded, and, only the words of the Act were interpreted in a wooden fashion. Apart from the fact that the literal rule of interpretation is not always the best rule and has to give way to the mischief rule (as indicated by Ramaswami J) it is hard to camprehend as to how the highest court in the country means to give effect to the injuction of article 51 (c) of the Constitution. 'The state shall endeavour to foster respect for international law and treaty obligations...', and further to article 51 (d) which specifically mentions 'encourage settlement of international disputes by arbitration',[22] if not through an interpretation of the Act which is in consonance with the treaty obligation. It is interesting that the majority (Grover and Shah JJ.) itself observes, "We apprehend it would hardly be conducive to international commercial arbitration not to have legislation giving full and complete effect to what is provided by the protocol and the convention."[23] Though the strictures to the legislature or to legislative drafting are quite to the point, but one wonders if the Court itself was really so helpless as it gives out to be. Could it not draw support from article 51 (d), and put an interpretation on the provision of the Act which would have encouraged settlement of international disputes by arbitration ? It would be unconvincing indeed,

19. (1965) 2 W. L. R. 250 at pp. 262-263.
20. *Conflict of Laws* (8th ed.), p. 1075.
21. A. I. R. 1971 S. C. 1, at p. 8, para 17 *Barras* v, *Aberdeen Steam Trawling and Fishing Co. Ltd.*, 1933 A. C. 402, was relied on by the court.
22. However, Article 51 of the Constitution was not called in aid by either party, nor is it mentioned in any of the judgements.
23. A. I. R. 1971 S. C. 1, at p 9, para 19.

if it were to be argued that an English rule of interpretation, howsoever sanctified by repeated application, will have precedence over a clearly stated directive principle of state policy under the Constitution.

The majority judgement, on the whole, leaves one with an uneasy feeling that perhaps the Court was led away by the consideration that arbitration proceedings in a foreign county, if allowed to be continued, were likely to be, in effect, *ex parte* because of governmental restrictions on foreign exchange, making it virtually impossible for the Indian firm to take its witnesses to Moscow and to otherwise properly conduct the proceedings there. The court even took judicial notice of the difficulty of obtaining foreign exchange.[24] Such extra-judicial solicitude for the Indian firm in the case of a contract (with an arbitration clause) freely entered into wirh a foreign firm, in the present submission, seems to be totally unwarranted It could at best remain a matter of conjecture if this consideration, or the purely literal interpretation of section 3 of the Act decisiveiy weighed with the court in deciding what it actually did.

(b) In *R. Monteiro* v. *State of Goa*,[25] the appellant (R. Monteiro), a resident of Goa, after the annexation of Goa by India on December 19, 1961 following a short military action, exercised the option to retain his previous citizenship/nationality i. e. Portugese nationality and applied for a residential permit. This option was offered to all Goan residents under Goa, Daman, Diu (Citizenship) Order, 1962, following the enactment of Constitution (Twelfth Amendment) Act, 1962 which was deemed to come into effect from December 20, 1961 and by which Goa was included in Union territories. On his failure to apply for renewal of residential permit on the expiry of the earlier one on November 13, 1964, he was ordered to leave India; and on his failure to leave India, he was prosecuted under the Foreigners Act, 1946.

The appellant sought defence under the Geneva Conventions Act, 1960[26] on the plea that the order directing him to leave India was tantamount to deportation, and the Geneva Conventions Act gives protection against such deportation during occupation which had not validly come to an end. It was contended on his behalf that Geneva Conventions must not be looked into in isolation but read in conjunction with inter-

24. *Ibid.*, at p. 12, para 30.
25. A. I. R. 1970 S C. 329. See also *Sebastiao Fransisco* v. *State*, I. A. R. 1968 Goa 17.
26. The Geneva Conventions Act, 1960 (Act VI of 1960) was passed to give effect to Geneva Conventions of 1949. The Gonventions have been reproduced in the Schedules to the Act.

national law as part of the positive law. After the League Covenant, U. N. Charter and the General Treaty for the Renunciation of War, the acquisition of territory in international law by the use of force does not confer any title. Occupation, therefore, can only be *terra nullius*, not now possible It was conceded that the war of liberation of Goa and the annexation were lawful but he contended that annexation did not deprive protected persons of the protection. The amendment of the Constitution only legalises annexation so far as India is concerned but in international law the territory remains occupied.[27] It can come to an end only by cession of territory or withdrawal of the occupying power from the territory, both of which events had not taken place. The protection of the Geneva Convention (Articales 47 and 49)[28] therefore, continued.

Hidayatullah C J[29] who delivered the judgement of the court first enunciated the welknown principle of international law, viz, the principle of the territorial supremacy of a state which empowers it, *inter alia*, to regulate the reception, residence and eviction of aliens from the whole or any part of its territory.[30] Though the learned Chief Justice did not put it in these words, the implication of the judgement clearly is that this bein the customary rule of international law recognised and practiced by civilsed states, it is part of the law of India also, and that the Registration of Foreigners Act and Foreigners Act are in conformity with this principle.

Again, the judgement seems to have conceded in principle, and rightly so, that if a municipal legislation gives effect to an international

27. Reliance was placed upon Dholakia, *International Law*, pp. 180, 181; Oppenheim, *International Law*, Vol. I (7th ed.), pp. 574 *et sea*; R. Y. Jennings, *The Acquisition of Territory in International Law*, pp. 53-56, 67.
28. Geneva Convention (IV), 1949
Article 47, "Protected persons who are in occupied territory shall not be deprived, in any case or inany manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of the territory, nor by an agreement concluded between the authorities of the oecupied territories and the occupying power, nor by any annexation by the latter of the whole or part of the occnpied territory."
Article 49; "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying Power or to that of any other Country, occupied or not, are prohibited, regardless of their motive ....."
29. The bench consisted of Hidayatullah C. J., Sikri, Bachawat, Mitter and Hegde JJ.
30. Oppenheim, *International Law*, (8th ed.) Vol. I, pp. 675-676, Brierly, *Law of Nations*, p. 277, and *Musgrove* v. *Chun Teeong Toy*, 1896 A. C. 272 (P.C.) were relied upon by the court.

convention (The Geneva Convention Act, 1960 in this case), the convention ought to be read in conjuction with international law as part of the positive law, in as much as the court proceeded to determine the meaning of the words 'annexation' and occupation' in article 47 of the Geneva Convention (IV), 1949 (Schedule IV of the Act of 1960) in the context of the history of Geneva Convention and the general principles of international law.

The learned Chief Justice traced the history of Geneva Conventions and pointed out that the 1949 Conventions are only supplemental to the Hague Regulations of 1907 (article 42 to 56), that there is no definition of 'occupation' in the Geneva Conventions, and therefore we have to turn to Hague Regulations. Article 42 of the Hague Regulation defines it in the following words A territory is considered as occupied when it finds itself in fact placed under the authority of hostile army'. The Court rightly observed that military occupation is a temporary *de facto* situation, quite distinct from annexation which means that there is not only possession but uncontested sovereignty over the territory. The Court also emphasised the recognised distinction between true annexation and pre-mature or anticipated annexation. It is premature so long as hostilities are continuing and there is an opposing army in the field even if the occupied power is wholly excluded from the territory.[31] Anticipated annexation by unilateral action is not true annexation. When the Geneva Convention (Article 47) lays down that annexation has no effect on the protection, they, in fact, speak of premature annexation. The learned Chief Justice pointed out that when the Convention itself being drafted the experts were half-inclined to add the word 'alleged' before 'annexation' in article 47 to distinguish it from true annexation.[32] In subjugation not only the *de facto* but also *de jure* title passes to the conqueror. It would, however, seem to have been enough for the Court, it is submitted, to have observed that the word annexation' in article 47 of the Geneva Convention (IV) could only mean premature annexation, i e. unilateral annexation of territories under belligerent occupation.

Once the appellant conceded that the liberatian of Goa and the annexation by India were lawful, he could not indirectly base his arguments on the ingredients of valid title under the principles of general international law, i. e. cession of territory or withdrawal of the occupying power. His limited case only related to as to whether occupation,

31. Greenspan, *The Modern Law of Land warfare*, pp. 215 *etseq*, 600 603; Could, *Introduction to International Law*, pp. 652-656; 662-663; Brierly, *Law of Nations*, p, 655, were relied on by the Court.

32. No authority is cited by the Court for this legislative history.

in the circumstances of the case, had come to an end within the meaning of the Geneva Convention (IV) 1949. The main purpose of the law of belligerent occupation (and the Geneva Convention (IV) 1949), being to ensure a measure of real protection for the occupied territory and its inhabitants[33], it will have to be determined in the context of the circumstances of each case if 'occupation' had come to an end. The learned Chief Justice rightly pointed out that the military engagement in Goa was only of a few hours duration and there was no resistance at all Therefore, since occupation in the sense used in article 47 of the Convention ceased, the protection also ceased.

In the present view, it was not, however, necessary for the court to have observed as it did that"...it was, thus, true annexation by conquest subjugation". This observation might have been relevant to the question of title, but there too it has not to be forgotten that India claim to Goa was never based on conquest followed by subjugation and annexation. India's case was that it was an action to liberate Indian national territory) and so it was not violative of the U. N. Charter at all).[34] If a state claims a territory as one's own and uses military force to regain it, the title in that case is certainly not based on conquest and subjugation. Thus, it was quite unnecessary for the Court to have entered into the question of title, and then have tried to justify that conquest followed by subjugation once it is an accomplished fact, can give a valid title, despite article 2(4) of the U. N. Charter.[35]

33. See, Schwarzenberger; *International Law*, Vol. II (1968), p. 178.

34. See, Security Council, Verbatim records, S/PV 987, December 18, 1961, p. 83 *et seq*.

35. A I. R. 1970 S. C. 329, at p. 336, para 27.

R. Y. Jennings observes on p. 72 of his book, note 27 *supra*, that if a state has in fact a legal title to the territory in the possession of another state, and uses force to recover its possession, it cannot be employment of force contrary to the provisions of article 2 (4) of the Charter; the matter is one within its domestic jurisdiction.

[However, in the footnote on the same page with respect to Indian argument on Goa he points out that India had herself recognised Portugese title in 1950, 1953 and again in the *Right of Passage* case.]

With respect to a situation where a conqueror having no title by conquest, is nevertheless in full possession of the territory and cannot apparently be ousted, R. Y. Jenning does suggest the traditional procedure of recognition by which the law is adjusted to fact. (pp. 61-62) And he considers the difference between the automatic acceptance of title created by illegal force as a matter of law, and a procedure for recognition which in effects is the determination in each case by the internarional community, as of real substance and importance. (But, as mentioned earlier, this has never been India's case for its title over Goa.)

The Court also pointed out that the Geneva Conventions Act, 1960 does not give any specific right to any protected person to approach the Court for its enforcement. The Government of India has only undertaken an obligation to respect the Convention regarding the treatment of civilian population. The Act was passed under Article 253 of the Constitution read with entries 13 and 14 of the Union list in the seventh schedule to implement the agreement signed. It is submitted that it is not at all a satisfactory manner of incorporating an international convention in the municipal law of a country through legislation. The Convention could be effective in the real sense only if rights are created in favour of the beneficiaries to approach the court directly with respect to its interpretation and application. It would have been ideal indeed if the convention itself imposed an obligation on the parties to confer such a right through their municipal laws. In fact, in view of the above observation by the Court, all the discussion on the meaning of 'occapation' and 'annexation' under the principle of international law was purely academic.

It is heartening, however, that the learned Chief Justice gave no credence to the very narrow and shallow ground of 'act of state, which was upheld by the lower courts, and proceeded to judge the validity of the expulsion order on principles of law-municipal and international.

The judgement of Hidayatullah J., thus, applies the customary international law principle of the territorial supremacy of a state, gives recognition to the principle that if a municipal legislation given effect to an international convention, the convention ought to be read in conjunction with international law as part of the positive law of India, and in the light of these principles holds that the word 'annexation' in article 47 of the Geneva Conevention (IV), 1949 could only mean premature annexation.

III. At times, when the number of contentions are made by parties before the Supreme Court in a case, some based on international law and some on the interpretation of municipal law, the Court has been more inclined to give preference to municipal statutes This approach of the Court, in the present submission, can only be explained by the fact that the Court feels more at home and on surer grounds in basing its judgement on the municipal statutes and orders etc. as compared to the less familiar and, at times, complicated international law norms.

(a) In *State of Madras* v. *Rajagapalan*[36] the question for decision was if a member of the Indian Civil Service (which was a specially privileged class of service under the direct and ultimate protection by the

36. A. I. R. 1955 S. C. 817.

Secretary of State representing the British Government) continued in service after Indian independence.

It was contended on behalf of the state, among other arguments, that the constitutional changes affected in the wake of Indian independence resulted in the emergence of India as an independent sovereign state and that it followed therefrom, on well recognised principles of international law, that this brought about automatic termination of the contracts of service between the prior Government and its servants. The respondents on the other hand, contended that howsoever independent the new Dominion Government may as regards the functioning of its legislature and of its executive government, the new government was still to function in the name of the King of Great Britiain and that, therefore, the Dominion was not on the same footing as an independent sovereign state, which obtains sovereignty over a new country by conquest or cession. Thus the principles of international law relied upon would not apply to such as a case.

Jagannadhadas J. who delivered the judgement of the Court observed that the question whether the Indian Independence Act brought about a full sovereign state for each and every purpose is one of considerable importance and is not free from difficulty. "We do not wish to decide that question on the present occasion. It appears to us that the present case has to be decided with reference to the question as to what exactly has been brought about by the Indian Independence Act and the subsidiary legislation which followed thereupon, in so far as they relate to the tenure of persons in the position of the plaintiff." The Court then proceeded to examine the relevant provisions of the Indian Independence Act and the subsidiary legislation passed thereunder and concluded that "the essential structure of the Secretary of State Services was altered and the basic foundation of the contractual-cum-statutory tenure of service disappeared. it follows that the contracts as well as the statutory protection attached thereto came to an automatic and legal termination ..."[37] (Emphasis supplied).

It is submitted that the court actually did consider the impact of the Indian Independence Act; it did observe that though in theory the new Government of India was carried on in the name of His Majesty, this was no more than a symbol of the continued allegiance to the Crown;[38] and it did hold that the contracts of service came to an automatic termination. It was therefore, but proper for the Court to

37. *Ibid*., at p. 827.
38. *Ibid*.

have also boldly declared the status of India after the passing of the Indian Independence Act[39] and applied the well recognised principle of international law, mentioned above, as part of the municipal law of India. It is also submitted that it does seem to be necessary under international law that the new state must acquire sovereignty for each and every purpose before the termination of the contracts of services of the employees of the former state can be implied; the real question relates to the acquisition of sovereignty *vis-a-vis* the contracts of service.

(b) In *Amar Sing* v. *State of Rajasthan*,[40] however, the Supreme Court did reiterate the principle with approval, though without mentioning that it was applying the principle of international law as part of the municipal law of India.

"Now it is well established that when one state is absorbed in another, whether by accession, conquest, merger or integration, all contracts of service between the prior government automatically terminate and thereafter those who elect to serve in the new state, and are taken on by it, serve on such terms and conditions as the new state may choose to impose." Surprisingly, the court cited its decision of *Madras* v. *Rajagopalan*[41] as having settled the law, though as observed above, the Supreme Court in that case actually refrained from deciding the case on the the general principle of international law, and relied on the interpretation of constitutional documents instead.

Amar Singh's case related to the effect of the amalgamation of the native state of Bikanar in the United State of Rajasthan through a coventant of merger, on the contract of service of a former employee of the Bikaner State. The Supreme Court arrived at the same conclusion in interpreting and applying the relevant provisions of the covenant.

It is submitted that the approach adopted by the Supreme Court in this case i.e. enunciating and applying the principle of international law along side the application of municipal statutes/constitutional documents is in question, 'fosters greater respect for international law', than the one adopted in *Rajagopalan's case* wherein the Supreme Court evaded the question. In *Amar Singh's case* too, however, the Court should have clearly stated that it is the international law principle that it is applying rather than merely citing the earlier cases Indian and/or British as authorities.

39. See also, T. S. Rama Rao, Some Problems of International Law in India, 1957 *Indian Yearbook of Int. Affairs*, pp. 5, 8 (Here inafter cited as *I.Y.I.A.*)
40. A. I. R. 1958 S. C. 228.
41. A. I. R. 1955 S. C. 817.

B. Implementation of Customary principles of International Law as Part of the law of the land

The cases are really few wherein customary principles of international law might have come up before the Supreme Court for application as such They have generally been invoked in the interpretation of municipal statutes as examined in the previous section

(a) In *Ram Babu Saxena* v. *State*,[42] the question came up if the extradition treaty between the Tonk State and British India, of 1889 would survive the amalgamation of the State of Tonk into the United States of Rajasthan in 1948 through a convenant between the Rulers of some states, following Indian Independence in 1947. B. K. Mukerjee J. mentioned with approval the opinion of International Jurists[43] that when a state relinquishes its life as such through incorporation into or absorption by another state, the treaties of the former are automatically terminated, the learned judge held that though the personality of Tonk State was not extinguished completely because of amalgamation into the United States of Rajasthan, but since the state lost its full and independent power of action over the subject matter of the treaty,[44] the treaty must necessarily lapse The court did not, however, mention in so many words that it was applying a principle of customary law as part of the law of India, in interpreting the constitutional documents in question.

Similarly, the court applied another international law principle too in this case without specifying it as such, viz. that there is no universally recognised practice that there can be no extradition except under a treaty The offences in question were covered by the Act, but the treaty did not cover them. Section 18 of the Extradition Act, 1903 provided that the provisions of the Act would not derogate from the provisions of any treaty of extradition. Section 7 of the Act, in substance, provided that an accused shall be arrested and extradited to any state outside India not being a foreign state on a warrant being

42. A. I. R. 1950 S. C. 155. ace also S. K. Agrawala, *Inrernational law Indian Courts and Legislature* (1965), pp. 71-73 for certain comments on the case.
43. *Ibid*, pp. 161-162. Hyde. *International law*, vol. III, p. 15 9 was cited in support.
44. The case of *Terlinden* v. *Ames*, 184 U S. 270 was also cited in support where it was held that where sovereignty in respect of the execution of treaties was not extinguished and the power to execute remains unimparied, outstanding treaties eannot be regarded as void.
The power of the Tonk State, however, to execute the treaty was altogether gone after the Covenant of merger, so the treaty could not but be regarded as void.

issued by such a state. The Supreme Court held that even presuming that the treaty subsisted, extradition of a person for an offence which is not extraditable under the treaty, is not a derogation from the provisions of the treaty—the Act enlarges rather than curtails the power of the other party to claim surrender of criminals when it authorises the Indian Government to grant extradition for some additional offences The court did not agree with the plea that the enumeration of offences in the treaty implied a prohibition against either of those parties providing by its own municipal laws for the surrender of criminals for other offences not covered by the treaty. Obviously, any literal construction of section 18 or the Act would have made the application of international law and practice in the matter impossible.

(b) Similarly, in *State of West Bengal* v. *Jugal Kishore More*,[45] Shah J. of the Supreme Court applied the principle the other way round, i. e. because of the enactment of the Extradition Act, 1962 the Government of India is not prohibited from securing through diplomatic channels the extradition of an offender for trial of offences committed within India from a country (Hong Kong in this case) with which India has no extradition treaty.[46] (In this case Hong Kong was prepared to surrender the accused under the assumption that under Hong Kong law the Fugutive Offenders Act, 1881 still applied).[47]

(c) In *Harinder Singh* v. *I. T. Commissioner, Punjab etc.*,[48] the limited question for the decision of the court was if the Ruler of the Faridkot state was immune from income tax with respect to incomes from his public and private property, under the provisions of the Indian Income Tax Act, 1922, with respect to the assessment years 1946-47 and 1947-48 (i. e. the years when the erstwhile state had not yet acceeded to the Union of India).

The implication of this pleading, of course, was that if there be a rule of international law recognising the immunity of the sovereign from taxation with respect to his income (public and private), it should be part of the law of India also.[49] The Supreme Court also seems to have proceeded on same basis.

45. A. I. R. 1969 S. C. 1171.
46. See also S. K. Agrawala, *Annual Survey 1069*, pp. 478-481, for a fuller summary of the case.
47. See S. K. Agrawala, note 42 *supra*, pp. 193-200, for a short history of the law of extradition in India.
48. A. I. R. 1972 S. C. 202.
49. The Andhra Pradesh High Court in *Mir Osman Ali Khan Bahadur* v. *Commr. of Ineome Tax, Andhra Pradesh*, I, L. R. (1963) Andh. Pra. 17 had stated the relationship thus :

But relying on its decision in *Madhavrao Jiwajirao* v. *Union of India*[50], the Supreme Court held that the native states had no international personality. As such any exemptions which they may be given, must be under the relevant taxing Acts. The court also pointed out that under the Income Tax Act, exemption of the income of the Rulers derived from Central Government securities was specifically given under section 60 of the Act, which implied that the Rulers were not exempt from other provisions of the law. The court also drew support from a Ceylonese Case[51] for the proposition that the Mysore Government having no position in international law could not claim any immunity arising by virtue of international law, and could not, therefore, claim exemption from taxation for profits earned in Ceylon by a factory owned by it.

Explaining the status of the Rulers, the Court proceeded to observe, "Nonetheless the status of these rulers in England was recognised as being on par with other Rulers in the matter of personal immunity from being sued in their courts. In so far as British India was concerned these were governed partly by Acts of the Legislatures particularly the provisions contained in the Civil Procedure Code and notifications of the executive under taxation laws as well as by executive or administrative instructions relating to their privileges".

As regards the rule of international law, the Supreme Court arrived at the conclusion that there is no uniform practice followed by various states with respect to exempting a foreign state or its property from taxation. It affirmed its earlier decision that "International law vis-a-vis the liability of a sovereign to taxation in respect of his private property is in a process of evolution. It has not yet become crystallized"[52].

"Indisputably, a sovereign ruler enjoys immunity from taxation under international law and it is only in cases where this rule is superseded by express words that this should be denied to him. If a legislature wants to depart from these principles and bring such ruler to tax, there must be clear indication in the Act itself. In she absence of such express words, the statute must be interpreted in conformity with international law. Simply because the Municipal law did not provide for such an exemption, the principles of international law should not be regarded as having been superseded."

50. A, I. R, 1971 S, C. 530,
51. *Supt. of the Government Soap Factory* v. *Commissioner of Income Tax, Ceylon*, cited from XLI A. J. I. L., at p. 239, in the article; "Immunity from taxation of foreign owned property."
52. *Commissioner of Income Tax, Andh. Pra* v. *Mir Osman Ali Khan Bahadur*, A. I. R. 1966 S. C. 1260, per Subba Rao J.

(d) In *Mobarik Ali Ahmed* v. *State of Bombay*[53], the appellant who had committed the offence of cheating while in Pakistan against a Bombay businessman, was tried before Indian courts when his presence was secured in India through extradition for another offence. He contended that since he had never stepped into India during the period of the commission of the offence, he could not be tried under the Indian Penal Code The Court relied on the decision in the *Lotus Case*[54], Hackworth[55] and Halsbury[56] and arrived at the conclusion that if one of the elements of the offence, and more specifically its effects, have taken place within the state, a state is entitled to assume jurisdiction over offences committed by persons beyond the territories of the state. Exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender. However, the court thought that the case dealt with a question of municipal law and not international law and proceeded to examine the provisions of the Penal Code.

(e) In *Lachman Das* v. *State of Punjab*[57] where the question *inter alia*, was as to the effect of the merger of one independent state with another, the court relied on the rule of international law that "the state ceases to be an independent person when it ceases to exist Practical causes of extinction are : merger of one state into another, annexation after conquest in war, breaking up of a state into several states, and breaking up of a state into parts which are annexed into surrounding states. By voluntarily merging into another state, a state looses all its independence and becomes a mere part of another."[58]

Therefore, when the new state of Pepsu was formed, the eight states which had merged into it ceased to exist as independent personae and there could be no question of sovereignty of such states or of its ex-rulers. The court further observed that if the effect of the original covenant is to completely divest the Rulers of their sovereign power, there can be no question of their entering into any treaty thereafter as that could be only between sovereigns and the supplementary covenant cannot, therefore, be sustained.[59]

53. A. I R. 1957 S. C. 857,
54. P. C. I. J. Series A, No. 10, 23.
55. *Digest of International Law*, (1941 ed.) Vol. II, p. 188.
56. *Law of England* (Third ed.), vol. 10, p. 318.
57. A. I. R. 1963 S. C. 222.
58. Oppenheim, *International Law*, vol. 1, p. 150 which was cited in support.
59. *Ibid.*, p. 842 was relied upon by the appellant for the proposition that a treaty while it subsists may be dissolved by the mutual consent of the contracting parties. The court held that it presupposes that on the date of the latter treaty by which the earlier treaty is modified, the contracting parties are sovereigns.

The Supreme Court, thus, applied the principle of international law as part of the municipal law of India, though not stating is specifically. The court subsequently proceeded to examine the terms of the covenant to arrive at the same result.

Doctrine of Act of State : a limitation on the application of customary international law :

It may also be mentioned that one severe limitation on the application of customary international law by municipal courts in India has been the doctrine of Act of State.[60] This writer has commented elsewhere[61] that the Supreme Court has enthusiastically applied the doctrine without questioning its rationale in the changed context of India, despite some of its own jurisprudence[62] and that of the Privy Council[63] on the subject to the contrary, and in complete disregard of the general international practice.[64]

Once the plea of Act of State is accepted by the court, it refuses to examine the legality or illegality of the action in question, and thereby the opportunity of the application of customary international law principles to the fact of the case by it, is completely lost.

Under Indian law the capacity and liability of the state to sue and be sued has been continued unaltered[65] since the time of the East

60. See T. S. Rama, Rao, note 39 *supra*, pp. 28, 44-45. He observes, "Their (Act of State) recognition therefore implies that, so far as the courts are concerned, International law occupies in the hierarchy of the sources of law the last place, and is preceded not merely by statutes but by the executive acts and declarations, under certain circumstances at any rate."
61. S. K. Agrawala, India's Contribution to the Development of International law..., note 4 *supra*, pp 82-87; A. K. Agrawala, note 42 *supra*, pp. 31-43; Doctrine of Act of State and the law of State Succession in India, *Int. & Comp. L. Q.*, pp. 1399-1407 (1963) (That discussion has not been reproduced in this paper).
62. See *Virendra Singh* v. *State of U. P.*, A. I. R. 1954 S. C. 447; *State* of Gujrat v. Vora Fiddali, A. I. R. 1964 S. C., 1043, dissenting opinion of Subba Rao J. at pp. 1065 1072.
63. *Amodu Tijani* v. *Secretary, Southern Nigeria*, (1921) 2 A. C. 399 at p. 404, per Lord Haldane; *Oyekan* v. *Adele* (1957) 2 All E. R. (P. C.) 788, per Lord Denning. See also *Salaman* v. *Secy of State for India* (1906) 1 K. B. 613, per Sterling J.
64. Wortley, *Expropriation in Public International Law* (Cambridge, 1959), pp. 125-8; D. P. O. 'Connell, *The Law of State Succession* (1956), p. 77; Kaechenbeech, The Protection of Vested Rights in International Law, 1957 *B. Y. I. L.*, pp. 1-18; G. Schwarzenberger, *International Law* (London, 1945), pp. 75 and 90-92; See also *U. S.* v. *Percheman* (1833) 32 U. S. 51, at pp. 86-7; *German Settlers Case* (1923), P. C. I. J. Series B., No. 6.
65. See V. N. Shukla, *Constitution of India* (6th Ed. by D. K. Singh), p. 484. See also article 300 of the Constitution.

India Company. The Act of State doctrine too has been continued by the Courts as a concomitant of this principle. It is difficult to agree with the view,[66] in the present submission, that article 372 of the Constitution continued the old law as interpreted by the Privy Council and no scope was left for the courts to manoeuvre out of it.

