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PRACTICE REGARDING RESERVATION TO MULTILATERAL TREATIES AND EMERGING INTERNATIONAL LAW*

M. N. P. SRIVASTAVA†

Modern international society is heterogenous in composition. States today are interdependent for satisfaction of their needs and requirements and treaties are the only means by which they create binding obligations, and create and modify rules of international law with a view to fulfilling their needs and requirements and regulating their relations with each other peacefully. Lord McNair has well described the treaty as :

"....the only and sadly overworked instrument with which the international society is equipped for the purpose of carrying out its multifarious transactions".[1]

States to meet their requirement, conclude agreements with each other, as a result of which large number of treaties have been concluded and are being ratified in international life. But these states have their own constitutional or international requirements and peculiarities and they have their own national policies to which they have to adhere rigidly. So at times they are faced with difficulties in participating in a multilateral treaty and in order to overcome these difficulties they tend to make reservations.

It is in the interest of the international community that treaties of multilateral nature laying down fundamental rules, should be universally binding on all members of the community. Therefore, largest possible number of states should be party to such treaties. If largest number of states are to be enabled to be participants in a multilateral treaty they should be given the right to make reasonable reservations in order to get over their genuine difficulties or obstacles.

In the treaty relations a state cannot be bound without its consent and consequently no reservation can be effective against any state without its agreement thereto.

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

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1. McNair, *Law of Treaties*, 1961, Appendix A, "The Functions and Differing Legal Character of Treaties," at 740.

Reservation is the part of bargain and is reciprocal in nature[2]. It requires the assent of other contracting states, to become effective or valid[3]. Whether the consent of all or of even one contracting state is necessary for a valid reservation is controversial. As is well known there are four different theories of consent, viz., Traditional theory[4], Sovereignty theory[5], Pan-American theory[6] and Compatibility theory[7].

The Traditional theory requires the consent of all the contracting parties and emshasises upon the integrity of the treaty but neglects the

2. Louis Henkin, "The Treaty Makers and the Law Makers : The Niagara Reservation," *Columbia Law Review*, (1956), Vol. 56, at 1161, 1164—1169; D. R. Anderson, "Reservations to Multilateral Conventions : A Re-Examination" *I. C. L. Q.*, (1964), Vol. 13, at 452-453; *ILC Report*, 1962, Vol. II, at 61; *ILC Report*, 1950, Vol II, at 239; Hackworth, *Digest of International Law*, vol. V, at 102-103; Oscar Schachter, "The Question of Treaty Reservations at the 1959 General Assembly," *AJIL*, (1960), Vol. 54, at 372; M. H. Mendelson, "Reservations to the Constitutions of International Organizations", *BYIL*, 1971, vol XLV, at 137 (138); W. W. Bishop, "Reservations to Treaties", *Recueil Des Cours*, (1961), vol II, at 253.
3. *ILC Report*, 1950, Ibid.
4. H. W. Malkin, "Reservations to Multilateral Conventions", *BYIL*, (1926), Vol. VII, at 141-162; G, Fitzmaurice, "Reservations to Multilateral Conventions", *ICLQ*, (1953), vol. 2, pt, 1, at 2; W. W. Bishop, "Reservations to Treaties" *Recueil Des Cours*, (1961), Vol. II, at 276; McNair, op. cit, at 160; ILC Report, 1951, Vol. II, at 1,2 and 126; Sir H. Lauterpacht, "Some Possible Solutions of the Problem of Reservations to Treaties", *Grotius Transactions*, Vol. 39, at 97; *ILC Report*, 1953, Vol. II, at 123; *ILC Report*, 1950, Art. 10 (3), at 240-241; Yuen-Li-Liang, "The Third Session of the International Law Commission; Review of its work by the General Assembly, Reservations to Multilateral Conventions". *AJIL*, (1952), Vol. 46, at 498, 490; *Report of the S. G.*, U. N. G. A. O. R., Annexes, Doc. A/1372, at 7; *ICJ Reports*, 1951, at 46-47; M. H, Mendelson, *op, cit*, at 141, 149.
5. Yuen-Li-Liang, *Ibid*, at 498; U. N. G. A. O. R., Fifth Session, Sixth Committee, 223rd meeting, para 23; W. W Bishop, *Ibid*, at 284, 334, 335-336; *ILC Report*, 1953, Vol. II, at 127, 128; *ICJ Reports*, 1951, at 24; Oscar Schacter, *op cit*, at 377; G. Fitzmaurice, *Ibid*, at 10 and 11; M. H. Mendelson, *Ibid*, at 142.
6. *ILC Report*, 1951. vol. II, U. N. Doc. A/1858, at 127; W. W. Bishop, *Ibid*, at 280, 281, 334; G Fitzmaurice, *Ibid*, at 13-18; *ILC Report*, *Ibid*, Annex A, at 5; Yuen-Li-Liang, *Ibid*, at 493-497; 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 Item 56, "Reservations to Multilateral Conventions", *Report by Secretary General*, at 6, paras 31 & 32; M. H Mendelson, *Ibid*, at 141-142.
7. *ICJ Reports*, 1951, at 15, 46; G Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4", *BYIL*, 1957, Vol. XXXII, at 280.

