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The Banaras Report: The Legal Aid and Clinical Legal Education

Bibliography

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ON THE RETIREMENT OF

PROFESSOR DHARMA PRATAP

The staff Council of the Law Faculty places on record the appreciation of the meritorious services rendered by Professor Dharma Pratap to the Law Faculty and the University. Professor Dharma Pratap has been an alumnus of the Banaras Hindu University and joined the Law Faculty as a lecturer in 1948. He was promoted as a Reader in 1959 and a Professor in 1971. He acted as Principal Law College in 1959 and served as the Head of the Department and the Dean Faculty of Law from 24-12-1973 until his retirement on 31-12-1976. Thus he was all allong actively associated with the progress of the Law Faculty.

Professor Dharma Pratap has been a renowned scholar of International Law in best of Oxford traditions and has trained generations of students in law. The staff of the Law School wishes him a happy and peaceful retired life and all students of law look forward to his more fruitful academic contributions and association with the Law School in its research and other academic pursuits.

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CONTENTS

Articles

The Problem of Aerial Hijacking and the Emerging International Law ... R.P. Dhokalia 1

Relation of International Law to Internal Law under the Indian Constitution ... J.N. Saxena 46

Theories of Consent to a Valid Reservation—A Critical Study ... M.N.P. Srivastava 61

Nature of the Coastal State's Rights in the Exclusive Economic Zone ... Balbir Chauhan 85

Compensation to the Victims of Criminal Violence in India ... P.N. Banerji 110

Hindu Widow's Adopted Son ... Paras Diwan 129

Notes and Comments

Nazi Decrees and Their Validity—An English Decision ... Rajeev Dhavan 151

Book Review

Oda, Johnston, Holst, Hollick and Hardy, *A New Regime for the Oceans* ... W. Paul Gormely 162

Matte, Nicholas, Mteesco and Hamilton, *Legal Implications of Remote sensing from outer space* W. Paul Gormley 169

The Banaras Report: The Legal Aid and Clinical Legal Education 180

Bibliography

Legal Aid ... B P. Agrawal
A. R. Chaturvedi 184

THE PROBLEM OF AERIAL HIJACKING AND THE EMERGING INTERNATIONAL LAW

DR. R.P. DHOKALIA*

1. Introduction :

A new area of increasing concern in Public International Law has recently been the question of crimes committed on board aircrafts and affecting international civil aviation Of the crimes, which extend from attacks an aircraft on the ground and other acts of sabotage to aerial hijacking or skyjacking, perhaps the most dramatic, boldest and having widest possible ramifications is the unlawful seizure of a civil aircraft during its flight-which is popularly known as aerial hijacking. This new crime, with its suspense and drama, appears to have attracted the greatest amount of publicity, worldwide attention and international concern during recent times. Dramatic increase in the number of incidents of aerial hijacking, during last one decade or so,[1] has posed one

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1. Since 1947 there have been more than 350 incidents of hijacking in different parts of the world Upto 1953, most hijacking were carried out by people wanting to escape from East European Countries The next wave came between 1958 and 1964 involving Cubans fleeing to the U. S. A. Between January 1969 and 1970 there were 118 incidents of hijacking and 14 incidents of sabotage and armed attacks against civil aviation which involved airlines of 47 nations and 7,000 passengers representing 83 nationalities, There 96 people killed and 57 injured as a result of such unlawful acts as hijacking, sabotage and armed attacks. See ICAO letter, July 3, 1970. In 1969 alone there were 92 attempts of which 73 were successful as the aircrafts were hijacked. In 1971, the first hijacking incident took place on the Indian sub-continent when an Indian aircraft was hijacked at gun point to Lahore on 30th January 1971 by two Kashmiri Youths. They demanded as the price of the safety of the plane the release of "all political prisoners rotting in Indian jails" beeause of the Kashmir dispute. Pakistan granted political asylum to the hijackers who destroyed the aircraft on 2nd February 1971. In 1972, there were a total 60 hijack attempts of which 22 were successful to the extent that the hijacker reached his ultimate heavenly objective or escaped with the extortion money, and 38 failed. During 1973, one reported attempt was to hijack an aircraft in the U. S. A. of which no further details were available and the other incidents took place most recently e. g. when on June 10, 1973 three armed men hijacked a Royal Nepal Airlines twin-engined plane which was on its scheduled flight from Biratnagar to Kathmandu to Forbesganj airstrip inside the Indian border

of the most difficult and elusive problems ever faced by the international civil aviation community, because it presents a serious threat not only to the personal safety and life of air travellers but also to the peaceful relations of nations[2] as well as to an orderly international travel or transport of the jet age which has enabled man to conquer time and space in traversing the globe.[3]

Aerial hijacking is really a hybrid problem, wherein classical international law and municipal law concepts relating to the rights of the state or states concrened against the hijacker as well as the personal rights of hijackers in the state of refuge are involved. Since neither customary rules of international law nor statutory provisions of states seem adequate enough to deal with the offences relating to aerial hijacking, the problem of determining and defining international law principles governing this area has in recent years vexed foreign ministries and international lawyers of all nations.

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and decampted with Rs. 50 lakhs in Nepalese currency (Times of India, June 11, 1973). The statistics about the incidents is compiled by the International Transport Association (IATA) A number of airlines of communist countries, including the Soviet Union, are not members of IATA but the Organization has access to information on hijackings in these countries through the International Civil Aviation Organization (ICAO). Whilst there were only 22 cases in 1973, the number went upto 29 in 1974. However, in comparison to the year 1969 it appears that the downward trend has set in perhaps for the reason that more and more countries are now tending to take an inflexible stand against hijackers in not giving into the terrorists demands for the release of their imprisoned comrades or for ransom or both

2. The incident which shocked and drew world wide attention was when two Arab terrorists, in one of the boldest skyjackings so far, Commandeered a Lufthahansa 727 with eleven other passengers aboard and forced the release of three young *fedayeen* who had been confined in Separate Bavarian prisons since they were captured only two months ago during the Olympic massacre of Israeli atheletes and coaches in Munich The hijackers did not release the aircraft until the three Black Septemberists were surrendered by the West German Government on Arab terms whilst the rescued *fedayeen* exprisoners and the hijackers were given hero's welcome at the Libyan capital of Trivoli at the time of Lufthansa jet landed there, Israeli phantoms in retaliation struck four Palestinian camps near Damascus killing 65 people, and bombed Syria which was alleged to provide the *fedayeen* with camping space and money This led to repercussions in West Germany hurting Bonn's relations with Israel as well as with the Arab nations. See Time, Nov. 13, 1972, pp 7-8

3. For an account of incidents during 1968 and upto May 26, 1969 See Gerald F. Fitzgerald "Development of International Legal Rules for the Repression of Unlawful Seizure of Aircraft" 7 *Canadian Year Book of International Law* 1969, p. 269. fn 1; A. E. Evans, "Aircraft Hijacking : Its Causes and Cure", 63 *AJIL*, 1969, p. 265.

The term 'hijacking' is the relic of the prohibition era and is a word taken from American slang being derived from the shout of "Hi-Jack' given by those about to appropriate the illicit liquour being carried by bootleggers in the days of prohibition in the United States.[4] It has come to mean stopping and stealing from a private vehicle in transit with the intent of theft of its cargo. "Aerial hijacking" is the term currently used for seizing control of a commercial aircraft and converting it to private use as a means of transportation by forcibly changing its flight plan to a different destination.[5] Individuals seeking to reach their own destination, which otherwise would have been inaccessible to them, or highly organized groups[6], such as Black Septemberists or Palestinian Terrorists, with a view to obtaining hostages to be used as bargaining counters have in recent times resorted to aerial hijacking. Also, there have been several cases of State hijacking, for instance, a Middle East Airlines caravelle, soon after its take-off from Baghdad on 10th August 1973, was "boxed" by two Israeli Air Force jets and forced to fly to an

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4. See the American Sources of Slang, by Lester V Barry and M. Vanden Bark, *Chambers Tweentieth Century Dictionary*, and also Colombos, *International Law of the Sea*, 6th Ed. 1967, p. 445. Hijacker is defined as an armed person who preys on bootleggers and seizers illicit liquor for profit. Piracy and hijacking developed as collateral activities of bootlegging and smuggling. See Compact Edition of the *Oxford English Dictionary*, Vol. II supplement.

5. The *modus operandi* of a hijacker usually is that during the flight he seizes a stewardess and forces her at gun oint to take him to the cockpit of the aircraft where the pilot is ordered to procced to the forced destination. See A. E. Evans, 63 *AJIL*, 1969, pp. 696-697.

6. Nearly nine out of ten hijacks are politically motivated. Reactions against injustices in the present day society, political dissent and even mere anarchic expressions of personal discontent have led individuals and groups to use hijacking as an instrument of terror, political extorsion and mass kidnappings in connection with idealistic rather than criminal ends. The extremists in the Popular Front for the Liberation of Palestine (P. F. L. P) of George Habash, Black Septemberists, Eritrean Liberation Front fighting to liberate Ethiopia's northern most province, urban guerrillas in South America and radical students in the Far East have used hijacking in the service of their ideology. See in this connection Nicholas M. Poulantzas, "Some Problems of International Law connected with Urban Guerrilla Warfare : The kidnapping of Members of Diplomatic Missions, Consular Offices and Other Foreign Personnel". *Annals D'Edudes Internationales*, Annals of International Studies, 1972 pp 137-187 at p. 137-138 Lewis S. Feuer *The conflict of Generations : The character and significance of student Movements*, 1969; Deniel and Gabriel cohn Bendit, *Obsolete Communism : The Left Wing Alternative*, 1969; F. Sully, *Age of the Guerrilla*, 1968; Roscoe R Oglesby, International War and the Search for Normatic Order, 1971; *International Conciliation* 1971 No. 585, pp. 7-27.

air base in northern Israel. The Israelis apparently hijacked the Caravelle with a view to capturing Dr. George Habash, leader of the Popular Front for Liberation of Palestine (FFLP) and three of his colleagues who were reportedly planning to fly to Baghdad by the Middle East Airlines Caravelle. After a thorough check of the passengers identity and luggage, the chagrined Israelis allowed the plane to return to Beirut. This "Israeli piracy" as all Arab papers called it was the fourth case of State Hijacking.[7]

Aerial hi-jacking has in our times exploded into a world-wide hazard to the safety of international aviation. This novel crime confronted by the world community is covered neither by the old custom-based international law relating to piracy,[8] nor by the provisions of relatively recent 1958 Geneva Convention on the High Seas' (Articles 14-21 as to piracy on the High Seas) because of the very specificity of the elements of the offense as defined.[9] Article 21 of the Convention on

7. See Times of India, August 13, 1973. The first case of state hijacking took place in 1955 when French Intelligence personnel forced down a chartered plane flying Algerian fighters from Morocco to Tunisia in Algiers and imprisoned them. The second case was of 1966 when Mr. Nasser of Egypt brought down at Cairo airport a plane carrying a Yemini delegation on its way to the U. N. O. to complain against the presence of Egyptian military forces in Yemen. In July 1971, the third case of state hijacking was reported when Col. Gaddafi ordered a BOAC plane on its way to Khartoun to land at Benghazi and nabbed two Sudanese communist leaders connected with a coup against President Nimerie and who were sent to Khartoum and hanged. Israel has condemned Arab hijackings since an El Al air-liner was diverted by PFLP to Algiers in 1968 and has been calling for severe punishment of hijackers.

8. Oppenheim, Vol. 1, 8th Edn., 1955, p. 608. Under customary International law robbery or attempted robbery was an essential element constituting piracy See Colombos *Supra* p 445.

9. Articles 14-22 of the Geneva Convention on the High Seas, 1958 deal at length with piracy. According to Article 15 "piracy consists of any of the following acts :

(1) Any illegal acts of violence, detention or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed :

(a) *on the high seas, against another ship or aircraft*, or against persons or property *on board such ship or aircraft*;

(b) *against a ship, aircraft*, persons or property *in a place outside the jurisdiction of any state.*

(2) Any act of voluntary participation in the operation of a ship or of an aircraft *with knowledge of facts making it a pirate ship or aircraft.*

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph (1) or sub-paragraph (2) of this Article.

the High Seas requires the seizure of a pirate to be effected by "warships or military aircrafts, or other ships or aircrafts on government service authorized to that effect' and this suggests that the seizure of an aircraft by a person on board that aircraft does not amount to piracy This is also clarified by the International Law Commission in its commentory on Art. 15 of the Convention on the High Seas defining piracy : "Acts committed on board a ship by the crew (which applies to aircraft as well), or against persons or property on the ship, cannot be regarded as acts of piracy'.[10] But, often the word "piracy" is loosely used in practise as to include all sorts of acts which International Law does not regard as piracy, e.g. broadcasts by "pirate radio" stations[11] as well as even aerial piracy.[12]

* The first of these paragraphs excludes seizing of the vessels by persons thereon, for it specifies that action must be taken "against" another craft The second paragraph is more ambiguous. The use of word "any" in place of "a" suggests that even this offence is directed against an object outside the craft on which the alleged pirate is travelling. See L. C. Green, "Piracy of Aircraft and the Law". *10 Alberta Law Review*, 1972 No. 1, p. 73. Also N. M Poulantzas, "Hijacking V. Air Piracy : A Substantial Misunderstanding Not a Quarrel over Semantics" *Rauree Nellinque dearoit international*, 1970 401 23 p. 80; also Sushma Malik, "legal Aspects of the Problem of Unlawful Seizure of Aircraft", *IJIL*, 1969, pp. 62-63.

10. Yearbook of International Law Commission, Vol 2, 1956, p. 282.

11. A new phenomenon of pirate broadcasting made its appearance around, 1958. Such pirate stations, as the *'voice of Slough'* *'Radio Invicta'* or *'Radio City'* operated off the English coast, *'Radio Veronica'* and *Radio & T. V. Noorzee*, operated off the Dutch coast, *Radio Nord'* outside Swedish jurisdiction, *'Radio Mercur'* off Denmark. See for a detailed study, H. E. Van Panhuys and Menno J. Van Emde Boas, "Legal Aspects of Pirate Broadcasting" 60 AJIL, 1966, pp. 303-341; Sami Shubber calls aerial hijacking a special type of piracy see his "Is Hijacking of Aircraft Piracy in International Law ?" 43 BYIL, 1963-89, p. 202.

12. For instance, see E. McWhinney (ed), Aerial Piracy and International Law, 1971; Professor McWhinney gives explanation of the usage of the term "piracy" in the title of this volume for Semantic reasons which stemmed from Canadia's bilingual (French and English) character, the volume referred to being the product of an international conference held in Canada recently. The term 'hijacking is, in this regard literally untranslatable into French, where it must be rendered either rather inelegantly, as *de' tournement illicite*, or else, more generally and more popularly as *pirateric aerienne'*. See Proceedings of the American Society of International Law, 65th Annual Mtg. Vol. 65 Sept 1971 No. 4, p. 95 In U. S A., Public Law 87-197 uses the word 'aerial piracy" which includes wide range of offences, see I. M. whitmen, p 426. wurfel, "Aircraft piracy-Crime or Fun", 10 Willam & Mary Law Rev., 1969, pp. 867-871.

Though the term "piracy" may be broad enough to cover "hijacking" the contemporary international law concept of piracy has certain limitations when applied to aerial hijacking which is not accepted as yet as *hostis humani generis.*[13] Infact the problem of hijacking is not that of piracy at sea[14] or in the air but that of unlawful seizure of aircraft. Therefore, the term 'piracy' is not only wholly inadequate and misleading but also seems to have led to the belief that the hijacking problems cannot be dealt with unless close analogy with *'piracy jure gentium'* exists. Even in the law of the sea, in the well-known cases of the *Santa Maria* and *the Anzoatequi* the terminology which has prevailed is that of unlawful interfence with ships on the high seas. Therefore, the two notions of hi jacking and air piracy are to be clearly distinguished by reference to their distinctive elements. Whilst the distinctive elements of air piracy are : illegal acts of violence, detention, or any act of depredation committed for *private ends* by the crew or the passengers of a private aircraft *against another aircraft* on the high seas or in a place outside the jurisdiction of any state, the essential elements of hijacking are three : (1) person on board an aircraft, (2) unlawfully committing *against the same aircraft* an act of interference, seizure or other wrongful exercise of control; and that (3) this act is committed while that aireraft is in flight. Hence, now-a-days the matter of unlawful seizure of aircraft, known as hijacking has been rightly separated from the matter of unlawful interference with aircraft which includes matters, like assaults against an aircraft and its passengers while on the ground, acts of sabotage and so on. Therefore, recently two separate conventions : the Hague Convention of 1970 and the Montreal Convention of 1971 have been adopted on the two distinct but related matters pertaining to unlawful seizure and of unlawful interference with aircraft.

The nature and variety of the acts of hijacking present a novel problem for the contemporary world community with a dilemma as to whether its solution is to be sought through strictly legal modes of action or through non-legal forms of community control. Varying from the relatively crude and amateurish acts carried out by an individual "lone wolf" of paranoiac or moronic personality[15] to the technically accomplished and highly organized hijackings by coordinated groups or states with political objectives, hijacking of aircrafts is generally resorted to broadly for two kinds of purposes : (a) for international blackmail purpose, kidnapping or depriving innocent passengers and crews of their freedom or threatening their lives, and even the destruction of their aircraft as a means of inducing compliance with the hijackers political or pecuniary demads; and (b) for travel purpose, as a means of escape or for capturing as a State operation of individuals for political purpose but with no specefic aim of hurting anyone or damaging anything in the aircraft. Travel hijackings are usually resorted to by individuals who escape from a tyrannical regime as political dissenters and who are likely to be deprived of the benefits of "due process of law" if they are returned to face the autocratic regime denying human rights.[16] State hijackings are resorted to as a state operation for political ends and this gives a more sinister dimension to the aerial hijacking to the extent it is for the purpose of exacerbating ill will between states, or for political fence-mending, or for blatant terrorism.

The diversity of values and political interests, or a jaundiced attitude on the part of many states, because of political and ideological cleavages in the world community, has prevented effective solution of this significant international problem of hijacking of civilian aircrafts. Besides, deep seated political antagonism and conflicts between groups of states (viz Soviet Bloc vs the Atlantic community; Israel vs the Arabs; Cuba vs the American republics and the Communist vs non-communist states in the East Asia) not only tend to apply to the crime of hijacking the concept of political offense as a defense to the crime, but also impede in extending the concepts of universal jurisdiction and mandatory extradition to the offence of hijacking. If, on the one hand, there are countries who have sympathy with the political objectives of some

13. A pirate is considered an outlaw, a *hostis humani generis*, see Report of the Sub-Commitee of the Committee of Experts for the progressive Codification of International Law, 20 A J. I. L. p. 117 Special Supp 1926, p. 224

14. See S. Shubber : "Is hijacking of Aircraft Piracy in International Law ?" 43 B Y. I L 1968-69 pp. 193-204.

15. For an account of the typical hijacker's personality and leading psychiatrist's view that hijackers are not normal men who can be dealt with as if they were ordinary criminals, and in most cases they are paranoid, suicidal, schizophrenics or frustrated astronauts or moonstruck lunatics to whom the threat of death is not a deterrent but a stimulus to crime, see David Hubbard. The Skyjacker; His Flights of Fantasy, Macmillan, 1971. The author advocates elimination of the death penalty for the skyjacker so that skyjacking cannot be undertaken as a form of unconscious suicide and favours stressing the skyjacker's sexual problems to make piracy seem humiliating rather than heroic. In his view the greatest deterrent to skyjacking would be an international agreement to send the air pirates back to the country where they committed their crime. See Time, November 1973, pp. 42-43.

16. See Oliver J. Lisstizyn, "International Control of Aerial Hijacking : The Role of Values and Interests." Proceedings of American Society of International Law, Sept 1971, Vol 65 No. 4, pp. 82-83, also his paper "Hijacking International Law and Human Rights" in E McWhinney (ed), Aerial Piracy and International Law, 1971, cited idem, p. 83 fn. 4.

of the terrorist groups, which are responsible for a big spurt in hijacking incidents, on the other hand there are responsible organizations, such as the PLO and even the PFIP who, though committed to the liberation of Palestine, have repudiated the method of hijacking which has become the handiwork of highly fanatical extremist groups.

The records of aerial hijackings during past two decades demonstrate that violence has become a factor of increasing significance in international air transport. On the one hand, with waves of aerial hijackings one leading to several others, the international community is constrained to recognize the common responsibility for evolving a new set of principles of international law with a view to regulating hijacking and other attacks on civil aircraft; on the other hand, owing to the fact that aerial hijacking tends to have fairly obvious political overtones, it involves for many a countries a problem of recognition of the offence as political and non-extraditable. For instance, under Cuban Law 1226 of September 16, 1969, Cuba retains the right to grant political asylum to any body, including a hijacker, even though the same law denounces hijacking as detrimental to the security of the Country. Similarly, hijackers fleeing to the West from the Communist countries are seldom returned. Political ideologies seem still more important than the lives of the innocent people.[17] In the absence of universal acknowledgement of aerial hijacking as *hostis humani generis*, and without a rule of international law providing for mendatory extradition[18] of hijacker by the state where the hijacked aircraft is forced

17. The first cases of hijacking occurred in Europe after the World War II when persons seeking escape from oppressive Communist regimes in East Central Europe began seizing aircrafts to flee to the West. In the Western Hemisphere hijackings of aircrafts began with the advent of Fidel Castro to power in Cuba. It was the United States Government that first condoned hijacking and welcomed as heroes those Cuban refugees who hijacked planes and boats to get to freedom See M Whitman, 6 Whitman, Digest of International Law, 1968, pp 799- 20 Cuba has signed a bilateral agreement with the U. S. A. as a result of which the menace has all but disappeared from the Caribbean.

18. Extradition is described under international law as the surrender by one state to another, of an individual accused or convicted of an offence outside its own territory and within the territorial jurisdiction of the other which being competent to try and punish him demands the surrender. Under the contemporary international law of extradition embodied in numerous extradition treaties, it is not mandatory for a country of refuge to extradite any alleged offender at the mere request of the state alleging that its criminal law has been breached unless there exists an extradition treaty to this effect between the two countries specifically providing for extradition in respect of the particular crime alleged. Also, many countries instead enact municipal law providing for procedure to be followed in the event of extradition

to land, it may not be possible to come up with a complete solution for the hijacking problem which has indeed become a shocking and dramatic kind of offense.[19] The offence renders vulnerable any runaway, airport or aircraft which remains open to the grenade-wielding fanatics, political terror groups, or criminals in search of escape, *ransom* or a political bargain with hostages at their mercy. Hijacking has today become an international menace and conspiracy since some countries overtly or covertly offer sanctuary and succour to aerial pirates by harbouring all those who arrive at their airports with plane loads of hostages. Most countries avoid a tough stand against hijackers usually for fear of the lives of innocent men, women and children held as hostages, lest any desperate or demented hijacker may not carry out the threat to blow up the hijacked aircraft, the hostages or all the passengers.

In the present paper an attempt is made to throw light on the legal response of the world community to the spreading problem of unlawful seizure of or interference with civilian aircrafts. It discusses

and listing the crimes for which it will be granted. Extradition, therefore, is possible only if the alleged crime is listed in the extradition treaty and the relevant statutes of both the requesting state and the state of refuge. The result is that there is no possibility of extradition of hijacker as hijacking is a new crime and has neither appeared in extradition treaties nor in the statutes concerned with extradition. See L. C. Green, "Recent Trends in the Law of Extradition." 6 Current Legal Problems, 1953, pp. 284-287.

19. In India magneto-meters to detect metal have been installed in four major airports. Several ideas have figured out to discourage hijacking. In the U. S. 2000 men are being trained as air marshals. The Federal Aviation Administration has planned a combination system of "behaviour profile" and metal detection. A texas firm has invented an advanced electoric system which registers guns or chunks of metal with iron content and gives an alarm. Notwithstanding a series of internal security measures applied by the commercial airlines themselves (searching all passengers for concealed weapons; police patrols and special corps of Inspectors accompanying flights, and special protection of the pilot by locking cockpit doors during flights) which really do not provide effective deterrent device, there has been alarming increase in successful and attempted aerial hijackings during last few years. Dallas Psychiatrist David Hubbard who has outlined his ideas on hijacking on the basis of his intensive research over three and half years in a 1971 book: The Skyjacker : His Flights of Fantasy, believes that the sky-marshal programme and belligerent policy towards skyjackers have only existed new types of psychopaths with ever more dangerous tendencies toward violence. See Time, Nov. 1972 p. 42. For an interesting discussion on hijacking, see A Lee Bradford, "The Legal Ramifications of Hijacking Airplaines", American Bar Association Journal, 1962, pp. 1024-1039.

the steps in the matter of law-in-the-making that have been and are currently being taken with a view to drawing up international agreements in order to deal with the problem of unlawful seizure of or interference with civil aircrafts. It deals with the existing state of law embodied in the multilateral conventions governing aerial hijacking with a view to throwing light on the problems and the emergent principles of international law.

II. International Conventions Applicable to Crimess Committed on Board and Against Civillan Aircrafts :

The phenomental rise in air navigation has been one of the marvels of our age. Not only does the international air transport provide a convenient mode of international travel for the bulk of passenger transportation but has also helped to shrink the globe by conquering distance and time. Increasing need for legal and other measures ensuring safety of flights in international navigation, has led to spontaneous international cooperation in the development of aviation law.

If the International Convention for Regulation of Air Navigation signed in Paris on 13th October, 1919, related chiefly to technical aspects such as safety regulations, rules of airworthiness, radio and meteorological procedures and the licensing of personnel and aircraft, the Chicago Convention on International Civil Aviation which came into effect on 4th April 1947, brought out the bulk of the technical requirements as International Standards and Recommonded Practices in the various Annexes (16 in number). The Chicago Convetion made significant contribution in bringing about uniformity in the maintenance of the minimum standards or requirements in different spheres connected with the operation of aircraft such as licensing requirements, airworthines requirements, and rules of the air. It also set-up International Civil Aviation Organization, a permanent body charged with the task of continuous formulation of standards in keeping with technological advancements and which has contributed enormously to the maintenance of highest technical standards and safety record achieved by civil aviation throughout the world. Though described as the constitution for the postwar global air law because of its comprehensive nature covering all phases of civil aviation, it could not have anticipated or visualised in 1944 the possibility of misuse of commercial airlines for international blackmail purposes, or of innocent passengers being held hostages for political ends, or of bombs being placed in aircrafts exposing the aircrafts and their pessengers to total destruction, or of governments assisting or abeting in the commission of such offences. However, since 1961 a series of menacing hijacking incidents and the frequency of

their occurence has led to the world-wide relization that mere maintenance of technical standards in international civil aviation will not ensure the desired degree of safety against such unlawful acts as hijacking, sabotage and armed attacks. The rise in violence against persons on board the aircraft has led to the enactment of national laws as well as the conclusion of international treaties to deal with the problem.

Aircraft hijacking, being a crime of aero-space age is a contemporary addition to the roster of criminal acts that cross national boundaries and so requires a substantive law and international competence to prosecute and punish those accused of such offences, be they states or individuals. The competent bodies of the International Civil Aviation Organization (ICAO)[20] as well as the U.N. General Assembly and the Security Council have over a period of years[21] made concerted efforts towards adoption of a law dealing with the crimes against civilian

20. See Oppenheim, 7th Ed. Vol. 1, pp. 468-482 with comprehensive bibliography. This organization was created by the Chicago Convention on International Civil Aviation of 1944 which is described as the "constitution" of the global air world. The ICAO functions through an Assembly, a Council, a President of the Council, a Secretary-General, and various commissions and committees. It has its headquarters in Montreal and maintains four other field offices (Lima, Paris, Cairo and Melbourne) which serve as liaison between the organization and the member states in different regions of the world. Its aims and objects are to develop the principles and techniques of international air navigation and also to foster the development of international air transport including promoting safety of flight. See Marjourn whitman, pp 390-399. Thomas Burgenthal, Law Making in the International Civil Aviation Organization, 1971.

21. The U. N Secretary General expressed his concern at the increase in hijacking incidents in the addendum to the introduction to his annual report to the U N. General Assembly, see U. N. Doc. A/7201/Add. 1, at 19. Besides the ICAO and the U. N. bodies, the subject has also received attention in non-governmental private bodies like International Air Transport Association (IATA) and the International Federation of Airlines Pilots Association (IFALPA), which successfully threatened economic boycott and similar pressures and even applied them in the case of a celebrated hijacking to Algeria in 1968. These organizations are pressing hard for a boycott of any country that offers sanctuary to hijackers or even appears to be encouraging them. Not only are the pilots concerned about the absence of international agreement on how to deal with skyjackers they are particularly annoyed at Britain and France which have taken a relatively lenient attitude towards hijackers and have opposed the use of skymarshals because of the danger of a shootout in the air. The pilots are also irritated by the lack of security on the ground and are furious and a bit desperate over the inability of law enforcement agencies to control the problem. See Time No. 13, 1972.

aircrafts. Under the auspices of the ICAO, three multilateral conventions have been concluded which have attempted to provide for international control of aerial hijacking, viz the Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft, 1963[22]; the Hague Convention for the Suppression of unlawful Seizure of Aircraft, 1970[23]; and the Montreal Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation 1971[24]. These conventions in the field of hijacking partly cover the same field and partly are complementary.[25]

(A) Tokyo Convention 1963 : First modest beginnings in the sphere of international action to meet the problem of aerial hijacking were made by the Convention on Offences and Certain Other Acts Committed on Board Aircraft commonly known as the Tokyo Convention which was adopted at the Tokyo Conference on Private Air Law on September 14, 1963.[26] It aimed to secure collaboration of states with a view to restoring the control of aircraft to its lawful Commander, enabling the passengers and crew to continue that journey as soon as possible, and returning the aircraft and the property thereon to the persons lawfully entitled to its possession. The Convention included elaborate provisions concerning the jurisdiction of the state of registration and of certain

22. U. N. Treaty Series, vol. 704, No. 10106, also 58 AJIL 1964, p. 566. It entered into force in 1969 when the U. S. A. ratified the Convention being the twelfth country to ratify. It took over six years to obtain the necessary minimum number of twelve ratifications to bring it into force. As to July 1971, 45 State were parties to the Convention.
23. On the basis of the draft submitted by the Legal Committee of the ICAO the Diplomatic Conference, held at the Hague under the auspices of the ICAO and attended by the representatives of 77 states, adopted this convention which was signed, when opened for signature on Dec. 16, by 50 states. With the ratification by 10 states, the Convention has come into force on October 14, 1971. For the text see, II IJIL 1971, 155; I. L. M. vol 10, 1971 p. 133.
24. For the text see 11 I.J. I. L. 1971, pp. 742 748.
25. Professor J. H. W. Verzijl, a distinguished European jurist, took note of the incidental problems of legal interpretation presented by these multilateral conventions in his remarks published in "Hijacking of Aircraft", Institute Droit International, Eighteenth Commission Final Report, 1971, Annuaire de e' Institut de Droit International vol. II and cited by Professor Edward Mcwhinney in his address on "New Development in the Law of International Aviation : The Control of Aerial Hijacking", Proceedings of the American Society of International Law, 65th Annual Mtg. Sept 1971, Vol. 65 No. 4, p. 71 fn. 1.
26 For the text of the Tokyo Convention, see 58 AJIL, 1964, pp. 566-573. It had 26 Articles 1963, UNTS, No. 10106 (1964), 2 Int. Leg. Material p. 4042.

other states affected by acts in respect of offences committed on board civilian aircrafts; the powers and duties of states in relation to offenders; the powers of the aircraft Commander; the unlawful seizure of aircraft and the relevant powers and duties of states. Since the Paris Convention on the Regulation of Aerial Navigation (1919) as well as the Chicago Civil Aviation Convention (1944) had stressed on the nationality of aircraft linked with the State in which they were registered, the principal emphasis of the Tokyo Convention was that at least one state, the State of registration of aircraft, would have competence to exercise jurisdiction over the offences committed on board a civil aircraft in flight. But, on these offences committed on board an aircraft, the national laws of the State concerned will remain applicable. This Convention, however, did not obligate the States which had jurisdiction to exercise it over the offender or, alternatively, to extradite him. Though the Convention declared that offences committed on board the aircraft of a contracting state were to be treated for the purpose of extradition as if committed in the territory of that state, it, however, did not create an obligation to grant extradition. In the case of unlawful seizure of the aircraft also it only required the landing States of the hijacked aircraft to permit the passengers and crew to continue their journey as soon as practicable and to return the aircraft and its cargo to those entitled to it.[27] In other words, it imposed no obligation on any state to take any action against those who seized an aircraft in flight. However, of major significance was the object of the Convention to secure collaboration of states in order that control of aircraft and its cargo was restored to its lawful commander; that the passengers and crew might be able to continue their journey as soon as possible; and that the aircraft and the property thereon might be returned to the persons lawfully entitled to its possession.[28] Thus it merely provided for certain actions to be taken by the contracting states to prevent seizure or disposing of the crew, passengers cargo and aircraft after the event when the hijacked aircraft had landed.[29]

27. Art. 11 of Tokyo Convention, 1963; For drafting history of this Article See Gerald F. Fitzgerard "Development of International Legal Rules for the Repression of the Unlawful seizure of Aircraft" 7 The Canadian Yr. Book of International Law, 1969, pp 281-283.
28. As early as 1968, the ICAO, by its Resolution A 16-37 unanimously adopted by its Assembly, Called on the ICAO members to apply Art. 11 of the Convention even before the entry into force of the Convention. The principles set forth in Art. 11, permitting the aircraft, crew and passengers (except for the hijacker) to resume their trip are now accepted practice of states and a part of international law not dependent upon treaty
29. Arts. 12-15 of the Convention; See Gerald F. Fitzgerald, "Offences and certain other Acts Committed on Board Aircraft" 1 Canadian Yr. Book of

The Convention was not an offence-creating instrument. Since it did not define "Penal offence" nor dealt with the offenderrs who were not on board the aircraft (e. g a person who just places a bomb on board the aircraft), aerial hijacking constituted neither a distinct offence nor an international offence under it. It did not make even "unlawful seizure" of an aircraft a penal offence and did not deal with the treatment of the offender in specific terms of his prosecution or extradition. It presumed that the act of "unlawful seizure" was punishable under national laws of all civilised states under concepts of assault, theft, robbery or dacoity of movable property. Hence, the Convention genarally applied to the offences against penal law under national laws as well as to all acts which endangered the safety of aircraft or persons or property or maintenanance of good order and discipline on board.[30] It, however excluded offences against penal laws of a political nature or those based on racial or religious discrimination. It authorized the Commander to take certain measures with a view to preventing acts which may jeoperdise the safety of aireraft including restraining the person concerned and disembarking him or delivering him to competent authorities in the State of landing.[31]

The main drawbacks of the Convention were that it did not create an obligation to grant extradition;[32] It did not define "offences against penal law"; it did not make "unlawful seizure" a penal offence, it did not deal with the treatment of the offender in specific terms i. e. his prosecution or extradition; and it also failed to deal specifically with all forms of attack on aircraft and their passengers and crew, for instance, a time-bomb placed on board an aircraft by an offender who was not on board the aircraft. The result was that most of the states could not prosecute a hijacker because in their penal law hijacking as such was not an offence and, if they at all did prosecute, it was not for hijacking but for some other acts like, theft, assault or kidnapping.[33]

International Law, 1964 pp. 191-204, also Robert P. Boyle, "Jurisdiction over Crimes Committed in Flight : An International Convention" 1965, 3 Criminal Law Quarterly, p. 68; Also Peter B. Keenan Anthony Lester, Peter Martin and J. F. McManon (ed) Shawcross and Beaumont on Air Law, 3rd ed. 1966, vol. 1 Chap. 40 pp 701-705. Alec Samuels, "Crimes Committed on Board Aircraft : Tokyo Convention Act 1967" XLII, BYIL 1967, pp. 271-277.

30. Art 3 ibid.
31. Arts 8 & 9 ibid.
32. Art. 16, ibid.
33. In most of states aerial hijacking has not been by itself an offence under municipal law, and so, if the hijacker was required to be prosecuted at all it was not for hijacking but for some other acts such as theft, assault, or

Moreover, hijackers and other offenders committing acts of violence against aircrafts remained unpunished because neither "unlawful seizure" of an aircraft had been declared a penal offence nor prosecution or, alternatively, extradition of the culprit seizing an aircraft in flight had been declared obligatory for the contracting states by the convention.

Obviously, the Tokyo Convention of 1963 was only a feeble attempt to deal with the problem and was not designed as a deterrent to hijacking. However, this convention has been given effect to in India by the Tokyo Convention Act, 1975.[34] The main problem for most countries has been not in regard to defining or providing sanctions in their national enactments for the criminal act committed on board

kidnapping, force or violence, threat or force of violence, fraud, wrongful intent to seize, to take control of the aircraft, which were offences of a less serious character. See A. I. Mendelsohn, "In Flight Crime : The International and Domestic picture under the Tokyo Convention" 53 *Virginia Law Review*, 1967, pp. 532-548 at 534-535. For the position in Canada, Argentina and Australia, U. K. and U. S. A. See Gerald F. Fitzgerald, supra 7 *The Canadian Yr. Book of International Law*, 1969 pp. 272-276.
The Indian Penal Code also made no provision for hijacking as an offence. Recently, Indian Penal Code (Amendment) Bill, 1972 introduced in the Rajya Sabha has provided for forcible seizure and control of aircraft and other vehicles in section 362-A as follows :

(1) "Whoever on board an aircraft in flight, being an aircraft registered in India, unlawfully by force or show of force seizes such aircraft or exercises control of it for the purpose of landing at a place other than the place of its destination shall be punished with *imprisonment for life.*"
(2) "Whoever on board any vehicle, other than an aircraft, registered in India, unlawful by force or show of force seizes such vehicle or exercises control of it for the purpose of taking it to a place other than the place of its destination shall be punished wiih *regorous imprisonmsnt for a term which may extend to ten years and shall also be liable to fine*" (emphasis added) See Bill No. XLII of 1972, clause 146 p. 37.

See also for the UIS. law on the subject Ss. 1463 Federal Aviation Act of 1958 and Public Law 87-197, approved on September 5, 1961, 75 Stat. 466; also, Cuba—Act No. 1266 of September 16, 1969 (Arts 1,2 Instruments Relating to Piracy (Sea and Air) in Report of the 54th Conference, the International Law Association, 1970, pp. 752-753.

34. See for literature on the subject, Gerald F. Fitzgerald "The Development of International Rules Concerning Offences and Certain other Acts Committed on Board Aircraft" 1. *The Canadian Yr. Book of International Law*, 1963 pp. 230-251, Idem, "Offences and Certain Other Acts Committed on Board Aircraft : The Tokyo Convention of 1963" 2. *The Canadian Yr. Book of International Law* 1964, pp. 191-204. For an account of the pre-Tokyo law, cases and Bibliography, see O' Connell, *International Law*, Vol. 1, pp. 586-588.

an aircraft but in respect of their ability to effectively apprehend, prosecute and punish the offender. The perpetrator of the act, having committed the crime and having left the aircraft, manages to evade the jurisdiction of the country whose law it has violated and it may be difficult or even impossible to obtain his return to that place, and the state of his refuge may not be interested in prosecuting him. The Tokyo Convention, therefore, failed to provide any remedy for this situation. The state which has the greatest competence to prosecute a hijacker under the Convention is the State of registration of the hijacked aircraft, but that state cannot necessarily obtain the extradition of the hijacker from the state where he has sought refuge for the reason that 'hijacking' is not listed as an extraditable offence by most of the extradition treaties.[35] The problem becomes more acute when there is political focus on the hijacking act and on the use of the passengers and crew of the hijacked aircraft as hostages for international blackmail purposes, and the states concerned great the acts of hijacking as "political offences" thereby excluding them from the operation of extradition treaties. Besides, many nations having a tradition of political asylum would not like to give-up completly in the case of hijackers.[36] Furthermore, the state in which the hijacker is found would not always be able to prosecute him because the offences committed by the hijacker during the course of hijacking might have been completed outside the jurisdiction of that state.

(B) *The Hague Convention 1970* : In 1968, the General Assembly of the International Civil Aviation Organization directed its Legal Committee to consider the above-mentioned difficulties created by the lack of adequate rules in the Tokyo Convention and to suggest legal measures which could be taken to counteract the growing menace of hijacking.[37] On the basis of the draft submitted by this committee,

34(1) See Sushma Malik, "Legal Aspects of the Problem of Unlawful Seizure of Aircraft" 9 *IJIL*, 1969, pp. 63-71; O'Connell, *International Law*, Vol. II, 1965, pp. 792-808.

36. See in this connection, Gillian M. E. White, "The Hague Convention for the Suppression of the Unlawful Seizure of Aircraft", *The Review Int. Commission of Jurists*, April—June 1971, No. 6. p. 39.

37. In 1969 a draft was initiated by the U. S. A. It was conceived as a Protocol to the Tokyo Convention providing for a multilateral mandatory extradition and limited to hijackers of any aircraft in flight carrying passengers, This was, however, rejected. Another compromise proposal, contemplating prosecution of hijacker obligatory if extradition was refused on the ground that the offender was sought for political persecution, was also rejected. Sea Report of ICAO Legal Sub-Committee on Unlawful Seizure; 8 *Int. Legal Materials*, March 1969, p. 245.

the diplomatic conference, held at the Hague from 1 to 16 December 1970 under the auspices of the ICAO and attended by representatives of 77 states, adopted the Convention on the Suppression of Unlawful Seizure of Aircraft.[38] The Hague Convention attempts to fill-up the gaps left in the legal system by the Tokyo Convention.

Two major factors contributed to the strengthening of the convention : First, a strong and wide-spread reaction to a series of forcible seizure and diversion of civil aircrafts, whose passengers and crew were held hostages for specific demand of release of Arab guerrilla terrorists from prison or custody during the period when the Convention was being drafted and reviewed; and two, the direct and serious concern shown by the two Great Powers—the United States and the Soviet Union—in the hijacking problem. The U. S. A. felt concerned, because by far the largest number of aircrafts hijacked at the time were of U S. registration and ownership,[39] and the Soviet Union felt disturbed for the reason that it had suffered two successful hijackings just before the Hague Conference and it saw a great danger in opportunities offered by hijacking for escape of its disgruntled citizens from its control. Not only that the U. S S. R. had by that time become a member of the ICAO it also attended the Hague Conference with a block of votes favouring a stronger convention.[40]

The Hague Convention of 1970[41], comprising fourteen articles, attempts to ensure that hijackers do not go unpunished. It aims to

38. The ICAO, as a result of that it had been doing, introduced an essentially pragmatic distinction between *unlawful seizure of aircraft*, on the one hand and *unlawful interference with international civil aviation or its facilities*, on the other. The former refers to what is commonly known as hijacking or sky-jacking; the latter refers to all other criminal acts directed against civil aircraft or aviation facilities. Whilst the former has only rarely involved a case where a passenger has been fatally injured, the latter, sabotage and unlawful attacks on aircraft and aviation facilities have been of a much more serious character than hijacking, eventhough they may not have attracted the same amount of popular attention See "Summary of Civil Aircraft Damaged or Destroyed by Deliberate Detonation of Explosives" ICAO Doc. A17-WP./25 (5-5-70).

39. For statistical data on aerial hijacking see A. E. Evans, *supra* p. 695.

40. Professor McWhinney, commenting on the participation of both the U.S.A. and the U S.S.R in the adoption of the Convention, remarks :
"Here we have, of course for the first time with a major international Convention involving aviation, that element of bipolar (Soviet-western sponsorship and support that has proved so vital to the political success of other really important ventures in international law-making in the post Cold-war era." Proceedings of the American Society of International Law, 65th Annual Mtg. Vol 65, Sept 1971, No. 4, p. 72

41. It is significant that of seventy-seven countries attended the Hague Conference there were no negative votes, only two abstentions to the adoption of

establish universal jurisdiction and requires each contracting state to provide a basis for prosecution of a hijacker, regardless of the place where the hijacking has occurred, if the hijacker is found in its territory. From the point of view of the definition of the new offence, two key provisions are: Articles 1 and 2 which obligate contracting states to agree that any person, who on *board an aircraft in flight* unlawfully by force or threat of force or by any other form of intimidation seizes or exercises control of that aircraft or attempts to do so or acts as an accomplice of such a person, commits an offence and he shall be punishalle by severe penalties.[42] Here, the definition of the offence seems somewhat narrow from two points of view : First, the liability is confined to unlawful use or threat of force or any other kind of intimidation for seizing or exercising control of an aircraft in flight, including attempts to do so or to associate in such acts. It does not cover acts such as interfering with the scheduled air traffic, endangering other aircrafts because of deviation from regular routing, endangering the lives and security of crew and passengers, destroying aircraft and property of passengers, and abducting passengers and the crew howsoever temporary.[43] Second, the definition of the offence confines the offence to only acts committed *on board on aircraft in flight.* An aircraft is considered to be in flight, according to paragraph 1 of Article 3, from the moment its doors are closed at embarkation until any door is opened for the purpose of disembarkation[44]. In the case of a forced landing, whether forced for technical reasons or because of the activities of a hijacker, the flight is deemed to continue after landing until the competent authorities take charge of the aircraft, passengers and property on board. This excludes many of the acts of hijacking of aircrafts which have lately taken place, viz seizure or deviation of an aircraft at its place of take-off or landing, or attacks made on aircrafts on the ground before embarkation or after disembarkation, or cases of state-hijacking wherein airforce jets of a state may 'box' a plane in and force it to fly to an arbitrary destination. Besides, paragraph 2 of Article 3 excludes from the scope of the Convention the aircrafts used in military, customs and police services. This excludes acts of aerial hijacking of a service aircraft by a member of the services, or by a civilian flying on board a service aircraft. Moreover, this Article excludes acts of aerial hijacking taking place on aircrafts on domestic flight i. e. when its place of take-off or actual landing is within the territory of the State of registration. The Convention does not apply to domestic flights, for the reason that offences taking place on such flights do not involve international element and are fit to be regulated by domestic law. However, in case an aircraft on scheduled domestic flight within the territory of the State of registration is hijacked to a foreign destination, or the hijacker of an aircraft on domestic flight escapes from the territory of the State of registration after the hijacking, then the provisions of the Hague Convention will be applicable.

