THE BANARAS LAW JOURNAL

Vol. 11 January – December 1975 Nos. 1 & 2

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THE BANARAS LAW JOURNAL

Cite This Volume

11 Ban. L. J. (1975)

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PRACTICAL STUDIES IN FREEDOM OF RELIGION IN INDIA

J. DUNCAN M. DERRETT*

British judges began to administer law to the inhabitants of Bengal Bihar and Orissa in 1772, and the administration of justice was overhauled and regularised under Lord Cornwallis in 1793. From then onwards, the religion a person professed, or rather the religious community to which he could be shown to belong, determined the system of private law (in particular family law) by which he could be governed, the same courts applying all the personal laws concurrently to the various litigants. When India and Pakistan became independent in 1947 the legacy of communities divided by religion, or rather membership of communities conventionally designated by religion (e.g. Muslims, Hindus, etc.) became an embarrassment. Freedom of religion was guaranteed in the Constitution, whil India was determined that, one day, the 'religious' systems of law, the so-called 'personal laws' would be abolished in favour of a so-called uniform Civil Code for the whole of India (see Constitution of India, 1950. Art. 44). But freedom of religion implies also freedom to define one's own religion and India was not too sure about that, since an individual's identity in terms of professed religion would, more often than not, be merely another way of indicating his social grouping. The analogy I have drawn in the past between India's situation, for example, and that of Protestants and Catholics in Northern Ireland or Muslims and Greeks on the Island of Cyprus, helps to place this in perspective. Intermarriage between the religious grouping will eventually dissolve the mixed political and religious problems. But it is at present rare, and confined to wealthy or enlightened classes. States plagued with such legacies are forced to enact statutory, secular, marriage laws, to which the wealthy, enlightened, or adventurous citizens may have recourse; for their own 'personal' laws may forbid such unions.

Unlike the United States, India opted against a Wall of Separation. Freedom of religion was to be a positive, and not a negative thing, at least on the face of it. It was conveniently forgotten (but not always by Muslims) that the Hindus, that amorphous mass of vaguely like-thinking people claiming to be *autochthonous* to India, were a majority, and itended

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to remain the dominant culture. Any stranger to India will soon become aware that studies of 'Indian Culture' promoted by the state or in line with public attitudes in India are more or less exclusively Hindu in slant.

The cases studied here in an objective tone exemplify the nature and extent of freedom of religion in India. From a technical point of view it is difficult to hold them, even the last, to have been incorrectly decided. They are part of the rich sediment of Indian case-law, out of which will grow the authoritative law to be handed down by the Supreme Court. As long as Parliament does not amend the Constitution in this regard,[1] which it may do if public sentiment is too blatantly offended, these cases reliably indicate the ways of the wind. Christians interested in the balance between the communities in India, which is still a mission field, will find more than one of the decisions instructive.

The principal constitutional provision proceeds as follows :

Art. 25. *Freedom of conscience and free profession, practice and propagation of religion* :—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law :

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

The need for such written protection, as I have indicated, arises from the fact that the minority communities might suffer from any thoughtless or perverse arrangements which the majority might think fit to enact as laws and communal harmony is best achieved if each individual is not only free to practise his religion, but is also (in a striking phrase owed to P.K. Tripathi, a former Dean of a Law School who subsequently became a member of the Law Commission) free from the religions of his fellow citizens, whether of his own, or another community.

1. The power to amend the Fundamental Rights is now admitted by the Supreme Court in *Kesavananda Bharati v. State of Kerala* (1973) 4 S.C.C. 225, A.I.R. (=All India Reporter) 1973 S.C. 1461 (1973).

India is usually described as a 'secular state'[2]. We are by now quite familiar with what that means. It means a state in which government does not lean towards any religious community, in which religions are treated equally, in which religions are equally fostered, and no one community sets the pace, in matters of religion, for the rest. This is consistent with the Hindu outlook on life.

It sounds all very well, and works smoothly provided that the *positive* requirements of one religion do not come up against the *negative* requirements of another. The classical example was the Cowslaughter case,[3] a case which was solved by a neat compromise. The total prohibition of slaughter of (sacred or non-sacred) cows and bulls or bullocks was held unconstitutional not because this put Muslim hide and gut dealers totally out of work but because such interference with the livelihoods of others was not authorised by the constitutional protection of cattle (a provision which was deliberately phrased in ambiguous terms in 1950). It is traditional in India that religious communities' mutual quarrels should be solved by interposition of the ruler's decree, and the courts have inherited an ancient and necessary role.

What is to be done when the religion in question holds as part of its tenets that its creed should be propagated actively ? This may occur in order to obtain proselytes, which will—necessarily upset the balance between the groups in numerical terms. The religion of the majority, or at least its most zealous section (which can count on the support of the remainder in a crisis), may require that the making of such proselytes shouldbe resisted. Public order, morality and health certainly are not furthered by any public brawling or unedifying contests; but the contradictions between the two religions may lead to a denial of rights even without public order, morality, or health being brought into play.

Examples of what I mean can be taken from two spheres, one further from and one nearer to Indian experience. A group of people calling their system of thought 'Scientology' have attempted to 'push' it by various types of advertising and 'propaganda'. At different times their activities came to the notice of the British Government, and have been signalised by

2. The actual term 'secularism' is misliked by the important constitutional scholar, ex-chief Justice of India, K. Subba Rao, *Conflicts in Indian Polity* (Delhi 1970), 39. The legal content of the term is summarised by him at pp. 39-42. He ends with the conviction that 'a point of time may come when India may demonstrate to the world how the present unbridled materialism can be tempered to spiritualism'. The last-quoted word is used by him in the sense of 'spirituality'. Secularism is described as a founding faith of the Indian polity by JusticeV.R. Krishna Iyer, *Indian Secularism* (Dehradun, ND) (1975), 1-2. He eschews all theologies of secularism if there are communal bigotry.

3. Summarised in Derrett, *Religion, Law and the State in India* (London 1968), 471-2.

various ministers and officials as inconsistent with the nation's welfare. In particular the department of education and health have taken an interest in the proceedings of those who run the business of Scientology, and expressions unfavourable to the continuance of that business have fallen from responsible public servants. The Scientologists have claimed, without success, that their movement is a church. They have filed suits for damages against officials who have made unfavourable pronouncements against their activities, and the courts have (to the best of my knowledge) uniformly pronounced against them.[4] They claim, *inter alia*, to be a persecuted religion. English law has no written fundamental freedom of religion, and if it had it is not likely that Scientology would successfully claim classification as a religion. But my point is that the educated public regard the Scientologists as participants in a dubious enterprise, and they have been taught so to do far more often by the attitude of informed leaders of opinion than by notorious experiences of dissatisfied customers of this business. The idea that Scientologists should force their proselytising campaign upon the public in spite of the warnings and disapprobation of departments of government is extremely distasteful to educated sections of the public; while one must admit that on the other hand numerous liberally-inclined people will wish the Scientologists the best of luck and favour them as bold spirits defying political power. At any rate the claims, pretensions, and proceedings of the adepts in Scientology raise uniform hostility in better-educated classes of many religious persuasions, and the deportation of some of them was greeted with satisfaction.

Scientology provides an example of the diverse reactions of a culture against an aggressive campaign analogous to an exercise in salesmanship. It then cloaked itself in the self-chosen form of a religion. The adepts in that would be religion are incapable (until they are cured) of seeing the proselytising activities of its ministers otherwise than as legitimate evangelisation.

My second example is taken from Israel. Israel, because of its being the home of Holy Places of three faiths, and because of its inhabitants' belonging to three major world religions, cannot be otherwise than positively disposed towards 'freedom of religion'. But that is not the end of the matter. *The Times* (London) reported on the 19th September 1973 a mission to England of Chief Rabbi Shlomo Goren, who sought to obtain the

4. R.V. Registrar-General, ex parte Segerdal (1970) 1 All E. R. 1 (1970) affirmed in R.V. Registrar-General, ex parte Segerdal and another (1970) 3 All E.R. 886 in the Court of Appeal. Hubbard v. Vosper (1972) 1 All E.R. 1023 (C.A.), (1972) 2 W.L.R. 389 (1972); Church of Scientology of California v. Johnson-Smith (1972) 1 All E.R. 378, (1972) 3 W.L.R. 434 (1972).

help of Cardinal Heenan, Archbishop of Westminster and Dr. Michael Ramsey, then Archbishop of Canterbury, to stop missionary activity amongst Israel's Jews. Though the number of gentile wives of Jewish immigrants is small, and those who take an interest in Christian missionary work is smaller, and, further, those amongst other inhabitants of Israel who are interested in listening to Christian missionaries are a very small fraction of the population, the indignation of some sections of the Jewish population has led to violence. Chief Rabbi Goren has called for a law forbidding missionary activity that 'exploits the misery of individuals.' It is most unlikely that he had heard of India's predicament, but the similarity of the choice of phrase with what we have heard in India is remarkable. Israel is de facto a Jewish state in much the same sense that Pakistan is a Muslim state—though very much more than the sense in which India could be claimed to be a Hindu *state*—and a total want of correspondence in this area would be more remarkable.

When the Constitution of India was being framed the clauses which envisaged a freedom of religion were keenly debated.[5] It was felt, amongst other objections, that a freedom to propagate religion would lead to disorder, and was intellectually and historically unjustifiable in India. The objections came in the main from a section of Hindu society associated with nationalistic, nay militant Hinduism. They were unaware that there were missionary manifestations of Hinduism itself, and that if, for political reasons, Sikhism was to be lumped with Hinduism, at least one important branch of 'Hinduism' had an onward-going proselytising programme. Islam no doubt was the chief source of fear. Proselytising by Hindus did not annoy the majority community: it was loss of their own membership which concerned them. Islam was always frankly missionary in outlook. Unlike many parts of Africa, India knew Islamic missionary endeavour only in objectionable forms. Conversions took place in modern times in connection with inter-communal, sometimes forced marriages; or, worse, as forced conversions during communal rioting which Hindus deeply deplored. At the very time when these things were being debated civil strife was going on an unprecedented scale, due to the precipitate withdrawal of the British rulers and the intransigence of Indian leaders (for which the British disclaim responsibility). The forcible conversion of Hindus, particularly Hindu women, was a manifestation of religious antagonism at its worst. Conversion from Hinduism to Islam was all too common, and few, if any, Hindus could believe that it was sincere or religious in the commonly accepted sense

5. The sources (Constitutent Assembly Debates) and their implications are dealt with by Mohammad Ghouse, *Secularism* (cited below), ch. 1.

of that word. Conversion from Islam to Hindusim was unheard-of. Christianity likewise had a bad name. Hinduism had never forgiven the early missionaries for their widespread conversion of untouchables and other under-privileged classes. It was Hinduism's own fault (as it were) that such classes were still available for missionaries' endeavours, after Muslim Sultans had performed the same function for the lower social classes in Northern and Eastern India. But who has heard of a people accepting with patience what they regard as slights, especially when the latter are clearly incurred by their own want of foresight ?

Some Christian missionary methods are adjusted to the Hindu mentality, and have been successful. Some missionaries have ceased to be overtly proselytising as such. Some methods are crude and objectionable by modern Western standards, offering secular benefits for the convert, and spiritual pains for the would be victim who resists. The methods are attuned to the public towards which the endeavour is angled, and most missioners are themselves Indians, often of comparatively low caste. This is in itself an affront to Hindu sentiment, which accepts any amount of norm-propagating, provided those that propagate the norms are Brahmins by caste. For Brahmins were the *gurus* (teachers) of the nation in pre-British times, and they have a predilection for pontificating to this day.

Therefore it was urged that propagation of religion should not be erected into a fundamental freedom. The experience of Soviet Russia showed that it was possible for religion to survive, even though the right to propagate was denied, and correspondingly the right to freedom of anti-religious propaganda was guaranteed :

With extraordinary objectivity and generosity, the Constituent Assembly came to recognize that at least two Indian religions, Islam and Christianity, had the right and duty to propagate themselves as part of the religion itself; if thus the religion was to be protected the right to propagate it must be protected. Hence the form of Art. 25, reproduced above.

In *Mrs. Yulitha Hyde* v. *State of Orissa*[6] a number of persons proceeded under Art. 226 of the Constitution. Some Catholics had been prosecuted under the Orissa Freedom of Religion Act[7] (Act 20 of 1968), and, happily to relate, Catholics and Protestants joined to attack the validity of the statute. Its provisions, so far as relevant, may be indicated as follows :

Sec. 3 dealt with 'prohibition of forcible conversion' and provided,

6. A. I. R 1973 Or. 116 (1973)
7. Which empowers High Courts *inter alia* to issue writs, even against Government, for the enforcement of any of the Fundamental Rights.

'No person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means, nor shall any person abet any such conversion.'

Sec. 4 provided 'punishment for contravention of the provisions of Sec. 3 :'

'Any person contravening the provisions contained in Sec.3 shall, without prejudice to any civil liability, be punishable with imprisonment of either description which may extend to one year or with fine which may extend to Rs. 5,000 or with both; Provided that in case the offence is committed in respect of a minor, a woman, or a person belonging to the Scheduled Castes or Scheduled Tribes,[8] the punishment shall be imprisonment to the extent of two years and fine up to Rs. 10,000.'

The definition section is important. Sec. 2 provides :

'In this Act unless the context otherwise requires :—

(a) 'conversion' means renouncing one religion and adopting another;

(b) 'force' shall include a show of force or a threat of injury of any kind including threat of divine displeasure or social excommunication ;

(c) 'fraud' shall include misrepresentation or any other fraudulent contrivance;

(d) 'inducement' shall include the offer of any gift or gratification either in cash or in kind, and shall also include the grant of any benefit, either pecuniary or otherwise;..'

The applicants challenged the power of the state legislature to pass such an Act, on the ground that it offended against the fundamental right under Art. 25 of the Constitution. They produced eloquent affidavits as to the nature of the Christian religion(it must have been a work of art to make them all agree !), and as to the methods by which missionary work went on. Allegations against specific missionaries, viz. that they had used force or fraud were, it seems, hard to come by, or, perhaps, harder to substantiate. The state filed no counter-affidavits. Accordingly it would have been possible for the learned judges (R. N. Misra and K. R. Panda, JJ.) to

8. These are the castes and tribes specified in the Scheduled Castes and Scheduled Tribes Orders. They were criminal castes and criminal and forest tribes, tribal peoples. See the Scheduled Castes and Scheduled Tribes Orders Amendment Act, Act 63 of 1956, Scheduled I (1); and for the various Orders themselves see H.M. Seervai, *Constitutional Law of India* (Bombay 1967), p. A-96, on Art. 341.

proceed at once to the law, but, out of abundant caution, they looked into the applicants' allegations and consulted the Bible, to which the affidavits had made frequent reference. Christian belief regarding conversion was reviewed. Mild threats addressed to the intended converts had certainly occurred: but the Bible itself contains many curses as well as blessings. To consider whether propagation was part of the Christian faith the Sixteen Documents of the Second Vatican Council were consulted, and quoted. The state did not deny that propagation was required by Christianity. As to the definition of *religion* as found in Art. 25 (above), some old ground was covered again and American and Australian authorities were again cited. The Indian case of *Durgah Committee V. S. Husscin Ali*[9] was quoted for the now well established proposition that exhibiting beliefs and spreading ideas were included in the freedom of religion. The right is, however, subject to 'public order, morality and health.' The judges held that if the impugned Act had intended to prohibit the use of 'force' or 'fraud' as methods of conversion, mere reference to the words should have been enough. On the other hand, by giving an extended meaning to the words, an interference with the Christian religion had been caused. The usual meaning as found in the Indian Penal Code would have been practicable. The limitation subject to which the right is guaranteed in Art. 25 (1) would seem, in their opinion, to cover already the prohibition of the use of fraud and force. The statute's definition of 'inducement' unreasonably surpasses the field of morality. It is not covered by Art. 25 (1).

The legislative competence of the state was also doubtful. The statute was sought to be brought under Entry 97 of List 1 (Central List) by the petitioners. The basis of this was that, though the state claimed the statute came within Entry 1 of List II or Entry 1 of List III (the first is 'Public Order'; the second, on the Concurrent List, 'Criminal law'), the court could not seriously accept that the 'pith and substance' of the statute was public order or criminal law. It was evidently religion, and this must come within the residual item in the Seventh Schedule, namely Entry 97 of List I, reserved to the Union Parliament. Therefore the state has purported to legislate in a field reserved for the central legislature, and the judges declared the Act *ultra vires*. The convictions were set aside.

In *Rev. Stainislaus* v. *State of Madhya pradesh*[10] P. K. Tare, C. J., and U. N. Bhachawat, J., dissented form *Yulitha Hyde*, and, in closely similar circumstances, upheld the corresponding statute of Madhya Pradesh, the Madhya Pradesh Dharma Swantantrya Adhiniyam (Religious Freedom

9. A.I.R. 1961 S.C. 1402, 1414 (1961).
10. A.I.R. 1975 M.P. 163 (1975).

Act), 1968. A missionary had been prosecuted under the Act, and challenged the proceedings and the validity of the Act under the Constitution by way of a miscellaneous petition, a writ petition, and a criminal revision petition. He relied heavily on *Yulitha Hyde*. Two circumstances were different. The political history of conversion to Christianity has been more tense in Madhya Pradesh : there had been a Commission of Inquiry into what went on. Secondly, the Act itself instead of referring to 'inducement' referred to 'allurement'. Further, persons responsible for converting others were ordered under Rules promulgated under the Act to intimate the conversion with full details of the convert, his family, subsistence, etc., to the District Magistrate within seven days, in a particular form, and the District Magistrate was to report to Government on all such 'cases' by the tenth day of each month. Sec. 4 of the Act laid down a penalty for breach of the prohibition of forcible conversion by use of force or allurement, or by any fraudulent means. The penalties were heavier when any person of the Scheduled Castes or Scheduled Tribes was concerned.' 'Allurement' was defined in sec. 2 as the offer of any temptation in the form of any gift or gratification. Force' and 'fraud' were defined as in the Orissa statute.

The court, pressed to hold that the state had no legislative competence since the statute must fall under Entry 97 of List I, held on the contrary, that the case law on 'public order' revealed that it was very much wider than 'law and order' or 'public safety', and this Act, being concerned with the prohibition of forcible, fraudulent conversions was a statute concerning public order. Whether commotions might be aroused was not an issue. To my mind the case in Orissa and that in Madhya Pradesh could be distinguished on the ground of different political histories. Further, the court showed no trace of doubt but that, whatever the tenets of any religion regarding proselytism (which was a question they totally neglected), this statute was passed to secure freedom of religion. Not only does the Act not encroach on the freedom of religion itself;[11] but it upholds the principle that no one can claim a right to encroach on the freedom of other individuals by questionable methods. To prohibit, and to penalise, conversion by allurement cannot be challenged either on the ground of legislative competence or on the ground of violation of Art. 25, which (indeed) it was passed to further. As I submit there is a means of distinguishing these two closely associated cases, there is a sense in which both can be held to be correctly decided—and they are useful straws in the wind.

I would take *Yulitha Hyde* and *Rev. Stainislaus*[12] together as episodes in the same story, or phases of the same drama. I would submit that if we

11. A.I.R. 1975 M.P. 163, 168, .16 (1975).
12. A.I.R. 1975 M.P. 163, 166, .10 (1975).

are prepared to understand them both against their setting they form a piece with the leading ideas of the Indian Constitution as at present conceived : (1) the contents of a religion must be found out by testimony and/or affidavits from experts, and the court may, in its judicial discretion, examinine the scriptures of that religion in the light of that evidence;[13] (2) the Constitution of India protects as a fundamental right the propagation of a religion as well as belief in it; (3) the limitations 'public order, morality and health' (though they might serve as a screen, one fears, for repressive measures by the executive) are to be taken seriously, and are sufficient protection against objectionable proceedings by missionaries such as might, if Hindu resistance were strong enough, lead to disorder and communal or political dissention.

* * * * * *

Relations between Christians and Hindus are particularly touchy. The superiority stance of Christians towards Hindus is resented the more for the latter's half-conscious Hindu admission revealed in their commonly heard notion that Hinduism contains all that is good in Christianity, and more. The Jews of India, being always insignificant in numbers, have added nothing to this competitive situation. The judgment of T. Ramaprasada Rao, J., in *Kalyan Dass* v. *State of Tamil Nadu*[14] is only apparently contrary in tendency to *Yulitha Hyde* (above), and deserves careful reflection. The case may not (to some viewers) show Hinduism at its most tolerant, but that cannot be helped. What is sauce for the goose is sauce for the gander.

Many will remember that Mahatma Gandhi's religion required the reconstitution of Hindu society (principally in the light of the freedom struggle by the re-integration of the untouchables within the Hindu fold. This could hardly be done at a ritual level. I have already explained[15] that it was an interference with Hindu beliefs to intrude into a Hindu temple people who had, up to that point, been excluded from it on grounds not only recognized but also required by the Hindu religion.[16] All students of secularism will find it strange that statutes should be passed altering the beliefs of the legal trustees and ministers of an idol (they are called *shebaits*) whereby ipso facto the 'beliefs' of the idol itself are reformed (the idol is a juristic person)[17]. Nevertheless India set about this, in the interest of national unity, and on that altar the principles of the traditional Hindu religion were unhesitatingly sacrificed. Desiring to meet the scornful criticisms of the enlightened sections of their own population, India forsook intellectual

13. As I argued at *Religion* (above n. 3), 457-9.
14. A.I.R. 1973 Mad. 264 (1973).
15. Derrett, *Religion*, 454-7.
16. See below for the suggestion that an idol has a right not to be intruded upon.
17. See Derrett, *Introduction to Modern Hindu Law* (Bombay 1963), 782 ff.

honesty. The world must know that Hindus did not discriminate against their own compatriots on the ground of religion. And so in state after state temples were thrown open to untouchables and to members of castes previously allowed restricted or no access to public temples.[18] Private temples were not touched, understandably.

Throwing open temples to those people whose presence would pollute the idol, and so cause it to need reconsecration with costly ceremonies, produced an inevitable result. *Shebaits* would be bound to petition the courts against the statutes, urging that this so-called reform infringed the guaranteed freedom of the non-untouchables' religion. The Supreme Court worked out a beautiful compromise under which freedom to enter a temple did not mean freedom to enter any nearer to the idol itself than now excluded castes had been able to come.[19] 'Beautiful' this compromise is, but not intellectually sound, as the *agamas*, as the traditional texts are called which regulate the ritual administration of temples, do not permit untouchables to enter temples at all. The distances at which various castes must stand from the idol are regulated in such texts. The result is that entry within these circumferences is a breach of religion. However, the Supreme Court's latest views on the subject are law for India, and no one can deny that they are practical.

To proceed with our story: the Temple Entry statutes were designed to benefit Hindus. In course of time Jains and Sikhs were included in the definition of Hindu, so that a Hindu untouchable could enter a Jain temple.[20] There was no question of Temple Entry's meaning that Muslims, Christians, Parsis and Jews could enter temples in actual worship, i.e such as were actually used by Hindus for public worship. The rules framed by government under the statutes were intended to regulate the new freedoms, but of course they had no greater validity than the statute under which they were framed.

The government of the state of Tamil Nadu framed a new Rule 4 A under the Tamil Nadu Temple Entry Authorisation Act (Act 5 of 1947), Sec. 8. Until January 1970 non-Hindus were not allowed to enter, to offer worship or use waters or hills, streets, etc., requisite for obtaining access to the temple. The new rule removed the restriction and thus made a breach with custom. The petitioners, Hindu priests and *shebaits*, argued that the rule violated Arts 25 and 26 of the Constitution. The latter Article guarantees

18. Derrett, *Religion*, 453 n. 1, 455 n. , 471 n. 1.
19. Sri Venkataramana Devaru v. State of Mysore A.I.R. 1958 S.C. 255, 1958 S.C.R. 895 (1958); see also Commissioner of Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar A.I.R. 1954 S.C. 282, 1954 S.C.R. 1005 (1954); Srimad Perarulala Ethiraja Ramanuja v. State of Tamil Nadu A.I.R. 1972 S.C. 1586, 1972 S.C.D. 487 (1972).
20. Derrett, *Religion*, 455 n. 2.

religious communities freedom to manage their own affairs. It was argued on behalf of the state that the new rule laid down stringent conditions whereby all possibility of offence by non-Hindu visitors was eliminated. It was also argued that this is a secular age and that increasing secularisation makes Hindu exclusiveness in this respect anachronistic. The judge held the rule void as infringing Art. 25 of the Constitution.

His reasoning is easy to follow. The orthodox and effective Hindu doctrine was proved by experts, who cited texts. They explained that when non-Hindus enter a temple it is derogatory to other persons, Hindus, present there for religious purposes. Witnesses belonging to the (often discordant) Vaishanava and Shaiva sects agreed that expensive ceremonies are needed to purify the temple from non-Hindus' presence. In this, the so-called Kali ('Iron') Age, temple worship is a requirement upon which the *agamas*, the authentic texts of traditional Hinduism insist. Religious practices are protected by Art. 25.[21] Temples are the sole repository of divine power; they are sacrosanct as a whole. The image must be preserved from defilement; any departure from rules of worship may have this effect. Supreme Court cases[22] authorise us to accept that unqualified persons cannot be intruded into parts of temples from which the religion excludes them.

The learned judge, whose judgment has not been appealed, held that no non-Hindu may seek entry to a temple for pleasure of 'social evaluation' i.e. for idle or cultural curiosity. Temple Entry itself involves throwing open temples to all classes of *Hindus*. Christians themselves offer no sort of analogy. It is no part of the Christian religion to exclude non-Christians from churches, whereas it is part of the Hindu religion to exclude non-Hindus from temples.

It was argued that the tourist trade would suffer.[23] Tourists had been allowed, with a permit and a guide (for both of which they paid) round many parts of some famous temples. This, said the judge, is not based on any right. Courts and legislatures cannot turn over temples into museums for tourists, he said.

21. See Commissioner of Hindu Religious Endowments (above no. 19); Sardar Syedna v. State of Bombay A.I.R. 1962 S.C. 853 (see Derrett, Religion, 473-7); Srimad Perarulala (above n. 19).

22. N. 19 above.

23. At p. 269, para 20, end. His Lordship's point that tourists cannot be allowed to go round temples admiring them, instead of worshipping the idols, will be intelligible to most readers, and I, who am thus excluded from many temples dedicated by kings whose lives I have researched, must accept that the decision is legally sound. The way out may be to refurbish temples of architectural value (there are many) which have fallen out of use, and direct tourists thither.

It was argued that in Rameswaram and at Tanjore non-Hindus regularly go round as sightseers. The judge deplored such a practice as unauthorised and contrary to the Hindu religion.[24]

It was argued that if untouchables were allowed into temples non-Hindus might be allowed. His argument is interesting, and, as it is unfortunately expressed, requires elucidating. The Constitution abolished Untouchability due to two impetuses. Firstly there was the march of law. A Cosmopoliton attitude in the field of Constitutional legislation for a united, if federal, state, inevitably required a democratic movement of this kind. Secondly, it was recognised that a 'base sanctimoniousness' had introduced or retained, in Hinduism the same religious position we find in the *agamas*, namely that untouchables should be kept out of temples. Advanced socialistic principles positively required that it should be silenced in the public sector. Thus the position is this : the *agamas* are our authority for keeping non-Hindu tourists out of Hindu temples, since to allow them in is an affront to the freedom of religion of Hindu worshippers ; but the *agamas* are not listened to when they say Hindu untouchables must be kept out, because the Constitution has preempted the discussion.[25]

Thus the Constitution protects freedom of religion, including religious practices, provided that they do not offend Hindu sentiment to the extent of infringing public order, morality or health; but it does not protect Hindu sentiment against the intrusion of Hindu untouchables into public temples, since this anomaly was part of the bargain Hindus has to contract inorder to achieve independence in 1947 and show a united front against the Muslims who opted for Pakistan. It may be argued that this is imaginary as no trace of any such bargain can be found. This is untrue. When it was clear that untouchables were to be allowed to enter Hindu public temples there was a fear that they would introduce, with them, religious practices of their own at variance with the *agamas* followed in the temples. It was a natural fear, though equivocal from the point of view of freedom of religion. Therefore the legislatures introduced legislation which prohibits,[26] subject to penalty, the slaughter of animals and birds in any public temple'. Such practices belong to the religion of precisely those classes who were formerly excluded. These statutes have not been challenged by the untouchables or other interested persons. Why ? They most certainly infringe upon the freedom of re-

24. At p. 267, para 11.

25. M. Ghouse, *Secularism, Society and Law in India* (Delhi 1973), 205 : the temple entry cases overrode the *agamas* and reformed the religion by purifying it of an ancient evil.

26. Derrett, *Religion* 452 n. 3 gives an example. See also Kerala Animals and Birds Sacrifices Prohibition Act, Act 20 of 1968.

ligion as understood in the case-law on Art. 25 (above). The reason may be that it is known[27] that this was part of that bargain; and this was one of the silent conditions under which Gandhian principles were put into effect.

Studies of secularism in India will eventually take these two complementary decisions into consideration. Secularism is a topic of constant concern there.[28] But there are other decisions which are, in a sense, further commentaries on the present constitutional set-up.

* * * *

If non-Christians have no right to enter Hindu public temples one wonders what is to be done when it is in the interests of Hindu trustees that a particular Christian should enter. In Kerala there are a number of famous public temples where the authorities organise festivities which bring in the crowds and no doubt increase the prosperity of the institutions themselves. A great attraction is the pop-singer. Such temples are administred according to rules framed in accordance with state statutes. The rules invarialy exclude non-Hindus. Mr. Jesudasan, a celebrated pop-singer, was invited to a function at a great festival, and would have been a substantial attraction to the multitude. But he was born and brought up as a Catholic Christian. It was known that he was a sympathiser with Hinduism and had gone on an arduous pilgrimage to a Hindu holy place (let us hope that his steps were cheered by an appropriate accompaniments). Shortly before the festival was due to take place Mr. Jesudasan proclaimed in a news-paper that he was a follower of the Hindu Faith also (sic). He was also observed worshipping a Hindu idol 'in the customary manner'. The managers of the temple then declared that Mr. Jesudasan was a Hindu, and consented to his entry to the temple. Admittedly his followers and assistants, who were needed to set up all the electrical apparatus, were Christians, or many of them were : but that was detail. A Hindu worshipper of the idol sued for an injunction

27. L. Dumont. *Homo hierarchicus* (Paris 1967), 293-4.

28. The series of studies is long. Beginning in India with Luthera, *Concept of the Secular State and India* (Calcutta 1964), it entered its Christian/secular phase with D.E. Smith, *India as a Secular State* (Princeton 1963), still an influential book because of its American presuppositions. The discussion of it by Galanter, Flint, and Smith himself at *Comparative Studies in Society and History* 7/2, January 1965, 133-172, is of value. In India sweet reasonableness is represented by G.S. Sharma, ed., *Secularism : its Implications for Law and Life in India* (Bombay 1966) and more consistently by P.B. Gajenbragadkar, *Secularism and the Conssitution of India* (Bombay 1971). Muslims' fears are ventilated by M. Ghouse (above, n. 25). There are also J.M. Shelat's *Secularism, Principles and Application* (Bombay 1972); M.C. Setalvad, 'Secularism in India', in K.R. Bombwall and V.P. Choudhry, *Aspects of Democratic Government and Politics in India* (Delhi 1968), 39-63; and U.C. Sarkar, 'Indian Secularism : policy and implementation', *Law Review* (Chandigarh) 19/1 (1967), 4-17. For V.R. Krisha Iyer see n. 2 above.

against the temple managers restraining them from admitting the pop-singer, on the ground that he was not a Hindu within the meanings of the rules and that they had exceeded their powers. In *Ram Mohandas* v. *Travancore devaswom Board*[29] T. Chandrasekhara Menon, J., held that the managers had acted properly, and dismissed the suit.

His reasons were interesting, and unique. Up until 1975 we had understood that a person could have only one religion at a time. The personal law system, after all, is based on this hypothesis. True enough, the Dudekulas of Andhra Pradesh do not know whether they are Muslims or Hindus, and claim to be either according as its law offers them the relief which they happen to be seeking from the court.[30] But this bizarre anomaly serves to prove the rule. The judge in our instant case proceeded on two footings: firstly that Hinduism is a broad and tolerant religion, and secondly that there may be a Hindu by *conviction* as well as a Hindu by birth or conversion. The former argument is not novel, but the latter is altogether original. The fact that Christians would argue that a man who accepted Hinduism as his faith was no longer a Christian and has thus been converted was conveniently ignored.

The first argument was supported from two sources. The Supreme Court case of *Sastri Yajna Purushdasji* v. *Muldas Bhubdardas*[31] contains a vast amount of obiter dicta explaining the willingness of Hinduism to embrace as Hindus people believing in a short quasi-catachism of beliefs of a very broad character, so that a sect which included Parsis and even Muslims could be classified by the court as a Hindu sect for the application to it of statutes requiring it to be thrown open to all classes of Hindus (including, of course, untouchables). If a sect which included Parsis could be a Hindu sect, and its temple a Hindu temple, it would not be difficult to class Mr. Jesudasan as a Hindu for some purposes if not all.