universality of the treaty which is the basis of international cooperation. The Sovereignty theory being based on the doctrine of State's sovereignty extends to state unilateral and unfettered right to make reservations and hence consent has no place. The Pan-American theory is the combination of the above two theories and reconciles the integrity with the universality of the treaty. According to this theory states are free to make reservations but the treaty will not be in force between them and the states objecting to their reservations. The compatibility theory is refined form of Pan-American theory. It provides safeguards against the abuse of treaty making power. The related question arises, whether the consent of only signatories and actual parties is required for a valid reservation, or the negotiating states too have the right to give their consent.

This work attempts to examine the practice of the Secretariat of the League of Nations and of the United Nations, of other international organizations, of the depsoitary states and of the states in regard to reservations in the declarations under the Optional Clause of the Statute of International Court of Justice, in order to examine which theory has been followed generally in practice.

1. Practice of the League of Nations and the United Nations Regarding Reservation :

1. Practice of the Secretary General of the League of Nations : The practice of the League was either to define in the treaty the precise reservations which the parties were disposed to admit or to exclude expressly the making of any reservation whatsoever to the agreed text. The inclusion of such stipulation did not impose limitation on the right to make reservation but gave an advance indication that the consent of the other parties to the prohibited reservations, which was requisite for their validity, would not be forthcoming.[8]

The report of the Committee of Experts for the Progressive Codification of International Law submitted to the Council of the League on June 15, 1927, recorded the practice of the League of Nations in respect of the reservations.[9] The report classified the states into two categories. The one of the states represented at a multilateral conference and the other of those not so represented. As regards the first category the report observed :

8. Yuen-Li-Liang, "The Practice of the United Nations with Respect to Reservations to Multipartite Instruments", *A. J. I. L.*, (1950), Vol. 44, at 117.
9. "Report of the Committee of Experts 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.

A signature is the sign affixed by the negotiators at the foot of the provisions on which they have agreed. It presupposes that each signatory is fully in agreement with the other signatories; it establishes the assent of each of the negotiators to the final result of negotiations, and reciprocity of assents.[10]

According to the Report it frequently happened that in the course of negotiation of the treaty, agreement was reached between the contracting parties regarding a reservation which was put forward by one of them and accepted by the others. The reserving state when appending its signature to the act concluded had to mention and maintain its reservation and the other contracting parties, when they also append their signature, had to signify thereby that they had accepted the reservation and consented thereto.

The Report then dealt with the case of states which had not taken part in the negotiation. It observed that in such a case, in order that any reservation might be validly made to a clause of the treaty it was essential that reservation should be accepted by all the contracting parties. Otherwise, the reservation like the signature to which it was attached was null and void.

The Director of the International Labour Office in his Memorandum,[11] submitted to League Secretariat, expressed the view that—

In any event, the admissibility of reservations presupposes, according to the general principles of international law, the consent, either explicit or tacit, of the high contracting parties.