Though the Hague Convention recognizes the serious nature of the act of unlawful seizure of aircraft and requires the contracting states to make the offence punishable by "severe penalties", it has failed to define a "severe" penalty or to prescribe any minimum penalty for the offence and, therefore, leaves it open to each contracting state to pres-

the Final Text, and fifty-nine states (excluding Cuba, the Democratic German Republic, the People's Republic of China and all Arab countries) had signed the Convention by April 1971. Since it was to come into force after being ratified by ten of the signatories, it has come into force on 14th October 1971. In January 1974 sixty three states were parties to the Hague Convention and included the Soviet Union and eight other Communist countries, the U.S.A , the U K. and eleven other members of the NATO, Nine Latin American countries, three Arab countries and Fifteen Afro-Asia countries. See 10 *Int. Legal Materials*, 1971, p. 133, Also 11 *IJIL*, 1971 pp. 155-160.

42. According to the preamble of the Convention, the Contracting States cannot accept that hijackings can be excused as political actions, for it points out that such actions constitute a matter of grave concern and that in order to deter future offenders there is urgent need for appropriate measures of punishment to be provided. It may be noted that the couvention does not use the term 'hijacking' for the offence which it defines in Art. 1 of the Convention.

43. It may be pointed out that attempts at definition remind one of the terms such as "aggression", "terrorism" and "self Defence" for which no generally satisfactory definition has yet been reached in international law. The offences enumerated in Article 1 of the Convention for the Supression of Unlawful Act against the safety of Civil Aviation are not exhaustive enough and the definition could be complemented by adding diversions sabotage, violent seizure or wracking of aircrafts, and kidnapping or assaulting of passengers and extorsion in connection with these crimes. These acts violate fundamental rights of the individual and to respect and defend these rights is recognized as primary duties of states Articles 1 and 3 of the Universal Declaration of Human Right (1948); Articles 2 (1) 6 and 17 of the International Covenant to Civil and Political Rights (1966); Articles 1, 2 and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); and Articles 1, 5 and 6 of the Proclamation of Tehran.

44. Compare also Art. 5 paragraph 2 of the Tokyo Convention for definition of the Term "in flight" according to which an aircraft was considered in flight from the moment when power was applied for the purpose of take off until the moment when the landing run end". The Hague Convention has improved over the earlier definition because it covers also the mischief done in between the closing of the doors and the actual application of the power.

cribe such penalty as it regards severe.[45] Without any international standard of severity in respect of penalty for the offence of hijacking, and the diversity in national standards severity as reflected in the statutory provisions for penalty, it is likely that extradition of hijackers may become more difficult. On the one hand, many countries may not be included to extradite hijackers to the countries may not be inclined to extradite hijackers to the countries where laws prescribe extremely severe penalties like death penalty or life imprisonment.[46] On the other hand, the countries which favour sufficiently severe penalty may feel most reluctant to exradite the offender to the countries where hijacking is punishable by as little as one year in prison. Perhaps a solution of this problem could be found if the Hague Convention provided that in the event of conviction of a hijacker by a Municipal Court or an international tribunal the sentence to be imposed shall not exceed in severity of the penalties applicable to the crime prescribed by either the state having the custody of the accused or the state where the crime was committed.

The real difficulty however lies not so much in defining or providing sanctions for the criminal act committed on board an aircraft as

45. A perusal of national laws in this regard shows a wide difference between states concerning the concept of appropriate punishment for the offence of hijacking. Art. 199, sub-paragraphs 2 and 3 of the Argentine Penal Code prescribe imprisonment varying from three to fifteen years imprisonment; the Australian Crimes (Aircraft) Act, 1963 in Art. 11 provides an excellent example of the escalation of punishment to fit the crime which varies from two years to death penalty. See Gerald F. Fitzgerald, supra, pp. 272-273; Brazilian Hijacking Law, October 20, 1969 provides imprisonment from 8 to 20 years and Mexican Decree on Hijacking prescribe imprisonment for 5 to 20 years; See IX *Int. Legal Materials*, 1972, January No. 1 pp. 180-185. For Cuban Hijacking Law of Sept. 16, 1969, See 8 *Int. Legal Material*, 1969, November No. 6, p. 1175, The amendment in the Indian Penal Code Section 362-A provides for punishment varying from rigorous imprisonment extending to 10 years and even life imprisonment.

46. It is difficult to obtain any reliable statistical data on sentences given to hijackers, but it is true that variations are unpredictable. The U.S. Federal Statute, enacted in 1961, prescribes the penalty of death for not less than twenty years in prison. Federal Aviation Acr, Sec. 902 (1), 49 U S.C. Sec. 1472 (i). In the U.S.S.R. two persons tried on charges of planning or attempting to hijack Soviet aircraft have been sentenced to death or maximum imprisonment permitted by the Soviet Law. French statute of 1970 prescribes penalties of five to 10 years in prison for simple hijacking, ten to twenty years for hijacking resulting in injury or illness, and life imprisonment for hijacking resulting in death. See 10 Int. Legal Materials, March 1971, p. 436.

in ensuring effectively the prosecution and punishment of the offender. In fact, whilst the act may constitute an offence at the place where it has been committed, the perpetrator of the act after he leaves the aircraft may be thousands of miles away from the country whose law he has violated and it may be difficult or even impossible to obtain his return to that place. Besides, though he would be liable to punishment according to the law of the State in which he leaves the aircraft, that state may not be interested in prosecuting him. Similar problem may arise in bringing a charge against the perpetrator of an unlawful seizure, more particularly, at the moment of disembarkation from the aircraft. The offender in this situation is generally either in a country of which he is a national or in which he hopes to obtain asylum. In neither case will he be extradited to the state in whose airspace the seizure has been committed, nor to the state whose law applies to the offence as a result of extra-territorial application. The Hague Convention did not attempt to find a remedy for these problems. In fact the present arrangements for the apprehension of the persons accused of international crimes are far from satisfactory and there exists urgent need of an international convention for apprehension of international criminals binding the parties to arrest the criminals found on their territory, whether aliens or nationals, and to surrender them to the appropriate court for trial.

A key provision in the Hague Convention in regard to establishing jurisdiction over the offence is Article 4. According to it, the states in best position to prosecute the hijacker are : the state of Registration of the hijacked aircraft, the state of the lessee in case it is an aircraft lessed without crew, and the state where the hijacked aircraft lands with the alleged offender on board. In order to ensure coordinated treatment of aerial hijacker, these states are required by this Article to take such measures as may be necessary to establish jurisdiction in all circumstances over the offence and to that end to enact or amend legislation whereby their courts will have jurisdiction over the hijacking or any act of violence such as murder directed against passengers or crew in connection therewith. Since the state of registration cannot exercise jurisdiction over the hijacker in case he is physically outside its jurisdiction the need for adequate arrangements was recognized.

Article 4 of the Hague Convention is indeed an improvement for the reason that two new mandatory bases for the exercise of jurisdiction have been added : one, jurisdiction of the state of the lessee based on the lease of an aircraft without crew to a person whose principal place

of business or permanent residence is in a contracting state,[47] two, jurisdiction of the state of landing based upon the alleged offender found in the territory of a contracting state and upon the failure of that state to extradite the offender. Article 4, infact provides for technical purposes application of four principles relating to exercise of state jurisdiction over crimes viz. the active nationality principle, the passive nationality principle, the protective principle, and the universal principle.[48] This article, requiring each contracting party to take such measures as may be necessary to establish jurisdiction in all circumstances, comes very close to establishing universal jurisdiction. It, however, does not say which state is to have priority in the exercise of jurisdiction in case of conflicting claim in respect of establishing jurisdiction over the offender and so fails to solve the problem of conflict of jurisdiction. The danger is that, in place of insufficient jurisdiction existing so far with regard to crimes committed on board an aircraft, there may be henceforward too much of jurisdiction resulting in conflict of jurisdictions. The Convention could lay down some criteria for determining priority of jurisdiction notably the nationality of the parties, the *locus*

47. Article 4 paragraph 1 (c) provides for jurisdiction to cover situation of interchange of aircrafts with a view to extending jurisdiction of contracting states to offences which have been committed on board aircraft leased without crew to lessee. Article 5 of the Convention meets another situation of joint or international registration of civil aircrafts. According to it, states which operate aircrafts subject to joint or international registration, shall designate for each aircraft the state among them which shall exercise the jurisdiction and have the attribute of the state of registration for the purpose of this convention. This provides an interesting solution in order to deal with a complicated situation of joint or international registration of aircrafts.

48. The principles of international law with regard to exercise of juurisdiction over crimes committed on board aircraft are: (i) the territorial principles which recognizes that every state may punish crimes committed on its own territory, whether by its own nationals or by foreigners; (ii) the active nationality principle stressing that each state may punish crimes committed anywhere by its own nationals; (iii) the passive nationality principle which asserts that every state has a right ro punish crimes wherever committed and of which their own nationals are victimes; (iv) the universal principle authorising all states to punish crimes of a henious nature which threaten international community as a whole e. g piracy, and (v) the protective principle which maintains that states may punish crimes wherever committed and which directly threaten their own security. See O H. N, Robertson, *Rights in Air Space*, 1965, pp 74-75. Cheng, "Crimes on board Aircraft" 12 *C. L, P.* 1959, p. 177; Sarkar "The Problem of Crimes in International Law", 11 *ILCQ* 1962, pp 4 8-470, Myres S McDougal, H. D. Lasswell and I. A. Vlasic, *Law and Public Order in Space*, 1963 pp. 695-702.

of the crimes, or the *situs* of real or personal property. Further, the problem lies in the fact that the Convention only require contracting states to "establish their jurisdiction" which only means they must enact laws conferring jurisdiction on their courts. But it cannot compel states to exercise such jurisdiction in particuler when they lack power to do so under their own law. Infact, when a state would exercise its jurisdiction would depend upon the circumstances of each case involving several complications, ranging from political issues such as extradition and the right of asylum, on the one hand, to the practical problem of keeping hijackers in custody on board aircraft or at airports, on the other.

If the state of registration of aircraft cannot exercise jurisdiction over the hijacker because he is physically outside its jurisdiction, it becomes necessary to have adequate arrangements for the return of the hijackar to the state of registration and such return is normally affected by the use of extradition procedures. In the state of registration or the state of lessee fails to obtain extradition of the hijacker from the state of landing, from whose territory he escapes, the state to which he has fled will be competent to prosecute him it does not extradite him pursuant to article 8 of the Convention to the state of registration, the state of lessee.[49] Such a state in whose territory the hijackar is present, if it is not one of the states mentioned above, can only prosecute him for associated acts of violence in accordance with its domestic law or the applicable rules of international law. Here lies a loophole for hijacker who escapes to a state other than the state of registration and the state of registration and the state of the lessee which may fail to obtain his extradition. Although the Convention requires each contracting state "*without exception whatsoever*" to submit a hijacker found within its territory to its competant authorities for the purpose of prosecution, unless it chooses to extradite him.[50]

49. Article 4 para 2 of the Hague Convention. Japan claimed universal jurisdiction over hijackers (all persons not necessarily Japanese nationals) on all aircrafts not necessarily aircrafts registered in Japan) Australia Law of 1962 also applies to all aircrafts which started, ended or should have ended their flight in Australia.

50. Article 7 of the Convention. The decision to prosecute or not must be taken "in the same manner as in the case of any ordinary offence of a serious nature under the law of tat state", and this gives a discretion to a state to treat an offender leniently. This article reminds one of Article 2 of the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extorsion that are of International Significance, which was adopted by the O. A. S. General Assembly at a special session on February 2, 1971. This Convention, with a view to preventing and punishing

to be directed not against a state but against the individuals responsible. The universality principle : that a crime may be prosecuted in any country in the world is recognized by some countries but regarded by others as contarary to international law. The International Law Association in 1970 and the *Institute de Droit International* at its zagreb meeting in 1971 recommended that hijacking be subjected to universal jurisdiction as it threatened international communication to the same extent as done by piracy and it injured the international community and international order as a whole. Moreover, universal jurisdiction over hijacking may be justified on the ground that a state is entitled to claim universal jurisdiction over all acts which are crimes under its own laws as well as of the state where they are committed. The internationalization of an offence means that, irrespective of the place where such an offence is committed, national law and courts are competent to prosccute the presumed perpetrator of the offence. It follows that, in case any criminal offence committed on board an aircraft is declared as an "international crime", all states will becomc competent to try any case of unlawful seizure of aircraft without regard to the place where the offence is committed. The practical consequences of this would be two fold : first, this will make it possible for any state to prosecute and punish the hijacker and so the problem of conflict in criminal law of different countries will be cluminated, and, two, hijacking would not be treated as "political' offence howsoever politically motivated it may be, and so, the perpetrators of the offences connected with hijacking would be deprived of the shelter of political asylum.

The proponeets of internationalization of the offence of hijacking maintain that, until the hijackers can find political asylum or some place to go to for a refuge and to be treated as a hero rather than a criminal that he is, and so long as there exists no objective criterion to eliminate subjective evaluation of an act as a political or as a common crime, hijackings will continue.[58] Although internationalization may

58. Here one is reminded of the Convention to Prevent and Punish Acts of Terrorism (February '2, 1971). Article 2 of the Convention describes the terrorist acts as common crimes of international significance *"regardless of motives"* a term which serves to objectify the facts of terrorism by eliminating the subjective political or social considerations of the dead" Article 3 of this Convention says "oersons who take part in the conception, preparation, or execution of the criminal acts mentioned in this Convention shall not be protcted by territorial or diplomatic asylum and shall be subject to extradition. In every case the determination in this regard is to be made by the state under whose jurisdiction or protection such persons are located." See "Inter-American Juridical Committee : Statement of Reasons for the Drafs Convention on Terrorism and Kidnapping", 9 *Int. Leg. Mats.* November 1970, No. 6 pp. 1250-1273.

make it possible to prosecute and punish the hijacker, perhaps it may rarely facilitate the effective repression of unlawful seizure for two reasons : *firstly.* the agreement on internationalization of hijacking cannot obligate states to prosecute their own nationals or persons to whom they have granted asylum. and *secondly.* because of political elements involved in hijacking, states will be reluctant to adhere to a Convention obligating them to prosecute persons who are considered by them to have committed a political offence abroad or whom they do not wish to prosecute f.r political reasons. However, though an agreement seemed towards internationalizing hijacking may not be acceptable to the states not wishing to prosecute the offenders for political reasons, it may have the beneficial result of confining the offender to his country of origin or asylum, because any other state can prosocute him if he were to venture on to its territory. Also, the basic approach, that hijacking is a crime that merits the application on the universal principles of jurisdiction, is sound as it does not seem absurd to provide for severe and effective punishment of hijacking on the same basis as for war crimes or genocide. The concept of international crime has long been recognized in international law. But despite the recognition of international criminality, international criminal law does not exist in any material sense and the means of trying international crimes remain haphazrd in the absence of an international criminal court.

The Hague convention has also not succeeded in reconciling the duty of all states to repress aerial piracy with the rights of states to grant asylum, especially to political refugees with and indeed the developing right of such persons to seek refuge from prosecution. Article 4 of the Hague Convention requires each party to take such measures as may be necessary to establish its jurisdiction in four cases which include the case where the aircraft on board which the offence is committed lands in its territory with the alleged offender on board, and the case where the alleged offender is present in its territory and is not extradited. This asserts jurisdiction by the contracting states over the hijacking committed by nationals of other states on aircrafts registered in other states.[59] Although the contracting states are required to establish their jurisdiction this means only that they must pass laws conferring jurisdiction on their courts but they are under no obligation to exercise such jurisdiction.[60]

But the Hague Convention gives to the detaining state an option of extraditing the hijacker rather than of prosecuting him. Article 8

59. See also S. Shubber, "Aircraft Hijacking under the Hague Convention, 1970 A New Regime" 22 *ICLQ* 1973 p. 687.

60. See Michael Akehurst; "Hijacking" 14 *IJIL*, 1974, pp 84-85.

of the Convention provides that hijacking is to be deemed an extraditable offence and leaves it to national laws of contracting states to determine whether or not in a given case the hijacker should be extradited.[61] Extradition of the alleged offenders under international law is obligatory only where there is a treaty to that eflect and hijacking is often not included as an extraditable offence. Also, extradition treaties often provide that a state is under no obligation to extradite its own nationals or persons who have committed offences of a political nature. The Convention now implies that for states which make extradition conditional on the existence of an extradition treaty hijacking is deemed to be an extraditable offence in any extradition treaty existing between the states parties which also have given an undertaking to include the offence as an extraditable offence in any future extradition treaties between them. Thus, the Convention seeks to amend all existing extradition treaties in force between the contracting states and provides an example of a later multilateral treaty being used to amend a series of bilateral treaties between the parties to the multilateral treaty. A State relying on extradition treaty, if requested for extraditing a hijacker by another state with which it has no extradition treaty, it has an option under Article 8 to treat the Convention as a legal basis for extradition of the hijacker. For other states, which do not make extradition conditional on extradition treaty, hijacking is recognized as an extraditable offence between themselves. The Convention is a multilateral instrument but is based on the traditional bilateral concept of extradition; it however, substantially broadens the extradition alternative. But it has not altered those provisions in many extradition treaties which exclude the extradition of national or of persons alleged to have committed offences of a political nature.

The principle of extradition or prosecution of the aircraft hijackers is a new development and is based on the international law of responsibility. But under the existing law of extradition, unless a state is bound by an extradition treaty which includes hijacking as an extraditable crime, it can refuse extradition of the hijacker. Since the extradition treaties of most of the states do not include hijacking as an extraditable crime, this leaves an opportunity to the hijackers to go unpunished in most of the cases. However, the Convention opens a scope for new bilateral extradition agreements with a view to including the offence of hijacking of aircrafts in the list of extraditable offences.

The Convention clearly does not prescribe mandatory extradition and, by reserving all the local legal requirements in regard to extradi-

61. Article 8 of the Hague Convention. This provi ion borrows heavily from Article 10 of the Convention counterfieting Currency, 1929, 112 *LNTS* 371.

tion, presumably leaves open to the hijacker the plea that his offence was infact political in character.[62] But this may lead to initiate negotiations for modifying or supplementing existing extradition agreements with a view to closing the politcal offence loophole for the hijacker.[63] The Convention, apparently failed to provide for mandatory extradition of all persons accused of hijacking because of lack of agreement on this point. Whilst support for mandatory extradition came from the two Great Powers, the U.S.A. and the U.S.S.R., as well as from the circles most directly concerned with commercial aviation, including airline managements, airline labour, aviation insurers, and national and international officials connected primarily with the promotion and

62. See L. C. Green "Piracy of Aircraft and the Law" X *Alberta Law Review* 1971 pp. 72-88. Professor Green, analysing the extraditable offence of piracy as well as international conventions and jurisprudence, finds customary international law of extradition inadequate to deal with the problem of aerial hijacking and concludes that the convention provides the only effective method of dealing with the problem. As to the nature of political offences L. C. Green, "The Nature of Political Offences", 3 *The Solicitor Quarterly* 1964 p 213. While the Indian Courts do not seem to have had the opportunity to consider the nature of the political offence, see Hingorani, *The Indian Extradition Law*, 1969, p 51; the courts in a variety of other countries have taken the position enunciated by the English Judiciary *in Re Gastione* that for claiming exemption from extradition an act may be considered political offence if it "is done in furtherance of, done with the intention of assistance, as a sort of over act in the course of acting in a political manner, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands.....The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part" 1 Q. B. (1891) p. 149 at 156, 159 ; See also Schtracks V. Government of Israel Summarised in 54 *AJIL*, 1960. p. 416 at 418. Considering rhe attitudes to political offences, aerial hijackers do not seem to qualify for non-extradition, if the states requesting their extradition base their claim upon an extradttable offence.

63. Even states which played up the political factors in the hijacking act and in seeking the operation of the so-called political exception" in extradition proceedings, notably Arab States and Cuba now tend to denounce hijacking and feel that th s kind of offence cannot really be written off as a political offence. Cuba has its own legislation denouncing hijacking (Law 1226 of September 16, 1969, 8 *Int. Legal Materials*, 1969 p. 1175) and has negotiated bilateral agreement with Canada and the U. S. A. Professor Liss tzyn is opposed to a USA-Cuban agreement providing for extradition in all case without exception of the ground that the real purpose of it would be to prevent Cubans from leaving the country, including those who do so for human rights. See for his comments, Proceedings of the American Society of International Law, 65th Annual Meeting, Sept. 1971 vol. 65, No. 4, p. 93.

regulation of aviation, others opposed to it were those concernd with human rights or with special political interests and relationships or ethnic affinity.[64] The former stressed greater need to protect world air transport and its users from the perils, costs and annoyances of hijacking than the to concern themselvs for the rights of individuals choosing hijacking as a means of escape from tyrannical regime.[65] which was a cause championed by the latter group having a majority at the Hague Conference. A convention providing for mandatory extradition would indeed hardly be worth writing as it would probably have obtained few ratifications. There is no denying the fact that universal mandatory extradition may not be possible in the near future. But an alternative to mandatory extradition, and which can meet the problem of the political defence, seems to be that the asylum state, not returning the hijacker to the country from which he comes, must ensure his punishment for the criminal acts like theft of the aircraft, jeopardizing the lives of the passengers, illegal possession of weapons, illegal immigration, and so on.

All in all, perhaps a stronger convention on hijacking could not be acceptable to states participating in the Hague Conference. Notwithstanding the reasons and impediments to the development of a truly effective instrument for the prevention of suppression of unlawful seizure of aircraft, the Hague Convention as it is, through a useful step forward, does not provide an effective deterrent to the aerial hijacking unless it is essentially ratified[66] or acceded to precisly by such states as the

64. See Oliver J. Lissitzyn, "International Control of Aerial hijacking : The Role of Values and Interest", Proceedings of the American Society of International Law, 65th Annual Meeting Sept. 1971 vol 65, No. 4, pp, 81-83.

65. Article 14 of the Universal Declaration of Human Rights, 1948 says : "..... everyone has the right to seek and enjoy in other countries asylum from persecution (But) this right may not be invoked in the case of prosecution genuinely arising from non-politfcal crimes or from acts contrary to the purposes and principles of the United Nations". Then in the 1951 Convention on the Status of Refugees, Article 1 provides that asylum is to be granted to those unable or unwilling to return to their original countries because of "well-founded fear of being presecuted for reasons of race, reiigion, nationality, membership of a particular social group or political opinions". 189 *UNTS* 137 : Also many important signatories to the European Convention on Human Rights too in consideration of human rights could not be agreeable to hijackers' extradition where they had reasons to believe that they will on return be denied due process and which would be gravely violative of the human rights of the accused sought to be extradited.

66. Until January 1974 only 63 states were parties to the Hague Convention and 43 states were parties to the Montreal Convention. These States belong to all political blocs and all regions of the world including the Soviet Union and eight other communist countries, the United States, the U. K. and eleven other members of the MATO, three Arab countries, and Nine Latin-American countries.

Arab nations, Cuba and the USA which have frequently served as the hijackers' destination. Though the Convention has no general provision concerning reservations, Article 12 permits a reservation to the dispute settlement clause to the effect that any state may at the time of signature or ratification of the Convention or accession thereto declare that it is not bound by the provision for the settlement of disputes arising under the Convention by arbitration or the ICJ. Any state not signing the Convention would provide an attractive place for most hijacked airplane to be taken to. Last but not the least important limitation of the Convention is that it does not cater in regard to acts of sabotage and other violent attacks directed against international civil aviation. Peradoxically, more damage has been done to the aircrafts by terrorists on the ground at various airports than in the mid air, Perhaps, most horrendous of such acts in which no hijacking was involved, was the one at Israel's Lod airport in May 1972 when three Japanese terrorists in sympathy with the PFLP retrieved their guns from their bags and with pitiless audacity embarked on indiscriminate shooting.

(C) *Montreal Convention 1971* : The Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation adopted at Montreal on September 23, 1971[67] has attempted to take care of and deal with unlawful acts other than unlawful seizure of airfraft. Accordingly to this Convention,[68] the contracting states undertake to make the following offences punishable by severe penalties : (i) attempts to commit or being an accomplice of a person who commits or attempts to commit, or (ii) commiting an offence by unlawfully and intentionally performing "an act of violence against a person on board an aircraft in flight" so to endanger the safety of that aircraft; or (iii) destroying an aircraft in service; or causing damage to such an airfraft rendering incapable of flight or endangeting safety in flight; (iv) placing or causing to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; (v) destroying or damaging air navigation facilities or inierfering with their opertion thereby endangering the safety of the aircraft in flight; and (iv) communicating information which one knows to be false thereby endangering the safety of an aircraft in flight.

Save the description of these offences, this Convention is similar in most respects to the Hague Convention for the Suppression of unlaw-

67. For the text see 11 *IJIL*, 1971, pp. 742-748; 66 *AJIL*, 1972, pp. 455-461. It has sixteen articles and is signed by thirty-nine states.

68. Articles 1 and 2 of the Montreal Convention.

ful Seizure of Aircrafts. For instance, Article 5 of this convention, like Article 4 of the Hague Convention, requires each party to take such measures as may be necessary to establish its jurisdiction. This obligates the contracting states to pass laws conferring jurisdiction on their courts but there is no obligation to exercise such jurisdiction. Also Article 8 of the Montreal Convention is similar to the identical article of the Hague Convention which provides that the offences shall be deemed to be included as extraditable offences in any extradition treaties already existing between contracting states. The Montreal Conventien, however, fills-up some gaps left by the Hague Convention in the sense that it goes beyond hijacking into other acts of violence jeopardizing the lives of the passengers and the safety of international civil aviation.

The thrust of three conventions discussed above is undoubtedly well beyond hijacking. They reflect the viability of international law and its ability to cope with the novel problems of aviation with really a remarkable speed. They also reflect a development toward recognition of state responsibility for the enforcement of emerging international criminal law in a new field. If a state is responsible for the acts of hijackers, action can be usefully directed against that state which has organized, financed, or otherwise assisted hijackers, or has failed to act against hijackers known to be operating from its territory. But, since most hijackers operate without any overt governmental assistance effective action need to be directed against the individuals responsible. However, the limitation is that the three international conventions represent a development toward definition of merely a new offence rather than declaring unequivocally the various acts of hijacking or skyjacking as a crime under international law.[69] Unless hijacking is declared an international crime, a *hostis humanis generis*, equivalent to sea piracy, war crime and genocide, the offender will not lose the protection of his home state, nor will he be punishable by any one apprehending him, nor can he be brought for trial before an agreed ad-hoc international tribuned. In order to ensure effective trial and punishment of the hijackers it would be better if confusion about the conflict of jurisdiction were eliminated,[70] and the accused were tried in all cases by a standing

69. Compare and contrast Article 1 of the Genocide Convention which declares in unambiguous terms that : "The Contracting Parties Confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". See Genocide Convention 1948. For the text see 45 *AJIL*, supp. 7. 1951.

70. See Shawcross and Beumont on *Air Law*, 3rd ed, 1966, vol. 1, pp. 705-706; Sarkar, *supra*, p. 446; See for preferences in the matter of State jurisdiction, the 1958 Draft of a Convention on Aviation Crimes prepared by the Air

international set-up in advance. Also, it is vitally important that a convention concerning hijacking is made an independent basis for exrradition requiring contracting states to extradite hijackers irrespective of the existence of political motives.[71] Furthermore, as far

Law Committee of the International Law Association, Article 2 "what Law Applies" provided as follows :

"3.01 (1) First preference : the law of the state of the flag of aircraft, if such state has an appropriate law;

"3.01 (2) Second preference : the law of the place where the accused person first touches earth after the commission of the crime;

"3.01 (3) Third preference : the law of the state and of the place where the aircraft first touches down after the commission of the crime (This may be an emergency landing place, or a scheduled landing place);

"3.01 (4) Fourth preferences : the law of the state and of the place where the aircraft was first scheduled to touch down, or where a first landing had been planned when the flight commenced, as the normal end of the flight during which the crime was committed. (This will not be an emergency landing place);...

"3.01 (5) Fifth preference : the law of the place where the aircraft last ascended in the flight prior to commencement of the crime".

cited by HcDougal and others, *Law and Public order in Space*, 1963, pp. 697-698 fn. 141.

The question of the jurisdiction is indeed of considerable practical importance as states have shown themselves particularly sensitive to otherr states assuming jurisdiction over their nationala for crimes committed abroad. It has been studied at a series of international congresses of comparative and penal law and notwithstanding the fact that the subject is not free from difficulty, it may be relevant to quote here the passage from the Introduction to the Draft Convention of the Harvard Research : "The investigation indicates that states have much more in common with respect to penal jurisdiction than is generally appreciated, that the gulf between those states which stress traditionally the territorial principle and the states which make an extensive use of other principles is by no means wide as has been generally assumed, that there are other practicable bases of compromise, without sacrifice of any essential state interest, on most if not all the controverted questions, and that if is feasible to attempt a definition of penal jurisdiction in a carefully integrated instrument which combines recognition of the jurisdiction asserted by most states is their national legislation and jurisprudence with such limitations and safeguards as may be calculated to make broad definitions of competence acceptable to all", 29 *AJIL*, 1935, Suppl. pp. 446-447.

71. There are several treaties and multilateral conventions which lay down that persons committing crimes with political motives have to be extradited. For instance, *The Belgian Attentant clause*, 1856; *Harvard Research, Extradition*, 1935, pp. 115-118; Art. 228 of the Treaty of Peace with Germany surrendering war criminals to the Allied Powers; Convention for the Prevention and Punishment of Terrorism signed at Geneva in 1937 19 *BYIL*, 1938, p. 214; and Convention to Prevent and Punish the

as the States granting asylum to the hijackers are concerned, account should be taken of the principles on the grantlng of asylum are embodied in the United Nations Declaration on Territorial Asylum of 1967,[72] this *inter-alia*, lays down guidelines as to who is entitled to grant political asylum, to whom and on what grounds, and excludes from the privilege incidentally, individuals suspected of war crimes, crimes against peace, or crimes against humanity. The limiting of political asylum by the Declaration as well as the caution the shown by states in granting it can as well be extended to the crime of hijacking. Bilateral agreements[73] on hijacking or extradition, subject to the traditional substantive and procedural safeguards namely, non-extradition of nationals, political offence exception, human rights consideration, political asylum etc, would only restrict the punishment measures and operation of the existing conventions on hijacking.

These three conventions discussed above may have some deterrent effect in reducing if not eliminating the number of cases of aerial

Acts of Terrorism taking the form of Crimes Against Persons and Related Extortion that are of International Significance, Washington, Feb. 1971 See 65 *AJIL* 1971, pp. 898-901.

72. G. A. Res 2312 (XXII), December 14, 1967; p. Weis, "The United Nations Declaration on Territorial Asylum." 7 *Canadian Yr Book of International Law* 1969, p. 92. In addition see the two judgements delivered by the ICJ in the *Haya de la Torre* case for the principles on the granting of asylum, ICJ. Reports, 1950, pp 2 6; and *ibid* 1951, pp. 71 ff., for discussion of the cases, see Alona E. Evans, "The Colombian-peruvian Asylum case : The practice of Diplomatic Asylum," 46 *AJIL*, 1952, pp 142-157 and J. L. F. Van Essen, "Some Reflactions on the judgement in the Asylum and Haya de la Torre cases" 1 *ICLQ*, 1952, pp 533-539.
In the case of hijacking of Indian Airlines Fokker Friendship plane to Lahore, the Government of Pakistan not only failed to return the two alleged offenders, but announced that they had been given asylum in Pakistan and that too without first disarming them and taking them into custody for their criminal acts, see the Memorial submitted by the Government of India in the Appeal Relating to the Jurisdiction of the ICAO Council, Chapter IV (1) para (e), 12 *AJIL*, 1972 p. 432.

73. See Alona E. Evans, "The New Extradition Treaties of the United States", 59 *AJIL* 1965, pp 351-362; Satyadeva Bedi, "Pre-requisites for Extradition to and from Commonwealth Countries," 12 *IJIL*, 1972 pp 25 -262; Regional Treaties on extradition have been drawn up not only within the American system but also by the members of the Council of Europe, see European Convention on extradition, UN Treaty see, vol. 359, p. 273. The Asian-African Legal Consultative Committee in 1961 had also prepared a set of draft articles embodying the principles of extradition. The Committee was divided on the question whether a multilateral treaty or a series of bilateral treaties should be concluded. Fourte Session, Tokyo 1961 pp 18-41. See in general I. A. Shearer, *Extradion in International Laws* 1919.

hijacking, provided : that they are accepted and ratified widely; that the contracting parties amend their criminal legisiation in order to make the penal clauses of these conventions effective; that they treat hijacking as a serious offence carrying a substantial penalty; and that, in the matter of granting asylum to hijackers or accepting the defence of political offence, they modify the traditional approach to extradition requests with a view to making the Conventions effective. The institution of extradition is infact an instrument of international cooperation for the suppression of crime in the present times of rapid development of communications enabling offenders to run away from the country where the crime was committed. Its purpose is defeated by the rule of non-extradition of political offenders and their right of asylum, which has considerably wider scope the extent it refers not only to the obligation not to extradite political offenders and implying a positive duty to receive them, but also embraces victims of prosecution fleeing from the country of oppression. In view of the consistent trend of growing acceptance by the world community of "collective self-determination" as a general principle of international law and as an inherent right.[74] the climate seems favourable to rebellion and insurgency as persecution alike. In view of this development, the principle of non-extradition of political offenders as well as their right of asylum require precise formulation in connection with hijacking resorted to for purpose of realization of the right of self-determination.

Although these conventions relating to aerial hijacking do not provide a complete and foolproof answer to problems of threat to international civil aviation, they embody the state of international law as it exists in contemporary international society. They require contracting states, as a matter of urgency, to take all possible steps to ensure that no act of unlawful seizure and no unlawful act against the safety of civil aviation would go unpunished. With this knowledge that, if such offences are committed, any escape from the state of registration would not help because either one will be extradited by the state of landing to the state of registration, or prosecuted by the state of landing. Consequently, any person who is of sound mind and is a non-political offender may be deterred from carrying out the offences covered by the Conventions discussed above. However, a fully effective legal deterrent to deal

74. See Articles 1(2) and 55, and Chapters XI, XII and XIII of the United Nations Charter and the prolific history of United Nations General Assembly resolutions pouring out a kind of quasi-anticolonial legislation which exhibit a recurring and confirned belief in the right of self-determination See Rupert Emerson, "The New Higher Law of Anti-Colonialism" in Karal Deutsch and Stanley Hoffmann, ed., The Relevance of International Law, *Essays in Honor of Lea Gross*, 1968, pp 153 174.

with political offenders or with mentally deranged persons resorting to hijacking is yet to be evolved and in this regard perhaps a multi-disciplinary approach to the problem might provide some solution. The existing conventions represent only a step-by step approach and admirable ability and viabillty of modern international law to evolve by agreement a new set of principles in order to cope with the novel problem of hijacking with rather a remarkable speed.

III. Resolution and Declarations By International Organizations :

Apart from the amendments in the national laws and adoption of multilateral conventions reflecting a legel response of the world community to the problem of aerial hijacking, a significant development is a series of resolutions and declarations adopted from time to time by the ICAO Assembly and Council and by the U.N. General Assembly and Security Council. These resolutions are expressive of global concern and world's painful fight against terrorism in the skies which has exploded into a world-wide hazard to international civil aviation and which can be countered only by concorted international collaboration.

The ICAO has made concerted efforts to grapple with the problem of hijacking since the Tokyo Convention was adopted in 1963. Since the ICAO'S primary function has been *inter-alia*, "to ensure the safe and orderly growth of international civil aviation throughout the world,"[75] its competent bodies have given serious thought to the question of crimes commited on board aircraft or affecting international civil aviation. They have also suggested what legal measures can be taken to counteract the growing menace of hijacking. It adopted a resolution on 26 September 1968 on unlawful seizure of aircraft inviting states to give effect to the principles of Article II of the Tokyo Convention even before ratifying or adhering to the convention.[76] The ICAO Council also urged contracting states to co operate with any state whose aircraft had been the subject of seizure,[77] and declared that unlawful interference with international civil aviation was not to be tolerated.[78]

75. Art. 44 of the Chicago Convention on International Civil Aviation, 1944, D. H. N. Fohnson, *Rights in Air space*, 1965, pp 62-69; For the accomplishments of this organization, see Thomas Buergentha!, *Law making in the International Civil Aviation Organization*, 1969; Walter Binaghi, "The Role of the International Civil Aviation Organization" in Edward Mcwhinney and Martin A. Bradley (ed). *The Freedom of the Air*, 1968, pp. 17-29; S. C. Chaturvedi, "Hijacking and the Law", 11 *IJIL* 1971, pp. 89-105, at 93-97.
76. ICAO Assembly Resolution A 16-37.
77. ICAO Council Resolution of 16 December, 1968.
78. ICAO Council Resolution of 10 April, 1969.

In a series of resolutions the ICAO has during last few years condemned acts of violence directed against aircraft crews, passengers, and civil aviation personnel. It has also urged states not to tolerate under any circumstances such acts and, pending the coming into force of appropriate international convention, to take effective measures to deter and prevent such acts as well as to ensure the prosecution or extradition of the offenders in accordance with their national laws. The ICAO has further urged cotracting States to implement as soon as possible its recommendations, in particular, in the matter of establishing local airport security committees and the exchange and dissemination of information.[79] It has also called upon states, upon a request fr mo a Contracting party of the conventions of aerial hajacking, to consult and cooperate in taking joint action in accordance with international law without including measures such as the suspension of international air transport services to and from any state which has after a unlawful seizure of aircraft detained passengers, crew, or aircraft for blachmail purposes, or which fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes.[80] The ICAO has appealed for the restoration of the hijacked aircraft to those who are lawfully entitled to possession, and for the resumption of uninterrupted flights and the safety of crews, pressengers and cargo. It has declared the need of concerted action on the part of states towards suppressing all acts jeopardising the safe and orderly development of international civil air transport.

Likewise, the United Nations General Assembly and Security Council too have expressed their concern at the increasing incidence of hijacking and other acts of violence directed against international civil aviation. They have also passed several resolutions calling upon states to take all possible suitable measures to prevent such acts. For instance, the General Assembly, vide resolution 2551 (XXIV) of December 12, 1969, condemed without exception the threat or use of force and all acts of violence related to aerial hijacking or other interference with civil air travel directed against passengers, crew and aircrafts engaged in air navigation facilities and aeronautical communications. Another resolution 2654 (XXV) of November 25, 1970, condemed and declared aerial hijacking as an act of wrongful interference with free and uninterrupted civil air travel jeopardising the lives and safety of the passengers and the crew and constituting a violation of their human

79. See in particular ICAO Assembly Reesolutions A 17-1,2,5,20, and A 18-10.
80. See ICAO Council resolution of October 1, 1970, *Int. Leg. Materials*, November No. 6, 1970 pp 1274-1285; ICAO Council resolution *ibid*, pp. 1286-1287; also 65 *AJIL*, 1971, pp 452-454.

rights. It called upon all states to take all appropriate measures to deter, prevent or suppress all such acts within their jurisdiction at every stage of execution of the acts of hijacking, and to provide for the prosecution, punishment or extradition of persons who perpetrate such acts in a manner commensurate with the gravity of those crimes. It also called upon them to take joint or separate concerted action in accordance with the U. N. Charter and in cooperation with the U. N. and the ICAO in order to suppress all such acts and to ensure that passengers, crew and aircraft are not used as a means of extorting advantage of any kind.[81]

These almost unanimous resolutions of the ICAO and the U. N. Assembly have unambiguously condemned all acts of aerial hijacking or other interference with civil air travel, whether originally national or international, and have exhorted states either to prosecute and punish the offenders or to extradite them. The value of these resolutions is that they help in establishing a climate of international opinion that is favourable to the development of law in this new area. It is true that these resolutions are only recommendatory and are not binding. But, in the present author's opinion, such resolutions may provide evidence of customary law when novel problems arise with unpredictable implications and, in particular, when states prefer to regulate these by a fluid and imprecisely evolving customary law rather than by a treaty. They tend to pave the way for later reformulation of the rules relating to the new problem in a more precise form of a treaty.[82] For instance, the General Assembly has given proof of its role in the direct and formal

81. See S. C. Resolution 286 of September 9, 1970 and G, A. resolution 26-45 (XXV) of November 25, 1970, 65 *AJIL* 1971 pp 445-447, also I *Int. Leg. Materials*, Nov. No. 6. 1970, pp. 1250-1273.

82. See as to legal significance of General Assembly resolutions, Obed y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, 1966; Roselyn Higgins observes : "Resolutions of the Assembly are not *per se* binding : though those rules of general international law which they may embody are binding on member states, with or without the help of the resolutions. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence" See *The Development of International Law Through the Political Organs of the United Nations*, 1963, p. 5; also D. H. N. Johnson. "The Effect of Resolutions of the General Assembly" 32 *BYIL* 1955-56 p. 97. This has precisely ha pened in space law as the relevant rules were first contained in a series of G. A. resolutions and the precise law of outer space was eventually drawn up at a later stage with outer space Treaty of January 27, 1967. 9ee Michael Akehurst, *A Modern Introduction to International Law*, 1970, pp. 43-44, 239-241.

consecration of rules of international law by means of categorical pronouncements about the juridical character of certain principles relating to self-determination and granting of independence to colonial countries and peoples, and activities of states in exploration and use of outer space.[83]

In order to determine the legal value and the binding force of the resolutions of international organizations, one may not insist on exaggerated juridical formalism, or on categorical and radical distinction between what is absolutely binding and what is not, but should take cognizence of emerging norms of nascent legal force which cover hazy, transitional, embryonic and inchoate situations with such cumulative effect that in the words of Lauterpacht, "a point is reached when the persistent disregard 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 principles and purposes of the Charter".[84] 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 a resolution of international organization 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.[85] If international law is nothing more or less than what States think it is, then may it not be held that particular rules of international law owe their existence and transmutations to the flow of international consensus which is reflective of inductively verifiable psychology ?

The tendency of the U. N. General Assembly to pass resolutions purporting to declare and proclaim the existence of various rules of international law pertaining to new problems confronted by the world community (e. g. on matters, such as anti-colonialism, self-determination, outer space, aparthied, and sovereignty over natural resources) has strengthened the notion of consensus of States embodying the best and most objective description of how states view international law on a given problem. Though the term 'consensus' is very ambiguous,[86]

83. G. A. Res. 1962 (XVIII) of Dec. 13, 1963.

84. See Lauterpacht's individual opinion annexed to an advisory opinion of ICJ Reports, in 1955 in "Voting Procedure", ICJ Reports, 1955, p. 120.

85. See for a recent study of the juridical effects of United Nations resolutions and of the attitudes of Member states, Jorge Castaneda, *Legal Effects of United Nations Resolutions 1969*, pp 1-21, 165-196

86. In Latin the word "consensus" means agreement, accord, sympathy, common feeling. See Murray, *New English Dictionary on Historical Principles*, 1905. But Professor Irving L. Horowits refers to as many as

however, in the field of political science, the term is used to indicate a continuum between simple majority agreement and unanimous shared beliefs.[87] According to Quincy Wright : "The law-making effect of such resolutions depends, not on their acceptance by a two-third majority of the Assembly in accordance with the formal requirement of the Charter, but on the actual generality of acceptance including all of the States with substantial interest in the subject."[88] Whilst Quincy tWright equates 'consensus' with 'consent', for Professor Ben Chang, 'Consensus' is the equivalent of *opinio juris* to the extent it contains two constitutive elements the material and the psychological.[89] In the opinion of the present writer, the resolutions adopted by the U. N. General Assembly or the ICAO on the new problems of international concern, such as hijacking, are declaratory of international public policy and are binding on the members of international community at large and not merely on the members of a particular international organization. This quality of universality imposes on all states rights and obligations in the enforcement of public policy which aims toward the long term development of international law and organization and human society's slow progress toward a true international order. Even though the Tokyo Convention, 1963, the Hague Convention, 1970, and he Montreal Convention 1971, do not receive universal ratification,[90]

eight shades of meaning of the term in the contemporary sociology, see "Consensus, Conflict, and cooperation : A Sociological Inventory" 41 *Social Forces*, 1962 p. 177.

87. Herbert Moclosky, "Consensus and Ideology in American Politics" 63 *American Political Science Review*. 1964, p. 361-363. Professor Qunicy wrigh, uses "substantial unanimity" as a synony of "Consensus", "Custom as a Basis for International Law in the Post-war World", 2 *Texas Int. Forum*, 1966, p. 147.

88. *Ibid*, 158.

89. "United Nations Resolutions on Outer Space; Instant International Customary Law M" 5 *Indian Journal of Int.' 1 Law*, 1965, pp 35-48 See also for an interesting study on the topic Anthony D' Amato, "On Consensus" VIII *The Canadian year book of Int.' 1 Law*, 1970 pp 104-122. He concludes that there is no metarule of the legislative effect of declarations of consensus though there are develomental signs. See Richard A Falf, "On the Quasi-Legislative Competence of the General Assembly", 60 *AJIL*, 1966, p. 782.