The argument could have been supported, but was not, by the extraordinary decision in *Sridharan* v. *Commissioner of wealth Tax.*[32] There it was advisable, for avoidance of tax, that a Hindu father should declare him-

29. (1975) Ker, L.T. 55 (1975). Discussed by me at (1975) Ker. L.T., Journal sec .31-2

30. Rosanna v. Subbanna, Indian Law Reports (1970) A.P. 1010 (1970.) The court emphasise that the judgment is not to be treated as a precedent even for the Dudekulas.'

31. A.I.R. 1966 S.C. 1119 (1966). The case is extensively discussed by me at *Relgion*, 45ff., also (1966) 2 *Madras L.J.* Journal sec. 47-54, and in *Hindu : a definition wanted for the purpose of applying a personal law* 70 *Zeits. f. vergl. Rechtsw.* 110-128 (1968), and in M. Galanter's careful and ample study at *Philosophy, East and West* 21/4, October 1971, 467-87.

32. 73 Inc. Tax R. 360, A.I.R. 1970 Mad. 249 (1970), discussed by *me* at (1970) 2 *Madras L.J.* Journal sec., 1-8 (1970).

self and his baby son as constituting a Hindu undivided family. Unfortunately in that instance the baby was his son by a European woman who was apparently still a Christian. The Madras High Court, however, held, to the disgust of many Madras Hindu advocates, that a Christian boy in similar circumstances could be classed as a Hindu, especially if his father said he was one. A dual identity, with consequent complexities in the family law, would be difficult to avoid in that instance.

The learned judge in *Ram Mohandas* argued in his very original judgment that Hinduism was a broad religion on the basis of opinions expresed by a well-known Hindu religious leader and pontiff, Sri Chandrase kharendra Sarswathi in his *Aspects of Our Religion*. These were to the effect that it was very wicked to be converted, leaving one god (as it were) in favour of another. The learned divine's argument was directed obviously against Hindus who desired to be converted to Christianity. But the tables were turned upon him, and the same argument was used to prove that it would be wicked, *from the Hindu Point of view*, to insist on Jesudasan's denying Jesus before allowing him to figure as a Hindu.

This argument lead directly to the second. The learned judge said[33], 'Therefore when a person declares that he is a follower of Hindu faith also (my emphasis), as long as that declaration is not challenged as made mala-fide or with ulterior intentions, it has to be taken as his having accepted the Hindu approach to God. He has become a Hindu by conviction'.

It will be admitted that this last was a decision and judgment of a single judge in far-South Kerala. But let us see what contribution it makes to the old and thorny problem of representation of tribal peoples in Parliament. Reserved seats for Scheduled Castes and Scheduled Tribes are still open only to members of those castes or tribes who are Hindus or Sikhs by religion. Since a number of tribes contain many Christians, and are longstanding areas for Christian missionary activity this part of Indian law has long caused dissatisfaction amongst Christians, who regard it (reasonably) as a breach of the policy of freedom of religion. The courts are frequently called upon to decide whether a particular man, elected for the reserved constituency, is a Hindu or not.[34] A typical pattern is of a man whose parents were converted, or was himself converted, and who has prospered in life and so wishes to represent his original people at New Delhi, regretting his religion and relapsing into Hinduism in time for the election. His opponents naturally

33. (1975) Ker. L.T. 55, 63 (1975).

34. S. Rajagopal v. C.M. Armugam A.I.R. 1969 S.C. 101 (1969) : S. Rajagopal v. C.M. Armugam A.I.R. 1974 Karn. 78 (1974) : Perumal v. Ponnuswami (1970) 1 S.C.W.R. 620 (1970).

claim that he has neither been reconverted nor relapsed in a sense known to the law. That law, viz., as to religious identity for the application of the Hindu personal law, is well settled.[35] It never occurred to anyone that it would be in-appropriate in the context of representation of the people. The Supreme Court has held[36] that where a Christian relapses into Hinduism he is not a Hindu unless he is accepted as such by the community, caste, or society into which he has relapsed. The question will then be a pure question of fact, whether they have accepted him or not.

How will *Ram Mohandas* affect this position, assuming that the Supreme Court can be persuaded to listen to it ? The erstwhile Christian would be Member of Parliament can claim to be a Hindu by conviction, and thus count as a Hindu within the meaning of the relevant Order, without having to prove that he has been accepted as a Hindu by any Particular Hindu community. He may thus retain a dual identity which, perhaps, the facts of the situation require. It would be wrong to argue, it is submitted, that he must prove he is a Hindu by conviction *and* acceptance by the Hindu community.

As for Mr. Jesudasan himself, there are residual problems. If he dies wealthy the church may insist on burying him and Hindus may wish to cremate him. The medieval saint Kabir was in a similar predicament. Muslims wanted to claim him for themselves, and wanted to bury him, since the tomb of a saint attracts pilgrims. Hindus wanted to burn his body and erect a shrine over his ashes, which would be no less profitable to its custodians. Kabir solved the problem by dissolving into flowers. It is doubtful whether we can expect such a solution in the case of Mr. Jesudasan. The likely quarrels between his intestate heirs (if any) should he marry as a Christian and leave Christian descendants, or should he, in any event, die leaving Christian ascendants or collaterals, and should he have married at any time a Hindu lady and perhaps, begotten Hindu descendants, is something to which the legal profession may look forward with impatience.

Our last case concerns the problems which arise when modern ideas percolate into the heart of the Hindu fold itself. Unlike Christians, who have recognised spiritual leaders who have jurisdiction over churches,[37] Hindus have no commonly accepted hierarchy which maydispose of internal problems. It is not uncommon for innovations in worship to be undertaken by portions

35. Derrett, *Introduction to Modern Hindu Law* (1963), 17-18.

36. See cases referred to at n. 34 above.

37. See M. Chanda Pillai v. Daniel Mar Philaxinose (1975) Ker. L.T. 45.

of a community and to be resisted by the remainder.[38] Since there is no ecclesiastical law or legally recognised arbitral body to cope with such schisms and the like, the regular courts are often approached to solve what, in the nature of things, their jurisdiction can hardly undertake to solve. Sec. 9 of the Indian Code of Civil Procedure provides, in effect, that courts shall have jurisdiction to try suits of a civil nature including a suit in which the right to property or to an office is contested, notwithstanding that such right may depend entirely on the decision of questions as to religious rites ceremonies. It is important to remember that in India the right to worship is a right of a civil nature.

In *Ramchandra K. Gore* v. *Gavalaksha G. Swami*[39] suit was filed by worshippers of an idol for an injunction restraining the trustees of a temple from installing in the temple, when renovated certain new idols around the original idol, on the ground that this innovation would diminish the sanctity of the latter. The arguments advanced in favour of the injunction were, briefly, that the plaintiffs' rights to worship were being interfered with if these new idols were introduced, and that Art. 25 of the Constitution guaranteed freedom to practise religion, and that the original idol was being trespassed upon by the intrusion of these other idols. The trustees replied that the new idols were only embellishments and would be conducive to the worship of the original idol.

The learned judge (Vaidya, J.) ridiculed the plaintiffs' position. So far as jurisdiction was concerned, since no right of property nor to an office was seemingly involved, the court (he opined) could not entertain the plaint. On the merits (which is more interesting) he took the view that the idol could not complain of an intrusion. He could have argued (but did not) that the proper persons to protect the idol's interests were the trustees themselves, and their discretion as to the idol's ritual interests would be final, provided they kept within the broad lines of the Hindu law. He further opined that if the plaintiffs complained that their worship would be obstructed by the worship offered by other worshippers interested in the new idols, so that the former suffered a hindrance in their freedom of worship, this was a risk that any Hindu worshipper took in any Hindu temple, since (though he did not say so in so many words) the actions of the individual worshipper relative to the idol do not have any relation to the actions of other worshippers.

38. See Tejraj C. Gandhi v. State of Madhya Bharat A.I.R. 1958 M.P. 115 (1958); H.H. Peria Kovil K.A.T. Ramanuja v. P.B. Venkatacharlu, Law Reports 73 *Ind. App.* 156 (1946); Ugamsingh v. Kesrimal (1971) 1 S.C.W.R. 9, A.I.R. 1971 S.C. 2540 (1971). The community as a whole have possession of idols in temples, even where there is no *shebait* : Ahmed v. State A.I.R. 1967 Raj. 190 (1967).

39. 75 Bombay L.R. 668 (1973).

As for Art. 25 the judgment proceeded in an interesting way : it does not guarantee that a person who wants to practise his religion according to his ideas can prevent other people from practising that very religion according to their own ritual as known to that religion.

What may we conclude from these recent developments ? From the Christian point of view it is clear that the law reflects some liberalising tendencies provided the balance of competition respects the Hindu community. It remains to be seen whether this tendency will work itself out logically when advantage to Hinduism is not evident. From the Hindu point of view it is clear that (i) so far as Christians are concerned their constitutional freedom of religion is established satisfactorily and offers no threat to the majority community; but (ii) developments within the Hindu community itself are loaded in favour of 'forward-looking' tendencies, if capable of being identified as such in cosmopolitan terms, whether traditional Hinduism would sanction them or not, and irrespective of cultural continuity. Let us face history. It is one traditional feature of India that religion functions in and because of the political balance between communities which are, from place to place and from time to time, in majoriry or minority situations. If this is correct, freedom of religion is not so much a religious as a political phenomenon. I do not know whether this can be said with equal truth of other polyreligious states with written constitutions.

INTERNATIONAL RECOGNITION OF THE HUMAN RIGHT OF COLLECTIVE SELF-DETERMINATION*

By

Dr. R. P. DHOKALIA**

I. *Introduction* :

Ever since the Members of the United Nations committed themselves to the "principle of equal rights and self-determination of peoples", excessive concern has been shown for the right of self-determination with a tendency to describe it as a fundamental human right inherent in men as such, regardless of the effects it may have on established situations or on a recognized *status quo*. The concept of self-determination is the product of an evolutionary process and its history clearly reveals a consistent trend of acceptance by the international community as a general principle of international law, even though it is not always applied and is still not undisputed. Whether or not it is firmly embodied in international law, the fact remains that it has certainly become one of the most hallowed and widely supported principles at the United Nations as a result of the pressures and needs of the time.

On the contemporary international scene the notion of self-determination has emerged primarily as a weapon to be used in the war against colonialism. An essential element of the present incarnarion of self-determination is the conviction that colonialism is not only obnoxious but also illegitimate under *all* and *any* circumstances. But it need be emphasized that the principle of self-determination has indeed far wider ramifications. Self-determination does not operate only in the context of decolonization, it has also relevance in the relations between free independent sovereign states. The protection of social, economic, political, cultural, and other human rights; territorial settlements on the basis of plebicites; claims of control over a territory by different factions within a state on the basis of cultural distinctness; and support for the cause of the international proletarian revolution, or for the established regimes against communist take-over,

* This is the revised version of the paper read by the author at the Seminar organized by the International Law Association held in 1974 at the Centre of Advanced Studies, Simla.

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are some of the areas in which self-determination is projected as an issue in relations between states. Self-determination has indeed many vagaries and uses. For instance, the pursuit of the ideals of equality and equalitarianism, espoused and promoted during the period of decolonization and revolutions for national independence, has engendered parochial and narrow nationalism and *autarky* in multi-racial societies and has led, not only to movements for secession and civil wars invoking the principles of self-determination, but also to outside intervention and resistance to a plea for self-determination. Recently, excessive concern has been shown for the right of self-determination or its application in such instances as the Vietnam, the West Irian, Biafra, Bangla Desh, Namibia and the Palestinian people. Also, picking up illustratious at random, claims for self-determination have been put forward by such groups within a nation as the French Canadians, the Welsh, the Scots, the Sikhs, the Tamils, the Nagas, the Vermontero, the Pathans, the Sindhis, the Karens, the Somalis, the Kurds and the Armenians, whose claim to a destiny of their own is wholly overridden by the claim of the States to maintain their sovereignty and integrity unimpaired. Sometimes, the right of self-determination, is taken to be no more and no less than one aspect of the right of revolution although it may be harnessed to the achievement of a basic political change which the dominant forces of the time agree to be necessary or even inevitable. At times the right of self-determination can be achieved only if the people can muster the force to overthrow the existing order, and any means which may be necessary for the overthrow of the established order are deemed legitimate. If the right of self-determination means that the right to opt out, secede, or revolt remains permanently in full force to be invoked whenever the people concerned so desire, then this right embodies a disastrous and anarchic doctrine aimed at the partial or total disruption of the national unity and territorial integrity of existing sovereign states and is also inconsistent with the new internationalism looking forward to formation of World State to be established in near future.

There is probably no single subject save self-determination about which there have been more debates, more speeches, and more resolutions adopted by a sweeping majority at the United Nations, and yet what exactly is this right of self-determination has not been defined precisely, nor has the dichotomy between the ideal and the practicability been bridged. In view of the racial and cultural groups cutting across territorial boundaries and the inconsistency of narrow racialism and parochialism with the new internationalism when carried too far, it is imperative that scholars of international law work on clarification of the major issues involved in the concept of self-determination with a view to providing adequate criteria for the determination of the right.

The present paper attempts : (i) to trace briefly historical evolution of the notion of self-determination and its recognition as a right by the world community; (ii) to examine the nature of this right; and (iii) to focus attention on the major problems involved in its application which is a singularly difficult and hazardous task.

II. *Right of Self-determination in Modern International Law—Its Historical Evolution and Recognition* :

There is no denying the fact that in the standard writings on classical international law there is no reference to self-determination even though it did not forbid a right to rebellion with consequential recognition of the newly-established authority and realization in fact by way of revolution of what we call today the right of self-determination. The traditional law of nations was indifferent to the principle of popularity of a government or to the ideological basis on which a government had been established. It even conceded that rights and title to sovereignty could flow from conquest or usurpation. It remained unconcerned with the changes brought about in sovereignty, not only by resort to force or even by illegal acts, but also without any consideration for the wishes of the people concerned.

It appears that the right of "self-determination" is the product of evolutionary process, and the successive wave of human thought and events presented it in its varied and diverse manifestations. If in the Greek *polis* it was an exercise of community behavioral auto-determination, during the Middle Ages, in the wake of propagation of Judaism, Christianity and Islam, arose the question of individual's moral choice which when exercised collectively in the religious sphere was known as "self-determination." Such early treaties, as the Treaty of Westphalia, 1648[1], which were concluded following the religious wars between the Christian sects in Europe, have recorded some reference to a right of "self-determination." Later, it seems that the separation of Church and State and the ideological struggle to liberate man from the ecclesiastical yoke, accounted for the emergence of theories of political freedom of man and, with the emergence of doctrines of political freedom of man, choice of government, and popular representation in the decision-making process of states, there began a new era of constitutional control of the organs of power for the protection of the rights of citizens. Subsequently, the identification of masses of people

1. This treaty, whilst establishing the principle of territorial sovereignty of individual sovereigns, recognizes essentially political character of the religious settlements in guaranteeing religious toleration to the three principal confessions : Catholics Lutherans and Calvinists. See D.J. Hill, A History of Diplomacy in International Development of Europe, Vol. 2, at 602.

with the State found articulate expression at national level in the assertion of the right of a cohesive group claiming to constitute itself as a "people" or a "nation." This raised the individual's freedom of choice of government to the level of people's right of self-determination at national level wherever a combination of commonly binding factors of some permanency (religion, race, culture, language and political ideology) generated a nationalistic concept. The nationalism, which was developed in the West in the nineteenth century, contained the ideals of equality, democracy and self-determination, and these were transmitted by the Imperial West to the colonial peoples who aspired for full self-government, independence and equality of sovereignty for acquiring international status.[2]

Although the American Revolution exemplified the collective assertion of political self-determination, international law still did not recognize that there existed any such thing as a right of self-determination in the modern sense. One may consider recognition of minority rights as coming nearest to recognition of a group, but there also, in the absence of specific treaties or without an international understanding given by unilateral declaration, a minority received no special protection or special privileges.[3] It was not until President Woodrow Wilson propounded his Fourteen Points that "self-determination" acquired any real significance on the international scene. However, even Wilson was not concerned with independence of people. He was largely concerned with dissolving the empires of the former Central Powers, or liberating territories which were occupied, and adjustment of colonial claims as among the victors. The only general mention of a principle of self-determination occured in Article 5 of the Fourteen Points:

> "A free, open-minded and absolutely impartial adjustment of all colonical claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined,"[4]

Although Woodrow Wilson proclaimed the right of self-determination in his Fourteen Points, it exhausted itself in its application to the specified time, place and people because it was tied to the break-up of the Empires which had impinged on the peoples of Eastern Europe and the Balkans, and it did not effectively extend beyond the peace-making at the end of the World

2. See for general analysis of the process of decolonization, Rupert Emerson, From Empire to Nation, 1962.
3. See H. Rosting, "Protection of Minorities by the League of Nations", A.J.I.L. 17 (1923) at 641; J. Stone, International Guarantees of Minortity Rights, 1932.
4. A.J.I.L. 13 (1919) at 161, Ogg and Beard, National Governments and the World War, 1919 at 565.

War I. Even the League Covenant made[5] no mention of the right of self-determination as a principle. However, because of the rhetoric of self-determination, there were numerous unfulfilled declarations on self-determination between 1914 and 1945.[6]

Whilst the post-World War I notion of self-determination spelled the end of European land empires, the post-World War II version of the notion has had its purpose the end of overseas colonialism. The nationalism, which was idealised in the Imperial West, with its implied right of self-determination, became one of the key sources of anti-colonialism in the twentieth century. During the Second World War, President Roosevelt persuaded Churchill to include in the Altantic Charter a statement of respect for the "the right of all peoples to choose the form of government under which they will live," although Churchill made it clear that Britain did not regard it as constituting a legal obligation, nor even a policy statement that was effective with regard to the non-self-governing parts of the British Empire.[7] At the San Francisco Conference the Soviet Union succeeded in having embodied in Article 1 clause (2) of the U.N. Charter a reference to the "principles of equal rights and self-determination of peoples" in the purposes of the United Nations and Molotov made it clear that the Soviet Government had the colonial peoples and the mandated territories in view.[8] But the Report of Comittee I to Commission I appears to establish that what the participants in the Conference had in mind referred to relations among states rather than granting of any specific right of self-determination to any entity :

> "The Committee understands that the principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct; that the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace; that an essential element of the principle in question is a free and genuine expression of the will of the people which avoids cases of the alleged expression of the popular will, such as those used for their own ends by Germany and Italy in later years."[9]

Commenting on the Article in question, Kelsen[10] also observes that "the term 'peoples' too in connection with 'equal rights' means probably states, since only states have 'equal rights' according to general international law. That the purpose of the Organization is to develop friendly relations among states based on respect for the principle of self-determination of 'peoples', does not mean that friendly relations among states depend on democratic form of government or that the purpose of the Organization is to favour such form of government. This would not be compatible with the principle of 'sovereign equality' of the Members, nor with the principle of non-intervention in domestic affairs established in Article 2, paragraph 7. If the term 'peoples' in Article 1, paragraph 2 means the same as the term 'nations' in the Preamble, then 'self determination of peoples' in Article 1 paragraph 2, can mean only 'sovereignty' of the States."

This narrow interpretation holds that the Charter of the United Nations did not grant any specific right to any entity, individual human being or group of them, other than the States which are parties to it. But, in addition to seemingly vague references in the Preamble and the statement of purposes,[11] the right of self-determination is again found in Article 55[12] re-

5. All that the Covenant conceded to the idea of self-determination was the reference in Article 22 that, in so far as former enemy territories were being placed under the Mandate, "The wishes of these communities must be a principal consideration in the selection of the Mandatory". This hardly could be described as recognition of any right of self-determination. The Versailles Conference, appreciating the limits of Wilson's point, refused to include any reference to this right. See Quincy Wright, Mandates under the League of Nations, 1930; M.C. Mills, "The Mandatory System", A.J.I.L. 17 (1923) at 50.

6. For instance, the notion of self-determination was used as a pretext by Germany to invade Czechoslovakia and as a basis by the victorious Allied Powers to decide the fate of Europe in the Declaration of Yalta and Potsdam. The U.S.A., in keeping with the Wilson Doctrine, announced 'self-determination' as a policy in 1945, followed by similar proclamation by several Western European Countries which however continued their colonial policies and practices undaunted by the proclaimed right. In some of the post-1919 Peace treaties some provision was made to enable the population of a territory, which felt that it was under the wrong sovereignty, to exercise a right of option for transfer of sovereignty from one Power to another but not to any right of independence or self-government. For instance, France would not accept the cession of Tenda and Briga in accordance with the Peace Treaty with Italy until after a plebicite. See Oppenheim, International Law, 1(1953) at 552 note 2. As to the plebicite as a condition of transfer of territory, see Fenwick, International Law, 3rd ed. 1948, 363-366.

7. House of Commons, September 9, 1941, Hansard, at 374. Cols 67-69.

8. New York Times, May 8, 1945.

9. 6 UNCIO Docs. at 455.

10. The Law of the United Nations, 1951, at 52.

11. One purpose of the United Nations, as defined in Article 1 of the Charter is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

12. Article 55 of the U.N. Charter, on international economic and social co-operation, calls for the creation of conditions of stability and well being necessary for peaceful and friendly relations among nations based on the principle of equal rights and self-determination of peoples.

lating to international social and economic co-operation, asserting that friendly relations between nations are "based on respect for the principle of equal rights and self-determination of peoples" and again in Chapters XI, XII and XIII on non-self-governing territories and the trusteeship system, which pledge administrators of such territories "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions." It is permissible to regard these provisions of the Charter as reflections of the basic idea of self-determination. The differences between the two systems of Non-self Governing Territories and Trusteeship system have also been gradually reduced by the process of "assimilation" familiar to all in the practice of the United Nations. This demonstrates commitment of the Members of the UNO to the "principle of equal rights and self-determination of peoples." Even though the Members were not unduly worried about the existence of the right of self-determination in the early days of the United Nations, subsequently, excessive concern has been shown for the principle of self-determination.

Contextuality is the basis of an informed international legal perception. It is indeed interesting how the idea of self-determination, which was launched for the benefit of the European States, became a crucial idea in the 20th Century for all the nations of Africa and Asia which revolutionised the world. The U. N. Charter is a product of World War II which may be regarded as the definitive water-shed dividing the earlier centuries of permissive international law from the new era when the higher law of anti-colonialism in the international sphere looks favourably on moves from within and without to win freedom for dependent peoples. This law condemns any extension or re-establishment of colonial rule and demands expeditious termination of all colonial relationships. Whilst in the earlier period before the World War II the relevant norms of international law gave legal validity to colonial wars, blockades and punitive expeditions as acceptable procedures to conquer or to acquire and to hold on and maintain a colonial empire, any rebellion against the existing colonial regime was stigmatized by the dominant forces in the international society as a treason to be punished with appropriate severity. But, after the World War II, the emergence of a number of quasi-colonial countries or ex-colonial Asian and African peoples as independent nations; the proliferation in the number of membership of the U. N. O. drawn preponderantly from the nations previously disinhereted of self-determination; and the entry and the increasing influence of communist countries on the international scene which look with pleasure on the complete collapse of colonialism, are the factors which have put colonialists everywhere on the defensive and made the international community accept the view that all

colonialism was illegitimate.[13] These factors accounted for a flood of anti-colonial legislation pouring out of the United Nations, what Professor Rupert Emerson of Harvard University has termed as "the new higher law of anti-colonialism."[14]

From 1950 onwards, the United Nations General Assembly, with increasing votes of the nations having achieved independence adopted a series of resolutions concerning self-determination. The reiteration of the right of self-determination, both in declarations and resolutions, or in other utterances at the United Nations, has conferred great authority upon it and made it a part of the contemporary international law by translating into a right what was merely the principle to which the Charter twice referred. Of the multitude of affirmations in more than thirty four resolutions, which in one guise or another reiterate the right of self-determination, a few will suffice to be referred here :

The Universal Declaration of Human Rights does not mention self-determination specifically, but Article 21 (3) of the Declaration significantly states : "*The will of the people shall be the basis of the authority of government*; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[14(i)] This clearly sets forth that democracy, as a political philosophy, is the goal and an ideal standard to be achieved by progressive humanity and it thereby seeks to crystallize this way of life in human society, through voluntarism and freedom of choice.[15]

In 1950, the General Assembly recognized the right of peoples and nations to self-determination as a fundamental human right and called upon the ECOSOC to request the Commission on Human Right "to study ways

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13. Professor B.V.A. Roling speaks of the emergence of a new international 'legisator' in place of the European Powers and their overseas descendants who were regarded as both the guiding forces of international society and the sources of international law, see International Law in an Expanded World, 1960; See also Oliver J. Lissitzyn, International Law in a Divided World, International Conciliation No. 542, March 1963.

14. Rupert Emerson, "The New Higher Law of Anti-Colonialism" in the Relevance of International Law, ed. Karl Deutsch and Stanley Hoffmann, 1968, 153-174.

14. (i) emphasis added.

15. See John P. Humphrey, "The U.N. Charter and the Universal Declaration of Human Rights" in The International Protection of Human Rights, ed. Evan Luard, 1967, 39-58. The Declaration was adopted by Res. 217 (iii) of the General Assembly on 10th December 1948 with 48 votes in favour, none against and eight abstentions (the Soviet Bloc, South Africa and Saudi Arabia).

and means which would ensure the right of peoples and nations to self-determination."[16]

Overcoming arguments that self-determination should be no more than a political principle, the General Assembly recognized that the violation of the right of peoples and nations to self-determination had resulted in wars in the past and was considered a continuous threat to peace. Therefore, at its 1951-52 session, the Assembly decided to include in the proposed International Covenants on Human Rights "an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations", which should be drafted in the terms : "All peoples shall have the right of self-determination" with the stipulation that all states should promote the realization of that right.[17]

At its seventh session in 1953, the General Assembly adopted the resolution entitled "The right of all peoples and nations to self-determination" in which it recognized that the right of all peoples and nations to self-determination is a pre-requisite to the full enjoyment of all fundamental human rights and that every United Nations Member shall uphold the principle of self-determination of all peoples and nations and shall recognize, respect and promote the realization of that right.[18]

In 1960, the highly important *Declaration on the Granting of Independence to Colonial Countries and Peoples* was unanimously adopted by the General Assembly. It is closely connected and intertwined with human rights and lays down the basic philosophy, that "the subjection to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights, is contrary to the United Nations Charter, and is an impediment to the promotion of world peace and co-operation." It declared unequivocally that "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." It emphasizes that "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence," and declares that "all states shall observe faithfully and strictly the provisions of the United Nations Charter, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of

16. Resolution 42 (v) of December 4, 1950.

17. See Resolutions 543 (vi) and Res. 545 (vi) of February 5, 1952; also Egon Schwelb, Human Rights and International Community 1964, at 106.

18. Schwelb, ibid, and Report of the Tenth Session of the Commission, doc. E/2573, 62-72 and the Report of the Secretary General, Doc A/2929 of July 1, 1955.

all states, and respect for the sovereign right of all peoples and their territorial integrity."[19]

The striking features of the 1960 Declaration, in conformity with the U. N. practice, are : first, its emphasis on independence as the goal, rather than self-government, and, second, its emphasis on the need for the grant of independence *now*. Not only was the Declaration specifically directed against the colonial powers, but the special Committee of 17 members and later of Twenty-Four (which was established in 1961 to examine the appli, cation of the Declaration, to carry-out its task by all means at its disposal, and to ensure as speedy as possible obedience to the U. N. anti-colonial dictate) tilted against the colonalists and spurred the Assembly to pour forth a series of resolutions on colonial issues on the ending of racial discrimination, and on the means of promoting the development of the new countries. However, Art. 6 of the Declaration condemns : "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country" as incompatible with the Charter. Thus, it safeguards the sovereignty and territorial integrity of the members of the United Nations in non-colonial situations.

By 1962, the Assembly declared that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their territory.... All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[20]

In 1965, the Assembly recognised the legitimacy of the struggle of the peoples under colonial rule to exercise their right to self-determination and independence. The Assembly invited all states to provide material and moral assistance to the national liberation movements in colonial territories and requested all states and international institutions, including the specialized agencies of the United Nations, to withhold assistance of any kind to the Governments of Portugal and South Africa until they renounced their policy of colonial domination and racial discrimination.

In 1966, the General Assembly reaffirmed its belief in the right of self-determination by embodying such a right as the first right in both the covenants on Human Rights adopted in 1966.[21] Both the Covenants—International

19. G.A. Res 1514 (xv) of December 14, 1960 was adopted by a vote of 90—0-9 and reaffirmed in 1962 by 101-0-9 votes.

20. G.A. Res. 1803 (xvii) of December 14, 1962.

21. Resolution 2200 of December 16, 1966. The Covenants were unanimously approved by the G.A. on December 16, 1966, with more than a hundred votes in favour. They require thirty-five ratifications to enter into force. See for the texts, A.H. Robertson, Human Rights in the World, 1972, Appendices Two and Three.

tional Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights—start off in identical terms with an article on the right of self-determination. This right is stated as one which exists and is of immediate application and is derived from the inherent dignity of the human person.

They declare that :

"(i) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(ii) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." [22]

The contents of the Article quoted above are in accordance with the political philosophy of the General Assembly as expressed through a series of resolutions on the subject since 1950. By stating a political principle as an enforceable right for the states which are parties to the Covenants and by undertaking to promote the realization of this right, a positive forward step has been taken. Not only that, since 1966, the right of self-determination in positive international law may be deemed to be *in nascendi*, since a non-binding international document declared that right to be so, but also, that after these Covenants come into force with 35 ratifications necessary to give them legal effect, this right would be regarded as inherent for the future.[23]

In 1971, the Assembly Resolution 2787 (XXVI)[24] on *Importance of Universal Realization of the Right of Peoples to Self-determination and of the speedy Granting of Independence to Colonial Cuntries and Peoples for the Effective Guarantee and Observance of Human Rights*, reaffirmed its previous resolutions on the subject since 1960. It confirmed that colonialism in all its forms and manifestations, including the methods of neo-colonialism, constituted a gross encroachment on the rights of peoples and the basic human rights and freedoms. It declared that the establishment of a sovereign and independent state freely determined by the whole people belonging to the territory constituted a mode of implementing the right of self-determination; and it affimed that to fight for self-determination of his people under colonial and foreign domination was man's basic human right and, therefore, peoples' struggle for self-determination and liberation was legal, and suppressing of movements for demanding the right of self-determination and hampering the liquidation of colonialism and racism were condemnable. It also called upon member states of the United Nations to give all their political, moral and material assistance to peoples struggling for liberation, self-determination and independence and to contribute individually or jointly to the implementation of the principle of self-determination.

22. See Art. 1 of both the Covenants, ibid.
23. On self-determination as a right, See J.E.S. Fawcett, "The Role of the United Nations—Is it Misconceived ?" in Nobel Symposium, Vol. 7, 95-101.
24. Reproduced in I.J.I.L., 12 (1972) 342-344.

The G. A. Resolution No. 3034 (XXVII) of December 28, 1972 on Measures to Prevent International Terrorism "reaffirms the inalienable right of self-determination and independence of all people under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular of national liberation movements and "condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right of self-determination and independence and other human rights and fundamental freedoms."[25]

A recent resolution of the Assembly (Resolution No. 3246 (XXIX) of November 29, 1974) on the importance of the Universal Realization of the Right of peoples to self-determination recognized the imperative need to put an end to colonial rule, foreign domination and alien subjugation in the context of situation in Southern Rhodesia. Besides reaffirming the inalienable right of self-determination of all peoples under colonial and foreign domination and alien subjugation and the legitimacy of their struggle for liberation, the resolution calls upon all states to offer such people moral, material and other forms of assistance in their struggle to exercise their inalienable right to self-determination and independence and to severe all links with the racist regimes of South Africa and Southern Rhodesia. It condems all Governments which do not recognize the right to self-determination and condemns the policies of those members of the NATO and the countries which encourage the regimes persisting in their suppression of the aspirations of peoples for self-determination and independence.[26]

These resolutions have in fact again and again reiterated the right of self-determination of people with reference to only colonial people and have not conceived of the minorities or even majorities of heterogeneous popula-

25. See also G.A. Resolution 2955 (xxvii) of December 12, 1972; Resolution 2963 E (xxvii) of December 13, 1972; Resolution 3059 (xxviii) of November 2, 1973; and Resolution 3070 (xxviii) of November 30, 1973 and relevant resolutions of the Security Council.
26. This resolution is reproduced in I.J.I.L., 14 (1974) 506-508.

tions within generally accepted political units which do not share in common values and are struggling for realization of the right of self-determination.