Judge Hudson in his International Legislation confirmed the League policy.[12] Harvard Research in International Law observed about the League Secretariat,

that it apparently does not regard an accession which is subjected to reservation deposited until those reservations have been communicated to and accepted by all the States signatories or parties to the treaty concerned.[13]

The act of ratification of the treaty with the knowledge of reservation would not amount to acceptance of reservation, unless the copies of the reservations made had been communicated by the depository to all

10. Report of the Committee of Experts, op. cit., at 881.
11. Memorandum by the Director of I. L, O., "Admissibility of Reservations to General Conventions," Annex 967 (a) *L. N. O. J.*, 1927, League Doc. c. 212, V. at 883.
12. W. W. Bishop, *op. cit*, at 276.
13. *U. N. G. A. O. R.* Annexes, Sixth Committee, Fifth Session, 1950, Agenda item 56, *Report of S. G.*, U. N. Doc. A/1372, at 3.

the signatories and parties to the convention.[14] Thus all the reservations made should be communicated by the depositary to all the signatories and parties to the convention.

In several cases the requirement of unanimous consent was observed. The Secretariat of League of Nations had scrupulously observed this principle of unanimous consent in the case of United States' adhesion to the Slavery Convention of 1926, subject to a reservation. Other examples are[15]-British accession to the International Sanitary Convention, 1893; British reservation to convention for the Adaptation of the Principle of Maritime warfare, 1899; Ottoman reservation at the International Sanitary Conference, 1903; Nicaragua reservation to the Hague Convention, 1907 etc. These are some of the examples where the treaty contained no specific provision regarding the making of reservations.

There are examples, on the other hand, of conventions which contained the provision regarding the making of reservations. In case of the Protocol to the Convention for the Simplification of Customs Formalities. 1923,[16] all the admissible reservations were embodied in the protocol. The other example is found in Annex II to the Convention providing a uniform Law for Bills of Exchange and Promissory Notes, 1930.[17] Article 1 of the Convention provided :

This understanding shall, if necessary, be subject to such reservations as each High Contracting Party shall notify at the time of its ratification or accession. These reservations shall be chosen from among those mentioned in Annex II of the present Convention.

This provision was interpreted by the Drafting Committee to mean that–

the acceptance of the uniform law may not be made subject to any reservation other than those indicated in Annex II of the present Convention.

Other examples of the clauses in conventions regarding reservations are given in I. L. C. Report of 1951.[18]

Thus, the practice of the League of Nations was to mention in the treaty itself the permitted reservation or to exclude the reservation altogether. A reservation in order to be effective required unanimous

14. *ILC Report*, 1951, Vol. 11, at 15, para 7.
15. *Ibid*, Annex D. at 13-14.
16. Yuen-Li-Liang, *A J. I. L.* (1950), Vol. 44, *op. cit*, at 118.
17. *Ibid*,
18. *ILC Report*, 1951, Vol. II, Annex C. at 11-13.

consent, of the signatories when the reservation was made at the time of signature, and the unanimous consent of all signatories and parties to the treaty when the reservation was made at any time after the signature. Negotiating states had no right to give consent to reservation. The consent could have been express or implied.

2. *Practice of Secretary General of United Nations :* Normally the multilateral conventions concluded under the auspices of United Nations have no provision regarding the making of reservation.[19] In such cases Secretary General of the United Nations has followed the practice of the League of Nations. In his Memorandum[20] the Secretary General has said :

> That a reservation may be definitely accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned. If the convention is already in force, the consent express or implied, is thus required of all States which have become parties upto the date on which the reservation is offered. If the convention has not entered into force, the consent of all the States which have ratified or acceded by the date of entry into force.

Thus the Secretary General has denied the right to the signatory states of objecting to reservations.