90. In January 1974, 63 states were parties to the Hague Convention and 43 states were parties to the Montreal Convention. Considering that there are more than 130 states in the world, these figures of ratification may seem to be rather unimpressive, but the number is still commendable in view of the procedural delay involved in the ratification of multilateral conventions. It is all the more appreciable to note that the states belonging to different political blocs, communist, capitalist, developing as well as

the general principles of international law, as contained in the above-mentioned three conventions and international public policy proclaimed in the declarations and resolutions adopted by the ICAO and the United Nations bodies, create binding obligations to deter, prevent and punish offenders and potential offenders in the matter of unlawful interference with civil aviation.

Thus, we have seen that the existing International Law furnishes rules and principles and general legal framework to deal with the menace of hijacking and, obviously, it is responding well to grapple with this new crime of aerospace age. However, there exist complex either of multiple jurisdication or of not exercising it willingly by the states concerned. Even in case a State is not directly or indirectly responsible for the acts of hijacking or a terrorism, action against the individual offenders becomes difficult because, whether the jurisdiction be universal or more limited, it remains optional for a state to exercise it notwith standing the fact that the international public policy imposes an obligation on all states individually or jointly to direct their action against the individual hijacker.[91] In case a State, which by its governmental action assists in the unlawful seizure of aircraft, or detains an aircraft after such seizure, or assists in the destruction, or creates obstacles in the immediate release of its passengers, crew and cargo, the ordinary rules of international law concerning State responsibility can be applied to hijacking without any difficulty.[92] Hence, State responsibility or liability arises : (a) if a State organizes, finances, or in any way assists hijackers; (b) if it fails to act against hijackers who are known to be operating from it territory, or allows knowingly its territory to be used for hijacking or terrorist acts or attacks on aircraft; (c) if it detains a hijacked aircraft or its crew or passengers and does not permit them to continue their

developed countries and all regions of the world have ratified these conventions.

91. The principle of universal jurisdiction of states for prosecuting and punishing hijackers had been recognized by the International Law Association Draft Resolution discussed at 54 th Conforence at the Hague in 1970. It declared aerial piracy as an offence *jure gentium* and obligated all states to take all necessary steps to seize any one committing piratical acts, whether committed on sea or in the air any where outside the jurisdiction of any state. See Report of the Fifty Fourth Conference 1971, pp. 708-709

92. For principles of states liability in respect of acts contrary to the rights of other states, see *Corfu Channel* case, I. C. J. Eeports, 1949, pp 4, 22 and *several arbitral awards Noyes* case 1933, 6 *RIAA*, p 311; Spanish Zone in Morocco, 1932, 2 *RIAA*, p. 707; Sevey case, 1929, 4 *ibid* p. 4 4; Ermerins case 1929, *ibid*, p. 476; Morton case, 1929, *ibid*, p. 428; See also Island of Palmas arbitration case, 1928, 2 *RIAA* p, 829.

journey as soon as practicable, and does not return the aircraft and its cargo to the persons lawfully entitled possession.

IV. Conclusion

It is manifest from the foregoing that the existing International law, as embodied in the three international conventions and international public policy resolutions by the U. N. O , does furnish some rules and principles and a general legal framework to grapple with the manace of hijacking and acts of terrorism against civil aircrafts. This is indicative of admirable response of the international public order to deal with the new and sensational crime of aerospace age. However, some glaring loopholes in the law as well as complex problems of decentralized application of these rules render it difficult to stamp out hijacking. Besides, several countries have chosen to stay out of the three international conventions on the subject and some of them even habitually defy the rest of mankind to offer sanctuary and succour to aerial pirates. But, it is indeed gratifying to note that recent events show that more and more countries are coming round to ensure that the crime of hijacking does not pay any longer. Though welcome this is not enough. Even the States which have signed and ratified these conventions outlawing hijacking and establishing international rules for the treatment of hijackers, find it difficult to contain and punish hijacking. The reason is that, in case no state is directly or indirectly responsible for the acts of hijacking or terrorism, although it may seem easy for a state to apprehend and take action against individual offenders, modern technology and scientific inventions have equipped the criminal to leave the *foro delicti commissi.* Furthermore, no state can take a grave risk and overlook the hazards of taking a tough stand by hitting back against hijackers of every hue, or by immobilizing the hijacked aircraft and leaving for them no alternative to unconditional surrender. Perhaps, steps like mandatory search of every passenger at the entry in airports, supplemented by magnetometer or other electronic devices to keep track of weapons carried by passengers on their persons or in their baggages; providing for locked and bulletproof doors of the cockpit and insulating them fully from the passengers' cabins; and posting of sky marshals on board all the civil aircrafts will be eminently worthwhile preventive measures which may act as deterrent to the hijackers.

As regards the problem of multiple jurisdictions and of decentralized application of the evolving law relating to hijacking for the purpose of apprehending and punishing the accused, the present writer is of firm opinion that in the current progression of the Crimes that

cross national boundaries (viz. crimes of violence, war crimes, distruction of or deamaging of submarine cables, acts of inhumanity, genocide, traffic in woman, sea piracy, racial discrimination, illicit drugtrafficking across frontiers, ecological crimes, and kidnapping and other offences of the same character)[93] municipal court system cannot cope with the effects of the communications revolution and the social and technological changes in which the 20th century world finds itself. Obviously, new ground must be broken in the international arena by strengthening the movement for the establishment of International Criminal Court with investigatory as well as judicial and punitive functions. As a result of continued sense of outrage rising from offences committed against the peoples of the world and having reperoussions on relations between states as well as because of the fact that offenders manage to escape penalties, the world society has developed in a piecemeal way a substantive body of international criminal code, however inadequate, in various accords and conventions as well as customs and practices among States. What is urgently required now is an international court with limited jurisdiction in respect of offences and sanctions but with the capacity to expand and giving an option with respect to the guidelines by which nations could prefer to be bound. Whilst the concept of international crime has long been recognized by international law the present means of trying international crimes are haphazard and unjust. Existance of international crimes even in present amorphous state suggests need of establishing international criminal court whose jurisdiction is voluntarily acceptable to States, because whilst some Governments may accept strictures on new offences like hijacking and criminal pollution endangering health and safety of mankind others might reject crimes like racial discrimination and suppression of human rights. Nations may retain primary jurisdiction over offences which have been traditionally tried by them or may extradite offenders to other countries according to extradition treaties. But, the new offences, like hijacking, which are the product of modern technology and its impact on transportation, can be controlled only through a combined effort of states and suggest need of having the accused tried and sentenced by an international criminal court.

Hijacking of aircraft, including sabotage and other attacks, is an abhorrent crime which merits the application of the universal principle

93. International offences have been dealt with by International Coventions such as she Convention on Drugs (New York 30-3.61) on Genocide (United Nations 3-12-40) and (Geneva 12-9-23), on white slave Traffic (Paris, 4-5-10 and Geneva 20-9-21); on Destruction and Damaging of Submarine cables (Paris 14/3/84 reinformed by Treaty of Vesailles).

of jurisdiction and severe and effective punishment. This can be assured only when all states are obliged : to punish the perpetrators of this crime as an offence *jure gentium* : to define these offences in their municipal laws as well as to provide therein for severe and effective punishment; or to accept, in accordance with their treaty obligations and municipal laws, mandatory extradition of persons accused or condemned for the crime of hijacking to the state having genuine interest in punishing the offender; or to hand them over for trial to an International Criminal Court. This was the solution provided by the Terrorist Convention of the 1930 dealing with the same type of problem That Convention unfortunately, remained unratified though India had ratified it.

The problem of reconciling the duty of all states to repress the crime of hijacking (having political motives) with their right to grant asylum is indeed more complicated, as it seems questionable to obligate states refuse asylum to refugees who escape from political persecution by using punishable way of hijacking. However, the only sensible solution seems to be that such offenders may safely be handed over by the asylum state to the International Criminal Court so that the state concerned bears no immediate political responsibility. The traditional rule of non-extradition for political offences should not be made applicable to the offence of hijacking and the international community must therefore create an obligation for every state to extradite the persons accused of hijacking on demand by the International tribunal.

The air hijacking simply stated, is a *modus operandi*, it can be committed by individuals as well as organizations and even by Governments (acting directly or indirectly, e g. by wrongful redirection of aircraft and abetting at ports of landing or approving the hijacking way of life) and can be used both in time of peace as well as in war. Its essence lies in the threat of indiscriminate violence directed against innocent air passengers. The magnitude of the crime, its spectacular nature with a view to giving headlines in the mass media on the assumption that the end justifies the means, and its proliferation in our times when terrorism is plaguing all parts af the world, urgently requires a more ample and really complete new international convention on this kind of international crime in order to prevent and punish the authors, assaulters and terrorists committing the crime as *hostis humanis generis*. Considering the seriousness of the acts which form the causes of this international crime it seems also necessary to take cognizance of all acts of an international character which are causative of the acts of piracy and to obligate all states to take all possible steps to prevent and to penalize them simultaneously with the penalization of piracy. The conscience of mankind

is affronted by aerial piracy and unlawful seizure of aircraft and what is necessary in the present writer's opinion, is a ten-pronged approach ;

(a) defining and proclaiming air-hijacking and air piracy as an international crime, for instance Genecide, Art. I;

(b) establishing universal jurisdiction of all states over the crime; viz. Sea Piracy;

(c) affirming the fundamental principle of obligation of states to punish the crime by taking the proper measures in their laws, fully defining them and providing for the imposition of heavy and effective penalities, e.g. Genocide Art. II, III, IV and V; Obscene publications, Art. I; White Slave Traffic, Arts. 1, 2, 3;

(d) Providing for compulsory extradition to the state most directly affected or to the international tribunal, as Drugs, Art. 36, 2 (b); Genocide Art. 7; White Slave Traffic, Pars, Art. 5;

(e) denying this crime the status of a political crime for the purpose of extradition e.g. Genocide Art. 3;

(f) Withholding asylum from perpetrators of this crime and also from the persons against whom there is *a prima facie* evidence that he or she had been involved in an attempt to commit such crimes against any aircraft whether on the ground or in the air e.g. Prevention and Repression of Terrorism Art. II, n. 2, Art. VIII n. 3;

(g) developing an effective international collaboration for prevention and punishment of the offence regardless of nationality of the offender and regardless of the place of commission of the offence and regardless of the state of registration of the aircraft involved, e.g. The Treaty of International penal Law of *Montevedio* Art 14;

(h) establishing an International Criminal Court within or without the UNO having an optional jurisdiction, concurrent with national courts and to which a state may transfer an accused from its own court for trial and which would be responsible for trying any criminal case of an international character, provided such a case is submitted to this court;

(i) providing for increased surveillance of passengers boarding aircraft;

(j) providing sanctions agalnst non complying states by methods such as cutting off air services to states abetting the crime or harbouring the offenders.

RELATION OF INTERNATIONAL LAW TO INTERNAL LAW UNDER THE INDIAN CONSTITUTION

J. N. SAXENA*

In the discussion of the subject concerning relationship between international law and municipal law, the practical question is : how a court will decide a particular situation where there is conflict between the rules of international law and the rules of municipal law. The question may become relevent under two circumstances. The particular situation may arise before an international tribunal which will have to decide the question of primacy i. e., whether international law takes precedence over municipal law or vice versa. On the other hand, if the conflict situation arises before a municipal court the answer will be dependent on the extent to which the constitutional law of the State permits international law to be applied directly by the courts. The scope of this paper is confined to the second part of the problems only and the attempt is to find out the contribution of the Indian courts in clarifying and developing the law relating to that aspect in view of the relevent provisions in the Constitution of India, 1950.

A question of international law before the Indian courts can be studied under two heads:

A. Customary International Law as part of the Indian Law; and

B. Treaty Rules and their relation to Indian law.

Before taking up the two aspects of the problem, it would be better to keep in mind that India became independent only in 1947. Before that, its external relations with foreign states constituted part of British foreign policy although it had a measure of internal personality even before independence. Although the Constitution of indepedent India came in force on 26th January 1950, for an understanding of the problems, it will be fruitful to study the position under the common law of England which was followed by the courts in India.

A. Customary International Law as part of the Indian Law.

It has been accepted as a basic principle of long standing in Common Law that international law is part of the law of the land. This proposition, known as the doctrine of adoption or incorporation, was

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stated in 1965 by Blackstone as followed to the effect that the law of nations is adopted in its full extent by the Common Law and is held to be part of the land. And the Acts of Parliament made to enforce this law or to facilitate its execution are not introductive of any new rule but merely declaratory of thereof.

This rule, that the law of nations is part of the law of Engiand was acted upon in a number of cases.[2] It suffered a slight reverse as a result of the dicta of some judges in *R. V. Keyn*,[3] but it was re-affirmed in the *west Rand Gold Miuing Co. V. R.*[4] The doctrine, has been greatly qualified in later judgments. The judicial committee of the Privy Council in *Chung Chi Cheung V. R.*[5] observed :

> "The court acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevent rule is, and having found it, they will treat it as incorporated into the domestic law, so for as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals".

The law as it stood in the United kingdom and followed in India before the Constitution came into force, except for some stray observations[6] that international law was part of the law of the land (custo-

1. Commentaries on the Laws of England, Book Iv, Chap. 5, quoted by Lauterpacht, H., "Is Internat onal Law a part of the Law of England" 25 Gr. Soc. Tr. p. 51 at p. 52.
2. Viveash v. Becker, (1814) 3 M & S. 284; De Wutz v. Hendricks, (1824) S. C., 9 Moore 586; The Duke of Brunswick v. The King of Hanover (1844) 8 Beav. 1, quoted by Lauterpacht, H., ibid, p. 54 and 55.
3. (1876), 2 Ex. D. 63. See the discussion of the case in "International Law" by Greig, D. W., p. 49.
4. (1905) 2. K. B 391. As per Lord Alvestone, C. J., at p. 406 :
   "... ... whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals to decide questions to which doctrines of international law may be relevant".
5. (1939) A. C. 160 at 168.
6. As per Latham, C. J. in Chow Hung Ching v. The King (1948), 77 C. L. R. 449 at p. 462 :
   "International law is not as such part of the law of Australia ... but a universally recognised principle of international law would be applied by our courts".
   As per Dixon J., ibid, at p. 477 :
   "In the first place the theory of Blackstone that the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here

mary law) was accepted in principle but in practice was subject to four important qualifications :

(1) International law was part of the law of land only in so far as it was incorporated into the land law by an Act of Parliament or by decisions of the Courts.[7]

(2) Owing to the doctrine of precedent prevalent in Common Law countries a court in such a country would apply its own version of a principle of international law or as laid down by the higher courts there and not the developing principles of international law.

(3) A rule of customary international law must give way to a municipal statute or enacted law,[8] on the Constitutional Principle of the supremacy of British Parliament.

(4) The practice of the British courts and followed by other common law countries, has been to deny the direct applicability of international law by taking evidence in the ordinary way, and instead accept the information from the executive on matters regarded by them as falling within the executive sphere e.g., on the question of the status of a foreign state, or government.[9] Similarly the courts will accept as conclusive any statement that the government might make on the extent of national territory. The Federal Court of India stated[10] that the fact that the subject matter of the dispute related to land claimed by both India and Pakistan was no bar to its exercising jurisdiction, for it was bound by the views expressed by the Government of India. Similary cases of Act of State by the Executive like a declaration of war, or the existence of a state of war, or an annexation of territory were not to be questioned by the municipal courts, eventhough a breach of international law might have been involved.

Inspite of these limitations the doctrine of incorporation still leaves two established rules recognised by the British Courts[11] :

adopted in its full extent by the common law, and is held to be a part of the law of the land is now regarded as without foundation. The true view held is "that international law is not a part, but is one of the sources of English law".

7. Supra note 5.
8. Mortensen v. Peters (1906) 14 S. L. T. 227.
9. Duff Development Co. Dtd. v. Kelantan (1924) A. C. 797.
10. Midnapore Zemindary Co. Ltd. V. Prove. of Bengal, AIR (36) 1949 Fed. Court, 143.
11. Starke, J.G., "An Introduction to International Law", p. 88 (7th ed. 1972).

(a) A rule of construction that Acts of Parliament are to be implemented so as not to conflict with international law, there being a presumption that Parliament did not intend to commit a breach of international law. But this rule of construction does not apply if the statute is otherwise clear and unambiguous, in which case it must be applied.[12]

(b) A rule of evidence that international law need not, like foreign law, be proved as a fact by expert evidence, and the courts will take judicial notice of its rules.

Article 51 of the Indian Constitution Provides :

(c) "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another....."

One may conclude from the distinction made in the above article between 'international law' and 'treaty obligations' that the term 'international Law' refers to customary international law. This interpretation would mean that customary international law is not incorporated into Indian municipal law ipso fact. The principle that international law is part of the law of land may, therefore, not be enforceable in the Indian Courts but in the light of above Article, the State would endeavour to foster respect for international law.

It can, however, be argued that Article 51, being in Part IV of the Indian Constitution, is only a directive principle of State policy. It is merely declaratory, and represents no modification of the practice already existing concerning the relationship of the two legal orders.

Owing to the brevity of the records of *travaux prepara toires* and the scantiness of the legal experience under the basic instrument upon this particular issue, the survey of case law that follows is necessarily of a preliminary and tentative nature.

In the case of *A. M. S. S. V. M. & Co. V. The State of Madras*,[13] the question was whether the state was entitled to abolish private right on the exploitation of chank fish in Palk Bay. The High Court, in its judgment said that it relied on principles of English Common law as well as on corresponding rules of law of nations relating to fisheries, to the maritime belt, to harbours and to estuaries.[14]

12. Mohammad Mohyud-Din V. King Emperor (India). (1946) 8 F.C.R. 94.
13. 1953 II M. L. J. 587.
14. ibid. p. 595 : "Whatever theory might ultimately find acceptance with the family of nations as to the true basis of the right which a state possesses over territorial waters, there cannot be any doubt that with reference to the rights of fishery, the marginal belt must be regarded as part of the territory of the littoral state".

In *Krishna Sharma v. Nest Bengal*[15] the Calcutta High Court observed :

"The language of Indian statutes is clear enough : in the interests of India, they seek to put restrictions in the way of trade between Indla and other countries. If that language be *in conflict wtth any principle of internationl law* as is said to be deducible from the implied provisions of the Anglo-Tibet Trade Regulation of 1914, municipal courts of India have got to obey the laws passed by the Legislature of the country to which they owe their allegiance. In interpreting and applying municipal law, these courts will try to adopt such a construction as will not bring it into conflict with rights and obligations deducible from rules of international law. If such rules, or rights and obligations are inconsistent with the positive regulations of municipal law, municipal courts cannot over-ride the latter."[16]

Similarly the Assam High Court observed in *Maharaja Bikram Kishore of Tripura V. Province of Assam*[17] :

".....it is a well established rule of construction that a statute will not be construed as over-riding international law unless the words of the statute compel the court to put such a construction upon it".

The editorial note to this case in the International Law Reports states :

"It would appear from this case, as well as from other cases, that following English law India has made International Law part of the law of the land"[18]

It would be difficult to agree with the learned editor's view if it means that international law is part of the law of India in the Blackstonian sense. It may be accepted if it expresses the traditional view subject to the very important conditions laid down earlier. However, the views expressed by the Punjab and the Kerala High Courts in later years were completely at variance with the traditional view. The punjab High Court observed :

"The courts of a country will not administer rules of international law unless the rules are sanctioned by the laws of that country"[19]

15. A.I R. 1954 Cal. 591.
16. ibid, p. 598.
17. I.L R. (1955) 64 at p. 65.
18. ibid p. 66.
19. M/S Tilakram Rambaksh v. Bank of Patiala, 31 I. L. R. (1966) 14 at p. 5; A. I. R. 1959 Punj. 440

The view of Kerala High Court was :

"I can decide only in accordance with the municipal law. As I see it, the relevant municipal law is not in conflict with international law, but even if it were, I would have to enforce it and it would be for the legislature to resolve the conflict."[20]

Again, it is well settled in India that in case of a conflict between a customary rule of international law the statements issued by the Executive the latter will be upheld by the municipal courts. When independence is granted to a territory, its courts will naturally accept the statement of their government as authoritative so far as the extent of national territory is concerned as observed by the Federal Court in *Midnapore Zemindary Co. Ltd.* v. *Province of Bengal.*[21]

It is, therefore, submitted that Indian tribunals have regarded the rules of customary international law as applicable whenever they are relevant to the adjudication of an issue of which they have jurisdiction, and concerning which there is no controlling legislation or executive act. In practice, the possibility of a conflict between customary international law and a statute is limited, although not eliminated, through the adoption by the Indian tribunals of the apparently universal rule that international law must be construed with the presumption that the legislator does not intend to violate international obligations. But in case the conflict cannot be reconciled, the Indian courts will follow the municipal legislation.

20. Steenhalf v. Collector of Customs, 31 I. L. R. (1966) 241 at p. 246-7 A. I. R. 1960 Kerala 170
21. Supra note 10. The Federal Court observed at p. 146; ".....this court cannot entertain an objection passed on the allegation that the land which is the subject matter of these proceedings is within the territories of another State when ..... the Government of this country disputes the boundary line as put forward by the Dominion of Pakistan and claims that the land in question has within the home territory ... Ordinarily, the Court takes judicial notice of the boundaries of a State but when in doubt it obtains information on the point from its own Government " The Federal Court quoted the view of the Farwell J. in Foster v. Globe Venture syndicate Ltd, (P900) 1 ch. 811, and its approval by Viscount Finlay in Duff Development Co. v. Kelantan Government, 1924 A C 7 7 where he objerved : "The judgement of Farwell J in Foster v. Globe Venture Syndicate seems to me to be a perfectly accurate statement of the law and practice on this point. There are a great many matters of which the court is bound to take judicial cognigance, and among them are all questions as to the status and boundaries of foreign powers".

B. *Treaty Rules and their Relation to Indian Law* :

"A treaty really concerns the political rather than the judicial wing of the state. When a treaty comes into existence...it has to be implemented and this can only be if all the three branches of the government viz. the legislature, the executive and judciary, or any one of them possess the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the state must equip itself with the necessary power".

(i) English Law

The rule that customary international law was part of English law, did not apply to treaty rules in the United Kingdom. A treaty duly executed and ratified by the Crown was binding under international law. But if such a treaty affected private rights, or which, for its enforcement, required an adjustment of common law or statute law, it always required an enabling legislation by Parliament. Unlike the provisions of United States[23] and French[24] constitutions, there is no general rule of English law giving the treaties an internal effect. All treaties do not have bearing on rights under municipal law.

Lord Atkin's observation in *Attorney : General for Canada* v. *Attorney General for Ontario*, succiently summarieses the position in connection with treaties within the British Empire and thus includes the position in India too, before the Indian Constitution of 1950 :

"Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of existing domestic law, requires legislative action. Unlike some other countries, the stipulation of a treaty duly ratified do nor within the Empire, by virtue of the treaty alone, have the force of law".

"The question of the proper scope of the treaty power has long been considered one of the most difficult constitutional problems in a federal system"[26]

(ii) Indian Constitution

The Constitution of India is federal with the provision of powers and functions between the Union and the States contained in the three lists : Union, State and Concurrent, There is, however no unanimity among

22 Maganbhai v. Union of India, A.I.R. 1969 S.C. 783 at p. 792.
23, United State Constitution Article VI, clause 21.
24. French Constitution of Oct. 27, 1946. Articles 26, 27 & 28.
25. (1937) A C. 326 at p. 347.
26. Looper, R.B., "The Treaty Power in India", 32 B.Y,I.L. (1955-6), 300.

the Constitutional lawyers about the nature of Indian Constitution.[27] The various provisions of the Indian Constitution (1950), that may have a bearing in relation to treaties of which India may be a signatory are laid down in Articles 51, 53, 73, 246 along with Entry 14 List I of Schedule VII and 253,

In turning to an examination of these constitutional provisions which concern the relation between conventional international law and internal law of India, it may seem that former ground has been reached than that which relates to the customary international law. But in fact uncertainties remain[28], and unlike other written constitutions such as those of the United States and France, in interpretting these provisions of the Indian Constitution, it is essential to keep in mind the innovations which have been introduced as well as the elements drawn from prior practice which must be regarded as tacitly incorporated in the new texts[29].

Article 51 (c), an article within the chapter on Directive Principles, lays down that :

the state shall endeavour to...foster respect for international law and *treaty obligations*....

It may be permissible to speculate from this article that the general pre-independce common law rule requiring enabling legislation to give internal effect to treaties is no more firmly adhered to. The doubt arises because of the judgement of the Madras High Court in *R. Menon* v. *The Collector of Customs*[30] in which the court, dealing with the question of the imposition on Mr. Menon, a penalty of Rupees one thousand under section 167(8) of the Sea Customs Act, 1878 and bearing some reference to the Imports and Exports (Control) Act, 1947 (of India), thoroughly discussed the provisions of the Customs Convention on Temporary Importation of Private Road Vehicles, an international convention (adopted by the United Nations Conference on Road and Motor Transport held at Geneva in

27. Verma, Prem, "Position Relating to Treaties under the Constitution of India", 17 J.I.L.I. (1975) 113
28. Supra note 22 at p 783 The Supreme Court observed :
"The Constitution did not include any clear direction about treaties such as is to be found in the U. S. A or the French Constitutions".
29. ibid., p. 798. The Supreme Court observed :
"Unlike the U.S.A. where the constitution is defined in express terms, we in our country can only go by inferences from our constitution, the circumstances and the precedents".
30. A.I.R. 1962 Mad. 404.

1949) of which India is a signatory. The case gives an indication that the Indian courts are tending towards a more flexible approach so far as the internal application of international agreements are concerned.[31]

It would, however, be wrong to come to any conclusion from this single case unless other relevant articles and cases are also considered.

There is distinction drawn under the Indian Constitution between treaty making and treaty-implementing power.

Article 53(1) of the Indian Constitution lays down :

The Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him *in accordance with this constitutiou.*

Again, Article 73(1) states :

(1) *Subject to the provisions of this Constitution,* the execctive power of the Union shall extend—

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.....

It is not section (1) (b) of article 73 which vests the treaty-making power in the executive, for it merely authorises the Union Executive to exercise rights arising out of a treaty. The treaty-making authority of the executive is given in section (1) (a) of that article read in conjuction with item number 14 of the Union List in the Seventh Schadule[32] which states :

Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

31. *ibld.*, p. 406.
"The confiscation of the car and imposition of the penalty have been made under item 8 of section 167 of the Sea Customs Act which will apply to importation or exportation of goods contrary to their prohibition or restriction for the time being under chapter IV of the Act. But that chapter will come into play on a proper construction of sub-clause (n) only where there is violation of the requirement to re-export the car within the specified period and not of the other limitations and conditions of notification No. 224 (of the Government of India, Department of Revenue).

32. *Supra* note 26, p. 304-5.

Thus, as the treaty making power in India vests entirely in the Union Executive, it is the President of India (in whom Article 53 vests all executive power of the Union) who enjoys the power to enter into treaties with foreign states, This power however, is not absolute, but is subject to the limitation that it must be 'in accordance with the Constitution' as provided in Article 53.

Though Article 246 states :

(1)...Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule....."

and as such, Parliament has full power to make laws with regard to Entry 14 of List I, it would be too much to plead that a treaty entered into by the executive will be available in International Law unless it is supported by a Parliamentary Act or Resolution. Far from it, the executive will be very much within its powers, and the treaty will be perfectly valid from the international law viewpoint even when it has not been informed to Parliament, For all treaties do not require Parliamentary sanction. The consitutional power of the Parliament, with regard to 'entering into treaties' therefore, may mean no more than the power to make laws sanctioning money expenditure and the power of altering existing laws for the implementation of the treaty obligations of the Union.[33]

(iii) Enforcement Power

Article 253 lays down :

Legislation for giving effect to international agreements- Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India or implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conferance, association or other body.

This article along with Entry 14 of list I of Seventh Schedula deals with enforcement part of treaties in India. In point of fact this article adds nothing to the Legislative entries 14 and 15...but confers exclusive power of law-making upon the Parliament. As the marginal note correctly represents the idea underlying the article it may be read legislation for giving effect to international agreements, and the article only says that Parliament is the authority to make such laws.[34]

33. *ibid.*, p. 305.

34. *Supra* note 22, p. J95.

This article gives a very wide power to Indian Parliament to implement treatise when compared to other federal countries. The power is given for implementation not only of any treaty, agreement or convention, but even a decision made at any international conference, association or other body. At the same time, this article removes the barrier imposed by articles 245 and 245 (3) on the power of the Union to legislate upon subjects lying under the state jurisdiction. Thus in comparison to the treaty making power, the treaty-implementing power of the Union Parliament is very substantial. It must, however, be remembered that a treaty does not become law of the land automatically under the Indian Constitution. So article 253 does not restrict the power of Union Excutive conferred upon it by Article 73. A legislation by the Union Parliament would, therefore necessary only where, for the performance of treaty obligations, an alteration in the existing laws would be required.

iv. Decided Cases

That the making of a treaty in India as an executive act as distinguished from a legislative one, wat clearly pointed out by the Calcutta High Court in *Union of India* v. *Manmull Jain.*[35] It was pleaded on behalf of respondents that the treaty by which Chandernagore had became part of India was itself without validity, as the Parliament had not legislated on the treaty by which Chandernagore was ceded to India. The Court obversed.[36]

> The contention that without parliamentary legislation making the treaty an Act of Parliament, the treaty cannot have any legal force or validity, is based on a misconception of the nature of a treaty. Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty.....but the treaty is complete without the legislation.....item 14 of List I undoubtedly provides for all legislation in connection with entering into treaties. This cannot, however, justify the conclusion that the makers of the constitution intended that no treaty should be entered into unless the Parliament has legislated on the matter. The power of legislation on this matter of entering into treaties leaves unouched the executive power of entering into treaties.....The President makes a treaty in exercise of his executive power and no court of law in India can question its validity."

35. A.I.R. 1954 Cal. 615.
36. *ibid.* p. 616-617.

This power of the Executive, however, is not absolute and in terms of Article 53, should be utilised "in accordance with this Constitution" and its extent in terms of Article 73 is "Subject to provisions of the Constitution." Thus the Supreme Court observed in *Berubari* case.[37]

> "...The treaty making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed upon it."[38]

The Supreme Court also quoted its observations from *RamJawaya* v. *TheState of Punjab*[39] where, dealing with the limits within which the Executive Government could function under the Indian Constitution, the court observed :

> The said limits can be ascertained without much difficulty by reference to the form of executive which our constitution has set up...The executive function comprises both the determination of the policy as well as carrying it into execution. This eventally includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, direction of foreign policy, in fact the carrying on or supervision of the general administration of the state...specific legislation may indeed be necessery if the Government requres certain powers in addition to what they possess under under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.[40]

It was argued on behalf of the Union of India *In re Berubari Union case*[41] that the implementation of a treaty was an excutive act and that it could be effected without any legislation under Article 253. The Supreme Court appears to have given no clear answer to this convention.[42] It would seem from the observations of the Court that it was prepare to accept that if the implementation of a treaty or agreement

37. In re *Berubari Union and Exchange of Enclaves*, 1960 S.C.R. 933.
38. *ibid.* p. 947.
39. A.I.R. 1955 S.C. 549.
40. *ibid.* p. 556-557.
41. *Supra* note 37.
42. Basu, D.D. *Commentary on the Constitution of India*" (4th ed. 1963), p. 183.
The Supreme Court had observed :
".....it is not necessary to consider the other contention raised by Attorney-General that it was within the competence of the Union Executive to enter into such an Agreement and that the Agreement can be implemented without any legislation". *Supra* note 37, p. 945.

merely involved the interpretation of an award, or the ascertainment of the disputed boundaries with the foreign state, no legislation was required. But legislation would be necessary if it involved the alienation or cession of any part of the territory of India and this required an amendment of the Constitution itself.

In *Maganbhai* v. *Union of India*,[43] the Supreme Court threw some useful light on the treaty provisions and solved the doubts left *In re Bernbari Unions' case*[44] the Court observed :

> Ordinarily an adjustment of a boundary which international law regards as valid between two nations should be recognised by the courts and the implementation thereof can always be with the Executive unless a clear case of cession is involved when Parliamentary intercession can be expected and should be had.[45]

It further observed on this point :

> If no constitutional amendment is required, the power of the Executive which extends to matters with respect to which Parliament has power to make laws can be exercised to correct boundaries now that they have been settled.[46]

In India, if the treaty involves an alternation in the existing law, legislation would be necessary.[47] For the same reason, the provisions of Universal Declaration of Human Rights[48] to which India is a party, cannot be availed of in Municipal courts where they are in conflict with the existing law of the country and cannot be enforced even on the ground of public policy.[49] It has been held that no right in favour of a private person can flow from the treaty, agreement or discussions which have taken place between the two high contracting parties.[50] Treaties, agreements and understandings between sovereign states are Acts of State outside the sphere of domestic law and they cannot be

43. *Supra* note 22.
44. *Supra* note 37.
45. *Supra* note 22, p. 798.
46. *ibid*, p. 801.
47. This position was illustrated in *Birma V. The State*, A.I.R. 1951, Raj. 127; and *Nanka V. Governor of Rajasthan* A.I.R. 1951 Raj. 153. In these cases, dealing with eaxtradition, the High Court of Rajasthan found it impossible to apply the treaty (of extradition between Dholpur State and the British Government), since it was not incorporated into the municipel law of the State by legislature enactment.
48. U.N.Doc. A/811 of 10 Dec., 1948.
49. *Bishambhar Singh* V. *State of Orissa*, A.I.R. 1957 Ori. 247 at 256.
50. *Nepal Knitting & Wearing Mills (Pvt.) Ltd.* V. *Union of India*, (1973) P.L.R. (D) 168.

enforced at the instance of private persons.[51] One exception to this rule is when the intention of the High Contracting parties is that the parties shall adopt some definite rules creating individual rights and obligations enforceable by national courts.[52]

It may, therefore, be submitted that the Constitution of India did not include any clear direction about treaties such as is to be found in the United States and the French Constitutions. It appears from the various provisions of the Constitution and decided cases that the union Executive has the authority to enter into treaties and agreements with foreign states, but this power is subject to the limitation that it must be used in accordance with the constitution. For the impiementation of a treaty, the sanction of Parliament is necessary if the treaty affects private rights or necessitates, an alteration in the existing laws. No cession of Indian territory can take place without a constitutional amendment, but a boundary settiement dispute cannot be equated as a cession of territory and so it needs no Parliamentary sanction.

Conclusion

There is consensus that international law is binding upon states, that faflure to observe international law in the municipal sphere involves the responsibility of the State, and the latter cannot rely upon its Constitution as an excuse. There is no doubt that municipal law in vlolation of international law may have legal effects within the State concerned. But from the point of view of internatinal tribunals, such an enforcement is illegal. States show remarkable concern not to appear as law breakers before the world at large. That being the case, the problem of the relationship between international law and in the municipal law in the municipal sphere is mainly one of machinery.[53] The municipal machinery is such that the municipial courts are under a duty to implement the will of the State as reflected in its legislative enactment, or, in Certain circumstances as indicated by the executive acts. There in term become limitations on the enforcement of international law by the Municipal courts within the national sphere. The municipal tribunals in such cases try their utmost to reconsile the rule of international law with the municipal law, unless the intention of the legislature is expressed in unequivocal terms.

51. ibid., p. 170.
52. ibid. p. 171.
53. Mosgenstern, F., "Uudicial practice and the supremacy of International Law", 27 B.Y.I.L. (1950) 42 at p. 91.

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51. ibid., p. 170.
52. ibid. p. 171.
53. Mosgenstern, F., "Uudicial practice and the supremacy of International Law", 27 B.Y.I.L. (1950) 42 at p. 91.

The effect of the Indian Constitution is not so much to introduce innovations as to resolve controversies and to reinforce existing trends towards the enhancement of the authority of international law. The reference to international law in Article 51, which is essentially declaratory, may be considered as an unquestionable basis for the practice of the tribunals in resorting directily to customary rules whenever they are susceptible of judicial application. But the courts in India, with few exceptions have been hesitant in interpreting that Article in this way. They consider that the directive in Articie 51 only indicates what should be the policy of India in the international sphere and it does not take them anywhere beyond what was indicated by the English courts in *West Rand Cold Mining Co's. Case.*[54] Even in the case of treaties, the position remains more or less the same as prevalent before the Constitution under the Common Law. In spite of a written constitution. India has not followed the practice found in the United States and the French Constitutions. Treaties do not become the law of the land *ipso facto.* They are entered into by the Union Executive and require a legislative action only if they entail alteration of existing municipal law or affect the rights of citizens. Finally, one may express the view that in India the doctrine that international Law is the law of the land is followed provided Lauterpach's statement[55] is read as follows :

> "There is nothing illogical or misleading in the statement that International Law is part of the law of (India) so long as we bear in mind the qualifying exceptions thereto (i.e., the necessity of municipal legislation in the matter of treaties and the rule as to Act of State) and so long as we do not impute to it a meaning which is alien to its true significance (namely, that it denies the supremacy of the Legislature)".

54. Ludhangsu *Mazumbar* v. *C.S. Jha Commonwealth Secretary*, A.I.R. 1967 Cal. 216 at 226.

55. Lauterpacht, H ,. "Is Interonational Law a Part of the Law of England", 25 *Soc. Tr.* 51 at p. 85.

THEORIES OF CONSENT TO A VALID RESERVATION—A CRITICAL STUDY*

M. N. P. SRIVASTAVA**

A 'reservation' is a special term limiting or varying the effect of the treaty[1] in so for as concerns the relations of the reserving state with one or more of the existing or future parties to the treaty. The practice of making reservations to treaties has developed in response to the recognition of the need of widest possible participation as well as of the difficulties in the way of states keen of participation. Reservations to treaties are a part of treaty process and the importance of reservations results from the role which they actually play in the treaty making process particularly when states conclude multilateral treaties.

Brierly has said that a proposed reservation is a part of the bargain between the parties and therefore, requires their mutual consent [2] In treaty relations a state cannot be bound without its consent and consequently no reservation can be effective against any state without its agreement thereto. That consent of some or all of the parties is an essential to make a reservation valid, is supported by the contractual nature of the reservation.[3] All the theories regarding reservation (unanimity rule, Pan-American rule, sovereignty rule and rule of compatibility with the object and purpose of the treaty) lay emphasis. Reservation is reciprocal. This is because consent is essential to make it effective. Thus the Unilateral statement is a proposed reservation, the

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1. *ILC Report*, 1962, Vol. II, art 18, at 61; D. R. Anderson, 'Reservations to Multilateral Conventions : A re-examination", *ICLQ* (1961) Vol. 13, at; 453; Hackworth, *Digest of International Law*, Vol. V, at 144-153; Louis Henkin, "The Treaty Makers and the Law markers : The Niagara Reservation", *Columbia Law Review*, (1956), Vol. 56, at 1151-1182; Oscar Schacter, "The Question of Treaty Reservation at the 1959 General Assembly" *AJIL* (1960), Vol. 54, at 72; M.H. Mendelson, "Reservations of International Organisations," *BYIL*, 1971, Vol. XLV, at 138; G.V. Glahh, *Law Among Nations : An Introduction to Public International Law*, Second Edition. 1970 at 430
2. *ILC Report*, 1950, Vol. II, at 239.
3. Louis Henkin, *Ibid*, at 1164-1169.

eventual provision to which the other parties, or at any rate a majority of them, agree is the actual reservation.[4]

In this paper an analytical examination of different theories of consent to a reservation has been made to find out which theory is in accord with the requirements of international co-operation among states and with the progressive development of international law through treaties. An attempt has also been made to discuss the solution given to the problem of consent to reservation by International Law Commtssion and to examine as to how far it has solved the problem under the contemporary conditions of the world community, There are four different theories of consent, that is, Traditional theory, Pan-American theory, Sovereignty theory and compatibility theory.

I. Traditional Theory

1. Theory : This is also known as theory of unanimous consent. According to this a reservation, in order to be valid, must have the assent of all the other contracting parties.[5] In other words, the reservation must be acceptable to all the contracting parties in order that the reserving state may be considered a party to the treaty.[6] If the reservation is not accepted by all the contracting states the reservation will be null and void and then if the reserving state does not withdraw its reservation it cannot be the party to the treaty.

This theory seems to accord more closely to the contract offer-and-acceptance notion of private law where if the offeree rejects the offer and instead makes the "counter-offer", the law provides that there is no agreement until the original offerer accepts this counter-offer or until both the parties can agree upon the terms of the contract.[7] The consent to the reservation may be express or implied, that is, the consent of the State will be presumed if that State fails to object within a reasonable time, that is, before the treaty enters into force, or within the time provided by the treaty or, where a State accepting an agreement is

4. D.R. Anderson, *op. cit.*, at 452; G.V. Glahn, *op. cit.*
5. The best expression of the traditional view is to be found in Sir W. Malkin's, "Reservation to Multilateral Treaties, "*BJIL* (1926), at 141-162; G. Fitzwamice, "Reservations to Multilateral Conventions," *ICLQ* (1953), vol. 2, pt I, at 2.
6. *ILC Report*, 1951, vol. II, at 1; Sir H. Lauterpacht, "Some possible solutions of the problem of Reservations to Treaties," *Grotius Transactions*, Vol. 39, at 97.
7. W. W. Bishop, "Reservations to treaties", *Recucil Des Cours*, (1961) Vol. II, at 276; McNair, *Law of Treaties*, 1961, at 160; H.W. Malkin, *Op. cit.*, at 141-142; *ILC Report*, 1953, vol. II, at 123.

held to have accepted all reservations made prior to its acceptance. Article 6 of the Harvard Draft Convention provides :

> In case the ratifying State makes reservations to the treaty it shall become effective when the other contracting party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform action implying its acceptance.[8]

When a treaty is concluded there are several interested parties : negotiating States, signatories, actual parties who have ratified, acceded or accepted the treaty. The question arises who are entitled to give consent to the reservation According to this theory all the States, that is, the actual parties, signatories, as well as the negotiating States have the right to object. But whether or not negotiating States should have the right to object to reservation, there seems no unanimous opinion. Prof. Brierly in his report has recognised the right of negotiating States by saying that if a proposed reservation relates to a projected treaty not yet in force, there are naturally no parties to consent to it, hence in this case consent of all States and international organisations, which have taken part in the negotiation of a projected treaty is necessary. This proposition follows from the fact that the process of negotiation of multipartite treaties is in effect one of offer and acceptance.[9] Another point of view is of the Secretary-General of the League of Nations and the United Nations respectively, who in their practice have rejected the objecting right of negotiating States.[10] The generally prevelant view is that in the practice of States today negotiating States have no right to object to the reservation.[11] The ICJ in its advisory opinion in the *Genocide Convention* case has denied this right of negotiating States and held :

> 'It is inconceivable that a State, even if it has participated in the preparation of the Convention, could, before taking one or the other of the two courses of action provided for becoming a party to the Convention, exclude another State. Possessing no rights which derive from the Convention, that State cannot claim such a right from its Status as Member of the United Nations or from the

8. Quoted by W.W. Bishop, *ibid* at 278; *ILC Report*, 1950, Vol. II, Art. 10(3), at 240.
9. *ILC Report*, 1950, vol. II, Art. 10(4), at 241.
10. U.N G.A.R.O., Annex Sixth Committee, Fifth Session, 1950, Agenda Item 56, Reports for the Progressive Codification of International Law, "Admissibility of Reservations to General Conventions." *L.N.O.J.* 1927, League Doc C. 211, V, Annexes 967, at 880-882.
11. *ILC Report*, 1953, Vol. II, at 132.

invitation to sign which has been addressed to it by the General Assembly.'[12]

Thus the negotiating States possess no right to object to reservation.

Reasons have been adduced in favour of signatory State's right to prevent, by it objection, the participation of a State ratifying or, otherwise finally accepting the treaty obligation subject to reservation. In this regard ICJ observed in the *Genoeide Convention* case :

"...that signature constiutes a first step to participation in the Convention.

It is evident that without ratification, signature does not make the signatory State a party to the Convention; nevertheless, it establishes a provisional States in favour of that State..... Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification."[13]

The legal interest of signatory state in objecting to a reservation will thus be amply safeguarded. The reserving State will be given notice that as soon as the constitutional or other processes have been completed, it will be confronted with a valid objection which carries full legal effect and consequently, it will have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation.

It is a universally accepted rule that it is the actual parties to the treaties that have a right to object to the reservation.

2. *Agruments in favour of the Theory* : It is argued that unanimouns acceptance of reservations is necessary, for the preservation of unity and uniformity of a multilateral treaty and its obligations. It is asserted that once the text has been adopted by a majority vote. The minority should not alter it to suit its own wishes by introducing reservations. The desire for universality should not lead to the neglect of the other equally important consideration, namely, the integrity of the convention and its uniformity of application.[14] Besides, the unanimity rule has

12. *ICJ Reports*, 1951, at 28.
13. *Ibid*, at 28.
14. Yuen-Li-Liang, "The Third Session of ILC : Review of its working G.A., Reservation to Multilateral Convention," *AJIL* (1952), vol. 46, at 490; W.W. Bishop, *op. cit*, at 292; ILC Report, 1951, Vol. II, at I.

the advantage of uniformity of legal relationship between the contracting parties.[15]

It is further contended by the supporters of the the theory that it is generally accepted that the States negotiating a convention are free to modify both rule and practice by making the necessary express provision governing the making of and admissibility of reservations. But when a treaty contains no such provision, and a reservation is made after the text is extablished, that reservation cannot, conveniently, be the subject of bargain or compromise. Hence in order to make a resetvation effective it must have been assented to by all the parties and only then the reserving State will be counted among the named number of States to bring the treaty into force. This theory, in no way, refuses the right of a State to make reservation.[16]

The supporters of the theory further maintain that while traditional theory reduces the number of reservations, it does not exclude the possibility of making reasonable reservations on constitutional and similar grounds. It requires that the matter should not be left completely to the discretion of the reserving State and should be subject to regulation. In this way this theory rejects the unfettered right of States to make reservations. This viewpoint is also supported by the dissenting opinion of four judges in the *Genocide Convention* case, that the object of participation being :

...to carry out the measures resolved upon by common accord, Hence each party must be given the right to judge the acceptability of a reservation and to decide whether or not to exclude the reserving State from the Convention, and we are not aware of any case in which this right has been abused.[17]

In order to guard against any possible by a signatory State of its right to object to a reservation and to forestall the possibility of a reserving State being indefinitely prevented from becoming a party to a convention by a State which itself refrains from assuming the obligations of a party, the ILC suggests that, while the objection by a mere signatory to a reservation should have the effect of excluding a reserving State. a time limit beyond which such effect would not endure, should be prescribed and accordingly fixed the period of twelve months from the date of objection to the reservation, within which signatory

15. Report of the S.G., U.N. G.A.O.R. Annexes, Doc. A/1372, op. cit, at 7, para 37.
16. MCNair, *op. cit.*, at 162; W.W. Bishop, *op. cit*, at 291.
17. ICJ Reports, 1951, at 46-47; W.W. Bishop, *Ibid*, at 275 276; G. Fitzmaurice, *op. cit.*, at 11.