Perhaps the Supreme Court itself had attempted it in *Virendra Singh's case*[67] which was, unfortunately, subsequently overruled. Further, observations in some of the Privy Council decisions[68] themselves do not quite support the thesis worked out in some of the judgements in *Vora Fiddali's case.*[69] In the present submission, it is feasible, reasonable and politic for the Supreme Court to hold that what has been continued by article 372 is only the general English common law principle that well recognised principles of international law form part of the land. What the customary principle of international law on a particular point is, must, however, be determined with reference to a wide-ranging enquiry into the practice of states generally and not merely the British law and practice.[70]

C. Implementation of Treaties under Indian Municipal Law :

Under article 253 of the Constitution of India, exclusive power has been given to Union parliament to make law for implementing any treaty, agreement, convention or any decision made at any international conference, association or other body. Entries 10 to 14 of List 1 of the Seventh Schedule cover all the conceivable matters relating to foreign affairs on which the Indian parliament exclusively can legislate. Entry 14 even contemplates a parliamentary law for the entering into and implementation of treaties. Since no law has been passed in this regard so for, the Supreme Court has, at times, been faced with certain difficult questions regarding the making and implementation of treaties.[71]

66. Reference is to the judgement of Madholkar J. in *Vora Viddali's* case, A.I.R. 1964 S. C. 1043, at pp. 1093-94, and that of Ayyangar J. at pp. 1066-1062. See also Seervai, *Constitutional law of India* (1967), pp. 820-821.
67. A. I R. 1954 S. C. 447.
68. Note 63 *supra.*
69. Judgements of Mudholkar and Ayyangar JJ. in A. I. R. 1964 S. C. 1043.
70. See also, T. S. Rama Rao. The Role of Indian Courts In the Interpretation, Application and Development of the Rules of International law, *I. L. A. Nainital Seminar 1969* (Allahabad 1972). pp. 8-9.
71. The Indian law and practice relating to the entering into and implementation of treaties has been extensively discussed in the following literature : C. H. Alexandrowicz, *op. cit. supra*; T. S. Rama Rao. note 39 *supra.* p. 3 *et seq*;; K. Narayana Rao, Parliamentary Approval of Treaties in India, 1960-66 I. Y. I. A., p. 22; Upendra Baxi, Law of Treaties in the Contemporary Practice of India, 1965 *I.Y.I.A.*, p. 137; T. S. Rama Rao, Some Constitutional Aspects of Treaty-Making Power in India, and C. G. Raghavan, Treaty Making Power under the Constitution of India, in S. K. Agrawala (ed.), *Essays on the Law of Treaties* (1972, Orient Longman): H. M. Seervai, *Constitutional Law of India* (1917) pp. 108-112; Basu, *Constitution of India* (Vth ed.) Vol. IV, pp. 192-194; T. S. Rama Rao note 70 *supra*, pp. 1-11; S. K. Agrawala, India's Contribution to the Development of International Law ..., note 4 *supra*, pp. 87-91 ! Robert B. Looper, Treaty Power in India, 1955-56 *B.Y.I.L.*, pp. 304-305.

I. Treaties of cession-their validity and implementation

In *In re Indo-Pakistan Agreement Relating to Berubari Union and Exchange of Enclaves*[72] the question came up if a part of the territory of India could ceded to a foreign country as an exercise of executive power, through the Indo-Pakistan Agreement of September 10, 1958 entered into between the Prime Ministers of India, and Pakistan, without an amendment of the provisions of the Constitution defining the territory of India. It was contended that article 3(c) of the Constitution[73] which deals with the internal adjustment *inter se* of the territories of constituent states of India, is wide enough to include the case of the cession of national territory in favour of a foreign country. The Supreme Court, through Gajendragadkar J., rejected this contention on two grounds : Firstly, if the power to acquire foreign territory which is an essential attribute of sovereignty is not expressly conferred by the Constitution[74], there is no reason why the power to cede a part of the national territory should have been provided for in the Constitution. The diminution of the area of any state to which the clause refers, postulates that the area

72. A. I. R. 1960 S. C. 845 (Hereinafter referred to as the *First Berubari case*). The opinion of the court was pronounced by Gajendragadkar J. on behalf of himself and Sarkar, Subba Rao, Hidayatullah, Das Gupta, Shah and Das JJ. and also Sinha C. J.
73. Article 3 (c) : "Parliament may by law — — —
(c) diminish the area of any state ... ..."
The Court's attention was also drawn to the Act of Parliament (Act XLVII of 1951) by which a strip of terr itory on the Assam border was ceded to Bhutan Government. The legislation in that instance was passed under article 3 of the Constitution. But Gajendragadkar J. did not consider that this instance could be of any assistance in construing Article 3.—*Ibid*, pp. 860-861, para 43.
74. It was argued on behalf of the Union of India that since article 1 (3) (c) of the Constitution (which lays down : 'The territory of India shall comprise ... ... (c) such other territories as may be acquired'.) give the power to acquire foreign territory, the power to cede territory must be taken as specifically excluded since it has not been mentioned, under the rule *expressio unius est exclusio alterius.* But the Supreme Court held that this provision does not confer power or authority on India to acquire territory, but it only makes a formal provision for absorption and integration of any foreign territories which may be acquired by India by virtue of its inherent right to do so.

diminished from the state in the question should and must continue to be a part of the territory of India. Secondly, article 3 does not refer to Union territories. Therefore, cession of a part of the Union territories would inevitably have to be implemented by legislation relatable to article 368 (amendment of the Constitution.) The Supreme Court held that it is an essential attribute of sovereignty that a sovereign state can acquire foreign territory and can, in case of necessity, cede a part of its territory, and this can be done in exercise of its treaty-making power.

Answering the question as to how these treaties shall be made and implemented, the court observed that the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Under the Constitution of India the implementation of the agreement ceding a part of the territory to Pakistan would naturally involve the amendment of article 1 and of the relevant part of the First Schedule to the Constitution (which give the description of the territory of India). Such an amendment could be made, the Supreme Court suggested, under article 368, or alternatively parliament could pass a law amending article 3 so as to cover cases of cession. If such a law is passed then parliament may be competent to make a law under the amended article 3 to implement the agreement in question.

The parliament, however, preferred the first alternative and amended the First Schedule to the Constitution by the Constitution (Ninth Amendment) Act, 1960.

The Union of India had relied on the decision in *Ram Jawaya Kapur* v. *State of Punjab*[75] wherein it was held on a reading of Article 73[76] that the executive powers of the Central Government are co-extensive and co-incidental with the powers of the parliament itself, as such parliamentary legislation is not a pre-condition to the exercise of executive power relatable to one of the entries in the Union List. But the Supreme Court in the *First Berubari case* did not consider the merits of this argument and summarily brushed it aside on the ground that the argument proceeded on the assumption that the Agreement or the determination of the disputed boundar already fixed by the Radcliffe Award, which it was not, and it actually amounted to cession or alienation of a part of Indian territory.[77]

75. A. I. R. 1955 S. C. 549.

76. For a comprehensive critique of the soundness of using article 73 for simulating a theory of treaty making, See C. G, Raghavan, note 71 *supra*, pp 224-228.

77. The Supreme Court stated that the *ad hoc* agreement to divide the disputed territory half and half had been arrived at quite independently of the earlier Awards, and also that the territory in question had remained in the

The opinion of Gajendragadkar J., however, does not state in so many words that if the Agreement involved only the settelement of disputed boundary (as was contended by the Uuion of India), its implementation could have been possible merely through executive action, but the whole tenor of the judgement leads to this very inference which was affirmed in a subsequent case.[78]

It may be noted that the British practice in this regard has been stated by Lord McNair[79] : "There is a practice, now amounting probably to a binding constitutional convention, whereby treaties involving the cession of British territory are submitted for the approval of parliament, and its approval takes the form of statute."[80] Under British practice[81] treaties of certain types, besides treaties of cession, require parliamentary legislation for enforcement.

possession of India and had always been treated as part of West Bengal and governed as such.

In *Nirmal Bose* v. *Union of India*, A. I R. 1959 Cal. 506, at p. 517 the Calcutta High Court, however, had taken the position that factual possession of the territory could not give India a title if under the Radcliffe Award the territory really belonged to Pakistan. Similar was the view of the Supreme Court in *Ram Kishore* v. *Union of India*, A I. R. 1966 S. C. 644 with respect to a part of Chilahati Village (See *infr*).

78. See, *Maganbhai Ishwarbhai Patel* v. *Union of Ind a*, A. I. R. 1969 S. C 783.

79. Lord McNair, *Law of Treaties*, 94 (1961).
However, McNair points out that the question of the circumstances in which parliamentary sanction is actually required by law for the cession of British territory is controversial; and he also cites them (*Ibid*, p. 94 *et seq.*).

80. The case of *Damodhar Gordhan* v. *Deoram Kanji*, (1376) I A. C. 332 (P. C.) decided by the Privy Council is sometimes cited for the proposition that Indian territory could be ceded by the Crown without the assent of parliament. But it has to be noted that the case related to cession of Indian territory to a native state, and not to a foreign power. A fuller reading of McNair, *The Law of Treaties*, pp. 96 footnote 1, 110, would also indicate that at least one law officer of the Crown on a subsequent occasion questioned the advisibility of cession of British Indian territory to a foreign power without parliamentary assent, in the face of the growing tendency in the direction of the limitation of prerogative powers, and an increase of parliamentary control.
The case cannot, therefore, be correctly cited as indicating the practice in British India in respeet of cession of Indian territory to any state.

81. See McNair, *op. cit. supra*, pp. 81-101.
It may be noted that article 253 of the Indian Constitution does not oblige the parliament to pass a law for the implementation of every treaty. It may pass any law for the implementation of any treaty for any part of the territory of India or for the implementation of any decision made at any international conference, association or other body.

Thus the future law to be passed by Indian parliament under this article could specify the categories of treaties etc. which may require

The judgement, however, has been criticised on serveral grounds.[82]

II. Implementation of Agreements transferring territories belonging de jure to another country, but being administered de facto by India.

In *Ram Kishore Sen* v. *Union of India*[83] it was contended, *inter alia*, that a portion of the village Chilahati (the whole of which had gone to Pakistan under the Radcliffe Award of 147) continued to remain in the administration of India, and since India had been in adverse possession for a number of years it had acquired a title to it under international law and the making over of this territory to Pakistan would tantamount

legislative implementation (which may or may not be in accord with the British practice.)

Professor Alexandrowicz, however, while commenting on *Birma* v. *The State*, A. I. R 1951 Raj. 296 had observed, "Thus it can be safely assumed that no deviation from English common law rules was intended, and that subsequent judgements of the Indian courts will follows the same line." (Alexandrowicz, *op. cit. supra*, p. 296).

82. H. M. Seervai criticises it on the ground that it was influenced by the mistaken notion that the word 'state' in article 3 does not include a Union territory (the court's attention not having been drawn to section 3 (58) (b) of the General Clauses Act which defines it as Including a Union territory), and that in any event it overlooks the express power, as well as the residuary power under Article 248 and Entry 97 of the Union List, to approve and implement a treaty of cession. [H. M. Seervai, note 71 *supra*, p. 121]

T. S. Rama Rao considers the latter ground to be irrelevant as the question at issue is not the power of parliament, but the necessity of the amendment of the First Schedule of the Constitution, in all cases of cession of Indian territory. But he considers the first ground to be impeccable which has also been accepted by the Supreme Court in *Ram Kishore Sen* v. *Union of India*, A. I. R. 1966 S. C. 644, at p. 648. He observes, "It is not seen how the origin of the ceding power in the country's sovereignty has any relevance to the question, and, if it has, how article 368 is better fitted as a medium of the exercise of that power than article 3." He pleads for the overruling of the Judgement. [T. S. Rama Rao, Some Constitutional Aspects of Treaty-making Power in India, note 71 *supra*, pp. 252-253; See also, C. G. Raghavan, note 71 supra, pp. 235-238.]

The criticism that no useful purpose is served by not reading the power of cession in article 3, has undoubtedly great force. However, the judgement in this advisory opinion seems to have concretized in as much as it has been affirmed by the Supreme Court in subsequent cases, and there seems little possibility of its being overruled. It may be appreciated that even if the power to cede territory were read in article 3 (c) or the article were amended to include that power, parliamentary legislation for the porpose would even then be necessary in terms of the opening words of the article.

83. A. I. R. 1966 S. C. 644 (hereinafter referred to as the *Second Beru-Bari case*).

to its cession which could be done only according to the procedure laid down in the *First Berubari Case*,[84] (i. e. by constitutional amendment).

Gajendragadkar C. J. who delivered the opinion[85] in the case also, interpreted Entry 13 of the First Schedule to the Constitution,[86] and concluded.

> It would indeed be suprising that even though the Union of India and the State of West Bengal expressly say that this area belongs to Pakistan under the Radcliffe Award, the petitioners should intervene and contend that Pakistan's title to this property had been lost because West Bengal had been adversely in possession of it. It is, therefore, unnecassary to examine the point whether a plea of this kind can be made under international law...

The judgement of Gajendragadkar J., on this point at least, is impeccable,[87] but one would have expected an examination of the plea from the stand-point of international law too by the Supreme Court once it had been raised by the petitioners, and more so because Sinha J. of the Calcutta High Court[88] had considered it in some detail.

However, the judgement lays down that no constitutional amendment or legislative enactment is called for under the provisions of the Indian Constitution for giving effect to an agreement between India and another country relating to the transfer of a territory being administered by India which really belongs to that other country. It was not

84 A I. R. 1960 S. C. 845.

85. On behalf of himself and Wanchoo, Hidayatullah, Shah and Sikri JJ.

86. Entry 13 of the First Schedule to the Constitution reads,

"West Bengal—The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or *were being administered as if they formed part of that Province...*" (Emphasis added)

It was contended that Chilahati so being administered, an amendment of the First Schedule to the Constitution would be necessary. The Supreme Court, tracing the history of the clause, pointed out that the words 'as if' refer to territories which originally did not belong to West Bengal but which became a part of West Bengal by reason of merger agreements. It was not intended to cover territories which are administered with the full knowledge that they did not belong to West Bengal and were to be ultimately transferred to Pakistan. (See S. K. Agrawala, in *Annual Survey of India Law*, 1966, *op. cit. supra*, pp. 50-52.)

87. See, T. S. Rama Rao, note 82 *supra*, p. 254; C. G. Raghavan, note 71 *supra*, pp. 238-239.

88. *Ram Kishore* v. *Union of India*, A. I. R. 1965 Cal. 282. See also, S. K. Agrawala, *Annual Survey 1965*, op. cit., pp. 123-126. The case came up in appeal to the Supreme Court from this judgement.

the case of cession of territory, title to which might have been acquired by India through adverse possession. Administration of the territory by India was purely accidental.[89]

III Implementation of an international Arbitration Award settling a boundary dispute of India.

In *Maganbhai* v. *Union of India*,[90] the Supreme Court was called upon to decide, if the implementation of the Award of 19th February 1968 of the Indo-Pakistan Western Boundary Case Tribunal[91], involved the cession of India territory in the areas of Rann of Kutch requiring legislative action under article 368 of the Constitution.

Hidayatullah C. J. delivering the judgement of the court[92] pointed out that the case concerned a boundary dispute and if for the adjustment of boundaries a constitutional amendment was required-questions which had not come up for decision in the two *Berubari* Cases. He observed that an agreement to refer the dispute regarding boundary involves the ascertainment and representation on the surface of the earth a boundary line dividing to neighbouring countries and the very fact of referring such a dispute implies that the executive may do such as are necessary for permanently fixing the boundary. A settlement of the boundary dispute cannot, therefore, be held to be a cession of territory :[93] "Ordinarily an adjustment of a boundary which international

89. Hidayatullah C. J. in *Maganbhai Ishwarbhai Patel* v. *Union of India*, A. I. R. 1969 S. C. 783, drew distinction between the two Berubari cases in the following words :

"The First *Berubari* Case dealt with transfer of territory which was *de facto* and *de jure* Indian territory and therefore as the extent of Indian territories as defined in Article I read with the First Schedule was reduced a constitutional amendment was held necessary. The Second Case concerned territory which was *de facto* under the administration by India but being *de jure* that of Pakistan, transfer of that territory which was not a part of Indian territory was held not to require a constitutional amendment". (*Ibid*, p. 798, paragraph 43)

90. A. I. R. 1969 S. C. 783 (The Delhi High Court decision is reported in A. I. R. 1969 Delhi 64. The case came up in appeal to the Supreme Court from that decision.)

91. *Indo-Pakistan Western Boundary Case Tribunal Award, 19 February, 1968* (Government of India Publication).

92. Hidayatullah C. J. delivered the opinion on behalf of himself and Ramaswami, Mitter and Grover J. J. Shah J gave a concurring but separate opinion

93. See T. S. Rama Rao, note 82 *supra*, p. 257, for the criticism that boundary settlement can also involve cession of territory. (See also the following pages of his article for other criticisms of the judgement). See S. K Agrawala, *Annual Survey, 1969*, pp. 469-472 for certain criticisms of the judgement, and *Annual Survey 1965*, 120-121 for the background of the case.

law regards as valid between two nations, should be recognised by the courts and the implementation thereof can always be with the Excutive unless a clear case of cession is involved when parliamentary intercession can be expected and should be had. This has been the custom of nations whose constitutions are not sufficiently elaborate on this subject."[94]

On an examination of the facts and evidence he arrived at the conclusion that there was a genuine dispute regarding boundary, and the award of the Tribunal being a decision on a disputed boundary, does not attract a constitutional amendment. "If no constitutional amendment is required the power of the Ezecutive which extends to matters with respect to which parliament has power to make laws, can be exercised to correct boundaries now that they have been settled. *The decision to implement the Award by exchange of letters, treating the Award as an operative treaty after the boundary has been marked in this area, is within the competence of the Executive wing of Government and no constitutional amendment is necessary.*"[95] (Emphasis added)

Hidayatullah C. J. relied on article 73 (1), the legislative entries and the decision in *Ram Jawaya's case*[96] in support of the extent of the power of the executive with relation to treaties,[97] but did not enter into any detailed examination of scope of article 73 (1)[98]; whereas in the

94. A. I. R. 1969 S. C 783, at pp. 798-799.
Hidayatullah C. J. extensively examined the U. S., French and British law and practice in this regard and summarised the position thus, "...the United States of America and the French Constitutions have a clear guidance on the subject. In England, as no written constitution exists, difference is made between treaties of peace when the Crown acts without obtaining the approval of parliament and cession in peace time when such approval must be had. But even so a distinction is made in the case of British possessions abroad and the United Kingdom. Again a difference is made in cases involving minor changes where boundaries have to be ascertained and adjusted. In British India advantage was taken of section 113 of the Evidence Act in cases of cessions to Native States, Prince or Ruler. That section is now obsolete..." (at p. 794).

95. *Ibid.*, at p. 801.

96. A. I. R. 1955 S. C. 549.

97. A. I. R. 1969 S. C. 783 at pp. 795 and 796.

98 See, C. G. Raghavan, note 71 *supra*, pp. 226-227. He pleads for an enabling legislation under article 253 defining the scope and the extent of the treaty-making power of the Union Executive. Amongst other arguments he submits that in situations where the treaty power of the Union executive touches a subject in the State list or the Concurrent list (e. g. fishing or narcotic drugs), a treaty cannot be made by the Union Executive except by compliance with the *proviso* to article 73(1)(a) of the Constitution.

concurring judgement Shah J., after citing with approval the Privy Council decision in *Attorney General for Canada* v. *A. G. for Ontario*[99], observed.

> By article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws.... The Executive is qua the state competent to represent the state in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the state. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List 1 of the Seventh Schedule. *But making of law under that authority is necessary when treaty or agreement operates to restrict any right.* If the rights of citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty[100]. (Emphasis supplied).

Commenting on the relationship between article 73 and 253, Shah J, also observed that Article 253 does not mean that the power to made treaty or implement treaty with a foreign state can only be exercised under authority of law. Article 353 deals with legislative power, thereby power is conferred upon the Parliament which it may not otherwise possess viz. treaty over a matter in the State list. But it does not seek to circumscribe the extent of the power conferred by Article 73.

Since the Court arrived at the conclusion that no cession of Indian territory was involved in this case, no question of the infringement of the fundamental rights of citizens (viz. right to move freely throughout the territory of India under article 19 (1) (d), and the right to reside and settle in any part of the territory of India under article 19 (1) (e) which, it was contended, were violated) could arise.

The judgements of Hidayatullah C. J.[101] and Shah J.[102] also affirm that the Indian courts cannot question the validity of an international arbitral award since the power of the executive in India to enter into a covenant that the decision of the tribunal shall be binding on both the Governments, cannot be challenged. The Award of the Tribunal has, therefore, to be implemented as an international obligation. The

99. 1937 A C 326, at p. 347.
100. A. I. R. 1969 S. C. 783, at pp. 806-807.
101. *Ibid.* pp. 790-791, 800, 801.
102. *Ibid.* pp. 807-808.

only question that the courts can decide is as to the steps to be taken under the Indian Constitution to implement the Award.

Hidayatullah C. J. has also observed, "...generally an award is not accepted when the terms of submission are departed from or there are fatal omissions, contradictions or obscurities or the arbitrators substantially exceed their jurisdiction."[103]

It is submitted that the approach of the court in going through all the evidence *de novo* in order to establish if it were a case of cession of Indian territory or merely that of boundary adjustment, did leave the possibility open for it to arrive at the conclusion that it was a case of cession. Any such finding by the Court would necessarily have implied that the Kutch Tribunal had departed from the terms of submission or had substantially exceeded its jurisdiction.[104] Such a situation can only place the Executive branch of the government in an extremely embarrassing situation. The passing of a constitutional amendment through the parliament would depend upon the relative strength of the ruling party at any particular time,[105] and the non-implementation of the Award could vitally shake the credibility of the Executive and the country to honour the engagements, in the international sphere. Besides, there could also be the possibility of international arbitrators being reluctant to accept the assignment on behalf of India. It is sometimes suggested that the solution to it might have been for the courts to have held either that transfer of territory howsoever affected is an Act of State, the legality of which cannot be questioned by the municipal courts, or to rely completely on the executive certificate on the subject.[106] But probably the Court cannot adopt

103. *Ibid.* p. 791.
104. It may be noted that the Agreement between India and Pakistan of 30 June, 1965 provided in article 3 for having recourse to the Tribunal "for the determination of the border in the light of their respective claims and evidence produced before it."
See also S. K. Agrawala, India's Contribution to the Development of International Law..., note 4 *supra*, p. 89 wherein it has been observed that there was virtually no evidence with the court for holding against the petitioners at least with respect to the two inlets on either side of Tharparkar.
105. T. S. Rama Rao, note 70 *supra*, p. 3.
106. It may be noticed that in *N. Masthan Sahib* v. *Chief Commissioner, Pondicherry*, AIR 1962 S. C. 797, the Supreme Court had held that the answer of the government in reply to a specific and formal enquiry by the court that it did not consider a particular area to have been acquired by the Government of India and therefore not a part of the territory of India, was binding on the court. Reliance was placed by the court on the Judgement of Atkin L. J. in *Fgernes, 1927* p. 311, and Halsbury, *Laws of England*, Vol. 7 (Third ed.). Support was also drawn from *Duff Development Company*

this line of approach.[107] In India in the face of the provisions of the Constitution and its own jurisprudence which it has developed over the years. In the alternative, the executive, in order to escape its possible embarrassment, would do well to insist upon the entering of a saving clause in its future treaties relating to the transfer of territory[108] or arbitration agreements that their implementation would be subject to the findings of municipal courts and the satisfaction of consequent constitutional requirements, if at all feasible. Perhaps, if the parliament amends article 3 once for all and provides for cession of territory therein[109] (an alternative suggested in the *First Berubari* case by Gajendragadkar J.) it would become possible for parliament to act through simple majority only, as and when necessitated by courts judgement.

Thus the judgement establishes the principle that an international award settling a boundary dispute of India can be implemented by the executive without any further legislative action, as an operative treaty.

IV. Implementation of Treaties violating private rights

In *Union of India* v. *Sudhansu*[110] the question arose if cession of a territory (Berubari Union No. 12) by India through treaty (Indo-Pakistan Agreement of September 10, 1958), would amount to compulsory acquisition of the property comprised in that territory by the Union of India and would, therefore, attract the provisions of article 31 (2) of the Constitution regarding compensation. The Calcutta High Court before which the petition was originally filed, through a single judge decision, had decided[111] in favour of the petitioners, holding that they were

v. *Govt. of Kelantan*, 1924 A. C. 797 and *Govt of the Ropublic of Spain* v. *Arantzazu Mendi*, 1939 A. C. 256. Sarkar J. even observed (at p. 806) that "any other view would create a chaos and we cannot be a party to it." The case has also been referred to by T. S. Rama Rao, note 82 *supra*, at p. 256, but he considers such a course to be inappropriate in the face of mandatory provisions of the Constitution incorporating the entire area of the State of Cutch, including the Rann, in the First Schedule. See also, C. G. Raghavan, *op. cit. supra*, pp. 239-241.

107. See A. K. Agrawala, note 104 *supra*, pp. 90-91.

108. See T. S. Rama Rao, note 70 *supra*, p. 4. But he does not consider this solution to be workable where territory has to be ceded as a result of an arbitral or judicial award, or of a peace treaty.

109. *Ibid.*

110. A. I. R. 1971 S. C. 1594. (It is also sometimes referred as the *Thired Berubari case.*)

111. *Sudhangsu Majumdar* v. *C. S. Jha*, A. I. R. 1967 Cal. 216. See also other High Court decisions on the making and implementation of treaties, viz. *Union of India* v. *Manmull Jain*, A. I. R. 1954 Calcutta 615; *Nirmal Bose* v. *Union of India*, A. I. R. 1959 Cal. 506; *Birm* v. *The Stte*, A. I. R. 1951 Raj. 127 *Nanka* v. *The State*, A. I. R. 1951 Raj. 153.

entitled to compensation in terms of article 31 (2) of the Constitution inasmuch as the operation of transfer involved deprivation of their right to property for which no provision was made in the Constitution (Ninth Amendment) Act, 1960.[112] On appeal, the Supreme Court[113] reversed the High Court decision, holding that though cession indisputably involved transference of sovereignty, there was no transference of ownership or right to possession in the properties of the inhabitants of the territory ceded to the ceding state itself, i e. the Union of India. Therefore, Article 31 (2) of the Constitution as read with Article 31 (2A)[114] was not attracted. The reasoning of Basu J. of the Calcutta High Court[115] that Article 31 (2A) would not cover the present case since so for all the cases which have been held to fall within its purview have been those in which there was exercise of the regulatory power of the state, did not find favour with the Supreme Court and it was summarily brushed aside.

The judgement of the Supreme Court, it is submitted, is based on too literal an interpretation of article 31 (2A) and does not seem to give full credence either to its own earlier jurisprudence on the subject or to the legislative history of clause (2A) which was introduced by the Constitution (Fourth Amendment) Act, 1955. The Supreme Court has earlier held in several cases[116] that transfer of A's land to B would be covered by Article 31 (2) provided there was a public purpose; whereas the introduction of clause (2A) was necessitated because the Supreme

112. The Constitution (Ninth Amendment) Act, 1960 was passed amending the First Schedule to the Constitution which defines the territory of India. This was necessitated because of the decision in the *First Berubari Case.*

113. The judgement of the court was delivered by Grover J. on behalf of himself, Sikri C. J, Shelat, Vaidialingam, and Ray JJ.

114. Article 31 (2A) lays down, "where a law does not provide for the transfer of the ownership or the right to possession of any property to the state or to a corporation owned or controlled by the state, it shall not be deemed to provide for the compulsory acquisition or requisition of property, notwithstanding that it deprives a person of his property."
Under Article 31 (2) compensation is payable only if there is acquisition or requisition of property for a public purpose, under the authority of law.

115. There are some other points too made on this aspect in the judgement of the Calcutta High Court (See A. I. R. 1967 Cal. 216 at p. 228), but no attempt was made by the Supreme Court to rebut these arguments, or to distinguish or explain away the cases cited in the judgement of Basu J. See also, V. S. Mani, The Berubari Cases from the perspective of International Law, 11 *I. J. I. L.*, p. 655 et seq. (1971)

116. *State of Bombay* v. *R. S. Nanji*, A. I. R. 1956 S. C. 294; *Sri Ram Narain* v. *State of Bombay*, A. I. R. 1959 S. C. 459; *K. K. Kochunni* v. *States of Madras and Kerala*, A. I. R. 1960 S. C. 1080.

Court had held[117] that even regulatory measures (not involving transfer of ownership) could amount to deprivation and, thus, could attract the application of compensation provisions under article 31 (2).

This judgement has also to be viewed in the context of the fact that neither the Indo-Pakistan treaty in question nor the Constitution (Ninth Amendment) Act had contemplated any provision for the protection of the property rights of the citizens, nor was any option for retaining the earlier nationality incorporated in the treaty—the minimum safeguards which the ceding states stipulate in treaties of cession in modern international practice.[118] Despite the detailed consideration of these issues in the judgement of the Calcutta High Court, the Supreme Court, in appeal, had nothing more to offer than sympathy for the hardship that might result to the inhabitants of the area due to the change of sovereignty on cession.

The Supreme Court might have been right in holding that no evidence was produced to support the inference that under the Pakistan laws the private rights of inhabitants in question will necessarily not be respected, but it is quite another thing to say that the possibility of their deprivation had not to be taken into account in the interpretation/application of a constitutional provision which could have at least secured them a solatium.

However, so far as the question of the relationship of international law with Indian municipal law is concerned, the fact that the Supreme Court went through the exercise of examining if article 31 (2) of the Constitution was attracted in this case, the judgement lends itself to the inference that treaties of cession entered into by India and a law seeking to give effect to cession must be able to stand the test of fundamental rights guaranteed to private persons. It is immaterial that the Supreme Court concluded in the case that no fundamental rights were violated.