It may be argued that these and several other similar resolutions and declarations adopted by the General Assembly, even though enjoying considerable moral force, are only recommendatory in nature and have no binding force on any member of the United Nations. But, not only that the member states regularly voting for these instruments may consider them selves obliged to recognize the right of self-determination, but also a consistent and recurrent practice over a period of years might lead in future to the development of a customary law. The prolific history of the Assembly resolutions demonstrates that those states which have consistently voted for these resolutions have a confirmed faith in the principle of self-determination though they may not consider themselves bound by the terms of these resolutions. In the view of the present writer the resolutions of the General Assembly, which are declaratory of recognition of certain legal principles, or which interpret the rules or principles of the Charter and are adopted by a majority verging on unanimity or virtually without opposition, have a legal function of contributing to the formation of customary rules of providing an evidence that a customary rule is already formed. Moreover by creating a machinery for the control of the application by states of the principles they embody, the resolutions and declarations of the Assembly tend to accelerate further the creation of customary rules.

Whilst one may not insist on exaggerated juridical formalism or on categorical and radical distinction between what is absolutely binding and what is not, one should take cognizance of embryonic norms of nascent legal force which cover hazy, transitional and inchoate situations with the cumulative effect that, in the words of Lauterpacht, "a point is reached when the persistent dirregard of the articulate opinion of the Organization is such as to foster the conviction that the state in question has become guilty of disloyalty to the Principles and Purposes of the Charter."[27] Since in the international legal order, states are at the one and the same time authors and recipients of the very norms they create, the recommendations contained in resolutions of U. N. General Assembly not only represent an expression of a general social feeling but also entail social sanction in the form of reaction of the body against the divergent attitude of the delinquent. Since international law is nothing more or less than what states think it is, may it not be concluded that particular rules of international law owe their existence to the

27. See Lauterpacht, individual opinion annexed to the Advisory Opinion of the I.C.J., in *Voting Procedure*, ICJ Reports, 1955, at 120.

flow of international consensus[28] which is reflective of inductively verifiable psychology. The General Assembly resolutions strengthen the notion of consensus[29] of states embodying the best and most objective description of how states view international law.

From this point of view, a flood of anti-colonial resolutions and those on self-determination referring to it as a right may be deemed to be "*quasi* legislation" bringing into existence a new higher law that repudiates colonialism in any form and recognizes the right of self-determination as a basic inalienable human right which every state dedicated to the ideals of freedom and peace must protect and implement through joint or independent action. The lacuna, however, is that the formula has been so vague as to confuse substantive legal content with the result that the General Assembly itself, when called upon to apply the principle of self-determination, has in most cases rejected it, as in the cases of Somalia, Algeria, West Irian and Bangla desh.

In view of the fact that the right of self-determination is now the most hailed principle of modern international law and at the United Nations, which has conveyed authority on it and made it a part of the evolving international law under the pressures and needs of our times and in consonance with contemporary position on human rights, the role of international lawyer consists in clarifying common interests shared by all members of the many communities of the human society and to innovate institutional and instrumental procedures for realizing those interests in the future. In the past, the classical international law, which was the outcome of Western European thought and civilization, had aimed at perpetuating of Western colonial rules in Asia and Africa by denying to them the right of self-determination, equality, independence, and sovereignty. In the present new era of national equality, racial equality, cultural equality and individual equality, a new group of nations, which have arisen primarily by getting out from

28. The term 'consensus' is very ambiguous. In Latin, the word means agreement, accord, sympathy, common feeling. See Murray, New English Dictionary on Historical Principles, 1905. Professor Irving L. Horowitz refers to as many as eight shades of meaning of the term in the contemporary sociology, see, "Consensus, Conflict, and Cooperation : A Sociological Inventary," 41 Social Forces, 1962, at 177.

29. In the field of political science, the term is used to indicate a continum between simple majority agreement and unanimous shared beliefs. See Herbert Mc Closky, "Consensus and Ideology in American Politics" 63 American Political Science Review, 1964, 361-363. Professor Quincy Wright uses "substantial unanimity as a synonym of "Consensus", see 'Custom as a Basis for International Law in the Post-war World", 2 Texas International Law Forum, 1966 at 147. For Professor Ben Cheng, 'Consensus' is the equivalent of *opinio juris* to the extent that it contains the two constitutive elements : the material and psychological. See "United Nations Resolution on Outer Space; 'Instant' International Customary Law ?" I.J.I.L. 5(1965) 35-48.

Europe's imperial control and demand an overhauling of the law imposed by Europe, has come to the fore as dominant element in the international society. It has expressed itself assertively not only in regard to the principle of self-determination but also on a variety of other issues, such as the implementation of Chapter XI of the U. N. Charter, the ending of racial discrimination and the means of promoting the development of new countries.[3] Since international community has an overwhelming number of new members which have peeled of from colonial empires and are transferee from one distinctive international order of domination to another distinctive one basep on formal equality, decolonization has become the order of the day which has drastically altered the associational arrangements among the peoples of the world.

The equalitarianism ardently espoused and pursued by the 'new nations' is not only shaping the structure of their societies but also finding concrete expression through modern international law.[31] The new international 'legislator' is shaping a new world system as a means of reversing both the relationships of peoples and the rules of the game as they had been established by the imperialist West during the days of its dominance. The rise of a new class or classes to political power, at the national as well as international level, has brought forth a call for the re-ordering of society and its legal norms along the lines which churchmen, humanitarians, liberals, social thinkers, or other groups in the West itself have been professing for long. Considering from a sociopolitical and economic point of view as well as from the viewpoint of law, national and international, the present writer believes that in regard to the question of self-determination, as in most other problems of international law, we have principal questions of change and stability: (i) the extent to which the principle of self-determination can be employed to bring about peace and stability in the municipal as well as international community, and (ii) the extent to which the principle of self-determination can be invoked in order to bring about reconciliation of outstanding differences between cohesive groups of people peacefully without violation of individual rights and violent conflict in a multi-racial society. It is, therefore, imperative that legal scholars, whilst taking cognizance

30. E. Mc Whinney, "The New States and the 'New' International Law", A.J.I.L., 60 (1966) 1-12.

31. See Edwin D. Dickinson, The Equality of States in International Law, 1920; Bengt Broms, The Doctrine of Equality of States as applied in International Organizations, 1959; Philip C. Jessup, "The Equality of States as Dogma and Reality : 1. Introduction", Political Sc. Qly. 60 (1945); 527-531; Julian R. Friedman, "The Confrontation of Equality and Equalitarianism : Institution Building through International Law", in The Relevance of International Law, op. cit., 175-218.

of the development and recognition of the right of self-determination, evolve adequate criteria for the determination of the right.

III. *The Nature of the Right of Self-determination* :

If modern international law recognizes that all peoples have the right of self-determination, then a few questions which naturally arise are : What is the nature of the right of self-determination of peoples ? What is meant by the "peoples" who are supposed to enjoy this right ? Is it a peoples' right or is it a territorial right exercisable by those within its confines ? What is the necessary link between a given people and a given territory on which they can exercise the right of self-determination ?

These are indeed difficult questions to answer precisely in the absence of any authoritative definition of "self-determination" which is loosely understood as a right to exercise collective behavioral freedom of choice. Wherever cohesive human groups seek identity, dignity, and opportunity, particularly in the throes of deprivation or in reaction to social political and economic exploitation, it is inevitable that they espouse the cause of equalitarianism and pursue recognition, stability, and national independence.[32] Since achievement of full self-government, independence, and equality of sovereignty constitutes an appropriate step towards acquiring the international status to which one is entitled within the community of nations, the world has been witnessing what is commonly known as nationalist explosion.[33] The modern state system owes its historical cohesion and strong individualization to external pressures as well as to the sentiments of loyalty to national collectivity and supreme solidarity triumphing over all internal tensions under the state framework of security and instrument of power.[34]

"Self determination," whether classified as a right or a principle, or a doctrine, or an emotion, or even an instinct, is an act of the total, necessary and free volition of a human group having a decisive factor of social cohesion and national solidarity, choosing the one alternative permitted to its

32. John H. Herz, Political Realism and Political Idealism, 1951, 189-205.

33. See Rupert Emerson, From Empire to Nation, 1962, for a general account of decolonization process and proliferation in the number of States. Amitai Etzioni, "A Paradigm for the study of Political Unification," World Politics, 15 (1962) 44-74.

34. A 'State' has been defined as "a juridically organized nation, or a nation organized for action under legal rules", Vinogradoff, Historical Jurisprudence, at 85. A 'Nation' has been defined by Ernest Barker as "a society or community of persons, whose unity is based (i) primarily on space, or nighbourhood, issuing in the feeling of neighbourliness, and in that common love of the natal soil (or *patria*) which is called patriotism; (2) secondly, on time, or the common tradition of centuries issuing in the sense of a common participation in an inherited way of life, and in that common love of inheritance which is alleed nationalism.." Ernest Barker, Reflection on Government, 1948, at XIV.

choice. As Professor Bassiouni of De Paul University has rightly put it, "self-determination" develops into and becomes a right whenever "a given collectivity is prevented or seriously impeded from freely adhering to exercising its values, beliefs and practices on the indigenous territory which they inhabit (or from which they have been removed) by another collectivity by coercive means."[35]

This right, therefore, presupposes two conditions:

(i) existence of conflict between two or more collectivities who have opposing or conflicting value-oriented beliefs and practices on a given territory, and

(ii) the failure of the socio-economic-political structure, in the event of conflict, to permit the relatively unimpeded coexisting persuit of divergent beliefs and practices on that territory. In these circumstances, 'self-determination' becomes not only the right relied upon by the oppressed group, but also the revolutionary norm granting to it the choice of an uncoerced determination. Thus, in the words of Professor Bassiouni, "Self-determination is a catch-all concept which exists as a principle, develops into a right under certain circumstances, unfolds as a process and results in a remedy. As an abstract principle it can be enunciated without reference to a specific context; as a right it is operative only in a relative context, and as a remedy, its equitable application is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate."[36]

Lenin had also emphasized the principle of self-determination and on this basis divided all countries into three groups; (i) all those advanced countries of Western Europe and of the American continent where the national movement had already become *l'histeire passee*; (ii) the countries of Eastern Europe where the problem of nationality was still alive and represented one of the vital issues of the day; and finally, (iii) colonies and dependencies, where the question of nationality was a problem of the future.[37] He spoke of three essential stages through which the self-determining entities must pass in the process of acquiring sovereign existence : the first stage was the mobilization of national sentiment and interjection of the peasantry into the struggle for political liberties in general and for national

35. M. C. Bassiouni, "Self-determination and the Palestinians", in Proceedings of American Society of International Law, 1971, 31-40 at 33.

36. Ibid, at 33.

37. "Socialist Revolution and the Right of Nations to Self-determination" cited by T.A. Taracouzio, The Soviet Union and International Law, 1935, at 27.

rights in particular; the second stage was characterised by the antagonism cultivated by the internationally concentrated labour movement working against international capital; and, finally, the advent of the third stage indicated by the victory of the prolitariat in one of the great nations when a revotution in the international position of every nation would take place determining the different results according to whether the nation was on the road from the feudual system to *bourgeois* democracy, or from the latter to the prolitarian democracy. This third stage in the development of self-determination, according to the Communist theory, was inaugrated by the Russian Revolution of 1917. Whatever the practical effects of the Communist theory of self-determination the principle was incorporated in the national legislation of the U. S. S. R. which embodied provisions to the effect that the Union was a free union of free peoples with equal rights, that each republic had the right to leave the Union if it so desired, and that at the same time door was open for voluntary entry into the Union of other socialist republics that may be formed in the future.[38] Logically, the Communist philosophy admits no restrictions upon the right of self-determination and champions the cause of colonies against their imperialistic overlords. The Soviet Russia as well as the Communist China recognize the progressive and revolutionary significance of national liberation wars, and they are the most active champions of national independence.[39]

Thus, the nature of self-determination as a right can be enunciated and it becomes operative only with reference to a specific context. In the context of colonial people and dependencies, self-determination means independence and freedom from alien rule and domination. In non-colonial situations and within the territories of existing states, where national religious and language minorities or "weak" social groups pose peculiar problems as regards both their specific fate and their specific function because they occupy a politically, socially, economically, legally, or cul-

38. See The Treaty of December 30, 1922 by which the Union of Soviet States came into existence. Cited by Taracouzio, op. cit. at 31.

39. See Soviet Communism : Program and Rules, ed. Jan. F. Triska, 1962, at 67. The question of wars of liberation has, however, recently become one of the main bones of contention in the Soviet-Chinese dispute. The Chinese accuse Russians of revolution behind in the new-found zeal for peace and maintain that the whole cause of the international prolitarian revolution hinges on the outcome of the struggle of the people of Asia, Africa and Latin America. Peking Review, 25 (1963) at 11. Despite the dispute, that the Soviet stress is on peaceful coexistence and the might of world socialism while the Chinese emphasize the inescapable necessity of war and revolution, both agree that a resort to arms to overthrow colonial rule is justified and a war of liberation is by definition a just war. See George Ginsburgs, "Wars of National Liberation and the Modern Law of Nations—The Soviet Thesis", in Law and Contemporary Problems, 29 (1964), 910-942.

turally inferior position and status, self-determination for the "out group" or the "outcast" group, which is excluded from the general society and frequently exploited and discriminated against, means a struggle for political rights and even secession from the State for a new loyalty to a new society. Resistence by the State to the threat of secession ends generally either in its pure domination, suppression and violent and ruthless re-integration, or in emergence of a new entity and triumph of self-determination. In the context of revolutionary class struggle between the haves and the have-nots, or between the capitalists and the prolitariat, self-determination means liberation of the working class and the victory of the socialist forces. Here, the Communists envisage the spontaneous right of the prolitariat to struggle for its supremacy which resolves itself from the international point of view into a paramount right of self-determination for nationalities.

Whilst the doctrinal base of the Communist countries is their duty to support movements of internal violence for the liberation of the prolitariat or the working class all over the world from the yoke of the capitalist class, that of the West, in particular of the U. .S.A., is to use its economic and military power to oppose a Communist take-over through indigenous forces of rebellion. Since the prolitarian right to struggle and to fight for national self-determination is essential for the progress of world revolution and for the eventual achievement of the new world order, the paramount prolitarian goal of international social reconstruction justifies the rights of national self-determination, class struggle and wars of liberation which are claimed by the communists to be exempt from the general trend toward a total ban on war and prohibition of the use of force.

So, self-determination as a right is operative only in a relative context and the basis of its equitable application is sought in conflicting value-oriented beliefs, convictions and ideological contentions of two or more collectivities on a given territory where they come in violent conflict in pursuit of their divergent legitimate rights. When this right accrues to the people it is not extinguishable by coercive measures and, when violated, the only remedy for the dissident group lies in opting out, if necessary, with foreign intervention. If political persuasion has failed, no state should be permitted to suppress the dissident people with bullets as the right of self-determination must be respected if democracy as a political philosophy is the goal of progressive humanity. In the 20th Century, the idea of self-determination, which originated for the benefit of European nations, has become the crucial idea for the people all over the world in particular for the nations of Asia and Africa.

IV. *The problems Involved in the Application of the Right* :

The history of the notion and right of self-determination until our times clearly reveals a consistent trend of still growing acceptance of it by the common morality of mankind as a general principle of international law. Though recognized in principle in various international resolutions, declarations and public pronouncements by states' representatives and officials, in actual practice of states, particularly of colonial and neo-colonial states, the right of self-determination has not been applied voluntarily or consistently. Notwithstanding the fact that as a right to exercise collective freedom of choice, self-determination is a general principle of modern international law recognized by the world community, it is still not undisputed and is not always applied in practice.[40] Professor Green maintains categorically that there is still no right of self-determination in positive international law, although since 1966 there may be one in *nascendi*."[41] Whilst it has achieved substantial recognition in theory as a sensible and reasonable way of settling territorial disputes, it has not yet become an imperative principle of action. There have been of course some cases of resort to plebicite or referendum as a means of determining the propriety of territorial adjustments.[42] Yet, self-determination on the part of the people of a territory has not become legally indispensable for its transfer from one state to another. What actually are the problems involved in the operation of the right may be discussed under the following main headings :

(i) *Lack of precise Definition* :

Perhaps the dichotomy between the ideal and the practicability in respect of self-determination exists because of the lack of any precise definition of self-determination and the lack of adequate criteria for determination of the right. It is far from clear what are the indices on which the outcome is to be based. This, however, does not mean that we should simply reject the principle of self-determination. There are in international law many a legal principles, which are not defined for example the terms :

40. See Rupert Emerson, "Self-Determination" Proceedings, Ame. Soc. of International Law 1966, 135-141.

41. L.C. Green, "Self-Determination and Settlement of the Arab-Israeli Conflict, idem, 1971, 40-48.

42. See S. Wambaugh, Plebicites since the World War, 2 vols. 1933. Cession of territory may be made conditional upon the results of a plebicite held to give effect to the principle of self-determination as in Outer Mangolia in 1945 and in South-West Africa in 1946. On Outer Mangolia, see D.J. Dallin, Soviet Russia and the Far East, 1948, 354-355. On the plebicite in South-West Africa, see G.A. Official Records 2nd sees., 4th Com. 1947. Annex 3e, 181-184, Annex 3 f, 193-197. All plebscites held after the First World War were required under the term of the Treaty of Versailles (Arts. 34, 49, 88, 94, and 109) See Oppenhiem. op Cit, pp. 551-552.

"aggression". (this has been now defined by the G. A. Resolution 3314 (XXIV) of December 14, 1974 after continuous efforts of 51 years to do so since 1923), "non-intervention" and "self-defence", which lack precise definition and yet on that ground their relevance in international law is not denied. Legal indeterminacy is the result of diverse conflicting value-oriented beliefs and practices, and rules of international law are invoked in such circumstances by adversary parties largely for hortatory purposes. In view of the racial and cultural groups cutting across territorial lines and ideological struggle for prominence waged on global dimensions, there is a trend towards widespread occurance of political violence carried on with in the borders of a single state and in which outside intervention is solicited resulting in blurring the distinction between civil war and international war. Here we are left with the dilemma, whether law is to be used as a mechanism for guidance or rationalization of action, and whether self-determination is to mean nothing more than a slogan.

Whatever may be the basis for invoking the right of self-determination, whether as a claim for independence from colonial rule or as a right to internal revolution and secession, or as a claim for unification of people and territory with another entity, or as a claim of minorities for choice of state affiliation or as a means of territorial settlements by plebicite, in all cases there exist, invariably two co-existing inter-related factors : *People* and *territory* which matter in the exercise of the right of self determination.

(i) '*A people*' : Self-determination is essentially a *peoples' right* which is exercisable and is actuated only within a given territory susceptible of acquiring the characteristics of sovereignty which is a requisite condition for international status. This right of self-determination accrues to the *people* or to a human collectivity, because it is they who determine their goals of political and human rights, seek freedom of choice for establishing their identity, and react to violations of their rights and exploitation or oppression of any kind. It does not accrue to any and every people but only to such social collectivity of human being who feel psychologically commonly bound by certain factors of permanency, like religion, race, culture, language and political ideology, who share a life of contiguity and common historical experience to accumulate a common mental capital and to develop a common mental purpose for its maintenance and extension, and whose collective behaviour demonstrates pursuit of shared goals which they are desirous of implementing. Yet, "the people" is one of the loosest terms having no fixed and definable content. Any group of human beings can claim to be designated as a "people" who in the "struggle for survival" are provoked by the apprehensions of insecurity and feel strongly concerned about their security from being attacked, subjected, dominated or annihi-

lated by other groups and individuals. If they are endowed with the gift of "being concerned" and have the ability to plan definite action with a view to individual or group future; if in a society, any groups of peoples, on the basis of some distinguishing marks and feature imputed to them by the general society, find themselves not fully integrated into the whole society or are considered to be outside the main group because of socially significant differences, they can claim themselves to be "a people" and disrupt the existing polity in order to set-up the new ones of their own which meet their aspirations. When carried too far any number of such groups claiming to be "a people" may create anarchic conditions in any multi-racial, or multi-lingual and pluralistic society.

(ii) *Territory* : Self-determination further accrues to the people on a given territory with which they have a legitimate link and upon which their future political and social expectations can be realized.[43] But, what can be this legitimate link ? There must be some rational nexus between the people and the territory for the exercise of the right of self-determination. Since primitive times, human groups, including nomads contrasted with more settled peoples, have exercised authority over and taken measures to guard the areas, often of considerable size, sorrounding their camps, wherever they may be. In organized communities settled on land, people attached allegience to the soil in tribal and feudal periods of histroy, and modern nationalism also has manifested primitive attitudes towards the outsider by asserting indissoluble bond between the people and the territory. Thus it is on a territory, such as a natural geographical unit like an island or a peninsula, or an artificial unit created by drawing lines, that a myth of oneness is created by "a people" and which has become the basis of the idea of motherland or national territory. Unless "a people", identified in advance, establish their legitimate link with the territory it seems difficult to conceive of self-determination and its operation, But it is a difficult question to be answered, whether self-determination is a peoples' right or is it a territorial right exercisable by those within its confines ? On the one hand, it is the people alone who can determine their goals regardless of geographic limitations as the Jews living all over the world conceived of Israel, or as the African nationalists today are endeavouring to inculcate the idea that within the artificial boundaries of the colonial times there dwell nations with distinct cultures that transcend clan limits.[44] On the other hand, the

43. Professor Bassiouni has attempted to formulate some guide-lines for defining the word "the people" and the necessary connection between 'the people' and "the territory" in the context of the Palestinian Problem' op. cit. 31-40.

44. See J.S. Coleman, "Nationalism in Tropical Africa, The American Political Science Review, 48 (1954) 412-414, 421-433. On the Subject of overcoming clannishness as a common problem, see F. Znaniecki, Modern Nationalities, 1952, 93-97.

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ideal can be actuated only within a given territory susceptible of acquiring the characteristics of sovereignty, as did the muslim majority provinces of the British India which after partition in 1947 constituted the Islamic state of Pakistan. Further problem in modern times is constituted, when the idea of national territory as a fundamental nation-making concept is exploded by the communist theory for the realization of idealistic purposes by conceiving the brotherhood of working class for its emancipation. It seems beyond dispute that, if all peoples have the right to self-determination, who are not specifically identified in advance and the time and the circumstances or the situations under which this right is applied are not pinned down or closely defined, the world order and stability will be jeopardized.[45]

(ii) *Self-determination, a principle of Political Action and Revolution* :

In the application of the right of self-determination further difficulty is created by the fact that this right represents in effect a principle of political action. The aspirations to independent political existence in combination with several political factors, such as nationalist, linguistic, religious passions and parochialism, fire a political decision of self-determination with an anarchic principle of fragmentation of existing states and emergence of other human groups into separate political units. Wherever human groups seeking identity, dignity and opportunity, particularly, when confronted with oppression, exploitation and deprivation, espouse the cause of freedom and equality and invoke and seek self-determination, the governing authorities at home or overseas in the name of peace, order and territorial integrity, use all means at their disposal to stop the dissidents or the rebels from opting out. Self-determination, because of illimitable vastness of the claims and promises which it appears to be making, embodies a revolutionary principle. As a collective human right and as a means of independence, self-determination is basically no more and no less than one aspect of the right of revolution[46] against the *status quo* and the establishment even though it may involve a political change which the dominant forces of the time recognize to be necessary or inevitable.

The Preamble of the United Nations Declaration of Human Rights seems to acknowledge a contingent right of revolution when it proclaims : "it

45. Professor Rupert Emerson has concluded "that all people do not have the right of self-determination, they have never had it, and they will never have it", "Self Determination Revisited in the Era of Decolonization," in Occasional Papers in International Affairs, No. 9, December,1964, at 64.

46. See G. Pette, "Revolution—Typology and Process of Revolution, ed. C. Friedrick 1966, 10-29.; Richard A Falk, "Janus Tormented : International Law of Internal War" in James N. Rosenan (ed.), International Aspects of Civil Strife, 1964, 185-248.

is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Yet, self determination as an inherent right of revolution in order to overthrow, disintegrate or to dissolve an existing order, is one which no established political system can incorporate within the system as a regularly operative and available right, because it is manifestly incompatible with the maintenance of an orderly system. This right, therefore, as a right of revolution inescapably retains its enigmatic character not only because of its fluid content but also because of the value-laden approach of the existing states, whether old or new, making qualitative distinction between *actors* as well as *situations*. Right of revolution may be acceptable in an anti-imperialist context for the anti-colonialists whereas the same may not be acceptable to them in a non-colonial situation. Similarly, this right may be acceptable to the Imperialists at home but not in colonial situations. The difference in the value element in this right renders it impossible to define situations in legal language in universalistic terms and accounts for whatever fine distinctions, which may be attempted in abstract, appearing as inconsistent. Then, the problem of non-state actors such as the Kurds, the Kashmiris, the Pathans, the Nagas etc., further complicates the situation if qualitative differences among non-state actors may have to be taken into consideration, although international law has basic difficulties in dealing directly with them. Besides, revolutions today are no longer political, but social and tend to generate more bitter and prolonged struggles than the revolutions of the past and, furthermore, third powers are more inclined today to treat revolutions as their concern. A case of revolutionary secession of a part of an existing state raises thorny problems. Domestic rebellions or revolutions within existing states have acquired international significance today because of extra-legal developments such as cold war, nuclear weapons, the outlawry of war, and competitive foreign interventions.[47]

(iii) *Right of Self-determination Revives the Theory of Bellum Justum* :

Since anti-colonialism indisputably represents the dominant element in the international society, the essential element in the present incarnation of self-determination is the conviction that colonialism is illegitimate under *all* and *any* circumstances. Irrespective of the variations among the mother countries, administrative authorities, local conditions and motives of the colonial rule, segregation and inequality under the colonial rule are comple-

47. The Vietnam war illustrates the complications of ideological super power conflict in a domestic conflict on self determination issue. See Richard A. Falk, Legal Order in a Violent World 1968, 261-323, Appendix A, 535-558.

mentary conditions.[48] The nationalist movement for self-determination which is committed to equality is a means to certain ends e.g. to deprive the colonial system of its legitimacy and in particular to strike at the legitimacy of the *status quo* based on the inequalities of that system. If oppression and exploitation exist the right of self-determination is obviously unimpeachable. The role of law lies in determining whether changes in the structure of a given society facing tension and conflict within itself might be desirable, and if so, of what sort and under what conditions they become feasible in a beneficial form. In case a legal order fails to provide for a peaceful change, violence becomes inevitable. If colonialism is illegitimate then the question, whether any means which may be necessary for the overthrow of colonialism and the exercise of the right of self-determination are legitimate, naturally raises thorny problems which are directly related to the failure of the international legal system. For instance, what course is left for the vast majority of exasperated coloured people of South Africa and Rhodesia ? Whilst in South Africa, the minority of white South Africans have not only a monopoly of power but have also suppressed human rights of the black Africans of the country subjecting them to the notorious *apartheid*, in Rhodesia the white minority has proclaimed UDI resulting in effective exclusion of the four million Africans from political power. Also, in territories, like Angola and Mozambique, Portugal had, until recently, been intensifying the measures of repression against indigenous population with a view to locking-in their legitimate right of self-determination, and aspirations of freedom and independence.

Even though the bulk of dependent people and colonies has achieved independence or they are already on way to it, there are still bits and pieces of the colonial empires, like the territories to which the Portuguese had anachronistically clung until very recently denying the validity of the international consensus on self-determination, for which no sensible solution has yet been found. It falls to the institutions of the world community to supply the necessary norms and satisfy the legitimate rising aspirations of the people. The right of the colonial people to overthrow the oppressive colonial government of their own free will by revolutionary action is one which no colonial power can accept, as to accept it is either to abdicate power or to authorize anarchic civil war. On the other hand, the concept of the war of liberation as a just war (in pursuit of the passionate yearning for freedom for all dependent peoples and their inalienable right of self-determination)

48. See Leonard Barnes, Empire or Democracy, 1939; John Sydenham Furnival, Colonial Policy and Practice, 1948; Colston Research Society, Principles and Methods of Colonial Administration, 1950; John G. Sytoessinger, The Might of Nations, 1962.

against colonialism as a permanent aggression and illegal and immoral institution *ab initio*, underlines the principle that even armed action or use of force as an instrument to end the inequity of colonialism is justified. A war of liberation represents licit response to sufficient provocation when the colonial power persists in clinging to its ill-gotten privileges by the use of arms and, therefore, it is an act of self-defense against which there can be no self-defence. The prohibition of the use of force contained in Art. 2(4) of the U. N. Charter is addressed to states and, therefore, in no way hampers the people of a country or territory from taking up arms against the established authority or an oppressor government or foreign rulers.[49] Violence, indulged either when there is no hope of seeing justice done, or when clash of interests or of faiths prevents the rendering of justice, is the resultant of the feeling of revulsion in a people concerned for promoting justice for whom the only remedy for injustice lies in the use of force. This is revival of the *bellum justum* theory which lasted until after Grotius time and justified the use of force in support of justice.[50] Today, a growing number of newly-independent states subscribe to the theory that, in the *inter se* relations between the colonial or dependent peoples and their alien rulers, the principle of self-determination, of human rights, and of fundamental freedoms can be vindicated through resort to physical force in order to meet the coercion conducted by the latter against the former. Therefore, in their view, an armed conflict in colonies and dependent territories has an international character, because it is fought between the armed forces of the dependent people, on the one hand, and those of the metropolitan government on the other.[51] Such a view finds more extreme expression in Communist Countries repeatedly committing themselves to the proposition that wars of liberation are just wars deserving the support of all progressive forces.[52]

49. See K. Skubiszewski, "Use of Force by States, Collective security—Law of War and Neutrality", in Manual of Public International Law, ed. Max Sorenson, 1968, 738-843, at 771-772.

50. See Grotius, *De jure bell a: pacis*, II, i, 1-5, Classics of International Law, J.B. Scott, 1950; W. Ballis, The Legal Position of War; Changes in its Practice and Theory from Plato to Vattel, 1937, at 27; for 20th Century revival of the theory of *bellum justum*, particularly by Hans Kelsen, See Law and Peace in International Relations, 1942, at 38-39.

51. Liberation of Goa by India from Portugal by armed forces in December 1961 was in accord with this theory : See Mazrul A. Ali, "Consent, Colonialism, and Sovereignty". Political Studies, 1963, 36-55.

52. See George Ginsburgs, "Wars of National Liberation and the Modern Law of Nations-the Soviet Thesis", Law and Contemporary Problems, 29(1964) .910-942. The official Soviet Text Book on International Law as well as the Declaration of the Eighty one communist parties' Meeting in Moscow in 1960, put forward the idea of liberation in the category of "just cause" for active participation in internal strifes. See International Law, Moscow, nd. at 402; Dan. N. Jacob, ed. The Communist Manifesto, 2nd ed. N.Y. 1962, 27-29, Eduard Kardely, Socialism and Wars 1960, at 194.

Sometimes the supporters of wars of national liberation claim that repression of the inhabitants fighting for self-determination constitutes an armed attack entitling them to the right of self-defence.[53]

(iv) *Self-determination in Non-colonial Situation an Anarchic principle* :

The right of self-determination, including the right of revolution and waging a war of liberation, cannot be entirely confined to the peoples and overseas territories subjected to the alien rule. The driving force of contemporary history is creative nationalism and an urge towards achieving greater self-respect and freedom among national societies as well. Internationally as well as domestically, the awakening of the have-nots and the underprivileged classes tends towards the transfer of political power to new classes which are seeking reordering of society and legal norms. Oppression, whether foreign or domestic, is being fought by the oppressed. The right of the people to fight the government under which they happen to live, be it their own, a foreign-dominated, or completely monopolized by the vested interests, is not to be deduced from the law on the use of force. It is derived rather from the principle of self-determination and from the political right of revolution and to have a government of the peoples' own choice. Self-determination, therefore, gives to any cohesive group of separately distinguishable peoples under oppression a right to opt-out whenever they so desire. Hence, existing multi-racial and pluralistic states, which embrace loose congeries of diverse peoples, are now permanently exposed to disastrous and anarchic shattering of their sovereignty and territorial integrity.

For many a newly-independent nations, particularly in Africa, self determination exhausts its mandate and is extinguished after a colony secures liberation from the alien rule. The African insistence on maintenance of existing states is a profound necessity in order to prevent endless inter-tribal and inter-state strife amongst African nations. For them, movements for secession run contrary to their aims of creating a free multi-racial society, and self determination is confined to the freedom from colonial rule and does not justify fragmentation of a nation into parts having no political or economic viability.[54] In India too, the Nagas, the Sikhs, the Kashmiris, and the Tamilians, have at times asked for separation in working the right of self-determination which has been consistently resisted.

53. See C. J. R. Dugard, "The Organization of African Unity and Colonization; An Enquiry into the Plea of Self-Defence". I.C.L.Q. 16 (1967) at 157.

54. See Robert K. Woetzel, "Political Rights in Developing Countries", in Proceedings of Am. Soc of Int'l Law, 1966, 141-147 ; C.J.R. Dugard, "Organization of African Unity and Colonization : An Enquiry into the Plea of Self-Defence", I.C.L.Q. 16 (1967) at 157.