State must ratify or accept the convention otherwise, its objection will have no effect.[18]

The supporters of the theory argue that the fundamental point is that every party to the convention has a right (which it is legally entitled to insist on, even if it is alone in so doing) to require that a participation in the convention shall be on a basis of equality and that no State shall, by means of unilateral reservation, create priviledged position for itself.[19] In a United Kingdom memorandum attached to the report of Secretary General, U. K. gave its argument :

> International convention is an integral whole and must be accepted or not accepted as a whole. It cannot be accepted in part. Neogations may exceptionally be permitted to meet the special circumstances of particular countries, provided they receive the consent of the other interested parties, but no state can claim a right to make such reservations unilaterally, or accept those parts of a convention which suit it while excluding those parts it disagrees with or does not feel it can carry out.[20]

Thus it lessens the possibilty of multilateral trealy as a matrix like container embracing many bilateral contracts.[21]

It is further argued that it seems logical to apply unanimity rule in cases of conventions which establish general principles of international law or which. however technical, are broadly regulatory of international conduct. In contractual compacts, States may agree or not to exchange the *quid pro quo*. In conventions with legislative intent a State willing to become a party must be assumed to wish to enforce atleast the core of the agreement. If another State considers that the reservation proposed is so crucial as to remove the real meaning from the text as drafted then objection raised against the reservation constitutes not a mere bilateral refusal to deal but rather a declaration that the legisiative intent of convention will not be frustrated by adherence subject to a nullifying reservation.[22]

According to the supporters of the theory there is a stronger case for requiring unanimous approval of a reservation where the convention in question is in the nature of Charter or Constitution of an international

18. Report of ILC to G. A., Doc. A/1858, Chapter II, *ILC Report*, 1951, Vol. II at 130, para 30.
19. H. W. Malkin, op. cit, at 142; *ILC Report, Ibid*, at 128; U.N.G.A.O.R. Annexes, Doc. A/1372, *op. cit*, at 7, para 35.
20. W.W. Bishop, *op. cit.*, at 284.
21. *Ibid*, at 275, U.N.G.A.O R., Annexes, Doc. A/1372, *Ibid*, at 7, para 37.
22. U.N.G.A.O.R., *Ibid*, at 6, para 34.

organization formed under the auspices of the United Nations. It would clearly be neither equitable nor workable to permit States members of a functioning body to vary the terms of their admission inspite of the rejection by one or more members already meeting more onrous terms. It does not appear even theoritically possible to have a State sitting and voting as a member of international Council and bound to certain other States members of that council, but not bound under the same constitution to certain other member states which have rejected its reservation.

It is argued that this point of view is supported by the practice of the depositary states e.g. International Sanitary Conventions of 1892, 1894, 1902 and 1912, International Wireless Telegraph Convention of 1912 etc. The practice of the depositary authority of the Hague Conventions and that of League of Nations was based on that principle. This was also the practice of the Secretary General of the United Nations, The report submitted by the ILC in 1951 was also based on that principle.[23] In view of the ILC, in the absence of any deliberate change in this respect effected by general agreement or constant practice acknowledged as law, this must be regarded as still constituting the existing rule of international law, prior to the advisory opinion of the ICJ in the matter of Genocide Convention and apart from the so called Pan-Amrrican system,[24] the principle of the unanimous consent was generally, if not universally, recognised as expressive of a rule of international law.

3. *Arguments Against the Theory :* The Traditional or unanimity theory is, however, subject to various criticisms. It is argued that the adoption of unanimity rule unjustifiably and arbitrarily limits the treaty making power of sovereign States, whereas States' right to make reservation is inherent in its sovereignty.

It is pointed out that, by objecting to a reservation accepted by all others, a party to a multilateral convention will in effect be exercising the veto, that is, it will enable one State arbitrarily to exclude participation of another even though the reservation may be proposed only on some reasonable adjustment of the provisions of the convention to the internal legal system of the reserving State. Such a result will derogate from the sovereignty of the reserving State.[25]

23. *ILC Report*, 1951, Vol. 11, Doc. A/1858, at 125-131.
24. Pan-American system was initiated in 1938 as the result of the resolution adopted at the eighth International Conference of American States.
25. Report of the Sixth Committee of G.A. of Nov. 10, 1950, U.N. Doc. A/1494.

Furthermore, it is argued that the requirement of unanimous consent to a reservation will discourage the signing and ratification of multilateral convention. A treaty widely accepted, although not absolutely uniform in its application to all parties, may be preferable to a treaty, theoritically uniform in its application, which is effective only as between relatively few States. The progressive development of international law through multilateral treaties will not be advanced by insistance on unanimous assent to reservations. The principle ef universality is fundamental to international cooperation. The majority view, in the *Genccide Convention* case while admitting the concept of unanimity "is of undisputed value as a principle" stated as follows : Thus

> It is proper to refer to a variety of circumstances which would lead to a more flexible applicatian of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded....Extensive participation in conventons has already given rise to greater flexibility in the international practice concerning multilateral conventions. Most general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.[26]

the requirement of unanimity is said to be contrary to the need of flexibiliity in internatioal relations and to the objective of maximum participation.[27]

It is asserted by the critics that it is better to have some instruments for international co-operation even though they are Imperfect than by insisting on agreements which establish uniform obligation, to have no agreement at all. To permit multilateral agreements only among those States which see eye to eye on all terms will reduce the area of common action. In practice, reservations frequently do not change materially the obligations of reserving states. Even where reservations would substantially lessen the obligation of the reserving State, it will generally be more desirable to have the limited co-operation than to exclude it altogether. Nevertheless, it seems more desirable to

26. *ICJ Reports*, 1951, at 21-22.
27. Oscar Schacter, "The Question of Treaty Reservation at the 1959 General Assembly", *AJIL* (1960), vol. 54, at 377.

have those States subscribing to the principle, for example, that the Genocide is a crime under international law than it would be to exclude them from all participation in the convention.[28]

Furthermore, it is argued that States will inevitably seek to protect what they conceive to be their particular interest and unless they are permitted to do this by reservation. it is doubtful that they will be willing to enter into international agreements. It might be argued that the states faced with the possibillty of total exclusion from international agreements would avoid making reservations. If this assumption were correct. the rule proposed by the report of the Secretary General would have the salutory effect of promoting greater uniformity in internationl agreements without a loss of participation. Such an argument, however, fails to take into account that reservations may express vital national policies which States will not sacrifice at any cost.[29]

A passage of the advisory opinion of the ICJ in the *Genocide Gonvention* case, is quoted by the critics of the theory to the effect that the adoption of multilateral convention by majority vote in the international conferences might make it necessary for certain states to make reservations. Hence denying a State the right to participate in the multilateral convention merely because one party to the convention objected to a reservation formulated by that State is a challange to the right of minority.[30]

A substanctial majority of States represented at the Sixth Session of the General Assembly declined to accept, as expressive of existing international law, the principle of unanimous consent. Moreover, it appears that some Governments, including that of United Kingdom, who in the past have conspicuously advocated that principle, may be ready to admit that it is too rigid and that it may have to be replaced by a system based on some kind of majority vote.[31]

The critics of the theory maintain that the bilateral contract view of "strict reciprocity of obligations and the equivalence of consideration,' did not really apply to all multilateral treaties. Though in some treaties, like economic agreements and International Labour Conventions, departure by one party from the standard laid down in the treaty makes it

28. "The Effect as Objections to Treaty Reservations," *YLJ* (1951), Vol. 60, at 732.
29. *Ibid*, at 733.
30. Yuen-Li Liang, op. cit, at 492; Report of the Sixth Committee to the General Assembly 1950, U.N. Doc. A/1494, at 25; *ICJ Reports*, 1951, at 22.
31. *ILC Report*, 1953, vol. II, at 125.

difficult for others to adhere to it. But in the humanitarian and similar conventions of a general character described as conventions of normative type the conspicuous aspect is not usually the establishment of the nicely balanced system of rights and obligations—of give and take—of the parties *inter se* but rather the assumption of an absolute obligation towards a transcending and imperative international interest subscribed to out of a sense of moral obligation and international solidarity,

II Sovereignty Theory or Theory of Unlimited Right to Make Reservations or Unilateralism

This theory reflects the attitude of Communist countries towards reservations. The main exponent of this theory is Soviet Union.

1. *Theory* : Each State, resting on principle of sovereignty, has the incontestable right to make a reservation to any treaty whatsoever. According to this theory reservations are a manifestation of national sovereignty and that in the exercise of that sovereignty, a State does not violate any rule of law,[32] States have inalienable right to make reservation to mutilateral conventions. Thus there is an absolute unilateral right to make reservations at will and to become a party to international conventions subject to such reservations, even if, they are objected to by other party.

A legal consequence of the theory is that the treaty is in force between a State which has made the reservation and all the other parties to the treaty, except the part of the treaty to which the reservation relates. Because this theory advocates the principle of unlimited right to make reservation, consent has no place. The questions regarding the parties who make reservation and those who may give consent to such reservation have already been discussed in Traditional theory, and they also similarly arise in connection with this theory.

2. *Argument in Favour of the Theory* : It is asserted by the supporters of this theory that the principle of sovereignty and equality of states cannot be modified by a decision taken by the majority vote. The Czech delegate to the General Assembly agreed in general with this view and

> Was convinced with the abundant proof that has been offered of the existence of the right to make reservations and to preserve the partnership relationship in a treaty even when the reservations had not been acceptad.[32]

Similarly the delegate of the Soviet Union laid emphasis on the principle of state sovereignty as the fundamental principle of international

32. Yuen-Li-Liang, *op. cit*, at 498.

law. The view supporting sovereignty theory maintains that by objecting to reservation accepted by all others, a party to multilateral convention cannot in effect exercise veto. Thus it would not enable one State to include arbitrarily the participation of another even though the reservation might be proposed on some reasonable ground and such a result will be consistent with the sovereignty of the reserving State.

This theory according to the supporters encourages the signing and ratifications of multilateral conventions. Thus it makes room for maximum participation and helps in progressive development of international law through multileral treaties. It advocates the principle of universality as fundamental to international cooperation. It refers to a variety of circumstances, which lead to a more flexible system, for example, more general resort to reservation, very great allowance made for tacit assent to reservation, the existence of the practices which admit that the author of the reservations which have been rejected by the certain contracting parties is nevertheless regarded to be a party in relation to all the States parties to the convention, except the part of the treaty to which reservation relates. Thus it is consistence with need of flexibility in international relations and to the objective of maximum participation.

It is argued that this theory allows to have some instruments for international co-operation even through they are imperfect and thus expands the area of common action. It desires to have the limited co-operation of the reserving state than to exclude it altogether.

This theory enables the states to enter into international convention by permitting them to make reservations to protect their particular interest.

It is further argued that adoption of multilateral conventions by majority vote makes it necessary for certain state to make reservation. Thus it protects the right of minority by giving states the incontestable right to make reservations. According to professor Bishop, in the view point of the Union of Soviet Socialist Republics, the question of reservation is of particular importance for it, in so far as the alleged aggressive trend of imperialist policy is deepend by class hatred for the workers' state. In the view of the Soviet Union by abusing the principle of adoption of decisions at conferences by majority vote, the imperialists when concluding treaties frequently tempted to infringe the Soviet Union and to impose their will upon it by inserting clauses disavantageous to it.[34]

33. U.N.G.A.O.R., Fifth Session, Sixth Committee. 223rd meeting, para 23.
34. W.W. Bishop, *op. cit*, at 335-336.

3. *Arguments Against the Theory* : The critics of this theory, however, point out the defects and consequences of the acceptance of the sovereignty. In their view if absolute license is given to states to make resevations and no state is allowed to make use of its liberty of action, it would be prejudicial to the interest of the international community. In their view this theory does not preserve the unity and uniformity of the multilateral treaty and obligation and thereby destroys the integrity of the treaty. This doctrine aims for universal participation which leads to the negtect of other equally important consideration, namely, the integrity of the convention and its uniformity of application.

The danger of allowing a reserving state to become a party inspite of objections of other parties was pointed out by the U. K. Government in its memorandam attached to the report of the Secetary General.

It is argued by the critics that this theory encourages the multiplicity of reservations and leaves the matter completely to the discretion of the reserving state subject to no regulation. Other parties have no right to judge the acceptability of reservations. This unlimited right to make reservations may be abused by making reservations however arbitrary and destructive of the essential purpose of the treaty. It lacks safeguard against an abuse of treaty making power.[36] Thus this theory does not consider the fundamental point that every party to the convention has a right to require that a participation in the convention shall be on the basis of equality and that no state shall, by means of unilateral reservation, create priviledged position for itself.

Another argument is that a claim, by reference to the right of sovereignty to participate in the treaty a denial of the sovereigny of other parties to the treaty. It is also contended that the sovereign right of the minority is sufficiently protected by the fact that state is not obliged to accept the text adopted by majority vote. This theory is against the principle that the sovereignty of the objecting state, in addition to that of reserving state, should also be respected. The United States of America saw no support in practice for the proposition that any state has the "sovereign right" to make any reservation it wishes, without regard to the views of other states parties to the treaty in question.[37] The Court in the reservations case, rejected this theory and maintained :

35. *ibid*, at 284.
36. *ILC Report*, 1953, Vol. II, at 128.
37. W. W. Bishop, *op. cit*, at 334.

> It is obvious that so extreme an application of this idea of state sovereignty could lead to a complete disregard of the object and purpose of the Convention.[38]

This theory has no safeguard in the interest of the authority of treaties and of maintaining an adequate standard of international intercourse, and, in a distinct sense, of international morality. Thus Governments can make use of the faculty of making treaties for the purpose not of undertaking international obligations but of merely creating the impression that they have undertaken them.

There also appeared to be a general (if not unanimous) opposition to 'unilatoralism'—that is, to unlimited right of a state to make reservations however antagonistic to the essential purpose of the treaty.[39] The theory has been rejected as untenable since its application would make obvious nonsense of the whole process of negotiating and drawing up of the text of the multilateral convention.[40]

III Pan-American System :

1. *Theory*: The organization of the American States follows a different system. The Eighth International Conference of American States, at Lima, 1938, provided that :

> "In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan-American Union. prior to the deposite of respective instrument, the text of the reservation which it proposes to formulate, so that the Pan-American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty, may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory states."[41]

If no reply was received within one year, it would be understood that the signatory has no objection to the reservation. With respect to the juridical status of treaties ratified with reservations, which have not been accepted, the Governing Board of Pan-American Union understands that :

> "1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.

38. *ICJ Reports*, 1951, at 24.
39. Oscar Schacter, *op. cit*, at 377.
40. G, Fitzma wice, *op cit*, at 10-11
41. *ILC Report*, 1951, Vol. II, U.N. Doc. A/1858, at 127.

2. It shall be in force as between the governments which ratify it with reservations and the signatory states which accept the reservations in the form in which the treaty may be modified by said reservations.
3. It shall not be in force between a government which may have ratified with reservations and other which may have already ratified, and which does not accept such reservations."[42]

The reserving state will not be the party to the treaty if its reservation is not accepted even by a single signatory state.

This system attempts to combine the process of facilitating maximum participation in multilateral convention, with a recognition of the fact that the reservation cannot be imposed on the other parties against their will. Under this system no attempt is made to distinguish between different clause or types of reservations according to their nature and character. All are treated alike. Any reservation can be made, and made as of right and state making it automatically becomes the party to the convention, also as of right, and also with the benefit of reservation, even if objection has been taken to it by other parties, but in that event convention is deemed not to be in force between reserving state and objecting State.[43]

2 Arguments in Favour of the Theory : The supporters of this theory give following arguments in its favour.

It gives preference neither to the majority nor to the States making reservations but preserves the legal equality of the states. States are left quite free to exercise their sovereignty by specifying which provisions are essential and which are accessory and consequently liable to reservation.[44]

As this system allows a reserving state to become party to a multilateral convention despite objections to its reservations, it obviates the possibility of a veto and provides the best protection for the minority. It has the great advantage of flexibility.[45]

The practice of organization of the American States does not sacrifice the principle of integrity to that of universality but makes an attempt to reconcile those two principles. It is the one most in keeping with international reality.[46]

42. W.W. Bishop, *op. cit*, at 280.
43. G. Fitzmauric, *op. cit*, at 13.
44. *Ibid*, at 14.
45. *ILC Report*, 1951, Vol. II, U. N. Doc. A/1858, at 127.
46. *ibld*, Annex A, at 5, para 5.

It has the advantage of encouraging wider acceptance of a treaty and prevents conventions from remaining unratified documents. Charles G. Fenwick, writing with approval of Pan-American system, stated :

> The procedure followed by the Pan-American Union is believed to be the one best adapted to secure the ratification of the mulitilateral treaties by as many states as possible. It makes it unnecessary at the time a treaty is drafted to eliminate from the text all those elements likely to give rise to reservations. It recognises also that reservations may at times be no more than the expression of a national complex which the particular state may have in respect to possible effects of the treaty not contemplated by the other parties. It proceeds upon the assumption that reservations may frequently be technical qualifications of a treaty rather than substantive limitations of its obligations.[47]

It has been argued that the system has been tried and proved workable. Contrary to the assertion of ILC that the Pan-American practice, which is suited to the needs of American States, is not suitable for application to multilateral conventions in general, the representative of the Dominian Republic declared that it can be applied even better in a world wide organization, such as United Nations. Indeed, "the system is what is, not because the group of American States is unified, but the group is unified because of the system". Contended the reprentative of colombia.[48]

This emphasizes on the principle that "half a loaf is better than no bread". It can, with some apparent plausibility, be urged that the extent of obligation of any one party under a convention of "normative" type is not dependent on the number of parties to the convention, and is the same whether the other party becomes a limited or qualified party a party but subject to certain reservations. State without reservation will not be relieved of any of its obligaiions on account of other party's reservation, yet non-reserving State will not have to discharge any greater extent of obligation than before, or that it has to anyhow. In such circumstances it may be urged that reserving States participation does not prejudice non-reserving state, and is in general interest for it enlarges the field of application of convention by increasing the number of countries applying it in whole or in part, and it is better they should apply it in part than not at all. This view is, of course, urged as possessing special weight precisely where conventions having social or humanitarian objects are concerned.[49]

47. W. W. Bishop, *op. cit*, at 281, 334.
48. Yuen-Li-Liang, *op. cit*, at 495.
49. G. Fitzmaurice, *op. cit*, at 18.

3. *Arguments Against the Theory* : The crities have argued against this theory on the points given below. The application of this system to multilateral conventions drawn up under the auspices of the United Nations is opposed on the ground that society has much diversity of its members in contrast to homogenity of American States, that is, the members of regional or continental organization may be in a special position, by reason of their common historical traditions and of their close cultural bonds, which have no counterpart in the relations of general body of States.[50] This fact is explained by Mr. Gilberto Amedo in his memorandum as follows :

> It must be remembered that the atmosphere in which the relations between American States develop is quite different from that of United Nations. In America there is a remarkble identity of interests which greatly reduces the possibility of disputes on point of fact and law. The limited scope of conventions concluded under the auspices of regional organisation makes it possible for such system to be applied without thc fabric of bilateral obligations in the framework of collective treaty becoming chaotic. Now a days when treaties are negotiated or concluded under the auspices of international organizations, to some extent partake the nature of laws. I doubt very much whether adoption of this procedure can be recommended, since it would make it possible for the treaty to be inforce between some parties in a form which might possibly evade its main aim, true purpose. The collective treaty, in general, possesses an Organic unity which must, as far as possible, be safeguarded.[51]

There has been some doubt about the existence of the so called Pan American system because not only that Judge Alvarez of the ICJ denied its existence but also for the reason that in the ILC, out of five American members, four were clearly opposed to the application of Pan—American theory to multilateral Convention.[52]

The Pan-American system of reservation does not make it easy for States to ratify. There are, for example, eleven conventions concluded within the past 28 years which, despite this system of reservation, had

50. *ILC Report*, 1951, Vol.II, U.N. A/1858, at 127, para 22.
51. Memorandum submitted by G. Amado, "Reservations to Multilateral Conventions", U.N. Doc. A/CN 4/L. 9. at 11; U.N.G.A.O.R. Agenda No. 54, "Reservations to Multilateral Conventions". Report by Secretary Generat 6, paras 31 & 32; *ILC Report*, 1951, Vol.II. U.N. Doc. A/1858, at 127-128, para 22.
52. Yuen-Li-Liang, *op. cit*, *Ibid*, at 495.

not been ratified by more than a fraction of number of states required for entry into force. The United Kingdom asserted that, even in America, doubts were begining to be felt as to the value of Pan-American system.[53]

It is hardly logically tenable proposition that two countries can both be parties to the same convention without its being in force, or applicable between them. Such a position really means (and is only logically possible on the basis) that the multilateral character of the convention is purely formal and methodological. Essentially it creates a system of bipartite (or quasi-partite etc.) relationships within a certain general framework. The distinguishing characteristic of a multilateral relationship; namely, the assumption of common obligation on a basis of equality is lacking.

This system involves the curious and most unsatisfactory result that a country can become a party to the convention, however sweeping the reservation it makes, if it can find but one other country to accept, or even merely not objecting to it-thus introducing, what amounts in practice, a virtually uncontrolled faculty of making reservations and this is the re-introduction of the absolute sovereignty principle through back door. It certainly opens the door to arrangements between countries belonging to a group, directed to changing the incidence of the convention by means of consented reservation.[54]

Pan-American system can be said to be capable in working in relation to the conventions of the contractually or reciprocally operating type, inother words, conventions under which each party is not merely bound to do or abstain from doing something in abstract, but is bound to do so abstain from doing on reciprocal basis. On the other hand in the convention of normative character the obligation is both general and absolute. There the obligation is not operative in relation to other states and the obligation is in no way affected by the participation of other countries that is such conventions operate for each party *per se* and not between parties *inter se*—coupled with the further peculiarity that they involve mainly the assumption of duties and obligations and do not confer direct rights or benefits on the parties *que statee* that gives these conventions their special juridical character and makes application to them of the Pan-American system of reservations inappropriate and indeed undesirable.[55]

53. *Ibid*, at 496.
45. *ILC Report*, 1851, Vol.II, at 5, para 4; See Fitzmaurice's Observation.
55. G. Fitzmaurice, *op. cit*, at 15.

The essence of Pan-American system is that it purports to create an equitable balance between the positions of reserving and objecting states. There are no benefits which the objecting state can withheld from the reserving state. Hence we see that advantages are with reserving State and disadvantages are with objecting state whose objections for all practical purposes rendered ineffective in normative conventions. The objecting state, despite its objections, is still itself obliged to apply the convention in full, and is not relieved from any part of its obligation. The reserving state, on the other hand, only has to carry out conventions subject to reservations which may relieve it from some important part of the burdens. There is thus created a situation of pure privilege for the reserving State, which it can establish for itself at its will, and in which the normal sanction or deterrent against the use of reservation, namely, the withholding of corresponding advantage, breaks down, because there are no advantages to withhold, Similarly, while the Pan-American system professes to recognise that a reservation made by one state cannot be imposed on another without its consent, the practical effect is precisely to impose the reservation on the objecting state. Thus the balance intended by Pan-American system breaks down when the system is applied to normative conventions[56].

The doctrine 'half a loaf is better than no bread' as advocated by this theory, is open to serious objections when applied to normative treaties[57] on the grounds that : (i) It re-introduces the sovereignty rule; (2) impairs the integrity of the treaty and consequently; (3) the other states may detract from ratifying the treaty, because they will be faced with the possibility—even the probability—that, if they accept the convention without qualification, they will find that other governments, ratifying or acceding subsequently, will do so subject to reservations involving important derogation from the treaty or creating for themselves a position of privilege to which the earlier contracting parties accepting the treaty without reservation, will be unable to make any effeetive objection. This is likely to lead to some slowing up of the process of ratification, since governments will tend to delay their final acceptance in order to see what reservations are being entered by other governments. It is also likely to lead to increasing secpticism and disillusionment on the part of the circumspect governments towards the whole process.

A substantially similar view was taken by international Law Commission[58].

56. *Ibid*. at 16.
57. *Ibid*, at 17-18.
58. *ILC Report*, 1951, Vol.II, at 127, para 22.

IV Compatibility Theory

1. *Theory* : The theory of compatibility with the object and purpose of the treaty was pronounced by the International Court of Justice in its advisory opinion in the *Genocid Convention* case[59]. This theory propounds the rule that a reservation should be compatible with the object and purpose of the treaty and only then a reserving state, even if it maintains its reservations which have been objected to by one or more of the parties to the convention, will be regarded as a party to the treaty.

2. *General Remarks of the Court* : Although limiting its replies to the cause of Genocide Convention, the Court made certain general remarks :

(1) The Court rejected outright the view that there is any absolute or unrestricted right to make and maintain reservations.[60]

(2) The making and maintainance of the reservation will be governed by the provision of the treaty in this regard, if treaty contains any. But it cannot be inferred from the mere absence of any article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations.[61]

(3) In its treaty relations a state cannot be bound without its consent and consequently, no reservation can be effective against any state without its consent thereto.

(4) The traditional concept for a valid reservation is of undisputed value but in the present state of international practice, the traditional concept does not appear to have been transformed into a rule of law.

(5) The objection of a signatory state will have the legal effect only when it ratifies the convention and until that moment it merely serves as notice to the other state of the eventual attitude of the signatory State. A state entitled to sign or accede to the treaty will have no right to object unless it has done so.

(6) The legal effect of consent to the reservation will be that for the state accepting the reservation, the reserving State will be party to the convention and for objecting state, the reserving State will not be the party to the treaty.

3. *Arguments in Favour of the Theory* : The majority opinion supported this theory on the following grounds :

59. *ICJ Reports*, 1951, at 15, 46.
60. *Ibid*, at 24.
61. *Ibid* at 21; G. Fizmaurice, "The Law and Procedure of the International Court of Justice 1951—4", *BYIL*, 1957, Vol. XXXIL, at 280.

(1) That the multilateral convention is the result of the agreement freely concluded, hence no state is entitled to frustrate its purpose by unilateral decision.

(2) That the concept of unanimity of consent, inspired by the notion of contract, is of undisputed value as a principle but it has not been transformed into a rule of law. A variety of circumstance for example, the universal character of the United Nations under whose auspices the conventions like the Genocide are concluded, the wide participation envisaged by such conventions, more general resort to reservations, very great allowance made for tacit assent to reservations and the adoption of flexible system are manifestations of a new need for flexibility in the operation of multilateral conventions.

(3) The character, purpose, provisions, mode of preparation and adoption of multilateral convention are the factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

(4) The characteristics of the conventions like Genocide do not provide a contractual balance of rights and duties of individual states but merely serve a common intention. The purpose of securing extensive participation will be defeated if an objection to a minor reservation should produce complete exclusion and this will detract from the authority of the moral and humanitarian principles which are the basis of the convention. On the otherhand, parties cannot have intended to sacrifice the very object of the convention in favour of securing as many participation as possible. Thus, the compatibility of a reservation with the object and purpose of the convention is the criterion by which states must be guided individually in making reservation and in appraising their admissibility.

4. *Arguments Against the theory* : The dissenting judges while maintaining the unanimity rule, criticised this theory as follows :

(1) the dissenting judges favoured the Traditional theory, as it was supported by the opinion of writers, state practices, practice of the Secretariat of the League of Nations and of the United Nations and that the negotiating states were free to adopt any flexibility governing reservations by making express provisions in the treaty and hence in the absence of any special article with respect to reservations, unanimity rule should be applied. They therefore, rejected the Court's compatibility criterion.

62. G. Fitzmaurice, *Ibid*, at 284.

(2) The Compatibility criterion has been rejected on the ground that it attempts to classify the reservation into compatible and incompatible which would involve a subjective classification of the provisions of the convention into two categories of minor and major importance. Thus any state desiring to become a party would be at liberty to assert subjectively that a particular provision is not a part of the object and purpose of the convention, and that it has, therefore, a right to make reservation—subject always to an objection by any of the existing party on the ground that the reservation is not compatible. This theory has been further rejected on the ground that it is new rule, and has no legal basis, and has not been supported by any authority of this Court or Permanent Court of International Justice or any other international tribunal or any text book.

(3) The compatibility theory cannot work due to certain reasons. Firstly, do the object and purpose of the convention comprise any or all of its enforcement articles ? Secondly, if each contracting state makes its own appraisal of whether a reservation is compatible or not, there would be no certainty as to the status of reserving state. In consequence it would not be clear when a convention is in force.

(4) Further, the integrity of the terms of the convention is of greater importance than mere universality of acceptance. In a common effort to promote a greater humanitarian object every state expects every other interested state not to seek any individual advantage but to carry out the measures evolved by common accord, so that every party has to be given the right to decide whether to exclude the reserving State.

The four theories discussed above recognize the right of states to make reservations requiring consent of other interested states (that is signatories and and actual parties) as necessary condition for a valid reservation. These theories also maintain reciprocal nature of reservation, that is, the relation between the reserving state and other parties to the treaties, will be only to the extent as modified by the reservation of the reserving State. These theories differ on the fundamental question of the extent to which the consent is necessary.

The Unanimity theory, while emphasizing the integrity and uniformity of multilateral treaty and obligations and hence requiring the unanimous consent of all the contracting parties, neglects the equally important principle of universality of the treaty which is the fundamental basis of international cooperation. It results in giving arbitrary veto power to the objecting States which discourages the participation of States in multilateral treaties because reservation may express vital

national policies which states will not sacrifice at any cost, and thereby reduces the area of common action. This in effect may adversely affect the progressive development of international law through multilateral law-making treaties. It is, therefore, better to have some even imperfect instruments for international co-operation than to have no agreement at all. Further, the requirement of unanimous acceptance of reservation is gradually giving away, under the combined pressure of Pan-American Union parctice, the attitude of United States of America, Union of Soviet Socialist Republics, United Kingdom and other countries,[63] the advisory opinion of the Court in the *Genoside Convention* case, and the partial willingness of the ILC to depart from the complete unanimity of acceptance.

The sovereignty theory, based on the principle of states sovereignty gives unfettered unilateral right to states to make reservations even if objected to by other parties and thus the consent of interested states has no place. This theory, though avoids veto, protects the interest of minority, desires to have even limited co-operation of the reserving state than to exclude it altogether and, thus, expands the area of common action, makes the treaty universal—a fundamental of international co-operation by allowing maximum participation, lacks the safeguard against an abuse of treaty making power. It permits even such reservations prejudicial to the object and purpose of the treaty and thus to the interest of the international community. The sovereign right to make reservations amounts to denial of sovereignty of other objecting states which is contrary to international morality and does not maintain an adequate standard of international intercourse.

The Pan-American theory combines the two principles : (1) the sovereign right of states to make reservations; and (2) non-acceptability of reservation without the consent of interested states. It reconciles the integrity with the univerality of the treaty. This theory though has all the advantages of the flexible rule, gives the right to states to make whatsoever reservations they like, subject to the acceptance by atleast one state.

The Compatibility theory is merely a refined Pan-American rule. It provides safeguard against the abuse of the treaty making power. The

63. U.N.G.A.O.R., Sixte Committee, 1966, 21 st Session, Agenda item 84, Grvernments supporting the flexible approach of the Commission were Syria, Colomiba, Spain, Poland, Romania, Cylon etc.; *IC Rexport* 19 Vol. II, at 124, Majority of States represented at Sixth session of G.A. dealined to accept as expressive of existing international law the principle of unanimous consent.

safeguard of compatibility of reservation with the object and purpose of the treaty in question, is subjective and not workable owing to the primitive and decentralized nature of international society and the lack of unconditional compulsory jurisdiction of the Court.

In the decentralized international society, the international relations among the sovereign states are regulated by treaties. Treaties are concluded after a delicate process of negotiation and compromise; hence the possibility of making reservations is necessary to eliminate the differences regarding the secondary provisions of the treaty while the object and purpose of the treaty is common to all; to enable the states to avoid their constitutional difficulties and to protect their vital interest instead of facing choice between accepting or rejecting the treaty in its entirely. Thus, the reservation increases the area of common action, if the maximum participation in the treaty is provided for and, thereby, international co-operation and progressive development of international law through multilateral treaties is promoted. But the right to make reservation should be subject to reasonable limitation. If the Pan-American rule accompanied with Compatibility rule is applied, it will be best suiting formula for the present international community because both the theories are in acord with contemporary realities.

The Vienna Convention on the Law of Treaties[64] has devoted five articles from Art. 19 to 23 on the question of reservation and Art. 20 deals with the "Acceptance of and objection to reservation" which is as follows :

(1) A reservation expressly authorised 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 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.

64. U. N. Doc. A/CONF. 39/27, May 23; 1969.

exercise therein, to the exclusion of any other State, the functions of a State.[2]

Sovereignty means that a State enjoys freedom from interference or intervention by other States because "sovereignty...involves the exclusive right to display the activities of a State".[3] "Freedom from interference" and "exclusive rights" means that within its own territory the jurisdiction, one of the most obvious forms of the exercise of sovereign power,[4] is exclusive, except indeed in so far as the sovereign by its own will permit the exercise of jurisdiction by another sovereign. The principle of non-intervention was strongly expressed by the International Court of Justice in the *Corfu Channel Case*, where the United Kingdom proceeded, without Albanian consent to carry on mine-sweeping operations through the part of the Corfu Channel which lay within the Albanian territorial sea, to collect evidence against the Albanian authorities for presenting it to an international tribunal, thus facilitating the latter's task. The court rejecting this application of the theory of intervention observed :

> The Court can only regard the alleged right of intervention as the manifestation of policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects of international organisation, find a place in international Law. Intervention is perhape still less admissible in the particular form it would take : far from the nature of things, it would be reserved for the most powerful states, and might easily lead to preventing the administration of justice itself.[5]

According to Sir Cecil Hurst, sovereignty denotes "the rights and the determination of a state to be master in its own household, and the limits, i.e. the geographical limits within which the state is entitled so to be master."[6] Similarly Loewenstein states :

> (Sovereignty) in its traditional sense signifies the unrestricted self-determination, by the individual state, of its external and domestic affairs. From this premise international law derives the legal assunptions of the independence and the equality before the law of each sovereign state and the prohibition to interfere

2. 22 *American Journal of International Law* (hereinafter called the AJIL), 1928, 868 at p. 875.
3. *Ibid* at p. 876.
4. *Estern Greenland Case* PCIJ (1933) Ser. A/B Case 53 p. 48.
5. *ICJ Reports* (1949) at p 35.
6. Hurst, Sir Cecil "The Continental Shelf". 34 *Grotius Society Transactions* (1949) 153 at p. 162.

> with the external policies and the domestic jurisdiction of other equally sovereign states.[7]

More precisely, sovereignty indicates "territorial and personal supremacy of the state"[8] or "omnipotence"[9] or "independence and authority" of the state in domestic and foreign relations. The permanent court of International Justice ruled that encroachments on sovereignty cannot be inferred[10] or presumed[11]; and that in case of doubt a limitation of sovereignty mnst be construed restrictively.[12]

Harmon Doctrine (1855) :

In a dispute between the United States and Mexico in connection with the use of the water of Rio Grande river, Judson Harmon, the Attorney General of the United States was of the opinion that an indepent State had unrestricted sovereignty with respect to that part of a river which lay within its territorial boundaries.[13] Judson Harmon held the view that :

> The rules, principles, and precedants of Internatioal Law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio-Grande lying entirely within the United States, although such use results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States.[14]

7. Karl Loewenstein, "Sovereignty and Legal Cooperation". 48 *AJIL* (1954) 222 at p. 243.
8. Article 2 of the Draft Declaration of the Rights and Dutics of States, United Nation General Assembly, Official Records (hereinafter called GAOR) 4th Session Supp. No. 10 (A/925) 1949; 44 *AJIL* (1950) at p. 15.
9. Schwarzenberger and Brown. *A Manual of International Law* (1976) Professional Books Ltd. p. 51.
10. *Interpretation of the Statute of the Memel Territory Case*. PCIJ Series A/B No. 71. pp. 104-5.
11. *S. S. Lotus Case* (1927) PCIJ series A. No. 10. p. 18. In *Asylum Case* (1950) the ICJ held : "A decision to grant a diplomatic asylum involves a derogation from the sovereignty of that state. It withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively within the Competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case". *ICJ Reports* (1950) pp 274-5.
12. *In Case of Free Zones of Upper Savoy and the Diserict of Gex* (order) *PCIJ* Ser. A. No. 24, p. 12; *Ibid* (Judgement) *PCIJ* Ser. A/B No 46, p. 167.
13. 21. Official opinion of the Attorney General of the United States No. 445 at pp. 274 83 (1898) See Larson and Jonks, *Sovereignty within the Law*, (1965) Oceana Publications at pp. 349-50.
14. *Ibid*, at p. 350.

In contrast Judge Holmes in *The Western Maid V. Thomson (1921) Case said* :

> "Sovereignty is a question of power, and no human power is unlimited."[15]

Therefore, sovereignty of State cannot be absolute, unlimited and unrestricted. In support of this argument one may quote numerous authorities.

According to Professor Schwarzenberger," (r)ules of customary international law, general principles of law recognized by civilized nations and, above all, treaties impose for-reaching limitations on the sovereignty of State".[16] Elsewhere the same author states that the "claim of unlimited external sovereignty would amount to the negation of international law and reduce it to a system of international morality."[17]

Similarly Oppenheim—Lauterpacht states :

> The very notion of International Law as a body of rules of conduct binding upon States irrespective of their Municipal Law and Legislation implies the idea of their subjection to International Law makes it impossible to accept their claim to absolute sovereignty in the international sphere.[18]

Therefore, the sovereign's power within its own territorial limits is not unrestricted and unlimited. In *The Island of Palmas* case Judge Huber said :

> The right has as corollary a duty : the obligation to protect within the territory of rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.[19]

Similarly in the *Boffolo Case* (1903) before the Italian-Venezuelan Claims Commission the claimant, who was a publisher of an Italian weekly newspaper in Venezuela, published an article somewhat critical of the local minor judiciary, and also referring to the President. He was summarily tried and expelled. The umpire held Venezuela liable

15. 257 US 419 at p. 432.
16. Schwarzenberger, *International Law* (1957) London at p. 121.
17. Schwarzenberger, *Power Politics* (1964) London at p. 91.
18. Oppenheim, *International Law* (8th ed. by Lauterpacht) London at p. 123. For a similar view see Fitzmaurice, G., "The general Principles of International Law considered from the stand point of the rule of Law." 92 *Recueil Des Cours.* (1957) 5.
19. *Supra* note 3.

for expelling the individual for insufficient reasons. In the course of his decision, the umpire said :

> That a general power to expel foreigners. at least for cause, exists in Government cannot be doubted...But it will be born in mind that there may be a broad difference between the right to exercise a power and a rightful exercise of that power.[20]

Sovereign immunity from the jurisdiction of a foreign state is itself an example of a restriction on sovereignty. Moreover, the modern trends in International Law depart from the Harmon doctrine. The question whether a State in whose territory an international river flows has absolute power in respect to the waters, has often arisen and states have not frequently argued that international law does not limit the sovereign powers of a riparian State.[21]

The *Lake Lanoux Arbitration* (1957)[22] and the *Trail Smelter Arbitration*[23] (1938-41), the leading cases on the subject, and the Indus Water Dispute[24] between India and Pakistan, which was eventually settled in 1960 through the intervention of the World Bank, constitute excellant examples of the modern trend in regard to the Harmon Doctrine. It is now certain that no riparian state possesses absolute sovereignty in respect to the portion of the river flowing through its territory. It, no doubt, has a right to the use of the waters, but its rights are limited by similar rights of other riparian states. Therefore, the theory of absolute and unlimited sovereignty is inadmissible in International Law.

According to A. Pardo, absolute jurisdiction of the State is "as obsolete as the absolute sovereignty of Kings."[25] The concept must be reinterpreted. Pardo, in respect of the Coastal State's jurisdiction over the adjacent sea, suggests the new definition : "National jurisdiction

20. See Larson and Jonks *Supra* note 13 at p. 379.
21. Bains, "The Diversion of International Rivers" 1. *IJIL* (1960) 38 see also Eagleton, "The Use of Waters of International Rivers". 33 *Canadian Bar Review*, (1955), 1018.
22. 53 *AJIL* (1959) 156.
23. 3 *UNRIAA* (1938 & 41) 1905. See Goldie L.F.E. "A General view of International environmental Law, a survey of capabilities, trends and limits." *Colloqne colloquim* (1973), Hague Academy of I.L; see also Oda. S., *The Law of the sea in our Time I-New Developments 1966-1975* (1977 Leyden at. p. 209.
24. 419 *UNTS.* 125; 3 Whiteman, Digest of *International Law*, (1964) Washington, 1046. In this settlement the western rivers were reserved for Pakistan and the eastern for India.
25. Arvid Pardo, in Bouchez & Kaijen eds, *The future of the law of the sea* (1976). The Hague. 1 at p. 17.

is a legal power of Coastal States to control and to regulate a defined area of ocean space adjacent to its coast subject to the limitations of international law designed to protect the interests of the international community."[26]

(ii) Concept of Sovereign Rights

"Sovereign rights" denote the rights "which are 'owned' and therefore, in this special sense, 'sovereign' is not to be confused with territorial sovereignty. Thus a right of passage does not necessarily confer sovereignty over the particular area of territory."[27] It connotes a "general proprietary control", and not any precise authority based on sovereignty. In the context of the EEZ, sovereign rights include all rights necessary for and connected with the exploration and exploitation of the natural resources. Sovereign rights are apart from merely right of jurisdiction, as the former denote the rights of the coastal state similar to those which it may have over the resources of its land territory.

(iii) Concept of Exclusive Rights

Exclusive rights denote that the rights assigned to or gained by a state cannot be acquird by any other state without the consent of the former, even if the former state does not exercise them. This empower the state with sole jurisdiction either to permit or to refuse other states to exercise any or all of the rights assigned to or gained by it with respect to the particular subject matter. In respect to the continental shelf. over which the coastal state exercises, "sovereign rights for the purpose of exploring it and exploiting its natural resources," these rights are exclusive. It means that it is the coastal state and only the coastal state which can authorize anyone to explore it and/or to exploit its natural resources. Under the notion of sovereignty, a state has "exclusive rights" over its territory, but by attaining the "exclusive rights" over the territory, a state may not necessarily have sovereignty. In a protectorate, the protecting state, under the treaty may have exclusive rights for the administration of its internal and external affairs, but it cannot claim sovereignty over the protected state.

(iv) Concept of Preferential Rights.

In the *Fisheries Jurisdiction Case* (1974) ICJ started from the fact that the 1960 Geneva conference failed by only one vote to adopt a

26. *Ibid.*
27. Brownlie I. *Principles of Public International Law* (1966) Oxford at p. 100.

text governing the breadth of the territorial sea and the extent of fishing rights. The court then observed :

> However, after the Conference the law evolved through the practice of States on the basis of the debates and near agreements at Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at the conference.....The second is the concept of *Preferential rights* of fishing in adjacent waters in favour of the Coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other states concerned in the exploitation of the same fisheries.[28] (emphasis added).

The court made it clear that, under the notion of preferential rights, other states can participate in the exploitation of living resources only if the coastal state has no capacity to take 100 per cent of the allowable catch of the living resources. The other states can take only surplus, which is beyond the capacity of the coastal state.

(v) Concept of Jurisdiction and Control

Jurisdiction has been defined as " the capacity of a state under international law to prescribe or to enforce a rule of law".[29] Judge Holmes in *Central Rail Road v. Jersey City* (1908) defines jurisdiction : "jurisdiction, authority to apply the law to the acts of man".[30] In another case, Judge Holmes uses the term "Power".[31] Therefore, jurisdiction involves a state's right to exercise certain of its powers. Jurisdiction is necessary for the validity of legislation, the most striking assertion of jurisdiction, and the judicial actions of a state. As Beale correctly observes that "the sovereign cannot confer jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law."[32] Jurisdiction is concerned with the functions of "legislative jurisdiction", as later answers "the question whether and in what circumstances a state has the right of regulation".[33]

28. *ICJ Reports* (1974) or p. 23.
29. Restatement of the Law (second) Foreign Relations. *Law of the United States* (1965), Washington, para. 6 at p. 20; see also The American Law Institute's proposed official Draft of the Foreign Relations Law of the United States of May 1962, p. 25.
30. (1908) US. 473 at p. 479.
31. *Wedding* v. *Meyer* (1904) 192, US. 573 at p. 584.
32. Joseph Beale, "Jurisdiction of a Sovereign State". 33 *Harvard Law Review* (1922-3), 41 at p. 43.
33. Mann F.A., "The definition of jurisdiction". III. *Recueil Des Court* (1964) 9 at p. 16.