The point is still moot, however, so far as rights other than right to property are concerned e. g. right to move freely throughout the territory of India or the right to reside and settle in any part of the territory of India. In case of a ceded territory, if a petitioner were to contend the violation of these rights, would the treaty become incapable of implementation, since the specific performance of these rights is not otherwise possible, or can monetary compensation be adequate recompense for the infringement of such fundamental rights ?

117. *Subodh Gopal's case*, A. I. R. 1954 S. C. 92; *Dwarkads's case*, A. I. R. 1954 S. C. 119.

118. See, Phillipson, *Tarmination of war and Treaties of Peace* p. 278 *et seq.* (cited in A. I. R. 1967 Cal. at p. 225). See also S. K. Agrawala, note 42 *supan*, pp. 165-166.

V. Treaties in violation of legislative enactment

In *Umeg Singh* v. *State of Bombay*[119] the Supreme Court applied the well-known principle that in case of a conflict between a treaty and legislative enactment, the court shall enforce the enactment The petitioners impugned the validity of the Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953, on the ground that it violated Clause 5 of the letters of guarantee entered into between the Rulers of certain native states and the Government of India, guaranteeing their jagirdari rights. The Supreme Court held that a legislature having plenary powers of legislation was bound only by the limitations imposed by the Constitution itself and not by any obligation undertaken by the Government[120].

Conclusion

The above discussion would indicate that there has really not been an abundant body of case law before the Supreme Court dealing with the relationship of international law to Indian municipal law. However, the judgements in the few cases which have come up have undoubtedly been trend-setting. The following conclusions[121] may be safely drawn from the above discussion :

119. A. I. R. 1955 S. C. 540.

120. *Ibid.* at p. 547. See S. K. Agrawala, *International Law Inpiun Courts and Legislature* (1965), pp. 53-56, for a critique of the decision; T. S. Rama Rao, op. cit., 1957 *I. Y. I. A.*, pp 39-40.

121 The possible explanation for this approach of the judges has not been attempted in this paper. However, Mr. Justice Mirza Hameedullah Beg, a Judge of the Supreme Court has mentionad two difficulties which courts in this country face in considering the applicability of rules of international law, viz. (a) difficulty of obtaining books and law reports, and (b) lawyers are not familiar with international law principles and often do not give much assistance to the courts as they should. He, however, mentions that this difficulty is easily overcome at the Supreme Court. IILA Nainital Seminar 1969 (1972 Allahabad), pp. 38 39] [Perhaps the Supreme Court does not experience the difficulty of books and reports, it may safely be presumed; though the Judge has made no observation on the point.)
The Judge has discretely avoided to mention the difficulties which the Supreme Court experiences on the subject. Perhaps, the approach which the Supreme Court judges have, at times, adopted, could be explained by the fact of their previous experience and training. The lacunae could probably be overcome through the suggestion this writer made a decade ago, for the constitution of a special *ad hoc* bench of the Supreme Court, consisting of judges who by training, experience and outlook may be better pronouncements on international law issues. "A provision could be made in the Constitution for the appointment as *ad hoc* judges of Indian jurists well versed in international law to sit on such a bench-members of the bar, international civil servants or law teachers." [See S. K. Agrawala, *International Law-Indian Courts and Ligislature* (1965), pp. 272—273.]

1. In the interpretation of municipal statutes, wherein the international law principles have been invoked frequently, the majority of the Supreme Court judges have often not put an interpretation on the statute which might permit the application of the international law principles, and it could not positively be said in such cases that the language of the statute permitted of one interpretation only.

2. In the interpretation of a statute giving effect to an international convention, the majority of the bench has surprisingly, at least one time, put a literal construction on the statute in full realisation and acknowledgement of the consequence that such a construction would defeat the object and purpose of the convention

3. The Supreme Court has generally thought it safer to take shelter behind municipal statutes etc. for its decisions, and has often evaded the expression of an opinion when a principle of international law is invoked along side the municipal statutes/constitutional documents.

4. Even when a principle of customary international law is applied, there is hardly ever a mention by the Court that it is being applied as part of the law of the land (under the Blackstonian doctrine). The legal authority or technique adopted by the court in the application of the principle is thus not always explicit.

5. The doctrine of Act of State has been resurrected by the Supreme Court in cases following *Virendra Singh's case*, making the application of customary international law principles impossible in situations covered by it.

6. Reliance is generally placed by the Supreme Court on British decisions and state practice rather than on a study of the diverse legal systems.

Perhaps a theory needs to be worked out by the Supreme Court that the only common law principle it has inherited under article 272 of the Constitution is the rule that the well recognised principles of international law form part of the law of the land; and therefore these principles can be ascertained only through a study of the practice of several states (and not that of Great Britain alone).

7. At times the interpretation of the constitutional provisions having an international law relevance has not been far-sighted enough e. g. regarding cession of territory, which may adequately take care of the international commitments of the country in the future and provide for the proper protection of the rights of its people.

However, judges broadly, the conclusion is inecapable that the prophecy of Professor Alexandrowicz has been substantially borne out through the jurisprudence of the highest court of the country during the past twenty five years.

APPLICATION ON SOCIAL SECURITY LEGISLATION —SUPREME COURT'S APPROACH

S. D. PUNEKAR*, C. M. GEORGE*

Concept of Social Security

The term "Social Security", in the sense that we use to-day, is of a recent origin. For the first time, it was used in 1935, when the U. S. Social Security Act was enacted. Its mention in the Atlantic Charter of 1941 made it popular, voicing one of the deepest and most widespread aspirations of the mankind. Though the term is new, the concept or the idea of social security is old, because man or woman had to face from times immemorial various contigencies or risks, such as employment injury, occupational disease, invalidity or disablement, ill-health or sickness, maternity or childbirth, old age, burial, widowhood, orphanhood and unemployment. During these contigencies, the man or the woman either could not work or could not obtain work and hence needed income security and in most cases medical care. For this purpose, schemes of social protection were evolved at various levels—individual, caste and community, till we came to the modern concept of comprehensive social security. Social security is thus a new name for an old aspiration[1].

The meaning of the term 'Social Security' and its application vary from country to country, just the same way it varied from one period of history to another. The differences are due to political ideologies, commitment to the concepts, priority to social security in national action plans, and the availability of resources, both money and organisation. The socialist countries, deeply committed to the goal to provide protection to every citizen from cradle to grave or from womb to tomb, top the list of countries with well-developed social security schemes. The developed countries with capitalistic economic order too have social security schemes, some of which comparable with those in socialistic countries, because of the inevitable acute problems that demand solutions. The countries in the third world vary very widely in respect of the acceptance of the concepts as well as their application. Even when the concepts are part of their avowed goals, the inadequacy in resources and perhaps lack of political well constrain these countries to translate their concepts into reality.

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1. I. L. O. : *Social Security—A Worker's Education Manual* (1958), Ch. I

Sir William Beveridge defines social security as ".....securing an income to take the place of earninings when they are interrupted by unemployment, sickness, or accident, to provide for retirement through age, to provide against loss of support by the death of another person, and to meet exceptional expenditure such as those connected with birth, death, and marriage. Primarily, social security means security of income upto a minimum, but the provision for income should be associated with treatment designed to the interruption of earnings to an end as soon as possible."[2] This definition foresees remedial plans to remove or make up the interruption in earnings in addition to immediate relief measures during continuance of the risk effects. Another definition but with universal acceptance, say that social security is the security that society furnishes through appropriate organisation against certain risks to which members are exposed.[3] This definition admits the existence of risks and the responsibility of the society to create appropriate organisations and schemes in order to provide for security for its members.

Social Security in India

In India, the joint family and the caste system provided in a crude form some protection of social assistance to the needy and the destitutes. However, the growth of individualism under the Western influence disintegreated the joint family and further, the secular concept discouraged social assistance through caste organisations. Modern industrialisation highlighted the enconomic problems of the industrial worker, and our social security legislation, beginning with the Workman's Compensation Act, 1923, was enacted for the industrial workers. With the advent of freedom, social security was considered as an important field of action by a Welfare State.

The Constitution of India (1949), taking inspiration from the U. N. Universal Declaration of Human Rights (1948), stressed *inter alia* : right to life, liberty and security; social security; right to work, to free choice of employment, to equal pay for equal work and to just and favourable remuneration; right to a standard of living adequate for the health and well-being of the citizen and his family; and right to proper education. The "Directive Principles of the State policy" in the Constitution reaffirm that the State has to assure its citizens, men and women

2. William Beveridge, *Social Insurance and allied Services*, London HMSO, 1942, reprinted 1946. P. 120.
3. International Labour Office, *Approach to Social Security, An international Survey*, Geneva, P. 80.

equally, the right to an adequate means of livelihood, equal pay for equal work, protection for the health and strength or workers and for the tender age of the children and protection of children and youth against exploitation. The directive principles further assure right to work, to education, to public assistance in certain cases, to just and humane conditions of work and maternity relief, and to a living wage.

Social Security Legislation

The usual way to translate such assurances into action is through legislation. Hence social security measures for industrial workers in India are largely legislation based.[4] The laws originally covered only industrial wage-earners and were gradually enlarged to other employees as well.[5] However in India, social security laws are still confined to organised industrial sector and almost all of these have been enacted after Independence. Important social security laws in India are :

1. The Workmen's Compensation Act, 1923.
2. The General Provident Fund Act, 1925.
3. The Employees' State Insurance Act, 1948.
4. The Coal Mines Provident Funds and Bonus Schemes Act, 1948.
5. The Employees Provident Funds, 1952 (with Employees' Family Pension Scheme, 1971).
6. The Seamen's Provident Fund Act, 1966.
7. The Maternity Benefit Act, 1961.
8. The Plantation Labour Act, 1951.
9. The Gratuity Act, 1972.
10. Few sections in Industrial Disputes Act, relating to lay-off and retrenchment compensation (chapter V-A inserted in 1953).

The State Governments have their own maternity benefit legislation beginning with the then Bombay Province in 1929. Similarly, the State of Assam has its own provident fund legislation for plantation workers in the Assam State. The different Welfare Boards created both by the Central Government, such as Coal Mines Welfare Board, etc. and those created by the State Governments for specific industries seperately, or the general labour welfare boards also, can be seen and understood as some forms of social security agencies. These welfare boards are created under specific legislation. Hospitalisation, free treatment for specific diseases that last longer demanding constant medical attention, and rehabilitation of the victims to a certain extent, are some of

4. V. K. R. Menon, *ILO and Labour Legislation in India*, Geneva, P. 3.
5. Employees Federation of India, *Social Security in India—A Review*, Bombay 1970, P. 3.

the benefits available to the labour. Few State Governments, particularly those of the U. P., Kerala, Tamil Nadu, West Bengal, the Punjab, Andhra Pradesh and Rajasthan, have introduced some sort of old age pension in the form of social assistance. Cash benefits, ranging from Rs. 12 to Rs. 25 per month, are available to the destitute persons above the age of sixty.

Role of the Supreme Court

The functions of the Supreme Court in the field of social security are to decide the constitutional validity; to interpret the different provisions in legislation, when disputed; to give general guidelines to the States for suitable legislative attempts; and to play a supervisory role. In the following pages, judicial interpretations, mainly by the Supreme Court, in respect of the important Social Security Laws in India have been discussed in some detail. These laws include the Workmen's Compensation Act, 1923; the Employees' State Insurance Act, 1948. The Employees' Provident Funds Act, 1952; the Industrial Disputes Act 1947, and the Payment of Gratuity Act, 1972.

The Workmen's Compensation Act, 1923

Judicial consideration of this Act has been too frequent during the last quarter century. Based on the British legislation on the subject, the judiciary in India has been guided by the British judicial interpretation in the matter. Under the common law, the master is under a duty to use reasonable care to ensure that his employees enjoy safe working conditions [6] The obligation is three fold, the provision of a competent staff of men, of adequate material, and a proper system of effective supervision.[7] One exception to this rule is the doctrine of *volenti non fit injuria*, i. e. the employee voluntarily assumed risk[8]. The negligence on the part of the employee reduces the damages awarded to him[9]. The employer can get away from this common law liability by insuring the employee[10].

The Workmen's Compensation Act, makes the employer liable to pay compensation to an injured workman if the 'injury is the result of an accident which has arisen out of and in the course of employment'.[11]. On the face of it, the section appears to be clear and lucid enough, and as not likely to give rise to any conflicting interpretations whatsoever,

6. *Lochgelly Leon anp Coal Co. Ltd.*, v. *V. M. Mullan.* 1934, A. C.—1.
7. *Silson and Clyde Coal Co. Ltd.*, v. *English*, (1973) 3 AII. ER, 346.
8. *Bowater* v. *Rowley Regi Corporation* (1944) AII E. R. 465.
9. *Stavely Iran and Steel Co. Ltd.*, v. *Joner* (1956) AII, E. R. 403.
10. Ibid.
11. Sec. 3 (1) W. C. Act. 1923.

However, in three important cases considered by the Supreme Court. the main point that had to be settled by the learned judges was : the real meaning of the words 'arising out of and in the course of employment'[12] and, consequently, the application of the Act in special circumstances. Under the common law, employment of a person does not commence unless he has reached the place of employment and does not continue when he has left the place, the journey to and from the place of work being excluded[13]. But the learned judges have introduced a theory of notional extension by which the employment/employer's premises would include an area which the workmen passes and repasses in going to and leaving the actual place of work.[14] This extension is both in time and place and should be reasonable. The Court has not set down any limits whereby an application of this concept would be considered reasonable. This theory of notional extension of employment as enunciated by the court would seem to cover an employee from the moment he leaves his dwelling place with no limitations. But that is not true It must be remembered that the theory was developed in the context of a specific situation and cannot be made applicable in all situations.

Thus, if a driver regularly goes home from work in a bus belonging to the employer and one day the bus meets with an accident injuring the home-going driver, it would be seen as taking place in the course of employment.[15] If a workman is on a public road, public place or public transport and he is there not in the course of employment, the notional extension theory is inapplicable, unless the very nature of employment makes it necessary for him to be there[16]. A contractual duty or obligation on the part of an employee to use a particular mode of transport would extend the area of employment, even if it were a public transport[17]. The BEST drivers' right to travel by the BEST buses free of charge to and from the place of work, subject to the conditions laid down in the standing orders, was interpreted as being tantamount to an obligation imposed on them in the interest of punctuality and job efficiency[18].

12. *Saurashtra Salt Mfg. Co.* v. *Bai Valk Raja and Others* 1958 II LLJ, P. 249.
13. Ibid.
14. Ibid.
15. *General Manager B. E. S. T. undertaking Bombay* v. *Mrs. Agnes*, AIR 1964 Sl. 194.
16. Ibid.
17. Ibid.
18. Ibid.

The theory of notional extension of employment was further reviewed in a case in which a seamen was found missing from aboard of a ship while it was sailing in the Persian Gulf. It was concluded that he had fallen from overboard to his death. As no concrete evidence was found to support this assumption, no compensation was granted to his dependants. Even if he had died and evidence had been available, the particular circumstances called for a further clarification of the theory of notional extension.

The expression 'arising out of employment' is not confined to the mere nature of employment. It applies to employment as such, to its nature, its conditions and its obligations.[19] If by reasons of any of these factors, the workman is brought within the zone of special danger, the injury would be one which arises 'out of employment'.

'In the course of employment' was taken to mean 'in the course of work' which the workman is employed to do or a work incidental to it. An accident arising out of employment means that during the course of employment an injury has resulted from some risk incidental to the duties of the service, which unless the workmen were engaged in the duty owing to the master, it is reasonable to believe he would not otherwise have suffered.[20] In other words, there must be a causal relationship between the employment and the accident. Lest anyone eager to promote the cause of social justice be tempted to draw unwarranted inferences, the judges cautioned that any inference must be deductable from the available facts and must not be mere conjectures.[21]

The Employees State Insurance Act, 1948

The Act, particularly sec. 1 (3), was challenged in the Supreme Court on the ground of excessive delegation. The Supreme Court distinguished between delegated legislation and conditional legislation and treated E. S. I. Act as a conditional legislation.[22] Section 1 (3) purports to authorise the central government to establish a corporation for the administration of the scheme of employees state insurance by a notification. At what point of time this notification should be issued and in respect of which factories or geographical area etc. are the questions which are left to the discretion of the Central Government. This is precisely what is done in conditioned legislation.[23]

19. *Mackinnon Mackenzie and Co. Pvt. Ltd.*, v. *Ibrahim Mohamed Issack*, 1970 II LLJ. p. 16.
20. Ibid.
21. Ibid.
22. *Basant Kumar Sarkar* v. *Eagle Rolling Mills*, 1964 II LLJ, P. 105.
23. Ibid.

The discretion conferred by sec. 1 (3) is guided by legislative provisions of the Act. According to the learned judges, a scheme of the kind, though very beneficient, could not be introduced in the whole country all at once. Such measures which need careful experimentation have some time to be adopted by stages and in different phases, and so, inevitably the question of extending the statutory benefits contemplated under the Act have to be left to the discretion of the appropriate Government.[24] The legislature evolves a scheme of socio-economic welfare, makes elaborate provisions in respect of it, and leaves it to the Government concerned to decide when, how and under what manner the scheme should be introduced, and that cannot amount to excessive delegation.[25] The E. S. I. Act applies in the first instance to all factories fulfilling the number requirements other than seasonal factories and may be extended to any other establishments, industrial, commercial, agricultural or otherwise.[26]

The Supreme Court dealt with the need to give liberal interpretation to the different provisions of social security legislation intended to confer certain benefits on labour while dealing with an *E. S. I* case. It directed the courts to give liberal and beneficient construction.[27] However, it cautioned the courts that the liberal construction should flow from the words used in the sections.[28] If the words in the sections are capable of two constructions, one of which is shown patently to assist the achievement of the objective of the Act, Court would be justified in prefering that construction to the other which may not be able to further the object of the legislation. On the other hand, if the words used in sections are reasonably capable of only one construction, the doctrine of liberal construction can be of no assistance.[29]

Doubts about the premises constituting a factory were raised too often in the initial days of the Act's application. The premises may be a building, or an open land or both. Inside the compound wall, there may be two are more premises, the premises used in connection with manufacturing process may constitute a factory.[30] When in a part of the premises occupied by a company, two process were carried on with the aid of power and on the premises more than twenty were working and no part of the premises is used for the purpose unconnected with

24. Ibid.
25. Ibid.
26. Ibid.
27. *Buckingham and Carnatic Co. Ltd.*, v. *Venkitaih* 1963 II LLJ, P. 638.
28. Ibid.
29. Ibid.
30. *N. E. L. P. Co.* v. *E. S. I. C.*, A. I. R. 1967 S. C., 1364.

manufacturing process, the premises would constitute a factory.[31] A clerk doing a non-manual work can be an employee and thus come under the scheme, if he is employed in connection with the work of a factory.[32]

Among the different benefits provided for the workers under the Act, are sickness and disablement benefits. Both presume absence from work and are expressed and given in terms of cash payable A qualifying condition for sickness benefit is two days waiting period. At the same time, there is no provision for employees entitling leave facilities for sickness either from the employer or from E. S. I. Corporation if the sickness period did not exceed two days Payment for sick leave is at the rate of 7½ of wages.[33] On a dispute on the subject, the Supreme Court has held that the provisions of E. S. I. Act could not be considered as a bar to the demands of the concerned workmen for sick leave with full wage.[34] The justification for such a liberal consideration by the Supreme Court is due to the fact that the E. S. I. scheme does not cover all the contingencies of sickness and that when such benefits were being given before the application of the Act, it could not be withdrawn on the grounds that the Act has become applicable.[35] This has been reiterated by the Supreme Court and expressed very clearly, when it observed that it was not the intention of the legislature to substitute the benefits obtainable under the Act for workmen's right to sick leave with full wage which they were enjoying earlier.[36]

In determining the question whether '*inam*' paid by a company to its empoyees would be covered by the definition of wages, the Supreme Court has ruled out that the features of the scheme for payment of '*inam*' show that it did not become a term of the contract of employment, and it could be withdrawn at any time. '*Inam*' does not acquire the nature of wages[37]. Since the scheme expressly excluded it from the contract of employment, it could not be considered as 'wages' and, hence, contributions would not be payable on it[38].

E. S. I. Act provides protection to members of scheme from being subjected to punitive action during the period of illness, maternity and disablement and consequent enjoyment of benefits[39]. Termination of

31. Ibid.
32. Ibid.
33. E. S. I. Act, 1948, Sec. 49.
34. *Technological Institute of Textile* v. *Its workmen* 1965 II LLJ, P. 149.
35. *Hindustan Times Ltd.*, v. *Their Workmen*, AIR, 1963, S. C., 1332.
36. Ibid.
37. *Braith Wait & Co. India Ltd.*, v. *E. S. I. C.*, 1968 II LLJ, P. 550.
38. Ibid.
39. Section 73 of EST Act, 1948.

the service of an employee after the duration for which benefit has been due or received does not fall under the prohibition on employers and as a result the employees cannot invoke the protective provision to cover a later period[40]. Prohibition to the employers is only to the extent of any positive action on their part in termination of service[41]. Automatic operation of the provisions of the relevant standing orders does not amount to and positive action on the part of the employers[42]. The employers not bound to accept a certificat, which is accepted by the E. S. I. corporation while granting the benefits to members, while dealing with the employees cases under the valid standing orders[43].

Under the common law, an inference that an employee has abandoned or relinquished service is not easily drawn without sufficient evidence that the employee intended to abandon. But where standing orders apply, the doctrine of common law and equity do not [44].

The Employees' Provident Funds Act, 1952

The Act is a beneficient measure enacted for the purpose of institution of provident fund for employees in factories and other establishments. The provisions have been made for the better future of industrial workers. The Act confers[45] on the Central Government the power to extend the application to new establishments by adding them to the schedule. This is valid and constitutional[46]. It does not delegate uncontrolled legislative powers to the executive[47]. It cannot be attached on the ground of discrimination because it lays down a rule which is applicable to all factories or establishments similary placed[48]. It also makes a reasonable classification without making any discrimination between factories placed in the same class or group[49]. The power to exempt certain units[50] does not confer uncanalised power on the appropriate Government and is not invalid on the ground of excessive delegation.[51]

The word "factory" in section 1(3) (a) is comprehensive so as to cover, not only factories exclusively engaged in scheduled industry, but

40. Supra note 25.
41. Ibid.
42. Ibid.
43. Ibid.
44. Ibid.
45. Sec. 1 (3) (b) of E. P. F. Act, 1952.
46. *Mohamedali and Others* v. *Union of India* 1963 I LLJ, p. 536.
47. Ibid.
48. *Dethi Cloth Mills* v. *P F Commissioner* 1961 II LLJ, P. 444.
49. Ibid.
50. Sec. 17 of E. P. F. Act, 1952.
51. Supra note 20.

also composite factories in industries some of which fall within the scheduled and some do not. The test for determining whether or not the Act applies to such a composite factory is whether its activity falls within the schedule in its primary and dominent activity or only its incidental or feeder activity. In the former case, the whole factory is within the purview of the Act, and in the latter case not[52]. The learned judges of the Supreme Court further clarified that the requirements as to the number of persons employed applies to 'factory' and not to 'industry' and so if the composite factory employs the prescribed number of persons, the Act is applicable to it, even though the unit engaged in the scheduled industry may be employing less than the prescribed number [53]. But if the several industries which are being run on the premises are independent and separate industries, the question as to which is dominent and which is feeder does not at all arise. In such a case, if any one of the industries falls within schedule I, the provisions of the Act will apply [54]. Similarly, the requirement as to the minimum number of employees applies to the establishment as a whole and not to each separate activity carried on the premises[55].

Where the E. P. F. Act does not apply and if a dispute arises for the introduction of a provident fund scheme, there are certain guide lines to be followed by the tribunals in awarding any provident fund scheme. The capacity of the concern to bear the burden of the scheme proposed to be introduced is an essential condition and an award made without a finding in that behalf is bad in law[56]. The tribunals must also take into account the practice prevailing in other comparable concerns in the region[57].Similarly, an award introducing a provident fund scheme on the lines laid down in the E.P.F. Act and imposing reasonable burden on the employer must be upheld, unless the employer can show that it is beyond his financial capacity[58]. At the same time, it is not proper to frame a provident fund scheme imposing an employer a burden of higher contribution than that fixed under the Employees Provident Funds Act, merely because legislation raising the rate of such contribution might be under consideration.[59]

The Act exempts factories and establishments from its application, during the infancy period, for three years in some cases and five years

52. *Associated Industries (Pvt) Ltd.* v *R P F Commissioner* 1968 II LLJ, p. 652
53. Ibid.
54. Ibid.
55. Ibid.
56. *Air Lines Hotel (Pvt.) Ltd.*, v. *Their Workmen* 1964 I LLJ, P. 415.
57. Ibid.
58. *Novex Dry Cleaners, New Delhi* v. *Its Workmen* 1962 I LLJ, P. 271.
59. *French Motor Car Co. Ltd.*, v. *Their workmen* 1962 II LLJ, P. 744.

in some others. Doubts about the reckoning the commencement is settled by the Supreme Court when it observed that the period of infancy should be calculated from the first establishment of the factory and not from the moment when the employees' figure of twenty or more is first reached[60]

The workmen's contribution to the provident fund must come out of their wages in the statutory scheme. A scheme of provident fund is bad in law, if it imposes the employer the obligation to pay into the fund the workmen's share without giving him the correlative right to deduct that amount from their wages[61]. In calculating the 'basic wages' of the employees for the purpose of determining the quantum of contribution by the employer to the provident fund, bonus of every kind, including production bonus, has to be excluded[62]. 'Basic Wages' as defined in section 2 (b) includes monthly salary as well as daily wages. On Principle, their is no difference at all between the two. The benefit of the Act concerns all employees equally, whether they are paid on monthly salary basis or daily wage basis[63]. When the scheme which is in force in a concern provides for two bases, one called 'quota' and the other called 'norm', the test for determining which is the real base for the purpose of provident funds Act is : which is the base up to which the workmen are bound to produce[64]. If no workman can stop work at the 'quota' and every workman is bound to give production upto the 'norm', on pain being liable for dismissal if he does not, the real base is the 'norm'. In such a case, the payment made for the production above the 'norm' is production bonus, which must be excluded in calculating basic wages, but payment made for production upto 'norm' is 'basic wages[65].

The Payment of Gratuity Act, 1972

Gratuity as a retirement benefit was in vogue by employers' voluntary introduction, as a result of collective bargaining agreements, by the implementation of wage board recommendations in some cases and by industrial adjudication. The only exception to this, till the payment of gratuity under the Act of 1972 was the case of working journalists, to whom gratuity benefit was conferred by a statute[66]. In the absence of

60. *State of Punjab* v. *Sarpal*, 1970 II LLJ, P. 64.
61. *Orrisa Cement Ltd.*, v. *The Union of India*, 1962 I LLJ, P. 400.
62. *Bridge and Roof Co. (India) Ltd.*, v. *Union of Iddia*, 1962 II LLJ, P. 412.
63. *Supra* note 44.
64. *Jay Engineering Works Ltd.*, v. *Union of India*, 1963 II LLJ, P. 72.
65. *Ibid.*
66. Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955. Sec. 5 (a) (i) and (ii).

any statute, the Supreme Court's guide lines governed the tribunals in adjudicating disputes on gratuity.

Gratuity, graciously given to workers as a retirement benefit for long and faithful service, has come to be regard as a legitimate claim which the workmen could make and in proper case would give rise to industrial disputes[67]. When the financial resources of a company are strong and stable and its future prospects are bright, so that it is able to bear the burden of gratuity scheme, it must be held that the workman's case for introduction of gratuity for their benefit is made out.[68] The Supreme Court directed the Tribunals that they may frame a gratuity scheme, provided they take care to see that the scheme framed under an award is not unduly favourable to the workmen and does not place an undue strain on the employer's financial resources[69].

In dealing with the question of emp'oyers' financial capacity to bear the burden of the proposed gratuity scheme, the Supreme Court has observed that the tribunals must always bear it in mind that a gratuity scheme is a long term one and the magnitude of its theoretical impact is not as much as the extent of the actual impact of the scheme.[70] The financial burden of gratuity scheme must be calculated on the practical basis so that only three to four per cent of the employees retire every year and not theoratically on the actuarial basis[71]. In view of the fact that gratuity is a long term provision with its burden distributed over a number of years, the scheme of gratuity can be framed even when the present position of the concern is not very sound, if there is reason to hold that it will gradually get into a flourishing condition.[72] The factors to be taken into account while framing a gratuity scheme are : (1) financial condition of the employer, (2) his profit making capacity (3) the profit earned by him in the past, (4) the extent of his reserves (5) the possibility of replenishing him and (6) a prior charge for a fair return invested on capital[73]. Therefore, it cannot be suggested that in framing the scheme, the basis should be employers capacity to set apart immediately the whole amount required for building up the gratuity fund[74]. Otherwise the gratuity schemes would be framed very rarely, if at all.