The argument, that the doctrine of self-determination has relevance only where the foreign domination is the issue and that it has no relevance where the issue is territorial disintegration by dissident citizens, runs counter to the whole philosophy and driving force of contemporary history favouring protection of political and human rights. It ignores the problem of political, economic and cultural rights which is rather one of reconciling outstanding differences between diverse groups, tribes, etc. or between political leaders and the ruling elites competing for power. Wherever there are grave violations of political and human rights, it is incumbant on the governing authorities to resolve political differences peacefully without violation of human rights. Voluntarism and freedom of choice provide a sound foundation for a progressive humanity. In the words of Ernest Barker "The State is the necessary condition of any organized human life; the necessary condition of justice; the necessary condition, as it develops its nature and learns its duties, of liberty as well as justice".[55] That a government should rest on the consent of the governed is a fundamnetal principle to which we all subscribe. If a dissident group is pushed back to the wall and finds itself compelled to opt-out and seek either independence or union with another state in circumstances where it is not an unreasonable choice, its right of self-determination must be respected, and the state cannot arrogate to itself the power to stop the dissident people with bullets if political persuasion has failed.

A few years back the tragedy and the eventual triumph of the people of Bangla Desh as a result of an armed conflict provided an illustration of the onesided butchery, massive killing and genocide of the people of the then East Bengal at the hands of the incumbent government of military rulers in Pakistan. The people eventually won a victory for self-determination and democratic principles with the assistance of India.[56] In such a situation, the question, whether the rebels are patriotic heroes or punishable traitors rests upon the success or failure of a revolution. Whilst revolts and insurrection within a country reflect clashes of interests between the old and the new elites which represent tribal or religious, cultural and regional groups holding conflicting social interests sealed in a closed system of life, they also manifest a violent movement of disintegration and separation of rival *autarkies*. Social secession can hardly be met by a state by its policy of rejection, or violent re-integration and ruthless suppression which only end in pure do-

55. E. Barker, Reflections on Government, 1948, at 407.

56. See R. P. Dhokalia, "Norm-creating Potentialities in the Tragedy of Bangla Desh in the Area of Collective Right of self-determination" Paper read at the Seminar on Human Rights in India at Banaras Hindu University on the occasion of the Silver Jubilee of the Human Rights Day in December 1973.

mination. If just concession and persuasion fail to achieve re-integration and the secession or insurgency assumes an international character, because of links with the outside parties or governments, most serious complications arise for which solutions are still to be found.[57] The ideal of a free multi-racial democratic society is not difficult to achieve in practice if the diverse elements comprising it are willing partners in common life., But, if this is lacking, it is not an ideal which can be imposed by force, suppression and genocide. If a separately distinguishable people within a state express a clear political decision on their future, having been left with no choice between subjection and annihilation, the incumbent state cannot be allowed to lock-in their right to self-determination by whatever means at its disposal. In cases where popular peaceful domestic opposition is crushed by the coercive apparatus of the state and the government is aided by foreign allies, then "the sole possibility of approximating the ideas of self-determination is to accord equivalent rights to insurgent or anti-incumbent groups that solicit aid from foreign countries."[58]

However, several crucial questions arise which require an imaginative approach in order to meet one of the most pressing issues of the present era in the form of civil wars, wars of secession, and wars of liberation undertaken by a people within a state in order to achieve their goal of self-determination. For illustration a few of these are :—

Can any ethnically amorphous inhabitants within an existing state who consider themselves separately distinguishable and oppressed people, like the French Canadians, the Welsh, the Scots, the Pathans, the Kurdas, or the Nagas, claim a right of self-determination, however irrational their wish for freedom may be ? Can such a right of people to build a destiny of their own embrace a right to muster any available force and means with a view to overthrowing the existing order and exposing it to disastrous anarchic shattering on the ground that their inherent right of self-determination has been overridden by the Establishment ? How can a potential conflict between the right self-determination (asserted by an armed rebellion, an insurgency, or by a full-fledged war of national liberation), on the one hand, and the limits of the use of force by the incumbent power, on the other hand, be reconciled and regulated by international law ? Is foreign military intervention for a humanitarian reason in an internal conflict involving self-

57. R.P. Dhokalia, "Civil War and International Law" I.J.I.L. 11 (1971) 219-250; Richard A. Falk, "The International Regulation of Internal Violence in the Developing Countries", Proceedings of the Ame. Soc. of Int'l Law. 1966, 55-67.

58. See, Richard A. Falk, "U.S. Legal Status in the Vietnam War" in Legal Order in a Violent World, 1969, at 301.

determination legal ? If international legal system fails to provide a remedy to a people struggling for self-detrmination and facing annihilation at the hands of the incumbent power, how far is it legal for the neighbouring states or others most directly affected to assist the victim and to what extent ? Is foreign intervention anywhere justified on the grounds of internal violation of human rights, whether committed by a minority against a majority or by a government elected by a majority against a minority ? Should the U. N. Charter be revised to allow the application of legal principles which would justify foreign intervention on the basis of the right of self-determination ?

These are complicated and tentative questions which international lawyers can attempt to answer in order to focus attention on the public policy aspects and to draw objective and fruitful conclusions as to the notion of collective self-determination as a general principle of international law. It is worthwhile to explore the consensus for the progressive development of rules of behaviour, even though the answers may remain inconclusive. These questions however, raise humanitarian problems which have ceased to be the prerogative of legal experts and which have now acquired a dimension of political urgency, because the misery and tragedy of ravaged populations stretching around the globe in recent years seem to outspace the ability of the international system to prevent and regulate civil wars and to meet the requirements of humanitarian relief. In the present writer's opinion, wherever the minimum human rights of a people within a nation or in a dependent territory are violated the illegitimacy of the governing authorities becomes so flagrant that their government itself becomes an outlaw and foreign intervention (collective, multi-national, or individual) may be warranted in favour of the people struggling for separate identity, freedom and self-determination as to their future way of life. The Bangla Desh instance is perhaps the most important in our times as a case of succeessful self-determination. India's role in respect of the self-determination of the people of the then East Bengal and their eventual triumph in the emergence of a new nation of Bangla Desh may turn out to have some norm creating potentialities. It was in exceptional circumstances : the entry of ten million Bengali refugees, the failure of the international system to prevent and regulate genocidal ethnic war, the Pakistani military aggression in the form of air strikes and the formal declaration of war by Yahya Khan, the total failure of the parent government to contain and control the so-called war of secession as demonstrated by the continued successes of the insurgents and the establishment of the Provisional Government of Bangla Desh in effective control of a vast territory, and the invitation of the duly recognized Provisional Government of Bangla Desh for military assistance: that India went selflessly to the rescue of the people

of Bangla Desh facing oppression.[59] Here was a unique case where the "majority" rebelled against the "minority" and, since the majorities do not secede they assert themselves, the movement of the people of East Bengal was not a secessionist movement but a struggle for self-determination demonstrating the capacity of the claimants of the right to engage in a needed social change. Having realized the goal, the Indian armed forces were soon withdrawn from Bangla Desh, the occupied territories of Pakistan in the Western sector were magnanimously vacated, and ninety thousand prisoners of war were repatriated as soon as possible. Perhaps India's is a solitary and unique example of a victorious power in the history of international relations to behave so magnanimously with the vanquished. Also, it serves to illustrate the selfless use of force for humanitarian purposes only, in particular solely for the triumph of a foreign peoples' right of self-determination in favour of political democracy, social justice, and economic progress. This event may be treated as the harbinger of a new law.[60]

Considering that the world community has rejected colonialism and trusteeship, it is now left with a single aspect of the sovereign state. A concept of selective national sovereignty makes qualitative distinctions among international actors and allows certain states freedom to do somethings while not giving such freedom to others, without prohibiting the strong from exploiting the weak.[61] The concept of sovereignty as a centralized system, it seems, is becoming increasingly outmoded. Any people or territorial units of a state aspiring for an autonomy and their own way of life, for a share in resources and political power, and for freedom from dominance, exploitation and violence, must acquire a status and recognition in international life as sovereign state which the existing states seem to resist with full force. Unless the world community could move towards a notion of territories which, though lacking statehood, were associated with the United Nations for benefitting from economic and technical assistance programmes, and safeguarding and protecting of individual or minority rights, the issue of self-

59. See Statement of Mr. Swaran Singh, Minister of External Affairs of India in the Security Council on the situation of Bangla Desh, December 12. 1971. U.N. Doc. S/pv. 1611, 21-72, reproduced in I.J.I.L., 11 (1971) 699-723.

60. See for the contrary view, Thomas M. Frank and Nigel S. Rodley "After Bangla Desh : The Law of Humanitarian Intervention by Military Force". A.J.I.L., 67(1973). 275-305

61. See for numerous cases of intervention before and after 1945, ibid, 277-89; As to the role of the U.S.A., See William Everett Kane, "American Involvement in Latin American Civil Strife", Proceedings of Ame. Soc. of int'l Law, 1967. 58-69, Richard A. Barnet, "United States Intervention in Foreign Civil Strife Since World War II" ibid, 1966, 13-18.

determination in all probability will remain insoluble.[62] The basic issue in restructuring the world order is to enable the nations and peoples realize the larger values of individual autonomy and freedom, justice in the distribution of worldly goods, participation in decision-making structures and the availability of conditions for the self-realization and creativity of the individual.[63] In order that the principle of self-determination be applied to a particular process of seeking for the people involved in a collectivity to make a political determination of their future, some criteria as to who are those who qualify for being called "people" must be established, and the situations and circumstances under which the right is asserted by "the people" identified in advance, or the grounds on which that claim is over-ridden by the appropriate authorities must be analysed from socio-political and economic point of view. In the present writer's opinion the intractable problem of collective self-determination requires sociologically-grounded inquiry and analysis of the political process of self-determination and re-interpretation of the basis of emerging obligations of all actors[64] under contemporary international law. Perhaps it is a suitable subject which fulfills the test of the "necessity" or "desirability" in the sense of Article 18 (2) of the Statute of International Law Commission for the selection of the topic for its codification and progressive development.

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62. See D.W. Bowett, "Self-Determination and Political Rights in the Developing Countries", Proceedings of Ame. Soc. of Int'l Law, 1966, at 135.

63. See Rajni Kothari, "National Autonomy and World Order : An Indian Perspective" Proceedings of the Ame. Soc. of Int'l Law, 1972, 157-268.

64. There is a need for making qualitative distinctions among Governments, among international actors, among non-state actors and among competing non-governmental elites as well as between situations in order to evaluate operational significance of the right in different contexts.

RESERVATION TO TREATIES AND THE VIENNA CONVENTION ON THE LAW OF TREATIES - A CRITICAL STUDY*

M. N. P. SRIVASTAVA**

I

INTRODUCTION

During the process of conclusion of a multipartite treaty, it has never been possible for the states, in all cases, to make idenitcal promises. Therefore, account has to be taken of reservation, which gives indication by a party that it is not prepared to accept a particular term or that it wishes some other variation in its favour. In the simplest case of a reciprocal reservation to a bipartite treaty, a reservation in fact constitutes a proposal for amending the treaty thereby re-opening the negotiations as to the terms of the treaty. But in case of a multilateral treaty the problem is more complicated because the reservation may be accepted by some states and rejected by others.

On the subject of reservation to treaties there has been a prolonged debate among states because of their diverse and even conflicting attitudes. The western states, on the one hand, have supported the traditional rule to the effect that a state could not make a reservation to a treaty unless the reservation was accepted by all the states which had signed or adhered to the treaty. The Communist and Latin American Countries have rejected this doctrine and have argued that special reasons, like economic under development, make it difficult for particular states to accept certain provisions of a treaty and it was in the larger interest of obtaining an increased number of ratifications of multilateral conventions and a wider participation under the treaty system that uniformity in the terms of treaty was worth sacrificing. The Vienna Convention on the Law of Treaties has reconciled these conflicting views. While it partly concedes to the traditional rule by recognising that every reservation is incompatible with certain types of treaties unless accepted unanimously, it basically follows the principles laid down by the International Court of Justice in the Genocide case.[1] Even if the Vienna

* This is the revised version of a chapter of the thesis submitted for LL. M. in 1970 unber the title "Problems Relating to Reservation To Multilateral Treaties" written under the supervision of Professor R. P. Dhokalia, Law School, Banaras Hindu University, Varanasi.

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1. Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports, 1951, at 15.

Convention on the Law of Treaties never enters into force the customary international law is likely to evolve on the lines laid down by the Convention.

The reservation attached to the treaty has now become a well-established institution. In view of the fact that multilateral treaties are often the outcome of a delicate process of prolonged negotiation and compromise, it would be unrealistic and probably contrary to the wider role and functions of multilateral conventions in the international community to exclude reservations altogether. Reservations, if applied reasonably and within certain limits, may indeed be beneficial and may perhaps contribute to the progressive development of international law. The institution of reservation enables the largest number of states of different social and political structure and legal systems to participate in international multilateral treaties. The system of reservation provides a counter-part of the majority rule in a treaty system.

The subject of reservation to multilateral treaties is very complex and raises several controversial problems relating to formulation of reservation, acceptability and non-acceptability of reservations, the procedure to be followed and the legal effect ensuing filing of reservations, and withdrawl of reservations. This paper proposes to examine briefly the past efforts at codification and the solutions found in respect of the problems of reservation by the International Law Commission. Attempt is also made to examine the articles under the Law of Treaties with full legislative back-ground and to evaluate whether the solutions eventually adopted by the Vienna Convention on the Law of Treaties are satisfactory and in accordance with the needs and requirements of the modern international society.

II

PAST EFFORTS AT CODIFICATION

Bilateral treaties present no problem of reservation. The practice of appending reservations to multilateral treaties dates back to 19th century and the traditional rule was provided by the unanimity theory which was applicable to all types of treaties. The problem arose in its pressing form in 1925 when Austria, having been invited to sign the Second Opium Convention, attached to it reservations. In 1927, on the request of the League Council a report on the question of admissibility of proposed reservation was prepared by the Committee of Experts for the Progressive Codification of International Law.[2] The Committee in its report re-iterated the traditional rule according to which a reservation in order to be valid must have the assent of all interested States. Hence, the League Council and the Secretary General as the depository of treaties conformed to this rule.

2. League Doc. 211, 1927, V. Annexes 967, at 880-882.

In the year 1927, Art. 6 of a Draft adopted by the International Commission of American Jurists[3] provided that the reservation would be effective if expressly consented to even by a single state. It did not recognise implied consent. The reservation so made affected only the clause in question and not the whole treaty. This draft did not say anything about other problems relating to reservations e.g. who may object or give consent to the reservation ? What would be the relation between the objecting and reserving state. It also did not define reservation and did not say as to how the reservation should be made and communicated to the other contracting parties. Further it was silent regarding withdrawal of reservations and the problems relating to the entry into force of the treaty in question.

In 1928, a Convention on Treaties was adopted by the Sixth International Conference of American States at Havana.[4] Arts. 6 and 7 of this Convention dealt with reservations. According to Art. 7, the formulation of reservation was the act inherent in the national sovereignty and as such constituted the exercise of a right which violated no international law. In other words, it recognised unfettered right of a state to formulate reservation. Art. 6 recognised the principle that without consent no state could be bound by the reservation. A reservation in order to be effective must be expressly assented to by the state informed of the reservation, or a state may give its consent impliedly by performing acts and mere silence on its part did not amount to implied consent. The consent of a single state was sufficient to make the reserving state a party to the treaty. The reservation made by a state affected only the application of the clause in question in relation to other contracting states with the state making the reservation. The reservation made must be communicated to all other contracting parties.

The Havana Convention however, did not define the term 'reservation' and had not mentioned which states may object to the reservation. Further it neither fixed the time limit for a reply nor regulated the relation between the objecting state and the reserving state, nor did it mention the procedure to make the reservation or to withdraw reservations. It remained silent regarding the entry into force of the treaty. Thus, this Convention was far from satisfactory.

In 1932, the Governing Board of the Pan American Union adopted a resolution setting its policy and its practice regarding reservations. Furthermore, its resolution XXIV of 1938, approved by the Eighth International Conference of American States, provided for the procedure regarding the reservation.[5]

3 I.L.C. Report, (1950), II, at 248, Appendix F.
4 Ibid., at 224-245, Appendix B.
5 W.W. Bishop, 'Recueil Des Cours', (1961), II, at 280.

The Harvard Draft Convention of 1935, devoted four articles[6] to the problem of reservations. Article 13 of this Convention defined the term 'reservation' in the sense of the formal declaration, and not in the sense of an agreed special stipulation, the legal effect of which would be to limit the effect of the treaty, meaning thereby that the definition did not mention of negative reservation which would increase the obligation of the reserving State. The reservation might be made at the time of signature, ratification or accession to the treaty.

The Harvard Draft Convention advocated the unanimity rule. Article 14 laid down that when reservation was made at the time of signature and the treaty was signed by all the signatories at the same date, the reservation was effective only when consented to by all the signatories. In case the treaty was open for signature until a certain date, the consent of the signatories, which signed before the date fixed, was required. In the event of the treaty being open for signature at any time in future and the reserving State signed the treaty before it had been brought into force, the consent of all the signatories signing the treaty was required. However, when the reserving State signed the treaty after it had been brought into force, the consent of all the signatory States, or contracting parties prior to the time of signature of the reserving State was required. Further, this article laid down that if a State had made a reservation when signing a treaty, its later ratification would give effect to the reservation in its relations with other States which had become or may become parties to the treaty concerned.

Article 15 provided for the reservation made at the time of ratification and stipulated the same rules as contained in Art. 14 of the Convention with regard to the consent of signatory States, with the only addition of recognizing the right of acceding States to make reservations. When the treaty was signed on the same date, the reservation made at the time of ratification required the consent of all the States which had become party to the treaty prior to the ratification by that State and the same rule applied for the consent of acceding States when the treaty was open for signature until a certain date. When a treaty was open for signature at any time in future and a State made reservation while ratifying it which ratification was however made before the treaty was brought into force, the consent of acceding States was not required; on the other hand, if the reserving State ratified after the treaty had been brought into force, the consent of acceding States which had acceded to the treaty prior to the ratification by that State, was required. The rule laid down in Art. 15 (d) of the Harvard Draft was exactly the same as in art. 14 (d).

6 I.L.C. Report, (1950), II, at 243, 244, Appendix A.

Article 16 of the Harvard Draft laid down that, if an acceding state made reservation before the treaty had entered into force, the consent of all the signatories to the treaty and of all the States which had previously acceded to the treaty was required and, if a reserving State acceded to the treaty after the treaty had entered into force, the consent of all other States which had become or may become parties to the treaty was required.

This Draft Convention had stated the general rule of integrity of the treaty applicable in those cases where the treaty was silent. But it left the States free to adopt any rule they liked by starting every article with the phrase "unless otherwise provided in the treaty."

This Draft Convention did not specify the time limit after which the implied consent of the State may be presumed. It was also silent regarding withdrawl of reservation. Further it did not prescribe the rules regarding the procedure of making reservation and as to whether the reservation made at the time of signature should be repeated at the time of ratification or not and, also, whether reservation made should be communicated to other States. Since the nations of the world did not favour unanimity rule this convention could not be adopted.

III

THE CODIFICATION UNDER THE AUSPICES OF THE UNITED NATIONS :

1. *The International Law Commission*, set up in 1949[7], is an organ of the General Assembly to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.[8]

In accordance with article 18 of its Statute, the I.L.C. decided at its first session to undertake the codification of three topics namely; (i) the Law of Treaties, (ii) Arbitral Procedure, and (iii) the Regime of High Seas. It worked on the subject of the Law of Treaties from 1949 to 1966. After a prolonged work spreading over 17 years the Commission finally adopted in 1966 the final text of the draft articles on the Law of Treaties.[9] The United Nations Conference which met at Vienna[10] in two sessions, first, in 1968

7. By General Assembly resolution 174 (XI) of November 21, 1947 and under the Statute adopted by the Assembly.

8. See for detailed study R.P. Dhokalia, The Codification of Public Int. Law, Manchester, 1970.

9. I.L.C. Reports, (1966), II, at 177.

10. U.N. Conference on the Law of Treaties, Fisot Sesoien, Vienna, March 26—May 24, 1968, Official Records, Summary Records of the Plenary Meeting and of the meetings of the Committee of the Whole, at xi, (Resolution 2166 (xxi)) of the G.A. Convening the Conference.

and the second in early 1969, finally adopted the Convention of the Law of Treaties.

The Vienna Conference adopted the Draft Articles prepared by the Commission in 1966 with certain drafting changes. The Vienna Convention has five articles : Art. 19 "Formulation of reservations", Art. 20 "Acceptance of and objection to reservations", Art. 21 "Legal effects of reservations and of objections to reservations", Art, 22 "Withdrawl of reservations and of objections to reservations", Art. 23 "Procedure regarding reservations."[11]

2. *Analysis of the Rules Regarding Reservations* :

(i) *Freedom to Formulate Reservation* :

Art. 2 (1) (d) of the Vienna Convention defines a reservation as "a unilateral statement ... made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provision of the treaty in their application to that State." Whenever a state is willing to accept most of the provisions of a treaty, but it has objections to other provisions of the treaty for one reason or other, it may make reservations when becoming party to that treaty. In regard to reservations there exists a presumption that States are free to formulate reservations. This right to make reservations poses the problem whether the states have absolute right to make reservations and if not, what should be the reasonable limitations.

Art. 16 of the Draft Articles adopted by the Commission in 1966 had followed the principles enunciated by Sir Humphrey with only minor drafting changes.[12] This Article read as follows :

> "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless :
> (a) The reservation is prohibited by the treaty;
> (b) The treaty authorizes specified reservations which do not include the reservation in question; or
> (c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty."

The Vienna Convention adopted at its 70th meeting the Draft Article 16, without any change of substance and with only certain drafting changes. The renumbered adopted article 19 is as follows :[13]

11. U.N. Conference on the Law of Treaties, op.cit., 70th meeting, at 414-418 and 72nd meeting, at 425.

12. I.L.C. Report, (1966), II, at 203.

13. U.N. Conference on Law of Treaties, op. cit., 70th meeting, at 414-418.

"A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless :

(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations which do not include the reservation in question, may be made; or
(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

In the interest of greater clarity, the word "only" before "specified" in para (b) has been inserted. With regard to para (c) of I.L.C's text the phrase "in cases where the treaty contains no provision regarding reservation", it is observed that a treaty may conceivably contain a provision on reservation which does not fall into any of the categories contemplated in paras (a) and (b) and, therefore, it has been decided to replace the phrase by "in cases not falling under sub-paras (a) and (b)" in order to ensure that no gap is left.

The making of the reservation must be subject to certain limitations and, in that respect, the provisions of article 19 afford sufficient safeguards. This article has taken all the new developments[14] into account and so the Convention rightly accepts the right of the States to make reservations. Where the parties themeselves predict what is or what is not an admissible reservation, that should conclude the matter, hence paras (a) and (b) of article 19 are satisfactory.

It is argued that article 19 (b) contradicts article 20 (1) of the Convention on the Law of Treaties. While article 19 (b) precludes the formulation of a reservation other than those specified in the treaty, article 20 (1) states that reservation authorized by the treaty requires no subsequent acceptance by the other contracting States unless the treaty so provides. Reservations not specified in the treaty may be admissible, but they require acceptance by other contracting states. Art. 20 (1)[15] is as follows :

"A reservation expressly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides."

Art. 20 (1) states the general rule, but the use of the phrase, "unless the treaty so provides" makes it clear that the contracting parties are at liberty to derogate from the general principle and to consider carefully at the time of negotiation, whether and to what extent reservations should be permitted and how they should be dealtwith.

14. I.L.C. Report, (1962), II, at 63, para 4.
15. U.N. Conference on Law of Treaties, Report of the Committee of the Whole, Second session, 1969, at 28, para 57.

Since different states might reach different conclusions about the compatibility of reservation, the Convention lays down detailed rules about the acceptance and rejection of reservations. The test of reservation laid down in article 19 (c) to the effect that it should be compatible with the object and purpose of the treaty, seems to be reasonable in principle but, unfortunately, it is impracticable in the absence of any authority to decide the question of compatibility. The criterion has been rightly criticised as being subjective and not sufficient in itself. There is an inconsistency between article 19(c) under which a reservation incompatible with the object and purpose is null and void and article 20 (4) which leaves the application of the test of compatibility to the discretion of the individual parties. Hence, for the above reason, while this criterion should be accepted as a general guide, it could be transferred to the commentary.[16] To make the compatibility test objective and workable it has been suggested that reservation must be communicated to all the contracting states and after the expiry of the specified period, say three months, if objection has been raised by a majority of contracting State, the reservation should fall to the ground.[17] As to this, it is noteworthy that the purpose of reservation is to cover the position of a state which regards as essential a point on which the majority has not agreed, and this raises the basic question of majority versus minority.[18]

The criterion of "compatibility with the object and purpose" has not been extended to reservations made persuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on making of reservations and cases where these are permitted.[19] It was rightly agreed in the Commission that where the parties had themselves provided what was or was not an admissible reservation, that should conclude the matter.[20]

The explanations offered as to why the compatibility test was not inserted in article 20 dealing with acceptance of and objections to reservations are : (i) Extention of the test to this article might result in rather drastically altering the position of the States with regard to reservations; (ii) keeping in view the consensual basis of treaty relationship, it would be correct to keep that point independent of the question of compatibility test.[21]

16. U. N. Conference on Law of treatiesop. cit., First Session, 1968, at 109, para 19.
17. Ibid, First Session, 1968, at 110, para 29.
18. I.L.C. Report, (1962), I, 654th meeting, at 164, para 37.
19. Ibid., (1965), II, at 46.
20. Ibid., (1966), II, at 50.
21. Ibid, (1962), I, 654th meeting, at 145, para 85; 652nd meeting, at 148, para 25.

Article 19, despite its shortcomings, as pointed out above regarding the applicability of compatibility rule, represents the best possible compromise formula for the time being.[22]

(ii) *Rights of States Concerning Acceptance and Rejection of Reservations* :

The problem of acceptance of reservations to multilateral treaties had been much discussed in the recent years and had been considered by the General Assembly itself on more than one occasion. This happened first in 1951 in connection with the reservations to the Genocide Convention, then again in 1959 concerning the Indian Reservation to the IMCO Convention. The I C J dealt with the subject in its advisory opinion concerning the Reservations to the Genocide Convention. Subsequently, the International Law Commission paid attention to the problem in connection with its Draft articles on the Law of Treaties. We come across divergent views expressed in the General Assembly, in the Court, and in the Commission on the fundamental question of the extent to which the consent of the other interested states was necessary for an effective reservation to a multilateral treaty.

The other questions which have arisen are : what States have right to object to or accept the reservation ? Whether only the parties or also the signatory and negotiating States have the right to object the reservation ? Should the right to object be subject to any limitation so that its exercise may not be abused ?

Another problem is of consent to the reservation. A reservation, since it purports to modify the terms of the treaty as adopted, is effective only against a State which gives its consent to it. A State making the reservation is in effect making the new proposal which must be assented to by other States before any contractual *nexus* can arise between them.[23] Moreover, the reciprocal nature of the reservation requires implied or explicit consent of the other parties to the treaty.

The rule finally adopted by the I L C in 1966 concerning the acceptance and objection to the reservation was embodied in Art. 17 of the Draft Articles which was as follows :

"1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting states unless the treaty so provides.

22. ILC Reports (1962), I, 651st meeting, at 142, para 56.

23. Ibid., (1950), II, art. 10 (4) at 241; (1950), I, at 93-94, paras 63 and 64. Brierly maintained that reservation was the part of the bargain between the parties hence it must in general, be consented by the other parties to the treaty.

2. When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article :

(a) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(c) An act expressing the State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."[24]

With a view to avoid uncertainties in this article certain drafting changes were made when it was adopted as article 20 at the Vienna Conference.

The amendments to delete the words "or impliedly" in paragraph 1 of the Commission's Draft Art. 17, proposed by Switzerland,[25] France and Tunisia[26] and Thailand[27] was adopted by the Conference.[28] It was observed in the Conference that the provision of Draft Art. 17 (1) was logical and necessary but it was not clearly worded and might give rise to differences of opinion on whether a reservation was impliedly authorised or not. The decision on that point would rest with each State party to the convention and could easily lead to considerable legal uncertainty.[29] The reference to im-

24. I.L.C., Report (1966), II, art. 17, at 202.

25. A/CONF. 39/C. 1/L. 97.

26. A/CONF. 39/C. 1/L. 113.

27. A/CONF. 39/C. 1/L. 150.

28. U.N. CONF. on the Law of Treaties, First Session, Vienna, 1968, Official Records, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole, 25th meeting, at 135, para 30.

29. Ibid, 21st meeting, at 111, paras 39, 43.

plied authorization in the treaty might be interpreted as covering the provisions of sub-para (c) of the Commission's Draft Art. 16 on the compatibility test; a reservation which was impliedly authorized in the treaty need not thus comply with the compatibility test. It was necessary to exclude such as interpretation, since a party should always be able to submit objection that areservation was incompatible with the object and purpose of the treaty unless the reservation was expressly authorized by the treaty.[30] Moreover, in the then existing form the wording reduced the scope of the procedure for the acceptance of reservations laid down in para (4) of the Commission's Draft Art. 17 which in fact would operate only in the case of the reservations referred to in the Commission's Draft Art. 16 (c).

In paragraphs 4 and 5 of Art. 17 of the Draft Articles the words, "and unless the treaty otherwise provides" were added by keeping in view the right of the negotiating States to agree upon any other rule other than provided by the Commission's Draft Article 17. The redrafted article 20 of the Vienna Convention is as follows :

"1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides :

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressig a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

30. U. N. Conference on Law of Treaties First Session, 1968, at 111, para 47.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."[31]

This article seems logical and necessary. Para 3 of the article does not lay down though it should have done so, that any contracting State may object to a reservation to the constituent instrument of an international organization, even if the reservation has been accepted by the competent organ of that organization on the ground that the reservations may be of such a character which may be highly objectionable to other States.[32] The integrity of the constituent instrument will not be adequately safeguarded by the provisions of art. 20 (3) as they stand. This provision will admit reservations at the inception of the organization, when its organs are not yet in operation. If the reserving states are themselves in majority among those who have ratified the constituent instrument, they will be able to decide in the competent organ in favour of the acceptance of their own reservations. The result will be, to bring about an amendment of the constituent instrument by the indirect means of reservations and the acceptance of the reservation will then be a matter for a collegiate decision rather than for the application of the flexible procedure.[33]

Para 4 of the art. 20 provides a satisfactory compromise text in respect of the principal question : whether emphasis should be placed on maintaining the integrity of the treaty or whether States must be given freedom to accept a treaty with certain reservations. The solution given in the article has several advantages : firstly, that the admissibility of reservations, within reasonable limits as proposed by it, would not give States undue latitude. If reservations go too far, they will generally be rejected and, under the reciprocity rule of reservations, the other parties to the treaty can avoid the application of the provisions in question in their relations with the reserving State.[34] Secondly, although a multilateral treaty may as a result of reservation be reduced into bilateral treaties different in content, even so that result is better than complete failure.[35] Thirdly, the solution has rightly

31. U.N. CONF. on Law of the Treaties, Report of the Committee of the Whole of its work at the Second Session of the Conference, op.cit., at 28.

32. U.N. Conference on Law of Treaties, First Session, 1968, op. cit., at 108, para 10.

33. Ibid, at 109, paras 20, 21.

34. I.L.C. Report, (1962), I, 652nd meeting, at 148, para 22 and at 158, paras 43 to 46.

35. Ibid, at 148, para 23.

approached the flexible system because, though reservation should not be encouraged but it will be unrealistic and, probably, contrary to the functions of multilateral conventions, to exclude reservations, altogether.[36] Further, since the number of States to-day has become more than hundred and these States are of very diverse cultural, economic, and political conditions, it is legitimate to assure that power to make reservations without the risk of being totally excluded by the objection of one or more States may be a factor of promoting a more general acceptance of multilateral treaties. The solution recognises respect for sovereign equality and thus promotes relations between States with very diverse interests. It provides the solution to the uncertainty as to who is a party to the treaty and what are the reciprocal obligations of the contracting States. Thus, the solution provides a flexible, acceptable and constructive rule, appropriate to the needs of the international cooperation and the principle of integrity should not be overstressed because it will result in not keeping with the progressive development of international law.

The right of the negotiating States to object to a projected treaty has been rightly rejected. The conception of the provisions of a projected treaty as an entire "offer" may be taken in strict logic to require that any reservation proposed thereto should be consented to by all the parties to the negotiation and all the States and international organizations entitled in accordance with the treaty provisions to accept the projected treaty. The same principle implies that a reservation proposed to a treaty in force should also be consented to by a State which participated in the negotiation of the terms of the treaty but which later failed to accept those terms as binding. But such rule will clearly be contrary to the established practice or convenience of the parties.

The signatories have rightly been given the right to object to reservation where the treaty has come into force. This may be supported by the example of the treaty which has been signed by thirty States and has to come into force after ratification by five States. While some of the other signatories are preparing to ratify it, the sixth State may make the reservation at the time of depositing its instrument of ratification. If only the five States which have previously ratified be consulted and not the States which have signed the treaty in all sincerity but have not completed the procedure for ratification, that will rather be unfair and, further, the acceptance of reservation and thus the entry into force of the convention will depend on chance, because if the convention is ratified by States which had accepted the reservation then the reservation stands accepted; but if the convention is ratified by the States

36. ILC Report, (1962) I, 651st meeting, at 144, para 77.

which do not accept the reservation, the reservation will not stand accepted.[37] The signatories have certain rights because the negotiation of the treaty is not concluded by the fact of signature. The rule is too rigid, hence States will decline to ratify or accede to a treaty, and this will be contrary to the aim of the United Nations to get the maximum participation in a treaty.