On the receipt of an instrument of ratification or accession subject to a reservation, the Secretary General formally notified the reservation to all the states which may become parties to the convention and asked the states, which had ratified or acceded, of their attitude towards the reservation within a specified date, i. e., normally the date of entry into force of the convention. If the state had ratified or acceded to the convention before the notice of reservation and did not expressly object to the reservation, it was the understanding of the Secretary General that that state had accepted the reservation. Likewise if a state ratified or acceded to the convention, subsequent to the notice of reservation, without express objection to it, its consent to the reservation would be presumed. If the convention was already in force the procedure was not to differ substantially except that a reasonable time to object was allowed before which tacit consent could be presumed.

Secretary General in his Memorandum cited the opinion of certain jurists and the practice of Governments acting as depositaries in support of his practice. Harvard Draft Convention in sections 14 (c) & 15 (c) had

19. M. H. Mendelson, *op. cit.* at 155.
20. *U. N. G. A. O. R.* Annexes, Sixth Committee, Fifth Session, 1950, U. N. Doc. A/1372.

advocated that a reservation might be valid only when all the signatory states had consented to it, when treaty had not entered into force; but when the treaty had entered into force, the consent of all the signatories or parties to the treaty, was required.[21] Brierly, in his first report to the I. L. C. advocated the unanimity rule. Secretary General cited certain text book authorities which had favoured his view-point.[22]

In his Memorandum the Secretary General was of the opinion that right to object to reservation should be exercised only by states which were parties and it should not extend to signatory states[23]. The Secretary General had reasons for his view. Firstly, that it was not logical to empower a state, which may not ratify its signature for some years to come or in consequence of altered circumstances it may not ratify at all (because it was generally accepted that there was no obligation to ratify the signature)—to exclude the participation of a state which subject to certain conditions, was ready to accept responsibilities under the convention at once. Secondly, he said, a broader category of states whose interest in the convention might reasonably be protected would embrace not only signatories but all those which took part in the negotiation of the text and this approach was not adapted to United Nations[24]. Thus the final authority to exclude the participation of the reserving state should in effect confined to those states which had or by entry into force would have established their immediate concern by themselves becoming parties. Nevertheless the right of the signatory states to make their objections heard would by no means be absolutely excluded. Any objection by signatory would of course be circulated so that its reasoning could be taken into account not only by the reserving state, which might then decide to withdraw its reservation, but also by the parties which might then be persuaded to enter an objection on their own behalf. To Secretary General, this system represents a fair compromise of the various interests of the parties, signatories and reserving states in a manner realistically related to United Nations machinery for the promulgation of conventional international law[25].

While advocating the requirement of unanimous consent to reservations, Secretary General made a reference to the Pan-American

21. UN. Doc. A/1372, *op. cit*, at 4, para 18.
22. *Ibid*, para 20.
23. The right to object to reservation should extend to all signatories had been advocated by H. D. C., *Ibid*, at 7.
24. *UN Doc.* A/1372, *Ibid*, Paras 42, 43, 47 (c), "....it is in the interest of efficiency to keep to a minimum the no. of states required to give unanimous consent to a reservation. This best can be achieved by confining the power to reject a reservation to the States most directly effected namely, to actual parties to the convention in question."
25. *Ibid*, at 8, para 45.

system[26] and observed that this system had the advantage of permitting maximum participation even though some of them undertook to be bound by only a portion of the text and exchanged that undertaking with only a portion of parties. It had the additional advantage of permitting an instrument of ratification to be deposited definitely and hence less uncertainty as to the status of reserving state. He said that this theory was well adapted to regional agency and to the close relations existing between states within a defined geographic area. Likewise it was well suited to those multilateral conventions whose essential nature was that of merely contractual undertakings within a group of states, where such multilateral conventions in operation were simply a complex of bilateral agreements.

On the other hand Secretary General submitted that Pan-American theory was not well-fitted to the purposes of the conventions drawn up under the auspices of United Nations. Such conventions had world wide character by which states in very diverse circumstances agreed to be bound, and presumably agreed to be bound in exchange for the similar consent of all other parties. They had a law-making character, not the character of the contract; and they were multilateral not only in form and in manner of adherence but in their purpose and essential juridical effect[27].