The fact of participation in effective decision is "Control", and the expectation of community members about such decision is "Authority".[34] According to Brecht Arnold, authority is the manifestation of "judicially valid norm" which have been established or recognised by the Government of a sovereign state in the forms prescribed by its laws".[35]

Action by a state in prescribing or enforcing a rule having no jurisdiction to prescribe or to enforce, is a violation of international law, giving rise to a claim.[36] On the other side of the coin, if a state has jurisdiction to prescribe or to enforce a rule, its violation is punishable, as Max Weber states :

> Thus, the existence of a "legal norm" in the sense of a state "law" means that the following situation obtains : In the case of certain events occurring there is general agreement that certain organs of the community can be expected to go into official action, and the commands derived from the generally accepted interpretation of the legal norms; or, where such confermity has become unobtainable, at least to effect reparation or "indemnification"[37].

It is seen below in the next chapter that a state may have extra territorial jurisdiction on the ground of nationality, protective interest theory, and protection of certain universal interest In *Trustees and Executors and Agency Co. v. Federal Commission of Taxation* (1933) Evatt J, added that "the extent of extra territorial jurisdiction permitted, or rather not forbidden, by international law cannot always be stated with precision. But certainly, no state attempts to exercise jurisdiction over matters, persons or things with which it has absolutely no concern."[38]

The conclusion is that a State has jurisdiction if its contact with a given set of facts is substantially direct and close and the jurisdiction in respect to them is in harmony with international law i. e. practice of states, principle of non-interference etc.

III The nature of the Coastal States Rights : The Debate over Diverse Claims :

34. See Mc Dougal and Harold D. Lasswell in Nawaz M. K. ed. *Essay on International Law.* (1974) Leiden, at p 78.
35. Brecht, Arnold, *Political Theory.* (1959) at p. 183 cited by Mc Dougal and Lasswell. *Ibid* at p. 78.
36. Restatement second, *Supra* note 29 para 8 at p. 23.
37. Max Weber, *Law in Economy and Science* (1954) at p. 14 cited by Mc Dougal and Lasswell, *Supra* note 30 at p 84.
38. 39 *Commonwealth L. Reports.* (1933) 220 at pp. 235-36.

(i) Third UN Conference on the LOS :

As the origin and concept of the EEZ are out of the purview of this discussion, suffices to state here that the concept would empower Coastal States to extend their jurisdiction to 200 nautical miles from their shores. In order to describe the nature of the rights over the living and non-living resources of the zone, states proposed in their draft articles, and referred in their discussion to various terms, which have been discussed above.

In a working paper submitted by Australia and New Zealand in August 1972, it was proposed that coastal state should enjoy "exclusive jurisdiction" over the "living resources" of the zone. One of the conditions suggested was that where the coastal state is unable to take the whole allowable catch of a species, it should allow the entry of foreign fishing vessels with a view to maintaining maximum food supply. Such access should be granted without the imposition of unreasonable conditions and without discrimination between nationals of other states.[39] But in a later proposal these two states refer to "sovereign rights" over the renewable and non-renewable natural resources of the waters, the seabed and the subsoil thereof.[40]

The proposals made by Canada, Japan, the Soviet Union and the United States in respect of fisheries have in common the idea that the Coastal State should acquire preferential rights over coastal species. A Canadian Working Paper on Management of the Living Resources of the Sea of 1972 suggested that the use of coastal fisheries resources should be of maximum benefit to the people of the Coastal State in terms of economic efficiency, contribution to the economy and improvement of social conditions. Therefore, the Coastal State should have exclusive rights for some coastal species, and preferential rights for others.[41] But, a later proposal, co sponsored by Canada with India, Kenya and Sri Lanka, suggests "sovereign rights for the purpose of exploration. exploitation, conservation and management of the living resources" of the zone.[42] It further recognises the right of a "developing land locked State" to fish in the "exlusive fishery zone of the adjoining Coastal State on the basis of equality with the nationls of that State".

39. Doc A/Ac 138/Sc. IIiL. Il. See Art. I & V., Report of the committeeon the Peaceful uses of the Seabed and the Ocean floor beyond the limits of national jurisdiction. *GAOR.* 27 th Session Sup. No 21. (A/8721). (hereinafter called 27 th Report (1972) at p. 183.
40. Doc A/Ac 138/Sc. II/L. 36, see 28 th Report (1973) vol. III p. 77.
41. Doc. A/Ac 138/Se II/L. 8, 27 th Report (1972) 164.
42. Doc. A/Ac 138/Sc II/L. 38, 28 th Report (1973) Vol. III p. 82.

According to the United States proposal, the Coastal State may reserve to its nationals that allowable portion of the catch which they can harvest, Supposing that these resources are not fully utilized, vessels of foreign nations are permitted under reasonable conditions to participate on the basis of certain priorities. This proposal suggests that the Coastal State "shall regulate and have preferential rights" of all the coastal living resources.[43] In a later proposal, the United States speaks of "jurisdiction and the sovereign and exclusive rights" for the purpose of exploring and exploiting the renewable and non-renewable natural resources" of the zone.[44]

The Soviet Union's proposal takes a more or less similar position to Canada and the United States insofar as anadromous species are concerned.[45] The Japanese proposal suggests preferential rights of the Coastal State only for coastal fisheries but contrary to the abovementioned proposals, Japan takes the view that no preferential rights of catch should be granted to a Coastal State in respect of harvesting of anadromous stocks of fish.[46]

Article 4 of the draft articles submitted by Colombia, Mexico and Venezuela suggests "sovereign rights" over the renewable and non-renewable resources of the zone".[47] This article has been taken verbatim from the Santo Domingo Declaration 1972, a declaration which has been signed by these three states with seven others.[48] But the declaration further refers to the "right to ensure sovereignty ovre the resources of the Area." The Yaounde Seminar at one point speaks of "exclusive jurisdiction" for the purpose of control, regulation and rational exploitation of the living resources of the zone, but further refers to "sovereignty" over all resources within the zone.[49]

The Kenyan proposal, which attained the maximum support from the developing countries, speaks of "sovereign rights" and "exclusive

43. Doc. A/Ac 138/Sc IIiL. 9, 27 th Report (1972) pp. 175-9.
44. Doc. AOONF. 62/C. 2/L. 47. See 3 UNCLOSOR Vol. III p. 222 (Article 1.).
45. Doc. A/Ac 138/Sc II/L. 6, supra note 43 at pp 158-161.
46. Doc. A/Ac 138/Sc II/L. 12, Ibid. pp. 183-7.
47. Doc. A/Ac 138/Sc/L 21, 28 th Report (1973) Vol. III pp. 14-19,
48. Doc. A/Ac 138/80. 27 th Report (1972) at p. 70. It was signed by Colombia, Costa Rica, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Dominican Republic, Trinidad and Tobago. Other participants, Barbados, El-Salvador, Guyana, Jamaica and Panama, did not sign it. See 66 AJIL (1972) at p. 918.
49. Doc. A/Ac 138/79 27 th Report (1972) 73. It was signed by 17 African states, namely the Cameroons, Tunisia, Algeria, Dahomey, Egypt, Sierra Leone, Zaire, Senegal, Ethopia, Equatorial Guinea, Kenya, Ivory Coast, Nigeria, Mauritius, Tanzania, Togo and Central African Requblic.

jurisdiction" but further makes a distinction between non-renewable resources, over which the Coastal State would have "exclusive control", and renewable resources to which the Coastal State would have "exclusive or preferential rights.[50] The approach of the Kenyan delegation, proposing "exclusive or preferential rights" for living resources, seems to be appropriate because it recognizes the "rights" of neighbouring land-locked and merely shelf-locked states to participate in the exploration and exploitation of the living resources of the zone, although the term "rights" in context with the land-locked and shelf-locked states in respect to the living resources is a misguiding factor, as will be explained later.

The proposal by the Soviet Union and other socialist states provides for "sovereign rights" over all living and non-living resources of the zone.[51] Two proposals put forword by fourteen[52] and eighteen states[53] refer to "sovereignty" over the renewable and non-renewable resources for the purpose of exploration and exploitation only. Twenty-two land-locked and shelf-locked states' proposal, without embodying any such phrase, simply provides for the right of a Coastal State to establish a zone for the purpose of exploring and exploiting the living and non-living resources therein.[54]

The Working Paper of Iceland does not refer to "sovereignty" or "sovereign rights" but simply to "jurisdiction and control".[55] Wording used in the Working Paper of China[56] implies the right of ownership. According to Section 2 (2), "All natural resources within the economic zone of the Coastal State...are owned by the Coastal State", although the text goes on to say that : "A Coastal State exercises exclusive

50. DOc. A/Ac 138/Sc II/L. 10. 27 th Report (1972) at p. 180.
51. Doc. A/CONF, 62/C. 2/L. 38, UNCLOSOR Vol. III at p. 214. Proposed by USSR, Bulgaria, Byolorussian SSR, German Democratic Republic, Poland & Ukrain SSR.
52. Doc. A/Ac 138/Sc II/L. 40. 28 th Report (1973) Vol. III p. 87.
53. Doc. A/CONF. 62/C. 2/L. 82. 3 UNCLOSOR Vol. III p. 240. Proposed by Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, United Republic of Cameroon, Tanzania and Zaire. In Doc. A/Ac 138/Sc II/L. 40 supra note 52, all states are common except Algeria, Mouritius and Somalia.
54. Doc. A/CONF. 62/C. 2/L. 39. Ibid. pp. 216-17. Proposed by Afghanistan, Austria, Belgium, Bhutan, Bolivia, Botswana, Finland, Iraq, Laos, Lesotho, Luxembourg, Mali, Nepal, Netherlands, Paraguay, Singapore, Swaziland, Sweden, Switzerland, Uganda, Upper Upper Volta and Zambia.
55. Doc. A/Ac 138/Sc II/L. 23, 28th Report (1973) Vol. III, p. 23.
56. Doc. A/Ac 138/Sc II/L. 34, Ibid. p. 71.

jurisdiction over its economic zone for the purpose of protecting, using, exploring and exploiting the resources..." It further explicitly provides for the concept of ownership in Paragraph 3 :

> A Coastal State shall, in principle, grant to the landlocked and shelf locked states adjacent to its territory common enjoyment of a certain proportion of the *right of ownership* in its economic zone. (emphasis added)

The draft articles put forward by Argentina[57] differ considerable from those quoted above on this particular issue, as they provide for "sovereign rights *over an area* of sea adjacent to its territorial sea upto a distance of 200 nautical miles." (emphasis added)

However, this text further states that a Coastal State would have "sovereign right" over the renewable and non-renewable natural resources found in the area. It distinguishes the adjacent sea area and the territorial sea by guaranteeing the freedom of navigation and overflight in and over the adjacent sea area, as these freedoms are certainly not the characteristics of the territorial sea.

A proposal put forward by Ecuador, Panama and Peru requires not only "sovereignty" and consequently "jurisdiction" over the zone but also over the air space above it.[58] But, like the Argentine proposal, it also recognizes the right of free navigation and overflight. Similarly, Nicaragua's proposal provides :

> 2. It shall be within the competence of the Coastal State to make provision in its national sea for sovereign, jurisdictional or special powers, or combination thereof, with no limitations other than those provided for in this Convention.
> 3. The same rights shall extend to the air space above the national sea, and to the submarine shelf, ... as far as the outer edge of the continental emersion (*sic*).
> 4. The national sea, superjacent air space, submarine shelf and/or sea-bed and subsoil referred to in the preceding paragraph shall constitute the national zone of the Coastal State, the integrity and inviolability of which[59] shall be guaranteed by the international community.

This proposal further provides that in the zone beyond the first 12 nautical miles, all other states shall have the freedom of fishing, navigation, overflight, laying of submarine cables and pipelines. On the

57. Doc. A/Ac. 138/Sc II/L. 37, Ibid. p. 78. See Articles 4, 7 and 13.
58. Doc. A/Ac 138/Sc II/L. 27. Ibid. p. 30.
59. Doc. A/CONF. 62/C. 2/L. 17. 3 UNCLOSOR Vol. III p. 195.

one hand, the text claims sovereignty over the zone as a Coastal State may have over the territorial sea; on the other, it guarantees all other states the freedoms, which they may have on the high seas. Nicaragua has also signed the Santo Domingo Declaration of 1972, which requires only "sovereign right" over the renewable and non-renewable natural resources of the zone.

In a Mexican Decree of 26 January, 1976, on continental change to account for EEZ beyond the limits of the territorial sea, Article 27 provides : "The nation shall exercise the rights of sovereignty and jurisdiction" in the zone.[60] In another decree of 1 February, 1976, the same phrase has been used in Article 1, but Article 4 more clearly provides :

> Within the exclusive economic zone, the nation has :
>
> I. Sovereign rights of exploration and exploitation, conservation and management of natural resources, both renewable and non-renewable, of the sea bed, including the subsoil and the superjacent waters;[61]

Those Latin American states, which propose "sovereignty" rather than "sovereign rights" or "exclusive rights" seem to have aspirations from the Resolution of Inter-American Judicial Committee in 1973, which provides that the "sovereignty or jurisdiction" of a Coastal State extends to the area adjacent to its coast up to a maximum distance of 200 nautical miles, as well as to the air space above and the bed and subsoil of the sea.[62]

The Nigerian proposal provides for the "exclusive right" of the Coastal State to explore and exploit the renewable living resources but "sovereign right" in the case of non-renewable resources.[63] The different phrases have been used for renewable and non-renewable natural resources because the Nigerian delegation was of the opinion that the concept of "sovereign rights" was "inappropriate to cover fish which might move from the territorial sea of one state to another or to the high seas within a day." But this approach does not accord with the nature of sovereignty as formulated by Jude Huber in the *Island of Palmas Arbitration* :

> Manifestation of territorial sovereignty assumes.....different forms, according to the conditions of time and place. Although

60. 15 *International Legal Materials* (hereinafter called ILM) (1976) 380.
61 *Ibid.* p. 382.
62. *ILM* (1973) 711.
63. Doc. A/CONF. 62/C. 2/L. 21/Rev. 1. 3 *UNCLOSOR* Vol. III p. 199. See Article 2.

continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as enhabited or unhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed, or again regions accessible from, for instance, the high seas.[65]

Also the *Eastern Greenland* (1933)[66] and *Clipperton Island* (1937)[67] cases have clearly laid down that what was required was effective display of state activity in such a manner as circumstances of territory demanded. The Peruvian delegate approaches more obliquely: "What should be stipulated were not the rights and functions of the Coastal State within its zone of exclusive jurisdiction, but rather the rights and uses granted to other states."[68] These, laying of cables and pipelines and preferential treatment of land-locked and other geographically disadvantaged states. But this idea has not been accepted by the ongoing 3 UNCLOS as Article 46 (2) of RSNT provides : "All provisions applicable in the high seas and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this chapter."[69]

In cases where present convention does not attribute rights or jurisdiction to the Coastal State or to other State within the exclusive economic zone and a conflict arises between the interests of the Coastal State and any other State or States, the conflict should be resolved on the basis of equality and in the light of all the relevant circumstances' taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.[70]

So the idea that "residual rights" should rest in the Coastal State has been rejected.

China's repesentative speaks of "exclusive jurisdiction" as it is the "natural corollary to the exercise ef full sovereignty over resource." According to him, the "exclusive jurisdiction" would include the right to protect, use, explore and exploit all the natural resources in the zone,

64. See the statement of the Nigerian delegate in the second session of the 3 UNCLOS. 3 *UNCLOSOR* Vol. II at p. 172.
65. 22 *AJIL* (1928) 868 at p. 877.
66. *PCIJ* ser. A/B No. 53.
67. 26 *AJIL* (1932) 390.
68. 3 *UNCLOSOR* Vol. II p. 194.
69. *Ibid.* Vol. V. p. 160.
70. *Ibid.* p. 161.

to adopt the necessary measures to prevent those resources from being plundered, encroached on, damaged or polluted, and to exercise over all control of the marine environment and scientific research and their regulation.[71].

Burma's representative said: "(Sovereign rights) should be coupled with exclusive regulatory control and management power....."[72] The representative of Honduras refers to "sovereign competence",[73] while the representative of Upper Volta speaks of "guaranteed control."[74] The Polish representative introduces the right of "innocent fishing. "Where the Coastal States is enable to take 100 per cent of the allowable catch on the living resources of the zone, it should allow the foreign vessel to fish there. "Fishing within the zone would be regarded as innocent if it did not interfere with the exploitation of stocks which were fully or partially utilized by the Costal States by distributing the ecological balance or by reducing the amount of the allowable catch reserved for the Coastal State."[75] But, as been mentioned earlier, the 3 UNCLOS adopts "*Sovereign rights* for the purpose of exploring and exploiting conserving and managing the natural resources, whether living or non-living of the sea bed and subsoil and the superjacent waters." (emphasis added) The same phrase has been used in the Continental Shelf Convention of 1958.[76] There, it is necessary to look at the debate of the 1 UNCLOS and the writings of the publicists in that era.

(*ii*) *First UN Conferences LOS and Writings of the Publicists*

In the United States Proclamation of 1945, the concept of "control and jurisdiction" was preferred to "sovereignty" and the 'control and jurisdiction' thus claimed had reference not to the seabed and subsoil of the Continental Shelf as such but merely to the resources of the Continental Shelf.[77] Gidel, in the United Nations Memorandum, states that the United States claim was not of sovereignty but merely of "certain limited and specialized rights in respect of certain areas beyond the limits of the territorial sea."[78] Full sovereignty over the Continental Shelf was claimed by Argentina, Chile, Peru, Costa Rica, Nicaragua, Honduras and El Salvador.

71. *Ibid.* p. 187.
72. *Ibid.* p. 224.
73. *Ibid.* p. 171.
74. *Ibid.* p. 174.
75. *Ibid.* p. 202.
76 *UNTL*, p. 312.
77. UNLS. ST/LEG/SER. B/1.(1951) 38.
78. Gidel, Memorandum No. 81, cited by Mc Dougal and Burke, *The Public Order of the Oceans* (1962) Yale, at p. 694.

Vallat, commenting on the United States proclamation of 1945, writes :

> It is difficult to see what distinction there is between control over the 'natural resources' and control over the subsoil and seabed themselves. Anything of value might be included in 'natural resources', and any use or interference with the subsoil or sea bed might equally be regarded as a use of interference with the 'natural resources.' Therefore, it does not seem that the use of this expression imparts any real limitation, and the claim may be taken as relating to the subsoil and sea bed themselves.....More over, 'jurisdiction and control' are tantamount to sovereignty.[79]

Similarly, Lauterpacht states :

> An area which is under the State's exclusive control and jurisdiction, not delegated by or accountable to a foreign government or autority, is under the sovereignty of that State. It is part of that State ..for the exclusive jurisdiction and control is sovereignty.[80]

He further explained that in Mandates of the League of Nations or Trust Territories under UN Charter, a state may not claim sovereignty but may have "jurisdiction or control" or "exclusive jurisdiction and control", but, in the case of the Continental Self, there is no other state to claim the residual powers, as may be the case with a mandated or trust territory.

According to Sir Cecil Hurst, the "distinction between the jurisdiction and exclusive control which are claimed and sovereignty is so small as to be little more than a question of name."[81] Similarly, Brierly in the International Law Commission argued that if the littoral state had exclusive rights of control and jurisdiction over the subsoil, it could be regarded as enjoying sovereignty.[82] Disagreeing with this view, Professor Green referred to Judge Max Huber's statement in the *Island of Palmas Case* (1928) : "Sovereignty...in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State...Territorial sovereignty...involves the

79, Vallat, F. A., "The Continental Shelf". 23 *British Year Book of Int. Law* (hereinafter called BYIL) (1956) 3 3 at pp 336-37.

80. Lauterpacht, H., "Sovereignty over Submarine Areas". 27 *BYIL* (1950) 376 at p. 389.

81. Hurst, Sir Cecil, "The Continental Shelf". 34 *Grotius Society Transactions* (1949) 153 at p. 161.

82. 1. *Year Book of Int. Law Commission* (hereinafter called YBILC) (1950) at p. 227, para. 8. a.

exclusive right to display the activities of a State."[83] He further argues that "effective occupation on the part of the Coastal State is a necessary prerequisite to acquisition of sovereignty" on the part of the state over the Continental Shelf.[84] In the Case of *Gasparroni ed altri* (1952)[85] the Italian tribunal acquitted the defendants accused of theft who had dragged certain munitions of war, abandoned by the Allies, form the bottom of the sea at a place 22 miles off the Italian coast. The tribunal held that neither by international law nor by Italian law was the Italian State entitled to this property or authorized to grant an alleged exclusive concession for its recovery from high seas; rather, the only way to acquire title to the property was through occupation, i.e. the taking possession of the munitons coupled with *animus occupandi.*

Similarly, India's position in the l UNCLOS was that building of installations for military purposes on the shelf would constitute an appropriation of the sea bed and it would lead to sovereign rights over the Continental Shelf.[86]

In 1950, Professor Francois, in the International Law Commission, made the distinction between the 'sovereignty' and 'jurisdiction and control'. In regard to the first, the powers of the State were limited only to the extent of obligations specifically undertaken. With regard to the second, its powers extend only so far as they have been expressly conceded.[87]

The International Law Commission in 1951 adopted the phrase "Control and jurisdiction"[88]. This decision has been criticized by the Governments of Chile, France, Iceland, Union of South Africa and the United Kingdom,[89] all of which considered that Coastal States should exercise "sovereignty" over the Continental Shelf, though, with the exception of Chile, they did not claim sovereignty over the superjacent waters and the air space above. The Brazilian and Danish Governments believed that the Coastal States should exercise "exclusive jurisdiction"[90]. Taking these observations into account, Professor Francois

83. 22 *AJIL* (1928) 868 at pp 875-76.

84. Green, L. C., "The Continental Shelf". 4 *Current Legal Problems* (1951) 54 at p, 73. See 4 Whiteman. *Supra* note 24 at p. 849.

35 4 Whiteman, *Ibid.* at p. 871 (ed altri, XXXVIII Rivista Di Diritto Internazionale (1955) 9094).

86. See Doc. A/CONF. 13/C. 4/L. 57, 1. *UNCLOSOR* Vol. VI p. 141; also D.P, O' Connell, *The Influence of Law on Sea Power* (1975) Manchester, at p. 158.

87. Doc. A/CN. 4./SR 68 at p. 7 (1950).

88. 1 *YBILC* (1951) p. 274,

89. 1 *YBILC* (1953) p. 83

90. *Ibid.*

proposed that the original text should be modified by inserting the words "sovereign rights"[91]. Mr. Alfaro, supporting Professor Francois' proposal, said that the phrase "sovereign rights" would dispel the doubt as to whether states exercised full sovereignty over the Continental Shelf or only the rights of control and jurisdiction. He further stated :

> Sovereignty consisted of a whole series of powers and attributions exercised by States within their own territory, from which two—the right of control and jurisdiction—had been selected.[92]

Lauterpacht's proposal for the insertion of "sovereignty"[93] was rejected by the Commission as the latter wanted to "avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely, the safeguarding of the principle of full freedom of the superjacent sea and the air space above it"[94]. In its eighth session in 1956, the Commission, for the consideration of the 1 UNCLOS, adopted draft article 68 which provided :

> The Coastal State exercises over the Continental Shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.[85]

In 1 UNCLOS, Argentina proposed an amendment to the above draft article to replace the phrase "sovereign rights" by "sovereignty"[96]. This amendment further provided that it would not affect the regime of freedom of navigation on the high seas, or the air space the above the superjacent waters. Mexico also proposed a similar amendment[97]. By proposing the replacement of "sovereign rights" by "control and jurisdiction" the Swedish delegation attempted to recast the International Law Commission draft article 68 as it was adopted by the Commission in 1951[98]. In support of its proposal, in the IV Committee of 1 UNCLOS, the Argentine representative said :

> According to the geographical view the Continental Shelf was a prolongation of the territory of the Coastal State under the surface of the sea, and it was therefore not possible to make a distinction between the rights of the Coastal over the mainland and its rights over the continuation of the mainland beneath the sea[99].

91. *Ibid.*
92. *Ibid* pp. 83-84.
93. *Ibid.* p. 84.
94. See commentary on Article 68, paragraph 2, 2 *YBILC* (1956) at p. 264.
95. *Ibid.*
96. UN Doc. A/CONF. 13/C. 4/L. 6, 1 *UNCLOSOR* Vol. VI. 127.
97. UN Doc. A/GCNF. 13/C. 4/L. 2, *ibid.* p. 126.
98. UN Doc. A/CONF. 13/C. 4/L.9, *ibid.* p. 129.
99. *ibid.* at p. 48.

According to the Swedish delegate, the rules proposed by the International Law Commission with regard to the Continental Shelf were "new rules that did not form part of the existing international law. The rights exercised by Coastal States in virtue of those rules presupposed the consent of other governments". Therefore, in the view of the Swedish delegation, the "sovereign rights" was not the proper phrase to describe the limited rights of the Coastal State[100]. But later, the Swedish delegation withdrew its proposal in favour of the United States proposal which would have required the substitution of "exclusive rights" for "sovereign rights"[101]. The United States delegate argued that the terms such as "sovereignty" or "sovereign rights" might introduce an element of uncertainty about the legal status of the superjacent waters and air space[102].

This view of the United States delegation seems to be correct because in the Inter-American Council of Jurists in 1956, the Mexican representative had said : "because a Coastal State exercised sovereignty over its Continental Shelf as over those parts of its territory which were not submerged, it had sovereignty over the superjacent seas as well"[103].

Without referring to any term, the representative of the Dominican Republic said : "the principal question in discussing the nature of the Coastal State's rights must be the effectiveness of those rights, and provided that the Coastal State had effective rights to exploit the natural resources of the Continental Shelf it was of no consequence how those rights were described"[104]. But the Brazilian representative correctly stated :

> If sovereign rights which were of themselves exclusive erga omnes were deemed to be limited for certain purposes, they could not properly be regarded as sovereign, since sovereignty was the aggregate of the rights of a State[105].

The Maxican delegation expressed its willingness to add to its proposal some wording to the effect that "it should be without prejudice to the regime of the high seas as applied to the superjacent waters of the Continental Shelf[106]. The Cuban representative, strongly opposing this view, said :

100. *ibid.* at p. 18.
101. Doc. A/CONF. 13/G. 4/L. 31, *ibid.* p. 135.
102. *ibid.* 51.
103. See the statement of the Cuban representative. *ibid.* p. 62.
104. *ibid.* p. 66, para. 28.
105. *idid.* p. 55, para. 7.
106. *ibid.* p. 63.

It should be remembered also that the freedom of navigation included freedom of submarine navigation. It might be necessary for a submarine to come to rest on the sea bed, an act which be fully in the accordance with the principle of freedom of seas but would become techanically a legal impossibility if the sovereignty of the Coastal State extended to the sea bed and subsoil of the high seas.[107]

China's representative, supporting the United States proposal said: "Sovereign rights were rights pertaining to a sovereign and had no legal basis unless full sovereignty was recognized."[108] In contrast, the Indian representative opposing the United States proposal said that the term "exclusive rights" had no significance in international law; while "exclusivity was an attribute of sovereign rights, none of the other attributes of sovereignty were attached to the expression 'exclusive rights'."[109] Similarly, the Italian representative said that "the right to own something and the right to use it might equally be exclusive; but they were different categories of rights. Thus, to say that a right was exclusive was not to define it in substance."[110]

The Argentine delegation withdrew its proposal because it was similar to the proposal made by Mexico. The United States proposal was adopted by the fourth Committee.[111]

In order to elaborate the nature of the rights of the Coastal State in the Continental Shelf, Argentina and Yugoslavia separately proposed an additional paragraph to draft article 68 adopted by the International Law Commission. The Argentine proposal provided :

> The rights of the Coastal State are exclusive in the sense that if that State does not explore or exploit the Continental Shelf no other State may undertake these activities without its consent.[112]

The Yugoslav proposal[113] differed in language but was similar in substance, therefore, in the fourth Committee only the Argentine proposal was put to the vote, and it was adopted.[114] In the Plenary Meetings

107. *ibid.* pp. 52-53.
108. *ibid.* p. 52, para. 19.
109. *ibid.* p. 60.
110. *ibid.* p. 64.
111. It was adopted by 21 votes to 20 with 27 abstentions. *ibid.* p. 69.
112. Doc. A/CONF. 13/C. 4/L. 6/KEV. 1, Ibid. p. 128. This text originally did not contain "explore or" before "exploit", which was inserted at the proposal of the representative of Costa Rica. See 1 *UNCLOSO* Vol. VI at p 55. See Doc. A/CONF. 13/C. 4/L. 6/REV. 2 at p. 128.
113. Doc. A/CONF. 13/C. 4/L. 13. *Ibid.* at p. 130.
114. *Ibid.* p. 70. It was adopted by 36 votes to 6, with 25 abstentions.

of the 1 UNCLOS, the Indian proposal, that the words "exclusive rights" in draft article 68 as adopted by the fourth Committee, should be replaced by "sovereign rights" was adopted,[115] thus restoring the language recommended by the International Law Commission. Though, even in 3 UNCLOS, India adheres to the same position, the language of article V (2) of the agreement between India and Sri Lanka on the Maritime Boundary between the two countries in the Gulf of Manaar and the Bay of Bengal creates a different impression, as it provides :

> Each Party shall have sovereign rights and exclusive jurisdic- *over*...the exclusive economic zone as well as (its) resources, whether living or non-living, falling on its side...[116] (emphasis added)

(iv) Preferred Solution for EEZ

If the living and non-living resources of the zone are approached from different angles, one may suggest that because the non-living resources are found in the Continental Shelf, i. e. sea bed or subsoil thereof, rather than in the superjacent waters of the shelf, and the Coastal State under customary international law exercises "sovereign rights" over the Continental Shelf for the purpose of exploring it and exploiting its natural resources,[117] the term "sovereign rights" would be more appropriate for non-living resources. But it is neither necessary nor practicably possible that the limits of the EEZ and the Continental Shelf should coincide, so non-living resources found in the EEZ but beyond the edge of the Continental Shelf would not be covered by this approach. Art. 44, paragraph 1[118] of RSNT provides that the Coastal State in its EEZ has "sovereign rights" for the purpose of "exploring and exploiting..." It means the Coastal State, and only the Coastal State, has the right to explore and exploit the living and non-living resources of the zone or to permit some other State to do so. No other State can explore or exploit the natural resource of the zone without the express consent of the Coastal State, even if the latter does not explore or exploit it.

Article 51 (1)[119] of RSNT obliges the Coastal State to "promote the objective of optimum utilization of the living resources." The essence

115. This was adopted by 51 votes to 14 with 6 abstentions. See 1 *UNCLOSOR* VOL. II p. 14.
116. See the Agreement of 23 rd March 1976 in 16 *IJII* (1976) 118.
117. In the *North Sea Continental Shelf Cases* (1969) the IJC remarked that the first two articles of the C S. C. form part of customary international law. *ICJ Reports* (1969) at p. 42.
118. *UNCLOR* Vol. IV. p. 160.
119. *Ibid.* p 161.

of this clause will be discussed below; suffice it to state here that if the Coastal State is not capable of catching the whole allowable catch in the zone, it is under an obligation to permit foreign vessels to fish, but there is no such obligation so far as the non-living resources are concerned. The reason is quite obvious : if the living resources are not utilized at the proper time, they will go to waste, but this is not the case with non-living rssources. Hence the "sovereign rights" seems to be the most appropriate term for non-living resources. But for living resources, the term "preferential rights" seems to be preferable.

Article 44, paragraph 1 of RSNT provides for "Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resorces..."[120] In comparison with C.S,C., here the "sovereign rights" do not relate merely to powers to acquire and exploit the resources, but are clearly identified as such jurisdictional "measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations enacted" by the Coastal State" in conformity with the present convention".[121]

Artscle 58 of RSNT provides : "Land-locked States *shall have* the right to participate in the exploitation of the *living resources* of the exclusive economic zones of adjoining Coastal States on an equitable basis..."[122] (emphasis added) In practice, the resolution of this problem is a question of insurmountable difficulties. Afghanistan, for example, borders with Iran, Pakistan, China and the Soviet Union. Should it be allowed to participate in the exploitation of the living resources in the zones of all these four states ? On the other hand, South Africa broders with Lesotho, Botswana, Rhodesia and Swaziand. Should all these four countries be allowed to participate in the exloitation of the living resources in the zone of South Africa ?

Article 59, paragraph 1 of RSNT provides : "Developing Coastal States which are situated in a subregion or region whose geographical peculiarities make such States particularly dependent for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources in the exclusive economic zones of their neighbouring States and developing Coastal States which can claim no exclusive economic zones of their own shall have the right to participate, on an equitable basis, in the exploitation of living resources in the exclusive economic zones of other States in a subregion or region."[123]

120. *Supra* note 118.
121. Art. 61. *ibsd*. at p. 163.
122. *ibid*.
123. *Ibid*.

Four countries, namely the Cameroons, Ghana, Ivory Coast and Thailand, will benefit under the first category, while Iraq, Jordan, Singapore and Zaire will benefit under the second category.[124]

According to Article 50 (1), the Coastal State "will determine the allowable catch of the living resources in its exclusive economic zone,"[125] and by Article 51 (2) it "shall determine its capacity to harvest the living resources of the exclusive economic zone".[126] The text places no limitation upon the competance of the Coastal State to determine the "allowable catch", for example by relating it directly to available resources and the need to provide scientific data on which the "allowable catch" is based.[127] Therefore, Coastal States' right to determine the allowable catch is unqualified. Article Articl 51 (3) further states that it is only once the Coastal State has admitted that there is a surplus of living resources that, in granting access, it is to take into account *inter alia*, "the provisions of Articles 58 and 59,... the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks."

Undoubtedly, it would be possible for the Coastal State to set the allowable catch at any level it wished and, more particularly, to set it by reference to its own capacity to harvest the resources, thus eliminating any need to allow other States access to the resources of the zone.[128]

124. In the first category, the first three countries have a very short coastal length, and Thailand is shelf-locked. In the second category, the EEZ for Iraq and Jordan will be of 200 square nautical miles, for Singapore only 100 sq. nautical miles and for Zaire 300 sq. nautical miles. See Alexander, L. M. and Hodgson, D , 'The role of geographically disadvantaged states in the Law of the Sea."13 *San Diego* 1. 1. (1976) 558 at p. 567.
125. Art. 50 (1) RSNT. 3 *UNCIOSOI* Vol. V at p. 161.
126. Art. 51 (2) *Ibid*.
127. Art. 50 (2) requires the Coastal State to take "into account the best evidence available to it" in order to "ensure through proper conservation and management measures that the maintenanee of the living resources in the bxclusive eeonomic zone is not endangered by over exploitation" but there is no similar obligation in fixing the allowable catch in the zone. On the other hand, when dealing with the management and conservation of the living resources of the high seas, Art. 106 makes the determination of the 'allowable catch" dependent upon" the best evidence available to the State concerned", and also requires the exchange on a regula. basis of scientific information, catch and fishing statistics and othor relevant data.
128. See Greig, D.W., *International Law* (1977) Butterworth at p. 310.

Article 51 (1) lays down the paramount objective "of optimum utilization of the living resources" in the zone, and it is specifically made, "Without prejudice" to Article 50, including of course the Coastal State's right to determine the "allowable catch". But if the Coastal State does not have the capacity to harvest the entire allowable catch"[129] in case there is a surplus of living resources, Article 51 (1) i.e. requirement of optimum utilization obliges the Coastal State to give access to other States. The concept of "optimum utilization" echoes in various recent international agreements. In an agreement between the United States and The European Economic Market, the United States, in determining the surplus of living resources in the United States zone which may be made available to vessels of the member States of the Community and of other countries, undertakes to "promote the objective of optimum utilization."[130] In a similar agreement the United States and Japan "undertake to ensure...optimum utilization and rational management of the fishery resources."[131]

Hence, the Coastal should have "preferential rights" in respect of the living resources, rather than sovereign rights or exclusive rights of the zone.

The reasons for the perference of these terms are quite obvious. Sovereignty cannot be used either for living or non-living resources, because sovereignty comprises the right to exercise the state's function to the exclusion of others. In the EEZ, other States have the freedoms of navigation and the right of laying of submarine cables and pipelines etc. It may be argued that these rights of other States may be considered servitudes like the right of innocent passage in the territorial sea. Effective occupation on the part of the Coastal State is a necessary prerequisite to acquisition of sovereignty over the zone. Absolute titles, with respect to historic waters, i. e. Palk's Bay, Hudson Bay etc, have been established by long continued occupation by the Coastal States and with acquiescence of other nations,[132] which is certainly not the case in EEZ.

"Jurisdiction and control" or "exclusive jurisdiction and control," etc., may not be used for the reason shown in the earlier discussion, that in cases of Trust territories under the United Nations Charter or

129. See Art. 51 Paragraph 2 of RSNT.

130. See Art. IV of the Agreement of 10th February 1977 between US and EEC. 16 *ILM* (1977) 257 at p. 259.

131. See Art. I of the Agreement of 10th February 1977 between US and Japan. *ibid* 28, at p. 289.

132. See *Anna Kumaru Pilliw* V *Muthupayal* (1904) 27 *Madras I. J.* 551; 20 ILR (1953) p. 16 at foot note 2.

Mandated territories under the League Covenant, or even in case of protectorates, the State may have exclusive jurisdiction and control but cannot claim to have some of the sovereign powers. Sovereignty is the aggregate of powers and here a few of them are concerned with the resources of the zone. These limited sovereign powers are sufficient to declare that the Coastal State has similar rights over the resources of the zone as it may have on its own land. Therefore "sovereign right" is the most appropriate term with regard to non-living resources.

With respect to the living resources, the Coastal State has not been given similar rights as it may have on the living resources over its own land, because under Article 51 (1) of RSNT the Coastal State, in case there is surplus of living resources, is obliged to allow the entry of foreign vessels. Therefore the Coastal State has "preferential rights" rather than "sovereign rights". If the Coastal State is granted "sovereign right" in respect of the living resources, as has been done in RSNT, the Coastal State would have no obligation towards either the landlocked or developing Coastal States which either cannot claim their own economic zones or which are situated in a subregion or region whose geographical peculiarities make such States particularly dependent for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources in the zones of their neighbouring State.

COMPENSATION TO THE VICTIMS OF CRIMINAL VIOLENCE IN INDIA

P. N. BANERJI*

I. Introduction

There is evidence to indicate that certain categories of the victims of crime were compensated in the olden days either by the offender or his kinsmen, or by the sovereign. In ancient India injuries or loss caused due to offences committed by government officers were compensated by his subordinates and by his family members. Again, traders or businessmen who lost their property while travelling through the kingdom were also compensated.[1] Similarly, S. 22 and 23, the Code of Hammurabi (written sometimes in 2270 B. C.) provided that when a traveller had been robbed on a highway and the offender escaped, the entire community of the area had to contribute in order to compensate the victim.[1a] In mediaeval England compensation for victims of crime was the responsibility of the offender's relatives sometimes even to the sixth degree of cousinship. At Exeter and Cambridge, in the Eleventh century, guilds were formed whose members were pledged to provide wergild, or blood money for those who became liable to pay it.[1b] But the practice had been discontinued subsequently. The right to punish the offender was taken over exclusively by the state, leaving the victim to claim damages for certain categories of loss or injuries in a civil action. There was then a further change in the penal philosophy and the states all over the world, though oblivious of the plight of victims, began to the interested in the reform and rehabilitation of offenders. It is not only recently that public attention has been focussed again on the victims of crime and the principle of victim compensation, as a matter of state policy, has been accepted in several countries.[2]

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1. See *Arthasashtra* by Acharya Vishnugupta (Chanakya), Translated by Bharatiya Yogi, Ist ed. Adhyaya 21, Adhikaran 2, p. 206.

1a. See Mueller, Tort, Crime & the Primitive, *Jl. of Crim L. C. & P. S.* 1955, 317.

1b. See Margery Fry, Justice For Victims, *Journal of Public Law*, Vol. 8 (19 9) 192.

2. Programmes for compensating victims of crimes by state have already been established in England, New Zealand, North Ireland and in the U.S.A. (about 12 States), See Law Comm. of India, *Forty-seeond Report on Indian*

II. Should we Compensate The Victims Of Violent Crime ?

Needless to say that in India, as elsewhere, most of the offences are committed either against the property or person and the victims of both these categories of offences deserve our sympathy. But the former category of offences, it is logical to think, mainly affects the middle class and the rich who have very often absorbed the loss. To them. there is also open the option of insurance coverage for the loss and the possibility of *restitution in integrum* in the event of recovery of the property.[3] There is also open to them the remote possibility of recovering some damages in a civil suit.[4] In short, all these factors tend to show that we can perhaps defer this aspect of compensation for the time-being and limit our discussion to the victims of violent crimes. Such a course would also be justifiable for the resson that any scheme for compensating loss of property due to crimes, as distinguished from injuries due to crimes of violence, is forught with the danger of exposing itself to fraud[5]. more particularly, in a poor country like India.

There were in all 9,55,422 criminal violences throughout the country. Out of these 15708 were murders, 9837 were dacoities, 16958 were robberies and 68331 were riots[6]. The 'Crime In India' our official statistics on crime, does not classify the number of crimes committed

Penal Code (June 1971 para 3.20, p. 55). In 1967-68 compensation programme for the wictims of crime was initiated in Ontario (Canada). Similar programmes exist in West Germany Finland; See Eric Silk, Q. C. and Shaun MacGrath, Compensation for Victims of Crime in Ontario, The Law Society of Upper Canada *Gazette*, Vol. IX, No. 1 (March 1975) 29.

3. In 1970 the value of stolen property in India was 130 23 lakh and the property recovered was 14.98 lakh, the percentage of recovery being 1.5 In the case of dacoity, robbery, housebreaking, criminal breach of trust and other such offences the percentage of recovery was 22. 1. See *Bharat Men Aparadh* (Crime In India), 1970, Government of India, Ministry of Home, 67.

4. In practice civil action for damages is brough in rare cases. See Thakurdas Bhargava, Report of tke Joint Committee on Probation of Offenders Bill (Central) quoted by S. C. Consul's *Probation of Offenders Act and Rules*, IV ed,. 1977, 99.

5. There is a possibility that false complaints will be made by unscrupulous persons alleging loss of property due to thefts, robbery, dacoity etc. See Margery Fry, Justice For Victims, *Jour. af Pub. Law*, Vol. 8 (1959) 193. She thinks that so far as offences against property go any scheme for state insurance will not work because of fraud. However, she seems to be right when she says that few people would voluntarily wound themselves to obtain a modest compensation and the risk of successful deception in such cases is negligible.

6. *Bharat Men Aparadh* (Crime In India) 1970, Sarani (Table) II.

under the head 'hurts' or 'grievous hurts', except for juvenile offenders. Needless to say, such offences would be substantial in number. While murder is the highest category of violence, the other offences mentioned above are often associated with violence. It seems to be high time for us to get concerned about the possible impact of such crimes on the individual members of our society as also on the economic health of the community as a whole. Our Constitution has the avowed object of making India a social welfare state[7]. If welfare of the people is our objective can we legitimately ignore the sad plight of even a segment of our people who are killed, injured and incapacitated due to criminal violence? The fate of their helpless dependents is not a matter of lesser concern.

Prime facie, there is reason for us to compensate the victims in general and more particularly the victims of criminal violence and this accounts for the lip-service that our law has paid to the concept of victim compenseation. Section 545 of the Criminal Procedue Code, 1898, had provided for compensation to the victims of crime to be paid from out of the fines recovered from the offenders. The present Code of 1973 has corresponding provisions in S.357. It says that when a court, upon convication of an offender, imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied *inter alia*, in the payment to any person of compensation for any loss or injury caused by the offence. Such order is passed when compensation is, in the opinion of the court, recoverable by such person in a civil court.[8] This section further goes on to provide that persons responsible for causing death, or for abetting the death of some person may also be fined and out of it compensetion could be paid to those who are entitled to recover damages from the convicted person, for the loss arising from a death, under the Fatal Accidents Act, 1955.[9]

7. Articles 38 and 39 of the Constitution of India, 1949.
8 The Criminal Procedure Code, 1973, S. 357 (1) (b).
9. *Ibid.* Sub Section (1) (c).
(The Indian) Fatal Accidents Act, 1855 has the object of providing compensation to families for loss occasioned by the death of a person caused by actionable wrong. Section 1A of the Act provides that when death of a person is caused by a wrongful act, neglect or default and it is of such a nature that it would have entitled the person injured, had he not died, to recover damages from the person responsible for injury, then notwithstanding the death of the injured, such persons as the wife, husband, parent and children, if any, of the deceased will be entitled to compensation. The suit, in question, can be brought by and in the name of the executor, administrator or representative of the person deceased. Compensation under this provision, though rarely claimed, has since been awarded not only in the cases of negligent homicides, culpable homicide not amounting to murder but also for murders (See AIR 1963 HP 37 and AIR 1949 All 448).

Again compensation can be ordered to be paid to bonafide purchaser of property when such property had been obtained by the seller by theft, criminal misappropriation, criminal breach of trust etc. and therefore the purchaser is deprived of the same for its being restored to the rightful owner[10]. Compensation can be given also in those cases where sentence is imposed of which fine does not form a part. In such cases the court may, when passing judgment, order the accused to compensate the victim who has suffered any loss or injury.[11]

The above provisions, though elaborate, are hardly adequate for the purpose of satisfactory compensation to the victims for the simple reason that the quantum of fine under our present economic structure will have to be rather small. Then again, the fine imposed is liable to further reduction on account of the expenses properly incurred in the prosecution. If reported cases of the appellate courts are any guide, they do not show that the courts are making liberal use of these provisions[12] and then again it is difficult to believe that they will be

10. The Criminal Procedure Code, S. 357 (1) (d).
11. *Ibid.* sub Section (3).
12. Very few cases have been reported in popular journals. However, in *State of Mysore* v *Tythappa*, 1967 Cri. L. J. 557 : AIR 1967 Mys. 51, the accused caused death of a person by rash and negligent driving of a car and was convicted under S. 304 A of the Indian Penal Code on his own admission. He was ordered to pay a fine of Rs. 250 and in default to suffer simple imprisonment for 3 months. In a revision petition by the State for enhancement of fine the High Court enhanced the fine to Rs. 750 and considering that it was a fit case for compensation awarded Rs. 500 as compensation to the father of the deceased.