In 1951, the Commission had rightly recommended that the right of signatories to object should be subject to early subsequent ratification i. e., within one year[38]. The effect of the time-limit was that after the time-limit had expired a signatory State which did not ratify would lose its right to object to reservation and, consequently, it was impossible for a signatory State to abuse its right of objection. The fixing of the time-limit will compel the Governments to settle down seriously to study the convention and thus it will remove many difficulties, namely, if a State is slow about giving its consent, the international community is kept in uncertainty and the benefit that can be expected from the treaty is diminished. The Drafting Commitee, in 1962, added this condition to Sir Humphrey's article that if objecting state did not become a party to a treaty whihin two years, its objection would have no effect,[39] but, strangely, this was dropped by the Commission for no reason.

It is not advisable to make it obligatory for State to reply in writing one way or the other about the reservation. Presumption of consent is necessary so that the treaty relations between any two States should not remain undefined. The principle of presuming consent to a reservation from the absence of objection had been recognized in State practice and also by the I.C.J. in the Genocide Convention case, for the reason that "very great allowance being made in international practice for tacit assent to reservation." A period of twelve months, within which a State has to object and after which the consent will be presumed has been recommended. It is based on the practice of the League of Nations.[40] There may be certain degree of rigidity in a rule under which tacit assent will be presumed after the lapse of the fixed period, but it seems very undesirable that a State by refraining from making any such comment upon a reservation should be enabled indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State under a treaty of universal application. In good faith the application of the procedural provisions of the treaty and, especially, those dealing with the participation in the treaty will seem to require that

37. ILC Report, (1950), I, 53rd meeting, at 95, para 88; (1951), I, 104th meeting, at 190, paras 100-102, at 191, para 114.
38. Ibid., (1951), I, 104th meeting ,at 190, para 103, and at 193, para 152.
39. Ibid., (1962), I, 668th meeting, at 258, art. 18 (4).
40. Ibid., (1950), I, 53rd meeting, at 93, paras 46, 47, 49, 53.

States adopting the multilateral treaty should take note of the formulation of the reservations and voice expeditiously any objection which they may have in respect of reservations so that the position of the reserving State under the treaty may be clarified and that the relationship is on the same basis if a State voices no objection. It seems reasonable to hold that after an appropriate interval a State shall be presumed to have consented to the participation of reserving State as the party to the treaty. It does not seem possible to make such presumption only on some positive act of recognition of the reserving State as a party to the treaty.

There are good reasons for proposing a longer period than three months as proposed in 1953 and 1956 by the Commission.[41] Firstly, that it propounds a general rule applicable to every treaty which does not lay down a rule on the point and the contents of which are unknown; and States may, therefore, find it easier to accept a general time-limit for voicing objections if a longer period is proposed. Secondly, the Inter-American Council of Jurists had favoured a longer period as proposed here. Thirdly, there may even be cases where a Government desires to bring another State's reservation before the competent organ of the State in connection, perhaps, with the State's own decision to ratify the treaty.

Sub-paras (a) and (b) of para 4 of art. 20 of the Vienna Convention show the extent of flexibility in formulation and acceptance of reservations. The clause (c) is, therefore, necessary, because of the flexibility of the sysetm established in sub-paras (a) and (b). The defect in para 4 is that the reservations compatible or incompatible but authorized under art. 19 (c) may be subject to acceptance or objection under the terms of the art. 20 (4).

The provision for a twelve month time-limit contained in para 5 of art. 20 will settle the problem after the expiry of that period. But the question of determining the position during that twelve-month period remains. The provisions of the article do not make it clear whether the reserving State is or is not a party to the treaty during that period. The point must be covered in order to avoid a legal vacuum. On the whole this article illustrates progressive development of international law as it goes further than customary law whereunder consent could probably be implied if no objection was made within a reasonable time.

(iii) *Procedure Regarding Reservations* : It is important to lay down the procedure of making reservations, of giving an express acceptance of and objection to the reservations, and also of their communication.

In 1966, the Commission finally adopted Draft Article 18 based on Waldock's report, with the addition of a new para 3 to dispense with the

41. ILC Report, (1962)., II, at 67, para 16.

requirement of confirmation of an objection to a reservation. Art. 18[42] of the Draft Articles was as follows :

"1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty.

2. If formulated on the occassion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An objection to the reservation made previously to its confirmation does not itself require confirmation."

The Vienna Conference has adopted this article without any change of substance and has made only certain drafting changes in para 1 and 3 of Draft Art. 18. In para 1, in order to avoid any doubts on the scope of the provision and using the Canadian amendment[43] as a basis, the words, "Contracting States and" before the words "other States entitled to become parties to the treaty", were added. It was considered in the Conference that the contracting States had, a *fortiori*, the right to be informed.[44] There was agreement in principle with the Commission's text of paragraph 3; it was believed that the wording of para 3 might be erroniously interpreted to mean that objection after confirmation of the reservation did itself require confirmation; and hence the text required clarification. It was thought right to include a reference to express acceptance of a reservation in order to show that such express acceptance did not require confirmation.[45]

With the above suggested changes, the Conference adopted the article and renumbered it as Article 23 which is as follows :

"1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

42. I.L.C. Report (1966), II, at 208, art. 18.

43. U.N. Conference on Law of Treaties, First Session, 1968, op. cit., at 124, para 38.

44. Ibid, at 416, para 25. (A/conference 39/C. 1/L. 158)

45. Ibid, at 124, para 31, Hungarian amendment (A/Conference 39/C. 1/L. 138).

3. An express acceptance of, or an objection to a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawl of a reservation or of an objection to a reservation must be formulated in writing."[46]

It is commonly agreed that a proposal of a reservation must take the shape of formal declaration.[47] There is some sense in requiring the authentication of the reservation.[48]

The rule, requiring some form of confirmation of the reservation made at the time of signature subject to ratification or acceptance in the instrument of ratification, is desirable in the interest of certainty and is in harmony with the modern concept of ratification process as a confirmation not of signature but of the treaty.

Para 2 of this article in no way conflicts with the obligation of a State not to frustrate the object of a treaty prior to its entry into force in accordance with the principle of good faith and it has been stated clearly that no reservation can be formulated with respect to a clause affecting the essential object of a treaty.[49]

Para 3 of this article is essential to remove the serious doubts about the advisability of retaining the last sentence of para 2, as it will greatly complicate the matter if a double confirmation of an objection is suggested. Moreover, it maintains a precise co-relation between art. 20 (4) (c) and art. 21 (2) of Vienna Convention.

Thus the solution provided by the article seems quite satisfactory, useful and progressive.

(iv) *Legal Effects of Reservation* : Now we turn to the effect of reservation on the rights and obligations of the reserving State, the effect of reservation in the relation between a reserving State and an accepting State and the relations of the other parties to the treaty *inter se*. In case the reservation has been objected to, what will be the effect of reservation in relation to objecting State and reserving State ?

46. Vienna Convention on the Law of Treaties. U.N. Doc. A/Conference 39/27, A.J.I.L. 63, (1969), Official Documents, at 875.

47. I.L.C. Reports, (1950), II, art. 10 (2) : such a declaration is frequently endorsed upon original text of the treaty itself or included in the instrument of ratification or accession of a State, or recorded in a separate formal instrument collateral to the treaty, such as a protocol, or a process verbal of signature, a process verbal of the exchange or deposit of ratifications, a protocol of accession etc.

48. A statement made in G.A. in course of debate upon a projected treaty cannot constitute an effective proposal of a reservation, which States, subsequently accepting the treaty in question must be deemed also to accept, but if a declaration made during negotiation is confirmed at the time of signature would amount to formal reservation.

49. I.L.C. Report, (1965), I, 813th meeting, at 269, para 88 and at 270, para 91.

Sir Humphrey Waldock dealt with this problem in para 5 of Draft Art. 18 and para 4 (c) of Draft Art. 19 of his first report.[50] The Draft Articles were :

"5. (a) When the treaty has entered into force, a reservation which has been established as admissible in accordance with the provisions of the present article shall operate :

(i) To exempt the reserving State from the provisions of the treaty to which the reservation relates to the extent of the matters covered by the reservation; and

(ii) Reciprocally to entitle any other party to the treaty to claim the same exemptions from the provisions of the treaty in its relations with the reserving State.

(b) The reservation of one party to a pleurilateral or multilateral treaty shall operate only as between the reserving State and the other parties to the treaty; it shall not affect in any way the rights and obligations of the other parties to the treaty inter se."

Article 19 (4)

"4. When the objection has been made to a reservation in conformity with the provisions of the present article and the reserving State does not withdraw its reservation :

(c) In case of multilateral treaty, the objection shall preclude the entry into force of the treaty as between the objecting and reserving State but shall not preclude its entry into force between the reserving State and any other State which does not object to the reservation."

In 1965, the Commission proposed a separate article [51] with a new addition of para 3 to cover the situation even an unusual one : where a State objected to or refused to accept a reservation but nevertheless considered itself in treaty relations wirh the reserving State and gave the unilateral rights to objecting State to establish the treaty relations with the reserving State.[52]

In 1966, the Commission finally adopted the draft article 19, which stood as follows :

"1. A reservation established with regard to another party in accordance with articles 16, 17 & 18 :

(a) Modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation ; and

(b) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

50. ILC Report, (1962), II, at 61-62.

51. Ibid, (1965), I, 816th meeting, at 284, para 56.

52. Ibid., (1965), II, at 55, suggestion of U.S.A.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."[53]

This article has been adopted by the Vienna Conference without any change and has been renumbered as Article 21. In the interest of clarity, the Committee has inserted in para (a) the words "in its relation with that other party" after the words "for the reserving State." The art. 21 stands now as follows :

"1. A reservation established with regard to another party in accordance with Articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies these provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposod to the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."[54]

Paras 1 and 2 need no comment as they are the automatic outcome of the flexible system. In para 3, the view of Special Rapporteur that the situation should be governed by the mutual consent of the reserving and the objecting State has been rightly rejected.[55] The unilateral approach is more in line with the general structure of the provisions on reservation and preferable to the Special Rapporteur's reciprocal approach, because if a State proposes a reservation that step automatically brings into play the whole of the law governing the institution of reservation. If an objection is made to the reservation the objecting State should have some option to decide whether or not it wishes to be in treaty relations with the reserving State subject to the reservation. It will unnecessarily complicate the matter to require a further agreement between the two States as to whether or not they

53. ILC Report, (1966), II, at 208.

54. U.N. Conference on law of Treaties, First Session, 1968, op. cit. at 416, para 28.

55. I.L.C. Report, (1965), I, 800th meeting, at 171, paras 3, 7; at 172, paras 22 to 24; at 173, para 26.

wish to be in such treaty realtions with each other. The formulation of the article is simple and free from ambiguity and the solution proposed seems satisfactory.

(v) *Withdrawl of Reservations* : The problem is whether or not the reserving State has the absolute right to withdraw the reservation unilaterally even when the resevation has been accepted by the other States. How an effective withdrawl of reservation can be made ? What will be the rights and obligation of the reserving State after such withdrawl ? At what point of time the legal effects of the withdrawl of a reservation will begin to operate ?

Sir G. Fitzmaurice and Sir Humphrey Waldock in their reports,[56] considered that the reserving State had the absolute right to withdraw the reservation unilterally, at any time, without the consent of the State which had accepted the reservation. After the withdtawl of reservation, the previously reserving State would become automatically bound to comply fully with the provisions of the treaty and was equally entitled to claim the compliance with that provision by the other parties. An effective withdrawl of reservation could be made by written notification to the depository and, failing any such depository, to every State which was entitled to become a party to the treaty. Prof. Waldock suggested that the withdrawl would be operative as from the time of the notice had been received by the other States concerned.

The Commission had adopted draft article 20, substantially based on Sir Humphrey's report. Article 20 of the Draft Articles was :

"1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawl.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawl becomes operative only when notice of it has been received by the other contracting States."[58]

This article has been adopted by the Vienna Conference without any change of substance and is renumbered as Article 22, withdrawl of reservations and of objections to reservations.

"1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a state which has accepted the reservation is not required for its withdrawl.

56. I.L.C. Report. (1956), II, art. 40 (3), at 116; (1962), II, art. 17 (6), at 61.

57. Ibid, (1962), I, 667th meeting, at 253, paras 73, 75.

58. Ibid, (1966), II, at 209.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawl of a reservation becomes operative in relation to another contracting state only when notice of it has been received by that Stat;

(b) the withdrawl of an objection to a reservation becomes operative only when notice of it has been received by the state which formulated the reservation."

It has further provided that objection to the reservation can be withdrawn at anytime and it will come into operation when it comes to the knowledge of the reserving State.

This article recognizes unilateral right of withdrawl of reservation as the consent of other State is not considered a necessary condition of the reserving State's ability to withdraw the reservation, because the reservation consitutes an exception which is merely tolerated.[59] As regards the situation where the two States make similar reservatious, though independently of each other, it was observed in the Commission that the consent of the other State was necessary in order that the withdrawl by one State would oblige the other to withdraw its reservation as well.[60] It may be argued that any one of those States has the right to withdraw its own reservations without consulting the others and without having to obtain their consent because such withdrawl does not affect the validity of other identical reservation.[61] The other case of similar reservations is where the two States make identical reservations on the basis of ancilliary agreement between them, and in such a case the unilateral withdrawl of reservation by one of them may be a breach of ancilliary agreement.[62] As to this situation it may be said that the withdrawl of reservation by one State would give rise to the problem of incompatible treaties, which is not the subject matter of this article.[63]

This Article has provided a good and satisfactory solution subject to one defect that it does not accept the suggestion proposed in the Commission to fix a time limit i.e., any notice of withdrawl of reservation communicated should become operative, 90 days after the receipt by the depositary of the instrument to which the communication related.[64] This suggestion aimed

59. I.L.C. Report, (1965), I, 800th meeting, at 175, paras 49 to 51.
60. Ibid, at 175, paras 53 to 55.
61. Ibid, at 176, para 70; at 177, paras 72, 78.
62. Ibid, at 176, para 63.
63. Ibid, at 177, para 79.
64. Ibid, at 176, para 64.

to solve the problem by limiting the time for which the reserving State was required to wait for the withdrawl of its reservation to become effective, and thus it aimed to remove uncertainty. This Article has no provision requiring that withdrawl of the reservation should be in writing. Art. 23 (4) of the Convention has provided that withdrawl of reservation and an objection to the reservation must be in writing. This has added to the security of treaty relations and has dispelled the possible doubts concerning the withdrawl of reservation. In case a treaty has not entered into force between two States, because one of them has objected to a reservation made by the other and has not indicated that the treaty shall nevertheless enter into force between them, there will be no obstacle to that treaty coming into force between the States in question once the reason for the objection had been removed.[65]

IV

CONCLUSION :

The articles relating to reservation not only attempt to codify already existing rules in this branch of law but also incorporate, where necessary, new rule reflecting the progressive development of international law.[66] The articles give proper expression to the aspirations and needs of the contemporary world. Some of the fundamental principles underlying these articles are equality of contracting States, their free will, full consent and good faith. The articles are progressive and practical and may have the effect of bringing the law in accord with the contemporary realities.

Treaties are the only instrument by which the States in their relations, perform multifarious activities, including the codification of international law. Individual States participating in a treaty have their own national policies which they tend to adhere adamantly, they have their own constitutional or internal requirements and peculiarities, and in order to meet these conditions and requirements, the articles relating to reservations contained in the Vienna Convention on the Law of Treaties have rightly accepted the right of the States to make reservations and have also provided that the reservation should be made in accordance with the provisions of the treaty if any. Where the treaty is silent, the Convention has concluded that silence or failure to insert express clauses on the admissibility of reservations implies that the contracting States contemplated total liberty in the matter of reservations. Thus the Convention embodies a flexible principle of reservations.[67]

65. U.N. Conference on Law of treaties, First Session, 1968, op. cit., at 38, para 64, Austrian amendment (A/conf. 39/C. 1/L. 4 and Add. 1).
66. I.M. Sinclair, The Vienna Convention on the Law of Treaties, 1973, at 16.
67. Ibid, at 41.

Also, the Convention has provided a reasonable safeguard against the abuse of the right to make reservations, i. e., the reservation is required to be compatible with the object and purpose of the treaty. The criterion of compatibility of reservation with the object and purpose, is a matter of subjective appreciation by each contracting State and the absence of a Court or a tribunal with unconditional compulsory jurisdiction will give rise to divergent interpretations and a variety of participation in a treaty. The Convention therefore has apparently failed to provide any objective criteria for the application of compatibility rule.

The question of compatibility of the reservation with the object and purpose of the treaty is legal one and requires a decision through judicial interpretation. In the absence of the International Court's unconditional compulsory jurisdiction the best and suitable way out for the disputing parties seems to be to have an advisory opinion of I.C.J on the matter. May be that in the case of dispute regarding the compatibility of the reservation, the depositary may be required to ask the advisory opinion of the I.C.J. Thus some certainty regarding the compatibility of the reservation to the object and purpose of the treaty can be achieved by advisory opinion and this may provide an objective criteria for the application of the compatibility rule.

The Convention respects the sovereign and equal right of each State not to be bound against its will by a reservation.

As regards the problem of the extent to which the consent of other contracting parties is required, the Convention has adopted the flexible system because, to ensure the effectiveness, universality, and the integrity of a treaty, it is essential that as many states as possible should become party to a multilateral treaty and accept the bulk of its provisions. Further, the flexible system by providing maximum participation in a treaty increases the area of common action and, thus, encourages international cooperation and contributes to the progressive development of international law through conclusion of multilateral treaties. Therefore, the rule calculated to promote the widest possible participation in the multilateral treaty is the one best suited to the immediate needs of the modern rapidly expanding international community.

The detrimental effect of the reservations on the intergrity of the treaty is rather exaggerated, by the supporters of the unanimity rule because : (1) in most cases the effect of a reservation on the general integrity of the treaty is minimal; and (2) the unanimity rule strikes at the very root of the universality of the treaty. Further, an opposition to the unanimity rule seems to have increased during recent times. It is again and again pointed out by the States that the requirement of the unanimity is contrary to the

need of flexibility in international relations and also to a maximum participation in the treaties. The existing practice regarding the reservation which is based on the flexible system has been rightly adopted by the Convention.

The Convention has not committed any error in confining the right to object to a reservation only to the signatories or to the actual parties to a treaty. Regarding the problems of procedure, legal effects, and withdrawl of reservations as discussed above, the Convention has attempted to provide as satisfactory solutions as are possible under the contemporary conditions of the world community.

IMPACT OF REGIONALISM ON THE MOST-FAVOURED NATION CLAUSE*

BAGISH C. NIRMAL**

1. *INTRODUCTION* :

Today nations of the world have shown their positive orientation towards an expanding volume of international trade for economic as well as political reasons. Consequently, statistical dimension of the world trade in this part of the twentieth century has unprecedently increased. But this could have not been possible at all without conscious and concerted efforts on the part of governments to bring about conditions under which trade opportunities, at least equal to other rivals in the third market, could be sought out and cultivated by removing unnecessary political and other impediments. One of the tools employed for furtherance of such an objective has been the most-favoured nation clause[1] in the inter-state treaties, the most

*This article is based mainly on the author's dissertation "Most-Favoured Nation Clause Problems and Attempts at Codification" submitted for LL.M. degree, written under the supervision of Prof. R.P. Dhokalia, Law School, B.H.U.

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1. Literature abounds in on the definition of the most-favoured-nation clause. These definitions are either restrictive or general in nature. As it is not necessary to give all the definitions, here only a few of them are illustratively quotedbelow :

(a) 'Briefly defined, the most-favoured-nation clause is simply a pledge of non-discrimination against the commerce of the other party to the treaty or a pledge to make the other party equally favoured with any third country. The customary wording, however, has been a pledge to grant to the other party treatment not less favourable than may be granted to the 'most-favoured among other countries ....' Hyde, *International Law Cheifly as Interpreted and Applied by the United States*, 2nd Rev. Edition, 1947, Vol. II, p. 1503, citing a statement made by the United States Tariff Commission.'

(b) "According to the most-favoured-nation clause in its general form, all favours which eiter contracting party has granted in the past or will grant in furture, to any third state must be granted to the other party" Oppenheim, *International Law*, 1962, Vol. I, p. 971.

(c) "The most-favoured-nation clause is one which has become customary to insert in treaties of commerce, providing that, if any reductions of tariff of other advantages are granted by either contracting state to any third state, the other shall have the benefit of it," Sir Thomas Barclay, 'Effect of "Most-Favoured-Nation Clause" in Commercial Treaties', *Yale Law Journal*, 1907-1908, Vol. 17, p. 26.

(d) "The most-favoured-nation clause is a provision generally contained in an agreement between states, whereby the contracting parties grant each other all such

conspicuous characteristic of which is that it aims at elimination of discrimination in trade, especially, by way of imposition of tariffs and custom duties in inter-state trade, by guaranteeing equality of treatment to rival commercial states in the markets of a third state.[2] Accordingly its inclusion in a commerical treaty between states would 'open the doors to the enterprises which are able to compete commercially with any other state benefiting from the clause[3] and, therefore, in effect would lead to expansion of world trade.

The most-favoured nation clause is not however, a new mechanism, employed for the trade expansion of the twentieth century. It is an old concept which emerged for the first time though in embryonic form in the middle ages[4] for preventing the growth of jealousies between various trading cities of Europe struggling for maximum trade benefits[5] and had been found congenial to the centuries of mercantilist capitalism.[6] Though it has not been found absent in any stages of its evolution, it was the era of free trade only in which the clause reached its greatest ascendency and remained almost the universal basis of a vast system of commercial treaties.[7] Afterwards the most favoured nation clause could not regain such ascendency because of the manifold factors viz. adoption of the protectionist and trade restrictive policies by the states for economic, political and ideological reasons, the emergence of the totalitarian regimes, the great economic depression of 1930 and the outbreak of two world wars.

advantages, greater than they have previously enjoyed, as they have already granted or may subsequently grant to a third power, without the need for the conclusion of a new agreement between them for that purpose," S. Basdevant, '*Clause de la plus favorisee*,' *Reportire de droit international*, 1929, Vol. III, p. 464, English translation cited in the U.N. Doc. A/CN. 4/257 and add 1, YBILC, 1972 Vol. II, p. 163. For other definitions see L.G. Jahnke, 'The European Economic Community and the Most-Favoured-Nation Clause', *CYIL*, 1963, Vol. I, p. 252; R.C. Synder, *The Most-Favoured-Nation Clauses An Analysis with Particular Reference to Recent Treaty Practice and Tariffs*, 1948, p. 10 cited in U. N. Doc. A/CN. 4/257 and add 1, YBILC, 1972, Vol. II, p. 163; O' Connel, 'State Succession and Treaty Interpretation', *AJIL*, 1964, Vol. 58, p. 44.

2. W. Friedmann, *The Changing Structure of International Law*, 1964, p. 353.

3. W. Friedmann, *Law in a Changing Society*, 1972, p. 477.

4. A. Nussbaum, *A Concise History of the Law of Nations*, 1947, p. 30; See also J.H.W Verzijl, *International Law in Historical Perspective* 1972, Vol. V, pp. 434-435 and U.N. Doc. A/CN. 4/L. 127, Y.B.I.L.C. 1968, Vol. II, p. 166.

5. U.N. Doc. A/CN. 4/215, Y.B.I.L.C., 1969, Vol. II, p. 359.

6. Schwarzenberger, 'The Most Favoured Nation Standard in British States Practice, *B.Y.I.L.*, 1945, Vol. XXII, p. 97.

7. See A. Nussbaum, op. cit. pp. 199-200.

Recognizing the desirability of increasing freedom of trade by development through voluntary agreements[8] and need of facilitating efficient world allocation of resources[9] and production, states recently entered into a number of regional economic agreements which accentuated the formation of the customs union and free trade areas like the EEC (1957) : The EFTA (1960), the LAFTA (1960), the Australian Newzealand Free Trade Areas (1965) and the Arab Common Market (1965). These regional economic groups move in the direction of elimination of internal barriers in trade among the member nations, and hence are discriminatory in nature against the non-participating countries.[10] Obviously they bring about widespread repurcussions on the most favoured nation clause which ensures non-discrimination in matters of tariffs and trade. The proliferation in the number of the regional groups during the period following the conclusion of the Rome Treaty and the continuing trend of growth in the number has presented grave problems in as much as the traditional pattern in world trade conducted on the most favoured nation basis has been adversely affected. An attempt has been made in this article to examine the problem of the compatibility of the most favoured nation clause with the regisonal economic groups. This article then proceeds to deal with the question of exception of the regional economic arrangements and discusses the draft proposals of the International Law Commission, on the most favoured nation Clause' pertaining to the perplexing probelm of the regional unions claiming exception to the clause.

II. *The Compatibility of the Most-Favoured Nation Clause and the Regional Economic Groups* :

The question of compatibility of the Most-Favoured Nation obligations with those arising out of associations of states under a customs union frequently arises where states joining a customs union or other economic arrangements of an organizational character have already undertaken obligations towards the non-participating countries and which are still in effect.[11] One of such instances is that of Russia which by basing her claim on the most-favoured nation obligations undertaken by France in the agreement of 1958[12] claimed, in 1962, that she was entitled to same respect for customs duties as France was extending to the other members of the European Economic Community.[13] Further, noting that the treaty contained an exception in favour of a customs union, the Soviet union argued that she was entitled to equality of treatment with the members of the community while it was not a complete customs union.[14] Under such circumstances, the question concerning the fate of the mostfavoured nation obligations arises. Professor O'Connel[15] has suggested the following solution to such problem :

(i) that the most-favoured nation benefits operate with a view as to ensuring the same privileges to the third party as to the members of the union or the organisation;

(ii) that the third state be denied the benefits of the most-favoured nation clause on the ground that it must be interpreted so as to operate only when the contracting parties enter into bilateral commercial agreements and not into customs unions;

(iii) that the customs union treaty establishing a superior normative order must have the effect of cancelling the most-favoured nation clause, and

(iv) that entry into a customs union be treated as analogous to entry into a real union so that the ordinary law of state succession applies.

Generally, in order to avoid disputes in this regard, an exception clause is inserted in the treaties which provide that most-favoured nation obligations do not extend to the benefits derived from any customs union

8. GATT, Art. XXIV, para 4.

9. Kenneth W. Dam, Regional Economic Arrangements and the GATT : The Legacy of a Misconception, *U. CHI. L. Rev.* 1963, Vol. 30, pp. 622-635. W. Corden, a renowned economist has also isolated the following advantages of a customs union—'The most important single generalisation is that a customs union is more likely to lead to a net increase in economic welfare if the economics of the partner countries are acatually very comperative (or similar) but potentially very complementary (or dis-similar). ....In addition, a customs union is more likely to lead to a net increase in economic welfare the higher the initial rates of duty on imports into the partner countries, the greater the proportions of the world's production, consumption, and trade that are covered by the members of the union and the greater the slope for economics of large scale production in those industries within the union that are now enabled to expand by undercutting similar industries in other parts of the union. A Customs union is also more likely to raise welfare if each of the two countries is, the principal supplies to the other of the products that it exports to the other and if each is the principal market for the other of the products that it imports from the other. W. Corden, *Recent developments in the theory of International Trade*, 1965, pp. 54-55.

10. George G Fisher, 'The Most Favoured Nation'clause in GATT : A Need for Re-evaluation ? *Stanford Law Review*, 1966-67, Vol. 19, p. 844.

11. O'Connel, *International Law*, 1965, Vol. I. p. 293.

12. U.N.T.S., Vol. 338, p. 280. This treaty extended the earlier trade agreement of 1951 for a period of five years, but with the addition that the most-favoured nation provisions of the earlier treaty 'shall not extend to the benefits derived from any custom which may have been or may be cond uded by one of the contracting parties.'

13. See L.G. Jahnke, 'The European Economic Community and the Most-Favoured Nation Clause "*The Canadian Year Book of International Law*, 1963, Vol. I, pp. 257-258.

14. Id., p. 258.

15. O'Connel, op. cit., p. 293.

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14. Id., p. 258.

15. O'Connel, op. cit., p. 293.

which have or may be joined by one of the constracting parties.[16] This raises the pertinent question : whether a customs union or common market or free trade is an implied exception to the obligations undertaken in a most-favoured nation clause. A brief account of diverse views on the problem as such is given hereunder.

III. *Regional Economic Groups as an Exception to the Most-Favoured Nation Clause : Diverse views :*

(a) *Anglo American View :*

With regard to the question whether a customs union involves an exception to the most-favoured nation clause, the United Kingdom has not only taken a negative stand[17] but has even maintained this position to own detriment.[18] On the other hand, the British law office has laid down the principle which has been consistently maintained by the government that the objection does not extend to customs unions where there exists a close political union between the parties[19] and where a British commercial treaty itself contains a provision reserving from the scope of the most favoured nation clause privileges accorded to a third state by virtue of any customs union which has been or may be formed.[20]

The United States government also holds the view that in general the establishment of a customs union would not exclude the operation of the most favoured nation provisions embodied in the primary treaty of commerce.[21] This view was best reflected in the opinion given by the solicitor for the U.S. Department of State on the occassion of the Austro-German

16. e.g. Treaty of Trade and Navigation between the Federal Republic of Germany and the U.S.S.R. states that most favoured nation obligations do not extend to 'advantages arising out of a customs union which have been or may hereafter be concluded by one of the contracting parties. U.N.T.S., Vol. 246, p. 71, (Art. 1). There are also multilateral treaties like General Treaty on Central American Integration signed at Managua on 13 December 1960 (U.N.T.S., Vol. 455, p. 3., (Art. xxv)/and the Convention on Transit Trade of Land Locked States signed in New Yark on July 8, 1965/U.N.T.S., vol. 597, p. 54 (Art. 10); which provide for the exemption of the benefits conferred by them from any most-favoured nation arrangements with a third state.

17. Mc Nair, *The Law of Treaties*, 1961, p. 282.

18. See Report on the proposed South African customs union by the Law officers to the Colonial office dated March 14, 1889 reproduced in Mc Nair's *Law of Treaties*, pp. 284-286.

19. See Report by the Queen's advocate dated 27 January, 1886 on the effect of the proposed customs union between France and Monaco-reproduced in Mc Nair's book on the Law of Treaties, p. 284.

20. Mc Nair, op. cit., p. 282.

21. Ibid.

Treaty for the establishment of the Auschlus. He took the strong point that a customs union would not be an implied exception to the most-favoured nation clause,[22] embodied in the treaties of friendship, commerce, and consular rights of 8 Dec., 1923 between the United States and Germany, and of 19 June, 1928 between the U. S. and Austria, which were still in force since an exception in favour of a customs union was excluded on the basis of the principle of *inclusio unius est exclusio alterius*.[23]

(b) *Opinion of the Permanent Court of International Justice :*

In the *Customs Union* case the P.C.I.J. was faced with the question whether the Austro-German Auschlus was compatible with Austria's undertaking in Art. 88 of the treaty of Saint German and in the Geneva protocol of 1922 not to compromise her political and economic independence. It was argued by France and the United Kingdom before the Council of the League of Nations that Austria's most-favoured nation obligations precluded the formation of a customs union.[24]

In its advisory opinion though the court did not give its opinion to the question as such, it defined the term 'customs Union' as a union between sovereign states having uniformity of customs laws and customs tariffs, unity of customs frontiers and customs territory vis-a-vis third state, freedom from import and export duties *interse* and other restrictive regulations and also the apportionment of duties between the members according to a fixed quota.[25] Also, it held that the formation of customs union would violate the above mentioned treaties.

Since none of the states participating in any of the regional economic groups for the time being, has lost either its identity or its political independence, therefore any claim on the basis of customs union does not deserve exceptional treatment to the most-favoured nation obligation.

(c) *GATT provisions and Regional Economic Arrangements :*

Recognizing that it is desirable to increase freedom of trade by the development, through voluntary agreements, of closer integration between the economics of the contracting parties in a regional or economic group and also the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting of parties with such territories,[26] Art.

22. Hackworth, *Digest of International Law*, 1943, p. 295.

23. Jahnke, op. cit., p. 255.

24. P.C.I.J. series A/B, No. 41, p. 51.

25. Ibid; see also O'connel, *International Law*, 1965, p. 294.

26. Supra note 8.

XXIV of GATT has provided a vehicle for regionalism by allowing the formation of customs unions and free trade areas provided they meet the following requirements :

(i) *Elimination of Internal Barriers* :

The first requirement is that duties and other restrictive regulations of commerce shall be removed with respect to substantially all the trade between the constituent territories of the customs union on products originating in such territories.[27] The same requirement is also to be met in the case of a free trade area.[28] The very purpose of the 'substantially all' criterian is to reject from the general the exception to the most favoured nation provisions, arrangements which exclude highly protected and high cost sectors of industry and agriculture.[29]

(ii) *The Common External Trariff* :

GATT permits the customs union not to extend to the other contracting parties the reduction granted to each other, provided the requirement that 'the duties and other regulations of commerce shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable to the constituent territories prior to the formation of such uniont[30] is being met. This requirement is also to be complied by a free trade area.[31] However, the basic difference between a customs union and a free trade area's requirements is that while in the former-

27. Art. XXIV, para 8 (a) (i) of GATT lays down that 'a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles xi, xii, xiii, xiv, xv and xx) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade, in products originating in such territories.