67. *Indian Hume Pipe Co Ltd*, v. *Its Workmen*, 1959 II LLJ, p. 830.
68 *Ibid.*
69. *Ibid.*
70. *Wenger & Co*, v. *Their Workmen* 1963 II LLJ. p. 403.
71. *Sone Valley Port land Cement Co.*, v. *Their Workmen*, 162 I LLJ, p. 218.
72. *Delhi Cloth Mills Chemical Works* v. *Their Workmen*, 1962 I LLJ. p. 388.
73. *Bharatkhand Textile Mfg. Co. Ltd.*, v. *Textile Labour Association*, 1960 II LLJ, P. 21.
74. *Ibid.*

For these reasons, it has been held that in fixing the gratuity schemes, the Tribunals must consider the financial capacity of the employer on the basis of his ability to build-up the fund gradually in course of time year after year[75].

An earlier award rejecting the workmen's claim ceases to be of relevance and importance, if the financial position of the employer has considerably improved since the time of the award.[76] It is the financial position of the employer at the time of adjudication which is material when considering the introduction of a new scheme imposing financial burden on the employers.[77] Where there has been a material change in conditions since the time when the earlier award was made, a demand for its revision is not barred Tribunals are expected to decide the claim for introduction of a scheme, or revision of the one in existence under an earlier award on the merit of the case. The principle of *resjudicata* cannot apply to such cases.[78] The revision of a gratuity scheme, which is in force can be considered by the tribunal only when it has arrived at a definite finding about the employers' financial capacity to bear the additional burden.[79] Similarly, future prospects are a relevant consideration when determining the employers' capacity to bear the burden of gratuity scheme and they must ordinarily be judged on the basis of the figures of the last five years or so.[80] When considering the financial capacity of the employer the Tribunal must consider the overall financial position of the company as a whole, rather that of the branch affected by the dispute, because once the scheme is introduced in any one branch, the demand for its introduction in other branches cannot be resisted by the employer.[81] If the scheme of gratuity introduced by the Tribunal is reasonable and in accordance with the schemes introduced at the relevant period of time in other places in the country, the employer cannot object to its introduction in his concern merely on the ground that such scheme is not in force in similar other concerns in the region.[82] There can be no inflexible rule that a uniform rate of gratuity must be fixed to all concerns in the same industry.[83] Introduc-

75. *Ibid.*
76. *Gramophone Company Ltd.*, v. *Its Workmen* 1964 II LLJ, P. 131.
77. *Ibid.*
78. *Remington Rand India Ltd.*, v. *Its Workmen*, 1962 I LLJ, P. 287.
79. *Gardnie Hendeason Ltd.*, v. *Their Employees*, 1961 I LLJ, P. 641.
80. *Supra* note 74.
81. *Ibid.*
82. *Gujarat Engineering Co* v. *Ahamedabad Misc Industrial workers*, 1961 II LLJ, p. 660.
83. *Amritsat Royon and Silk Mills Pvt Ltd* v. *Their Workers* 1962 II LLJ, p. 224.

tion of a gratuity scheme in a concern when it is shortly going to be closed down is inappropriate.[84] Upon its closure, the whole burden of the scheme would fall at the same time, and in fact, though not in name, the scheme would operate as retrenchment compensation, thus giving two retrenchment compensations to the workmen[85].

'Gratuity' is a scheme of retirement benefit, being a reward for good, efficient and faithful service rendered for a considerable period. There would therefore be no justification for awarding gratuity when an employee voluntarily resigns and brings about a termination of his service after a short period of service.[86] Section 5(1)' (a) (iii) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, which provided for payment of gratuity for a working journalist on retirement after three years of service has been held to be unconstitutional and void as being unreasonable restriction on the right to carry on trade or business guaranteed under Article 19(1) (g) of the constitution [87] A minimum period of ten years' service is a reasonable qualifying condition to be eligible for gratuity scheme.[88] A gratuity scheme must contain provisions as to the minimum period of service required for entitling the workmen to gratuity which are reasonable and neither too liberal nor too harsh.[89] It is reasonable to fix the minimum period of five years when the termination of service is at the order of the employer, and ten years when it is voluntary by the workman himself.[90] Gratuity cannot be claimed by a workman who has not put in service for the specified minimum period. When a workman is discharged prior to his putting the minimum qualifying period, the Tribunal has no power to direct for payment of gratuity.[91] The Payment of Gratuity Act, 1972 has accepted 58 years as the age of superannuation [92] But in case where the contract of employment specifies some age as retirement age, then that age will be applicable.[93] Age of retirement from service has become the pattern of fixing the age of retirement anywhere. But considering the improvement in the standard of health and increased longevity, fixing the retirement age at 60 would

84. *Akola Electric Supply Co. Ltd.*, v. *J. N. Jarare* 1963 II LLJ, p 426.
85. Ibid.
86. *Express News Papers (Pvt.) Ltd.*, v. *Union of India* A. I. R. 1958 S. C. 578.
87. Ibid.
88. *Garment Cleaning Works* v. *Its Workmen*, 1961 I LLJ, P. 513.
89. *Supra* note 68.
90. *Ibid.*
91. *Mary & Baker (India) Ltd.*, v. *Their Workmen*, 1961 II LLJ, P. 94.
92. Section 2 (r) (ii) of the Payment of Gratuity Act, 1972.
93. *Guest Keen Williams Co.* v. *Sterling* 1959 II LLJ, P. 405.

be fair and proper, unless there are special circumstances justifying fixation of a lower age of retirement.[94]

Gratuity is earned by an employee for long and meritorious service. It is paid to a workman to ensure good conduct through out the period he serves the employer. If a workman commits such misconducts as causes financial loss to his employer, the employer would under the general law have a right of action against the employee for loss caused. Making provisions for withholding payment of gratuity where loss is caused to the employer conflicts with harmonious employment relations.[95]

The rate of quantum of the gratuity benefit provided in a gratuity scheme must be uniform to all classes and categories of employees in the concern. It is improper to make discrimination between *operatives* and other staff and if any gratuity scheme contains any discriminations in the matter, the employees affected thereby have the right to demand its removal.[96] Fifteen days' wages for one year's service is a normal rate in any gratuity scheme and it is open to the tribunals to fix a higher rate in a highly prosperous concern.[97] There is no invariable rule that a ceiling must always be placed on the total amount payable as gratuity. But where there is no provision for compulsory retirement on reaching a specified age, a ceiling should be fixed.[98] The scheme of gratuity must provide reasonable rates of payment and reasonable ceiling on the total amount payable as gratuity.[89] Fixation of maximum amount of gratuity at twenty months' wages is reasonable in view of the prevailing trend in industrial concerns.[100]

The concepts of 'gratuity' and 'retrenchment compensation' are not conflicting, and in principle, there is nothing to prevent the retrenched workers from getting gratuity in addition to retrenchment compensation. However, the question, whether a worker could have claimed both or only the one which is more favourable depends upon the construction of the scheme which is in force. The concept of gratuity as a retirement benefit was and still is distinct from the concept of retrenchment compensation under Sec. 25F of I. D. Act. There exists, therefore, no conflict

94. *Caleutta Insurance Ltd.*, v. *Their Workmen*, 1969 II DLJ, P. 1.
95. *Burhanpur Tapti Mills Ltd.*, v. *Burhanpur Tapti Mills Mazdoor Sangh* 1965, I LLJ, P. 453.
96. *Dunlop Rubber Co. (India) Ltd.*, v. *Its Workmen*, 1959 II LLJ, p. 826.
97. *Amritsar Rayon and Silk Mills (Pvt.) Ltd.*, v. *Their Workmen* 1962 II LLJ, p. 224.
98. *Ibid.*
99. *Supra* note 68.
100. *Greaves Cotton & Co Ltd.*, v. *Their Workmen*, 1964 I LLJ, p. 342.

between the two. As a result, wherever there exists a gratuity scheme independent of Sec 25F of I. D. Act, workmen are entitled for both.[101] However, if the payment to be made is in the nature of retrenchment compensation only, the workmen can claim either under 25 F or under the scheme, whichever is higher, but not both.[102] Employees are entitled to claim the introduction of a gratuity scheme in addition to retrenchment compensation.[103] An industrial tribunal is competent to frame a scheme giving the workmen the double benefit of gratuity as well as retrenchment compensation.[104]

Industrial employees are entitled to the double benefit of gratuity as well as provident fund. There is no bar on principle, to this double benefit, and the claim must be allowed, subject to the employers capacity to bear the double burden. Existence of a statutory scheme of provident fund under the Employer Provident Funds Act, 1952, does not bar the workmen from claiming introduction of gratuity scheme also.[105] The Act does not exclude to entertain such a demand.[106] The workmen can be given the double benefit of gratuity as well as provident fund, provided that the financial capacity of the company is capable of bearing the double burden.[107] If the system of gratuity as well as provident fund is in force in other similar concerns in the region, the tribunal is justified in introducing a gratuity scheme even when the provident fund scheme is already operating, unless the employer proves that the additional burden will be too heavy to bear.[108]

Earned gratuity does not become forfeited even for grave misconduct. Provision for deduction for loss caused to the employer is justified and adequate. Once gratuity has been earned by service, it does not become forfeited even upon dismissal for misconduct, and the proper rule in this behalf is that the amount due shall be paid after deducting the whole financial loss caused to the employer by the employees' misconduct.[109] Even when workmen is dismissed for misconduct, he can not be deprived altogether of the benefit of gratuity he has earned by

101. *Supra* note 65.
102. *Brahmachari Reaserch Institute* v. *Its Workmen*, 1959 II LLJ, p. 840.
103 *Indian Bank Ltm., Madras* v. *Indian Bank Employees'Unin*, A. I. R. 1960, S. C. 653.
104. *Dalmia Cement (Bharat) Ltd.* v *Their Workmen* A. I. R. 1960, S. C. 413.
105. Supra note 71.
106. *Gujarat Engg. Co.* v. *Ahamedabad Misc. Industrial Workers Union* 1961 II, LLJ, p. 660.
107. *Ibid.*
108. Supra note 69.
109. *Garment Cleaning Works* v. *Their Workmen*, 1961 ILLJ. p.

past period of service.[110] The gratuity scheme should provide that upon termination of service for misconduct, the loss caused therefrom shall be deducted from the gratuity which has become due.[111] However, the Payment of Gratuity Act, 1972 disqualifies a person from receiving gratuity for grave misconduct such as roitous or disorderly behaviour or any act which constitutes moral turptitude and consequent termination of service.[112]

The claim for gratuity is not forfeited by interruption in service, even though it is over a long period, if the break is condoned and the employee has been allowed to resume duty.[113]

Lay-Off

Lay off is a measure to meet temporary inability of the employer to keep the establishment fully working.[114] Lay-off compensation to workmen under the I. D. Act, 1947 is treated as a social security measure so as to provide financial benefit during involuntary unemployment. It is so provided because the principles of social justice demand that the workmen forced into unemployment should receive at least partial compensation to their wage loss, especially so, when the industry has the capacity to absorb the burden therefrom[115]. The statute which gives such right of compensation, therefrom should be liberally construed.[116] However, when there are disqualifying provisions, the latter should be construed strictly with reference to the words used therein.[117]

Lay-off referred to in section 25-C of I. D. Act, 1947 is the lay-off defined in section 2(kkk), and, therefore, a lay-off is justified only when it is covered by the definition in 2(kkk) and the relevant standing orders.[118] The employer has no common law right to declare a lay-off for reasons other than those specified in section 2(kkk) or the concerned standing orders.[119] In other words, a valid lay-off can take place only when the employer is unable to give employment to the workmen on account of shortage of coal or power or raw materials, or accumulation of stocks, or breakdown of machinery, or for any other reason. The

110. *Hindustan Times Ltd.*, v. *Their Workmen* 1963 I LLJ, p. 108.
111. Supra note 68.
112. Section 14 (b) (i) and (ii) of the payment of Gratuity Act, 1972.
113. *Jeevanlal (1929) Ltd., Calcutta* v. *Its Workmen* A. I. R. 1961 S, C. 1567.
114. Section 25-Cread with section 2 (kkk) of I. D. Act, 1947.
115. *Rastriya Mill Mazdoor Sangh* v. *Appolo Mills Ltd.*, 1960 II LLJ p. 263.
116. *Asociated Cement Co.* v. *Their Workmen* 1961 I LLJ. P. 1.
117. Ibid.
118. *Workmen of Devan Tea Estates* v. *Management of Devan Tea Estates*, 1964, I LLJ, p. 358.
119. Ibid.

words "any other reason" must be construed to mean some reason which is analogus to the reasons specified in the section and it cannot be understood that the words "any other reason" cover any reason of whatsoever character for which lay-off may take place.[120] Lay-off declared merely for reason of financial depression is not a valid ground.[121] The workmen's right for lay-off compensation cannot be denied even when the lay-off is due to an order of the Government curtailing the working hours in the industry and consequently, in the circumstances beyond the control of the employer.[122] Even when the lay-off compensation is the outcome of a settlement between the parties, the employer is under a liability to pay lay-off compensation as per statutory provisions, unless the settlement itself expressly provides otherwise.[123] Section 25-C of the I. D. Act confers the workmen the right to lay-off compensation and provides the method for its calculation. If the lay-off is not valid, the workmen can claim full wages for the period wrongly laid off.[124]

Under section 25-C, as it stood prior to its amendment in 1956 when there was only one continuous lay-off of over 45 days under one notice, the workmen were entitled for compensation for only 45 days. Only when workmen once laid-off for 45 days were laid-off again for a period extending over a week during the course of one year, lay-off compensation for the days above 45 days were available. While interpreting section 25-C(a) and (b), the Supreme Court observed that the conclusion no doubt leads to an anamalous position, since under one continuous lay-off, the workmen were entitled to compensation only for 45 days, whereas if there was a break, and the workmen were again laid-off, they could claim lay-off compensation for a further period, but that was a matter for the legislature to rectify.[125] As the provision stands to-day, workers are entitled to get compensation beyond 45 days, unless there are agreements to the contrary.

Retrenchment, Transfer and Closure

Retrenchment, transfer and closure are necessary incidences of running an industry. That is why provisions are made for these in I D. Act, 1947.[126] However, the employer is not given unlimited power to

120. *Kairbetha Estate, Kottegiri* v. *Rojamonikam*, 1960 II LLJ, P. 275.
121. *Supra* note 115.
122. *Supra* note 112.
123. *Northern Dooars Tea Co. Ltd.*, v. *Their Workmen of Den Dina Tea Estate* 1964, I LLJ, P. 436.
124. *Supra* note 115.
125. *Modi Food Products Co. Ltd.*, v. *Faqir Chand Sharmah*, 1956 I LLJ, P. 749.
126. Section 25-F, 25-FF, 25-FFA and 25-FFF of I. D. Act, 1947.

exercise this right. Retrenchment will be justified only when, due to shrinkage of work whether permanently or for a definite or indefinite period, there has arisen surplus labour in the employment of an establishment.[127] It is undoubtedly for the management to decide the strength of the labour force and thus employers' right to determine the number of workmen for efficient work cannot be questioned.[128] Even when retrenchment is affected, it is open to the tribunals when referred to them for adjudication, to see (a) whether the retrenchment was justified by the circumstances of the case, (b) whether the grounds for retrenchment given by the employer are true, and (c) whether the order of retrenchment was motivated by bad faith and a desire to victimise or harass the workman whom for some ulterior reasons the employer wanted to discharge or dismiss.[129]

The provisions of section 25-F are mandatory and payment of compensation as provided therein is a condition precedent for a valid retrenchment. Retrenchment, affected without compliance with the requirements of section 25-F, is bad in law and the workman concerned can claim reinstatement.[130] When retrenchment of some employees becomes necessary due to the need of re-organisation, such retrenchment is perfectly justified. In the absence of any evidence to establish that the plea of reorganisation was only a colourable pretext to get rid of certain workmen, the order of retrenchment cannot be said to be an act of victimization merely because the discharged workmen are active workers of the union.[131]

The employer is under a legal obligation to effect retrenchment in compliance with the industrial principle 'last come first go', unless there are reasons for a departure and they are recorded. The onus of showing that such reasons exist is on the employer and, in the absence of such reasons, retrenchment effected in violation of the principle is bad in law.[132] But there is one limitation that the retrenched workmen cannot plead violation by the employer of the principle of 'last come first go' when their union has agreed to the seniority list prepared by the employer and the retrenchment effected is in accordance with the seniority as proposed in the list.[133]

127. *J. K. Iron and Steel Co., Kanpur* v. *Iron and Steel Mazdoor Union*, 1956, I LLJ, P. 227.
128. *Workmen of Subong Tea Estate* v. *Subhong Tea Estate* 1964 I LLJ, P. 333.
129. *Parry & Co. Ltd.*, v. *Industrial Tribunal*, 1970 II LLJ, P. 429.
130. *State of Bombay* v. *Hospital Mazdoor Subha*, 1960, I LLJ, P. 251.
131. *D. Marcopollo & Co. (P) Ltd.*, v. *D. Marcopollo & Co. Employees Union*, 1958 II LLJ, P. 492.
132. *Swadesamitram Ltd., Madras.* v. *Their Workmen*, 1960 I LLJ, P. 504.
133. *Bennett Coleman and Co. Employees' Union.* v. *Bennett Coleman Ltd.*, 1964, I LLJ, P. 458.

It is a statutory obligation on the employer, who has retrenched certain workmen to give them an opportunity for re-employment subsequently, if there arises an occasion to employ any person in the same category.[134] But it does not apply to workmen whose services are terminated by reason of transfer of ownership of the concern. Such workmen are entitled only to the compensation provided.[135] Section 25-FFF of the I. D. Act, inserted by the Amendend Act of 1957, conferred certain benefits to workers even when an industry is closed down. Where the closure of an undertaking is shown to be malafide, it does not follow that the closure is a fiction and it is unreal in the sense that the undertaking can be treated to be in existence in the eye of law.[136] Where there is no pretence of closure and the undertaking has, in fact, been closed, but the closure is not *bonafide*, the consequence would be the liability on the employer to pay higher compensation under section 25-FFF of I. D. Act, 1947.[137]

Conclusion

Every new labour law, be it legislative or judicial has offered the workers a new deal. This have been particularly so in case of social security.

Initially introduced on a voluntary basis by progressive employers, except the benefits under the Workmen's Compensation Act, 1923, and the Maternity Benefit Acts of the States given for social and economic welfare of workers which are important for industrial peace and increased productivity, the benefits under other legislations have lately assumed the character of justified industrial claim. They have been settled either by bipartite negotiations or by industrial adjudication. Wherever the industrial tribunals allowed the claims of workers, they did so within the broad guidelines laid down by the Supreme Court in a series of decisions.

Except in cases of the Workmen's Compensation Act, 1923, and States Maternity Benefit Acts, the first major social security legislation have been the E. S. I. Act, 1948, and the Coal Mines Provident Fund and Bonus Scheme Act, 1948. The former contained the benefits envisaged under the Workmen's Compensation Act and the State Maternity Benefit Acts in addition to sickness and medical benefits. The latter, retirement benefit scheme introduced as an experimental basis,

134. *Cawnpur Tannery Ltd.*, v. *Guha* 1961, II LLJ, p. 110.
135. *Ankapalla Co-operative Agrieultural and. Ind. Society* v. *Its Workmen*, 1962 II LLJ, p. 621.
136. *Tea Districts Labour Association* v. *Ex-employees*, 1960 I LLJ, p. 802.
137. *Ibid*.

paved the way for the Employee's Provident Funds Act, 1952, as the Supreme Court liberally considered the claims made by the workers from more prosperous industries and units than the coal mines.

The first thing the Supreme Court was required to consider was the constitutional validity of these legislations. The attack was on the alleged ground of discrimination of units and excessive delegation of powers to the Government The Supreme Court, while analysing the legislative provisions has been guided by the spirit in the Directive Principles under the Indian Constitution. It rejected the plea of constitutional invalidity. According to the Honourable Court, these legislative measures came under conditional legislation and if the Government were not delegated the power to introduce the schemes in a selective areas and industries on the basis of its being satisfied according to qualifying conditions laid down for all, no social legislation was possible to be introduced at all. Again the classification of industries on geographical areas included in the schedules was reasonable and was prompted by practical considerations.

The theory of notional extension of employment/employment premises under the Workmen's Compensation Act and the E. S. I. Act is a classic example to show how the Supreme Court have tried to see the legislative intention and thus cover exceptional cases and circumstances which otherwise apparantly will fall outside the scope of the simple construction in the sections. This has set at rest innumerable legal fights which otherwise would have become inevitable.

The co-ordinal rule in construction of a statute is to construe it according to the plain, liberal and grammatical meaning. But this rule is subject to an important exception, namely, that the ordinary meaning can be departed from where grammatical construction would lead to some absurdity or to some repugnancy or inconsistency either with the other provisions of the statute or the scheme of the statute itself. When there is a doubt about the meaning, it should be understood in the sense in which it best harmonises with the subject of the enactment and the object the legislature had in view. In all the cases referred to it, the Supreme Court gave liberal and beneficial construction, especially where the different sections were capable of two constructions. By its decision, it has enlarged the scope and applicability of the term premises and workmen. The benefits granted under the statutes were not treated as a bar for the employees to claim benefits they had enjoyed prior to the introduction of the schemes.

In awarding introduction of provident fund and gratuity schemes, the financial capacity and prevailing practice in industry have been

considered as the main test to determine. The financial capacity has been further elaborated as financial stability, future prospects and financial capacity at the relevant point of time. As a result of a series of decisions given by the Supreme Court, a stage has reached that in the event of an industrial dispute raised by the employees in the courts of law it is almost certain that they are assured of getting the benefit under the provident fund and gratuity schemes provided that the industry has the financial capacity to bear the additional burden. Lowering the labour strength for application of Employees' Provident Funds Act, 1952, introduction of Family Pension Scheme in 1971 and legislation of the Payment of Gratuity Act, 1972, are the direct result of the Supreme Courts liberal thinking in these areas.

The lay-off compensation available for a limited period of 45 days, if the same was under one notice, was modified by the Parliament and made liberal as a consequence of an observation of the Supreme Court.

The Supreme Court has not blindly followed the old rules when it came to deal with the social security legislation. It is true that judicial restraint has been the established doctrine. But one notices major departure from it when judicial caution has been replaced by judicial valour with a view to introduce any quality for keeping the law in tune with the changes in society.

THE ROLE OF THE DOCTRINE OF COMMUNITY OF INTEREST IN INDUSTRIAL RELATIONS : A PERSPECTIVE APPRAISAL*

By

HARISH CHANDER*

I. Introduction

In India there are triangular interests conflicting in industrial relations. On the one side there is the interest to bring about the welfare of the workers, on the other side there is the interest of the employers or the management to produce more and earn more profits, and on the third side there are interests of the society that the people should get sufficient goods and services at cheaper rates and at the same time there is no industrial unrest so that the law and order situation in the society is maintained well. All these triangular interests have to be adjusted well so that neither workers nor the employers or the society suffers. This adjustment process raises the question. What matters should be permitted by the law on which the workers can raise industrial disputes in order to achieve their betterment ? On the other side it is also important to identify the areas in which the employers will have the sole function to perform which cannot be agitated by the workers. Thirdly it is also essential to provide for those matters where neither the workers nor the employers can agitate and the matter is to be settled mainly in the social interest. Many situations and circumstances have been clarified by the courts through various decisions as to what are the matters over which the workers can raise industrial disputes. But still there is a good deal of confusion in respect of those matters where the employers have the sole right to perform their function and also in those matters where the interests of the society would be taken into consideration while bringing the settlement of industrial disputes.

The Doctrine of Community of Interest could be a good test itself which the courts can adopt for deciding the matters on which the workers can agitate as industrial disputes, and what matters the employers can solely decide themselves, and in what matters the interest of the society shall be maintained. The courts so far have used the doctrine of

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community of interest only for the purpose of deciding as to what is an industrial dispute on which the workers can agitate. The doctrine properly applied on all these sides can be very useful in adjusting the clashing interests of workers, management and society. In each case it should be tested as to where does the balance of interest lie ?

The Industrial Disputes Act, 1947, in section 2 (k) defines the term industrial dispute as follows :

> 'Industrial dispute' means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

The above definition of industral dispute appears to be very clear unambiguous. But on the face of it is evident that the definition is so wide between the employers and the workers which is connected with employment or non-employment or terms of employment or conditions of labour of 'any person' can be covered within it.

The expression 'any person' is possible to be interpreted in the widest sense and the Supreme Court had to devise the doctrine of communtiy of interest in order to place the limits on the interpretation of the term 'any person' in the definition.[1] As the expression 'any person' used in the definition is very wide and so it has to be interpreted according to the objects of the Industrial Disputes Act, 1947, and the context in which it has been used in the Act. Thus 'any person used in the section only means those persons who are affected and interested in industrial relations'.

The Doctrine of Community of Interest contains three principles within its legal ambit :

Firstly, it means that the workmen should have direct interest in the subject matter of the dispute. Secondly, it means that the workmen raising the industrial dispute should have the substantial interest in the subject matter of the dispute[2]. Thirdly it means that the workmen must have at least the community of interest in the subject matter of the dispute so that they can validly raise an industrial dispute about that matter[3].

1. See *N. K. Sen* v. *Labour Appellate Tribunal* (1953) I L.L.J. 6; and *Workmen of Dimnkuchi Tea Estate* v. *Dimakuchi Tea Estate*, (1958) I L.L.J. 500.
2. The test of direct or substantial interest was devised by Mr. Justice Chagla in the case of *N. K. Sen* v. *Labour Appellate Tribunal* (1953) I L. L. J. 6.
3. See the case of *Workmen of Dimakuchi Tea Estate* v. *Dimakuchi Tea Estate* (1958) I. L.L.J. 500. and also *All India Reserve Bank Employees Association* v. *Reserve Bank of India*, (1965) II L.L.J. 175.

II. The Doctrine of Community of Interest

(A) *The Dimakuchi Tea Estate Case* :

It was in the case of *Workmen of Dimakuchi Tea Estate* v. *Dimakuchi Tea Estate*[4] that the Supreme Court, while deciding the interpretation of the term 'any person' in Section 2 (k) of the Industrial Disputes Act, 1947, for the first time used the expression of the community of interest of workmen as one of the grounds for raising an industrial dispute.

Facts of the case were that a person was appointed as an assistant medical officer by the company. His services were on probation and could be terminated with the stipulated notice to him. After he joined the job in the company he also became the member of the Tea Estate Workers Union. During the probation period his services were discharged by the company on the recommendation of the chief medical officer on the ground of incompetence in his medical duties. The workmen in the tea estate were not satisfied by the reasons given for discharge and they espoused the cause of the assistant medical officer for reinstatement. The industrial tribunal in this case decided that as the assistant medical officer was not a workman and therefore, no industrial dispute could be raised for this purpose. The matter was raised by the workers in the form of special leave to appeal under Art. 136 of the Constitution before the Supreme Court.

The court by majority held that the expression 'any person' occurring in the third part of the definition clause did not mean any body and every body in this wide world.[5] It further held that workmen could not raise industrial dispute about a person who did not belong to their class or category of 'workmen'.

The majority opinion in the *Dimakuchi Tea Estate* case also approved the test of direct or substantial interest of workmen for raising the dispute, as laid down by Mr. Justice Chagla in the case of *N. K. Sen* v. *Labour Appellate Tribunal*[6]. The Supreme Court by its majority opinion in *Dimakuchi Tea Estate*[7] case, in brief, decided the following points for making an industrial dispute :

(1) The definition in Section 2 (k) has three parts;

4. (1958) I L.L.J. 500 : A. I. R. 1958 S. C. 353.
5. *workman of Dimakuchi Tea Estate* v. *Dimakuchi Tea Estate* (1958) I L.L.J. 500 at 509.
6. (1953) I. L.L.J. 6.
7. *workmen of Dimakuchi Tea Estate* v. *Dimakuchi Tea Estote*, A. I. R. 1958 S. C. 353, at pp. 354 to 364.

(a) there must be a dispute or a difference;

(b) the dispute or difference must be between employers and employers, or between employers and workmen or between workmen and workmen; and

(c) the dispute or difference must be connected with the employment or non-employment, or the terms of employment or with the conditions of labour, of any person.

(2) The subject matter of the dispute must relate to;

(a) employment or non-employment or

(b) terms of employment or

(c) conditions of labour of any person.

But there is a limitation that a person in respect of whom the employer-employee relation never existed, or can never possibly exist, cannot be the subject matter of a dispute between employers and workmen

(3) If the expression 'any person' is given the ordinary meaning, then, the definition clause will be so wide that it would become inconsistent with the objects of the Industrial Disputes Act. The workmen then may raise a dispute about a person with whom they have no possible community of interest, and they may raise dispute about employment of a person in another industry or in which the employer cannot give relief to the person.