In *Gurbax Singh & another* v. *State of Punjab*, 1974 Cri. L. J. 42 6, a case *inter alia*, of rioting and grievous hurt where the injured persons suffered as many as 9 and 4 injuries respectively, they were awarded a paltry compensation of Rs. 300 and 200. Subsequently, the Session Judge gave the benefit of doubt to the accused and hence the award of compensation became nugatory.

In *Jamshed* v. *State of U.P.*, 1976 Cri. L. J. 1680, where the accused had broken into a house and had killed a girl only to wipe out any evidence against himself and was given life imprisonment, the plea of compensation under S.357 seems to have been ignored.

See also K. Ko landa Reddy, Compensation under Section 357, Cr. P. C. In Offences Affecting The Human Body, 1976 *Cr L J* (*j*) 66. The author says :

"Quite often the courts while convicting and sentencing the accused to a term of imprisonment, have not been imposing fine and even in cases where fine is imposed, the complainant or the person who suffered loss or injury is not compensated out of the fine amount. Victim of an onslaught should also get equal fairness if not more than an accused at the hands of the courts".

inclined to award adequate compensation to the victims or their dependents in the near future. It is also provided in the section that recovery of fine will have to wait till the expiry of the period allowed for appeal and for such length of time as a decision is obtained on appeal which, under the existing conditions, may well take a couple of years or more. In effect, therefore, the very purpose of compensating the victim or his dependents in such cases is likely to be defeated. In this connection the following extract from the Forty-second Report of the Law Commission of India, made in the context of the old Code of 1898, is highly significant :

> We have a fairly comprehensive provision for payment of compensation to the injured party under S. 545 of the Criminal Procedured Code. It is regrettable that our courts do not exercise their salutary powers under this section as freely and liberally as could be desired. The section has, no doubt, its limitations. Its application depends in the first intance, on whether the court considers a substantial fine proper punishment for the offence. In the more serious cases, the court may think that a heavy fine in addition to imprisonment for a long term is not justifiable, especially when the Public Prosecutor ignores the plight of the victim of the offence and does not press for compensation on his behalf. Another limitation stems from the fact that the Magistrate's power to impose a fine is itself limited. At present a Magistrate of first class cannot impose a fine exceeding 2,000 rupees and a Magistrate of second class cannot impose a fine exceeding 500 rupees....[13]

In the matter of recovery of fines, relevant provisions of the Criminal Procedure Code, 1898 were contained in S. 386. The corresponding section in the Code of 1973 is S. 421. These provisions make it clear that no warrant or recovery of fine shall be executed by the arrest or detention of the offender in the prison (S. 421, Proviso to sub sec. (5)). The recovery would be possible only when the offender has some moveable property and if the offender happens to be a village dweller he may be asked to pay the fine in the same manner as he pays his land revenue. In the case of default, the amount could be recovered both from his moveable or immovable property by the Collector (S. 421 (1) (a) & (b)).

13. The Law Cormission of India, *42 nd Report* (1971) para 3. 17, p. 52. In its earlier recommendation the Commission had recommended that the pecuniary jurisdication as to fines of Class II Magistrates to 1,000 rupees. This has since been done in the Cr. P. C. of 1973.

The Probation of Offenders Act, 1958 passed by the Parliament and also the corresponding law of some States have a provision for award of compensation to the victims.[14] Section 5 (1) of the Central Act provides that the offender can be directed to pay reasonable compensation to the victims of the offence when the Court is releasing an offender after admonition under S. 3, or granting him probation under S. 4 (1). If a civil suit for damages is instituted subsequently, the civil court may take into account any amount that might have already been paid to the victim under the Probation of Offenders Act. Reported cases are rare on the point and those reported on probation, in general, do not create an impression that any wide use has been made of these provision.[15] In fact aware as they are of the economic plight of most of the offenders who qualify for probation, our courts are less inclined to impose upon them the liability to pay substantial compensation to their victims for that might itself bring economic ruination to the family of the offender. Then again, for the reasons aforesaid, there is a limit beyond which the courts would not like to go in extending the period within which the offender will pay up the compensation amount. Afterall, a probationer cannot be asked to go on compensating his victim for years together.

The proposed change relating to the compensation to the victims of crime in the I. P. C. (Amendment) bill, 1972[16], which is still pending for enactment, does not seem to hold any special promise for the victims. The proposed S. 74 B, in sub-section (1) lays down that the courts will have the discretion to award compensation to certain categories of persons mentioned in sub section (6), which includes the injured victim. The award shall ordinarily be in the form of money but it may also be in any other form which the court deems fit to specify (sub Sec. (2). The compensation will be limited to the amount of fine which the court is empowered to impose (Sub Sec 3). The order to pay compensation can either be in lieu of or in addition to any other punishment (sub sec 4). It has been legitimately provided that before passing any order under sub section (1), the court may take into consideration the nature of the offence, the motive for it, the economic and social status of the

14. See Section 6 of the Bombay Probation of Offenders Act, 1938; Section 7 of the C. P. & Berar Probation of Offenders Act, 1936 (M.P.) S. 5 of the West Bengal Offenders (Release On Admonition and Probation) Act, 1954.

15. A search for reported cases on compensation in All India Reporter and the Criminal Law Journal of the last 6 years proved futile.

16. The Indian Penal Code Amendment Bill, 972, Cl. 29, pp. 9-10 (As introduced in Rajya Sabha).

offender and of the person in whose favour such order is made, and all other relevant factors (S. 74 B 5).

Persons who will qualify for compensation are the ones who defray properly incurred expenses in the prosecution, the actual victims, who suffer any loss, damage or injury caused by the offence and who would be entitled to claim damages for the same in a civil court (S, 74 B 6). In the event of a conviction for any offence for having caused the death of another person or for having abetted the commission of such an offence, the compensation may by awarded to the persons who are, under the Fatal Accidents Act, 1866 entitled to recover damages from the person sentenced ((S. 74 B 6) (iii)).

Needless to say that the above provisions for compensation, even when enacted, will hardly be adequate since ultimately it is the economic status of the offender which will determine whether or not a victim will receive compensation; and then again. a court will be empowered to award compensation within its pecuniary jurisdiction of imposing fines. Lastly, like the provision in the Criminal Procedure Code, it has the same disadvantages that the offender in most cases would not be detected and apprehended and even when apprehended and prosecuted, he would be discharged or acquitted due to lack of evidence[17], and even when convicted, he will be found indigent in most cases.

III. Who should Compensate the Victims of Violent Crime?

From the provisions of law just mentioned, it is obvious that in India we have accepted the principle of compensation to the victims of crime, though by the criminal himself. We have failed to acknowledge that liability to compensate the victim has been shifted to an individual who is very often unidentifiable and even when identifiable, is in most cases financially irresponsible. Indeed, it may be argued that since the criminal has inflicted the injury it is he who should be liable to compensate the victim. However, besides the fallacy just mentioned, this proposition has manifold implications. Firstly, if the criminal is to compensate the victim adequately through fines paid to the state should it not absolve him from any further punishment? But, if we accept the principle of 'compensation alone', it will have the unfortunate implication of compromising an important principle of penal philosophy which calls for physical punishment of some kind for the purpose of deterrence or retribution. Secondly, punishment by way of liability to compensate in exclusion of other punishments will permit the rich offender to buy up his freedom outright[17] and the only method left to us of adding to

17. From amongst the total true cognizable cases between 1964-67, the number of people chargesheeted in India were 52.7 percent and then again only 29.5 percent of the cases chargesheeted ended up in conviction. See Crime In India Table II (b), p. 11 (1968). Government of India, Ministry of Home.

his discomfiture will be to impose on him onerous terms and conditions or release on probation. But release on probation, it hardly need to be pointed out cannot be resorted to in all serious cases of hurts, grievious hurts, homicides and murders.

On the other hand, if we accept compensation-cum-imprisonment here also it would be fair to reduce the punishment of those offenders who have compensated the victim by paying their fines But this will mean that in case of an offender failing to pay his fines due to poverty, the punishment will again have to be extent it might have been proposed to be reduced. Even here, the rich will have an opportunity to buy up his freedom earlier than the poor and such a position will be wholly unjust.

We are left with two other alternatives i. e. firstly, we put both the rich and the poor criminal into the prison for the same length of time for similar offence and while permitting the rich offender to pay up his fines from out of his private funds, ask the poor offender to work and thus pay up his fines from out of his wages in the prison. There will be an element of injustice even in this proposition, but it can be balanced to some extent by imposing much greater fine on the rich offender as compared to the poor; secondly, we can make both the rich and the poor offender to rigorous work either in a prison or while on probation[19], irrespective of their personal assets, and deduct from his earnings on the same scale. However, the issue involved here is that when an offender is being made to work while in a prison or on probation in order to earn his wages and thus pay up his fines, should it not mean that we are claiming precedence for his liability towards the victim over his legal and moral duty towards his dependents. This will be particularly unfair for us to do when we are dealing with a poor offender. In this context, the following remarks of the Home Office of the United Kingdom cannot be ignored :

"There could be no effective recovery from the offender unless prison earnings were raised to a level approximating to that of normal wages outside prison. If this eventually became possible, should the prisoner's liability to his victim then be given preference over his

18. Stephen Schafer, *Restitution To Victims of Crime An Old Correctional Aim Modernised, Criminological Controversies* (1968), 317-318.

19. This approach will have the advantage of synthesizing the concept of personal reparation by the offender to the victim with the concept of deterrence & retribution (See Gerhard O. W. Mueller, *Compensation For Victims of Crime: Thought Before Action, Criminological Controversies* (1968), 328.

liability for the support of his dependents and for the cost of his maintenance in prison ? If the offender is not in prison, or if he has not discharged his liability to his victim before he is released, the question of priority of his various commitments is no more easily resolved. Even if the extent of his liability has been determined, could it be enforced without resort to the controversial device of attachment of wages ? Should enforcement continue indefinitely-perhaps for the rest of the offender's life—until the liability has been finally discharged".[20]

Whichever of the solutions is adopted, there will be no denying the fact that an isolated individual criminal can rarely pay a substantial compensation to the victim. At the present juncture in India any compensation programme based on the capacity of the criminal to pay will deprive most of the victims or their dependents from securing adequate and prompt compensation for the loss or injury inflicted on them.

The above discussion will indicate that, if at all we are serious, and we have reason to be so, about compensating the victims of violent crimes, there appears to be no other alternative than to initiate a compensation programme to be operated upon by the state from public funds. This would be justifiable also on the ground that in a large number of crimes, besides the difficulty in identifying the wrongdoer, there is no satisfactory means available to us to affix responsibility for the offence on a financially responsible person. However, this takes up to the propriety of such a programme.

IV. Why should the State Compensate the Victim of Crime ?

There are arguments of considerable weight in favour of the proposition that the state should compensate the victims of criminal violence. Firstly, it has been said that the state does not encourage people to move about everywhere armed for private defence.[22] In India, for instance, the weapons of defence are highly restricted in their distribution because of licensing law as also because of the prohibitive cost of such effective weapons as pistols, revolvers, or guns etc. While the criminal can make use of home-made unlicensed guns or pistols whenever and whereever he wants, the law abiding citizen is always handicapped. This situation implies that it should be the ultimate responsibility of the state to maintain law and order and protect the life and

20. Command 1406 (1961) p. iv.

22. See Margery Fry, Justice For Victims, Round Table, *Journal of Pub Law*, Vol. 8, 1959, 19 , She says "Afterall, the state which for bids our going a rmed in self-defence cannot disown all responsibility for its occasional failure to protect",

property of its citizens. Should it be improper to say atleast theoretically that crimes occur because of the failings of the state and should it not, therefore, be an obligation on the part of the state to compensate atleast the victims of violent crimes ?

Again, should it not be the function of a social welfare state to look after those who suffer from criminal violence in a society which has been conditioned to breed violence? The concept of social welfare state is wide enough to include the task of looking after the victims of crime and thus to plug atleast one of the many loopholes which leads people to a life of poverty and destitution. Crime is afterall a product of the society and the society cannot, therefore, absolve itself from its liability towards the victims.

It is also possible to argue that even if civil action for damages is available to victim or his dependents, it is being severely limited because of imprisonment or death of the criminal demanded by the state.[23] The punishment imposed on the criminal may to a certain extent satisfy the instinct of revange of the victim or his kinsmen and it may also give them some sort of moral or spiritual satisfaction, but all this hardly compensates them in any material sense[24].

Again, it has been pointed out that since society has assumed the punishment and rehabilitation of the offender, it would be logical to think that it should also assume liability for the victim. Just as all employees in the industry share work-risks collectively through programmes of workmen's compensation, similarly, the general society should also share the burden of criminal injuries.[25]

It is also possible to argue that while punishment of a criminal exacted by the state can at best be looked at as a transformation of individual vengeance into a social one, the alternative of material satisfaction to the victim has been almost ignored. Assuming that social vengeance against the criminal does give some form of satisfaction to the victim, there is a definite limit beyond which the state cannot go in punishing the criminal because of ethical considerations.[26]

The last but not the least, vital consideration is that of social and moral justice. In the present juncture of our history, people's faith in the administration of law and justice is at the lowest ebb. The police

23. See Richard D. Knudten, *Criminal Victim and Social Responsibility, Criminological Controversies* (1968) 308.

24. Stephen Schafer, Restitution to Victims of Crime—An Old Correctional Aim Modernised, *ibid* at 311-312.

25. *Ibid.* note 23.

26. *Ibid.* note 24.

administration is being looked upon today as an ill-equipped and inefficient machinery incapable of stemming the tide of ever-increasing crime. The judicial administration is being looked upon as a slave of technicalities and conservatism. There is, therefore, an acute sense of insecurity and injustice building up in the people slowly but surely. A compensation programme for the victims of violent crimes at this crucial moment will greatly help to assuage this sense of injustice.

The only way open to reconcile conflicting ethical and philosophical considerations involved in the disposition of offenders and their victims would be to impose lesser punishment on the criminal on condition that he will also pay a fine to the state and the proceeds of which will be used to finance a fund for compensating the victims of violent crimes. This is not to say of course that the payment of compensation to the victims should depend on the realisation of fines in individual cases. Adequate financing of the fund should be the ultimate responsibility of the state. However, before thinking out a programme and the means of financing the same, it might be worthwhile to consider some arguments which go against the idea of compensation to the victims at the state expense.

V. Arguments Against State Compensation to the Victims

It is argued at some corners that in many cases the victim is partly or largely responsible for the injury caused to him and if it is so, why should the state compensate him for the injury suffered ?[27] While this might be partly true, the precise responsibility of the victim is difficult to assess. Afterall, a victim who quarrels with another does not always know that other will stab him to death or to cause grievous injury. There is indeed some evidence to prove that women in the West play an important role in most cases of rape[28] and this may be equally true for India. Our solution to this problem would be to exclude this category of offence from our programme of state compensation for the time being and leave it on to the existing provisions of the Pend Code to punish the offender in proper cases. At any rate in view of the current values of sexual morality in this country, there will be very few of such cases coming up for compensation.

Fear has also been expressed that there might arise fraudulent claims in those circumstances where a member of an organised gang

27. It has been estimated that approximately one—fourth of all violent crimes are victimsprecipitated. See Wolfgang, *Patterns in Criminal Homicide* (1958), 254.

28. See von Hentig, *The Criminal & His Victim* (1948) 383.

of criminals is beaten up by others and claims compensation.[29] The argument can, perhaps, be countered by saying that afterall such people, like any one else, are also a part and parcel of our society and at times they are no less a victim of circumstance in choosing their career, as is the case with most of us. We can possibly enhance the rate of compensation for those who are innocent as compared to those who are found to have been partly responsible for their injury. This is being done more or less successfully both in U. K. and Canada[30] where the compensation boards take into consideration all circumstances including victim's behaviour which may have directly or indirectly contributed to the injury or death.

In has also been pointed out that any programme of victim compensation by the state would not help the reformation of the criminal and exempt him at state expense from an obligation which he ought to discharge.[31] However, this argument has limited application to the above scheme, where the liability to pay fine has not been compromised at all. In fact, an offender, whether he be in prison or on probation, will still have the obligation to pay to the state a sum, which he could bear to pay, keeping in view his financial and physical capabilities. His capacity to pay fines will, however, be delinked from the compensation that the state will pay to the victim.

Another problem of some dimension is that if full compensation is made to the victim before conviction of the offender, when such offender is being prosecuted, the compensated victim will be reluctant to testify against his assailant in a court of law.[32] This difficulty, it might be suggested can perhaps be resolved to some extent by making part payment of compensation in such cases, pending the conclusion of the victim during the trial will finally determine whether he should get full compensation.

One of the most powerful argument against a programme of compensation by the state is that it may encourage commission of crimes because tempatation of compensation may act in such a manner as encourage sons and daughers to see their father killed or a wife to see that her husband is dead.[33] It is submitted, that the fear seems to be exaggerated. Is

29. Fred E. Inbau, *Journal of Pub Law*, Vol., 8, No. 1 (Spring 1959) at 203.

30. See Eric Silk, Q. 6. and Shaun Mac-Grath, Compensation for Victims of Crime in Ontario, The Law Sociesy of Upper Canada *Gazette*, Vol. IX, No. 1, March, 1975, 32.

31. *Ibid* note 29 at 201.

32. Fred E. Inbau, *idid* note 29.

33. Gerhard O. W. Mueller, Compensation For Victims of Criminal Violence, A Round Table, *Jl. of Pub. Law*, Vol. 8, 1959, 232.

it not true that the same incentive also exists for near relatives who know that killing a husband or father will bring a substantial amount of insurance money or provident fund ? Again, even if it is true that some crimes are committed in this manner, this alone is not sufficient to close the door to legitimate compensation to an innocent dependent. The possibility of deceit it is believed by some[34] can be eliminated by an efficient machinery of investigation and stringent requirement of proof.

Lastly, fear has been expressed by some of prohibitive costs of a victim compensation programme.[35] However, the experience of most of the countries adopting such a programme appear to be contrary[36] and it is only till recently that Ontario had been making wide propoganda to invite more and more applications for compensation to the victims.

As regards the model of compensation programme that will suit our purpose, a comparative look at some of the programmes already operative in other countries may be helpful.

VI. Compensation to The Victims of Criminal Violence in other Countries

The New Zealand programme was the very first in the series. It provides a limited minimum of compensation to victims and their dependents who have suffered from certain acts of violence that can be broadly classified under the heads of homicides, assaults, woundings, and sexual offences of violence like rape, attempt to commit rape, sexual intercourse with a girl under 12. Robbery has not been specifically mentioned but undoubtedly, it will qualify a victim in the event of its being accompanied with violence.[37] In general, offences against property have been excluded. 'Injury', qualifying for compensation has been defined as to include actual bodily harm, pregnancy and

34. Helen Silving, Victims of Criminal Violence, *Ibid* at 252.
35. *See*, for instance, Gerhard O. W. Mueller, *ibid* note 33 at 231.
36. New Zealand dispensed 14,888 in the first eighteen months of its operative programme. *See* Nudten, *Supra* note 23 at 333. Subsequently, a sum of $ 84,000 has been estimated as the annual cost of compensation. See Cameron, *infra* note 37.

    Again, the Fifth Report of the Ontario Criminal Injuries Comp. Board for the fiscal year 1973-74 recorded a total of 510 applications, 386 heard, 22 rejected and $ 722, 637 33 paip. See Shaun MacGrath ibid note 30 at 30. There is also no complaint from Britain as regards prohibitive costs.
37. For details *see* B. J. Compensation for the Victims of Crime : The New Zealand Experiment, *Journal of Pub. Law*, Vol. 12, No. 1 (1963) 365.

mental or nervous shock. Victims include dependents in the event of an injury resulting in death.[38]

The claims are heard by a tribunal of three members, the Chairman being a judge, former judge, a judicial officer, a barrister, or a solicitor. There is no appeal from the tribunal, but the tribunal may state a case for the Supreme Court on a point of Law.[39] There can be adjournment of the compensation proceedings before a tribunal at the instance of the Attorney General. This is done sometimes during the pendency of a criminal proceedings against the offender. The power of the tribunal to award compensation is discretionery not only as to the amount of commensation but also to the making of an order of compensation.

The British compensation programme is not statutory. It is based on a white paper. A compensation board has been established to grant *ex gratia* lump sum payment to a victim. The payment is made upon a review of his wages earned at the time of his injury and the actual costs of the physical attack to the victim. The payment is limited to twice the industrial earning of the victim and the damages are neither punitive nor meant for personal suffering. Family members are not paid any compensation in the event of death of the injured but they can seek aid under the British Fatal Accidents Act. The amount of compensation is subject to reduction, if the victim has received payment from other public sources. A reduction is also made when the victim is partially responsible for his own injuries. Claims of less than £ 50 are disallowed. The programme is in the form of a parliamentary 'grant in aid' and in effect it has no limits on the number of awards that the compensation board can decide to make.[40]

In Canada the programme of victim compensation was first initiated in Ontario in 1967 under the Law Enforcenent Compensation Act. It was re-enacted in 1971 and further amended in 1973 to make it more comprensive. Unlike Britain, where compensation is not granted for death, the Ontario programme grant compensation both for injuries and death resulting from crimes of violence against the Criminal Code of Canada. Offences for which commnensation is granted include assault, wounding, murder, rape and several other offences of similar nature, but injury caused by motor vehicles are excluded from the Act unless

38. *Ibid*. at 371.
39. *Ibid* at 372.
40. For details *see* Richard D. Knudten, *the Criminal Victim and Social Responsibility, Criminological Controvercies* (1968) 330.

the vehicle is used to commit an assualt.[41] Compensation is also granted for injuries sustained while preventing or attempting to prevent an offence and for lawfully arresting or attempting to arrest a person for an offence against another person, or while assisting a police officer in the performance of his duties.

Compensation can be granted to a person responsible for the support of the victim, who could be husband, wife, son, daughter, etc. In the event of death ensuing subsequent to injuries, the victim's dependents or the person or persons responsible for the support of the victim who has incurred expenses prior to death can be granted compensation.[42] The compensation is awarded for actual and reasonable expenses incurred as a result of injury or death, for monetary loss incurred as a result of total or partial disability affecting the victim's capacity to work and for monetary loss incurred by the dependents on account of victim's death, pain and suffering.[43]

The compensation Board consists of 5-7 members, the Chairman and Vice-chairman being on a full time basis with appointment for specified periods. Most of the members are trained in law. Usually, a panel of 2 or 3 members of the Board conduct a hearing. Hearings are initiated upon an application by the victim or his dependents within the maximum period of 1 year, but grant of compensation in most cases depends on promptness in submitting an appliction.[44] The hearings are informal and simple and are meant to carry on an honest and frank review of the application. In deciding whether to make an award, or the amount thereof, the Board takes into consideration all circumstances including victim's behaviour which may have directly or indi rectly contributed to the injury or death. The application must furnish the Board with such evidence as the medical reports, receipts, statement of lost wages and any other relevant data in order to verify the claim.[54] The Board takes into consideration all other payments received from public sources including pension. Payment may be refused if the applicant does not co-operate with the Board or has failed to report the offence promptly to the law enforcement agency.[46]

41. See Shaun MacGrath, Compansation For Victims of Crime in ontario, The Law Society of upper Canada *Gazette*, vol. IX, No. 1, March, 1975, 30.
42. *Ibid* at 35.
43. *Ibid* at 32.
44. *Ibid*. at 35.
45. *Iqid*. at 32.
46. *Id*.

It is customary to arrange for sitting of the Board in the county and district towns where the volume of cases are considerable. It is common for the Board to summon the Investigating Officer to give evidence with respect to the occurrence. The Board has also a modest staff of investigators which has the responsibility of investigating applications and where an order is made for periodic payments, this also requires investigation.[47] In the event of a disagreement with the decision of the Board, there is provision for review or appeal under this Act as well as under the Judicial Review Procedure Act, 1971 and the Statutory Powers Procedure Act, 1971.

In U. S. A. the New York Compensation programe of 1966 is very similar to that of U. K. Under it, the state offers financial compensation to the innocent victims of violent crimes at the discretion of a three member crime Victim Compensation Board. The compensation includes basic medical expenses and earnings lost during the period of recovery. On the other hand, the Californis programe is like a local charity and it has tied victim compensation to public welfare assistance programmes. It indemnifies citizens who are personally injured or suffer property damage while aiding in the prevention of a crime or while apprehending a criminal. This programme does not allow compensation to unmarried victims when their earning is more than $ 100 a month and similarly a married man with a family is allowed compensation only when his earnings are less than $ 250 per month[48]. However, besides this, there is another provision for the victims of crime in California. Section 11211 of the Welfare And the Institutions Code of California provides for payment of support and aid to certain incapacitated victims of crimes of violence and to their families[49]. The families of those kilied as a result of criminal violence may also be eligible for aid. It also directs the State Department of Social Welfare to work out criteria for payment of aid. The crime victims have no property qualifications in order to qualify for compensation. However, the victim has to show that he is incapacitated and that the income of his family is below the prescribed level.

The California law also directs imposition of fine on the offender guilty of crime resulting in injury or death to an innocent person unless the criminal's family is in need of support, These fines are used to augment the fund for victim compensation under the aforesaid section

47. *Ibid*. at 37
48. *Supra* note 04 at 332,
49. James E. Culhame, Calrfornia Enacts Legislation To aid Victims of Oriminal Violence, *Stanford Law Reviev*,. 18, 1965-66, 266.

11211. Under this section even victims without family are entitled to aid. The Act does not take note of the fact that a victim might be in a position to recover under the tort liability. Again, if the victim is injured while preventing a crime, he might possibly recover under sections 11211 and 13600 as also from tort action[50].

Unlike California victim compensation programme, taken independently, the British and New Zealand programmes strive to return the victims to their pre-injury position to the extent possible within the ceiling. As already pointed out the British programme compensates for loss of earnings and expected loss of earnings upto a rate equal to twice the current average national wage. Both the British and New Zealand plans provide for out of pocket losses and emotional damage[51].

Both of the above programmes, as also the Ontario programme try to eliminate fraud by requiring that the victim should notify the police about the occurrence as soon as possible. Immediate investigation assures that a crime has been actually committed. Again, while all the three above programmes take note of victim's responsibility or fault, the California statute ignores this aspect.[52]

VII. A Workable Programme for India

As regards a workable programme for India, its salient features could be as follows :

1. Each State shall have a board of compensation in view of the volume work as also the vastness of the country. Such a board may consist of atleast 5 members. The Chairman should be a member of the judiciary, whether existing or retired, and should be appointed on a full-time basis for a specified period subject to renewal of his term on grounds of efficiency and honesty. Two members should be from the Bar, preferably, from advocates who have already put in seven years of practice. They should work on a part-iime basis for which they shall be given proper remuneration. The other two members should be appointed on an *ad hoc* basis from the locality where the victim or his family resides.

2. While an application for compensation shall be made within a maximum limitation period from the date of the occurrence, the Board may take into consideration the promptness with which the same has been submitted.

50. *Ib d* at 269.
61. *Ibid* at 270.
52. *Ibid.* at 271.

3. Compensation could be awarded in case of violent crimes resulting in injuries for which rest or hospitalisation has been actually needed or medically advised for more than 10 days. For the reasons stated earlier, sex offences should better be excluded for the present. Broadly speaking, the offences which will qualify the victims or his dependents for compensation would thus be murder, culpable homicides, negligent homicides, hurts and grievous hurts and any other forms of assaults that might lead to sickness, injury or infirmity. Compensation could also be made for injures sustained while preventing or attempting to prevent an offence and for lawfully arresting or attepting to arrest a person for an offence against another person, or while assisting a public servant in the discharge of his duties.

4. The payment of compensation shall be left to the discretion of the Board and it may refuse in those cases where there has been undue delay in informing the police about the occurrence or where circumstances give rise to a reasonable suspicion as to the genuiness of the claim.

5. The Board, while fixing the quantum of compensation in each case, shall take into consideration such matters as the assets of the victim or his family, any other benefit derived by him or by his family from public sources, and also the victim's own responsibility for the injury. While indirect or remote expenses could be ignored, the compensation shall include an amount which could take care of the economic needs of the family besides medical expenses, nutritions and tonics for faster recuperation of the health of the injured. In the event of death of the injured, the expenses already incurred by those who were responsible for looking after him during his sickness could be paid by way of compensation.

The hearings of the Board shall be informal as simple to cater the needs of the general public and at the same time to ascertain the genuienness of the claim. The applicant must furnish the Board with such evidence as the medical reports, receipts, statement of the loss of wages and all possible proof at his command to verify the claim. Payment may be refused if the applicant does not cooperate with the Board.

7. Sitting of the Board shall be held in the district headquarters and shall also have a small staff for the proposes of independent investigation whenever so required.

8. Periodic payments or pensions could be awarded by the Board for such people as are permanently incapacitated.

9. In the event of dissatisfaction with the decision of the Board, the same could be subjected to review or appeal before a judicial authority.

Finance for the programme

Perhaps it is possible to levy a small surcharge on tickets of such transports as Railways, Bus Service (including city bus), steamers and even aeroplanes. The tax burden will thus be distributed amongst crores of people without leading to extra hardship. While this amount can be sufficient for the purpose, it can further be augmented by recoveries of fines from convicted persons by the states through the usual procedure under the Criminal Procedure Code. The only change required in the Code would be to eliminate any reference to compensation to the victims, except for the disposition of fines towards the compensation fund.

Recovery of a small levy of two to five paise per rupee from the travellers is justified on the ground that afterall they are also subjected to the same risk of criminal injury, if not more, as anyone else. Then again, a vast number of people, rich and poor alike, have to travel by public transport system and therefore the liability to share the burden will be distributed evenly on a very large number of people. Naturally, the burden will be less to the poor who buy a ticket of the lower class. It is these people who will be the ultimate beneficiaries and there seems to be nothing wrong, if they share the burden af insurance against injuries from criminal violence.

Another merit of the scheme is that the process of recovery of the levy through the transport departments concerned, public or private, would be comparatively easy.

viii. Conclusion

Victims of crime are isolated individuals and therefore they can never be expected to present a joint front and make a demand for compensation. They can never have an articulate voice and, therefore, it is difficult to believe that they shall ever be in position to exact a benefit from the state which they certainly deserve. However, it is the task of an enlightened legislature not only to provide for those who can make a forceful demand but also for those who are not organised and hence cannot do so.

Compensation to the victims of violent crime is overdue in India where any catastrophy, whether through an accident or a crime, leads to untold suffering to the injured and also to his dependents.

HINDU WIDOW'S ADOPTED SON

PARAS DIWAN*

I

The Shastric Hindu law did not permit a widow to make an adoption for herself,[1] though a widow was permitted, under certain circumstances to adopt a son to *her* deceased husband.[2] Since such an adoption was *by* her and not *to* her, she was not the adoptive mother by virtue of the fact that she was the adopter, but on account of the fact that she was the wife of her deceased husband[3] to whom the adoption was made. This rule that the widow's adoption was not to herself but to her husband was further fortified by the doctrine of relating back[4] : i. e. the adoption related back to the date on which the deceased husband of the widow died. In some cases an unsuccessful attempt was made to apply the doctrine of relating back to the converse

1. It was in *kritrima* form that a Hindu female was allowed to adopt a son in her own right. In the *kritrima* form, when a married woman adopts a child, she need not take the consent of her husband.
2. The basic text on the subject is that of Vasistha : "Nor let a woman give or accept a son save with the assent of her lord." (XV. 6). This text has been differently interpreted by commentators and digest-writers, giving rise to four different views. The Mithila school holds the view that assent of the husband is required at the time of adoption and since this is not possible in the case of the widow, the widow cannot adopt : *Dattaka Mimamse*, I. 16; *Vivada Chintamani*, 74.1; *Chandra Choor* v *Bibhuti*, (1945) 23 Pat. 763. On the other hand the Bombay School takes the view that the text applies only when adoption is to be made during the life-time of the husband : Cellector of *Madura* v *Ramalinga*, 12 M. I. A. 397. The Benares and the Bengal Schools take that express consert of the husband during his life time is necessary though it is capable of taking effect after his death : *Janki Devi* V *Suda Seo*, 1 S. D. 197; *Tara* V *Dev*, 3 S. D. 387. (Bengal Authorities). *Chaudhary Padum Singh* V *Odey Singh*, 12 M. I. A. 397; *Tulsiram* V *Beharital* (1890) 12 All. 228 (F. B); *Bishwanath* V *Jugal*, (1923) 50 I. A. 179; The view expressed in the Vramitrodaya that a wldow can adopt with the consent of her husband's *sapindas* has not been accepted *Prem* V *Harimar*, 1946 A. W. R. 32. In the Madras School the view is that in the absence of husband's consent the widow can adopt with the assent of husband's nearest *sapindas* : *Collector of Madura* V *Mootoo Ramalinga*, 12 M. I. A. 397.
3. Hindu marriage being a sacrament, even death did not dissolve the marriage, therefore the widow continued to be the wife of her deceased husband.
4. For fuller statement See Raghvachariar's *Hindu Law* (5th ed.), p. 165

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situation.[5] It seems that an attempt was made to provide both the parents to a child who was adopted by a single person. Obviously, the attempt could not have succeeded in all cases. If a bachelor (in old Hindu law there was no question of spinster adopting a son) adopted a son, the adopted son could not be provided with an adoptive mother.[6] At no stage of its development, the Hindu law made an attempt to extend the fiction by laying down that if a single person adopted, then the subsequently married spouse will be the adoptive parent of the child.[7]

The Hindu Adoptions and Maintenance Act, 1956 has made fundamental changes in the old Hindu law of adoption. It confers almost equal rights of adoption on both Hindu males and females[8], and allows a Hindu female to adopt in her own right.[9] Under the Act a Hindu male or a female can adopt a child in certain circumstances and on the fulfilment of certain conditions laid down therein; otherwise the adoption will not be valid.[10] A married male Hindu cannot adopt a child without the consent of his wife, and if he has more than one wife living then the consent of all of them is necessary.[11] However, the consent of wife may be dispensed with if she has completely and finally renounced the world, or has ceased to be a Hindu or had been adjudicated to be of unsound mind by a court of competent jurisdiction.[12] A spinster, divorce or widow (who has not remarried) has the right to make an adoption, but not a married woman.[13] However, a married woman may adopt a child if her husband has ceased to be a Hindu, or has completely and finally renounced the world or has been adjudicated to be of unsound mind by a court of competent jurisdiction.[14] It is

5. The Madras High Court took the view that the deceased wife of a widower is the adoptive mother of the child adopted by him : *Sunderama* V *Venkatasubba Ayyar*, 1926 Mad. 1203; *Sowmtharapandian* V *Periaveru Theven*, (1933) 56 Mad. 759 (F. B.). There is no direct textual authority for the proposition. Ii is based on the fictional interpretation of the words *pratigrihimata* in the *Dattaka Mimansa* (VI. 50) and *Dattaka Chandrika* (III. 17). See *Sivagami* V *Somasundaram*, 1956 Mad. 323 for the contrary view. See also Mayne (11 th ed.), p. 244.
6. *See* Mayne, p. 190 and pp. 244-245.
7. Thh Hindu Adoptions and Maintenance Act, 1956 lays down that such a spoue will be the step parent of the child : s. 14 (3).
8. Sections 7 and 8. She cannot adopt even with the consent of her husband.
9. Section 8.
10. Section. 6.
11. Proviso to s. 7.
12. *Ibid.*
13. Section 8.
14. Section 8 (c).

necessary that when a Hindu male or female adopts a child that he or she is of sound mind and is not a minor.[15] Further, a Hindu can adopt a male child only when he or she has no Hindu son, son's son or son's son's son;[16] similarly, he or she can adopt a female child if he or she has no Hindu daughter or son's daughter alive.[17] If adoption of a child of opposite sex is made then the adopter must be at least twenty one years older than the adopter.[18]

Since modern Hindu law recognizes the right of both Hindu male and female to adopt a child to oneself, the questions that arise are : can a person adopt a child to another ? or, whether a husband can adopt a child to his wife or whether a wife can adopt a child to her husband ? When a single person adopts a child, in what manner is the child related to the ex-spouse or the future spouse of the adopter ? Does a son adopted by the widow of a coparcener become a coparcener with the surviving coparceners of the deceased husband ?

II

Adoption of a child by one for another

The following two propositions were well settled in old Hindu law : (i) a parent could not delegate his authority to give the child in adoption or to take a child in adoption;[19] and (ii) the physical act of taking or giving could be delegated to another person.[20] In other words, the old law stipulated that the authority to give or take a child in adoption could not be delegated, a person must himself exercise the authority to take or give the child in adoption But once a person decided to take or give a child in adoption, he could delegate the physical act of giving and taking the child in adoption. Thus, when a sick, aged or infirm person adopted a child, he adopted the child *to* himself or herself, though on account of age, infirmity or sickness he or she was free to delegate the performance of the ceremonies of adoption : in such a case the adoption was made by the person *to* himself though the ceremonies were performed *by* someone else.[21] It seems that these propositions are

15. Sections 7 and 8.
16. Section 12 (i).
17. Section 12 (ii).
18. Section 12, Clauses (iii) and (iv).
19. *Beshet appa* V *Shivagappa*, (1873) 10 Bom. H. C. 268.
20. *Vijiaradgam* V *Lakshuman*, (1871) 8 Bom. H. C. 244; *Venkata* V Subadra, (1884) 7 Mad. 584; *Shamsingh* V *Santabal*, (1901) 25 Bom. 551; *Kisum* V *Satya* (1903) 30 Cal. 999.
21. *Shamsingh* V *Santabai* (cited above) where a Hindu convert to Islam gave his son in adoption by delegating the performance of ceremonies to another person).

given statutory form in s. 5 of the Hindu Adoptions and Maintenance Act, 1956. It is submitted that this is what is meant when the section says that no adoption "shall be made...*by* or *to* a Hindu....." However, Bhargava, J. of the Supreme Court thinks that two kinds of adoption are visualized : one is an adoption by a Hindu and the other is an adoption to a Hindu. The learned judge gives the following instances of the latter : when a female Hindu whose husband is dead, has finally and completely renounced the world. or has been declared by a court of competent jurisdiction to be of unsound mind, adopts a child, then such an adopted son will also be the adopted son of her husbaud.

It is submitted that under the moderh Hindu law one spouse cannot adopt to another. When a married Hindu male adopts a child, he can do so only with the consent of his wife; in the absence of wife's consent adoption is null and void.[22] Since the adopted son is made by the Hindu male with the consent of his wife, he becomes the adoptive father and his wife becomes the adoptive mother.[23] A married Hindu female is not allowed to adopt at all,[24] and if she adopts a child with the consent of her husband, the adoption is null and void. This is the entire law relating to adoptions by married persons whose another spouse is living and is a normal person.

In three abnormal cases a married spouse can adopt during the life-time of the other spouse and without his or her consent, and probably despite his dissent. These cases are : (i) when the other spouse has completely and finally renounced the world (i.e. has become a *sanyasi* or *yati*), (ii) when the other spouse ceased to be a Hindu, and (iii) when the other spouse has been declared by a court of competent jurisdiction to be of unsound mind.[25] With due deference to Bhargava, J.[26], in such cases the child will have no relationship with the other spouse of the adopter. Any other view is likely to result in anomalies and absurdities. Thus, a childless married woman whose husband has become a *sanyasi* adopts a son and a daughter and if we hold that such a child will be related to the other spouse, it would mean that the

22. *Sawan Ram* V *Kalawanti*, 1976 S. C. 1761.
23. *See* sections 7. Section 6 (1) lays down that no 'adoption shall be valid unless the person adopting has the capacity...and the person giving in adoption has the capacity to do so''.
24. In a case where the adopter has more than one wife, then the consent of all the wives is repuired, though senior most wife alone becomes an adoptive mother and the rest are designated as atep-mothers. To call all of them as adoptive mothers, would have been rather too much of a fiction.
25. Section 8 (c).
26. Proviso to s. 7 and s. 8 (c).

sanyasi has been blessed with a son and a daughter. Similarly, if a childless married Hindu wife whose husband has become a Muslim adopts a child, then it would mean that a Muslim has an adopted son, even though by his personal law a Muslim is not allowed to adopt. Similarly, if a childless married Hindu female whose husband has been adjudicated as a person of unsound mind, adopts a daughter, then it would mean that an insane person has an adopted daughter, even though under Hindu law, an insane person has no capacity to adopt. Thus, by this process, a *Sanyasi*, a Muslim and a person of unsound mind have been allowed to have an adopted child.

This takes us to the adoptions made by a single person.

It is an established position in the modern Hindu law that a widow, widower, a spinster and bachelor have capacity to adopt. In such cases the question that arises is whether the child adopted by a single person has any relationship with the exspouse of the adopter or with the future spouse of the adopter ? Or, the questions may be pased as under :

(a) When widow (or widower) or divorcee adopts a child, then what is the relationship of the child, if any, with the deceased spouse or with the divorced spouse ?

(b) When a person (widow, widower, divorcee, spinster or bachelor) adopts a child and subsequently marries then what will be the child's relationship with the subsequently married spouse ?

To the question posed in (b) the Hindu Adoptions and Maintenance Act, 1956 provides a direct answer by laying down that in all such cases the subsequently married spouse will be a step parent of the adopted child.[27]

No direct answer has been provided to the question posed in (a) by the Hindu adoptions and Maintenance Act, 1956. The question may arise in three situations : adoption by a divorcee, adoption by a widow, and adoption by a widower. In the first situation the answer seems to be clear : the adopted child of the divorcee will stand in no relationship with the divorced spouse. Then should our answer in other two situations be different ? The question in the second situation has come up before some of our High Courts[28] and the Supreme Court.[29]

27. Clauses (3) and (4) of s. 14.
28. *Ankush* V *Janabai*, 1966 Bom. 174; *Subhash Misir* V *Thanga Misir*, 1967 All. 148 and *Hanuman Rao* V *Hanumayya*, (1966) A. P. 140.
29. *Sawanram* v *Kalawanti*, 1967 S. C. 1761.

The question came up before the Bombay High Court in *Ankush* v *Jenabai*,[30] where a Hindu, N died leaving behind two widows, L and T and a daughter J from L. The senior widow, L, died in 1938. The junior widow, T, adopted the plaintiff as her son in 1957. The plaintiff filed a suit for the recovery of possession of all the properties of N, including those alienated by the widows, on the plea that he was not merely the adopted son of T but also of N. Applying the provisions of s. 12 of the Hindu Adoptions and Maintenance Act, 1956, the trial court came to the conclusion that the child was the adopted child only of T and not of N, since under that section the adoption was effective from the date on which it is made. The trial court was clearly of the view that the doctrine of relating back was no longer operative. On appeal, the Bombay High Court came to the opposite conclusion.

Building his arguments on the premise that the "adopted child is for all purposes absorbed in the adopting family", Desai, J. came to the conclusion that an adopted child of the widow was absorbed in the adoptive family to which the widow belonged, i. e. the family of her deceased husband, the adopted child being "tied with the relationship of sonship with the deceased husband of the widow; the other collateral relations of the husband of the widow." With least hesitation the learned Judge observed: "We have no doubt that on a widow adopting a son the necessary consequence that arises under the provisions of the Act is that the child would be the adoptive son of the deceased husband."[31] The Allahabad High Court also reached the same conclusion on slightly different facts[32,33].

Thus the doctrine of relating back was resurrected.

The Andhra Pradesh High Court in *Hanumantha Rao* v *Hanumayya*[34] took a contrary view. In this case, A and his two sons B and C were members of a Hindu joint family. B died in 1924 leaving behind his widow D. D adopted a son E in 1957. E filed a suit against C and his son for partition and claimed possession of half a share in the properties (A had died earlier). The trial court held the adoption valid, but said that the adopted son could not divest C and his son of the properties already vested in them before adoption. This decision was upheld by the High Court. His Lordship said that even by a cursory reading of s. 12 of the Hindu Adoptions and Maintenance Act, 1956, it was abundantly clear that the adopted child was deemed to be the child of

30. *Cited* above.
31. 1965 Bom. 174 at p. 178.
32. *Cited* above,
33. 1967 All. 148 at p. 149.
34. I. L. R. (1966) A. P. 140.

his *or* her mother or father : that this was so was clearly indicated by the word, "or" between father and mother. And this was further clear from the words, the adoption was effective "with effect from the date of adoption... On a fair interpretation of the provisions of s. 12 of the Act, we are of the opinion that the section has the effect of abrogating ordinary rule of Mitakshara law that, as a result of the adoption made by the widow, the adoptee acquires rights to the share of his deceased adoptive father which had passed by survivorship to his father's brothers".

The question came before the Supreme Court in *Sawan Ram* v *Kalawanti*[35]. In this case a reversioner had challenged certain alienations made by the widow to one Ramjidas. The reversioner's suit was decreed. The widow filed an appeal to the High Court and while the appeal was pending, adopted one Deepchand as her son. The appeal was dismissed by the High Court. When in 1959 the widow died, the reversioner brought a suit for possession of all the properties of Ramajidas. The trial court dismissed the suit on the ground that Deepchand, the adopted son, had preferential claim to the properties of Ramjidas over the reversioner, since he was not merely the adopted son of the widow but also of her deceesed husband. The High court confirmed the decision of the trial court. The reversioner preferred an appeal to the Supreme Court.