28. 'A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (....) are eliminated on substantially all the trade between the constituent territories in products originating in such territories'. GATT Art. xxiv-8 (b).

29. Isiah Frank, 'Discrimination Regionalism and the GATT' *A.S.I.L.Proc.* 1960, Vol. 54, p. 179.

30. GATT, Art. xxiv, para 5 (a).

31. Art. xxiv para 5 (b) of GATT lays down that 'with respect to freetradearea, ... the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area, or interim agreement, as the case may be.'

case each member is to apply substantially the same duties and other regulations of commerce to trade with non member countries,[32] it is not required in the latter case and each member retains its existing tarrif on trade with the outside countries.

The main purpose of the requirement and safeguard laid down in Art. xxiv para 8 (b) is 'to insure that whatever discrimination stems from the establishment of permitted regional arrangements comes about as a result of the internal tariff reductions during the interim period and their ultimate elimination, rather than as a result of any raising of barriers against outsiders' and accordingly reduces the uneconomic diversion of imports from third countries to higher cost sources within the group by imposing the ceiling on the extent of discrimination; it also reduces the possibility of using external tariff policy as a weapon for bargaining purposes in dealing with the outsiders.

(iii) *Elimination of Quantitative Restrictions* :

With respect to internal quantitative restrictions para 8 of Art. xxiv requires that quantitative restrictions, as 'restrictive regulations of commerce' must be eliminated on 'substantially all' inter member trade, except that, where necessary' quantitative restriction permitted under Arts. xi, xii, xiii xiv, xv and xx may be retained.

As regards the elimination of quantitative restrictions imposed on import from the third countres, Art. xxiv of GATT is silent as paragraph 5 of Art. xxiv which uses the phrase 'duties and other regulations of commerce' omits the word restrictive and thereby excludes quantitative restrictions.

(iv) *Plan and Schedule Requirement* :

When the text of Art. xxiv para 5 was loosened to allow an 'interim agreement' necessary for the formation of a customs union or a free trade area, it was provided that such an agreement must include a 'plan and schedule' for the formation of such a customs union or of such a free trade area within a 'reasonable length of time.[34] If after having studied the plan and schedule 'included' in an agreement for the formation of such a regional arrangements in consultation with the parties to the agreement and taking due account of the information available, the *Contracting Parties* of GATT find that 'agreement is not likely to result in the formation of a customs union or of a free trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, they shall make

32. GATT, Art. xxiv, para 8 (a) (ii).

33. Isiah Frank, op. cit., p. 180.

34. GATT, Art. xxiv, para 5 (c).

recommendations to the parties to the agreement, and 'the parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.'[35] Further, in the event of any substantial change in the plan or schedule, it must be communicated to the *contracting Parties* which 'may request the contract ing parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free trade area.'[36]

(v) *Waiver procedure* :

The draftsmen of the GATT recognized that where a customs union or free trade area was established it would not be appropriate for their members to continue to be under an obligation to share any special treatment under these arrangements, which generally included other economic or political obligations, with other countries entitled to most favoured nation treatment and such regional economic arrangements were accordingly exempted from the application of Art. 1.[37] From this point of view GATT provides the procedure forthe general waiver unders Art. xxiv-5 of the GATT. In case the proposals for the formation of the regional economic arrangements do not fully comply with the reaquirements referred to in Art. xxiv, a two thirds majority is required to approve such proposals.

The above mentioned safeguards against the formation of a customs union or a free trade area, though appear on first impression to be adequate and effective, they are in fact too inadequate and excessively vague. For example the phrase, 'substantially all' referred to in Art. xxiv is not unambiguous becasue the following questions arise as to which a categorical answer is not available : (i) whether the phrase indicates something in the order of 99 percent;[38] (ii) whether the concept were to be viewed in purely statistical terms so that a higher percentage of trade could be comprehended with the arrangements and also (iii) whether the percentage could be calculated on the basis ofthe total internal trade of the area or the trade within the area of each country separately.[39]

Further, ambiguity is to be found in the requirement that, in order to enable a regional economic grouping to qualify as a customs union it must entail the common external customs tariffs applicable to trade with other

35. GATT, Art. xxiv, para 7 (b).
36. GATT, Art, xxiv, para 7 (c).
37. GATT, Art. xxiv-10.
38. F.A. Haight, 'Customs Unions and Free Trade Areas Under GATT, *J. W. T. L.*, 1972, Vol. 6, N. 3, p. 392.
39. Isiah Frank, op. cit., p. 179.

countries. Against this requirement an eminent writer[40] has raised a number of questions : whether an arithmetical average of duties previously imposed satisfies the requirement that duties not be 'on the whole higher' than before the customs union was established, despite the fact that it could easily be more restrictive in fact than the earlier regime, whether the requirement that duties shall not 'on the whole' be 'more restrictive' is independent i.e. if the duties are not on the whole not higher, is the union still required to show that they are not 'on the whole' more restrictive ? Further, how can the union show it ? Apart from these ambiguities, it is not clear whether the words 'on the whole' and "general incidence' refer to each item in the common external tarifl schedule or to the common external tariff schedule as a whole;[41] and, also, whether the members of the customs union are free to use either a simple arithmetical average or the weighted average in the calculation of the common external customs tarifls.[42]

A further troublesome ambiguity lies in the requirements on quantitative restrictions which must be eliminated on 'substantially all' inter member trade unless such restrictions are persuant to specifically provided exceptions. Art. XIII of the GATT states that in exceptional situations specified in Art. XIV, quantitative restrictions must be applied non-discriminately. But Art. XXIV requires the elimination of quantitative restrictions against members only and, therefore, entails discrimination against third countries.

The other ambiguity that has plagued the GATT has arisen in connection with the use of the expressions 'reasonable length of time' and 'Plan schedule'. The GATT's experience in this regard leads us to the conclusion that the time period taken in bringing the customs union or free trade area to find fruiton has been generally 'indefinite' rather than reasonable.[43]

Thus, it is evident from the foregoing discussions that the requirements and safeguards prescribed by GATT Art. XXIV are ambiguous and, therefore, are incapable of application to specific situations. In the words of prof. Kenneth Dam '... if a single adjective were to be chosen to describe Art. XXIV, that adjective would have to be deceptive. First, the standards established are deceptively concrete and precise; any attempt to apply the standards to a specific situation reveals ambiguities which to use an irresistible metaphor, go to the heart of the matter. Second, although

40. Stanley D. Metzger, 'Regional Markets and International Law', *A.S.I.L. Proc.*, 1960, Vol. 54, p. 175.
41. Kenneth W. Dam; *The GATT : Law and International Economic Organization*, 1972, p. 277.
42. Jahnke, Op. cit., p. 261.
43. Supra 41, p. 276.

the rules appear to be based on economic considerations, the underlying principles make little economic sense.....[44]

The first experience in the application of GATT Art. XXIV was in 1949 when the contracting parties at their third session in Anney examined the customs union agreements between South Africa and Southern Rhodesia.[45] But the real test for Article XXIV did not come until 8 years later in 1957 when the Rome Treaty which brought into existence the European Economic Community was submitted to the GATT. Since the compatibility of EEC with with Art. XXIV of GATT has been fully examined in other studies,[46] it will suffice here for our purposes if only a summary of the points made is given.

First : The EEC fails to comply with the safeguarding requirement that substantially all trade within the customs union be freed of duties and other restrictions, since it has excluded agricultural products from the regime of elimination of duties and other regulations applicable to other trade within the union.

Secondly : There was little doubt regarding the compliance of the community with the requirement of paragraph 5 (c) of Art. XXIV of the GATT that union shall take place within a reasonable time after the signing of the interim agreement. Since the customs union of the community has now been completed, the above mentioned doubt is of no legality.

Thirdly : The EEC used the arithmetical average of the highest possible tariffs in the calculation of the common and external tarifl applicable to the trade of the third countries and there by excluded a greater volume of goods than did the various tariffs which were applied by the individual members. Thus the action of the EEC in establishing the common external tariff are of doubtful legality.[47]

Fourthly : The quantitative restrictions issue was sufficiently important in the review of the EEC for a special subgroup, established to discuss that issue. That subgroup expressed serious concern over the possibility that members of the community would discriminate against non-member contracting parties.[48] The legalistic debates in the subgroup did not lead to a resolution of this issue.[49]

44. Id, pp. 275-276.
45. See F.A. Haight, op. cit., p. 397.
46. See Jahnke, op. cit., pp. 252 et seq; James J. Allen, 'The European Common Market and the General Agreement on Tariffs and Trade, '*Law and Contemporary Problems*, 1961, Vol. 26, pp. 559 et seq.
47. Jahnke, op. cit., pp. 261-270.
48. GATT, B.I.S.D., 6th Supplement, 1958, p. 80.
49. Id., pp. 70, 76-81; Kenneth W. Dam, 'Regional Economic Arrangements and the GATT : The Legacy of Misconception', *U.Chi.L. Rev.*, 1963, Vol. 30, pp. 644-46.

Fifthly : The regime established by the agricultural regulations of the EEC goes contrary to the very spirit of GATT Art. XXIV-4 which provides that the formation of the union should not substantially reduce the trade of non members; and also of the assurances given by the members of the community that any measures taken under the articles of the Rome Treaty relating to agriculture, giving preferences to the community trade, would not harm the exports of non members,[50] in as much as such regulations led to a dramatic fall in the imports of agricultural products in the community.

Sixthly : The ECC overseas territories provisions have caused greater concern to the contracting parties to GATT because not only these provisions appear plainly incompatible with GATT provisions with respect to preferences not accorded to non members but they also provide the unparalleled opportunity for trade diversion, especially at the cost of the newly-developed countries.[51] The community and the associated states have justified the association agreement on the ground that it constitutes a free trade area under GATT Art. XXIV. But this argument is not sustainable as it envisages, the establishment of a free trade area out of an embryonic customs unions composed of highly industrialized countries and country whose dominant industry is agriculture.[52]

The other regional economic arrangements, like the EETA which was formed in 1960, also did not comply with the GATT requirements as it was a free trade area for industrial products only. The European Economic Coal and Steel Community covered only two major products line. The LAFTA (1960), the Newzealand Australia Free Trade Area (1965) and the Arab Common Market (1965) agreements contained no time table for the elimination of trade barriers between the participants, when they were presented for the review in GATT. All of the 'Association Agreements' have lacked some of the elements envisaged in the GATT rules and some of them have provided only for an exchange of preferential treatment for certain products only.[53] Thus, not a single customs union or free trade area agreement which has been submitted to the contracting parties has conformed fully to the requirements of GATT Art. XXIV.

Further, it has been only the free trade area provisions of GATT wich have been badly abused and misused, and thus has given too much impetus to the formation of the free trade areas. Yet the *Contracting* parties have felt compelled to grant waivers of one kind or another for every one of the

50. Supra 48, p. 84.
51. Allen, op. cit., p. 569.
52. Jahnke, op. cit., p. 271.
53. Supra 38, p. 399.

proposed agreements.[54] The obvious reason for this is that those regional arrangements were in a sense more powerful than the GATT itself and if an attempt has been made to block the drive to wards regionalism on the ground that the legal requirements of the GATT have not been complied with 'the GATT itself probably would have been destroyed.'[55]

The Anglo-American practice, the opinion of the P.C.I.J. and GATT'S experiences suggest that a customs union or a free trade area has never been absolutely conceived as an exception to the most-favoured-nation clause As none of the regional economic arrangements has fully complied with the GATT'S requirements, the question how they can claim to be an exception to the most-favoured nation clause has become of far reaching importance because of the continuous trend in the proliferation of regional economic arrangement to the deteriment of the trade on MFN basis. The growing concern for free trade in the modern world of economic interdependence impelled the nations of the world in the G.A. to refer the matter for study of the ILC.

4. *Codification on Most-Favoured-Nation Clause by the International Commission and Regional Economic Arrangements* :

In the context of economic life of modern world, the sixth committee of the G.A. as well as the ILC found the subject suitable for codification following the adoption of the Convention of the Law of treaties. The Commission has undertaken major task of codification on the subject and thereby had attempted to codify the existing law with a view to providing solutions to the problems with which the clause is confronted.[56]

54. Supra 49, pp. 660-61.

55. Patterson, *Discrimination in International Trade : The Policy* Issues 1945-1965, (1966), p. 263.

56. The idea that the ILC should study the most-favoured nation clause had originated in 1964, during the discussion on the law of treaties at its sixteenth session. At that session of the International Law Commission, one of its members, Mr. Zimenez de Arechaga introduced his proposal for inclusion of an additional article dealing with the most fauoured nation clauses in the draft on the Law of Treaties prepared by the Commission. It was urged in the support of the proposal that the broad and general terms in which articles relating to third states had been drafted tended to blur the distinction between provisions in favour of third states and the operation of the most-favoured nation clause, a matter that might be of particular importance in connection with articles dealing with termination of amendment of provisions regarding rights or obligations of states not parties to the treaties. The ILC,however, while recognizing the fact that the operation of the most-favoured nation clause should not in any way be prejudiced, had not found it indispensable to make a specific exception regarding such clauses in the articles in question for the reason that these clauses in commis sions opinion were not in any way affecting the articles on the law of treaties. Accordingly, the Commission did not think it advisable to deal with most-favoured nation clauses in general in the codification of the general law of treaties although it expressed its feeling that such clauses might at some future time appropriately become the subject of a special study.

At its 19th session, in 1967, after the completion of the articles on the law of treaties, the Commission keeping in view the suggestion made by several representatives in the 'sixth Committee' of the General Assembly and considering that clarification of the legal aspects of the clause might be of assistance to the United Nations Commission on International Trade Law (UNCITRAL) had decided to place on its programme the topic of most-favoured nation clauses in the Law of Treaties and appointed Mr. Endre Ustor as Special Rapporteur to deal with it. See U.N. Doc. A/CN. 4/L 127 of 19 June 1968, *YBILC*, 1968 Vol. 11, pp. 165-166.

The Special Rapporteur had submitted a working paper and five reports (A/CN. 4/L. 127, A/CN. 4/213; A/CN. 4/228 and add's ; A/CN. 4/257 and add 2, A/CN. 4/266 and A/CN. 4/280) to the Commission during the year 1968-1974. Amongst sixteen articles so far formulated by the Commission,[57] only Art. 2 which defines the 'most favoured nation clause' is pertinent for our purpose. That article runs as follows :

"1. Most-favoured nation clause means a treaty provision whereby an obligation is undertaken by one or more granting states to accord most-favoured nation treatment to one or more beneficiary states.

2. when, as in the usual case, the contracting states undertake to accord most-favoured nation treatment to each other, each of them becomes thereby a granting and beneficiary state simultaneously" (58)

The careful perusal of the aforesaid article makes it clear that neither it nor the corresponding article of the draft prepared by the drafting Committee has taken the cognizance of the problems of the exception to the most-favoured nation clause especially that of customs unions and free trade areas which are tangible realities of today. Recognition of the regional economic arrangements as an exception to the most-favoured nation clause, it is

57. This study is based on the material available to the author in the Central library. B.H.U.

58. U.N. Doc. A/CN. 4/257. The corresponding article of the draft prepared by the drafting committee defines the most-favoured nation clause as a treaty provision whereby a state undertakes to accord most-favoured nation, treatment to another state in an agreed sphere of relations. Article 4 of the draft articles proposed by the drafting Committee, U.N. Doc. A/CN. 4/L. 203. Article 3 of the special rapporteur's draft which defines 'most favoured nation treatment' runs as follows :

"1. Most favoured nation treatment means treatment upon terms not less favourable than the terms of the treatment accorded by the granting state to any third state in a defined sphere of international relations with respect determined Persons or things.

2. Unless, otherwise agreed, paragraph I applies irrespective of the fact whether the treatment accorded by the granting state to any third state is based upon treaty, other agreement, autonomous legislative act or practice." U.N. Doc, A/CN. 4/257.

submiited, would adversly affect the international trade conducted on the most-favoured nation basis. As the expansion of trade and intensification of economic co-operation among all nations are *sine qua non* for the maintenance of international peace and security, the problem of the regional economic arrangements deserves careful consideration by the ILC. What the commission should do in this regard is that it should try to reconcile the most-favoured nation clause with regionalism. To meet this end following suggestions are worth considering.

First : Since it is the lack of control and the failure to enforce the GATT rules that gave rise to the explosion of the regional economic arrangements, due emphasis should be given on the enforceability aspects of GATT rules and only those regional economic groups should be recognized as an exception to the most-favoured nation clause which after strict and minute examination by the GATT, have been granted waiver.

Secondly : If possible at all, the free trade area provisions of the GATT should be deleted. The *Raison detre* is that it has only been these provisions of the GATT which have been frequently honoured in abuse and not in compliance and has caused overflood of the free trade area.

Thirdly : In view of the fact that the regional economic arrangements provide the unparalleled opportunity for trade diversion especially at the cost of developing countries, some device should be thought of so that their formation might not impair the trade and development of the developing countries. Perhaps, it would be better if the regional economic arrangements extend all those tariff benefits to the 'developing countries which they are already granting to some of them e g. the EEC overseas territories provisions have provided certain benefits to the associated states' under the association agreement. If it is not possible at all, the regional economic groups should conclude agreements with the developing countries on individual basis for furthering latter's trade. It is hoped that the commission while dealing with the exceptions to the clause shall take into account the aforesaid suggestions and shall include an article on this question in its draft at the later stage of its work.

5. *Conclusions* :

In the post-Second World War period, international trade and intensified economic relations among states *inter se* have assumed great importance as they are conditions precedent to satisfactory amicable international relations among states and for their peaceful co-existence. International trade in our time is governed by a multilateral trade agreement—the General Agreement on Tariffs and Trade (GATT) which came into being at a conference convened in 1947 to establish an international trade organization

(ITO) and became effective on January 1, 1948. In order to design an economic system based on non-discrimination and on the broadest and freest-possible exchanges of goods, the GATT employed the traditional tool of the 'most-favoured nation clause'. Ironically, the GATT at the same time has provided a vehicle for regionalism by allowing the formation of customs unions and free trade areas, provided they meet the requirements laid down in Art. XXIV of GATT. The emergence of innumeable regional economic arrangements in the recent years have brought about wide spread repurcussions on the most-favoured nation standard for they discriminate in the matters of tariffs against the countries not participating in them. They, by inhibiting the successful operation of the clause in international economic relations, have caused greater concern especially to the developing countries for whose trade and development, the regionalism is most detrimental. Promotion of the establishment of the new international economic order, based on equity, sovereign equality, inter-dependence, common interest and co-operation among all states irrespective of their economic and social systems is, it is submitted, not possible without the reconcilation of the most-favoured nation with regionalism. Obviously, the problem under consideration is of prime importance and the conclusions of the International Law Commission which is currently working on the most-favoured nation clause are eagerly awaited.

NOTES AND COMMENTS

"Legislative simplicity and interpretative complexity—a comment on the Renton Committee Report on 'The Preparation of Legislation." (1975)

RAJEEV DHAVAN *

English lawyers have always had an extremely technical attitude to law reform. This consists of lawyers setting out to make their own technical law more comprehensible and easily understood by themselves and the lay man. The tradition of this limited kind of law reform stretches back to at least Francis Bacon's attempt to codify the laws of England and culminates in Jeremy Bentham's general plans for codification and simplification. Not only did Bentham want lawyers to undertake the mammoth task of codification, but he also wanted to expunge a large number of "anarchichal fallacies." He wanted to ensure that the law did not indulge too many fictions but used more direct and plain linguistic methods. But despite the Thibaut-Savigny codification controversy in Germany or the Carter-Field controversy in New York, it was soon realised that the real problem was not just one of codification. The Anglo- Indian codes had codified all of the common Law except torts. The sum total of these statutes would, however now occupy one-tenth of Indian or England's current legislative activity for one year. The real problem lies in using statutes as forms of communication. The luxury of a prolific parliament must inevitably create cybernetic problems.

In May 1973, James Prior, the President of the Council, appointed the Renton Committee with the following terms of reference :

> "with a view to achieving greater simplicity and clarity in statute law, to review the form in which public bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme; to consider any consequential implications for parliamentary procedure; and to make recommendations."

The Report entitled *The preparation of Legislation* (1975) Cmnd. 6053 was published in May, 1975 ; took two years to report and entailed a cost of £73,187 of which £ 11,625 was the cost of printing the report. Was this £ 60,000 or

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so—excluding the extremely high printing costs—184 page report really worth it ? There is no douot that the Committee was extremely well advised by its witnesses, including 16 members of the judiciary, legal professional groups, government departments and agencies, Q.C.'s, M.P.'s, academics and foreign advisers (pp. 161-2).

The Report reinforces the essential, hitherto ignored, home truth that legislation is not by experts for experts; but by the people, using experts, for the people. As the Report put it : ".. in principle the interests of the ultimate users should always have priority over those of the legislators," (pr. 10.3, p. 56). But, even this must, of course, be subject to an overall efficiency bar. Karl Llewellyn's approach of stating general principles and leaving the rest to contigency and administrative discretion (see (1975) 84 Yale L.J. 1022 at 1038) was rejected in that it defered problems without solving them (prs. 10. 10-11 p. 59) even though it was conceded that this approach may have some uses with respect to private and personal laws (pr. 11.5, p. 62 ".. the draughtsmen must never be forced to sacrifice certainty for simplicity") and convenience (pr. 11.13, p. 65). To achieve this, all kinds of detailed proposals are made about the use of short sentencce (pr. 11.10, p. 64; pr. 11.12 p. 64-5), allowing a full stop in the middle of a section (pr. 11.12, p. 64), indexing odd definitions in Acts (pr. 1.17, p. 66-7), parathentical fractions and mathematical formula (pr. 11.20, p. 67), printing schedules in larger type (pr. 11.22, p. 68), legislation by reference within limits (prs. 11-28-31, pp. 69-70), amending existing legislation (Chapter 13, pp. 76-84) and consolidation (Chapter XIV, pp. 85-93). Detailed attention was given to publicity, both before and after the publication of a statute (Chapter XV pp. 94-99 and see the example of Explanatory aids for the *Local Government Act*, 1972, pp. 173-4) and to the use of computers for information retrieval (Chapter XVI. pp. 100-109). Even more interesting are the proposals for the simplification of fiscal laws (Chapter XVII, pp. 110-120) in particular the insistence that the tax payer be told the precise reasons for tax differentiation (pr. 17, 1-7, pp. 111-2). The useful practice of the Anglo-Indian codes of providing examples was endorsed (pr. 10.7, pp. 57-8).

While all these changes are welcome, the major concern of jurists has not always been directed against legislative drafting alone but also against judicial indiscretion. The present rules of statutory interpretation which ask definitional and typological questions seem, as Hart indicated in his inaugural address two decades ago, to pose the wrong questions. Statutes have a time-dimension and it is important that in a representative democracy, the policy projections of the law makers have priority over the predilections of arbitrators and administrators. Judges looking at statutes are forced to play a linguistic game of typological syllogism. Having done this, they

have to conjure the teleological dimension within which the statute was supposed to have meaning. But such conjecture must inevitably militate against the whole idea of democracy. Judges must be 'neutral' (in Weschler's meaning of the word). This neutrality must not just consist of an overall consistent pattern of decision making, but must also entail the use of 'neutral' and agreed interpretative aids which accord with the teleological expectations of the law makers. The Law Commission endorsed this view very hesitantly in their paper on Interpretation of statutes (No. 21 Scottish Law Comm. No. 11) in 1969. The Renton Committee has gone no further. It has recommended that policy statements accompany statutes (pr. 11.8, pp. 63-4). Then apart from endorsing the Law Commission's five year old recommendations (e. g. prs. 19..1, p. 135; 19.5, p. 128 etc.) adopting general rules about the undesirability of retrospective legislation (pr. 19.32 p. 144), proposing that the general legislative purpose be looked at (pr.19.28, p. 143 and leaving it to Parliament, in exceptional circumstances, to indicate what materials may be judicially referred to, the Report suggests nothing new. Reports of Royal Commissions and white Papers are declared inadmissable (pr. 19.23, p. 142) as are Parliamentary Debates (pr. 19.26, p. 143, pr. 10.7, p. 58). One cannot really understand why Explanatory Material referred to in Chapter 15, cannot be looked at. There is admittedly the problem of weighting the interpretative aids. But this does not necessarily create problem of conflicting emphasis of the kind indicated by Professor Dickerson (see pr. 19.24, p. 142). After all, if new legislative aids are permitted the lexical priority of *all* the aids to interpretation taken together, will have to be reassessed. The credibility of White Paper may be destroyed in Parliamentary Debates. That in itself is not sufficient justification to exclude reference to both. Rules of interpretation on priority and emphasis can easily be worked out. To some extent the emphasis depends on the status of the document, its quality and the legislative stage at which it was received. But the Report did not express a willingness to approve any major re-think about interpretation of statutes even though it agrees (as per the Law Commission) that "there is an interaction between the form of a communication and the rules by which it is to be interpreted." (pr. 19.1, p. 135).

All said and done the Report is a good report. It is drafted in a novel way. The paragraphs are numbered by Chapter and an adequate index supplied. The proposals on clearer legislation are important. But the recommendations on judicial interpretation carry a far too uncomfortable assertive certainty about them. The broad dimensions of *Heydon's* case, which would support a 'context-purpose' teleological approach, were created by the courts in order to understand the legislature. They should be improved. It would be ironic if a legislative committee frowned upon the only constructive attempt made by the judiciary to understand the High Court of Parliament. In the long run the report is not about Law Reform, or even reforming the people through law—a much larger and much more meaningful question. It is a concerted, though incomplete, attack on the esoteric activities of technical professionals. To that extent the Report contains many salutary recommendations. Lawyers and legislators must stop confusing each other and start talking to their real audience—the people.

GENERAL SYSTEM ANALYSIS OF LEGAL SCIENCE*

M. A. MAHMOUD**

I. *Introduction* :

This paper deals with two fundamental questions which are relevant to the discussion of the functions of Law in society.

First, the discussion of the functions of law in society entails necessarily a discussion of the question of method, which is and will remain a major question. That is, the question of what methods are available and are valid for the study of law in society, their interrelationships, and their relationships with reality and theory. In other words, the occupation with the "is" and the "ought" of the functions of law in society leads to the occupation also with the "is" and the "ought" of the methods of the study of those functions.

In the study of law, generally speaking, attitudes towards the question of method manifest two characteristics; self-defence (which even involves attack) and pluralism. Students of law are still engaged in the defence of the relevance and validity of their methods, and pluralism is being admitted in order to reach a compromise.

The second question which the discussion of the functions of law entails is the question of the social functions of legal science itself, since legal science represents the intellectual effort which is made to cope with law (as a social phenomenon) as a base for intelligent action regarding the various aspects of Law in society. In other words, the cognition of the relevance of realism to "law" implies the cognition of the significance of the impact of legal science on the social functions of law.

This paper deals mainly with the "ought" of the method and attempt is made at systematizing the structure of legal science by analogy to the structure of the process of scientific discovery, then some conclusions are reached concerning the structural-functional analysis and the social functions of legal science.

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*This is the revised version of a paper presented at the world congress on philosophy of Law and social philosophy, Madrid in September 1973 under the title : "The Functions of Law and the Methods and Functions of legal Science."

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For the sake of clarity, at the outset some general observations are made as a background for the analysis and the conclusion arrived at in this paper.

II. *General Observations* :

The field of knowledge known as "law" deals with the study of the various kinds of legal norms in society: administrative, civil, penal, etc. As a matter of course it also deals with the methods of arriving at, of making, of explaining, of applying, of administering, of evaluating, and of changing legal norms.

Recently the complex of kinds of norms and the methods relating to their study are being described as "legal science". Some also speak of "legal sciences" as referring to the studies of branches of law and to the different conceptions regarding law maintained by opposing economic and political systems.

The major premise of this paper is that "branches of law" connote kinds of legal norms not "sciences" and that there can only be one "legal science" since, apparently, there are common characteristics of all legal systems.

That the study of law can be called "legal science" is verified by the fact that the study of law has tendencies which fulfil the requirements of a "science" : validity and practicability. Validity is fulfilled by the use o scienctific reserch methods. Practicability is fulfilled by the use of findings of legal science and of other branches of science to cope with social change, planning, the control of technological innovations and some other social questions.

The growth of social science and the ever increasing impact of its methods and output on legal science have been contributing to a high complexity of the latter. As a result, the need is becoming greater to search for a model whereby this complexity can be replaced by a clear picture which will help to distinguish between the various elements of legal science and their interrelations.

The way of building a scientific model is the "general system analysis" which is the analysis of the system of a certain object in terms of "structure-function", i.e. the units it is made up of, the processes of the interrelations of these units, and their functions to maintain themselves, each other and the system as a whole.

The starting point of the general system analysis of any branch of science should be the process of scientific discovery itself. This process has three major components:

reality or fact,

Method or the ways of applying the mind to reality,

theory or output, which also includes hypotheses.

In the following pages attempt is made on this basis to outline the general system analysis of legal science. Further, it also seeks to explain the analysis by a diagram of the system as a whole and of its feedforward and feedback cyberretic relations.

Needless to say that the general system analysis of legal science is not the same as that of the legal system. Yet the general system analysis of the legal system is relevant to that of legal science.

III. *The System of Legal Science* :

(A) *Reality as object of legal science*

Aspects of reality which are objects of legal science comprise three major clusters of phenomena :

environmental components of the legal systems

structure of the legal system

manifestations of the legal system or life branches of law

The environmental components of the legal system are : nature, history, ideology, politics, law, administration.

The Structure of the legal system is constituted of : sources of law, branches of law, anatomy of law.

The manifestations of the legal system or life branches of law in society are found in : constitutional law, penal law, commercial law, family law, international law, etc.

The scientific activity of investigating into and reporting on those aspects of reality as the object of legal science provide case studies of given legal systems (macro case studies) and of parts of given legal systems (micro case studies).

(B) *Method of legal science* :

Just as the manifestations of the legal system lead to the life branches of law in society, the various methods of research and the various levels and scope of their application lead to the methodological branches of legal science. Therefore, these methodological branches can firstly be enumerated as follows under the title–Methods of Research :

(i) analytical positivistic
(ii) sociological
(iii) logical (formal and symbolic)
(iv) historical
(v) applied (social functions, reform, use of physical devices and applied natural and social sciences)
(vi) philosophical (concerning alternatives of choice beyond scientific knowledge)

Secondly, the levels and scope of research cover the following :

(i) case method, macro and micro
(ii) comparative method, macro and micro. Six legels of comparison can be listed here :
  (a) natural and social setting
  (b) structure of the legal system
  (c) functions of the legal system
  (d) content of law
  (e) working of law
  (f) the state of the methodological branches of legal science in a given case or cases.

(C) *Theory of legal science* :

The output of the study of the phenomena of the legal system by the use of the method of legal science provides the theory which is the body of legal science.