(4) The definition under Section 2 (k) is subject to three limitations :

(a) the dispute must be a real dispute and capable of settlement or adjudication by directing one of the parties to the dispute to give necessary relief to the other.

(b) the parties to the dispute must be directly or substantially interested therein, so that if workmen raise a dispute, it must relate to the establishment in which they are employed.

(c) the expression 'any person' in the definition means a person in whose employment, or non-employment, or terms of employment, or conditions of labour, the workmen as a class have a direct or substantial interest, or with whom they have a community of interest.

(5) The workmen as a class cannot be dircctly or substantially interested in the employment or non-employment or terms of employment or the conditions of labour of persons who belong to supervisory

class and non-workmen for whom the Industrial Dispute Act does not confer any benefit.

(6) It is the community of interest of the class of workmen as a whole which provides a nexus between the dispute and the parties to the dispute.

(7) Where the workmen raise an industrial dispute as against the employer, the persons about whose employment, or non-employment terms of employment or conditions of labour the dispute is raised, need not be a workmen in the strict sense of the term under the Industrial Dispute Act but the person must be in whose employment the workmen have, as a class, direct or substantial interest.

Conceptually speaking the interest of workmen is direct if they agitate about their own employment, non-employment, or terms of employment or conditions of labour The interest of workmen is substantial if they espouse the case of fellow workmen with the same employer. But if the workmen espouse the cause of non-workmen or together with non-workmen then the interests of workmen are a community interest in the industrial dispute. Therefore, truely speaking, the community of interest is applicable in those cases where the workmen raise the dispute about some non-workmen or together with non-workmen.

With due respect it is submitted that the decision in *Dimakuchi Tea Estate's* case is not free from doubts. It is unjustified to presume, as the majority opinion in the case has done so, that the workmen as a class should not be interested in a person who does not come within the category of workmen In such cases where the subject matter of the dispute is not a workman and the workmen in general espouse the cause of such person, the workmen may not have the direct or substantial interest but they definitely can have the community of interest. It is also right that it is not the general interest of the community which matters in order to make an industrial dispute. The community of interest of workmen must be relating to employment or non employment or terms of employment or conditions of labour. And therefore, the medical facilities provided by the employers in a concern with a doctor or medicines, to my best knowledge, can come within the conditions of labour as provided in Section 2 (k). Thus the workers could validly raise an industrial dispute for the reinstatement of the doctor on the basis of the doctrine of the community of interest though they did not have any direct or substantial interest in the dispute.

Moreover, if such a case of an assistant medical officer in an industry, is espoused by workmen today as an industrial dispute, then it would be an industrial dispute, not on the basis of the doctrine of the community of interest only but also because such a person would also be a workman under the definition of workman under Section 2 (s) of the Industrial Disputes Act.[8] But by any standards of interpretation we cannot say that a doctor employed in an industry performs the job in the supervisory capacity or performs a job which is of an administrative or managerial nature. I do feel that there must be either direct or substantial interest of workman in the subject matter of the dispute or there must be a community of interest. But if we see the facts of the present case we would find that the workmen, as a class, were interested in retaining the services of the doctor because he used to give them proper care and attention which is expected from a doctor. The doctor's job is not a managerial or admistrative post and it does not affect, in any way, the interest of the management if the dispute is raised by the workmen for such a purpose.

8. Before amendment of the definition of workman in 1956 :

"Workman" means any person employed (including an apprentice) in any industry to do any skilled or unskilled, manual or clerical work for hire or reward and includes, for the purpose of any proeeedings under this Act in relation to an ivdustrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, maval, military or air service of the Government."

After the amendment in 1956, Section 2 (s) reads as follows :

"Workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manul, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or a consequence of, that dispute, or whose dismissal, discharge or retrenchment had led to that dispute, but does not include any such person—

(i) who is subject to the, Army Act, 1950 (48 of 1950), or the Air Force Act, 1950 (45 of 1950), or the Navy (Discipline) Act, 1934 (34 of 1934); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

(B) The Other Cases :

In the year 1958 again the tests propounded by the majority jugment in *Dimakuchi Tea Estate's* case were further approved by a larger bench of the Supreme Court in *Workmen* of *Dahingeapara Tea Estate* v. *Dahingeapara Tea Estate.*[9] In this case a tea estate was sold by the owner to another person and the purchaser continued to employ workmen and some other staff of the vendor. These workmen raised an industrial dispute about the discharged workmen and it was held that the dispute about discharged workmen is also an industrial dispute even through the discharged workmen may not be strictly speaking the workmen of the purchaser In this case the test of direct or substantial interest was applied and it was held that the workmen had direct and sub tantial interest in the discharged workmen.

Similarly, in another case a proprietory business was taken over by a private limited company in which the former proprietor, his wife and the previous manager became directors of the new company. The new company dispensed with the services of some workmen employed in the former firm. A dispute raised by the workmen of the new company for the employment of workmen of previous firm was considered to be an industrial dispute by Mr. Justice Gajendragadkar on the ground that the workmen of the company had direct and substantial interest in the employment, non-employment, or terms of employment or conditions of labour of the previous workmen.[10]

In the case of *The Standard Vacuum Refining Co. of India Ltd.* v. *The workmen*[11] Mr. Justice Wanchoo held that the workmen could raise validly an industrial dispute about the contract labourers working on the cleaning and maintenance of plant and machinery of the company because the workmen had direct and substantial interest in the industrial dispute.

In the *All India Reserve Bank Employees Association* v. *Reserve Bank of India,*[12] there was a dispute for the increase in the wages of workmen. The industrial tribunal rejected the claim of the workmen on the ground that if the incumbent would draw more wages as they claim then they would be out of the category of workmen. In this case Mr. Justice Hidayatullah said that if at the time when the industrial dispute was raised they were workmen then they could raise the industrial dispute

9. (1958) II L. L. J. 498 (S. C.), per S. K. Das J.

10. *Key's Construction Co. Ltd.* v. *Its Workmen* (1958) II L. L. J 660 (S. C.) : A. I. R, 1959 S. C. 208.

11. (1960) II L. L J. 233 (S. C.) : A. I. R. 1960 S. C. 948.

12. (1965) II L. L. J. 175 : A. I. R. 1966 S. C. 305.

even though at some future date they might go out of the category of workmen. Mr. Justice Hidayatullah also explained further that the workmen could raise a dispute about employment, non-employment or terms of employment or conditions of labour of non-workmen, in which they were vitally interested. He further added that they could raise an industrial dispute even for the promotion to the category of managerial or supervisory staff also if at the time they raise the dispute they were workmen.

Similarly in the case of *Workmen* v. *Greaves Cotton and Co. Ltd.*[13] Mr. Justice Jaganmohan Reddy decided the case in the following words:

> "It would, therefore, appear that the consistent view of this court is that non-workmen as well as workmen can raise a dispute in respect of matters affecting their employment, conditions of service etc; where they have a community of interests, provided they are direct and are not too remote."[14]

The Supreme Court further held that an industrial dispute could be raised about workmen and non-workmen and the tribunal could not dismiss the case merely on the ground that some workmen would go out of the category of workmen. But on the crucial date of adjudication at least some persons must be workmen otherwise the dispute would lapse because the tribunal could not have the jurisdiction to adjudicate about the dispute.[15]

III Conclusion

The perusal of the decisions of the Court indicates that initially the Court applied the doctrine only in the restricted sense.[16] It was considered that the workmen can raise an industrial dispute about employment, non-employment, or terms of employment, or conditions of labour of workmen only. But now the trend has changed considerably and now workmen can raise an industrial dispute about employment, non-employment, or terms of employment, or conditions of labour of non-workmen also. However, the doctrine of community of interest has been applied by the Court only to test whether or not the workmen can raise an industrial dispute under the Industrial Disputes Act, 1947. The Court can use the doctrine of community of interest in its fullest perspective by testing the dispute on the merits of the case also on the basis of the doctrine.

13. (1971) II L. L. J. 479 (S. C.).
14. *Ibid.* at 489.
15. *Workmen* v. *Greaves Cotton and Co. Ltd.*, (1971) II L. L. J. 479 (S. C) at 489.
16. See the decision of Mr. Justice Chagla in *N. K. Sen* v. *Labour Appellote Trimunal* (1953) I L. L. J. 6.

The definition of 'industrial dispute' under Section 2 (k) of the Industrial Disputes Act, 1947, is very wide and is capable of having varied interpretations which could cause a good deal of uncertainty and confusion for industrial relations in India. It is to the credit of the Supreme Court of India that a great deal of uncertainty and confusion has been removed by placing certain limitations on interpretation of the definition. The Supreme Court has evolved remarkably a number of limitations and explanations The doctrine of community of interest is one of the major contribution of the Supreme Court in the field of industrial law and industrial relations. By evolving the doctrine of community of interest the Court has prevented many controversies about interpretations and the likely future disputes which could hamper cordial industrial relations in our country.

The objects of regulating industrial relations under the Industrial Disputes Act are not only for the welfare of the workers alone,[17] but also to confer some rights to the employers in certain situations like lay-off, retrenchment and lock-out. Above all the interests of society are also important for regulating industrial relations. The policy of industrial relations in India is to adjust well the triangular conflicting interests of workers, management and the society in order to maintain cordial and harmonious industrial relations. Therefore, for adjudicating industrial disputes not only the interests of the workers, but also the interests of the management and the society have to be considered by the courts. So far the Court has used the doctrine of community of interest only in the restricted sense in order to test whether the dispute is an industrial dispute or not.

It is suggested that the Court can make use of the doctrine of community of interest not only to test whether the dispute is an industrial dispute or not but also to test, on the merits of the dispute in each case, whether the interest of the workers is predominant or the interest of the management is predominant, or the interests of the society is predominant. If in a dispute raised by workmen the interest of the workers are predominant then the relief in a dispute should be given to the workers. On the other hand if it appears that the community of interest of the management are predominant then it should be considered that it is not an industrial dispute. The interest of the management should be considered as predominant in those disputes which relate to

17. For objects of Industrial Disputes Act, 1947, see *workmen of Dimakuchi Tea Estate* v. *Dimakuchi Tea Estate*, A. I. R. 1958 S. C. 353 at 358. Also see the Report of the National Commission on Labour and the introductory remarks and Industrial Relations Policy in India of this Report.

the management functions.[18] In case it appears that the community of the society is predominant then the dispute should be adjudicated and settled taking into consideration the impact of the adjudication on the society.

The doctrine includes three principles within its fold. If the workmen raise a dispute about their own employment, or non-employment, or terms of employment, or conditions of labour then the principle of direct interest is applied; or if the workmen raise a dispute about other workmen then the principle of substantial interest is applied; or if the workmen raise a dispute about non-workmen, or workmen and non-workmen together, then the doctrine of community of interest is applied. Thus the workmen can raise industrial disputes for themselves, for dismissed, discharged, retrenched, or casual workmen of the employers. On the basis of the doctrine of the community of interest the workmen can raise a dispute for securing management or administrative jobs also either by espousing the dispute by themselves or by joining the hands with other non-workmen in the concern. It is humbly suggested that the courts should apply all these three principles separately without interchanging these terms in order to avoid conceptual difficulties.

Now a days there are many big industries employing thousands of workers In many of these industries workers have been provided with the medical facilities or hospitals, and schools for the children of the workers. The doctors, the teachers, laboratory assistants and research assistants are employed by the employers in various organizations to provide for the medical and educational facilities. The workmen these days may have the community of interest with such employees also. Therefore, it is submitted, that the Court should allow the workmen of the concern to raise an industrial dispute about employment, non-employment, or terms of employment, or conditions of labour of such persons on the basis of the doctrine of community of interst. The use of the said doctrine on the merits of the industrial disputes will certainly bring cordial industrial relations in India

18. In the Workmen of *M/s Firestone Tyre and Rubber Co. of India (P) Ltd.*, v. *The Management and others*, A I. R. 1973 S. C. 1229, the Supreme Court has given some idea of management function. But still the courts need to spell out in details as to what are management functions.

CESSION OF TERRITORY AND ITS VALIDITY: AN APPRAISAL OF THE SUPREME COURT-CONTRIBUTION

BAG SH CHANDRA NIRMAL*

I

Introduction

Amongst various modes of acquiring and losing territory 'Cession' occupies a significant place under Public International Law. Cession is a bilateral transaction whereby sovereignty over a territory is transferred from one owner state in favour of another state[1] with different motives and for different purposes viz. Gift,[2] Exchange,[3] Sale,[4] Marriage,[5] and Agreement[6]. A territory may be ceded voluntarily as was done by King Leopold when he transferred the Cango Free State of Belgium.[7] or under compulsion, normally in cases where one country is defeated by another country.[8]

* B. Sc., LL. M. (B.H.U.). The writer is extremely grateful to Professor R. P. Dhokalia, Law School Banaras Hindu University, for his guidance. The writer, however, is solely responsible for the views expressed in this article.

1. Oppenheim, 1. *International Law*, 547 (1955).
2. For example, in 1850 Great Britain made a free gift of the Horse Shoe Reef in Lake Fire to the United States. See Moore, 1 *Digest of International Law*, 534.
3. Roumania exchanged Bessarabia in 1878 with Russia for Dobrudja; and Great Britain exchanged the Island of Helgoland with Germany in 1890 for German East-Africa.
4. The Russian Sale of Alaska, the Danish Sale of the Virgin Islands and the United State's purchase of Lousiana, Florida and Danish West Indies furnish good examples of cession by way of sale, See Hyde, 1 *International Law*, 389-
5. The Portuguese King, for example, transferred the Island of Bombay to Charles II of England as a result of marriage alliance See Oppenheim, op. cit.
6. India in this way acquired Pondichery, Karikal, Mahe, Yanam and Chandra Nagaore from France. *Infra* 30.
7. This cession took place in 1908 by devise of King Leopold, who at the time of his death was sovereign of the Congo in his personal capacity as distinct from his position as King of Belgium. See Reeves, 'Origin of the Congo Free State from the stand point of International Law' 3 *A. J. I. L.*, 99 (1909).
8. The forced transfer of Alsace-Lorraine to Germany by France is an instructive illustration of such cession. It is, however, to be noted that following the adoption of the Covenant of the League of Nations and the conclusion of the Kellogg Pact, forced cession lost its validity. See Fenwick, *International Law*, 425 (1975 Indian ed.)

The usual means for carrying out cession of territory is a treaty between the ceding state and the acquiring state, defining the territory to be transferred and fixing the conditions under which the transfer is to take place. Such a treaty gives the acquiring state a legal title to the ceded territory against the ceding state and also the right to take possession thereof. The acquiring state, therefore, is authorised by general international law to take enforcement action against the ceding state if it commits an international delict by refusing, in violation of its treaty obligations to withdraw from the ceded territory. Also by a treaty of cession the new owner state acquires the appurtenances of the territory involved.[9]

Though the intention of the parties to transfar sovereignty is the sole criterian of cession, there is a school of thought which on analogy with the mode of coveyance in private law, maintains that the cession is incomplete until actual delivery of the territory is made.[10] Unless otherwise is stipulated in the treaty itself, a cession treaty must, therefore, be followed by actual transfer of the territory to the cessionary state. This point was emphasised by the World Court in *Certain German Interests in Polish Upper Silesia* (1926) and in the *Light Houses in Crete an Samos* (1951). It was declared by the court in these cases that there must be a complete disappearance of political links of ceded territory with the ceding state or states and that without the actual transfer the territory cession had not completely occurred even though in other respects the treaty of cession might have already come in force in accordance with the law of treaties[12]. In exceptional circumstances, as when cession is conditioned upon the results of a plebiscite, the date of actual transfer of territory may, however, be subsequent to that of

9. The Permanent Court of Arbitration held in the *Grisbadarna* Case (1909) between Norway and Sweeden that the cession of territory automatically includes the appurtenances of territory involved, See Scott, *Hague Court Reports*, 121.
10. In the *Fama* (1804) Lord Stowell, for example said :
"All concur, however, in holding it to be a necessary principle of jurisprudence, that to complete the right of property, *the right to the thing* and the possession of the thing itself, should be united. This is the general law of property, and applies I conceive no less to the right of the territory than to other rights." (emphasis added)
11. See O'Connel, I *International Law*, 504 (1965). The Swiss Federal Council, on the otherhand, refused to accept the view that sovereignty does not pass until delivery of territory is not made in its award of 1922 in the dispute between Colombia and Venezuela. See Scott, 'The Swiss Decision in the Dispute between Colombia and Venezuela', 16 *A. J. I. L.* (1922).
12. *P. C. I. J.* Ser. A No. 7 at 30; A/B No. 71 at 13.

the cession treaty coming into force.[13] During such period administrative and judicial functions and the power of delegated legislation already conferred by statute vest in the ceding state.[14] Cession may also be conditional upon the consent of the inhabitants of a territory to be ceded.[15] The requirement of prior approval of the inhabitants, before the cession takes place, had theoretical basis in the rich and scholarly writings of Grotius[16] and Vattel[17]. However its practice was not evidenced until the second half of the nineteenth century. Till the opening of the first World War, this principle was applied in isolated cases but could never become a rule of customary law. Rather, it was forgotton by the diplomats and condemned by the legal publicists[18]. With the spread of democractic institutions, by 1919, this principle was revived in as much as it became a matter of political doctrine of 'self determination of nations' and of practical utility. However, the present

13. See Schwarzenberger, *International Law*, 303-4 (1957) The actual transfer of territory may not take place unless frontiers by an International Commission or by decision of a third party have been determined. See the Advisory Opinion in the *Mosul* case (1925), *P. C. I. J.* See B, No. 12 at 22. The cession in such cases, as pointed out by the P. C. I. J in this case, is not ineffective owing to any indefiniteness in the agreement. 'The renunciation of rights and title is suspended until the frontier has been determined, but it will become effective, in the absence of some other solution, in virtue of the binding decision', the Court further observed.
14. O' Connel, op. cit., at 505. The point that it is the ceding state which has right to administration over the ceded territory upto the moment of delivery was emphasised in the *Gudder Singh and Another* v. *The State* I, L. R., 1953, p. 143. This case dealt with the situation in which India, the ceding state still administered the ceded territory by agreement with Pakistan, the state taking cession. The Punjab High Court held : 'In whichever way we look at it, whether the territory had become Pakistan territorry and by consent of the parties it remmained in (the) possession of India or after the cession of the te ritory to Pakistan it remained in possession of India, the right of India as a State to maintain order and safeguard economic conditions remained in that State'.
15. Gould. *An Introduction to International Law*, 357 (1957).
16. Grotius, the founder father of International Law relied upon the contract theory of the State in asserting that 'in the alienation of a part of a sovereign State it is, moreover, required that the part which is to be alienated must give its consent' *Dejure belli ac Pacis*, Eng. Trans. Book II, Chapter II, S. IV.
17. Vattel argued that a nation 'has no right to barter away (its members), allegiance and their liberty for certain advantages which it hopes for in return, *Droit Des Gens*, Eng. Trans. Book I, SS. 263.
18. The principle that the wishes of a populations are to be consulted when the territory which they inhibit is ceded has not been adopted into international law, and cannot be adopted into it until title by conqusst has disappeared, Hall, *International Law*, S. 9.
19. See Carbett, *Law and Society in the Relations of States*, 104-5 (1961).

position of this principle is that International Law does not require a manifestation of the will of the people of the territory involved, to make a cession legal[20]. But it does not mean that this principle does not hold good from the standpoint of Municipal Law[21].

Cession is distinct from the right of administration. This point found much emphasis in the debates of the British House of Commons on the question of Egypt s sovereignty over the Sinai Peninsula in general, and Southern Sinai in particular. After thorough examination of the relevant facts, Mr. Bloomfield, the Queen's Counsel opined that Egypt could not have acquired title to the Sinai Peninsula either by way of succession though conventions, or by prescription, as the right of Egypt over the Sinai Peninsula was one of administration and administration only.[22]

A treaty of cession not only transfers the territory involved to the cessionary State, but it also imposes on the new sovereign all those international obligations which are locally connected with the ceded territory. Thus the inhabitants of the territory lose their allegiance to the ceding State and become *ipso facto* by the cession subjects of the acquiring State..[23] No doubt in such cases of cession there is always the possibility of hardship for the inhabitants of the ceded territory as they have to submit themselves to a new sovereign.[24]

The most conspicuous characteristic of treaties of cession is that that they distinguish between the *imperium* of a State in respect of its territory, and the *dominium* held or owned by individuals. Nevertheless it is fairly established under International Law that a treaty of cession

20. See Svarlien, *An Introduction to the Law of Nations*, 179-80 (1955).
21. The Constitution of the Republic of Senegal stipulates in Art. 56 : '..... no transfer, no exchange, no adjunction of territory is valid without the consent of the populations concerned : See Whiteman, a *Digest of International Law*, 1101-2.
22. Bloomfield, *Egypt, Israel and The Gulf of Aquaba*, 141-43 (1957). See also the Advisory opinion of I. C. J. in *International Status of South-West Africa*, I. C. J. Reports (1950). The court in this case averting to the mandate system under the League of the Nations for the territory of South-West Africa to be exercised on its behalf by the Government of the Union of South Africa opined : "The terms of this Mandate as well as the provisions of Art. 22 of the Covenant (of the League of Nations) and the principles embodied therein showed that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the union of South Africa. The Union Government was to exercise an international function of administration on behalf of the Leage, with the object of promoting the well being and the development of the inhabitants."
23. *Supra* note 1 at 551.
24. Id. at 547.

transfers only *imperium* and not *dominium* 'unless the latter is expressly or by implication included.[25] It, therefore, follows that unless a contrary intention is not indicated in the treaty in a cession there is no transfer of ownership or right of possession in the properties of the inhabitants of the ceded territory. As regards the effect of cession on individual's private rights, it is to be observed that rules of International Law are more expicit and well established. The cession of territory does not involve any change in the private rights of the inhabitants of the ceded territory. In the *United States* v. *Juan Perchman*[26], Chief Justice Marshal observed : "The modern usage of nations which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and priavate rights annulled. The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property, remain undisturbed". It, therefore, follows that the private rights of the inhabitants of the ceded territory should be respected.[27] Even those who contest the existence in International Law of a general principle of state succession, observed the Permanent Court of International Justice in the *German Settlers in Poland*, do not maintain that 'private rights, including those acquired from the State as the owner of the property, are invalid as against a successor in sovereignty'.[28] These rights, after cession, may not be enforceable before the municipal courts of the successor state. As held in *Cook* v. *Sprigg*, it is well understood rule of International Law that a change of sovereignty by cession ought not to effect private property, but no municipal tribunal has authority to enforce such an obligation.[29]

25. See Lord McNair, *The Law of Treaties*, 331 (1961).
26. (1831-1834) 8 L, ed. 604.
27. P.C.I.J. also subscribed to this view in *Denzing Railway Officials* (1928) P. C.. I. J. Series B. No. 15 p. 17-18. Wherein it held that it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts.
28. P. C. I. J. Series B, No. 6, p. 36 at p. 38 the Court further held : it is true that treaty of peace does not in terms formally announce the principle that, in case of a change of sovereignty private rights to be respected ; but this principle is clearly recognized by the treaty '
29. (1899) A. C. 1572-78. This principle has been reiterated in subsequent decision such as *Secy. of State* v. *Raj Koi*. A. I. R., 1915 P. C. 50 ; *Vajesinghji* v. *Secy of State* ; A. I. R. 1924, P. C. 256, *Secy. of State* v *Rustam Khon*, A. I. R 1941 P. C. 64.

The study of the convergence and divergence of the Indian practice relating to cession of territory, especially of the exposition of the Supreme Court with the above discussed rules of International Law is both fascinating and fruitful and may have some significance in revealing the dynamics of International Law.

II

Cession of Territory and Contribution of the Supreme Court

India attained the Dominion Status in 1947—the legal basis of which was the *Indian Independence Act 1947* which in Section 1 provided for the creation of 'the independence Dominions' known as India and Pakistan from the appointed day (Aug. 15, 1947). By Section 2 of the said Act, it was laid down that subject to the provisions of Sub-sections (2) and (4) of Section 2, the territories of India shall be the territories under the sovereignty of His Majesty which immediately before the appointed date were included in British India, except the territories which under Sub-section (2) were to be the territories of Pakistan. Also, the Act provided, *inter alia*, that from the appointed day the provinces of Bengal and Punjab as constituted under the Government of India Act, 1935 shall cease to exist and there shall be constituted in place thereof four provinces to be known as East Bengal, West Bengal, East Punjab and West Punjab. Afterwards, a boundary commission presided by Sir Radcliffe was appointed by the Governor General for effecting the partition of Bengal and Punjab which gave an award known as 'Radcliffe Award' three days before the appointed day. While West Punjab and East Bengal went to Pakistan, East Punjab and West Bengal remained with India. Schedule 1 of the Indian Constitution which indicates the territory of India came into force on Jan. 26, 1950.

Since its independence, India acquired Pondicherry, Karikal, Mahe, Yanam and Chandra Nagar from France by way of cession agreement.[30] It acquired the princely State of Hyderabad by Police Action and Goa[31], Daman and Dieu, in 1961, by military action. Thus

30. Treaty ceding to India the territory of the Free Town of Chandranagore signed in Paris on 2nd Feb., 1951. 203 *UNTS* 155. Treaty of cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam signed in New Delhi on 28th May, 1956. 2 *FPT* 255.

31. The military take over of Goa in Dec. 1961 illustrates not only a tacit acceptance by the General Assembly of a successful conquest but also the profound differences occasionally encountered between the Western and the Afro-Asian interpretation of International Law. Consult Quincy Wright,' 'The Goa Incident', 56 *A.J.I.L.* 617-632 (1962). Wright (p. 631) asserted the view that 'it may in view of the principles of the Charter, that the elimination of Portugal from Goa is on the whole beneficial'. That statement appears to Von Glaha as a wholly indefensible position, placing as it does the vague provisions of the Charter on the subject of "colonialism" above the unquestioned title and sovereign rights of Portugal to its Asian enclaves'. Von Glaha, *Law Among Nations*, at 263 f n. 12 (1965).

India has acquired territories by both the voluntary and involuntary cession. On the other hand, India has concluded important treaties or agreements, like the Indo-Bhutan Treaty of Friendship[32], Indo-Pakistan Agreement over Berubari[33] and over Kutch[34], Agreement with Burma over the demarcation of Indo-Burmese Border[35], Simla Agreement[36] and Indo-Ceylon Agreement concerning Kachhatibu[37] for settling her territorial as well as boundary disputes[38]; some of which notably agreement with Pakistan over Berubari and agreement with Bhutan entailed cession of territory. The Supreme Court of India, whenever it had an occasion to decide, found that a few of these agreements involved cession of territory, while others merely purported to ascertain or delineate the exact boundary between India and the disputant neighbouring country. Obviously, how the Supreme Court distinguished a case of cession from that of border adjustment provides fascinating subject of study.

(a) Cession v Border Adjustment

The first cession case in which the question of cession of territory was judicially examined by the Supreme Court was *Re Beruberi Union Opinion*[39] where the Court was asked to render an advisory opinion on the legislative modalties of implementation of the Indo-Pakistan Ageement relating to Berubari Union. This agreement was entered into on September 10, 1958 between Prime Ministers of India and Pakistan with a view to resolving border disputes and problems relating to border areas. While one item of the agreement related to the division of Berubari Union No. 12, the other related to the exchange of Coach

32. 2. *F. P. T* 15.
33. 369 *UNTS*, 81.
34. See P. Chandra Sekhar Rao, 'Indo-Pakistan Agreement on the Rann of Kutch', 5 *IJIL*, 176 (1965).
35. See 7 *IJIL*, 432 (1967).
36. For the full texts of the Agreement see 12 *IJIL*, 409 (1972). See also K. Narayan Rao. 'Essence of Simla Agreement', 12 *IJIL*. 397 (1972).
37. For the full texts of the Agreement between India and Sri Lanka on the maritime boundary waters between the two countries and related matters (26th June, 1974) 16 *IJIL*, 126 (1976).
38. For comparison of Boundary disputes with the territorial dispute see S. P. Sharma, 'Boundary Dispute and Territorial Dispute : A Comparison' 11 *IJIL*, 655 (1970).
39. In *Re Berubari Union Opinion on case*, 3 S. C. R., 19601, 250.

Behar enclaves.[40] The most pertinent question at issue was whether the agreement involved cession or merely purported the delineation of boundary in the light of the 'Radcliffe Award',

The Court said that cession of national territory in law was tantamount to transfer of sovereignty over the said territory by the owner state in favour of another state.[41] Thus the object of cession according to the Court was transfer of sovereignty in respect of the ceded territory which belonged to the ceding state to another state. Here, the Court seems to state that an answer to the question, whether a transaction involves cession is dependent on whether India had territorial sovereignty[42] over the territory in question. To decide the question in the instant facts situation, the Court examined at length the Indo-Pakistan Agreement of 1958 and found that the agreement was entered into independently of the 'Radcliffe Award' and for reasons and considerations which appeared to the parties to be wise and expedient. Also, the Court analysed briefly the historical and constitutional background of

40. Item 3 in paragraph 1 of the Agreement reads as follows : "(3) Berubari Union No. 12.
This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The division of Berubari Union No. 12 will be horizontal, starting from the north east corner of Debiganj Thana. The division should be made in such a manner that the Coach-Behar Enclaves between Pachagan Thana of West Bengal will remain connected as at present with Indian territory and will remain with India. The Coach-Behar Enclave lower down between Boda Thana of East-Pakistan and Berubari Union No. 12 will be exchanged alongwith the general exchange of enclaves and will go to Pakistan.
Item 10 of the Agreement is as follows :
"(10) Exchange of old Coach-Behar Enclaves in Pakistan and Pakistan Enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to."
369 *U.N.T.S.* 81.