In the Supreme Court, Bhargava, J. referred to *Hanumantha Rao* v *Hanumayya*[36] and expressly dissented from the view taken therein. Analysing s.4 (1) of the Hindu Adoptions and Maintenance Act, 1956 the learned judge said that the section envisages two kinds of adoptions: (i) an adoption *by* a Hindu, and (ii) an adoption *to* a Hindu. The instances of the latter, according to his Lordship, are : adoption by a female whose husband is dead, or has completely and finally renounced the world, or has been declared to be of unsound mind by a court of competent jurisdiction, or has ceased to be a Hindu by converting to another religion. In these cases the adopted son of the Hindu female will also be a son of her deceased, *sanyasi*, insane or non-Hindu husband. This argument was further fortified by s. 12 which lays down that from the date of adoption all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by adoption in the adoptive family. This led his Lordship into the search of the family of the widow or the family of the husband of the Hindu female whose husband has became a *sanyasi*, or has become an non-

35. 1967 S. C, 1761.
36. I. L. R. (1966) A. P. 40.

Hindu or has been adjudicated to be unsound mind by a court of competent jurisdiction. The learned judge had no hestitation in saying that on marriage the family of a Hindu female is the family of her husband, and therefore the child adopted by her must belong logically to the same family. His Lordship observed : "On adoption by a widow, therefore the adopted son is deemed to be a member of the family of the deceased husband of the widow...The rights, which the child had, to succeed to property by virtue of being the son of natural father, in the family of his birth, is thus, cleary to be replaced by similar rights in the adoptive family, and consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow."[37]

It is submitted that the construction placed by the learned judge on the provisions of Hindu Adoptions and Maintenance Act, 1956 is rather artificial and does not appear to be socially desirable either. It is clear even from a cursory perusal of the provisions of the Act that now a widow has the right to adopt in her own right, and in those cases where a person leaves behind more than one widow each will have the right to adopt. It cannot be said that only the senior-most widow will have the right of adoption. Nor could it be said that the son adopted by the senior-most wife alone will be the adopted son of the deceased husband and the sons adopted by other widows will be his step sons ! (Since the learned judge insists that the child must be related to the deceased husband of a widow). It is submitted that this double fiction is nowhere warranted from the provisions of the Act. We may illustrate some of the anomalies that are likely to arise by placing Bhargava, J's construction on the provision. If a Hindu dies leaving behind three widows and no issue, then each of the widows can adopt a child (or two, one son and one daughter). Suppose these widows adopt children to themselves, then all the children will also be the adopted children of the deceased husband of the widows. In other words, the deceased Hindu male will have at least three (or six) adopted children. Or, A Hindu dies leaving behind two widows and an adopted son (adopted by him during his life-time with the consent of both his wives). Now if the junior widow exercises her right of adoption (The Senior widow cannot exercise this right, since on adoption by A, she being the senior wife became the adoptive mother of the child) and adopts to herself a daughter and a son, then the deceased male Hindu will have two adopted sons and an adopted daughter ! Or, suppose a Hindu dies leaving behind a natural son from his pre-deceased wife and a widow (whom he had married after the death of his first wife). Now suppose

37. 1967 S. C. 1761 at p. 1764.

his widow (who has no child and therefore has a right of adoption) adopts a son. The result will be that the deceased Hindu will have a natural son as well as an adopted son. Thus, the artificial construction placed on the provisions of the Hindu Adoptions and Maintenance Act, 1956 enables the deceased male Hindu to perform those feats which he could not have performed during his life-time.

It is submitted that the construction placed by the learned judge on the provisions of the Hindu Adoption and Maintenance Act, 1956 does not flow logically from them and is not tenable. Fortunately, in this case the question of divesting anybody did not arise and therefore there was no violation of the provision of clause (c) of s. 12 which lays down that "adopted child shall not divest any person of any estate vested in him or her before adoption." In this case the Hindu male had died in 1958 leaving behind a widow and no one else. This resulted in the widow taking the property of the deceased male Hindu by succession and taking it as a Hindu woman's limited estate. In 1954 (i. e. before the coming into force of s. 14, Hindu Succession Act, 1956) the widow made a gift of certain land to her grand niece (who was the mother of the child whom she adopted during the pendency of reversioner's appeal). Since she had no such power of alienation, the gift had to be held void by the court. These lands were not in her possession but in the possession of her grand-niece when the Hindu Succession Act, 1956 came into force, and therefore these lands could not become her absolute property, in terms of s. 14, Hindu Succession Act, with the result that old law applied to the land.[38] The adopted son could not claim these lands, in the capacity of the adopted son of the widow, but he could claim them as the son of the deceased husband, since in such a case he would be the nearest reversioner. It was in these circumstances that the Supreme Court held that the adopted son of the widow was also the adopted son of her deceased husband, and thereby enabled him to take the lands in preference to the reversioners.

It is submitted that the basic flaw in the argument lies on the assumption that husband's family is the family of the widow. There is no doubt that on adoption a child becomes the member of the family of the adopter.[39] But the vital question is : which is the family of adopter ? When a Hindu male adopts a child, we have no difficulty in saying that it is his family to which the child belongs, whatever might be the nature of his family, i. e. it may be a single man's family (bachelor's or widower's) or it may be a Hindu joint family to which

38. *Radha* v *Hanuman*, 1966 S. C. 216.
39. Section 12.

he belongs. When a spinster adopts a child, again we have no hesitation in saying that it is *her* family to which the child belongs, and we do not say that the child belongs to her father's family to which (loosely stated) she belongs. Similarly, when a devorced woman adopts a child, we say that the child belongs to *her* family, and we do not say the child belongs to her father's family to which she might have reverted, or to her husband's family which she had left. But when a widow makes an adoption, we say (almost like a reflex action) that the child belongs to her husband's family. The reason seems to be the hang-over of the past legal notions and social values. Hindu law has always maintained that on marriage the girl completely passes from the family of her father to the family of her husband, so much so that it is her husband's *gotra* which becomes her *gotra* and her husband's relations become hers.[40] And, in case she becomes a widow in her minority, the guardianship of the person as well as of property belongs not to her parents but to her husband's relations.[41] This notion is further fortified by another notion that a woman is never free : during maidenhood she is under the subjugation of her father, during coverture under the subjugation of her husband, and during widowhood under the subjugation of her son or other relations of the husband.[42] From these notions flow the inevitable conclusion that the Hindu widow cannot have her own independent home. Beneath these notions, is the concept of Hindu law that Hindu marriage is a sacrament and an indissoluble union.[43] This means that death does not dissolve the marriage. A Hindu female who becomes a widow continues to be the wife of her deceased husband, then she continues to be the member of her husband's family. The doctrines of adoption by widow and the relating back were the natural corrollaries to these notions. These notions are no longer valid, but old beliefs still cling to us. To-day (i. e. from the date of coming into force of the Hindu widow's Remarriage Act, 1856)—a widow can remarry[44], and it is no longer true that after the death of a Hindu male his widow continues to be his wife. The other aspect of sacramental marriage, i. e. it is an indissoluble union also stands abrogated with the

40. *See Rig Ved*, IX. 85; *Shatpatha Brahammana*, V. I. 6.10; *Taitririya Samhita*, III. I. 2.57; *Manu Smriti*, IX, 101-102.
41. *Manu Smriti*, V. 146; *Maaada Smriti*, XIII, 28-29.
42. *Manu Smriti*, V. 146-148; see also *Vasistha*, V, 1.3; *Gautama*, XVII.1.
43. *See* author's work, *Modern Hindu Law, Codified and Uneodified*, (2nd ed.). pp. 63-66. From these texts (referred to in footnotes 40, 41 and 42) was developed the concept of guardianship by affiuity : see *Chinna* v *Vinayagathammal*, 1929 Mad. 110. See also, Paras Diwan. *Parental Control, Guardianship and Custody of Minor Children*, Chapter IX.
44. *See* s. 2, Hindu widow Remarriage Act,i1856.

statutory recognition of divorce.[45] Thus, to-day the position of a Hindu widow is largely that of a divorce. If this is so, then why should we insist that the Hindu widow's family is that of her husband ? Why should we not say plainly that her family is her own family ? If a divarcee-woman can have her own family, if a spinster can have her own family, then, it is submitted, we should have no hesitation in saying that a widow too can have her own family.

The second fallacy seems to be a quest to find out both the parents of the adopted son of the Hindu widow. Section 12 lays down that all the ties of an adopted childar created in the adoptive family as if the child is a natural born child in the adoptive family. The ties that can be created in the adoptive family can be only those which the state of the family of adopter permits. If a bachelor adopts a child, the child cannot be provided with an adoptive mother; if a spinster adopts a child, the child cannot be provided with an adoptive father. Similarly, when a widow adopts a child, an adoptive father cannot be provided to the child.

Under the modern Hindu law an adoption cannot be pre-dated. Section 12 clearly lays down that the adoption will be affective from the date on which it is made. An adopted child is like a natural child from the date of adoption. Suppose a Hindu dies leaving behind a widow and no child on 1.1.57. The widow makes an adoption on 1.7.75. If the Hindu male is to be considered to be the adopted child of the deceased of the widow, then we have to pre-date the adoption. This would mean the re-creation of the doctrine of relating back which has been expressly abrogated by the Hindu Adoptions and Maintenance Act, 1956.[46] The Supreme courts decision in *Sawanram's* case[47] has (it is submitted) wrongly resurrected the doctrine of relating back.

The Hindu Adoptions and Maintenance Act, 1956 permits an issueles widow to make an adoption. In this regard now the law is uniform all over India, with the result that a widow governed by the Mithila school of Hindu has also power to make an adoption. Under the old Hindu law, with the exception of the Mithila school, a widow could adopt only if her husband had authorized her to make an adoption. To-day she can adopt even if her husband has expressly prohibited her from making an adoption. If we hold that a child adopted by a widow

45. *See* the Hindu Merriage Act, 1955 s. 13.
46. Section 12 : "An adopted child shall be deemed to be the ehild of his or her adoptive father or mother for all purdoses with effedt from the date of the adoption..." (Emphasis author's).
47. A. I. R. 1967 S. C. 1761.

is her husband's son, then in this case also the child will be the adopted child of her deceased husband. This will mean that what she could not do in the life-time of her husband (i.e. to compel adopt a child), she can do so after his death. She can thrust a son on her deceased husband. It is evident that under the Hindu Adoptions and Maintenance Act, 1956 (the learned judge does not says so) no distinction can be made between two cases : when a husband expressly or implied prohibits his widow to make an adoption and when he dies without saying anything. We cannot say in the latter case that the child adopted by the widow will be the adopted child of the hushand, while in the former case he will not be. Even under the old Hindu law there was no such distinction. In the Bombay school she could adopt without the authority of her husband. But there too if her husband had prohibited her, expressly or impliedly, from making an adoption, she could not make an adoption.[48] And then, in those cases where the husband expressly directs that after his death his widow should makc an adoption, there is the modern law, as there was nothing in the old law, which could compel the widow[49] to make adoption. In the modern Hindu Law, even when the widow adopts the adopted child cannot be considered to be the child of her deceased husband, since a Hindu who makes an adoption adopts to himself or herself.[50] Under the old Hindu law the child adopted by the widow became the child of her deceased husband by this fiction that the adoption made by the widow was the act done on behalf of her husband. She adopted to her husband for she could not adopt to herself.[51]

There is yet another aspect of the matter. If what Bhargava, J. says in respect of the adoption of a widow is correct then it should also apply to the converse case. When a widower adopts a child, then his deceased wife should be considered to be the adoptive mother. It has been seen earlier that such an argument was repelled by the court under the old Hindu law. The Supreme Court and the High Courts of Allahabad and Bombay[52] have built up their arguments on the basis

48. *Bajabai* v *Bale Venkatesh*, (1870) 7 Bom. H. R. Appv. I; *Collector of Madura* v *Mootoo Ramlinga* (1868) 12 M. I. A. 397; *Yadao* v *Namdeo*, (1921) 48 I. A. 313.

49. Under the old Hindu law in a series of cases it was firmly laid down that even when the husband has expressly desired his widow to make an adoption there was nothing which coulp compel her to do so : *Bamumdas* v *Mt. Tarinee* (1858) 7 M. I. A. 169 (is probably the earliest reported case); *Mutssaddilal* v *Kundanlal*, (1906) 33 I. A. 55; *Pratap Singh* v *Agarsinghji*, (1919) 46 I. A. 97.

50. *See* ss. 8 and 12, Hindu Adoptions and Maintenance Act, 1956.

51. *Choudhry Pundum* v *Koer Oodey*, (1869) 12 M. I. A. 350; *Narendranath* v *Dinanath*, (1909) 36 Oal. 824; *Putta Lal* v *Parwati*,

52. *Sawanram* v *Kalawati*, 1967 S.C. 1761; *Ankush Narayan* v *Janabai*, 1966 Bom. 174; *Subash Misir* v *Thangal Misir*, 1967 All. 148.

of s. 12 that all ties of adopted child are created in the adoptive family, and on the assumption that widow's family is her husband's family. When a widower adopts a child, child obviously belongs to the adopter's family, i.e. the widower's. Then, the question is : does widower's family include his deceased wife ? Had the question come before the Supreme Court in this form, it is submitted that the court would have, without hesitation, answered the question in the negative, as an affirmative answer would have resulted in more problems than it would have solved. For instance, a widower who remarries and adopts a child with the consent of his wife, then the wife will be the adoptive mother of the child But if we retain the fiction that the deceased wife is also the member of the family of the widower, then she too would be the adoptive mother of the child : thus the child will have two adoptive mothers. This question in this form will not arise in respect of a widow who had remarried, since a married woman has no right to make an adoption. Even if the remarried widow had the right to make an adoption, it is submitted the court would have least hesitation in saytng that on remarriage a widow belongs to the family of her second husband and she had no ties with the family of the deceased husband. What is submitted here is that the ties of the widow with her husband's family come to amend the moment she becomes a widow. The moment she becomes a widow, she acquires the right of adoption. This obviously implies that she has become independent of her deceased husband and can have her own independent family. If we would insist to say that she continues to belong to the family of her deceased husband till she remarries, then we would have to say this also that in case her deceased husband prohibited her from making an adoption, she cannot make an adoption. It is submitted that it is a hang-over of the past that has led the Supreme Court and the Allahabad and the Bombay High Courts in quest of adoptive father.

Thus, it is submitted that the entire scheme and the express provisions of the Hindu Adoptions and Maintenance Act, 1956 clearly nagative any suggestion that the child adopted by a widow is the child of her deceased husband or that a child adopted by a widower is an adopted child of the deceased wife of the widower. Section 12 expressly lays down that an adopted child shall be deemed to be the adopted child of *his or her adoptive father or mother.....*" (emphasis supplied). If the adopter is a single person then the adopted child will have only one parent. For instance, a child adopted by spinster will have only an adoptive mother and no adoptive father; similarly, a child adopted by a bachelor will have only an adoptive father and no adoptive mother. Section 14 lays down the adopted child's relationship with

the present and the future spouse of the adopter. It is indeed silent regarding the relationship of the child with the ex-spouse (whether living or dead) of the adopter. On account of this, some scholars have thought that there is a lacunae in the Act and this may be supplied by an amendment to the Act.[53] It is submitted that there is no lacunae. Should the Act lay down that how an adopted child will be related to his neighbour ? Is it necessary to do so ? Should the Act expressly say that the child Is not related to the neighbour in any manner ? Similarly, was it necessary for the Act to say that the adopted child of a person has no relationship with the ex-spouse of adopter ? Since some relationsship is contemplated with the present and future spouse of the Act expressly lays down that when a Hindu married male adopts a child, then his wife is the adoptive mother of the child.[54] If a married, Hindu with more than one wife adopts a child, then the senior most wife is his adoptive mother, while other wife or wives is/are step mother/mothers.[55] When a spinster or a widow adopts a child and then takes a husband, this husband is merely child's step-father.[56] Similarly, when a bachelor or a widower adopts a child and marries, then his wife is merely a step-mother to the child.[57] But when the divorcee (man or woman) adopts a child, then, it is submitted (on this there cannot be two opinion), the divorced spouse is in no way related to the adopted child. Similarly, when a widower adopt a child, his deceased wife is in no way related to the child. And, what is submitted here is, the same should be true when widow adopts a child, her deceased husband should be in no way related to the adopted child. Since an adopted child has no relationship with a neighbour, or an ex-spouse of the adopter, the Hindu Adoptions and Maintenance Act, 1956 does not, and need not, say so. It is obvious.

III

Adoption by Coparcener's Widow

It is a well established proposition of law that when a Mitakshara coparcener dies his undivided interest develoves on the surviving coparceners by survivorship. Under the old Hindu law it was also a well established proposition that a Mitakshara coparcener might authorize his widow to adopt after his death. The moment the widow of a coparcener adopted a son, the adopted son became a coparcener

53. Shri Narayan Das in his learned article "Desirability of Amendments of the present law of Adoption", 1966 (*AIR Journal*), p. 26 takes this view.
54. Section 14, Sub-section (1) and Sub-section (2).
55 Section 14, Sub-section (2).
56. Section 14, Sub-section (4)
57. Section 14, Sub-section (3)

with the surviving coparcener of the adoptive father and consequently acquired the same interest which his adoptive father would have in the property had he been living. This was on account of the doctrine of relating back : the child adopted by the widow of the coparcener became the child of the deceased coparcener from the date of the death of the coparcener. The doctrine of relating back was taken to extreme limits in *Anant* v *Shankar*.[58] The Privy Council held that the adopted son could topple his title too. His Lordships observed : "An adopted son by the mother of the male owner is to take estate out of the hands of a collateral....No distinction in this respect can be drawn between property which had come to the last male owner from his father and any other property which he may have acquired. K. separate *watan* property developed not on his mother who would be his heir in the general law but on the nearest male in the line of heirs; and if the plaintiff's adoption as son to B (K. father) puts him in that position his right to succeed cannot be limited to such *watan* pro- perty as K derives from B."

The view taken in *Anant* v *Shankar*[58] by the Privy Council that a coparcenary subsists even after the death of a sole surving coparcener so long as it is possible in nature or law to add a male member to it", has been reiterated by the Supreme Court in several cases.[59]

In subsequent cases the Supreme Court and the High Courts have endevoured to put some limits on this extreme view. Krishna Iyer, J. observed. "Two principles compete in this jurisdiction and judges have struck a fair balanee between the two, animated by a sense of realism, impelled by desire to do equity and to avoid unsettling vested rights and concluded transactions, lest a legal fiction should by invading actual facts of life became an instrumentality of instability...In short, the principle of relating the birth of the adopted son to the last day of the adoptive father's life is put in peaceful co-existence with recognition of rights lawfully vasted on the basis of realities then existing."[60]

The Supreme Court started briddling the hitherto unbriddled doctrine of relating back in *Srinivas* v *Narayan*[61] where the right of the adopted son to divest a collalteral heir was negatived. Venkatatama Iyer, J. said : "The law was thus well settled that when succession to the properties of a person other than an adoptive father was involved,

58. (1943) 46 Bom. L. R. 1 (P. C.).
59. This is how the Supreme Court has put it in *Sitabai* v *Zamchandra*, 1970 SC. 343.
60. *Sripad* v *Dattaram*, 1974 S. C. 878.
61. 1954 S. C. 379.

the principle applicable was not the rule of relation back but the rule that inheritance once vested cannot be divested."[62] His Lordship also said that when a widow of a coparcener adopts a son, then the right of the adopted son to claim properties as on the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for the purpose binding on the estate.

The next important case in this series is *Govind* v *Nagappa.*[63] In this case the joint family consisted of one K and his three sons RR, HR and IR. HR was given away in adoption by K. RR died in 1912 leaving behind a widow S. In 1933 there was a partition between K and IR. K. died in1935. S, the widow of RR adopted a son on September 18, 1955. The adopted son filed a suit of partition on the plea that the partition of 1933 was not binding on him as no share was given to him—he being in existence in 1912 (when his adoptive father RR died) by the operation of the doctrine of relating back. The Supreme Court accepted the proposition that the partition is not binding on the adopted son (thus accepting that a subsequent adoption by a coparcener's widow can unsettle a partition validily made prior to adoption), but proceeded to say that this does not obliterate the factum of partition. Hedge, J. observed : "It is one thing to say that an adopted son can ignore a partition effected prior to his adoption, which affects his rights and it is a different thing to say that his adoption wipes out the division of status that had taken place in his family."

When *Sripad* v *Dattaram*[64] came before the Supreme Court, Krishna Iyer, J. started on the assumption that it is a settled law that the rights of an adopted son spring into existence only from the moment of the adoption and all alienations made by the widow before adoption, if they are made for legal necessity or are otherwise lawful (such as with the consent of the next reversioners), are binding on the adopted son. In this case a Mitakshara joint family consisted of one M and his two sons C and K. K dled in 1921 leaving behind a widow RB and a daughter LB. A partition took place between M and G in 1944. In 1954 M gifte his share of properties to S, son of G. M died in 1946. K's widow RB adopted LBS, her daughter LB's son on 16.2. 1956, before the coming into force of the Hindu Adoptions and Maintenance Act, 1956. LBS filed a suit for partition ignoring the partition of 1944 and clamimed half a share, his case being that gift by M to S was invalid.

62. But the position is different when the property devolves on a descendent. See *Krishnamurthi* case, 1962 S. C. 59.
63. 1972 S. C. 1401.
64. 1974 S. C. 878.

The questions before the court were : whether the adoption made in 1956 can upset the partition of 1944, validly made under the then condition ? Whether the gift made by M to S could be retrospectively invalidated on account of the application of doctrine of relating back ? The court came to the conclusion that LBS, the adopted son, could get the partition re-opened, but could get only one-third share, and in computing the net properties available for partition the gift made by M to S had to excluded. The court further observed that it is an accepted principle that when a disposition is made, *inter vivos* or by will, by one who has full power to do, then the subsequently adopted son cannot challange or affect such disposition.[65]

The question whether a son adopted by a widow after the coming into force of the Hindu Succession Act, 1956 can divest the widow of the property already vested in her came for consideration before the Supreme Court in *Punithavalli* v *Ramalingam.*[66] The court without hesitation said that the rights conferred on a Hindu widow under S. 14 (1), Hindu Succession Act, 1956 are not restricted or limited by any rule or text of Hindu law. The doctrine of relation-back cannot be used for circumventing the plain intendment of the Act. It is interesting to note that Krishna Iyer, J. in *Sripad* v *Dattaram,*[64] observed that the question of upsetting of settled titles on account of doctrine of relation-back is not likely to arise since S 4., Hindu Succession Act, 1956 has practically swept off texts, customary rules of Hindu law which conflict with the provisions of the Act and that S. 12, Hindu Adoptions and Maintenance Act, 1956 makes it plain that an adopted child shall be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption. One would not venture to say that a judge of the eminence of Justice Krishna Iyer was not aware of the precedents[67] which have in fact resurrected the doctrine of relating back.

This takes us to the question as to what is the effect of an adoption made by a coparcener's widow relating to the coparcenary property devolved on other coparceners or vested in the widow prion to adoption ?

65. *Krishnamurthi* V *Krishnamurthi*, 1927 P. C. 139. See also *Bhivli* V *Hanmanthra*, 1950 Bom. 271; *N. R. Bijoor* V *Padmanabha*, 1970 Bom. 319, where this decision has been followed, and elaborated.
66. 1970 S. C. 1730. The court over-ruled the contrary decision of the madras High Court in *Ramalingam* V *Punithavali*, 1964 Med. 320.
67. See cases *cited* in footnotes 68, 71, and *Saman Ram* V *Kalwati*, 1967 S. C. 1761.

In *Akush Narayan's* case[68] Desai, J., after observing that the result of adoption by "either spous" (though under the Act, of the two spouses who can adopt, it is the husband alone who has the right to adopt and the wife has no such right) is that the adopted child becomes the child of both spouses (one may wonder whether a widow or widower has a spouse, but it seems to be clear that his Lordship thought that the widow's spouse is her deceased husband), said (*obiter*) that not only the widow's husband becomes the adopted father but all collateral relationships from the husband's side also comes into existence.[69] The learned judge did not stop there, but further observed : "...It is not possible for the respondent to contend that the son adopted by the widow will not become coparcener with other coparceners surviving after the death of her deceased husband."[70]

These *obiter dicta* of Desai, J. have been approved in *Sitabai* v. *Ram Chandra*[71]. In this case two brothers A and B constituted a Mitakshara joint family. B died in 1930 living behind his widow Sitabai. After the death of B, Sitabai lived with A as a result of which an illegitimate son, Ramchandra, was born to her in 1935. Sitabai adopted P on March 4, 1958. On March 13, 1958 A died leaving behind his illegitimate son Ramachandra. After the death of A, Ramachandra took possession of the joint family properties, whereupon P filed a suit for ejectment of Ramachandra on the plea that he being the adopted son B, was entitled to all the joint family properties by survivorship on the death of A. Ramchandra claimed the land on the basis of settlement of the same in his favour after it has been surrendered by A, and he claimed other properties on the basis of bequest to him under the will of A. Ramaswami, J. built up the argument on the premises that a Mitakshara coparcenery can consist of a single male member and widows of deceased male members and that the property of a joint family did not cease to belong to the joint family merely because the family is represented by a single coparcener who possessed the same rights which an absolute owner of the property may possess.[72] On this basis the learned judge came to the conclusion that even on the death of B the character of the property, did not change, that is, the properties continued to remain joint. Ramaswami, J. observed on the basis of ss. 11 and 12, Hindu Adoptions and Maintenance Act, 1956 that the child adopted by the widow "is tied with the relationship of sonship with the deceased

68. 1966 Bom. at p. 176.
69. Unfortunately this point was conceded by the lawyer of the respondent.
70. 1955 Bom. at p. 176.
71. 1970 S. C. 343.
72. Celiance was placed on *Gwli* V *Commissioner of Income Tax*, 1966 S. C. 1523.

husband of the widow. The other collateral relations of the husband would be connected with the child through that deceased husband of the widow."[73] Then nothing that s. 14 of the Act did not expressly state that the widow's adopted child became the adopted child of her deceased husband, the learned judge said that by necessary implication of ss. 12 and 14 the widow's adopted son became her deceased husband's adopted son also.

In *Sitabai's* case since the coparcener had died in 1930, (when the Hindu Women's Right to Property Act, 1937 did not exist) the question of divesting the widow did not arise. Had the widow then taken a widow's estate which would have matured into absolute estate on the coming into force of the Hindu Succession Act, 1956, the question whether the adopted son could divest her, would have arisen. The Supreme Court in *Punithavalli* v *Ramalingam*[74] has categorically (and it is submitted rightly) said that an adopted son of a widow cannot divest her of the property vested in her. Under the old Hindu law a son adopted by a widow became the adopted son of her deceased husband by virtue of the doctrine of relating back (and since the doctrine did not apply in the converse case, the son adopted by a widower did not become the adopted son his deceased wife). The proviso to s. 6, Hindu Succession Act, 1956 lays down that if a Mitakshara coparcener dies leaving behind a female heir in class I (or a male heir in class I claiming through a female), then his interest will devolve by succession and not by survivorship. Suppose a coparcenary consists of two brothers, A. and B. A dies in 1975 leaving behind his widow, W. Since A had died leaving behind a female heir in Class I of the Schedule to the Hindu Succession Act, 1956, his interest will devolve by succession. By notional partition it would come to one-half. Since there is no other Class I heir, W will take the entire one-half share by succession which vests in her. Now in 1977 W adopts S as her son. Does S become coparcener with B ? If, following the reasoning of the learned judge in *Sitabai* v *Ramchandra*[74], we answer the question in affirmative, then the question is : in what property does he become coparcener with B ? S cannot obviously divest W of the one-half share of her husband.[75] Then, does he become a coparcener in the remaining one-half share of B ? To

73. 1970 S. C. 343 at pp. 347-48. This observation was made without referring to *Sawan Ram's* case. It seems that *Sawan Ram's* case was not brought to the notice of the court.
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answer the Mitakshara system of law not merely son but the nephew (to be precise, the adoptcd son of the widow of the brother) has a right by birth.[76]

Sitabai v *Ramchandra* has been followed by the Delhi High Court in *Dunichand* v *Paras Ram*,[77] In this case on the death of K, an issueless Hindu, his widow M succeeded to his properties and took widow's estate. In 1944 she made an oral gift of the properties to two persons, BR and RR. Later on in the same year two reversioners PR and K filed a suit challenging the aforesaid gift. The suit was compromised in favour of the plaintiffs. Then in 1957 M field a suit for the cancellation of the gift and possession of gifted property. Again, a decree of compromise was passed under which one half of properties were awarded to M as against RR, and the suit against BR was dismissed. In 1957 M adopted DC, son of RR. M died in 1960. The reversioner, PR and K filed a suit for possession against DC and others. Khanna, J. after quoting extensively from *Sitabai's case* said that DC should be held not merely the adopted son of M but also of her deceased husband K. The learned judge further said that S. 12 (c), Hindu Adoptions and Maintenance Act did not come into play as there was no question of divesting the plaintiffs PR and K since no property vested in them (when M had adopted DC no property had vested in the PR and K). In view of this statement, of law his Lordship has no difficulty in holding that on the death of M her adopted son being the adopted son of K also was the preferencial heir of K. It is submitted that if we say that DC succeeds to the property of M being the adopted son of M the statement would be correct, but if we say that DC succeeded because he is the nearest kin of K, we can do so only if we accept that the doctrine of relation-back is still recognised in Hindu law, otherwise the adopted son of a widow cannot be also the adopted son her deceased husband.

It is submitted that in none of three cases divestment of property had taken place : In *Dunichand* v *Paras Ram* the property at the time of adoption did not vest in any person; In *Sitabai* v *Ramchandra*, of the two brothers who constituted coparcenary, the brother whose widow subsequently adopted a son had died in 1930, and therefore no property vested in the widow or any other person; In *Sawanram* v *Kalawanti* the widow who had widow's estate had alienated the estate before she made the adoption. (In fact she made the adoption pending the proceedings of the reversioners challanging the alienation made by her.) It may be

76. See author's work, *Modern Hindu Law, Codified and Uncodified*, (2nd ed.), p 211.

77. 1970 S. C. 343.

recalled that in that case a coparcenary consisted of A and his two sons B and C. B died in 1924 (when the Hindu Women's Right to Property Act, 1937 was not in existence; this fact has been noted by Bhargava, J.), leaving behind a widow D. A died in 1936 (making C a sole surviving coparcener : this fact too has been noted by Bhargava. J). In 1956 D adopted E and soon after his adoption E filed a suit for half a share against C and his son F. Bhargava, J., after observing that the ultimate decision arrived at by the Andhra Pradesh High Court in *Hanumantha's case* is not incorrect, said : "It is significant that by the year 1936 C was the sole surviving male member of the Hindu joint family which owned the disputed property. B died in 1924 and A died in 1936. By that time the Hindu Women's Right to Property Act, 1937 had not been enacted and, consequently, C, as the sole male survivor of the family, became fully owner of that property. In these circumstances it was clear that after the adoption of E by D, E could not divest C of the right already vested in him in view of the special provision in clause (c) of the proviso to S. 12 of the Act." On this reasoning, it is submitted that *Sitabai* v *Ramchandra* was wrongly decided. It is curious that no reference has been made to *Sawanram's* case tn *Sitabai's* case. It is further submitted that the observation of Bhargava, J. t hat the sole surviving coparcener becomes "fully owner" or that the joint family property "vests" in the sole surviving coparcener is not correct. In *Hanumantha's* case at the time of the adoption the coparcenary again comes into existence since C was blessed with a son. If we accept that the adopted son of widow is also the adopted son of the deceased husband, we have no alternative but to say what the Supreme Court has said in *Sitabai's* case. But can we say that ?

Again, in *Ankush* v *Janabai* also most of the properties were not in possession of the widow, but were alienated by her before the adoption was made. Since the widow was not in possession of these properties when the Hindu Succession Act, 1956 came into force, these properties did not become her absolute properties and did not vest in her. Another important fact when the appeal was pending in the High Court, the widow died and the court accepted the argument that the adopted son may be allowed to take the properties which were in the possession of the widow at the time of her death as her adopted son. In *Subhash Misir* v *Thagai Misir* also the properties were not in the posression of the widow, but in the possession of a collateral of the husband who claimed the properties is his own right. Originlly, it was the widow's suit for declaration and possession of properties, in which during the pendency of the proceedings the widow died and the adopted son of

the widow was substituted in her place. The adopted son was allowed to take the properties as the adopted son of the deceased husband of the widow. In *Arumugha* v *Valliammal* the widow succeeded to the properties of her husband and took them as women's estate. Subsequently, she made several alienations. One of her husband's sister instituted proceedings in 1951 and obtained a declaration that alientions made by the widow would not be binding on the reversioners. The widow died in 1960 but before her death she had adopted a son. After the death of the widow, the husband's sister filed a suit for possession of properties against the alienee. In these proceedings the adopted son intervened and claimed the properties as the nearest heir of the husband of the deceased widow, being his adopted son. In this case the Madras High Court decided against the adopted son, expressing disagreement with the decision in *Ankushnarayan's* case. It seems the Supreme Court's decision in *Sawanram's* case was not brought to the notice of the court.

The peculiar feature of most of these cases[78] is that the question of divesting any person did not arise, and therefore the adopted son was allowed to take the property of the deceased husband of the adoptive mother as his heir. But as has been held in *Punithavalli* v *Ramalingam*[79] the adopted son cannot divest any person if the property had already vested in him. In view of the submission made here, the decisions of the Supreme Court and the High Court which take the view that a son adopted by the widow of the deceased coparcener becomes coparcener with the surviving coparceners of the deceased husband needs a second look.

78. 1970 Del. 203.
79. 1970 Mad. 1730.

NOTES AND COMMENTS

NAZI DECREES AND THEIR VALIDITY—AN ENGLISH DECISION[1]

Are Nazi laws invalid now ? Were they valid when a Nazi's were in power ? Is every valid enacted law valid irrespective of its substantive content ? An English jurist has remarked :

> "In an extreme case the internal point of view with its characteristic normative use of language (this is a valid rule) might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this is so might be deplorably sheeplike, the sheep might end in the slaughter house. But there is little room for thinking that it could not exist or for denying it the title of a legal system ?"[2]

Do we agree ?

Before we go any further let us recount the problem posed by the case under review. A German Jew claimed income tax exemption on a pension under Double Taxation Order[3] on the grounds that he had both German and English Nationality. In order to determine the issue, the Court had to consider a 1913 law that stated that a German would lose his German Nationality, if he acquired some other nationality, and a 1949 law which stated that someone who had lost his German Nationality could regain it by way of application. Mr. Oppenheimer, the appellant, had not done this. In fact, he had become a British subject in 1948 by naturalization. This case could have been decided on the basis of the German 1913 law in that double nationality was not possible an argument which was left open by Lord Cross in the House of Lords.[4] Alternatively, it could have been decided on the basis of

1. *Oppenheimer Cattermole* (Inspector of Taxes) (1972) 1 Ch. 585; (1973) 1 Ch. 264; (1975) 2 W. L. R. 347 (HL)
   See further F. A. Mann. "The present validity of Nazi Nationality Laws" (1973) 89 *L. Q. R.* 194.
2. Hart. *The Concept of Law* (O. U. P., 1961) p. 114.
3. *Double Taxation Relief (Taxes on Income) (Federal Republic of Germany) Order 1955 (S. I. 1955 No. 1203 Sch. Are IX (1); Double Taxation Relief (Taxes on Income) (Federal Republic of Germany) Order 1967 (S. I. 1957 No. 25) Sch, Art IX (2).*
4. See *infra* fn. 35.

the 1949 law, in that he had not applied for German nationality. This was the argument that was accepted by the House of Lords.[5]

But what about the 1941 decree ? Was it invalid ? To some extent this is a much mooted question of jurisprudence. Are there certain natural law standards, whether derived *a priori* or from the legal system itself[6], which can be used for determining the validity on certain law ?

The problem of merging natural law concept with the idea of validity was one that was acutely faced by post-Nazi Germany. Modern day Germany has produced a revival of all kinds of natural law philosophy including approaches from Neo-Kantian, Neo-Thomistic, Neo-Protestant and even Neo-Hegelian standpoints.[7] To some extent this natural law revival was already foreshadowed by Rudolf von Laun's famous lectures on *Ethics and Law* in 19'4, where he treated obligation as some thing which is autonomously postulated. Meanwhile Radbruch's[8] ideas began to undergo a fairly fundamental transformation. In an article in 1936 in the *Law Quarterly Review*, Radbruch had praised Austin for ethical neutrality.

> "It remins nevertheless a great achievement of Austin's to have cleanly separated the method of perception of the law as it is from speculations about the law as it ought to be, and to have instituted an independent branch of juristic thought which has for its subject the fundamental notions of all positive law and leaves out all valuations. And it is not the fault of this disciple of Benthem the father of the science of legislation, that later on Anstin's philosophy of positive law, his general jurisprudence arrogated to itself the sole dominion in England, and that the real philosophy of law namely the philosophy of the right law, disappeared completely."[9]

5. See *infra* fn. *34-7*
6. A distinction made by Pound "Natural Natural law and Natural Positive lew" (1952) 68 *L. Q. R.* 330.
7. See generally Freiherr von der Heydte : "Natural law tendencies in contemporary German jurisprudence" 1957 I *Natural Law Forum* 115-121.
8. On Radbruch see generally W. Freidman "Gustav Radbruch" (1960) 14 *Vanderbilt Law Review.* 191; E. Bodenheimer "Significant Developments in German Legal Philosophy since 1945" (1954) 3 *Am. J. C. L.* 379: Puller "American Legal Philsophy at Mid-century" (1954) 6 *J. L E.* 457 : Radbruch's *Recht philosophie* was translated as Twentieth Century Legal Philosophy Series as the *Legal Philosophies of Lask, Radbruch and Dabin* (1950).
9. see G. Radbruch "Anglo-American Jurisprudence through Contintal eyes" (1936) 52 *L. Q. R.* 530 at 336.

Radbruch assumed a morally relativistic position and argued that jurisprudence could not really concern itself with any values whether of an individualistic nature, collective life or the jural postulates of the cultured life of that society. He argued in favour of relativism since he believed that "(r) elativism is the intellectual precondition of democracy. It refuses to identify itself with definite political opinion but is ready to let any political opinion which can obtain a majority take over the leadership of the state, because it does not know any unambiguous criterion for the correctness of political views, it does not acknowledge the ability of a point of view above the parties,"[10] But this relativism and belief in democaracy was soon to break down in the face of Nazi Germany. In the only lecture that he gave abroad during the duration of the regime, he was to argue that 'democracy can do anything—except to renounce itself. Relativism can tolerate any opinion—except the opinion which claims absolute dominion.'[11] Soon after the war he was to write *A primer of legal philosophy* which pleaded that a premium of absolute values was at least to be credited to a modicum of individual freedom. In a later work he even foresaw circumstances when an unjust law would not be credited with the title of law.[12] A large number of German jurists have been willing to think of law in moral and natural terms Thus Brunner emphasised the concept of equality and Coing a whole range of individual liberties. But there are very few German jurists who were in fact willing to attribute a lack of validity to the law even though they have counselled resistance. This is also true of recent German writings on law and justice which have sought to inter-relate law and autonomous morality.[13]

The relationship between the validity of law, a citizen's obligation to obey an unjust law, and the concept of justice has also been the subject of a large number of judicial decisions. The most well-known of these formed the focal point of controversy between Hart and Fuller.[14]

10. Radbruch : Rechts philosophie (5th Edn. 1956) 84 as quoted by Freidman *supra* fn. 8) at 202.
11. Radbruch *Der Relativisimus in der Rechts philosophie Der Mansch Im Recht* (1957) 86 as quoted in Freidman (*supra* fn. 8) at 203.
12. His essay "Gesetzlihes Unrecht und Ueberestzlihes Recht" (1946) as appendix IV to *Rechts Philosophie* (5 th Edn. 1956).
13. See Bodenheimer (*Supra* fn. 8) at 384 on Brunner's *Justice and the Social Order* (1945) at 383-4; and Coing's : *Die Oberstein Grundsatze und Grundziige der Rechts philosopnie* (1950 at 384-6; see further Karl engisch : "Recent developments of German legal philosophy : A report and apprairal" (1968) 3 *Ottawa L. R.* 47-78
14. H. L. A, Hert "Posltivism and the separation of law and morals" (1958) 71 *Har L. R.* 593 at pp. 619 ff ; L. L. Fuller : "Positivism and the separation of Law and Morals" (1958) 71 *Har L. R.* 630 at pp. 652 ff.

The case involved a German woman who had decided to tell the German authorities about certain statements her husband had made to her in private about the German regime.[15] The unfortunate husband was tried under certain repressive German statutes found guilty, sentenced to death, but not executed. Instead he was to test his fate at the front. After the war, the wife was accused of having attempted to deprive the husband of his liberty and freedom—a right that had been granted to him under a 1871 law. Hart in his interpretation of the decision of the German Court, assumed that the Court in fact declared the laws under which the husband was convicted as being invalid because they were opposed to the concept of justice and humanity. According to this interpretation, laws were retroactively validated. But such an explanation would not explain why the presiding judge was found to be innocent. A patient researcher[16] has shown that the case was not really an authority for the proposition that certain kinds of unjust laws can be retroactively invalidated. In actual fact, the lady in question was found guilty of having abused the law because she used it for her own purposes when she was under no duty to inform. She had in this way violated the 1871 law. There was, therefore, no question of retroactive invalidity.

Confusion may have been caused by the highly moralistic tone of the court which proclaimed that the woman informing under such circumstances had done something "contrary to sound conscience and the sense of justice of all decent human beings."

Meanwhile article I of the Military Government Law No I abrogated certain Nazi laws whereas Article II laid down :

> No German law, however and whenever enacted or enunciated, shall be applied judicially or administratively within the occupied territory in any instance where such application would cause injustice or inequality, either (a) by favouring any person because of his connection with the National Socialist Party, its formations of affiliated or supervised organisations, or (b) by discriminating against any person by reason of his race, nationality, religious beliefs of opposition to the National Socialist Party or its doctrines."[16a]

15. see Note: (1951) 64 *Har L. R. 1005-7*; Freidman: *Legal Theory* (Third Edn. 1953) p. 457 fn. 21,

16. H. O. Fappe: "On the validity of judicial decisions in the Nazi era" (1960) 23 *Mod L. R* 260 at 263 where the Court is reported as saying "that the statutes though" highly iniquitous laws...*cannot* be held to be statutes violating natural law..."

16a. On this see generally C. P. Harvey "Sources of law in Germany" (1948) 11 *Mod L. R.* 196 ff; K. Lowenstein "Reconstriction of the administration of Justice in American occupied Germany" (1948) 61 *Har L. R.* 419-67.

The exact import of this article is not clear. But the "German woman" problem was not the only problem to arise in post war Germany. Indeed the case of another German woman was brought before the Federal Constitutional Court 1952. Here once again it was not necessary to go into the question of invalidity on 'natural' law grounds because the court decided that there were so many irregularities in the trial that it violated the established principle of German criminal law. One way to approach these judgments is by using the extra-judicial reasoning of one of the Chief Justices of the Federal Supreme Court that "the tradition of not touching the philosophical fundamental principles of law that l (ie) at the basis of positive law.....presupposes that the positive law... self evidently stays within the under lying order of justice and also that in a civic society certain fundamental principles of law and ethics are universally and indubitably though, perhaps, only tacitly accepted as valid."[17]

These early cases represnt a distinction between the validity of a law and its abuse and seem to have decided issues on the basis of the concept of abuse of power rather than the invalidity of the law on natural law grounds. There are several other cases where the courts make an appeal both to the abuse principle as well as the natural law argument. In a case[18] involving a civil action against a civil servant for not intervening to prevent the death of the plaintiff's relative, the Civil Servant relied on provisions of the civil code designed to give immunity to civil servants. The courts did not allow him to use the code for this violation of duties. That was an abuse of power; but reference was also made to the general principles of law. This general reference became more specific in another civil case[19] where an officer killed a soldier who was absent without leave. The officer pleaded Hitler's order empowering members of the armed forces to kill without trial deserters, cowards etc. In actual fact this so-called order was not promulagated in law. But it was argued that to accept its authority would be 'a shameful self surrender of all members of the legal community (*Rechtsgeminschaft*) in favour of the despot.' But the Court went beyond the abuse of power theory making a statement on the validity of laws.

> "Even if the Katastrophen-order had been promulagated in due form it could not have become law (*Recht*). For the positive

17. Federal Supreme Court's decision of July 8, 1952 reported 1 ST R. 123/51, 3 BGHSt, 110-129 discussed Pappe (*Supra* fn. 16) pp 264 ff See also generally H. Rommen: "Natural law in decisions of the Federal Supreme Court and of the Constitutional Courts in Germany" (1950) *Natural Law Forum 1. ff.*

18. 3 BGHZ. 94 discussed Rommen (*supra* fn. 17) p. 10.

19. cited Rommen (*supra* fn. 17) pp. 10-17.

legislative act is intrinsically limited. It loses all obligatory power if it violates the generally recognised principles of international law (*Naturrecht*) or if the contradiction between positive law and justice reaches an intolerable degree that the law, as *unrichtiges Recht*, must give way to justice. Even the Fuhrer decree of February 15, 1945 on summary trials before military courts (R. G. Bl. I. 30) accepted the legal principle that no body maybe deprived of his life without a trial before a court : this is an inalienable human right. Thus the *Katastrophen*-order is null and void; it is no rule of law; obedience to it is against the law (*Recht*)."

To an English lawyes all this is *obiter dictum*. Traces of the abuse of power theory remain and it is significant that the general principles of law referred to themselves related to a positive law of the Nazi legal system (i. e. the decree of February 15, 1945).