As a result of the variety of method of legal science there is a variety of branches of the theory of legal science. Thus, the theoretical branches of legal science which include universal characteristics of law as a social phenomenon and peculiar characteristics of law in different societies. The theoretical branches of legal science can be enumerated as follows :

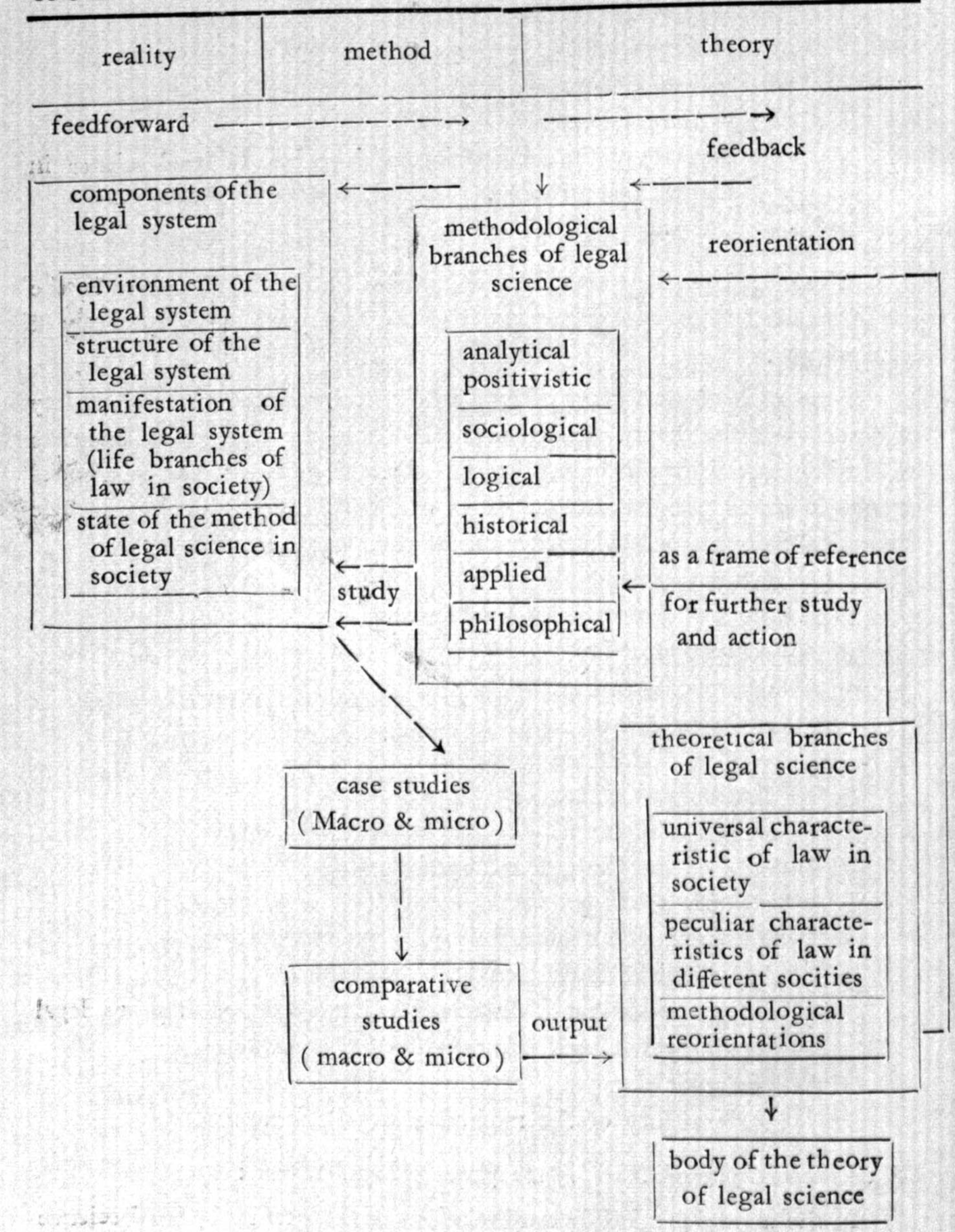
(i) anatomy of law
(ii) types of structures of legal systems
(iii) geography of law
(iv) anthropology of law
(v) evolution of law
(vi) acculturation of law
(vii) development of law
(viii) semantics of law
(ix) logic of law (formal and symbolic)
(x) scientific axiology
(xi) jurimetrics
(xii) the science of legislation
(xiii) technology of law (directives and methods to improve legal machinery and legal reform)
(xiv) legal education
(xv) reorientations of the method of legal science

IV. *A Macro Cybernetic Model of the System of Legal Science* :

In the above, the feedforward relations of the process of legal science have become clear. The feedback relations take place when the content of the theoretical branches of legal science is communicated to (a) the

various parts of the legal system through the applied method, and (b) the methodological branches of legal science.

The following diagram of the macro cybernetic model of the system of legal science illustrates the major elements of the process of legal science and their feedforward and feedback interrelations.



"MACRO CYBERNETIC MODEL OF THE SYSTEM OF LEGAL SCIENCE"

V. *Concluding Notes*

The general system analysis of legal science leads to a clear distinction between legal systems and their parts as objects of legal science and between legal science itself as the output of knowledge concerning law in society. This distinction ought to be borne in mind in order to avoid a misleading confusion between the two things. This will not mean that one should overlook the interrelationship between reality and science as an activity and output. On the contarary, the distinction at hand will make one able and in a better position to appreciate those interrelationships, having separated the two things on the abstract level. It will further help to know what can be drawn from case studies for the purpose of Comparison and what can thereafter be drawn into the body of the theory of legal science.

An implication of the distinction above is that the legal scientist, as if operating in a laboratory of natural science, must proceed in his enterprise by defining the object of his research, then by bringing it, as it were, under the magnifying glass of the method (or methods) and on the level and scope of research, and then by observing the findings which this process leads to. His report must be a clear, precise and exact record of the process in order to be accessible for easy and rational integration into the further process of legal science and to have thereby a bearing on the feedback on both the pure and the applied sides of legal science.

In the use of method, self-defence and its repercussions of attacking other methods should be replaced by specialization in methods and the respect of contributions of specialists of methods, each from the point of view of his field.

Moreover, in the combination of method, pluralism should be directed further towards synthesis, which is the end-in-view of the inter-disciplinary integrative approach.

The model of the system of legal science will better perform the functions of models the more it is seriously studied, commented upon and further elaborated. Since it is the writer's intention to continue the study of the system of legal science, comments are greatly needed and will be highly appreciated.

As enumerated by Deutch,[1] the functions of models are :

organizing : i. e. "the ability of a model to order and relate disjointed data, and to show similarities or connections between them that had previously remained unperceived".

Predictive : i. e. they imply some "predictions".

heuristic : i. e. "leading to the discovery of new facts and new methods.

measuring : i. e. they "may serve as indicators" or themselves help to obtain a "measure".

1. The Nerves of Government, 1966, pp. 8-9.

Efforts should be combined to arrange the findings relating to the body of the theory of legal science according to the model of its system. The major sources of such findings are :

(a) works on comparative studies on life branches of law and on the state of the methodological branches of legal science in given societies.

(b) works on methodological branches of legal science.

(c) works on the theoretical branches of legal science.

(d) relevant findings in works of other sciences as pointed out by their specialists and by legal scientists.

The task of collecting and arranging those findings from those sources, and of course of disseminating them, is of such a volume that it can only be achieved through an international centre which will operate by the aid of international organizations in the field of law and of national committees in all countries, and which will make use of modern devices of storage and retrieval of information. A project of an INTERNATIONAL CENTRE OF LEGAL SCIENCE (I.C.L.S.) has thus been set up in The Hague (since February 1972) in order to achieve this and other related goals which are indispensable for the promotion of legal science.

The social function of legal science is inherent in its task which is to investigate reality by the use of methods and to point out and synthesize the scientific facts resulting therefrom. In order to achieve this task in the most scientific and efficient manner, legal science has the subsidiary function of ordering its elements and the process of their interaction towards its final end. As is evident from the above, this subsidiary function cannot be achieved without a general system analysis of legal science itself.

Legal science has another subsidiary function, namely, to provide its professionals with the material whereby they can form and reform the activity and the output of their profession. The achievement of this second subsidiary function is apparantly dependent on the acquisition and the ordering of the findings of legal science, which can only be realized through the general system analysis of legal science and the medium of the I.C.L.S. It is only through these two devices that legal science as a profession, and thus legal scientists, will reach a frame of reference as a basic universal standard for their activity and will thereby promote the grounds of expertness and prestige which are necessary to identify and distinguish their scientific role as clearly as possible from that of politics and politicians. And it is through this way that legal science and legal scientists will be able to render better service to politics and politicians.

What is thus the final end of legal science ? From what is mentioned about the social function and the subsidiary functions of legal science, it becomes clear that its final end is the promotion of rationality to the widest possible scope in the various aspects and branches of law, in theory and in practice.

MICROFINE JUDICIAL APPROACH IN PREVENTIVE DETENTION CASES

By

C. M. JARIWALA*

Preventive detention is generally used to prevent any person from acting in any manner prejudicial to the defence of India, or the relations of India with foreign powers, or the security of India, or the secuirty of the state, or the maintenance of public order or the maintenance or supplies and services essential to the community.[1] In addition, a foreigner may be detained with a view to regulating his continued presence in India or to making arrangements for his expulsion. Of all these grounds the maintenence of public order is the readily available weapon to detain any person and this is the reason that the cases relating to preventive detention reported in the All India Reporter show that the cases of detention under this head topped the list. The person so detained gets two important constitutional safeguards : firstly, he cannot be detained for more than three months unless the advisory board consisting of High Court Judges (or persons qualified to be such) reports that there is sufficient cause for such detention or unless Parliament in exercise of its power under article 22(7) of the Indian Constitution prescribes the otherwise (Article 22(4));secondly, the grounds of detention shall be communicated to such a person as soon as may be and an earliest opportunity of making a representation against the order shall be given (Article 22(5)). The communication of the grounds of detention affords an important safeguard to the detenue against the enormous increase in the executive interference with the right to personal liberty. And even in that area the plea of irrelevant consideration gives an important ground of defence to the detenue. In such a plea the court examines as to how far the ground of detention is relevant and if the court is satisfied that the ground or grounds communicated to the detenu is irrelevant, the detenu is set free forthwith.

The words "public order" are also used in article 19(2), (3) and (4) which imposes restrictions on the right to freedom of speech (19(1) (a)); right to assemble peaceably and without arms (19(1) (b)); and right to form associations or unions (19(1) (c)).

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1. See the Defence of India Rule, 1939-Rules 26 and 129; the Defence of India Rules, 1962--Rule 30(1) (b); the Preventive Detention Act, 1950, Sec. 3; the West Bengal (Prevention of Violent Activities)Act, 1969, Sec. 3; the Maintenance of Internal Security Act, 1971-Sec. 3.

In the beginning, article 19(2), which imposes restriction on the freedom of speech and expression, did not provide for the words 'public order'. In *Romesh Thapper* v. *State of Madras*[2] the Supreme Court made a distinction between public disorder of a grave nature or an aggravated form and public disorder of a relatively minor breach of peace of a purely local significance. On this basis the majority of the Court pointed out that the grave and aggravated form of public disorder could be included within the ground of security of the state; whereas public disorder of a local significance could not be a valid ground for restricting the freedom of speech guaranted in article 19(1) (a). Fazl Ali, J., dissenting, went even further to include within the words "public disorder" "the maintenance of what is generally known as law and order". In order to do away with this difficulty the Constitution (First Ammendment) Act, 1951 inserted the words 'public order' in article 19(2). Subba Rao, J., in *Supdt., Central prison* v. *Ram Manohar Lohia*,[3] explained that the effect of the amendment was to bring in offences involving breach of a purely local significance within the scope of article 19(2). Justice Subba Rao pointed out that public order was synonymous with public safety and tranquility; it was the absence of disorder involving breaches of local significance in contradiction to national upheavals, such as revolution, civil strife or war affecting the security of the state.[4]

Article 19(2) uses the words, 'public order' with the expression 'in the interests of' which has been interpretaed by the Supreme Court to have a wider meaning than the word 'for the maintenance of'[5], and so the former expression makes the ambit of the protection more wide. Courts have allowed the regulation of the use of loud-speakers[6], the securing of public health[7] etc. under the expression 'in the interests of public order'. The Supreme Court even extended the expression to include anything which indirectly helped in the maintenance of public order.[8]

2. A. I. R. 1950 S. C. 124; See also *Brij Bhushan* v. *State of Delhi*. A. I. R. 1950 S. C. 129.
3. A. I. R. 1960 S. C. 633.
4. Id. at 641.
5. *Kedarnath* v. *State of Bih.*, A. I. R. 1962 S. C. 955, 967. *Dalbir Singh* v. *State of Punj*, A. I. R. 1962 S. C. 1106, 1109.
6. *State of Raj.* v. *Chawala*, A. I. R. 1959 S. C. 544; See also *Rajnikant* v. *State*, A. I. R. 1959 All. 360 Bom. 399, 403.
7. *Ram Nandan* v. *State*, A. I. R. 1959 All. 101, 104(F. B.); *Indulal Yagnik* v. *State*, A. I. R., 1960 S. C. 884.
8. *Babulal* v. *State of Mah.* A. I. R. 1961 S. C. 884; *O. K. Ghosh* v. *E. X. Joseph*, A. I. R. 1963 S. C. 812, 814.

It may be pointed out that unlike article 19(2), clauses (3) and (4) of the same article do not use the expression "the security of the state" as one of the grounds of restriction on freedom under article 19(1) (b) and (c), and the court has taken the view that the words 'public order' used in article 19(3) and (4) shall have the same meaning as in article 19(2)[9] and so in the light of the *Romesh Thapper* case, the public disorder of second category would not attract article 19(3) and (4).

In *Sodhi Shamsher Singh* v. *State of pepsu*,[10] the petitioners were detained on the ground that they published a pamphlet which made serious allegations against the Chief Justice of Patiala that his justice was based on communal considerations. The petitioners requested the court to issue the writ of *habeas corpus* on the ground that the detention was based on irrelevant considerations. Mukherjee, J., while allowing the petition held that the publication of the said pamphlet did not have any rational connection with the maintenence of law and order in the state or prevention of an act leading to disorder or disturbance of public tranquility. It is submitted that 'law and order' is not one of the grounds for detention under the Preventive Detention Act, 1950 and so such a ground cannot be used in exercise of the preventive detention power.

The expression 'law and order' was again used in *K. N. Joglekar* v. *Commr. of Police*, where the petitioners were detained on the ground that they instigated hartal bringing about a complete stoppage of work, business and transport with a view to promoting lawlessness and disorder. The court held that on such a ground an order could be made under the Preventive Detention Act, 1950. It seems that the Court wanted to bring lawlessness within the purview of public order and so the court interpreted the expression 'maintenance of public order', to mean 'in the interests of public order'.

In *Naresh Chandra* v. *State of West Bengal*,[11] the petitioner was detained for acts prejudicial to the maintenance of public order. One of the grounds of detention stated that the petitioner villified the Prime Minister of India, Mr. Nehru, for his allegedly turning a deaf ear to the untold miseries of the refugees. The detenu also vented grave feelings of violence against the Prime Minister and, further, threatened even to murder the Prime Minister. The Court held that the ground was not wholly unconnected with the maintenance of public order, on the contrary, it had a deleterious effect on the maintenance of public order. So far as the words 'wholly unconnected' are concerned, the Court seems to include within the expression 'public order' anything which

9. *O. K. Ghosh* v. *E. X. Joseph*, A. I. R. 1963 S. C. 812.
10. A. I. R. 1954 S. C. 276.
11. A. I. R. 1959 S. C. 1355.

even indirectly helped in the maintenance of public order. Moreover, the word 'deleterious' simply by itself does not come near the second form of public disorder explained in the *Romesh Thapper* case. From these words one can infer the court's cool treatment towards or slow attitude in protecting the right to personal liberty.

In *Ram Manohar* v. *State of Bihar*,[12] the expressions 'maintenance of law and order' and 'maintenance of public order' were subject to detailed discussion. In this case the petitioner was detained under Rule 30(1) (b) of the Defence of India Rule, 1962 with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order. The petitioner claimed his release on the ground, *inter alia*, that the order of detention was not in terms of Rule30(1) (b). The majority accepted the plea and set free the detenu forthwith. Sarkar, J., took the view that the words 'maintenance of law and order' occuring in the detention order could be confined to prevention of disorder of comparatively lesser gravity and of local significance only; whereas, 'maintenance of public order' meant prevention of disorder of a grave nature.[13] Hidayatullah, J., and Bachawat, J., were of the opinion that the two expressions were not synonymous. 'Law and order' represented the largest circle within which was the next circle representing 'public order' and the smallest circle represented 'security of state' and so every breach of peace did not lead to public disorder. In order to support his statement Justice Hidayatullah gave two illustrations; first, when two drunkards quarrel and fight there is disorder but not public disorder, and this cannot be dealt with under the preventive detention power; second, of two fighters in the above illustration, who are of rival communities and one of them tries to raise communal passions, the problem is still one of law and order but it raises the apprehension of public disorder. On the basis of these illustrations, he concluded that a mere disturbance of law and order leading to disorder was thus not necessarily sufficient for action under the Defence of India Rules, 1962.[14] Justice Mudholkar, concurring, agreed with Hidayatullah and Sarkar, J. J., that the two expressions were not synonymous and that the term 'public order' was something different from order or orderliness in a local area.[15] Raghubar Dayal, J., dissenting, was of the opinion that the two expressions were not different. He pointed out that 'law and order' could be an expression of wider import than public order but in the context in which it was used, it should be construed to mean

12. A. I. R. 1966 S. C. 740.
13. *Id.* at 745.
14. *Id.* at 758.
15. *Id.* at 764.

maintenance of law and order in regard to the maintenance of public tranquility. Justice Dayal further pointed out that simple and ostensibly minor incidents at times lead to widespread disturbances affecting public safety and tranquility[16]. It is submitted that the dissenting opinion is incorrect. No doubt 'public order' is included within the term 'law and order' but if the detaining authority is allowed to detain any person on the ground of maintenance of law and order, this will strain too much the right to personal liberty.

In *Sushanta* v. *State of West Bengal*,[17] the petitioner was detained under the Preventive Detention Act, 1950 on the ground that he had been committing offences of forming unlawful assembly, assaulting the police and peace-loving inhabitants, snatching away cash and valuables, and teasing school girls, etc. The Court held that these grounds were irrelevant to the maintenance of public order. Justice Grover, speaking for the court, pointed out that for public disorder it was necessary that it must affect 'the community or the public at large'. But Justice Grover did not clarify what was meant by the said expression. Sikri, J., in *Shymal* v. *Commr. of Police, Calcutta*[18] explained that if an act affected a locality and everybody who lived herein, it would amount to an act affecting 'public at large'.

In *P. Mukherjee* v. *State of West Bengal*[19], Justice Ramaswami further drew a demarcation in the concept of 'public at large' ; 'serious and aggravated form of disturbance which directly affected the community at large and relatively minor breaches of peace of purely specific individual'. According to him it was only the first meaning which was covered by the words 'public disorders'. In this case, the petitioner along with his associates was detained on the ground that he assaulted a person. The court held that such cases could be dealt under the ordinary criminal law and not under the preventive detention law. It seems that Justice Ramaswami wanted to confine the expression 'public order' to serious or aggravated form of disturbance'.

Chief Justice Hidayatullah, in *Arun Ghosh* v. *State of West Bengal*[20] clarified this point by adopting a test : " Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of public

16. *Id.* at 761.
17. A. I. R. 1969 S. C. 1004.
18. A. I. R. 1970 S. C. 269.
19. A. I. R. 1970 S. C. 852.
20. A. I. R. 1970 S. C. 1228, see *Kanu Biswas* v. *State of W. B.* A. I. R. 1972 S. C. 1656 where Khanna, J., applied this test. See also *Babul Mitra* v. *State of W. B.*, A. I. R. 1973 S. C. 197 where Dwivedi, J., following the *Arun Ghosh* case included within the words 'Public order' matters affecting "an *indefinitely* large number of persons in the locality." (emphasis supplied).

order, or does it effect merely an individual leaving the tranquillity of the society undisturbed ?" And on this basis he pointed out that if an act led to disturbance of the current or even tempo of life of the community taking the country as a whole or even a specified locality it would amount to public disorder. He supported this statement on the basis of the following illustrations : "Take for instance a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even-tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of another community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardised". In the above case the main question was whether acts of molestation directed against an individual's family resulted in public disorder. The Court held that the acts were directed against the family of an individual and were not directed against women in general from the locality and so though it might be reprehensible, yet it did not disturb the community at large.

The restricted meaning of the expression 'public order' was also accepted in *Sundara Rao* v. *State of Orissa*[21] where the petitioner was detained for the maintenance of public order on the grounds that he was a Naxalite who organised secret meetings inside the jail premises with a view to starting agitation; he demanded separate mess inside the jail; he shouted slogans like "Naxalites Zindabad", "long live Revolution", "Mao Tse Tung Zindabad", etc. The court held that these grounds were irrelevant to the maintencance of public order. Palekar, J., explained that the term 'maintenance of public order' covered the prevention of grave public disorder' and not the maintenance of law and order'[22]. The graveness of public disorder was also insisted in *the Abdul Aziz case*[23], where the court took the stand that if intrenal disturbances assumed grave proportion so as to have a direct impact on the maintenance of public order, it would be enough as a ground for detention.

The study of the above cases shows that in the beginning the Supreme Court adopted a liberal attitude towards the preventive detention measure. But, later on, the Court seems to have adopted a stricter view in such matters. This is clear from the fact that the Court has adopted a distinct attitude towards the expression 'public order' in protecting the right to personal liberty as compared to the rights under article 19(1). The court seems to come near the second meaning attributed to the expression in the *Ramesh Thapper case* by restricting the words 'public disorder' to disorder of 'grave' or 'serious'

21. A. I. R. 1972 S. C. 739.

22. *Id.* at 742.

23. *Abdul Aziz* v. *Distt. Magistrate*, Bardwan, A. I. R. 1973 S. C. 770.

nature, or 'aggravated form'. This means that even in the second inner circle of 'law and order', which is represented by 'public order', the court is trying to come near the smallest inner circle of 'law and order' which represents 'security of state', even though this is a separate ground for detention. Thus, inspite of the meagre constitutional safeguards against preventive detention, the Court has adopted a microfine approach in examining the plea of irrelevant considerations in cases of detention on the ground of maintenance of public order and thus restricted the excessive executive interference with the right to personal liberty. Thus the Supreme Court has opened a new horizon for the restricted constitutional right to personal liberty.

BOOK REVIEW

SAMUEL MERMIN—LAW AND THE LEGAL SYSTEM. BOSTON Little, Brown and Company. 1973. 339+xviii pp.

An introduction to some of the main elements of American Law, and its implementing institutions, will be of interest to common law jurists, who have been trained in a different legal system, and also to civil law jurists. The author—a professor of law at the University of Wisconsin—when explaining the purpose of his book indicates that he sought "..a short expository analysis, giving some perspective on the (United States) system as a whole, couched in simple language, but not avoiding the difficult problems posed by the system" (p. xv). Originally intended for law students, and additionally to students in other fields contemplating the study of law, this book can, at the very least, prove to be stimulating reading to any jurist, desirous of obtaining insight into the jurisprudence, as it is developing within the United States. Not by accident, this book is being used extensively in courses in common law, designed for civil law students, that are being conducted in the U. S. and Europe.

The plan of the five chapter text is first to raise a few pressing problems, such as the federal-state relationship, the impact of the social environment on the ever changing politive legal norms, the social limits that are superimposed on the law's efficacy, and the inescapable impact of social and moral values implicit in arriving at final judgments. Of particular interest will be the description of law-creating and enforcing agencies, e. g., legislatures, state and federal courts, administrative agencies, and the role of the executive branch. The functioning, interrelationships, and technique semployed by the decision-making agencies are presented in a challenging manner. In true socratic fashion, Professor Mermin poses numerous questions, the answers to which are not immediately apparent. Thus, the opening chapter raises many of the broader philosophical legal issues that will arise in the case selected for analysis.

The subject-matter of the actual case, which arose in 1960, involves the law of privacy, an especially timely subject in all States. Such issues as "standing to sue" (*locus standi*), interpretation of the South Carolina statute, the jurisdiction of the federal courts, and even a hypothetical issue (i. e. whether the state statute violated defendant's right to freedom of expression, protected by the Fourteenth Amendment to the United States Constitution), are discussed.

The main portion of the book is devoted to the detailed analysis of a single case, a very wise choice on the part of the author, owing to the fact that the science of *case analysis* is being drastically slighted in both Britain and the United States, as teachers and law students become pre-occupied with massing vast quantities of factual data, primarily the texts of statutes, pronouncements of learnard jurists, and the judgements handed down by appellate courts. This reviewer is of the opinion that the detailed presentation of the pleadings and arguments—which in fact are typical of those found in most common law jurisdictions—will give the reader considerable insight into the functioning and practice of the American legal order, for the reason that the discussion becomes involved with private substantive law, civil procedure, the rules of evidence, aspects of criminal law, and even public law. A non-American jurist will be interested in the court's application of case law precedent. The fact that the judgments of numerous states in the American federal union must be considered, illustrates "..some fundamental features of the Anglo-American precedent system" (p. xvii). In this context, the author gives insight into the appellate process and the role exercised by judges.

The postscript constitutes an additional chapter; it serves as an interesting counterpart to the issues originally raised in the First Chapter. Specifically, the future of the legal profession and the type of legal services to be provided to society face the organized bars of all civil and common law jurisdictions. This problem is world-wide and especially acute in Western democracies. Similarly, the future direction to be taken by legal education, and its relationship to other disciplies, are of immediate importance to all jurists. In particular, this reviewer feels that the simple and direct insight into the functioning of the American legal order provides a basis for further analysis.

In evaluating this book, the reviewer was impressed by the manner in which Professor Mermin demonstrated American solutions—and thinking-to legal issues, in good pragmatic fashion. Moreover, the entire text is well documented; thereby the reader is directed towards some of the more easily obtainable sources. Although portions of the text may seem obvious (depending on the special competence and experience of the lawyer, who happens to read this excellent publication), all non-American academics and jurists will find the book to be informative and stimulating reading. This reviewer suspects that his colleagues in other jurisdictions face similar, if not identical philosophical, moral, legislative, administrative, and especially legal challenges. May it, therefore, be suggested that lawyers having read this book, would be wise to pass it on to one of their colleagues in related disciplines, if they are likewise concerned with aspects of the administration

of justice. For example, political scientists, sociologists, and students of the behavioral sciences will be interested to gain a bit more insight into the implementation of positive law.

Furthermore, international lawyers can gain considerable inspiration from the study of municipal law, since many common problems face our various legal orders.

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V.R.KRISHNA IYER—Law, Freedom and Change (New Delhi, Affiliated East-West Press, 1973 pp. 134)

Justice V. R. Krishna Iyer's formidable reputation, precedes him. This might explain why he, and/or his publishers have chosen to ignore so many essential 'presentation' requirements in his latest book. There is no index or bibliography. A large number of quotations are unsupported by references. Many references are incomplete.

There are a large number of minor grammatical errors. New words and phrases are coined with alacrity. We are informed of the concept of 'juridicare' (pp. 126, 131), told that "(t) he Gandhi Peace Foundation is the only "little" in the "mickle" we find in this vast country" (p. 53), and casually introduced to a social crime called 'legicide' (p. 107). To support a point of Parliamentary Sovereignty he cites (p. 19) 1871 precedent of *Lee v Bude and Torrington Railway*. The House of Lord's ruling in *British Railways Board v Picking* in 1974 is surely more appropriate especially because it reversed a Court of Appeal decision of 1972 (before this book was published) which had called the *Lee* case into question. Again, he is quite happy to allow judges to 'sponsor' (p. 124) a Legal Aid Scheme without considering whether this would reflect on their impartiality. The reader must be prepared to ignore these and other idiosyncrasies—whether proceeding from Judge Iyer or the printing press—in order to assess the true value of this book.

Every underdeveloped country has to face the problem of law and development. On the one hand, they face what one can call the Savigny restraint : the law cannot too far move ahead of the people and thus alienate the community it seeks to serve by losing touch with what they want and are capable of doing. On the other hand, 'law' is a way of importing norms which could form the basis of an artificial but necessary emerging socio-economic order. To take an example which Judge Iyer scrupulously avoids in this book but which has been the basis of a large number of decisions by him when he was a judge in the Kerala High Court. A lot of jurists in India (including the present Chairman of the Indian Law Commission, Judge Iyer and many others) feel that India must have a secular civil code. They hope that a secular civil code will not just systematise the law but also reform it in such a way that people will ignore the peculiarity of their religious foibles and themselves become secular. It may transpire that many people may see this very much as an elitist move and argue—even clamour—against codification. In such a situation the Savigny line of reasoning would counsel restraint; but the lawyer who believes in the efficacy of norm creation would confidently perhaps sanguinely—say that people will learn and change.

The importance of Judge Iyer's book is that he inconveniently assumes that there is no conflict between these two approaches. The first chapter declares most emphatically that all legal and political institutions are useless without the right kind of social attitude to make them work. While we can hardly accent the authority of a few ancient Indian texts to support the statement : "(T) he crown, the cabinet, the Parliament and elections, were woven into ancient India's political fabric", (p. 9) it is difficult to ignore his central message that India's western political and legal system may well collapse if people do not acquire the civic sense to use it. This is not to suggest that Indian people will have to change and accept the cultural demands of a liberal democracy. Indeed Judge Iyer betrays a partiality to the Soviet model (without, however, explaining its cultural relevance (chapter 2). The real danger is that the alien system may well be diluted by indigenous subterfuge.

But having accepted the importance of a people's ethos, Judge Iyer breaks into revolution. Unhappy with one fabricated system he wants to create a new one :

> "If we are going to have perspective planning for law and social change in a developing community like ours, we must face the problems of defiance, assess our strength and weakness and *fabricate new instrumentalities of coordination and support.*" (emphasis mine).

Aware that this might require more than comradely persuasion he has designed a multi tier system which includes *inter alia* para-legal bodies (p. 53), public campaigns (53-4) and an extensive use of criminal methods. The last point is interesting. To take one set of suggestions :

> ".. (O)ur sentencing procedures have to be overhauled through the large scale introduction of prison reform, probation and parole, and the association of social welfare organisations in rehabilitation. In a different sense, social morality has to pervade sentencing methods. I would argue for consideration and the diversification and fitment (sic :) of punishment to crime, and would go to the extent of sentencing a woman to compulsory sterilization for killing her seventh child because she could not maintain it, and the castration of a rapist who has become a repeater because of an uncontrollable sex impulse. Alcoholics, if the community agrees, may have to be treated in the hospital and not degraded through the drill of rigorous imprisonement, social sense must inform sentencing techniques to make punishment meaningful and relevant to the lives of the common people and save it (sic;) from superstition and error .. Anticrime strategy is a comprehensive and demanding socio-legal project designed in the end to provide the law with a legal discipline." (p. 57)

Many judges in India feel that its Macaulay drafted Penal Code of 1860 cannot be used as a weapon of social change. The Indian Law Commission's Report on Social and Economic Offences (which Judge Iyer had a lot to do with) and this latest collection of essays ascribe an educative function to criminal law. Three of Justice Iyer's decisinos from the Indian Supreme Court which showed no leniency to people guilty of bribery (p. 80) food adulteration (80-90) and gold smuggling (p. 91-2) show that the learned judge means business. In the last of these judgements he specifically says that although 'penal treatment should be tailored to suit the individual, in the extreme category of professional economic offenders, incarceration is peculiarly potent'. (p. 92) There is an inherent danger in this new allegedly 'contemporary' criminology (pp. 80-92). The law may not, in fact, educate. It may not even deter. It may put the State in a position of polarity with its dissidents. The harsher the law, the more unreal it may seem. In the early sixties there was a controversy in England as to whether Criminal law can be used to enforce morality. Judge Iyer's demands on the penal system are far greater. He wants to affect a social revolution. He hopes that the people will respond, that the Mountain (the people) will come to Mahomet (the law). but suppose they do not. The experiment may well prove to be an expensive one.

Lawyers and sociologists in England have discovered that a Race Relations Act has not necessarily reduced discrimination either overtly or in people's minds. Studies on the new breathlyser laws show that the law did not have the educative and reforming impact that it was expected to. The impact of laws is more acutely felt when they are accompanied by advertising campaigns, strict enforcement, publicity and the like. But more often than not the change is temporary. A badly handled campaign may, in fact, amplify deviancy and be counter productive. Some laws like those relating to public safety may be more acceptable than those that demand changes in citizen's sense of moral responsibilities. It is, however, the latter kind of change that this book is interested in. Modern underdeveloped countries live in a heightened state of rush. They have to acheive miracles as a precondition for survival. Judge Iyer is asking for a miracle and is prepared to work a totally novel 'stick and carrot' approach to criminal and constitutional law to acheive it. The reviewer's reservations may well seem like cynicism in the face of his intense commitment. One last comment. Indian lawyers have a dangerous habit of projecting themselves into a pivotal social and political role. It is interesting to see that in his last chapter Judge Iyer shies away from imposing too much responsibility on the lawyer. He devises a scheme of legal aid and seems impliedly to be saying that lawyers must get their own house in order before they pose as champions and spokesmen for others.

This itself speaks volumes of wisdom. As a well known English commentator has said "Woe to the nation that is led by its lawyers ; it is like a pig being led by its tape worms".

Every student of law and development will undoubtedly be stimulated by this book. He might also find a lot of ideas he may wish to quarrel with.

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R. P. ANAND* LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES. DELHI : Thomson Press (1975), 287 pp.

Alleged present inadequacies of the contemporary law of the sea constitute the basic premises (or theses) set forth in this scholarly attempt to advance the legal position of developing States. Yet, while seeking to present the view points of the poorer States in the growing North-South confrontation[1] that has become all too familiar at the first two sessions of the Third United Nations Conference on the Law of the Sea, Professor Anand concedes the vital fact that : "The fundamental objective of the developing countries is, of course, to get as large a share in the resources of the sea-bed as possible."[2] Notwithstanding such frank admissions, Professor Anand adopts a solution also favoured by many academics and statesmen, i.e., the need for international co-operation in a spirit of good faith. Immediately, this reviewer recalls the pleas of the late Professor Wolfgang Friedmann in his General Course in Public Law, presented to the Hague Academy of International Law in 1969.[3] Subsequently to the completion of this book, the International Court of Justice in the *Fisheries Cases*[4]—after enunciating the rights of the respective parties (Iceland, Germany, and the United Kingdom) to preferential fishing rights, on the one hand, as modified by historic fishing rights—held that the parties had a *legal duty* to resolve their disputes in a spirit of good faith, either by means of bilateral solutions or within the framework of a multinational organization.