41. 3 *S. C. R.*, 1960 at 283.

42. It is to be noted that the concept of territorial sovereignty has an ancient foundation in International Law. Consult *Island of Palmas* Case (Netherlands/U. S. A.) 1928, 22 *A. J. I. L* 867 (1928) ; *Eastern Greenland* case, P. C. I. J. ; See A/B No. 53, (1933 , 64 *The International Status of South West African* case, I. C. J. Rep. 1950, p. 128; *The Minquiers and Serchos* case (France/U. K.) I. C. J. Rep. 1953, p. 46; Case concerning *Sovereignty over certain Frontier Land* (Belgium/Netherlands), *I. C. J. Rep.*, 1951 p 209; *Temple Case, I. C. J. Rep.*, 1961, p. 6; Goiten, 'Some Problems of Sovereignty', 13 *Trans. Grotius Soc.*, p. 79 (1928); Morgentham' 'Problem of sovereignty considered', 48 *Col. L. Rev.*, pp. 341-65, (1948): McNair : 'Aspects of State Sovereignty, 26 *Bybil*, pp. 6-47, (1949); Wade : 'Bais of Legal Sovereignty, *Camb. L. J.*, P. 172 (1955).

the instant case and arrived at the conclusion that the territory in question remained in the possession of India and had always been treated as part of West Bengal. This circumstance led the Court to hold that the agreement providing for transfer of such territory involved cession and in the sense purported to ascertain or delineate the boundary. To put briefly this case dealt with transfer of territory which was *defacto* and *dejure* Indian territory[43] and therefore, the Court held that the Indo-Pakistan Agreement involved cession. This indicates that cession always takes place if the territory transferred is *defacto* and *dejure* territory of the transferor state. However, no cession takes place if the said territory is devoid of *defacto* and *dejure* title and if the same is under *defacto* possession of transferor but being *dejure* of the transferee state. Also, the question is moot whether cession takes place in a case where the territory is having *dejure* but not *defacto* title. Since cession in international law corresponds to 'conveyance' under municipal law, it would perhaps be correct to hold that cession took place in such a case.

As the object of cession is transfer of sovereignty and the territorial extent of a state sovereignty is determined by the national boundaries of that state, the Supreme Court could have decided the instant case by ascertaining whether the territory in question was tranferred by India when after its boundaries were already finally determined and well settled. In order to appreciate this approach consideration of the two main processes in boundary making viz. 'delimitation' and 'demarcation' is desirable. The 'delimitation of a boundary' comprises the determination of a boundary line by treaty or otherwise, and its definition in written, verbal terms.[44] In other words, the 'delimitation as pointed out by Cukwurah refers to all the proceedings connected with the determination of a boundary line in a treaty, an arbital award or a boundary commission's report as the case may be'.[45] Distinct from 'delimitation', 'demarcation' comprises the laying down of a boundary line, as mutually defined on the ground by means of boundary pillars, monuments and buoys, and permanent erections of other kinds

43. In *Mangan Bhai Case*, Hidayatullah C. J. pointed out that 'the first *Berubari* case dealt with transfer of territory which was *defacto* and *dejure* Indian territory and, therefore, as the extent of Indian territories as defined in Articles 1 read with the first Schedule was reduced, a constitutional amendment was necessary'. A. I. R. 1969 S. C. 788, 798.

44. McMohan, 'International Boundaries' in 84 *Journ. of the Royal Society of Arts*, p. 4 (1933). cited in Boggs : *International Boundaries*, p. 32 (1940). See also Boggs in 45 *AJIL*, 242, n. 10 (1951). Jones, *Boundary Making*, 57 (1945).

45. A. O. Cukwurah : *The Settlement of Boundary Disputes is International Law*, p. 25 (1967).

along the topographical confirmations of the territories to be separated by it and requires a team of experts, constituting a mixed boundary commission of the contracting parties or of the neutrals respectively, appointed by each side, to carry out this spade work of boundary construction.[46] Thus, unless a boundary line is demarcated on the ground, it will not, in most of the cases particularly in the case of new states give that element of 'stabiity and finality' which should be the underlying object of the international boundaries, and, therefore, the territorial extent of the concerned states will be uncertain. Now, if in such a situation of the process of demarcations of the boundary a State gives away its territory to another state by way of boundary settlement it is not tantamount to a cession because the sovereignty of the former over the territory in question either does not exist or is atleast doubtful. In other words, if certain territory is handed over by a state in favour of another state after the delimitation as well as demarcation of the former's national boundaries such transfer involves cession. But if the boundaries have only been delimited but not demarcated and certain territory is required to be transferred to another state in accordance with the settlement of the boundary disbutes, such transfer does not constitute 'cession' but merely an adjustment of boundaries.

Now, turning to the facts of the *Berubari Union Opinion* case we find that the territory in question, i. e. Berubari Union 12 situated in

46. Id. at pp. 28, 78. Holdrich has correctly noted: "it is in this process (Demarcation) that disputes usually arise and weak elements in the treaties or agreements are apt to be discovered. Important features are found in unexpected positions, and a thousand points of local importance crop up which could never have been taken into account by the delimitators whose definitions leave them unconsidered and unadjusted' Holdrich · *Political Frontiers and Boundary Making*, p. 208 (1916). Among the best known examples of the agreements or separate instruments providing for this expert body are the following. Article 2 of Boundary Treaty between Colombia and Panama, Bogota, Aug. 20, 1924. 33 *L. N. T. S.*, p. 168; Paragraph (4) of the Agreement relating to the Boundary between the mandated territory of South-West Africa and Angola, June 22, 1926, 70 *L. N. T. S.*, p. 305, Agreement between U. K. and Brazil. for the Demarcation of the Boundary between British Guina and Brazil, March 18, 1930, paragraph (1). 101 *L. N. T. S.*, p. 401; Article 2 of the Frontier Agreement between Afghanistan and U. S. S. R. of June 13, 1946. 31 *U. N. T. S.*, p 147 at p. 150. (It may be noted that 'delimitation' as used in this article, in fact, refers to demarcation). Exchange of notes constituting an Agreement between U. K. and Ethopia amending the description of the Kenya-Ethopia Boundary of Sept. 29, 1947, 82 *U. N. T. S.* p. 191; Article 2 (1) of the Agreement between U. K. (on their own behalf and on behalf of the Government of the Federation of Rhodesia and Nyasaland) and Portugal with regard to Northern Rhodesian and Angolan Frontier, Lisbon, Nov. 18, 1954, 210 *U. N. T. S.* p. 265.

the police station Jalpaiguri in the District of Jalpaiguri, was not specified in the First Sechedule of the Independence Act, 1947, dealing with the territories which were to be comprised as the new province of East Bengal. Therefore, in the light of the said Schedule it was not at all a part of East Bengal. As it has been already pointed out that the Indian Independence Act provided for the partition of the provinces of Bengal and Punjab and also the respective territories of India and Pakistan. On June 30, 1947 the Governor-General appointed Radcliffe Commission for demarcation of the said boundaries. The Report shows that the Chairman framed seven questions for the decision on the demarcation of a boundary line between the East and the West Bengal. Question No. 6 was framed in this way : "which states claim ought to prevail in respects of the Districts of Darjeeling and Jalpaiguri in which the Muslim population amounted to 2.42% of the whole in the case of Jalpaiguri but which constituted an area not in any natural sense contiguous to another non-muslim area of Bengal" ? On the relevant issues the decision of the Chairman of the Boundary Commission was in the following words : "The demarcation of the boundary line is described in detail in the schedule which forms Annexure A to the award and in the map attached thereto, Annexure B. The map is annexed for the purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated on the map in Annexure B the description in Annexure A is to prevail". Paragraph 1 in the Annexure A provided that "a line shall be drawn along the boundary between the Thana of Phansidewa in the District of Darjeeling and the Thana Tetulia in the District of Jalpaiguri from the point where that boundary meets the province of Bihar and then along the boundary between the Thanas of Pachagan and Rajganj continue alongwith northern corner of Thana of Debiganj to the boundary of the State of Coach-Behar. The District of Darjeeling and so much of the District of Jalpaiguri as lies north of this line shall belong to West Bengal, but the Thana of Patgram and any other portion of Jalpaiguri District which lies to the east or south shall belong to East Bengal.

Although on the perusal of the relevant documents and the Radcliffe Award it appears that the Commission endeavoured to demarcate a boundary line between the East and the West Bengal, yet what it actually did was mere delimitation of boundary since its efforts were in no way connected with the laying down of that line on the ground by means of ground pillars, monuments and buyos, and permanent erections of other kinds. In other words, the boundary in question was not finally determined as it was delimited but not demarcated.

Since in the present case India transferred half of the Berubari Union No. 12 to Pakistan after a boundery line separating East and West Bengal had already been delimited but not demarcated, it was certainly a case of boundary adjustments and not of cession of territory.

The question of cession came again before the Supreme Court in *Ram Kishore Sen and others* v. *Union of India* (popularly known as Berubari Union No. 11).[47] In this case the petitioners challanged the legality of transfer of the village Chilhati under the Radcliffe Award, by the Government of India in favour of Pakistan It was contended by the petitioners that the territory being situated in Debiganj Police Station was a part of Chilhati in Jalpaiguri District of West Bengal, and, could not be transferred by the executive wing of the Government without constitutional amendment.

The Supreme Court, however, rejected the contention of the petitioners and held that no constitutional amendment was required for the transfer of the territory to Pakistan which *dejure* belonged to Pakistan but in effect was in *defacto* possession of India It follows that this was not the case of cession While asserting that a part of Chilhati village had been inadvertently retained and administered by India as a part of West Bengal, the Supreme Court declined to accept the petitioner's arguments that the territory being administered as part of West Bengal under entry 13 of First Schedule was a part of West Bengal which immediately before the commencement of the constitution was West Bengal. Interpreting the provisions of entry 13 of the First Schedule, the Court concluded that the territory in question might have been administered as part of West Bengal but the said administration could not attract, the provisions of entry 13 because it was not administered as it was a part of West Bengal. Thus it could not include a part Chilhati that was administered by West Bengal by virtue of an accidental fact.[47a]

It is to be observed that the juristic exposition of the Court is based mainly on the examination of facts of the case and interpretation of the relevant provisions of the Constitution of India. It has failed to appreciate the relevant rules of international law in support of its conclusions. By contrast, the Calcutta High Court cited the views of eminent international lawyers like Oppenheim[48] and Jennings[48a] on prescription and distinguished on facts the *Island of Palmas case*[48b] *and Maryland*

47. A. I R. 1966 S. C. 644.
47a. *Id* at 653.
48. Oppenheim I. *International Law* (8th ed. 1955).
48a. Jennings, R. Y., *Acquisition of Territory in International Law* (1963).
48b. See case No. 70 in *Annual Diggest* (1927-28).

v. *West Virginia*[48c] from the *Ram Kishore case*[48d] and held that India could not acquire title over the territory in question by virtue of her adverse possession, since the elements necessary for establishing a prescriptive right under international law viz. the continuous and undisturbed exercise of sovereignty and general recognition of this part by the civilised world did not exist in this case. It is submitted that this view is more in accordance with the international legal position.

The third case is the decision in *Magan Bhai Ishwar Bhai Patel* v *Union of India*[49] where the several petitioners sought a writ of mandamus or any other appropriate writ or order or direction under Article 32 of the Indian Constitution to restrain the Government of India from implementing without the approval of Parliament, the "Kutch Award"[50] granting an area of 350 square miles in Northern Rann comprising the Kanjaikot, Chhadbet, Dharabanni, Pirol Valckun and two inlets on either side of Tharpaikan to Pakistan. The petitioners contended that territory was a part of India and had always been so since the establishment of the dominions, and that India exercised administrative control over it and hence, the case could fall in the dictum of the *Re Berubari Union Opinion* case. The union of India argued that no cession of the territory was involved, as the boundary was always uncertain due to the shifting nature of the sea and sand and the case was analogous to the case of Chilhati. Thus the question at issue was whether implementation of the award involved cession of territory necessitating constitutional amendment or was mere adjustment of boundary which could be effected by mere executive action.

The Supreme Court on the basis of the evidence presented held that the case was concerned with a boundary dipute and that the ascertainment of true boundary in the light of the 'Kutch Award' involved no cession. It, therefore, follows that a case of settlement of boundary disputes is distinguishable from that of a case of cession. A boundary settlement, the Court said 'contemplates a line of demarcation' on the 'surface of earth', it only seeks to reproduce a line, a suitable boundary and it is so fixed.[51] The Court further said that the case was one in

48c. (1909) 217 U. S. A.
48d. A. I. R. 1965 Cal. 282.
49. Supra 43 at p 783.
50. For a preliminary study of the Kutch Award see B. S. N. Murti : 'The Kutch Award : A Preliminary Study', 8 *I. J. I. L.*, 51 (1968); T. S. Rama Rao : An Appraisal of the Kutch Award' 9 *I. J. I. L.* 143 (1960); Rahmatullah Khan : 'Relinquishment of Title to Territory : The Rann of Kutch Award', 9 *I.J.I.L.* 157 (1969).
51. A. I. R. 1969 S. C. 783 at p. 798.

which each contending state *exfacie* was uncertain of its on rights. Apparently, this observation of the Court seems to confirm the present writer's view.[52] However, strangely enough the Court held this case to be of boundary adjustment in a dramatic way. Considering itself bound by the award of the international tribunal, the Court intimated that it was not sitting in appeal over the award of the tribunal It, however, asserted its jurisdiction to determine where there was concrete and solid evidence to establish that the areas in questions which India, under the award was giving up to Pakistan were undisputed Indian territory, or whether there was a genuine boundary dispute so as to give occasion for making out the final boundary on surface of the earth. Viewed from this angle, the Court held that with regard to Kanjarkot the petitioners failed to make out their case that it was Indian territory. As regards, Dharabanni and Chhadbet, the Court pointed out that it was only during some seasons that they were contiguous with the main land while at other times they were inundated. In these circumstances, the location of the boundary was no more than a determination and the court held that no cession of territory was involved. As regard the two inlets, the court opined that this would also not mean a cession by India as there was genuine doubt regarding the title to these inlets. Whilst the existence of the watch and ward officer stationed by the Government of India in this area and the establishment of a polling booth for them at the election time indicated that the Government of India had control but the Court held that there was no proof of *dejure* title.

The way in which the aforesaid conclusions have been arrived at has been criticized on the ground that the court instead of examining the question of title on the basis of a fresh evidencc and also of appreciating the other basis of title in international law favouring India, wholly relied on the award under the wrong assumption that it was bound by the verdict of the tribunal that 350 sq. miles awarded to Pakistan belonged to it in law.[53] While agreeing with the main conclusions of the

52. See this work at pp. 239-40.

53. See T. S. Rama Rao, *op, cit.* p, 256. It is surprising that the Supreme Court regarded itself bound by Award which has been variously described as 'perverse', 'political', 'politically motivated', 'vitiated by extraneous considerations and expendency, "not an award but award to Pakistan.' Even the Prime Minister of India, Mrs. Indira Gandhi pointed out that 'it was evident that the tribunal's award was not merely based on the material produced by the two countries but also on certain political considerations. See debate in the *Lok Sabha* on a motion of non-confidence against the Government of India on 27 and 28th February, 1968. Reported also in *Times of India, New Delhi*, 28 and 29th February, 1968. *Times of India, New Delhi* 21st February, 1968, p. 1.

court it may be submitted that the Supreme Court might have arrived at the same conclusion by applying 'delimitation—demarcation test' discussed in this paper elsewhere.

It is to be recalled that as regards the question whether the Kutch-Sind Border was a well determined and demarcated border the following statement of Late Sri Lal Bahadur Shastri in the Lok Sabha on August 18, 1965 is important one :

"Although we were quite sure that the boundary was already well settled and the only question that remained was that of demarcation, Pakistan contested that position. Therefore, the situation had to be resolved by negotiations and, failing that, by the verdict of an impartial tribunal. In either case, there had to be a determination of the boundary and the next step would be demarcation of the boundary on the ground. As soon as the actual boundary between the erstwhile province of Sind and the State of Kutch, which had ceded to India in 1947, was determined the demarcation of the border on the ground could be taken".[54] Also, Article 3 of the Agreement of 30th June, 1965 between India and Pakistan went on to declare : 'In the event of no agreement between the Ministers of the two Governments on the determination of the border being reached within two months of the ceasefire, the two Governments shall have recourse to the tribunal.....for determination of the border in the light of their respective claims and evidence produced before it, and the decision of the tribunal shall be final and binding on both position.[55] Thus India's commitment was not only restricted to demarcation of boundary but also to its determination by the Tribunal.[56] It, therefore, follows that the Kutch-Sind border was neither determined nor demarcated. Obviously, the transfer of certain territory to Pakistan by India in implementation of the 'Kutch Award' for resolving the border disputes involved no cession and the *Ishwar Bhai* case merely concerned with the ascertainment of the boundary.

B. Power to Cede Territory

Under International Law it is of the essence of sovereignty to cede territory. This is, however, subject to the limitations which the municipal law of the state may either expressly or impliedly impose in that behalf. Turning to our municipal law we find that the Indian Constitution contains no specific provision regarding cession of territory. The

54. Shastri, *Kutch Sind Border Question—A Collection of Documents and Comments*, New Delhi, 1965, p. 212

55. *Kutch-Sind Border Question—A Collection of Documents and Comments*, New Delhi, 1965, p. 206.

56. R. P. Anand, *Studies in International Adjudication*. p. 224 (1969).

judicial expositions of the Supreme Court in *Re Berubari Opinion*[57], however, furnished an elaborate guidance on the subject under consideration. Regarding the origin of power to cede Indian Territory in the constitution, the Court opined that the power to cede national territory is outside the constitution and can be exercised by India as a sovereign state.[58] Rejecting the contention that the Preamble to the constitution does not permit the dismemberment of India, the Court opined that although it might be correct to discribe the Preamble as a key to the mind of the constitution, it was not a part of the constitution and, therefore, could not be regarded as the source of any prohibition or limitation.[59] As regards the contention that the express mention of the power of acquisition in Articles 1 and 2 excludes the power to cede and in such a case the rule of construction viz., *expressio unius est exclusio alterius* must apply, the Court observed that there was no substance in it. Article 2 (c) correctly construed confers no power to acquire foreign territories but merely recognize automatic absorption of such territories as may be acquired by India in its sovereign right and, consequently, does not exclude by implication, the power to cede national territory, the Court observed.[60] Further, the power to amend the constitution under Article 368 gives Parliament the power to amend Article 1 so as to include the power to cede national territory as well.[61] Stated briefly the court located the power of India to cede national territory not in the constitution but in the International Law.

Some of the reasons given by the Court in support of the aforesaid conclusion have shaky foundation. The dicta concerning the status and use of the Preamble has been recently questioned in the *Fundamental Right's Case*[62], wherein it has been pointed out that the Preamble is not a part of the constitution, based on American Law is factually incorrect since the Preamble was expressly valid and adopted 'as part of the constitution.'[63] Sikri C. J. observed : "No authority has been referred before us to establish the proposition that what is true about the powers is equally true about the prohibitions and limitations. (...) Even from

57. 3 S. C. R. 1960, 250 at 258.
58. *Id.* at 291.
59. *Id.* at 281-82.
60. *Id.* at 282-83.
61. *Id.* at 283.
62. *Kesarananda* v. *State ot Ker* A. I. R. 1973 S. C. 1461.
63. (1973) 4 SCC 225, Per Sikri, C. J. at pp. 324-25; per Sheict and Grover JJ at pp. 421-25; Per Hegde and Mukerjee JJ at pp. 479-80; per Palekar J at pp. 407-11; Per Khanna, J. at p. 787; Per Methew J. at pp. 845-52; Per Dwivedi J at p. 928; Per Chandrachud J. at p. 988.

the preamble limitations have been derived in some cases. (...) It seems to me that the preamble of our constitution (...) should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."[64] In the same case Hegde aud Mukherjee JJ. observed that "the statement in the Preamble that the people of this country conferred the constitution on themselves is not open to challenge before this. Its factual correctness cannot be gone into by this Court which is a creature of this constitution. The facts set out in the Preamble have to be accepted by this court as correct."[65]

The argument of the Court that the power of Parliament to amend Article 1(3)(b) under Article 368 would logically include the power to cede national territory in favour of a foreign state is, if not altogether untenable, least convincing since Article 1 is a general provision indicating the categories of territories constituting India and any such amendment would in fact effect no diminution of the territory of the Union of India. However, the power of Parliament to amend the First Schedule, would certainly include the power to cede national territory. Though the Court's argument suggests that the power to cede national territory is by implication within the constitution, yet it held otherwise. The usual means for effecting cession of territory is a treaty between the ceding State and the acquiring state. Making and implementation of treaties are, however, governed by, the relevant provisions of the Constitution of India. The various provisions that govern India's treaty making power are laid down in Articles 51, 73, 246 and 253 read with a number of entries enumerated in List I of the Schedule Seventh to the constitution. However, a survey of these provisions would reveal that our constitution does not provide any clean direction about treaties such as to be found in the American[66] and the French constitution.[67]

64. *Id.* at pp. 1503-1506.
65. *Id.* at p. 1624.
66. The constitution of the United States, under Article II, Section 2, Cl. 2 provides that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-third of the Senators present corum, and Article VI of the Constitution declares : "...all treaties made, or which shall be made under the authority of the United States shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby anything in the constitution or Laws of any State to the contrary notwithstanding." In the United States, a treaty is supreme law of the land and the states of the union have no power to obstruct its implementation by congress which can make any appropriate law for the implementation of the treaty. (*Missouri* v. *Holland*, 252 U. S. 4-16; See also Dickinson, *Law of Nations* 1057; Grandall, *Treoties Their moking and Enforcement*, Chapter XIV (1909); and McNair, *Law of Treaties*, 80 (1916).

(C) Conclusion of Treaties of Cession

As regards the question who has the power to conclude treaties of cession, the Supreme Court in the *Re Berubari Union Case* expressed no opinion except that it should be exercised in the manner contemplated by the constitution and subject to the limitations imposed upon it.[68] Stated generally, the executive has the power to enter into treaties, this power is co-extensive with the legislative power of the Parliament.[69] While the Constitution of India provides in Article 73 "the executive power of the union shall extend to the matters with respect to which Parliament has power to make laws and Article 53 says that the executive power of the Union is 'vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this constitution, Article 246 (1) gives exclusive law making power to the Parliament to make laws with respect to any of the matters enumerated in List I of Schedule VII. The Union List in its entry 14 (Schedule VII of the Constitution) provides; "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." Since Parliameat has so far made no law in this regard the treaty making

In a number of cases, the U. S. Supreme Court has laid down that treaty provisions prevail over inconsistent state laws (*Wore* v. *Hylton* 30 all 199 (1796); *Clark* v. *Allen*, 331 U. S. 503 (1947) but it cannot override federal laws or the prohibition of the Constitution. A valid law of Congress has been placed on the same footing as a treaty. The power to ratify the treaties vests with the President. After the signature of a treaty, the original intended for the Governments of the United States is forwarded by the diplomatic agent to the Secretary of State to be laid before the President and, if approved is transmitted by him to the Senate to receive the advice and consent of the Senate to ratification. If the Senate refuses or fails to give its advice and consent to the ratification of a treaty, the President, of course does not ratify it, as under para 2 of Article 2 of the Constitution, Joint Action by the President and the Senate is essential to make treaties. Hackworth, 5 *Digest of International Law*, 48-49 (1943); See also C. C Tansil, 'The Treaty Making Powers of the Senate', 18 *A. J. I. L.* 459 (1924).

67. Under the French Constitution the power to negotiate and conclude treaties vests exclusively in the executive. According to the French Constitution, treaties ratified by the State have the force of law notwithstanding any contrary municiapal law without any further Act of the Legislature other than necessary for the ratification of the treaty (Arts. 26, 27, 28 and 31). Article 26 ptovides : "Diplomatic treaties duly ratified and published shall have the force of law even when contrary to French internal legislation.'

68. A. I. R. 1960 S. C. 845 at 857.

69. Upendra Baxi, 'Law of Treaties in the Contemporary Practice of India, 14 *The Indian Year Book of Interational Affairs*, 143 (1965).

power rests with the central executive. The Government of India has consistently taken the view that the central executive has a plenary executive power to make treaties and agreements; of course to give effect to the treaty, it has to proceed to the Parliament.[70]

The above view has been judicially affirmed in certain important cases. Thus, in *Union of India* v. *Manmull Jain* Justice Dasgupta of Calcutta High Court observed.[71]

'Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty ... but the treaty is complete without legislation .. undoubtedly, this (item 14 of the Union List) provides for all legislation in connection with entering into treaties. This cannot ... however, justify the conclusion that the makers of the constitution intended that no treaty should be entered into unless the Parliament has legislated on the matter. The power of legislation on this matter leaves untouched the executive power of entering into treaties. The President makes a treaty in exercise of his executive power and no court of law can question its validity.' Though the position taken by the court is extreme and is not acceptable in its entirety it makes clear that the making of a treaty is an executive act and not a legislative act.[72] The ratio of *Ram Jawaya Kapoor* v.

70. The above stated position was also reiterated by Pandit Jawahar Lal Nehru, the Late Prime Minister of India in the following words :

> '...then the treaty making power under the Constitution rests with the executive Government. Of course to give effect to the treaty, one has to come to the Parliament, that is a different matter. So, Parliament comes in : But a treaty is completed the moment Government of India signs it. The Government of India, if it is doing a wrong thing, may by punished for it. but it is a different matter' *Lok Sabha Debates*, Second Series, 49, 1960, Col. 6265, 1960.

The Executive regards the existence of parliamentary power as more of a 'performance' limitation than a 'capacity' limitation on its treaty making power, Upendra Baxi, op. cit., p. 145. For exposition and critique of such limitations, see Hendry I. H, *Treaties and Federal Constitutions* (Public Affairs Press, 1955).

71. A. I. R. 1954 Cal. 615 at p. 616.

72. The aforesaid observation is misleading in as much as it maintains that the power of legislation of the Parliament on this matter leaves untouched the executive power of entering into treaties and that no court can question the validity of such a treaty. The true position is that if Parliament passes a law subjecting the executive power to enter into treaties to a particular procedure or limiting it within particular confines, the executive will no longer validly enter into treaties in violation thereof and that the courts can question a treaty when the Executive has acted beyond the scope of its power, violating constitutional limitations imposed on the executive.

State of Punjab[73] and *Jayanti Lal* v. *Ramn*[74] when is applied to treaty making power would seem to indicate that while entry 14 of list 1 treaty making is an item of Union legislation, nevertheless Union Government can enter into treaties with foreign powers although no legislation has been passed in pursuence of Entry 14, List 1.[75] In *Nirmal Bose* v. *Union of India*[76] the Calcutta High Court took the position that there can be no doubt that the Union Government has right by executive action to enter into treaties. This view has been again reiterated by the Supreme Court in *Magan Bhai Ishwar Bhai Patel* v. *Union of India*[77] in the following words : 'The executive is qua the State competent to represent the state in all matters international and may by agreement, convention or treaties in our obligations which in international are binding upon the state.'

The treaty making power of the President is not only subject to the limitations imposed by the constitution but are also subject to those which our courts would imply.[78] Besides, there are other limitations imposed by the rules of international law. Thus under the terms of the Covenant of League of Nations, the members agreed : The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understanding *inter se* which are inconsistent with the terms thereof, and solemenly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof'. Similarly, Article 103 of the United Nations Charter provides : "In the event of a conflict between the obligations of the Members of the United Nations under the present charter and their obligations under any other international agreement, their obligations under the present charter shall prevail". The effect of aforesaid provisions is that they render treaties in conflict whith the Covenant of the League of Nations as well as

Further, the courts, while deciding the validity of any law passed by Parliament for the purposes of its implementation, would be indirectly deciding the validity of the treaty itself.

73. A. I. R. 1955 S. C. 549.
74. A. I. R. 1964 S. C. 648.
75. Raghwan, 'Treaty Making Power under the Indian Constitution', in S. K. Agarwala (ed) *Essays on Law of Treaties* at 223 (1972).
76. A. I. R. 1959 Cal 506. 77.
77. A. I. R. 1969 S. C. 783 at 798.
78. The question as to what extent the judiciary would imply limitation on the treaty making power of the President is not clear. According to Raghwan 'our courts would impty limitations on that prowers similar to those implied in the United States', Raghwan, *op cit.*, at p. 246. The doctrine of implied limitations was not accepted by the majority in *Kesavanand Bharti* v. *State of Kerala*, A. I. R. 1973 S. C 1461 at 1591 to restrict the power of Parliament to amend the constitution.