Secretary General further observed that in such conventions which established the general principles of law or were regulatory of international conduct, Unanimity rule should be applied not for the reason simply to empower a state to exclude from the participation to the reserving state on its own theoritical approval of the reservation but on the serious ground of its deeming that the reservation strikes so directly at the essence of the convention as to impunge its basic purpose.

Further, in the case of conventions which were in the nature of charter or constitution of an international organization it would be inequitable and unworkable to permit states members of a functioning body to vary the terms of their admission over the objection of one or more members already meeting with onerous terms. Even theoritically, it did not appear possible to be bound to certain states and not bound to certain other states which had rejected the reservation, under the same constitution.

Finally, there was the uniformity of legal relationships resulting from the unanimity rule.[28]

26. UN. Doc. A/1372 *op. cit*,. at 5, 25 & 26.
27. Ibid, at 6' para 32.
28. Ibid, at 7, para 37

There are examples in support of the Secretary General's view.[29] United States of America made a reservation to the constitution of World Health Organization. Secretary General declared the United States of America as the party only after a unanimous acceptance by the Assembly, of the ratification as not inconsistent with the constitution. Prior to the entry into force of the constitution of the International Refugee Organization, the Secretary General circulated the text of reservations made by several states in accepting that constitution. Finally, when the last instrument of acceptance necessary to permit the entry into force had been deposited, the Secretary General requested the interested states of their observations before a specified date and only after that date had passed he declared that constitution had entered into force. Likewise Union of South Africa could sign the protocol modifying certain provisons of the GATT with reservation only when all the other contracting parties raised no objection.

This was the practice of Secretary General till 1952 when in the same year the General Assembly adopted the resolution (resolution 598 (VI) of 12/1/52) in regard to Secretary General's depositary practice in regard to multilateral treaties concluded after 12/1/1952. According to this resolution the Secretary General in absence of any clause on reservations in the treaty, will communicate to states concerned the text of the reservation and the observations received on the reservations to the states concerned. He will not pass any comment on the legal effect of such documents and will leave each state to draw its own legal consequences from such communications. The Secretary General will count the reserving state among the parties required for the entry into force of the agreement.[30] This resolution seems to approximate the flexible system. Thus the practice of Secretary General of the United Nations till 1952 was based on unanimity rule and later on is governed by this flexible resolution of General Assembly of 1952.

II. Practice of International Organizations in Relation to Reservations :

1. *Food and Agricultural Organization of the United Nations (FAO) :* The Food and Agricultural Organization of the United Nations had no standard reservation clause till 1953. In 1957 the Ninth Session of FAO Conference adopted a series of "Principle and Procedures" which in pursuance of resolution 598 (vi) of the General Assembly, incorporated a para regarding reservations, according to which a clause relating to

29. *UN. Doc.* A/1372, *op. cit*, at 2, 3, paras 12 to 16.
30. Summary of the Practice of the S. G. as Depositary of the Multilateral Agreements (STLIEG/7), para 80.

admissibility of reservations should be incorporated in every convention or agreement to be concluded under article XIV of the FAO Constitution. The FAO Conference adopted the unanimity rule.[31] Reservation made at the time of signature must have the assent of all signatory states.[32] An instrument of ratification, accession, or acceptance is accompanied by a reservation at the time of coming into force of the treaty, is treated as having been tendered for deposite pending consultation with the interested states i. e. all signatories, acceding and accepting governments, and after the coming into force of a convention or agreement, the reservation will be addressed to all the states which had become the parties to the convention at the time the reservation was received. Director General is required to notify all signatories, acceding and accepting governments of all reservations and depending on whether the treaty was entered into force or not, only certain governments will be requested to indicate their attitude. The time limit for goverments replies is three months from the notification and after lapse of three months the tacit consent of government will be presumed.[33]

No fixed procedure for establishing the terms of the reservation has so for been adopted by FAO.[34] Reservation made at the time of signature, should be repeated or referred in the instrument of ratification. A ratification not accompanied by any reference to a reservation made at the time of signing, will amount to an implicit withdrawl of such resevation.[35] in accordance with a conclusion adopted by the I. L. C. in the report covering the work of its Third Sesssion.