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1. R. Anand, Legal Regime of the Sea-Bed and the Developming Countries 233ff. (1975)./Hereinafter cited as Legal Regime.

> The increasing similarity of conditions of material life between the affluent and the technologically advanced nations of the Atlantic Community and those of the European Communist block is easily overlooked, and scores of millions of human beings living behind this iron curtain, are usually forgotten. This Third World, this *Commonwealth of Poverty*, is a world of unimaginable scarcity, a world containing two-thirds of humanity.

Id. at 235.

2. Id. at 247.

3. W. Friedmann, General Course in Public International Law, 127 Recueil des Cours 39-246 (1969 II). The value of both regional and international co-operation is advocated by Professor Friedmann.

4. Fisheries Jurisdiction Case (United Kirgdom v. Iceland) (Merits) (Judgment), (1974) I. C. J. 3. Id. (Germany v. Iceland), (1974) I. C. J. 175.

The author, therefore, has chosen to assume both the role of an advocate and that of the impartial scholar, for in this latter capacity he adopts the position of the United Nations General Assembly in its *Declaration on principles Governing the Sea-Bed and the Ocean Floor*[5], in which it was held—as a matter of law—that the sea-bed, beyond national jurisdiction (including continental shelves and economic zones for exclusive exploitation) must be utilized for the benefit of mankind as a whole. Regrettably, the reader is never completely certain as to whether Dr. Anand is speaking of the Third and Fourth Worlds, including the emerging rights of land-locked States and those with minimal coast lines (e. g. shelf-locked) or of the entire Global Community. Beyond question, he seeks to restrict the present rights of the nine or ten maritime powers to exploit the resources of the deep sea-bed and continental shelves, unlimited fishing beyond the traditional three-mile (or twelve-mile) limit or even on the high seas, when he speaks of creeping national jurisdiction. For instance, he goes so far in presenting the more extreme views of some developing States that the argument presented is that uninhabited or sparcely populated islands and surrounding continental shelves still in the possession of colonial powers should not be accorded legal status, as follows :

> But while claiming wide economic or resource jurisdiction, the developing countries do not want the colonialist Powers to gain from it. Thus, it has been suggested several times during recent discussions that isolated islands under colonial domination, frequently uninhabited and several thousands of miles from an administering metropolitan Power, should not be recognized as entitled to any zone of exclusive economic jurisdiction. Similar views have been expressed regarding Continental Shelf areas still under colonial rule, which, it is said, should not be exploited without any benefit to the poor helpless peoples of those colonies[6].

It seems doubtful if such an extreme position could be advanced as a serious proposition of law or even of diplomacy. It is a bit hard to visualize a legally

5. U. N. G. A. Res. 2749 (XXV) (adopted unanimously, 108 to 0, with 14 abstentions).

See also the author's discussion, Legal Regime, at 247ff.

Notice should also be taken of the earlier "moratorium resolution," in which the United Nations general Assembly :

Declares that, pending the establishment of the....international regime :

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.

(*b*) No claim to any part of that area of its resources shall be recognized.

G. A. Res. 2574 D (XXIV), 15 December 1969.

6. Legal Regime, at 242.

based denial of ownership over sea resources based on descrimination against a selected group of States.

The above comments are not intended to imply that a purely subjective approach is being taken; for in numerous instances, such as in the above cited example of restriction of legal rights to exploit certain offshore areas by foreign powers, Professor Anand is objectively presenting the positions taken at international conferences by a significant number of delegations. Although the mere fact of such presentation for the benefit of the reader implies that the author supports these views, it is often a bit difficult to detect, precisely, the author's polition. It would have been helpful and also strengthened the book if Dr. Anand had more clearly indicated the precise premises he sought to defend, because it appears that some of the more aggressive proposals advanced by a few developing States are clearly inconsistent with the notion of international co-operation or the exploitation of the sea-bed for the benefit of mankind as a whole. Obviously Dr. Anand is attempting to discuss crucial issues, rather than defend a "thesis" in the classical sense; nevertheless, the book would be more helpful if he had attempted to draw a sharper line between the legitimate claims of the poorer States and unilateral actions of coastal States for exclusive right in disregard of the other States, comprising the world community. At some parts of the book there is the impression that one form of selfish exploitation may be substituted for another.

The author contends, with considerable validity, that a coastal State is in a better position to regulate the total catch of fish, in order to conserve existing stocks. The rise in the total catch of fish by Chile following the imposition of a two-hundred mile fishery zone is cited by way of illustration. However, the reverse situation has been ignored : much of the destruction of the fish stock has been caused by the coastal State, albit for good reasons, to feed their starving populations.

Yet the value of the book would have been increased if this danger of inefficient management by coastal states had been recognized a bit more clearly. By way of illustration, the destruction of the herring stocks in the waters off Iceland was caused by the excessive catch of Icelandic fishermen and not by the high seas fishing fleets of foreign powers, as was shown by British Counsel, during the oral arguments in the *Fisheries Cases*.

Despite this apparent shortcoming, the book renders a major contribution by highlighting the coming confrontation between the States of the North-South Axis for the remaining resources of the oceans, now characterized as "inner space". Whereas the race into outer space by the two major superpowers was to a large extent prompted by political motives, the struggle

for the resources of inner space is necessitated by the desperate need for sources of food and raw materials.

Chapters One and Two will be extremely interesting to an internationally minded person who has yet to research the scientific and technological factors confronting attempts to exploit the riches of the seas and offshore regions. The comprehension of such factual data as to the types of mineral deposits and where they are to be found is fundamental to any proposed legal regime. The fact that great treasures are hidden in presently inaccessible areas leads Professor Anand to speculate, quite correctly, that this "Storehouse of Vast Resources" can help to aleviate the growing food and energy shortages. The potential of future production from the sea and sea-bed is far greater than normally realised. Only the lag in technology prevents the economical exploitation of these vast resources[7].

In this regard, it would have been helpful if the United States position in the General Assembly had been set forth, i.e. only the industrialized States are in a position to perfect the technology required to exploit the deep sea-bed; consequently no restrictions should be placed upon their embryo experiments and research. The greatest need at present is to perfect methods for the economical exploitation of the oceans.

If the perfection of techniques of the development of the sea-bed ".. does not move forward to the point where commercially viable exploitation of sea-bed resources is possible on a singficant scale, there will be no exploitation of sea-bed resources and no benefit to anyone, developed or developing, coastal or landlocked, east or west, north or south."[8]

This reviewer, in looking at the book as a total entity, has the feeling that he is, in reality, reading two distinct treatises, for the reason that the first two chapters, along with Chapter Six, "Interests of the Developing Countries and the Developing Law of the Sea-Bed",[9] constitute a distinct discussion. The Concluding Chapter[10] follows logically from Chapter Six, and it reflects the theme of the political disucssion rather than of the earlier Chapters, Three to Five, constituting the major portion of the book. These chapters deal with the precise issues of the continental shelf, jurisdiction over resources contained in and under the seas, and the efforts of the International Law Commission and the two Geneva Conferences to resolve the problems of the territorial sea, the limits of the continental shelf, and the jurisdiction

7. Id. at 16ff.

8. See e. g., U. N. GAOR, Report of the First Committee, U. N. Doc. A/7834, 1833d Plenary Meeting, 15 December 1969 (Agenda Item 32), at 1-2. (15 December 1969).

9. Legal Regime, at 233-63.

10. Id. at 264-70.

of coastal States. The newer issue, that has arisen since the enactiment of the two hundred meter continental shelf doctrine, is the future regime of the deep ocean-bed, namely, the area beyond national jurisdiction, which is the subject matter of the Fifth Chapter.[11] Here, the newer approach of "A Common Heritage of Mankind," as enunciated by the United nations General Assembly, is examined in light of the efforts of the U.N. Sea-bed Committee.

As is true of the entire text, this portion of the study is well documented, with the result that it will serve as a valuable reference source. In particular, the discussions in the International Law Commission and the votes at the two Geneva Conferences on the Law of the Sea (and also in the Sea-Bed Commitee) are considered in detail. The competing interests of the various categories of States, along with the proposed changes in the positive law of the seas, are analyzed, as for example those of the Latin American States, land locked States, archepelago countries, etc., in relation to the interests of the major maritime powers.[12]

As implied above, these discussions have a definite orientation that is opposed to present practices of the nine major maritime powers, especially in terms of their high seas fishing fleets. Secondly, only a few States—notably the United States—possess the technology and the financial resources required to exploit the resources not only of the continental shelves in remote portions of the world but also of the deep sea-bed. The reality of present exploitation of "inner space" and even of the territorial waters is that mere jurisdiction and ownership is not enough. Legal rights to sea resources must be accompanied by the ability to exploit.

This reviewer, while taking issue with some of the author's premises (frequently for the purpose of analysis) strongly approves of his use of the legal and philosophical concept of Social Justice.[13] In effect, a balance needs to be struck between the various competing interests, namely exporters of raw materials and consumers. Differences (or disagreements) in the application of social Justice will arise at such time as a distinct allocation must be made of certain non-renewable resources such as oil or manganese nodules.

11. Id. at 232.

12. See Ch. 2, Limits of National Jurisdiction, at 76-176.

13. An application of Social Justice—as this concept evolved in the jurisprudence of the International Labour Organization—has been made toward the area of environmental law in Gormley, Human Rights and the Environment: The Need for International Co-operation, to be published by A. W. Sijthoff, March 1976. See especially, F. Wolf, The Protection of the Environment and International Law, Colloquium 1973, The Hague Academy of International Law 452-56 (A. Kiss ed. 1975).

See also, Social Justice in the Law of Nations: The ILO Impact After Fifty Years (1970); and F. Morgenstern, Wilfred Jenks in the I. L. O., 46 Brit. Y. B. Int' l L. xvi (1972-1973).

One economic implication that is very effectively discussed is the impact that large scale deep sea mining may have on the economies of the poorer States, especially those geared to a single export, such as copper. Excessive production of metals from the ocean floor can result in a decline of the prices paid for land based sources, thereby ruining the economies of several countries.

The author seeks to restrict the right to exploit the deep ocean bed on the part of the United States to a far greater degree than would this reviewer. Another illustration of a basic difference in the future "freedom of the seas" would be in the area of scientific reasearch beyond national jurisdiction. The reviewer favours the unlimited right to conduct scientific research, which is similar to the position by the United States, whereas the author recognizes the opposition voiced by some coastal States on the ground that information gathered would not be made available. Accordingly, a few States have prevented research being conducted on their continental shelves or in the waters above.[14]

One main conclusion, evident throughout the book, is that the traditional law of the high seas is inadequate to resolve present day controversies of conservation and exploitation. It seems that this book, written well before the commencement of the series of sessions comprising the Third United Nations Conference on the Law of the Sea, did in fact anticipate the direction that would be taken by the majority of States. Accordingly, Professor Anand will be proved to have taken the correct position as to many of his recommendations, such as a two hundred mile economic zone, some restriction of freedom to fish on the formerly high seas, special consideration for the needs of developing States to preserve a minimum standard of living for their peoples, some type of international regime within the structure of the United Nations to "regulate"(or "consider") the exploitation of resources (especially of fishing) beyond national jurisdiction, favourable treatment and increased technological and financial aid for developing States, and a greater recognition of the "Common Heritage of Mankind." (Parenthetically, it is only necessary to glance at the records to the New York, Caracas, and Geneva meetings to appreciate the realism of the author's conclusions.)

Although the study was researched well before the first meeting in the above mentioned sessions comprising the Third Law of the Sea Conference was held, it is evident that the author anticipated the "future battlegrounds" that would emerge; consequently, this book will serve as a valuable starting point for scholars and statesmen gravely concerned with the coming session of the United Nations Conference to be convened in New York, plus subsequent

14. Legal Regime, at 101-110.

meetings. Similarly, the book anticipates the type of controversy taking place in the "Cold War" between Iceland and the United Kingdom. Furthermore, the author was very keen in detecting the points of departure between the various positions taken by developing States, as they come into conflict with the major maritime powers, i. e. the North-South Axis. He tries—not completely successfully—to discuss the entire global controversy. The difficulty is that his "advocacy" results in overly emotional statements not completely accurate. For instance, this reviewer was rather surprised by the following : "This 'colonial hangover' is sought to be perpeturated by agreements which tie the economies of the emergent countries to neo-capitalist groupings, such as the European Economic Community,."[15]

Henceforth, we can only wonder if one form of "imperialism" would be substituted for another[16] by depriving one class of states for the benefit of the poorer countries. Certainly, the delegates of some Latin American and African States in the Sea-Bed Committee have adopted such a stance, as noted above.

One point of departure seems particularly disturbing : the major industrialized powers, particularly those in Europe and North America are classified as affluent. Admittedly, a higher per capita income and gross national product are enjoyed; however, completely ignored is the present plight of the industrialized powers—comprising the membership of the OECD—brought about by the oil crisis. Much of the suffering caused to those peoples in the developing countries, or those behind the "iron curtain of poverty," cannot be traced to the actions of the Western Powers. Far from affluent, these Western Powers are also struggling against inflation, decreases in the value of currency, massive unemployment, shortages of energy, and a sharp decline in their gross national product. It is only necessary to look at the economic crisis in the United Kingdom, the high unemployment rate in Britain and the United States, plus the slowdown of industry in Japan. A major factor is the oil crisis. Nevertheless, the United States in 1976 will contribute over two billion dollars in non-military foreign aid, notwithstanding the fact that this money is desperately needed to solve some of the urgent problems in American urban areas. Similarly, even Great Britain continues its programs of foreign aid despite predictions of one and half million unemployed workers in 1976.[17]

The European Communities (Common Market) are not only contributing funds, but favorable trading arrangements have been made for the

15. Id. at 237.

16. See e. g., Id. at 247-49.

17. Economic Outlook, Secretariat of OECD (December 1975).

benefit of developing countries. Smaller Western European States continue their foreign assistance efforts, in spite of mounting difficulties, such as an unfavorable balance of trade, rising unemployment, and a lowering of their standards of living. Accordingly, the Netherlands spends five per cent of its annual budget to help developing countries. Furthermore, during debates within the United Nations General Assembly, the Dutch Minister for Foreign Affairs, Max van der Stoel, stated that the Netherlands will advocate, as a member of the EC, the future decisions to be taken by the Community play an active role within international aid programs for the benefit of countries most affected by the current world-wide food shortage.[18]

Likewise, the United States has taken a similar position within the General Assembly, as can be seen from the statement of Secretary of State Dr. Henery Kissinger :

> (A) global economy under stress cannot allow the poorest nations to be overwhelmed. A third of mankind faces the despair of abandoned hopes for development and the threat of starvation because of an inflationary world economy. The United States is committed to continue its aid programs..[19]

Therefore, this reviewer is disturbed by comments such as those of Professor Gunnar Myrdal : "(I)n the Western developed countries there is an air of insincerity and even hypocrisy in the discussion of their relations with underdeveloped countries." The attack of Myrdal continues :

> It is a fact that, as yet, no Western developed nation has made any real sacrifices in shouldering aid obligation to underdeveloped countries. Neither have they been prepared, on the whole, to abstain from even minor trading advantages that can be shown not to be of real long-term interest to a developing country.[20]

By way of comparison, it should be recalled that following the conclusion of World War Two Great Britain sent large supplies of wheat to Africa for the purpose of avoiding starvation : these shipments of wheat necessitated the imposition of bread rationing in Britain--a severe step that was not even required during the darkest days of World War Two.

This reviewer trusts that mention of the opposing view point does not seem to constitute unfair criticism; however, the two-valued approach of classifying the world into "affluent" and "poverty stricken" does have the result of weakening the book's objectivity. Part of the difficulty arises from

18. 11 U. N. Monthly Chronicle, 117, 118 (1974) (U. N. General Assembly, Meeting 2212/12 April 1974).

19. Id. at 129 (Meeting 2214/15 April 1974).

20. Legal Regime, at 239, citing Gunnar Myrdal, The Challenge of World Poverty 311 (1979).

the detached manner in which the writing has been done. Frequently, it is difficult to distinguish between the mere presentation of material as contrasted with the advocacy of a particular position. Of course, the inclusion of quotations and citiations to official documents does raise a strong presumption of approval. Still, the author could have indicated where the line should be drawn between legitimate changes in the law and selfish unilateral acts.

Professor Anand tends to rise above many of the diverse positions in his Concluding Chapter when he reiterates his dedication to Social Justice as the fundamental norm, basic to international co-operation. But he again reiterates his basic thesis : the existing law of the sea is inadequate and must be changed for the benefit of the developing world. Limits must be imposed on the extension of existing continental shelves and on national jurisdiction over the formerly high seas. Still, he foresees "a scramble for colonies under the sea with serious consequences."[21] It is further argued : "Most of this law must be reviewed, a vast majority of the countries now feel, in the light of the changed circumstances and the interests of the present international community."[22]

The author concludes :

> Gone are the days when law could be made largely by the *fiat* of a few powerful states. This would not be accepted or tolerated now. Indeed, it is today largely on the initiative of smaller, poorer, and until recently inconsequential states, and on their insistence that the law that is to govern and co-ordinate tomorrow's varied, increasing, and yet uncomprehended uses of the sea is being developed.[23]

On the other hand, it does appear that the author is not completely accurate in his analysis of the evolution of the law of the high seas from the period of the Rhodian-Roman Law. At the very least, Professor Anand has written a provocative and challenging book, as can be appreciated from the reviewer's reactions; and the careful documentation adds to the permanent value of the volume. That is to say, lawyers and statesmen will be stimulated to give further thought to issues confounding the Third United Nations Conference on the Law of the Sea and which may eventually prevent a consensus

21. Legal Regime, at 267.

22. Id.

23. Id. at 267-68. Contra, Gormley, The Development of the Rhodian-Roman Law to 1681, With Special Emphais on the Problem of Collision, 3 Inter-American L. Rev. 317 (1961); Gormley, The Development and Subsequent Influence of the Roman Legal Norm of "Freedom of the Seas," 40 U. Det. L. J. 561 (1963); and especially, Gormley, The Unilateral Extension of Territorial Waters : The Failure of the United Nations to Protect the Freedom of the Seas, 43 U. Det. L. J. 695 (1966).

from being acheived. As Professor Anand concluded in Chapter Five concerning a solution between the "have" and "have not" States, "Any future machinery is bound to be a compromise and based on a lot of give and take on both sides. Sacrifices will have to be made by all. But great works can be achieved by great sacrifices only."[24]

In anticipating future United Nations efforts and conferences he, nonetheless, recognizes that it may "..not be possible to make a comprehensive regime of the sea-bed all at once. It will have to be achieved slowly and perhaps piecemeal. But we must begin with the acceptance of certain basic rules and limits of national jurisdiction."[25]

W. Paul Gormley**

24. Id. at 232.

25. Id. at 269.

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Farid Ahmed V. U. P. Govt. A. I. R. 1950, Alld. 43 (If the conquering sovereign implidely recognise private rights, titles and ownership, then only it will exist otherwise come to an end.)

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The Jaipur Udyog Ltd. V. C. I. T., A. I. R. 1965 Rajasthan 162. (Agreement between former Jaipur State and company providing exemption from taxation—Merger of State with United state of Rajasthan-obligation whether devolves upon successor state.)

Partition—

In re commissioner for workmen's compensation, A. I. R. 1951 Mad. 880. (British admiralty not bound by Indian Law after passing of Independence Act, 1947).

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Sushma V. Osman A. I. R. 1950 Cal. 255. (A decree passed by a court which is now in one dominion cannot be executed by another court in other dominion.)

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Kadi municipality V. New chottalal Mills Co. Ltd. A. I. R. 1965 Gujrat 293. (State succession—respect of private rights.)

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Ravi ji Amar Singh V. State of Rajasthan. A. I. R. 1958 S. C. 228. (When one state is absorbed in another, whether by accession, conquest, merger or integration, all contracts of services between the prior Govt. and its servants automatically terminates and there after those who elect to serve in the new state and are taken by it, serve on such terms and conditions as the new state may choose to impose.)

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Shri Shubha Laxmi Mill. Ltd. V. Union of India and others, A. I. R. 1967 S. C. 750. (State succession and contractual rights.)

Citizenship and Nationality :

Abdul Gafoor V. State of M. P.. A. I. R. 1968 M. P. 29. (Voluntary migration—citizenship is lost.)

Abdul salam V. Union of India and others. A. I. R. 1969 Alld. 223. (Suit for injunction restraining Government from deporting a person claiming citizenship).

Abdul Wahab V. Suptd. of Police. A. I. R. 1963 Assam 55. (So long a person holds certificate of citizenship, he cannot be treated as a foreigner although the certificate has been obtained by misrepresen-

tation or fraud—Central Govt. only has jurisdiction to cancel the certificate.)

Abrahim V. State of Rajasthan. A. I. R. 1965 S. C. 618. (If an accused is foreigner at the time of commission of offence, then no excuse that on early date he was not a foreigner.)

Central Bank of India Ltd. V. Ram Narain. A. I. R. 1955 S. C. 36. (The active nationality principle—State is entitled to assume jurisdiction over its own national for offences committed abroad.)

Davood Ali Arif and others V. Deputy Commissioner of police. A. I. R. 1958 Cal. 565. (A passport by itself is not conclusive of nationality).

G. Y. Bhandare V. E. J. J., Sequeire. A. I. R. 1972 Goa 11. (Citizenship by incorportation of territory).

Jalla Begum V. Ghulam Zohra. A. I. R. 1959 J. & K. 32. (The fact that husband has migrated to a part of state under occupation of pakistan cannot deprive wife of her status as subject of the state of J. & K.).

Karimunnisa V. The State of M. P.. A. I. R. 1955 Nag. 6. (A wife who migrated with her husband to Pakistan on partition and remained there till his death—She and her child born there are foreigners.)

Kulathil Mammu V. State of Kerala and others. A. I. R. 1966 S. C. 1614. (Migration must be voluntary and not for a particular period)

Michael Anthony Rodrigues V. State of Bombay and others. A. I. R. 1956 Bomb. 729. (Externment of foreigner under Indian foreigner Acts 1946-A person whose habitation is undoubtly in India, having no present intention of removing himself of the habitation is not a foreigner).

Mohd. Reza Debstani V. The State of Bombay. A. I. R. 1966 S. C. 1436. (Indian citizen cannot be national of another state).

Mohd. Sher Khan V. Union of India, A. I. R. 1964, Alld. 63. (Obtaining of Pakistan passport no automatic cession of Indian citizenship-Central Govt to determine about the loss of citizenship.)

Mohammad Yusuf V. Union of India. A. I. R. 1967 Patna 266. (Migration and domicile—Minor can migrate independently.)

Nisar Ahmed V. Union of India. A. I. R. 1958 Raj. 65. (Person professing the ideology of Pakistan in pre-partition days must be deemed to have lost Indian domicile.)

Parwatawwa V. Channawwa. A. I. R. 1966 Mysore 1000. (Domiciles of States in India distinguished from Indian domicile. Whether a citizen of India could possess a state domicile apart from Indian domicile).

Rashid Hasan Roomi V. Union of India and others. A. I. R. 1967 Alld. 154. (Father deserting minor son in India, acquiring Pakistani citizenship, his new domicile deemed not communicated to minor.)

Sher Mohd. V. Govt. of India, Min. of Home affairs and other. A. I. R. 1964 Pun. 14. (Entry into India on shorter term visa on Pakistan Passport, whether involves acquisition of Pakistan citizenship).

State of AndhraPradesh V. Abdul Khader 1962, S. C. J. 100. (Whether a Citizen of India migrating to Pakistan has renounced his citizenship and became foreigner—a short visit to a foreign country is no migration.)

In re Abdul Khader, A. I. R. 1959 A. P. 241. (A temporary migration, where there is evidence that a person could be Indian before his migration to Pakistan—the person cannot be held to be a foreigner.)

State V. Sharif Bhai. A. I. R. 1959 Bomb. 192. (The fact that a person migrated to Pakistan without Indian passport, be evidence of his own conduct to show his intention of not returning to India.)

State of M. P. V. Peer Mohd. A. I. R. 1963 S.C. 645. (Person migrating after commencement of consitution—Central Government to determine the citizenship.)

State Trading Coperation of India V. Comm. Tax Officer. A. I. R. 1963 S. C. 1811 (As Companies are not natural persons, they cannot become citizens.)

The Govt. of A. P. V. Syed Mohd. Khan. (1962) II S. C. A. 418. (The competent authority to decide the citizenship of a person is Central Govt.—No deportation before such decision.)

Union of India V. Karam Ali. A. I. R. 1970 14 Assam & Nagaland. (Migration can only be from one territory to another no migration into India from a place now in Pakistan, prior to 15. 8. 1947.)

Decree or Judgement by foreign Courts—

Brijmohan Bose V. Kishorilal Kishanlal. A. I. R. 1955 M. B. 1 (F. B.) (The Court which passed the decree and the court to which it is transferred for execution by reason of constitutional changes ceased to be courts constituted or continued by different sovereigns and law administered be them can no longer be treated as laws enacted by different sovereigns.)

Dominion of India V. Hiralal. A. I. R. 1950 Cal. 12 (A foreign judgement cannot be executed by Indian courts unless it is by a court within the territories of a reciprocating country as under section 44 a of C. P. C.)

Marggarate V. Chacko A. I. R. 1970 Kerala 1. (Foreign court jurisdiction to pass an order for the custody of children, respected by Indian Courts in the interest of welfare of children.)

Radha Sham Roshan Lal V. Kudanlal Mohan Lal. A. I. R. 1956 Pun. 193 (F. B.) (A decree passed by a foreign court (at the time of passing) is a nullity.)

Sankaran Govindan V. Lakshmi Bharathi and others. I. J. I. L. 15 (1975) at 240, (Foreign judgements-Res judicata applies, if foreign judgment is vitiated by fraud or opposed to natural justice.)

Smt. Satya V. Teja Singh A. I. R. 1975, S. C. 105 (No rule of private international law could compell a wife to submit to a decree procured by the husband by trickery.)

Teja Singh V. Srimati Satya. P. L. R. 1970 at 235 (Foreign divorce decree of a Hindu marriage solemnised in India, where husband has adopted foreign domicile, is binding.)

Fundamental Rights.

Anwar V. The State of J. & K. (1970) II S. C. W. R. 276. (Foreigner entering India illegally—fundamental rights under constitution not applicable.)

Choithram Verhomal Jethwani V. A. G. Kazi & others. A. I. R. 1966 Bombay 54 (Has a citizen right to get passport ?)

R. Monteiro V. State of Goa. A. I. R. 1970 S. C. 329 (A foreign national can stay in India, only on taking out a permit.)

S. F. Xzvier doe Remedios Menterio Baidez—Goa V. State A. I. R. 1968 Goa 60. (Relating to Geneva convention Act (1960) Sch. IV—Question of applicability—Constitution of India—Art. 134(1) (C) Foreigners Act (1946), S. 3(2) (c).

Satwant Singh Sawhney V. Assistant Passport Officer, New Delhi. A. I. R. 1967, S. C. 1836. (Right to travel abroad whether a fundamental right.)

Jurisdictional Immunity to former rulers.

Bhimaji Narsu Mane V. Vijayasin Rao Ram Rao Dale A. I. R. 1955 Bombay 195. (The immunity is conceded only to recognised ex rulers—recognised by Govt. of India only.)

C. I. T. Andhra Pradesh V. H. E. H. Mir Osman Ali Bahadur. A. I. R. 1960 S. C. 1260 (Whether former Indian State is an international personality. (No)—Nijam Hydrabad liable to pay tax under Indian Income Tax Act.)

Darbar Surangwala Jetpur V. New India Assurance Co. Ltd. A. I. R. 1955 Bombay 275 (Immunity to ex-ruler only on notification issued by Govt. of India.)

Harinder Singh V. I. T. Commissioner Punjab etc. A. I. R. 1972 S. C. 202 (Status of former ruler whether their income is immuned from taxation on the ground of 'head of states.')

Her Highness Maharani Mandalasa Devi V. M. Ramnarain Pvt.Ltd. & others A. I. R. 1965, S. C. 1718 (Exemption from decree against firm in which ruler of former Indian State was one of the partners.)

Indrajit Singhji V. Rajendra Singh ji. A. I. R. 1966 Bombay 45. (The immunity of former ruler is dependent upon the opinion of Central Govt.)

Madhav Rao Jivaji Rao Sclndia V. Union of India 1971 (1) S. C. C. 85, (The order of the President of India with drawing recognitition of the former rulers, held to be ultra vires by the majority.

Mohanlal Jain V. H. H. Maharaja Sawai Man Singhji, Ex ruler of Jaipur. 1962, I. S. C. A. 641 (Privileges and immunities of ex-rulers of Indian States—no suit without the consent of Central Govt.)

Rai Shakri V. Bapu Singhji Takhat Singhji. A. I. R. 1958 Bomb. 30. (A decree passed by a court against a former ruler of India without the requisite certificate of Central Govt. will be a nullity.)

T. R. Bhawanishankar Joshi V. Somasundara Moopanar. A. I. R. 1965 S. C. 316, (Restoration of seized property to former ruler amounts to fresh grant.)

Union of India V. G. R. Silk. A. I. R. 1964 S. C. 1903. (Effect of agreement between President of India and Madhya Bharat's ruler regarding privileges and immunities of later.)

Jurisdictional Immunity to Foreign Sovereign :

Dulerai & Co. V. Pokerdas Mengraj. A. I. R. 1952 Bomb. 335 (Immunity of foreign Sovereign from being sued.)

Miscellenious—

Birna V. State of Rajasthan. A. I. R. 1951 Raj. 127. (A treaty before it forms part of law of land has to be incorporated into a law by the legislature.)

D. Gobalouswamy V. Union Territory of Pondicherry & others. A. I. R. 1948 Mad. 298. (International treaty between India and foreign country whether justiciable in a municipal court.)

Debendra V. Amarendra. A. I. R. 1955 Cal. 159. (Municipal Courts have no jurisdiction to try a suit relating to immovable property situated abroad.)

Nirmal Bose, V. Union of India A. I. R. 1959 Cal. 506 (In cases of mere adjustment of boundaries, the executive organ of Govt. of India can act independently of the legisiative body.)

P. H. Awari V. State of West Bengal, A. I. R. 1958 Cal. 303. (Sikkim being protectorate at that time could not come within the meaning of province.)

Padam Kumar Agarwalla and other V. The Addl. Collector of customs. A. I. R. 1972 S. C. 542 (Interpretation of treaty of trade and transit between India and Nepal, 1960.)

Royal Nepal Airlines Corporation V. Manorama Mehar Singh Legha. A. I. R. 1966 Cal. 319. (State jurisdiction—immunity of foreign Govt. Agencies—Whether Ambassador can claim immunity on behalf of the Govt.)

Seetha Lakshmi V. Veerajas A. I. R. 1952 Mad. 736 (Effect of wars on contract—valid if both parties or their agents are living in the same enemy occupied territory.)

State V. Motab Dewan. A. I. R. 1956 Patna 46. (A political agent in relation to any territory out side India means Principal officer representing the Central Govt. in such territory.)

State of West Bengal V. Jugal Kishore More and others. A.I. R. 1969, S. C. 1171. (Securing extradition of fugitive offender from Hong Kong.)

The Controller of Estate Duty, Banglore V.—John D' souza I. J. I. L. 15 (1975) at 79 (Value of foreign movable property in the form of life interest of a person domiciled in India is not exempted from the levy of estate duty.)

The Tarasov Extradition case. Order of First Class Magistrate.—I. J. I.L, 3 (1963) at 323 (In lack of formal treaty, no extradition of foreigner fugitive.)

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Statement of Particulars Under Section 19D(b) of the P. R. B. Act read with Rule 8 of the Registration of Newspapers (Central) Rules, 1956.

FORM IV

1. Place of Publication	LAW SCHOOL, BANARAS HINDU UNIVERSITY VARANASI-221005.
2. Periodicity of its publication	SIX MONTHLY
3. Printer's Name	S. BHARGAVA
Nationality	INDIAN
Address	BHARGAVA BHUSHAN PRESS, VARANASI
4. Publisher's Name	D. S. MISHRA
Nationality	INDIAN
Address	ASSTT. LIBRARIAN, LAW SCHOOL, BANARAS HINDU UNIVERSITY, VARANASI-221005.
5. Editor's Name	Dr. R. P. DHOKALIA
Nationality	INDIAN
Address	PROFESSOR OF LAW, LAW SCHOOL, BANARAS HINDU UNIVERSITY, VARANASI-221005.
6. Name and addresses of individuals who own the news papers and partners or shareholders holding more than one per cent of the total capital.	LAW SCHOOL, BANARAS HINDU UNIVERSITY, VARANASI-221005.

I, D. S. Mishra, hereby, declare that particulars given above are true to the best of my knowledge and belief.

D. S. MISHRA

EDITED BY PROF. R. P. DHOKALIA FOR LAW SCHOOL, BANARAS HINDU UNIVERSITY.

PRINTED BY S. BHARGAVA

AT BHARGAVA BHUSHAN PRESS, VARANASI

AND

PUBLISHED BY D. S. MISHRA FOR LAW SCHOOL, BANARAS HINDU UNIVERSITY.