Charter of the United Nations void and unforceable for all practical purposes.[79] The treaty making power is also subject to the peremptory norms of general international law (*Jus cogens*[79a]) Thus Article 53 of the Vienna Convention on the Law of Treaties states as follows : 'A treaty is void, if at the time of its conclusion it conflicts with a premptory norm of general international law, a premptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which one derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

If violation of norm of *Jus cogens* makes conclusion of a treaty void, the question arises whether a treaty in compliance of which a state cedes a territory arbitrarily to another state without consulting the people concerned or if it does so in violation of their expressed wishes, is invalid. It is unfortunate, however that in none of the decisions the Supreme Court seems to have adverted to this problems It is submitted that if the principle of 'self determination'[79b] constitutes *Jus cogens*, such a treaty is certainly invalid.

It is to be recalled that the U. N. Charter, in Article 1(2), setting out its purposes and Article 55, calls for respect for the principle of equal

79. See also Oppenheim, *L., International Law* 896, (8th ed.); Kelson. *The Law of United Nations*, 113 (1950).
79a. See generally Schwelb, 'Some Aspects of International *Jus cogens* as, formulated by the International Law Commission, 61 *A. J. I. L*, (1967) pp. 946-975; Verdross, '*Jus dispositivim* and *Jus Cogens* in International Law', 60 *A. J. I. L.*, (1966) pp. 55-63; Schwarzenberger, The Problem of International Public Policy, *Current Legal Problems*, pp. 191-214 (1965); Perhaps a most comprehensive report on the subject is contained in Eric Suy; The concept of *Jus cogens* in Public Internationl Law in the 'Papers and Proceedings on the Concept of *Jus Cogens* in International Law of the Conference of International Law' held at Lagonissi (Greece), April 2-8, 1966; Carnegi Endorsment for International peace (European center, Geneva, 1967; B. S. Murty, '*Jue Cogens* in the Law of Treaties', *Proc. of Indian Society of Int. Law*, pp. 10-24 (1968); R. P. Dhokalia, 'Problems Relating to Jus cogens in the Law of Treaties', '*Essays on the Law. of Treaties*' (S. K. Agarwal's ed.), pp. 149-178; I. M. Sinclair, '*The Vienna Convention on the Law of Treaties*, pp. 110-145 (1973); V. Nageswar Rao, 'Jus Cogens and the Vieenna Convention on the Law of Treaties', 14 *I. J. I. L.*, pp. 362-385, (1974).
79b. See generally Chakravarti, *Human Rights and the United Nations*, pp. 104-119 (1958); Lachs, 'The Law in and of the United Nation', *I. J. I. L.*, pp. 429-42; Whiteman, V. 38-87; id., xiii, 701-768; Verziyl, *International Law in Historical Perspective*, pp. 321-326; Kaur, 'Self Determination in International Law', 10 *I. J. I. L.*, pp. 479-502 (1970); Fawcett, 'General Course on Public International Law', 132 *Hague Recucil*, pp. 387-391, (1971, 4).

rights and self determination of peoples. Also the General Assembly Resolution 1514 (XV) taken together with thirty-two years of evolving practice of the United Nations Organs[79c] have not only established the principle of self determination as a part of the law of United Nations[79d] but also have turned it into a legal right without qualifications[79e]. Besides, the principle has been incorporated in a number of international instruments.[79f] As a result of these developments it can be asserted that the principle of self-determination is a part and parcel of general international law,[79g] binding all states, and, therefore, must be taken to have the character of *Jus cogens*[79h], since numerous General Assembly Resolutions on the self-determination are declaratory of world public opinion and international public policy.

Thus, like other kinds of treaties, the power to conclude a treaty of cession rests with the Central executive notwithstanding this is subject to the constitutional limitation imposed by the legislation passed by the Parliament in that behalf (if any in future) and general rules of international law.

(D) Implementation of Treaties of Cession

The Constitution of India in Article 253 deals with the provisions pertaining to the implementation of treaties. It gives the power to Parliamant to make any law for the whole or part of the territory of India for implementing any treaty, agreement or convention with any other country or countries, or any decision made at any international conference, asso ciation, or other body'.[80] This Article is significant one as it removes the limitations imposed by Articles 245 and 248(3) and opens the entire field to legislation by Parliament.[81] The effect of Article 253 is that Parliament alone has, notwithstanding Article 246(3), the power to make any law to implement the treaty, agreement or convention or the decision made at any international conference, association or other body. In other words, the field of implementing treaties has been reserved exclusively for Parliament[82] This article deals with legislative power and thereby confers upon Parliament which it does not otherwise possess.[83] It appears that Article 253 has been embodied in the Constitution with a view to avoiding the difficulties experienced in Canada in respect of implementing international agreements and conventions.[84] Other provisions with respect to the implementation of treaties are contained in Article 51 of the Constitution. This article, however, comes under Part IV of the Constitution which lays down the Directive Principles of state Policy. It does not confer any legislative power on the legislature. The article only indicates what should be the policy of our nation in international sphere[85] and declares that the state shall foster respect for international law and treaty obligations.[86]

Thus Articles 253 and 51 do not give any clear direction as to whether legislative enactment by the Parliament is *sin qua non* for the implementation of all international treaties and also for making them part of our domestic law. So is the case with the implementation of treaties of cession. As regards the questions whether the implementation of a treaty of cession can be effected without any legislative

79c The G. A. Resolution 1514-15 or 14th Dec. 1960 (The Declaration on the Granting of Independence to colonial people) says in paragraph 2 : "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development see General Assembly Resolutions 1654 XVI (27 Nov. 1961); 1805-XVII (14 Dec. 1962); The Declaration of Principles of International Law concerning Friendly Relations adopted by the U. N. General Assembly in 1970 (Resolution 2625-XXV).

79d. Brownlie, *Principles of Public International Law*, p. 484, (1966).

79e. Dr. Rosalyn Higgins maintains that the Declonization Declaration of 1960 taken together with the practice of the U. N. Organs provides 'ample evidence that there now exists a legal right of self-determination. Higgins, *The Development of International Law through the political organs of the United Nations*, p. 104 (1963).

79f. The Pacific Charter, 8 Sept., 1954; Communique of the Bandung Conference of Non-Aligned Countries, 6 Sept. 1961; Declaration of the Cairo Conference of Non-Aligned Countries, Oct. 1964.

79g. Professor Samuel A Beleicher asserts that the General Assembly Resolution 1514 (XV) is 'as much a part of our international law as any of the familiar traditional doctrines.' 'The Legal Significance of Re-citation of General Assembly Resolutions' *A. J. I. L.*, 475, (1969).

79h. Brownlie admits that the principle of self-determination constituttes *Jus Cogens*, supra 79d at p. 418. In the Vienna Conference on the Law of Treaties the representatives of the Eastern Europe especially the Soviet Union characterised the principle of self determination as having the nature of *Jus cogens*. See Sinclair, op. cit, at p. 125.

80. It is interesting to note that the constitution speaks of 'treaty obligation', 'treaty', 'agreement' and even 'decision of any international conference, association or other body'.

81. For details see Seervai, *Constitutional Law of India*, 110 (1967).

82. *Sudhangsu Mazumdar* v. *C. S. Shah Commonweatlh Seesetary*. A. I. R. 1967, Cal. 216.

83. *Magan Bhai* v. *Union of India*, A. I. R. 1969 S. C. 807.

84. The Privy Council by virtue of S. 132, B. N. A. Act of 1867; struck down as *ultravires* three Labour Acts passed by the Dominion Parliament in 1935 which gave effect to the draft convention adopted by the International Labour organisation in accordance with the Treaty of Versailles and ratified by Canada *Attorney-General of Canada* v. *Attorney-General of Ontario*, 1937 P. C. 82,

85. A. I. R. 1967 Cal. 216

86. *Ajaib Singh* v. *State of Punjab*, A. I. R. 1955 Punj. 309 (Reversed on another point in A. I. R. 1953 S. C. 10).

action and if not whether mere legislative action is sufficient for the purpose or constitutional amendment is necessary, in addition to or as an alternative, the Indian Constitution is not explicit and does not furnish any clear guidance. These questions came sharply in focus in the *Re Berubari Union Opinion case* wherein regarding the implementation of the Indo-Pakistan Agreement relating to Berubari Union. It was argued on behalf of the Union of India that the implementation of a treaty was an executive act and that it could be effected without any legislative action under Article 253. In support of the argument the learned Attorney-General relied on the *Ram Jawaya Kappor*[87] *Case* where dealing with the limits within which the executive Government could function under the Indian Constitution, the Supreme Court observed :

> "The said limits can be ascertained without much difficulty by reference to the form of executive which our constutiton has set up ..The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order. the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on a supervision of the general administation of the state...Specific legislation may indeed be necessary if the government requires certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus, when it is necessary upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed [88]

The court, however, did not express any opinion on the merits of this argument as it was advanced by the Attorney-General under the assumption that the agreement was a mere ascertainment or delimitation of the boundary in the light of and by reference to the award and it found that the agreement in fact amounted to cession or alienation or a part of Indian territory.[89] As the implementation of an agreement involving cession leads to the dimunition of the territory of the Union of India, it would naturally involve the alteration of the content of and the consequent amendment of Article 1 and the relevant part of the First Schedule to the Constitution, the Court held in the *Re Berubari Union Opinion Case*[90]. The Court thus propounded the thesis that cession

87. A. I. R. 1955 S. C. 549.
88. *Id.* at 556-557.
89. A. I. R. 1960 S. C. 845 at 855.
90. *Id.* at 861.

of national territory necessitates constitutional amendment. This was a notable departure from the practice of the British India which sanctioned a cession of territory without the assent of Parliament. Thus in *Damodhar Gordhan* v. *Deo Ram Kanji*[91], it was laid down by the Judicial Committee of the Privy Council that 'the general and abstract doctrine laid down by the High Court of Bombay that it is beyond the power of the British Crown without the consent of the Imperial Parliament to make a cession of territory within the Jurisdiction of any of the British Court in India, in time of peace, to a foreign power, is erroneous.' On the contrary, according to the Supreme Court's ruling, in every case of cession constitutional amendment is *sin qua non*. Obviously, it is a significant departure from the British practice of making a distinction in this regard between the cession made in war time and cession made in peace time.[92]

As regards the question whether implementation of agreement relating to Berubari Union 12 and the exchange of enclaves required any legislative action either by a suitable law of Parliament relatable to Article 3 to the Constitution or by way of suitable amendment of the Constitution in accordance with the provisions of Article 368 or both, the Court advised that the implementation of the present agreement will require a constitutional amendment of Article 1 (which specified the territory of India) under Article 368 or an amendment of Article 3 of the Constitution by ordinary law providing for cession of territories. In the view of the Supreme Court, Article 3 applied only to a federal redistribution of territories and not to cession of territory to a foreign state, and, thus, the Berubari agreement could not be implemented by legislation under Article 3 (c). Parliament followed the former course and passed the Constitution (Ninth Amendment) Act 1960. It is to be noted that the view of the Supreme Court that cession of territory involves an amendment of not merely the First Schedule to the Constitution but also of Article 1 is not acceptable because Article 1 which indicates the categories of territories constituting Union of India needs no amendment and the Constitution (Ninth Amendment) Act which was passed consequently on the Supreme Court's opinion to give effect to the transfer of Berubari Union to Pakistan, in fact effected no amendment.[93]

91. 63 I. A. (1876) P. C. 102; See also *Lachmi Narain* v. *Raja Pratap* Singh 2 *A. L. L. I.*
92. For detailed study of the British practice regarding session of territory see McNair, *Law of Treaties*, (1961), p. 95 et seq.
93. See T. S. Rama Rao, *op. cit.*, at p. 253.

It is not clear why Article 3 did not provide for the exercise of ceding power which is an essential attribute of the country's sovereignty. One argument which was advanced by the Supreme Court with a view to giving considerable support to its main conclusion was that Article 3 (c), (d) and (e) did not refer to Union Territory In other words, if an increase or dimunition in areas of the Union Territory is contemplated or the alteratlon of their boundaries or name is proposed, it cannot be effected by a law under Article 3. This position is of considerable assistance in interpreting Article 3 (c).[94] It may be submitted that the assumption of the Supreme Court, that the word 'State' used in all the said Clauses of Article 3 does not include the 'Union Territories specified in the First Schedule is erroneous as it did not take into account the relevant provisions of the General Clauses Act, 1867. Further, this court has itself struck the opinion in substance in *Ram Kishore Sen* v. *Union of India*[95] wherein it observed.

> "...the opinion proceeded on the basis that the word 'state' used in all the said clauses of Article 3 did not include the union territories specified in the first schedule. Apparently, this assumption was based on the distinction made between the two categories of territories by Art. 1 (3). In doing so, however, the relevant provisions of the General Clauses Act...were inadvertently not taken into account. Under Section 3 (58) (b) of the said Act, 'state' as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a state as specified in the First Schedule to the Constitution and shall include a Union territory. This provision of the General Clauses Act has to be taken into account in interpreting the word 'state' in the respective clauses of Article 3, because Art. 367 (1) specifically provides that unless the context otherwise requires, the General Clauses Act, 1967, shall subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of an Act of the Legislature of the Domain of India. Therefore, the assumption made in the opinion that Artlcle 3 in its several clauses does not include the Union territory is misconceived and to that extent, the incidental reason given in support of the main conclusion is not justified.[96]

"The main argument of the Supreme Court, as pointed out by Seervai[97] is mistaken since it overlooks the express powers and in any

94. A. I. R. 1960 S. C. 845 of 859.
85 A. I. R. 1966 S. C. 644.
96. *Id.* at 648.
97. *Constitutional Law of India* (1967) at 121-22.

event, the residuary powers, of the union under Article 248 and List I, entry 97 Sch, VII.

The other arguments of the Court that Article 3 (c) cannot be construed widely so as to include the cases of cession and that it deals only with an inter-state adjustment as regards area or boundaries of a state are not convincing for the reason that there is no such limitation in this Article and it is not for the court to import pre-conceived notions, doctriniare approach or words of limitation in the interpretation of a provision of the constitution which, as is well known, must be liberally construed. If Article 3 (c) is rightly construed, it covers the cases of cession, and, therefore it not only comes into operation but, must necessary come into operation.[98] In fact, Parliament has already passed the Assam (Alteration of Boundaries) Act, 1951 (Act, XLVII) of 1951 under Article 3 of the Constitution providing that the State of Assam shall cease to comprise the strip of territory measuring 32-81 square miles known as Dewangiri on the border of Kamrup district, which shall be ceded to Bhutan.[99] But the Court did not think this statute to be of any assistance in construing the scope and effect of the provisions of Article 3, saying that the learned Attorney-General had not relied on this as showing legislative practice. It means that had the above mentioned statute been relied on as legislative practice, this would have been of importance in construing the provisions of Article 3. As it was the second time when India was ceding its national territory, this statute certainly reflected the legislative practice and ought to have been taken into consideration by the Supreme Court in construing the scope of Article 3(c). Stated briefly, the opinion of the court should be overruled and Article 3(c) should be declared as the fittest medium of the exercise of ceding power which is one of the essential attributes of India's sovereignty. In order to avoid controversy, it would be better if an explanation to the effect that Article 3(c) is wide enough to cover the cases of cession of territory is appended to article 3 of the Constitution. Alternatively, a suitable provision dealing with the problem may be inserted in the constitution. The opinion did not make it clear whether constitutional amendment was also needed for implementation of treaties (agreements) involving interpretation of award or for adjustment of boundaries. These doubts were solved to a great extent by the Supreme Court in the *Magan Bhai Ishwar Bhai* case wherein Hidayatulla C. J. observed[100]:

98. *Nirmal Bose* v *Union of India* A. I. R. 1959 Cal. 506.
99. The Indian Parliament passed the Act 47, 1951, III, V. 177 for the implementation of the Treaty of Friendship between India and Bhutan signed at Darjeeling on 8th Aug., 1949 (Art. 4) (2FPT 15).
100. A. I. R. 1969 S. C. 783 at 798-99.

"An agreeement to refer the dispute regarding boundary involves the ascertainment and representation on the surface of the earth a boundary line dividing two neighbouring countries and the very fact of referring such a dispute implies that the executive may do such acts as are necessary for permanently fixing the boundary ...Ordinarily an adjustment of a boundary which international law regards as valid between two nations, should be recognized by the courts and the imeplementation thereof can always be with the Executive unless a clear case of cession involved when Parliamentary inter-cession can be expected and should be had. This been the custom of Nations whose constitutions are not sufficiently elaborate on this subject."

The Court further observed : "if no constitutional amendment is required the power of the Executive which extends to matters with respect to which Parliament has power to make laws can be exer ised to correct boundaries now that they have been settled The decision to implement the Award as an operative treaty after the boundary has been marked in this area, is within the competence of the executive wing of Government and no constitutional amendment is necessary." Thus the Supreme Court made it sufficiently clear that no constitutional amendment was required for the implementation of treaties involving interpretation of an award or for boundary adjustment It is not clear how the 'Award' is self executing treaty since an Arbitral Award is different in character from those of treaties.[101] Further, from the view point of the Indian law no treaty is self executing since it has no force of law as understood under the Indian Constitution unless and until it is incorporated in the Municipal Law of India by a specific legislation.[102]

(E) Effect of Cession on Individual's Private Rights

The Supreme Court in *Union of India* v. *Sudhansu*[103] discussed considerably the effect of cession on individual's private rights. The question primarily at issue was whether the cession of a territory by India as a result of treaty with Pakistan would be compulsory acquisition of the property comprised in that territory by the Union of India and would, therefore, attract the provisions of Article 31 of the Indian Constitution. The Supreme Court observed that the cession in question involved transfer of sovereignty and considered the view of the Calcutta

101. T. S. Rama Rao, 'Some Constitutional Aspects of Treaty Making Power in India', in Agarwal (ed.) *Essays on the Law of Treaties*, 1972 at 257.
102. *Birma* v. *State of Rajasthan*, A. I. R. 1951 Raj., 127; *Nanka* v. *Govt of Rajasthan*, A. I. R. 1951 Raj 155.
103. A. I. R. 1971 S. C. 1594.

High Court[104] untenable that the cession in question involved transfer of ownership and other property rights to Pakistan through the Union of India.

The process of reasoning by which the court has reached at the aforesaid conclusion is interesting and therefore, requires brief consideration. First of all the court quoted the following passage from its own judgment in *State of Gujarat* v. *Vora Fiddali Badruddin Mithibarwala*[105] which in its opinion gives tersely the Indian position on the question under consideration :

"Thus while according to one view there is a state succession in so far as private rights are concerned according to the other which we might say is reflected in our laws, it is not so. Two concepts underlie our law, one is that the inhabitants of acquired territories bring with them no rights enforceable against the new sovereign. The other is that the Municipal Courts have no jurisdiction to enforce any rights claimed by them, even by virtue of the provisions of a treaty or other transaction, internationally binding on the new sovereign.[106]

The court fully endorsed this view, the true import of which is that the inhabitants of the ceded territory have no legal right to enforce their private rights which they derive form their former rulers unless their rights have been recognized by the new sovereign. It may be observed that the Court has not taken due notice of the existing rules of International Law.[107] There are several treaties of cession which contain stipulations creating an obligation to the point of the successor state.[108] Further, there is almost consensus that the private rights of the inhabitants of the ceded territory should be respected.[109] No doubt these rights may not be enforceable against the successor state but it does not mean that they will become redundant by the transfer of sovereignty.

The court further observed that the respondents did not produce any evidence to the effect that under the Pakistan laws the private rights of the inhabitants therein would not be respected in accordance with the ordinary principles of law. One fails to understand the relevancy

104. A. I. R. 1967 Cal. 216.
105. A. I. R. 1964 S. C., 1043.
106. *Id.* at 1094.
107. See this work at p. 235.
108. For instance, Article 9, first para, of Annex, XIV to the Treaty of Peace with Italy, 94 U. N. T. S. at 227.
109. *See United States* v. *Perchmen* (1831-1834) 8 L. ed. 604; *Cook* v. *Sprigg*, 1899 A. C. 552, 578; *The German Settlers in Poland*, P. C. I. J. Series B, No. 6, p. 36. See this work at p. 234.

of such evidence since what was at issue was the question of the right of private property under the municipal Law of India and not under the law of Pakistan.[110] The Court seems to have taken the aforesaid view under mistaken impression that cession of territory becomes operative as soon as treaty of cession is concluded. In fact, cession of territory becomes operative when actual transfer to the cessionary state is made on an 'appointed day' fixed by the parties to the transaction. Till that day, the rights of the inhabitants of the ceded territory will be governed by the municipal law of the ceding state It may also be submitted that the Supreme Court's exposition, that the cession of territory only involves transfer of sovereignty and not of ownership and other property rights, cannot be fully endorsed since the distinction between 'sovereignty' and ownership has not yet been fully recognized by International Law.[111]

After Constitutional interpretation of Arts. 31 (2) and 12, the Court held that cession of territory by India as a result of treaty with Pakistan did not amount to compulsory acquisition of property comprised in that territory by the Union of India since in cession there was no transfer of ownership or right to possession in the properties of the ceded territory to the ceding state (Union of India). It is remarkable that for the construction of the term 'acquisition', the Supreme Court dealt only with Art. 31 and not with Art. 19 f [which confers on all citizens the right to acquire, hold and dispose of property].

III

Conclusion

The aforesaid study of the convergence and divergence of the Supreme Court's exposition on cession of territory with the well-established rules of International Law reveals that the Court has tried to reconcile the Municipal law of the country with International law. Thus its exposition of the concept of cession of territory, the state power to cede territory, and the effect of cession on individual's private rights converge with the rules of international law notwithstanding certain little divergence from the latter which is also noticeable in their application by the Supreme Court.

In the sphere of municipal law, the contribution of the Indian Supreme Court is of far reaching significance, especially in view of the fact that our Constitution is not sufficiently explicit and elaborate on the

110. See V. S. Mani, 'The Berubari Cases from the Perspective of International Law, II *I. J. I. L.* (1971) at p. 66.

111. Fenwick, *op. cit.*, pp. 403-404.

subject of cession of territory. As regards the question, whether the Indian Constitution permits the state to cede territory in the case of necessity, the court answered in the affirmative by holding that the power to cede territory being an essential sovereign act is not lacking in the case of India which is Sovereign Democratic Republic. Though the court has located this power not within the Constitution but in India's sovereignty, this is nevertheless significant as it strengthens not only the doctrine of sovereignty but also resolves the long standing controversy on the point. Though the Supreme Court notwithstanding its reasoning held that the power to cede territory is implicity within the Constitution, yet it imported pre-conceived notions, doctriniare approach, or words of limitation for the interpretation of Article 3 (c) of the Constitution It would, therefore, be better if Article 3 (c) is declared relevant provision for conferring power on the state to cede national territory or in alternative a suitable provision to this effect is inserted in the Constitution.

Cession of territory is usually effected by conclusion of a treaty between the ceding state and acquiring state. It appears from the judicial observations of the Supreme Court that power to conclude a treaty of cession rests with the Union Executive However, it cannot be implemented without a constitutional amendment. This thesis marks significant departure from the British Practice which recognizes distinction between cession taking place in war time and cession taking place in peace time.

As regards the nature of constitutional amendment needed for the implementation of a treaty of cession, the Court advised that it would reqire a constitutional amendment of Article 1 under Article 368 or an amendment of Article 3 of the Constitution so as to authorise enactment of laws providing for cession of territory. It is not seen how Article 368 is better fitted medium of the exercise of ceding power than Article 3. Since some of the reasons given in support of the main conclusion have not only been struck down in the subsequent case but are also of doubtful legality, the *Re Berubari Uinion* case should be overruled and Article 3(c) should be declared to povide for the exercise of the ceding power. Alternatively, a suitable provision dealing with this sort of problem be inserted in the Constitution.

The Court has taken the view that a case of boundary ascertainment and delineation is plainly distinguishable from a case of cession. A cession of national territory in law is tentamount to transfer of sovereignty over the territory in question by the owner state in favour of another state, the court said. Putting this definition of cession

in concrete form, the Court said that a case of cession dealt with transfer of territory which was *defacto* and *dejure* Indian territory. A case of boundary settlement, on the other hand, contemplates drawing of a line of demarcation on the surface of the earth; the case is one in which each contending state *ex facie* is uncertain of its own rights. Sincecession does not cease to be cession simply because it is effected in the disguise form of boundary settlement, the aforesaid distinction between the two does not appear to be much clear. It is submitted that the court could have intelligibly distinguished cession from boundary ascertainment by applying 'Delimitation—Demarcation test'. If the national boundaries are delimited but not demarcated, in such a situation transfer of certain territory will not involve cession of territory. As regards the implementation of treaties involving boundary adjustments along the international frontier, the court held that they could be implemented by the Central Government without a legislation by Parliament. Thus whereas constitutional amendment is *sine qua non* for the implementation of an agreement involving cession of territory no legislation by Parliament is needed for the implementation of treaties involving boundary adjustments.

The Supreme Court's observation with respect to the effect of cession on the individual's private rights that the inhabitants of the ceded territory could not claim compensation from the ceding state, is an important innovation in the Indian Law.

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AIYAR Mr. JUSTICE N. CHANDRASEKHARA

Judge Supreme Court of India, September 23. 1950—January 24 1953; Adhoc Judge Supreme Court of India, September 5, 1955—October 31, 1955 and December 1, 1955—May 11, 1956; b. January 25, 1888. **Educ.** : Christian College, Madras and Madras Law College; Advocate, Madras High Court 1910-1941; City Civil Judge (Madras) 1927; District and Sessions Judge (Madras) 1927; Judge Madras High Court 1941-48; Judge Supreme Court of India September 23, 1950—January 24, 1953. After retirement adhoc Judge Supreme Court of India 1955-56

Chairman Delimitation Commission, 1953-1955. Member, Indo-Pakistan Boundary Disputes Tribunal. Member, All India Industrial Tribunal (Bank Disputes).

Publications

Mayne's Hindu Law and author of Sanskrit works.

Noteworthy Decisions

D. N Banerjee v. *P. R. Mukherjee*, A. I. R. 1953 S. C. 1958; *Basudev* v. *State of Pepsu*, A. I. R. 1956 S. C. 1488.

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Publications

Several Articles on Law, Sanskrit Literature and Philosophy and Music. *Evolution of the Indian Constitution* (1970); Edited Mukharjee's *Hindu Law on Religious and Charitable Trust* (1960).

Noteworthy Decisions

State of M. P. v. *G. C. Mandawar*, A. I. R. 1954 S. C. 493: *Badridas* v. *Commissioner of Income-tax* A. I. R, 1958 S. C. 783; *Jamma Masjid* v. *Kodimaniandra*, A. I. R. 1962 S. C. 846.

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Chairman Monopolies and Restrictive Trade Practices Commission August 1970—October 17, 1972. Appointed Judge Supreme Court on October 17, 1972.

Noteworthy Decisions

Jagmohan Singh v. *State*, A. I. R. 1973 S.C. 947; *Durai Muthu Swami* v. *N. Nachiappan*, A. I. R. 1973 S.C. 1419; *Kuju Collieries Ltd.* v. *Jharkhand Mines*, A. I. R. 1974 S. C. 1892.

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Noteworthy Decisions

All India Bank Employees Association v. *The National Industrial Tribunal Bombay*, A. I. R. 1963 S. C. 171; *M. L. S. Bradari* v. *Improvement Trust*, A. I. R. 1962 S. C. 976; *Lachman* v. *Meena*, A. I. R. 1964 S. C. 40.

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Noteworthy Decisions

Faquir Chand v. *Saradrani*, A. I. R. 1967 S. C. 727; *Golak Nath* v. *State of Punjab*, A. I. R. 1967 S. C. 1643; *A. C. Campanies* v. *P. N. Sharma* A. I. R. 1965 S. C. 1595.

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Member, International Law Association; Member World Association of Judges.

Publication

Papers on Legal Political and Cultural subjects and addresses at Seminars published by the Indian Law Institute and University Organisations.

Noteworthy Decisions

B. C. and Company v. *Union of India*, A. I. R. 1973 S. C. 106; *State of Mysore* v. *Krishna Murthi*, A. I. R. 1973 S. C. 1146; *Official Liquidator Supreme Bank* v. *P. A. Tendolkar*, A. I. R. 1973 S. C. 1104.

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M. A., LL. B., Judge Supreme Court of India September 8, 1952. August 6, 1959. b. August 7, 1894; **Educ** : Baroda College, Elphinstone College and Government Law College, Bombay, Advocate, Bombay High Court 1921-44; Judge, Bombay High Court 1944-52, Judge, Supreme Court of India Sep'ember 8, 1952—August 6. 1959.