The legal effect of objection to reservation will be that even if one of the parties to the convention or agreement concerned objects to the reservation the reserving state does not become party to the convention or agreement. In such a case the reserving state by withdrawing its reservation may become party to the convention. The objection affects the relations between the reserving state and all parties to convention or agreement. Objections have legal effect only when formulated by states parties to the convention or agreement concerned at the approriate time.[36] Nations having made reservations are not included for the

31. *ILC Report*, 1965, Vol. II, "Depository practice in Relation to Reservations", *Report of the S. G.*, Doc. A/5687, at 76, 77.
32. *Ibid*, at 87.
33. *Ibid*, at 77, 92.
34 *Ibid*, at 89.
35. *Ibid*, at 91.
36. *Ibid*, at 96, 97.

purpose of calculating the number of acceptances required to bring the convention or agreement into force.[37]

2. *Inter-Governmental Maritime Consultative Organization (IMCO)* : The IMCO has no standard reservation clause[38]. There is no resolution or other set of rules for the regulation or guidance of the depository in dealing with reservations. The Secretary General of IMCO is guided by the practice followed by United Nations. IMCO Secretariat follows the rules contained in United Nations document ST/LEG/7 of 1959 entitled "Summary of the practice of Secretary General as Depositary of Multilateral Agreements"[39]. It has no practice to follow in case of the submission of the reservation which is clearly excluded by the terms of a reservation article contained in the convention[40]. The Secretary General receives the signature of a state desired to sign a convention subject to a reservation which is not expressly permitted by the text of the convention or otherwise already accepted, without consulting other interested states[41]. As to the force and effect of a reservation made on signature but not reiterated in the instrument of ratification, the Secretary General of IMCO will not pass judgement on the legal effects of reservation in accordance with General Assembly's resolution 598 (vi) of 1952[42]. An instrument of ratification, accession or acceptance accompanied by a reservation, which is not expressly permitted or prohibited by the text of the convention, is received and in accordance with General Assembly resolution 598 (vi) the Secretary General of IMCO will circulate it for the acceptance to the other states, leaving it to each state to draw legal consequences from such communications[43]. IMCO has no rule regarding the fixing of time-limit within which a state must object otherwise its consent will be presumed[44].

The Secretary General of IMCO makes no assumption as to any given legal effect of objections to reservations but merely gives notice to interested states of the terms of the objection[45].

3. *United Nations Educational Scientific and Cultural Organization (UNESCO)* : The UNESCO does not maintain any standard reservation clause for use in multilateral convention[46]. It has not adopted any

37. U. N. Doc. A/5687, *op. cit*, at 98, 99.
38. *Ibid.* at 77.
39. *Ibid.* at 78,
40. *Ibid.* at 84.
41. *Ibid.* at 87.
42. *Ibid.* at 91.
43. *Ibid.* at 92.
44. *Ibid.* at 94.
45. *Ibid.* at 95.
46. *Ibid.* at 77.

resolution or enacted any other rules for the regulation or guidance of the depositary in dealing with reservations. The Director General of UNESCO has been guided by the resolutions of the General Assembly as well as the advisory opinion of I.C.J. in the Genocide Convention case[47]. It has no established practice to follow in case of the submission of a reservation which is clearly excluded by the terms of a reservation article contained in the convention[48] A signature subject to reservation, or an instrument of ratification, accession or acceptance accompanied by a reservation, is received by the Director General, as for deposit and is communicated to all the interested states[49]. As to procedure for establishing the terms of the reservation, and the force and effect of a reservation made on signature but not reiterated in the instrument of ratification, UNESCO has no practice[50]. In notifying the instrument of ratification, accession or acceptance accompanied by a reservation, the Director General communicates the full text, in the original language, of the instrument of ratification containing reservation and any other observation which might be made in the matter[51]. The interested states include, as understood by UNESCO, all the states eligible to become parties to the convention. The Director General fixes a time-limit of six months, after which states which have not made their attitude known would be deemed to have approved the contents of the instrument of ratification[52].