There was another important case in 1952 (2) where certain officers were indicted, *inter alia*, for murder and deprivation of liberty because they sent Jews to concentration camps. The lower Court felt that they were not guilty because the murderous intentions of the regime could not be attributed to them and nor could they be imputed with knowledge of the intentions of these criminals. It will be seen that although the Supreme Court reversed this decision, the language used suggested the use of the 'abuse of power' concept dressed up in the emotive language of political persuasion.

"In the consciousness of all civilised nations we find (despite all the differences of their legal systems) a common nucleus of law (*Recht*) which according to the universal juridical convictions of all men, may not be violated by any legislative or other act of poiitical authority. This nucleus contains certain basic forms of human actions considered as inviolable; they have been found by all civilised nations by reason of common basic moral insight (*Anschauung*) and are thus considered valid, though an individual norm of an individual state may be seen to be violating them. The decree of Fedruary 28, 1933, against Communist violent acts dangerous to the state could by no reasonable person be considered as an unlimited authority for the Gestapo to violate that nucleus of norms which, according to the juridical convictions of all (,) no legislative or other authoritative act of any state may violate. It is the fundamental fault of the lower court that in its decision it did not take into consideration these limitations on arbitrariness valid everywhere and at all times. That the accused

20. 2. BGHSt. 234 discussed Romen (*supra* fn. 17) 11-13.

should not have known the few basic norms necessary for human living together—these fundamental norms of justice related to the dignity of the human person or that they should have misguided the obligatory character of these norms independent of all positive acknowledgement of authority. and that they should have accepted instead an authoritatively directed injustice, regarding the latter as law (*Recht*) cannot be taken seriously."

There is a fundamental difference between declaring a law invalid because it is contrary to a shared morality about the dignity of the individual and declaring a particular adminstrative act culpable it stemmed from an abuse of power even though clothed with a veneer of legality. These two ideas were confused in the famous *Canaris*[21] case where Admiral Canaris and others were found guilty of treasonable activity after a sham procedure to try them. The Court found that although the procedure to deal with criminal offences was quite different in war time when compared with peace time, the procedure followed in this case was highly questionable. The reasons that offered are : use the language of valitity and 'abuse of power'.

"The rulers of the Nazi State have often, as everyone knows, issued decrees that claimed to...(be positive) law (*Recht*) or to be in agreement with law (*Recht*). Nevertheless they violated these fundamental legal principles which independent of the recognition of the State, are valid. Acts of authority which are not even intended to serve justice, which violate knowingly the principles of equality before the law, and which gravely violate legal convictions of all civilised nations on the value and digniy of the human person can never produce valid law; and acts of an officer of law according to such decrees are and remain unjust (*Unrecht*). The lower Court has completely misrepresented the nature of law, which is the opposite of arbitrariness, and the nature of the judicial decison".

This fusion of two different techniques to give credibility to a trans-positive natural law approach, can also be seen in cases dealing with statutes which deprived German citizens of Jewish origin of their citizenship and appropriate their property. The decisions in question talk of the right to property[22] and the principle of equality recognised by the Weimar Constitution. But here prominence is given to the fact that the statutes were invalid. It was therefore stated that the laws in question

21. 2. BGHSt. 173 discussed Rommen (supra fn. 17) 13.
22. 16. BGHZ. 350 (decided February 28,1953) discussed Rommen (*supra* fn. 17) 14-15.

"were any by reason of their unjust content (*Unrechtsgehalt*) and their violation of the basic demands of any legal order, null and void; this law could not, even at and during the time of the Nazi regime produce *legitimate legal effect* (Rechtswirkungen)". But it has been explained that this does not mean that illegality was attributed to the regime itself. The Hitler regime was valid, it was only particular acts and laws which were invalid "if and insofar as in their *content* they violated the commands of natural law or the universally valid moral laws of Christian Western civilization."[23] This explanation might suggest that the inquiry about natural law or justice begins as a limited inquiry as to whether the act was a 'just' exercise of power or whether it was an abuse of power. It is only later that the validity of a particular rule may be challenged. In most cases it might even be possible to just attack the particular act in question without actually declaring the statute invalid, even though it can be assumed that were the court called upon to decide the validity of the Act, it would declare it to be invalid as violate of natural law notions.

This particular German problem, of which we got glimpses in Kennedy C. J.'s judgment in the Irish case on preventive detention,[24] can be applied to the 1941 decree in the case under review—*Oppenheimer v. Cattermole* (1)

It is important ta note that German Courts had decided that confiscations and expatriations under the 1941 decree were void since 1952 and 1962 respectively.[25] In *Oppenheimer v. Cattermole*, Goulding J., at first instance decided that some previous English decisions had ruled that German Jews deprived of their status under the 1941 decree, had continued to be "enemy (German) nationals" under the war Defence of the Realm regulations.[26] He, therefore, said that is was not "fair to subject to subject a man to the disabilities of imputed enemy nationality yet deny him any adventitious benefit that might flow from it." He was able to ignore the 1913 law on the basis that while he was a German national in English law he had lost his German nationality "long before, even though by (English) rules of public policy (the assessors) could not

23. 5. BGHZ. 76, discussed Rommen (*supra* fn. 17) 15. Consider also further decisions cited in that article.
24. *The State (Ryan) v. Lennon* (1935) I. R. 1935: if the Privy Council in *Moore v. Att. Gen.* (1935) I. R 472 at 485.
25. On confiscations see 9 BGHZ. 34; 10 BGHZ, 340: 91 and on expatriations see (1962) RzW 563. See further Mann (*supra* fn. 1) at 199 fn's 28 and 29.
26. *see Lowenthal v, Att. Gen* (1948) 1 All E. R. 295; *R. v. Home Secretary, Ex parte L. and another* (1945) 1 *K. B.* 7 (D. C.) discussed 1 *Ch.* 585 at 592 esp. at 594.

assert it" in an English Court.[27] This rather curious line of reasoning was not accepted in the Court of Appeal where two judges took the view that the 1941 decree was valid for the purpose of determining the applicant's nationality in the eyes of the domestic law of Germany,[28] while the third took the view that although the German decree was invalid the applicant lost his German nationality in 1948, because when he acquired British citizenship he could not have dual nationality.[29] Since the first two judges sought to limit the question of nationality in terms of the municipal law of Germany, the fact that they should validate the 1941 decree seems strange (a) in view of the fact that the decree had not been treated as valid in this context by German Courts. even though one can accept their argument that English Courts will not necessarily and invariably declare as invalid such foreign decrees that are penal or confiscatory in nature.[30] The earlier English decisions that had denied validity to the decree were treated as war time cases.[31] Lord Denning, the other judge, relied on the earlier war time cases to argue that after 1941 "the tax-payer was regarded, by English law, as a German national just as he had been before." The war did not end officially until July 9th 1951. So if nothing more had happened, he would have been regarded, by English law, still as a German national".[32] But what clinched the case for the learned judge was the fact that the taxpayer applied for English nationality and this meant that he lost his German nationality.[33] In the House of Lords this case was coupled with another case involving similar issues. The focal point of the controversy moved to the Basic law of 1949 and it was stated that the applicant did not apply for citizenship under that law. Had he done so, he might have retained his German nationality[34]; but would presumably have retained only one nationality—English or German—

27. *ibid* at 596.
28. (1973) 1 *Ch* 264 at p. 273 (per Buckley L. J.) and p. 274-5 per Orr L. J.).
29. *ibid* pp. 270-1. But it should be noted that Denning M. R., based the decision not on the 1913 law but on the fact that the war was technically still on in 1951 and Oppenheimer could not owe alleigance to Germany on the basis (see Calvin's case (1609) 7 *Co. Rep.* 1 at 5) that alleigance and protection go together.
29a. They apparently thought that the German court decisions had no retrospective effect and they were not, of course, aware of the new article in the Constitution on which the House of Lords relied.
30. *ibid* at p. 273 (per Buckley L. J.) and p. 274 (per Orr L. J.).
31. *ibid* at p. 274 (per Buckley L. J.).
32. *ibid* at p. 271.
33. *ibid* at p. 271 see further fn 29 *supra*.
34. (1975) 2 W. L. R. *347* (H. L.) at p. 356 (per Lord Hailsham); p. 365 (per Lord Cross).

because the 1913 law forbade dual nationality.[35] But the House of Lords specifically conceded that the war time decisions were limited to the duration of the war and only partly recognised an operative rule of public policy that the decree of 1941 was invalid because of its discriminatory nature.[36] In all three courts, there was a relunctance to recognise that German courts were willing to challenge a validly enacted law (in the positivist sense) on the grounds that it was against natural law. On the other hand it was plainly stated by several judges that the regime in question was a bad regime and thus the basic English positivist attitude was confirmed. One judge[37]—Lord Pearson—in fact was preparcd to declare this openly in suggesting that "(w)hen a government, however wicked, has been holding and excercising full and exclusive sovereign power in a foreign country, and some legislative or executive act of that government, however unjust and discriminatory and unfair, has changed the status of an individual by depriving him of his nationality of that country, he does not in my opinion effectively cease to be national of that country and become a stateless person unless and until he has acquired some other nationality..."[38] But, if this case represents the positivism of English Judicial thinking, it also provides another important fact of the English approach to natural law. The very fact that so many judges were willing to consider the use of the juristic techniques of public policy and international to invalidate the German statute would suggest that natural law in England is not the result of a head-on collision between statutory law and transpositive law, but the result of a determined even though covert exercise of juristic method.

This case has interesting parallels with recent developments in Indian Constitutional law. Ever since *Golak Nath v. State of Punjab*[39]—and almost certainly since *Kesavananda v. State of Kerala*[40] the Indian Supreme Court has toyed with the idea of testing constitutional amendments with an indigenously derived natural law theory. The theory is

35. This question is left open at *ibid* p. 365 by Lord Cross.
36. *ibid* at pp. 355 per Lord Hailsham (citing *AM Luther James Sagor & Co.* (1921) 3 K. B. 532; *Princess Paley Olga* V *Weisz* (1929) 1 K. B. 7-8 and cf. also *Frankfurther* V *W. L. Exner Ltd.*, (1947) *Ch.* 629 and *Nouello Co. Ltd.*, V. *Hinrichsen Edition Ltd.* (1951) *Ch.* 595 to support the statement).
37. Lord Pearson's view was rejected by the other four judges. Cross. J., gave primacy to the "established rules of international law and then asserted that a law which so gravely infringed human rights ought not to be tolerated.
38. *ibid* at p. 357-8.
39. *A. I. R. 1967 S. C.* 1643.
40. (1973) 4. *S. C. C.* 225.

derived from the Constitution and it has been argued that no constitutional amendment, even though an excercize of plenary power, can violate the 'basic structure' or the spirit of the constitution. I have argued elsewhere that the *Kesavananda* judgments are very confused because the seeming majority is not really a majority.[41] I shall not elaborate on that argument here. All that I need to say is that the 'basic structure' argument is extremely vague. But the idea that statutes should be tested on basis of general principles of law is by no means a new one. Sir Edward Coke put it forward in *Bonham's* case.[42] It is, *prima facie* a dangerous idea. In an extreme situation of the kind that arose in Germany, the natural law technique can be used. But even in such cases—German precedent clearly examplifies this—each excercize of power and statute must be concerned singly rather than the validity of the regime be questioned generally. But apart from these extreme cases, the natural law argument is a conservative argument. It appeals to lawyers who wish to preserve and further perpetuate the values and interests their legal system protects. It is an attractive argument. We must be careful to distinguish between contemporary morality and entrenched conservatism.

RAJEEV DHAVAN*

41. See Rajeev Dhavan : *The Suprems Court and Parliamentary Soveregnity* (Delhi, 1976, forthcoming).
42. (1610) 8 *Co. Rep* 114.

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BOOK REVIEW

SHIGERU ODA, DOUGLAS M. JOHNSTON, JOHAN, JORGEN, HOLST, ANN L. HOLLICK, and MICHAEL HARDY, *A New Regime For the Oceans*[1], Triangle Paper No. 9, New York : Trilateral Commission, 1976, 54 pp.

Five distinguished rapporteurs, constituting an intellectual Task Force, under the auspices of the Trilateral Commission (a group of private citizens from Western Europe, Japan, and North America, seeking to foster closer cooperation between the three major industrialized regions) have attempted to formulate a new economic and legal regime for the regulation of the world's ocean areas. Their specific purpose is to propose an "idealized" regime not necessarily identical with the final outcome that in all probability will be achieved by the Third United Nations Conference on the Law of the Sea. Regrettably, the recent failure of the 1967 New York session to implement the single negotiating text, or to reach agreement on such basic issues as the two hundred mile economic zone, the creation of an international authority, or even a basic consensus between the industrialized and developing States haunts the far-reaching proposals contained in the book, primarily an international regime for the oceans.[2] Indeed, the five distinguished rapporteurs all too accurately anticipate the growing trend toward unilateral and bilateral actions on the part of individual States and regional organizations for the purpose of securing control of off-shore resources by refusing to waite for the adoption of international solutions. Numerous States have begun to claim a two hundred mile economic zone, often in disregard of the legal and equitable interests of other States (and their peoples); and the European Communities is in the process of asserting these claims. Indeed, the EC Commission has proposed to the Council that a two hundred mile limit be adopted by January 1, 1977, in order to preserve the community's declining fish stocks. Other multinational regional groups can be expected to take similar-type action.

In an attempt to counter this trend, which had become all too obvious at the Caracas and Geneva sessions of UNCLOS III, and also

1. Regime For the Oceans 7.
2. See generally R. Dupuy, The Law of the Sea : Current Problems (1974). Cf. Gormley, The Unilateral Extension of Territorial Waters : The Failure of the United Nations to Protect the Freedom of the Seas, 43 University of Detroit L. J. 695 (1966).

by the growing State practice to extend the exercise of national sovereignty over the formerly free high seas, the authors propose that a global authority be established.[3] In fact, the creation of such an international authority can be deemed to constitute the thesis of the book. The antithesis, then, is "the movement towards a major extension of national jurisdiction over ocean resources."[4] However, the book bases a major portion of its pleas for international action and cooperation for the benefit of poorer nations on the fact that if two hundred mile economic zones became widespread it is the major powers, possessing long coastlines and extended continental shelves, that will benefit at the expense of disadvantaged States. For example, eighty percent of existing fish stocks are found within two hundred miles of land. "[V] irtually all oil and gas deposits now exploitable are situated within the continental margin, and ... most shipping—the ocean activity most affected by pollution measures—takes place in the crowded areas round the coast."[5] The authors further maintain :

> The institution of such zones will amount to a virtual appropriation to national jurisdiction of over one-third of the present high seas, a surface area roughly equivalent to the total land mass of the earth; in other words the size of the area which states have to administer will double. A striking feature of this appropriation is that nearly half (46 percent) of the ocean area thereby enclosed will go to high income countries (Canada, the United States, Australia, New Zealand, Japan, some European countries, the U. S. S. R. and South Africa) which contain less than a quarter of the world's population. Just over half of the area will go to the poorer countries, which have over three quarters of the world's inhabitants... Thus from the perspective of global equity the movement toward national appropriation hardly serves the objective of international economic and social justice.[6]

In adopting a global perspective for the purpose of safegarding the common heritage of mankind, a balance must be struck between national and interational interests, particularly as to the areas of: (1) navigation, (2) fisheries, (3) oil and mineral exploitation, and (4) environmental management From a future world-wide perspective, the four areas will be treated differently than under traditional

3. Regime For the Oceans 42-43.
4. Id. at 3. Accord generally, R. Anand, *Legal Regime of the Sea-Bed and the Developing Countries* (1975).
5. Regime For the Oceans 3-4.
6. *Id.* at 5-6.

international law. Thus, the major users of the oceans would share the financlal burdens of management; fisheries would be protected by a biological and scientfic rather than territorial criteria; limits would be placed on the exploitation of continental shelves even by the coastal State; and environmental management would be based upon "a worldwide network of (preferably harmonized) national legislation for pollution prevention and control."[7] Non-discrimination in the application of law as between foreign shipping and domestic polluters would be mandatory.

The Second Chapter deals with the Third United Nations Conference on the Law of the Sea. Regrettably, the 1976 New York session has confirmed the fears of the authors. While the review of the Caracas and Geneva sessions is appropriate, the data has been superceded by subsequent events. Of course, the basic issues remain, such as the adoption of an exclusive economic zone, the status of the international seabed, protection of the marine environment, the freedom to conduct research, and the right to navigation.

The book became especially challenging in Chapter III, Trilateral Interests and Perspectives, in that the future position of the major powers is considered but in light of the anticipated results from UNCLOS III. In terms of the problems posed above, and also considered at UNCLOS III, such as the two hundred mile economic zone, deep sea mining, and vessel-source pollution, it readily became apparent that the interests of the major powers differ considerably, as between themselves. For example, Japan possesses a long coastline and would rank seventh among coastal States in terms of benefits received, largely as concerns mineral resources. It would, therefore, acquire four and a half percent of the world-wide economic zone. Rich oil deposits are to be found within this area. At the same time, the restriction of its high seas fishing fleets would deprive Japanese fishermen of approximately half of their annual cateh—a major loss to the population, dependent on ocean protein.

Other States, such as the United States and Canada would benefit from the right to explore and exploit to the outer edge of their continental margins. However, it is maintained, Japan would not be so fortunate owing to a major trench off its coast. As such, the book is extremely effective in isolating these factors, though never losing sight of the proposals of landlocked, shelflocked, and geographically disadvantaged States, namely, the creation of regional zones and revenue-sharing schemes from mineral resources.

7. *Id.* at 11.

The diversity of State interests, as contrasted with geographical factors, can be seen from the varying coastlines of the nine members of the European Communities, each of which has its special rights to protect. Whether one begins from the single negotiating text of UNCLOS III, or from the idealized regime proposed by the five learned authors (as endorsed by the Trilateral Commission), the fundamental problems remain, e.g. the regime—assuming that one can be created—capable of regulating the exploitation of the deep seabed. Some States, such as Japan and even the United States, depend upon external sources for manganese, cooper, cobalt, and nickel. Accordingly, States are pursuing their interests by entering into consortia arrangements with the respective mining firms (a form of unilateral action), while at the same time advancing their positions at UNCLOS III.

In the book no attempt is made to "break away" from the series of law of the sea conferences, largely because of the fact that when the report was submitted at Paris in 1975 it was anticipated that significant agreements would be reached at the 1976 New York session, primarily on the basis of the single negotiating text. Accordingly, it is only possible to speculate whether this point of departure was well founded. Yet the fear that a failure to resolve basic issues would result in unilateral assertions of national sovereignty at the expense of international cooperation has tragically been proved correct.

> [T]he Conference session in the spring of 1976 will make some progress but not enough to resolve all difficulties. A further session may than be held in 1976. As the time stretches out to the end of 1976 and into 1977, more and more states, in the Northern as well as in the Southern hemisphere, may be unable to resist the pressure to extend their limits to 200 miles and to establish fishing—or more ambitious—zones. So far as the control of resources is concerned, such action, whatever its demerits from the standpoint of ideal global equity, would be relatively effective as a means of satisfying immediate national aims, and could be presented as being based on the work of the Conference to date... The principal dangers of such unilateral action, apart from those relating to conservation and existing patterns of fishing, are twofold : freedom of navigation would be threatened, as controls extended for one purpose (resource allocation) are used for another and extensions may not stop at 200 miles but, by a series of agreements (contingency, traditional rights, special circumstances) proceed further, until virtually all the oceans are under national sway.[8]

8. *Id.* at 40.

current UN negotations. In addition to a law of the sea tribunal, conciliation and arbitral panels are sought. In this context : "All counries should make a solemn or commitment to submit disputes which cannot be settled by negotiation to such procedures and to accept the outcome."[14] Classical norms of *pacta sunt servanda* and good faith must be respected by all States.

One of the more profound recommendations concern freedom of research. Unfortunately, this short recommendation was not adequately supported by the book's main text, although it was briefly mentioned.[15] Owing to the fundamental importance of the right to conduct scientific research, so as to increase man's knowledge of the marine environment, a more detailed analysis would have proved helpful, particularly in view of the conclusion that "[t]he results of research should be disseminated as widely as possible."[16] In view of the controversial nature of this statement, not only as it relates to the law of the sea but equally to space law, further elaboration is desirable.

In looking at the book as a total entity, it is clear that the Task Force of distinguished rapporteur's have accomplished their purpose, specifically to propose a new regime to goven the exploitation of ocean resources and to assure unimpeded navigation. No attempt was made to evaluate the diverse positions currently being defended at UNCLOS III. Nonetheless this reviewer is of the opinion that the legitimate interests of the industrialized powers have been downgraded. At the same time, the book is especially challenging because of the fact that scholars from the major developed States have sought to plead the cause of the Third World, and their approach assumes even greater significance in view of the recent failure of the 1976 session of UNCLOS III.

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14. *Id.* at 48.
15. *Cf. Id.* at 22-23.
16. *Id* at 48.

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MATTE, NICHOLAS MTEESCO, AND HAMILTON DESAUSSURE (Eds).

Legal Implications of Remote Sensing From Outer Space.[1]
Leyden : A. W. Sijthoff (1976). XIV+197 pp.

Twenty-three distinguished academics, scientists, administrators, and some of the leading writers in the field of space law participated in a conference held at Montreal and organized by the Institute of Air and Space Law of McGill University, in 1975. As the title suggests, the topic under discussion was the future application—and the potential benefits to be derived by mankind—from the information gathered by remote sensing satellites, along with related phases such as communication satellites, the projected experiments of regional and international organizations, and the evolution of an international legal norm of cooperation and participation. Consequently, Ambassador Cocca not only stresses the need for international cooperation, especially between the developing states and the U. S., but he adds—and quite properly—the necessity for participation between states.[2] Notwithstanding the common theme, each author was accorded considerable discretion as to the manner of preparation and the content of his presentation, with the effect that each essay tends to be "self-contained." The result is that some repetition necessarily results, as numerous speakers present introductory material Conversely, the individual nature of each contribution does have the advantage of providing insight into the particular viewpoint being defended, relative to one of the newest areas in the utilization of outer space. For instance, the book is extremely accurate in highlighting the different positions being asserted in United Nations organs by the United States, the Soviet Union, the Latin American countries (notibly Argentina, Brazil, and Chile), and the Western European states, on such issues as freedom of unrestricted research, full disclosure and dissemination of information, on the one hand, as bitterly contested by those states, desirous of retaining control over information relative to their natural resources, on the other. Underdeveloped states are fearful that the data obtained will

1. hereinafter cited as *Remote Sensing*.
2. A. Cocca, Remote Sensing of Natural Resources By Means of Space Technology, in Remote Sensing 63, 67. Acoord, W. Friedmann, General Course in Public International Law, 127 *Recueil des Cours* 39 (1963 II). W. Gormley, Human Rights and Environment ; The Need For International Co-operation (1976).

be used unfairly by the super-powers and multinational corporations. Thus, these competing interests reoccur throughout the text, but frequently in varying contexts, e. g. the position of African states as contrasted with those in Western Europe.

Some attempt, however, has been made in the Preface to bring together some of the fundamental concepts and issues. likewise, an attempt is made to define the newer science of remote sensing as.

> a methodology to assist in characterizing the quality and condition of natural resources, geographical features and phenomena, and the earth's environment by means of observations and measurements from space platforms.....The term has come to mean electronic detection and perception of the earth and its environment from outer space.[3]

Having determined the function and purpose of remote sensing, and similarly the uses and resulting benefits to be derived, based on the material obtained from satellites, such as cartography and photogrammetry, agricultural surveys, forestry and wildlands protection, mineral and petroleum exploration, sea ice and glaciology, water resources, ocean research and management, geological surveys, and military reconisance,[4] the main issue confronting international lawyers and statesmen is to resolve the difficulties inhibiting the utilization of the data so obtained.[5] Hence, one of the book's recurrent theme is the manner in which this data is to be disseminated. In terms of international law the issue becomes : which interest will be accorded greater

3. Preface, Remote Sensing XI. See ars *e. g. Id.* at 13, 19, & 69.
4. See especially, L. Morley, Remotc Sensing Satellites—What Do They Actually Measure and How Sensitive In the Information, *Id* at 14-17.
5. Contra, Address by J. van Aggelen, Social-Economic Aspects of Remote Sensing Satellites—a focus on the developing countries, October 10, 1976, 27 th International Astronautical Federation Congress, Anaheim. California, to pe published in Proceedings of the Nineteenth Coloquium on the Law of Outer Space (1977). (The developing states lack the facilities and the expert personnel to effectively utilize data obtained from satellites; therefore, more modest; and less expensive, sensing programs from conventional aircraft should be initiated.)

   While favoring the expansion of space sensing surveys, several of the authors also concede the difficulties confronting less developed states, as follows :

   > One of the major concerns of the developing countries is that they Will be left behind under an open—dissemination regime becausc they may not have the technological capacity and scientific infrastructure to make effective use of remotelysensed data.

   E. Wang, Canada and the International Principles Governing Remote Sensing, in *Remote Sensing* 151, 155.

deference, state sovereignty or the potential benefits to be derived by the super powers, though ultimately by the international community.

While at a theoretical level it is feasible to argue that the interests of all sovereign states, multinational organizations, and the world community are not necessarily opposed, and in numerous instances identical, in terms of the present political climate within the United Nations, and also within the United Nations Committee on the Peaceful Uses of Outer Space, assertions of state sovereignty have the aim of restricting the use of data obtained by means of remote sensing devices. In this regard, the series of speakers had to deal with the fundamental consideration as to whether or not the position of the United States that there should be global participation by all interested nations in U. S. space activities, with a resulting full dissemination of the information obtained, should be given sympathetic consideration. Despite strong opposition from some of the less developed (and in the opinion of this reviewer less forward looking) governments, eighty nations and locations have become involved with U. S. space activities. This high level of cooperation, largely through the support of NASA (as for example in placing "foreign" objects into orbit) has been achieved pursuant to the National Aeronautics and Space Act of 1958,[6] which provides that "activities in space should be devoted to peaceful purposes for the benefit of all mankind."[7] Conversely, the opposing viewpoint is clearly enunciated, particularly in the second section of the book, *Impact of Remote Sensing on the Economic Devlopment of Western Europe ond Latin America.*[8] In particular, Ambassador Cocca[9] stresses the right of sovereign states to be free from "spying" over their territory, especially their natural resources. In this controversy, the key factor becomes one of prior consent, that should be obtained from those states (and regional groupings) scheduled to be surveyed. Although several other authors discuss this problem,[10] none explore the legal nature of consent to overflights and how it is to be secured. Rather, the legal concept is assumed to be clear. Accordingly, the reviewer cannot help

6. Public Law 35-568, 15th Congress. July 29, 1958. 72 Stat. 426.
7. National Aeronautics and Space Act of 1958, as amended, *Id*. Cited by E. Galloway, Remote Sensing From Outer Space: Legal Implications of Worldwide Utilization and Dissemination of Data, in *Remote Sensing* 91, 93. In this context, see the Fourth Section of the book, Possible Integrated North American Landsat Program, *Id*. at 129-55, discussed infra note 2- ff. See especially the essay of C. Christol, *infra* note 29.
8. *Id*. at 43-84.
9. *Supra* note 2.
10. Accord, E. Pepin, French Proposals with Respect To Remote Sensing of Earth Resources By Satellite, *Id*, at 85.

but recall the difficulty faced by the International Court of Justice in the *Fisheries cases*,[11] the *Neclear Test cases*,[12] and presently in the *Agean Sea Continental Shelf case*[13] to determine if the parties have in fact given their consent to recognize its jurisdiction. Specifically, does the 1928 *General Act for the Pacific Settlement of International Disputes*[14] bind Greece and Turkey ?

Unfortunately, there is always a danger that a collection of essays may omit fundamental issues, largely because of the fact that each participant desires to deal with the larger issues. Such omissions tend to have the effect of making the book a bit uneven in its converage. Nonetheless, the fundamental contention, indeed the antithesis to the Americen position, is that : "It is beyond doubt that the permanent sovereignty of states over the natural resources of their territories and territorial waters includes not only a right of control of access to the information concerning those resources but also the dissemination of such data."[15] The primary assumption of the underdeveloped states is that such information—particularly as concerns the location of natural resources and the monitoring of environmental conditions—must remain classified, lest the major powers obtain an unfair bargaining advantage in their desperate search for new sources of raw materials. One author[16] draws a distinction between detection and exploitation, for the reason that an exporting state will always be in a position to prevent foreign exploitation, be it mining or oil drilling. Perhaps this approach fails to fully appreciate the inherent value of scientific data, which can become available to competitors.

11. Fisheries Jurisdiction Case (Merits) (Judgment), (*United Kingdom* v. *Ieeland*), (1974) I. C. J, 3. Id. (*Germany* v. *Ieeland*), (7974) I. C. J. 175.
12. Nuclear Test Case (Judgment) (*Australia* v. *France*), (1974) I. C. J. 253. Id. (*New Zealand* v. *France*), (1974) I. C. J. 457.
13. Application Instituting Proceedings, Agean Sea Continental Shelf (*Greece* v. *Turkey*), I. C. J. at 18, 10 August 1976. So crucial is the fundamental issue as to whether or not Turkey has consented to be bound by the Court's jurisdiction, that on 14 October 1976 the ICJ requested the parties to submit written pleadings "to the question of the jurisdiction of the Court to entertain the dispute..." Communique, I. C. J. No, 76/10, 14 October 1976. According to the time limits imposed, the Counter Memorial from Turkey is due on 24 October 1977. Considerable time will elapse before the ICJ can reach the merits of the dispute.
14. Art. 17, 93 L. N. T. S. 343; in connection with ill L. N. T. S. 414.
15. A. Cocca, *supra* note 2, at 65.
16. A. Stoebher, Remote Sensing of Earth Resources : Technique and Law, in *Remote Sensing* 33 40; see in particular his twelve specific conclusions, *Id.* al 37-40.

In yet a second instance the series of writers may have failed to appreciate the reality of remote sensing, in their attempts to evaluate competing national positions. Notwithstanding a desire on the part of some states to guarantee a degree of secrecy and classification of data (and even not to have their territories overflown), overlooked is the fact that in modern society it is impossible to keep such information secret for any reasonable length of time, as can be seen from the experience of military intelligence Not even in World War II, during which period all states were security conscious, could any technological development remain classified for an extended period of time. Remote sensing satellites have achieved such a high level of perfection that no state is in a position to maintain a "closed society," even as to military matters. Thus, the stand of the USSR (and France) is a bit unrealistic. That is to say, it is impossible to direct the orbits of satellites so that they do not pass over the territory of certain (and indeed all) sovereigns. Accordingly, science and technology have progressed far beyond those classical legal norms of international law designed to protect state security. Consequently, many of the debates in COPUOS fail to deal with the progressive nature of technology.[17]

Having recognized several of the main areas in which traditional state interests may have to be modified, regardless of attempts to accommodate those states refusing to participate in global space activities, it is now possible to concentrate—as did the majority of the participants at the McGill Conference—on the benefits to be derived by all states and their peoples.

One outstanding suggestion, which should form the basis of a future inquiry, is that remote sensing satellites can serve as a means of protecting not only the earth's ecology but also the human rights of private individuals. Consequently, Ambassador Cocca contends, and quite correctly, that "the protection from contamination (which entails the preservation thereof) is one of the fundamental human rights. The achievement of this proctection of the environment will be possible, to a great extent, by means of space technologies In a future enlargement of the Universal Declaration of Human Rights it becomes essen-

17. But Cf. the statement :

> It is beyond doubt that the permanent sovereignty of states over the natural resources of their territories and territorial waters includes not only a right of control of access to the information concerning those resources but also to the dissemination of such data. Cocca, *supra* note 2, at 65.

tial to include the right to live in a healthy environment."[18] All humanitarians, who are gravely concerned with the protection of the earth-space environment, will approve of these attempts to extend human rights conventions to encompass the protection of the environment and the safeguard of outer space.

Conversely, the concept of the human rights of individuals and of peoples necessarily becomes involved with the right of sovereign equality and self-determination, which can be interpreted to include "the economic aspects of the freedom of use and distribution of wealth which allows states the legitimate exercise of their exclusive sovereign rights over their natural resources."[19] Therefore the basic issue remains, regardless of the point of departure chosen; but, beyond question, the surveyed state has a vested right in all data obtained over its territory and possibly over international areas, as for example the high seas, in the reviewer's submission.

> The surveyed state must have full access to the data concerning natural resources and other observations carried out over its territory and territorial waters. This access should be completely unrestricted. The information to which the state is entitled cannot be distributed at random nor can it be requested without the necessary authorization from the state who owns the resources and, consequently, the information thereto...[20]

It can only be hoped that the two super powers will recognize the above mentioned legitimate interests of other sovereigns.

One of the most challenging series of essays is devoted to the European Space Agency, largely because of the fact that Western Europe (with the help of NASA) has progressed far beyond the experiments (and high sounding resolutions) of other regional groupings. For example Dr. Diederiks-Verschoor following comments on the earth-surveying nature of sensing sateltites, as contrasted with space exploration satellites, which seek to survey outer space, discusses the remote sensing

18. *Id.* at 64. Accord, W. Gormley, *supra* note 2 (private individuals and non-governmental entities have a legal right to be guaranteed a pure, clean, and decent environment).
19. *Id.* at 66.
20. *Id.* at 67. Additional support for the right to receive data can be seen in the essay by S. Hosenball, Free Acquisition and Lissemination of Data Through Remote Sensing, id, at 105-111; and G. Robinson, For a Worldwide Utilization and Dissemination of Data Acquired Through Remote Sensing, id. at 111-24.

program of the European Space Agency (EAS).[21] Of special interest to Western European states are missions obtaining statistical material relating to agricultural products, land use classification and mapping, the location of water reserves, sources of water pollution, coastal oceanography, sea-ice surveys, and geological investigations. Within this context, mention is made of The Netherlands national program, Agricultural Real Time Imaging Satellite System (ARTISS). "ARTISS will give a complete decentralized satellite picture, receiving an interpretation system in which every nation can get pictures only of its own territory."[22]

The relationship of national undertakings to regional and United Nations efforts must not be minimized. Aside from The Netherlands, other states have initiated limited activities, e. g., China, Brazil, Mexico France, Japan, and the United Kingdom, that should complement international schemes. As will be shown below, North American efforts have a definite applicability to United Nations space programs. On the other hand, it is often desirable to evaluate regional and national experiments in terms of global efforts. Accordingly, several authors particularly Diederiks, Gorove, and Boure'ly have made major contributions. In fact, it is not an overstatement to conclude that Michel Boure'ly has written the major study analyzing EAS[23] but from an inter-disciplinary point of departure.

In terms of potential regional contributions, Latin America must not be slighted, simply because of the fact that their plans have still to become functional. The primary consideration is that Latin American states recognize that "many of the beneficial uses of space technology could also be applied to the protection and management of our own resources and environment here on earth."[24]

This interest has been carried forward into the councils of the United Nations, e. g. the General Assembly and COPUOS. Nevertheless, it needs to be stressed that the Latin American position is more in line with those of France and the USSR as regards the preservation of state sovereignty, whereas Western European governments, generally speaking, tend to be closer to the desire on the part of the United States to recognize the right to conduct research (even by private associations and non-govermental entities) and to the unimpeded dissemination of information.

21. Observations on Remote Sensing Satellites, Id. at 69-74.
22. *Id.* at 73.
23. M. Bourely, Europe and Remote Sensing, *Id.* at 43-61.
24. S. Gorove, Legal and Economic Implications of Remote Sensing From Outer Space—Focus on Latin America, *Id.* at 75-84.

This joint American-Indian undertaking was inaugurated by Prime Minister Indira Gandhi.

> Through this satellite television program you will be able to see the holy places of our country and also the places where great new things are being done in farming, irrigation, power and industry...India is a vast country and it is not easy to reach the people who live in its far-flung corners...

Legal precedent and technological experience may now exist for future space cooperation and participation by the United States and India, in view of the fact that communication satellites, remote sensing devices, and even manned space vehicles fall within the scope of the international space treaties, mentioned above. Perhaps additional states will seek to utilize satellite transmission as a means of facilitating communication, as advocated by the U. S. Government.

The United States will continue to seek cooperation from other states in order to facilitate this legal and technological evolution, and in the words of Dr. Henry Kissinger : "Earth sensing and broadcast satellites of their use, are a fresh challenge to international agreement. The United Nations Committee on the Peaceful Uses of Outer Space is seized with the issue, and the United States will cooperate actively with it..."[31]

In this concluding portion of the book, and to an extent in each of the areas examined, proposals are advanced for the creation of international machinery and permanent organizational structures. In the European context, Belgium has proposed the creation of 'a new international organization competent to manage the space segment of the remote sensing system."[32] A similar example can be seen in the suggestion of the Scientific and Technical Sub-Committee of the Outer Space Committee, recommending that : "The Secretary-General be requested to explore the feasibility of establishing on an experimental basis an international centre which could train and assist persons from developing countries to make the most effective use of remote sensing information."[33]

However, there does not exist a sufficient consensus for the creation of such an international center or a new multinational institution.

31. Address, Annual Meeting of the American Bar Association, Montreal, August 11, 1975; U. S. Dep't of State P. R. 403; cited by M. Menter, The United Nations Contribution Towards An International Agreement on Remote Sensing, in *Remote Sensing* 173-85, at 182.
32. Bourely, supra note 23, at 49.
33. Report of the Twelfth Session, *cited* by G. Robinson, *supra* note 20, at 191.

Nonetheless, other authors continue to propose the creation of U.N. organs to deal specifically with manned and unmanned satellites.[34] Although the desirability of establishing such an organ would be readily conceded, the necessary consensus, toward some of the basic issues discussed above, will not be forthcoming in the foreseeable future

Any review of twenty-three separate papers must necessarily slight certain portions of the text, and even a few of the authors. Nonetheless, several recurrent themes run through the various discussions. It is, therefore, a bit unfortunate that a rapporteur did not integrate some of the material into a final conclusion. Although some attempt was made in the Preface to provide a basis for the following series of presentations, there was not an undertaking to integrate the various contributions, or for that matter to prepare a much needed index.

On the positive side, the editors and the various authors are to be congratulated for the production of an exhaustive study into a most difficult subject (not previously accorded extensive coverage) but with the advantage of the recognition of numerous diverse viewpoints on these controversial issues. That is to say, the major points of conflict have been analyzed and, on occasion, strongly defended. Accordingly, a major contribution to the science of space law has been written, that will be of considerable value to international lawyers and practitioners. It is not, consequently, unrealistic to predict that this book will become a primary source in the field of remote sensing and similarly an indispensable text in every major library, containing a space law collection.

W. Paul Gormley*

34. Tamm maintains:
> In due time an outer space agency will be established to provide for a coordination of effort and activity in outer space within a single international organization It would be given the function of establishing coordination between existing agencies, adoption of rules and regulations relating to outer space flight, and proving for a procedure for settlement of claims and disputes within a juridicial organ adjunctive to the main agency.

The Space Shuttle, Investigation of Earth Resources By Manned Observations, *J Space* L. 64 (1973). See also J. Tamm, Should an International Outer Space Agency be Established ? *Proceedings of the XIII Colloquium on the Law of Outer Space* 53 (1971).

Of Codding & Beheshti, An International Agency For Earth Resources Experiments, 1 *J Space L.*40 (1973) (there is no single existing international organization that can serve as a prototype for space agencies).

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THE LEGAL AID AND CLINICAL LEGAL EDUCATION : THE BANARAS REPORT

The Faculty of Law of the Banaras Hindu University appointed a Committee of nine senior academics and professional lawyears[1] under the convenership of Professor R. P. Dhokalia on 12th March 1976 in order to submit recommendations with regard to the introduction of Clinical Legal Education Programme in the Faculty of Law. The proposed course of Clinical Legal Education Progrmme (CIEP) is service-cum-education oriented. It is indeed designed for rendering socio-legal service to the poor, the handicapped and the backward who lack access to be represented by counsel as well as for educating and teaching of law practice skills in a real life context. It aims towards preparing the students for their careers as lawyers and developing in them the professional perspective towards clients and lawyering enterprise. The Committee recommended that the Course on Clinical Legal Education be introduced with effect from *July 1977.*

Since public welfare demands better trained lawyers, legal-aid oriented legal education should assume particular importancc in a poverty-stricken country like India, and so such a Clinic, as an adjunct of every law school, is the necessary step in the improvement of legal education. In order that the involvement of the Law students in the CLEP not brought about merely because of philanthropy, the merger of legal education with clinical experience has been emphasized. This will reconcile fully the students educational needs and the clients needs with better results providing for the award of credits to be given to the students for the clinical work. The introduction of the above programme will carry legal education beyond the confines of academic teaching.

The Committee unanimously welcomed the proposal of Clinical Legal Education and recommended for combining the Legal Aid and Clinical Legal Education in the programme and incorporating it in the

1. The Committee consisted of : Mr. Jagdish Mehta, District Government Counsel, Varanasi; Mr. Bakhtiyar Hussain, Advocate, Civil Court and Chairman, Legal Aid Committee, Varanasi; Mr. W. M. Siddiqui, Bar-at-Law, Advocate, High Court Allahabad; Dr. P. S. Sangal, Reader, Law Faculty, Delhi University; Dr Krishna Bahadur, Reader, Law Faculty, B H U,; Dr M. N. Chaturvedi, Reader, Law Faculty B. H. U.; Mr S. P. Raman, Reader, Law Faculty, B. H. U.; Dr. R. P. Dhokalia, Professor of Law, B. H. U. (Convenor).

LL. B. syllabus. Although the Legal Aid Clinics have been opened in some of the Law Faculties in the country, the Law School of Banaras Hindu University will be the first institution in the country to provide for legal aid and clinical education in the LL. B. curriculum. This programme has been conceived to be introduced initially for a limited group of 25 students of the final year but, in course of time when resources are available, it is contemplated to extend and make it compulsory for all the students in Fifth and Sixth Semesters.

Under this programme, it is proposed to open a "LEGAL AID CLINIC" which is expected to remain open between 5.00 p. m. and 7.00 p. m. every working day throughout the year except on holidays. Teachers of the Faculty belonging to the different specialization are to be associated with the Legal Aid Clinic.

The Committee on CLEP recommend that the Legal Aid Clinic's programme and other activities mentioned above be organised in the Law Faculty of the Banaras Hindu University under the overall direction of the Dean assisted by an Advisory Committee comprising of teachers, lawyers, retired judges, social workers and other officers and persons interested in the public service. There will be a Director and a Joint Director who will be assigned full responsibility for organising and conducting the Programme. The day-to-day working of the Clinic and the Programme will be organised and supervised by an Incharge of the Programme who will be a fulltime member of the teaching staff of the Law School.

The functions of the Legal Aid Clinic will include, *inter-alia,*

(i) Interviewing and counselling the clients, collecting facts about disputes, search of law and developing case strategy, preparing for trial and litigations, following up their cases;

(ii) Preventive and positive service at prelitigation stage by negotiating and conciliating disputes outside the court;

(iii) Seeking administrative and legislative remedies against wrongs done;

(iv) Giving postal advice in respect of legal problems of individuals and offering legal advice and counsel to the needy in litigation;

(v) Litigating in court and dispension of competent legal services.

With regard to the educating and teaching of law practice skills in a real life context and preparing the students for their careers as lawyers and developing in them professional perspective towards clients and the lawyering enterprise, the programme would include, *inter-alia,* :

(i) Drafting of legal documents, such as letters, notices, pleadings, applications, affidavits, cross objections, written statements, memorandum and other documents;

(ii) Preparing grounds of appeal, appellate briefs, revisions reviews, etc.;

(iii) Researching of case laws for use in briefs, and memorandum and checking texts and statutes and law journals;

(iv) Visiting the court and attending the Legal Aid Clinic and the Chamber of the Senior Lawyers every week.

It is also proposed to introduce the Community Education Programme in the CLEP which will include, *inter-alia*, :

(i) Preparing guide books and informative pamphlets in Hindi and other Indian languages on such themes of law as are most relevant to the common man;

(ii) Exchanging views by intensive discussion, worshop sessions and seminars on specific problems;

(iii) Visiting rural areas around Varanasi to discuss problems of villages, slum areas, jails, prisons and other places where legal assistance may be needed;

(iv) Championing the cause of the worker, widow, consumer, tenant, tiller and victims of oppression; and

(v) Undertaking programmes of socio-legal research on the problem of the poor, handicapped and under privileged, etc.

The Clinic will maintain a panel of legal practitioners who may render legal services free of charge or on a token remuneration. This will ensure quality legal service to the clients needing and seeking legal assistance in particular to that segment of society which goes largely unserviced by the legal profession. Involvement of outside legal talents without cost in the CLEP in supervision of the students of the clinical course will reconcile the service aspect of the progamme with the educational objective which should not be allowed to be swallowed by the former.

The Committee also felt that Liaison bodies were also necessary in order to establish contacts with the segments in need of advice and aid. In this regard the services of social workers, working class leaders, representatives of women's organizations, charitable and service organizations, representatives of newspapers, mass communications media and other organs of mass contact will be harnessed so that legal aid of the clinic may reach to the needy, the lonely,

the distant and the desperate. The local Bar Association, judges and magistrates and members of Parliament, Assembly and local bodies will be requested to refer the deserving cases involving the poor to the Law School Clinic. Similarly, the University National Service Scheme and social service Organizations and Women's Club will also be asked to act as an intermediary for the Clinic. Further, in order to realize the objectives of law-student intership programme of the Clinic, liaison will also be maintained with governmental and municipal Departments such as Department of food and druges, Water and Electric Supply Department, or with public or private sector agencies, consumer association and social welfare bodies where students may be attached for undertaking specific tasks including field investigation, written work and participation at decision making levels.

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