Vice-Chancellor, Banaras Hindu University 1960-65; Sometimes, Professor Government Law College Bombay; Vice-Chancellor, Bombay University 1949-51.

Publications

Translated V. L. Meh'a's *Cooperative Movement* into Gujrati; Edited *Mulla's Law of Insolvency in India* 1957 (2nd ed.).

Noteworthy Decisions

Keshva Mills v, *Commissioner of Income-tcx*, A. I. R. 1963 S. C 187; *E. D. Sasson and Co. Ltd.* v. *Income tax Commissioner Bombay*, A. I. R. 1954 S. C. 470; *Dharang Dhara Chemical's Works Ltd.* v. *State of Saurashtra*, 1957 (1) L. L. J. 447; *Income-tax Commissioner* v. *Sadra Devi*, A. I. R. 1957 S. C. 832, *News Papers Ltd.* v. *Industrial Tribunal Uttar Pradesh*, A. I. R. S. C. 532.

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B. A. (Hons) (Maths) LL B., Judge Supreme Court of India since July 17, 1973; b. December 21, 1921, **Educ** : Elphinstone College and Government Law College Bombay; Dakshina Fellow in Elphinstone College, Courted Jail in 1942 freedom movement; appointed fellow in Government Law College, Bombay; Started practice, Bombay High Court Februay 1948; Also practised in the Supreme Court and other High Courts; Judge Gujarat High Court July 1960—September 1967; Chief Justice Gujarat High Court September 1967—July 1973 appointed Judge Supreme Court of India July 17, 1973.

Acting Governor Gujarat State, December 7—25, 1967.

Noteworthy Decisions

K. Sanyal v. *District Magistrate*, A. I. R. 1973 S. C. 2684; *Mohd Shujat Ali* v. *Union of India*, A. I. R. 1974 S. C. 1681; *Kanu Sanyal* v. *Dist. Magistrate Darjeeling*, A. I. R. 1974 S. C. 510; *Gora* v. *State of West Bengal*, 1975 S. C. 473

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Chairman. Committee on Telengana Surpluses 1969.

Noteworthy Decisions

Mangal Singh v. *Ratno*, A. I. R. 1967 S. C. 1786; *Electricity Board Rajasthan* v. *Mohan Lal*, A. I. R. 1967 S. C. 1856; *Sawan Ram* v. *Kalawanti*, A. I. R. 1967 S. C. 1961.

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Honorary Provincial Secretary Boy Scouts Association Central Provinces and Berar 1921-34; Chief Commissioner of India 1948; Captain the Nagpur Regiment, Indian Auxilary Force; Volunteer Long Service Medal, 1929; King's Silver Jubilee Medal, Kai Sen Hind Silver Medal 1936.

Publication

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Noteworthy Decisions

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Noteworthy Decisions

Kesvanand Bharti v. *Union of India*, A. I. R. 1973 S. C. 1461; *Habibullah Khan* v. *The State of West Bengal.*

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M. A., M. L.; Judge, Supreme Court of India March 9, 1953—July 27, 1958. b. July 27, 1893. **Educ:** Law College Madras, Madras University, apprenticed under Sir Vepa Ramesam : enrolled as Advocate 1917, practised on the appellate side till 1948 : Member, Madras Bar Council 1943-48; Judge, Orissa High Court July 1948—October 1951; Chief Justice October 1951—March 1953; Judge, Supreme Court of India March 9, 1953—July 27, 1958.

Member, Madras Corporation 1933-43; Secretary and Vice-President Thakar Bapa Vidyalaya Madras 1936-48; Member, Senate and Dean Faculty of Law, Utkal University 1948-53; Joined Indian National Congress in 1920; Imprisoned for participation in Quit India Movement (early 1940s). After retirement Chairman Pay Commission of India.

Noteworthy Decisions

Saraswathi Ammal v. *Rajagopal Ammal*, A. I. R. 1953 S. C. 491; *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, A. I. R. 1953 S. C. 394; *Rajes Kanta Roy* v. *Shanti Devi*, A. I. R. 1957 S. C. 255.

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Noteworthy Decisions

Automobile Transport Ltd. v. *State of Rajasthan*, A. I. R. 1962 S. C. 1410; *Lala Kapur Chand Godha* v. *Mir Nawab Himayat Ali Khan*, A. I. R. 1963 S. C. 250; *State Trading Corporation of India* v. *The Commercial Tax Officer*, A. I. R. 1963 S. C. 1811.

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I. C. S., Barrister-at-law; Judge. Supreme Court of India August 24, 1959—Jan. 2, 1965. b. January 3, 1900. **Educ** : Calcutta University and Magdalene, College, Cambridge. Member of Indian Civil Service since 1924; held many lower judicial position in Bengal until 1948. Judge Calcutta High Court, 1948-59; Chief Justice Calcutta High Court, 1958-59; Judge Supreme Court of India, August 24, 1959—January 2, 1965.

Notable Decisions

Workman of B. P. Trust v. *Trustees of Port of Bombay*, A. I. R. 1962 S. C. 481; *State Trading Company* v. *The Commercial Tax Officer*, A. I. R. 1959 S. C. 1811; *State of Bombay* v. *Kathi Kalu Oghad*, A. I. R 1961 S. C. 1808.

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I. C. S., Judge Supreme Court of India July 27, 1960—October 25, 1965. b. October 27, 1900. **Educ** : Allahabad University. Held lower Judicial positions apparently in Uttar Pradesh. Judge Allahabad High Court 1946-60, Judge Supreme Court of India July 27, 1960—October 25, 1965.

Noteworthy Decisions

Purushottam Das Dalmia v. *State of West Bengal*, A. I. R. 1961 S. C. 1589; *Krishna Murthy* v. *State of Andhra Pradesh*, 1965 (1) Cr. L. J. 355.

DUA, Mr. JUSTICE INDER DEV

B. A. (Hons), LL. B.; Judge, Supreme Court of India August 1, 1659—October 4, 1972. b. October 5, 1907. **Educ** : Forman Christian College, Law College Lahore. Advocate and member, Lahore High Court Rules Committee 1933-1947; Senior Advocate, Federal Court 1944; Advocate East Punjab High Court 1947; Chairman Punjab Bar Council 1958; Central Government Counsel, Delhi Circuit Bench of the Punjab High Court 1956-58; Judge, Punjab High Court 1958-1966; Judge, Delhi High Court October 1966—July 1967; Chief Justice, Delhi High Court July 1969 to July 31, 1969; Judge, Supreme Court of India August, 1969—October 4, 1972.

Noteworthy Decisions

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DWIVEDI Mr. JUSTICE SURENDRA NARAYAN

B. A., LL. B., Judge, Supreme Court of India August 14, 1972 Dec. 8, 1975; b. October 1, 1913; **Educ** Allahabad University, Advocate Allahabad High Court 1945-1959; Judge, Allahabad High Court 1959—August 1972; Judge Supreme Court of India August 1972—March 1975, Died in harness in March 1975.

Publication

Location of Sovereignty in India 9 *J. I. L. I.* 71 (1967).

Notworthy Decisions

Kesvanand Bharti v. *Uniou of India*, A. I. R. 1973 S. C. 1461; *St. Xavier's College* v. *State of Gujrat*, A. I. R 1974 S. C.; *Wool Combers of India* v. *Their Workers Union*, A. I. R. 1973 S. C. 2758.

FAZL ALI Mr. JUSTICE SAIYED

Judge, Supreme Court of India since its inception-September 18, 1951. Re-appointed for the period of October 15, 1951-May 30, 1952;

b. September 19, 1886. **Educ** : Allahabad University, Middle Temple, Advocate, Patna High Court 1912-28; Judge, Patna High Court 1928-47; Chief Justice, Patna High Court 1943-47; Judge, Supreme Court of India since its inception—May 30, 1952.

Convener of Orissa, 1952-54; Chairman, States Reorganisation Commission, 1954-56; Governor of Assam 1956-59. Chairman Royal Indian Navy Enquiry Commission 1946; Member, Calcutta disturbances Enquiry Commission 1946. Indian delegate to second session of U. N General Assembly 1946.

Noteworthy Decisions

State of Bombay v. *C. N. Balsara*, A. I. R. 1951 S. C. 328; *Mc herson Appanna*, A. I. R. 1951 S. C. 184; *A. K. Gopalan* v. *State of Madras* (Dissenting) 1950 S. C. 27; *Khusal Das Advani* v. *State*, A. I. R. 1950 S. C. 227; *Bharat Bank* v *Employees Bharat Bank*, A. I. R. 1950 S. C. 188.

GOSWAMI Mr. JUSTICE P. K.

B. A. (Hons) B. L., Judge, Supreme Court of India since September 10, 1973. b. January 1, 1913. **Educ** : Sanskrit Tol and English School Sib Sagar; Cotton College and Earle Law College, Gauhati; practised at Dibrugarh in 1938; Enrolled Advocate, Calcutta High Court 1943; Government Pleader and Public prosecutor 1947-49; enrolled Senior Advocate Supreme Court September 1953; Member State Law Commission 1958-67, State Bar Council and its disciplinary Committee 1962-67; Judge, Assam High Court, May 1967—January 1970; Chief Justice, Assam and Nagaland High Court, January 31, 1970—September 10, 1973. Judge, Supreme Court since September 10, 1973.

Acting Governor Assam and Nagaland, December 1970—January 1971. Founder Secretary 1956-58 and President 1958-65. All Assam Lawn Tennis Association; Vice-President, All India Lawn Tennis Association.

Noteworthy Decisions

Killick Nixon Ltd. v. *Killick and Allied Companies Employees Union* 1975 (ii) L. L. J. 53.

GROVER Mr. JUSTICE AMAR NATH

M. A., LL. B. (Cantab) Barrister-at-Law, Judge, Supreme Court of India, February 12, 1968-May 31, 1973. b. February 15, 1912. **Educ** Government College, Lahore; Christ's College Cambridge; Prizeman and Honorary Scholar Chirst College Cambridge; called to the bar by the Middle Temple 1936. Praetised as an Advocate at Lahore, Simla and Chandigarh 1936-57; Member Bar Council 1954-57; Judge, Punjab High Court 1957-February 1968. Judge Supreme Court of India, February 12, 1968-May 31, 1973; Resigned on May 31, 1973.

Publication

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Noteworthy Decisions

Chinta Lingam v. *Government of India*, A. I. R. 1971 S. C. 474; *Kesvanand* v. *State of Kerala*, A. I. R. 1973 S. C. 1461; *T. G. Mudaliar* v. *State of Tamil Nadu*, A. I. R. 1973 S. C. 974.

HASAN Mr. JUSTICE GHULAM

B. A., LL, B., Judge Supreme Court of India, September 8, 1952-November 5, 1954. b July 3, 1891. **Educ :** Allahabad Law College; Advocate, Oudh Chief Court 1919-40; Judge, Oudh Chief Court 1940-48; Chief Judge, 1946-48; Judge, Allahabad High Court 1948-51; Member, Labour Appellate Tribunal, 1951-52; Judge Supreme Court of India September 8, 1952-November 5, 1954; died in harness of November 5, 1954 Member, Uttar Pradesh Legislative Assembly in 1930s.

Noteworthy Decisions

T. B. Ibrahim, Proprietor, Bus Stand Tanjore v. *The Regional Transport Authority*, A. I. R. 1953, S. C. 79; *Gobardhan Das* v. *Lachhmi Rai* A. I. R. 1954 S. C. 683; *State of Rajasthan* v. *Nath Mal*, A. I. R. 1954 S. C. 300.

HEDGE Mr. JUSTICE K. SADANAND

M. A., LL. B.; Judge Supreme Court of India, July 17, 1967 April 30, 1973. b. June 9, 1910; **Educ** : Karkala Board High School, St. Aloysins College Mangalore, Presidency College and Law College

Madras; called to bar in 1936 and practised in Mysore High Court 1936-1947; Public prosecutor and Government pleader, Mysore, 1947-52; Member of Parliament (Congress, Rajya Sabha, elected from Madras 1952-57). Resigned from the Rajya Sabha in 1957; Judge, Mysore High Court 1957-1966; Chief Justice, Delhi High Court 1966-67; Judge, Supreme Court of India, July 17, 1967—April 30 1973.

Alternate Delegate to the United Nations in 1954. Served on the Rules Committee, the Railway Corruption Enquiry Committee and the governing body of the Indian Council of Agricultural Research during his membership of the Rajya Sabha.

Publication

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Noteworthy Decisions

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IMAM Mr. JUSTICE SYED JAFER

B. A., LL B. (Cantb) Bar-at-Law; Judge, Supreme Court of India January 10, 1955—February 1, 1964, b. April 18, 1900. **Educ** : Lynam's preparatory School, Oxford, Malvern Public School, England, Trinity College, Cambridge, called to the bar from Middle Temple, 1922. Enrolled and practised in the Patna High Court 1922-32; Assistant Government Advocate, Bihar 1932-39; Advocate General, Bihar 1942-43; Judge, Patna High Court, 1943-53; Chief Justice Patna High Court September 3, 1953—January 9, 1955; Judge Supreme Court of India, January 10, 1955—February 1, 1964.

Noteworthy Decisions

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KAPUR, Mr. JUSTICE JEEVAN LAL

M. A., LL. B. (Cantb) Barrister-at-Law; Judge, Supreme Court of India, January 1, 1957 to December 12, 1962. b. December 13, 1897.

Educ; Government College Lahore. Magdalence College Cambridge, Inner Temple; Practised at Lahore High Court, Lahore 1922-47; Member, Federal Public Service Commissioner 1947-49; Judge, Punjab High Court 1949-57; Judge, Supreme Court of India, January 1, 1957 December 12, 1962.

Vice-President All India Postman's Union 1926-47; Chairman Law Commission of India, Chairman Delimitation Commission, Chairman, Commission on Exodus of Minorities from East Pakistan.

Publication

Author of *Law of Adoption in India and Burma* (1933).

Noteworthy Decisions

News paper Ltd. v. *Industrial Tribunal, Uttar Pradesh*, A. I. R. 1952 S. C. 532; *United Commercial Bank* v. *I. T. Commissioner* W. B., A. I. R. 1957 S. C. 918; *Petlad Turkey Red Dye Works Co. Ltd* v. *Commissioner of Income tax* A. I. R. 1958 S. C. 1484.

KHANNA Mr. JUSTICE HANS RAJ

B. A., LL. B., Judge Supreme Court of India, since September 22, 1971; b. July 3, 1912; **Educ** : Amritsar and Lahore; Practised at bar till 1952; District and Session Judge 1952; Special Judge Totry Ram Krishna Dalmia and others 1958-59; District and Sessions Judge, Delhi 1959-62; Judge Punjab High Court 1962-1966; Judge Delhi High Court 1966-69; Chief Justice, Delhi High Court August 1, 1969 September 1971; Judge Supreme Court since September 22, 1971.

Chairman Commission of Inquiry on Police Firing at Kalka Railway Station in 1956 and also of the Commission of Inquiry into charges against Orissa Ministers 1968-69.

Noteworthy Decisions

Keshva Nand Bharti v. *Union of India*, A. I. R. 1973 S. C. 1461; *St. Xavier's College* v. *State of Gujrat*, A. I. R. 1974 S. C. 1389; *Gwalior Rayon Mills* v. *Asstt. Commr.* S. T. 1600.

KRISHNA IYER, Mr. JUSTICE V. R.

B. A, B L (Madras) : Judge, Supreme Court of India since July 17, 1973; b November 1915. **Educ** : Christian College Madras and Madras Law College; Member of the Legislative Assembly. Madras

Legislature 1952-57; Minister for Law, Home Irrigation and Power, Kerala State 1957-59; Judge Kerala High Court 1968-71; Member, Law Commission of India 1971-1973; Judge, Supreme Court of India since July 17, 1973.

Vice-President, Indian Society of International Law, Indian Association of Lawyers; Founder Director, Kerala Law Academy; President, International Centre for Kathakali, Delhi, Member, Law Faculty of the Kerala, Cochin and Aligarh Muslim University, Executive Committee of Central Animal Welfare Board, Bhartiya Vidya Bhavan (Delhi Branch), Kerala History Association etc; was associated with Indo-Soviet Cultural Society, Indo-G. D. R. Friendship Society, International Democratic Lawyer's Association and general Cultural Organisations.

Publications

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Noteworthy Decisions

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MATHEW Mr. JUSTICE KUTTYIL KURIEN

B. A., B. L., Judge Supreme Court of India, since October 4, 1971, b. January 3, 1911; **Educ** Trivendram; practised at the Trivendrum Bar 1935-60, Advocate, Kerala High Court 1960-62 Judge Kerala High Court 1962-71; Judge, Supreme Court of India since October 4, 1971.

Publications

The Welfare State Rule of Law and Natural Justice, 3 *J. B. C. I.* 395 (1974); *Impact of Foreign Capital on Indian Economy* (1966).

Noteworthy Decisions

B. C. and Company v. *Union of India*, A. I. R. 1973 S. C. 116; *Fagushaw* v. *State of West Bengal*, A. I. R. 1974 S. C. 613.

MITTER Mr. JUSTUCE GOPENDRA KRISHNA

B Sc. (Hons), LL. B. Bar-at-Law, Lincoln's Inn; Judge, Supreme Court of India August 29, 1966-September 24, 1971 b September 24, 1906. **Educ** : Zilla School, Muzaffarpur, Patna College, Patna, The

University College London. Started practice in the Courts at Muzaffarpur in 1931; Practised at the bar of Calcutta High Court 1934-1952; Judge, Calcutta High Court 1952-1966; Judge, Supreme Court of India August 29, 1966-September 24, 1971.

Noteworthy Decisions

Madhav Rao Sciendia v. *Union of India*, A. I. R. 1971 S. C. 530; *Narayan Das* v. *State of M. P.* A. I. R. 1972 S. C. 2086.

MUDHOLKAR Mr. JUSTICE JANARDAN RANGANATH

B. A., LL. B., Judge Supreme Court of India October 3, 1860-July 3, 1966. b. May 9, 1902. **Educ** : Elphistone High School, Bombay, Sussex College, University of Cambridge, Lincoln's Inn; Practised in Ammaraoti 1925-29; Nagpur High Court 1925-51; Appointed District and Sessins Judge 1941-48; Judge, Nagpur High Court 1948-5 ; Judge, Bombay High Court 1956-60; Judge, Supreme Court of India on October 3, 1960. Resigned on July 3, 1966.

Chairman Press Council of India, 1966.

Noteworthy Decisions

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MUKHERJEA, Mr. JUSTICE ARUN KUMAR

B. A., Bar-at-Law, Judge, Supreme Court of India since August 14, 1972 October 23, 1973. b. Jauary 20, 1915 **Educ** Presidency College and Sanskrit College, Calcutta and School of Oriental Studies, London. Member, Indian Civil Service 1937-51; Secretary, Radcliffee Commission, represented West Bengal before the States Re-organisation Commission; Judge, Calcutta High Court 1962-72; Judge Supreme Court of India August 14, 1972—October 23, 1973.

Member, Calcutta University Senate, Sangeet Natak Academy; Acting Chancellor, Jadavpur University for three years; Vice-Chairman, Indian Statistical Institute, 1970-71; Chairman, University Grants Commission Committee for Development and Re-organisation of Calcutta University; Member, Committee for Re-organisation of Visva Bharti University.

Publications

Role of Judiciary in the Government process, 1968 *L. Q.* 12.

Noteworthy Decisions

Keshavanand Bharti v. *State of Kerala*, A. I. R. 1973 S. C. 1461; *Kesava Mills Co.* v. *Union of India*, A. I. R 1973 S. C. 389.

MENON Mr. JUSTICE P. GOVINDA

B. A., B. L.; Judge, Supreme Court of India, September 3, 1956-October 16, 1957; b. September 1896. **Educ** : Madras, Law College, Madras; Advocate Madras High Court 1920-40; Crown Prosecutor 1940; Indian representative before the International military Tribunal for the Far East at Tokyo, 1946, prosecuting General Jojo and other major Japanese War Criminals; Judge, Madras High Court 1947-1956. Judge, Supreme Court of India September 3, 1956-October 16, 1957; Died in harness on October 16, 1957.

Publications

Author of the Chapter on Maru Kakkathayam and Aliya Santa Law in Mayne's *Hindu Law*

Noteworthy Decisions

U. P. Govt. v. *H. S. Gupta*, A. I. R. 1957 S. C. 202; *Om Prakash* v. *State of U. P.* A. I. R. 1957 S. C. 458.

PALEKAR, Mr. JUSTICE DAVIDAS GANPAT

B. A., L.L. B ; Judge; Supreme Court of India July 19, 1971—Septembdr 3, 1974; b. September 4, 1909; **Educ** : Government High School Karwar; Elphinstone College and Government Law College, Bombay, Advocate Bombay High Court 1935-1939; Bombay Judicial Service 1939-54; Deputy Secretary to the State Government, Legal Department 19 4-56; District Judge, 1956-58; Additional Registrar and Registrar, Bombay High Court 1958-61; Judge, Bombay High Court 1961-71, Judge Supreme Court of India July 19, 1971—September 3, 1974.

Noteworthy Decisions

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RAJU, Mr. JUSTICE PENMESTA SATYA NARAYAN

B. A., LL. B., Judge, Supreme Court of India October 20, 1965—April 20, 1966. b. August 17, 1 08. **Educ** Tanuku, Vijianagram and Madras Law College, practised in Madras High Court 1930-50; Government Pleader and State Counsel. Madras 1950-53; Government Pleader, Andhra 1953-54; Judge, Andhra Pradesh High Court 1954-65; Chief Justice, Andhra Pradesh High Court, 1964-1965. Judge, Supreme Court of India October 20, 1965—April 20, 1966; Died in office on April 20, 1966.

RAMASWAMI, Mr. JUSTICE VAIDYANATHIER

M. A, M. Sc., Barrister-at-Law, Judge, Supreme Court of India January 4, 1965—Octobnr 30, 1959; b. October 30, 1904. **Educ** : Madras University; Called to the bar from Inner Temple. Entered Indian Civil Service October 1929; held lower judicial positions in Bihar; Additional Judge, Patna High Court 1947-48: Puisve Judge, Patna High Court 1948-1956; Chief Justice, Patna High Court 1956—January 1965; Judge, Supreme Court of India, January 4, 1965—October 30, 1969.

Publications

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Noteworthy Decisions

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REDDY Mr. JUSTICE P. JAGMOHAN

B. Com. (Leeds) B. A., LL. B. (Cantb); Judge, Supreme Court of India since August 1, 1969. b. January 23, 1910; **Educ** : Hyderabad, Leeds; Cambridge: Practised in the Bombay and Madras High Court

1937-46; District and Session Judge, Additional Judge and Puisne Judge, Hyderabad High Court 1947-55; Judge Andhra Pradesh High Court 1955-1966; Chief Justice, Andhra Pradesh High Court 1966-69; Judge Supreme Court of India since August 1, 1969.

Expert member, Legislative Council for Income-tax and Company Law; Member, Government Commission for Revisions of Company Law, Insurance Law: Deputy Secretary, Government of Hyderabad; Member Syndicate and Dean Faculty of Law, Osmania University 1952-59; Officiating Vice-Chancellor, Osmania University 1959; Member of Jury, Jawahar Lal Nehru Award for International understanding 1966-69: Chairman, Commission of Inquiry into Ahmedabad Riots, 1969.

Publications

The Hyderabad Excess Profit Tax Act; *Quest of Justice*.

Noteworthy Decisions

D A V. College Jullunder v. *State of Punjab*, A I. R 1971 S. C. 1737; *St. Xaviers College* v. *State of Gujrat*, A. I. R. 1974 S. C. 1389; *H. C. Mohanty* v. *Surendra*, A. I. R. 1974 S. C. 47.

SARKARIA, Mr. JUSTICE RANJIT SINGH

B. A., LL. B ; Judge, Supreme Court of India since September 17, 1973; b. January 16, 1916; **Educ**: Advocate, Patialia High Court 1940-43; Patiala and Pepsu Judicial Service 1943-51, District and Sessions Judge, 1951-62; Judge, Punjab and Haryana High Court 1967-73; Judge Supreme Court of India since Septembar 17, 1973.

Member Senate and Syndicate Punjabi University, since 1971.

Noteworthy Decisions

State of Punjab v. *Amar Singh*, A. I. R. 1974 S. C. 1022.

SHELAT Mr. JUSTICE J. M

M. A. (London) Bar-at-Law, Judge, Supreme Court of India, January 24, 1966-April 30, 1973. b. July 16, 1908 **Educ** : Elphinstone College and University of London; Practised in Bombay High Court from 1933 to 1948; Judge City Civil Court and Additional Sessions Judge, Greater Bombay 1943-54; Principal Judge and Sessions Judge 1954-57; Judge, Bombay High Court 1957-60; Judge Gujarat High Court 1966. Judge, Supreme Court of India January 24, 1966-April 30, 1973, Resigned on April 30, 1973.

Publications

Secularism; Principals and application (1972); Changing Pattern of Law of Tort, 11 *I. J. I. L.* 403 (1969); Legal Education its Scope, A. I. R. 1969 *Jour* 52; *Spirit of the Constitution* (1967) Delhi; Spectacle of Law A. I. R 1965 *Jour* 42; *The tragedy of Shah Jahan* (1960); Author of Akbar (1959) and Contributor to Munshi : *His life and work.*

Noteworthy Decisions

Shambhu Nath Sarkar v. *State of West Bengal*, A. I. R. 1973 S. C. 1425; *Kesvanand v. State of Keraia*, A. I. R. 1973 S. C. 1461; *S. G. Mohita* v. *State of Maharashtra*, A. I. R. 1973 S. C. 55.

UNTWALIA Mr. JUSTICE NANDLAL

B. A., B. L. Judge Supreme Court of India since October 3, 1974. b. August 1, 1915. **Educ** : Sitamarhi H. E. School; G. B. B. College Muzaffarpur; University Law College Calcutta; Practised as pleader at Muzaffarpur 1940-46; Patna High Court 1947-58; Additional Judge and Judge, Patna High Court January 1958-September 1972; Chief Justice, Patna High Court September 29, 1972-October 2, 1974; Judge, Supreme Court of India since October 3, 1974.

Noteworthy Decisions

Namy Ram Bora v. *State of Assam.*

VAIDIALINGAM Mr. JUSTICE C. A.

B. A., LL. B.; Judge, Supreme Court of India October 10, 1966-June 30, 1972. b. June 30, 1907. **Educ** : P. S. High School Mylapore, Presidency College and Law College Madras; Advocate, Mapras High Court 1931-53; Government pleader 1953-57. Judge Kerala High Court 1957-66. Judge, Supreme Court of India October 10, 1968 June 30, 1972,

Noteworthy Decisions

Digvijai Singh v, *Pratap Kumari;* A. I. R. 1970 S. C. 137; *Indian Oxygen Ltd etc* v. *Their Workmen*, A. I. R. 1972 S. C. 471.

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Abbreviations used for periodicals

A. I. R....Jl	All India Reporter : Journal Section
A. I. R....S. C	All India Reporter : Supreme Court Section
A. J. C. L.	American Journal of Comparative Law
A. W. R.	Andhra Weekly Reporter
Ban L. J.	Banaras Law Journal
Bom L. R.	Bombay Law Reporter
C. W. N.	Calcutta Weekly Notes
C. M. L. J.	Civil & Military Law Journal
Com. Cas.	Company Cases
Cri. L. J.	Criminal Law Journal
I. A.	Indian Advocate
I. C. L. Q.	International and Comparative Law Quarterly
I. J. I. L.	Indian Journal of International Law
I. J. P. S.	Indian Journal of Political Science
I. T. J.	Income Tax Journal
Jaipur L. J.	Jaipur Law Journal
J. B. C. I.	Journal of Bar Council of India
J. C. P. S.	Journal of Constitutional and Parliamentary Studies

J. I. C. J.	Journal of the International Commission of Jurists
J. I. L. I.	Journal of the Indian Law Institute
J. L. S. A. A.	Journal of Lal Bahadur Shastri Academy of Administration
J. N. A. A.	Journal of the National Academy of Administration
J. S. S. S. G.	Journal of the Society for the Study of State Governments
K. L. R.	Kerala Law Reporter
K. L. T.	Kerala Law Times
Kur L. J.	Kurukshetra Law Journal
L. & S. Rev.	Law and Society Review
L. L. J.	Labour Law Journal
L. Q.	Law Quarterly
L. R.	Law Review
La.	Lawyer
M. L. J.	Madras Law Journal
Malaya L. R.	Malaya Law Review
Merc L. R.	Mercantile Law Reporter
Pub L.	Public Law
Rutgers L. R.	Rutgers Law Review
S. C. C.	Supreme Court Cases
S. C. J.	Supreme Court Journal
S. C. R.	Supreme Court Reports
S. C. W. R.	Supreme Court Weekly Reporter
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