The Director General does not attribute any effect to the objections received from interested states to the reservation. All reservations received from interested states, whether containing objections or not, are communicated to governments which have made the reservation with the indication that the Director General would postpone the transmission of these observations to the interested states in order to enable the said government to study the communications received and, eventually, to transmit to the Organization any new communication it might wish to make. No new communication having been received from the governments which have made the reservation, the full text of all communications received are transmitted to the interested states in their original language. This transmission does not contain any appreciation by the Director General of the legal effect, if any, of the objections contained in the communications received.[53] UNESCO has

47. *U. N, Doc.* A/5687, *op. cit*, at 84.
48. *Ibid.*
49. *Ibid.* at 87 & 92.
50. *Ibid.* at 88 & 91.
51. *Ibid.* at 93.
52. *Ibid.* at 95.
53. *Ibid.* at 96.

no practice to determine whether or not the reserving state will be counted among the number of states necessary for bringing it into force, whether or not the objection to the reservation has been received.[54]

4. *Universal Postal Union (UPU)* : The Acts of the U. P. U. contain no express general provision governing the admission and treatment of reservations. Nor there is any resolution by a Congress or other organ on the subject.[55] As concerning the reservations made at the time of signature of the convention and procedure for establishing the terms of the reservation the U. P. U. Congress at London made the statement to the effect that reservations constituting derogations from the stipulations of the convention should take effect only if they had been accepted and incorporated in the Final Protocol.[56]

When reservation is made upon ratification, accession, or acceptance the Depositary of U. P. U. Acts, as a general rule, communicates reservations or statements made together with any objections on the part of Governments of the member Countries of the Union. If within a period of six months, more than one-third of these member-countries do not pronounce against the reservation, it is considered to be admitted.[57]

5. *World Health Organization (WHO)* : World Health Organization does not maintain standard reservation clauses.[58] There is no resolution nor any other set of rules for the regulation or guidance of the depositary in dealing with reservations.[59] In case of the submission of a reservation which is clearly excluded by the terms of a reservations article contained in the convention, in the case of the International Sanitary Regulations, if the World Health Assembly finds that a reservation "substantially detracts from the character and purpose of these Regulation," they do not enter into force with respect to that state until the reservation has been withdrawn.[60]

As a general rule, states put forward their reservations in their letters informing WHO of their acceptance of the Regulatlons[61]. The interested states are notified of the terms of reservation, in the case of the Regulations regarding Nomenclature, upon receipt of the text of the reservation at Headquarters, by means of a letter informing them of

54. *U. N. Doc.* A/5687, *op. cit*, at 98.
55. *Ibid.* at 77.
56. *Ibid.* at 88 & 89.
57. *Ibid.* at 93.
58. *Ibid.* at 77.
59. *Ibid.* at 84.
60. *Ibid.* at 84.
61. *Ibid.* at 89.

its terms. In the case of the International Sanitary Regulations, upon the entry into force of the Regulations with respect to the state concerned by means of a notice inserted in the weekly Epidemiological Record[62].

In the case of the International Sanitary Regulations, States members of WHO had nine months time from the date of notification to formulate reservations. States which have become members of WHO since the adoption of the Regulations have three months time to formulate reservations. In the case of the Regulations regarding Nomenclature, states, members of WHO had twelve months time (nine months for Supplementary Regulations) to formulate reservations. States which have become the member of the Organization since the adoption of the Regulations have also had twelve months and nine months time respectively to formulate reservations, and at the end of the appropriate period the other states have been notified by letter[63].

The instrument of ratification, accession, or acceptance accompanied by a reservation, not expressly permitted or prohibited by the treaty and not otherwise already accepted, in the case of the Regulations regarding Nomenclature, definitely bound the state from the date on which its declaration was received at Headquarters and in the case of the Sanitary Regulations, it was necessary to await the World Health Assembly's decision.[64]

In notifying interested states of the receipt of the instrument of ratification, accession, or acceptance, merely text of the reservation is communicated. The interested states are not requested to inform of their attitude towards the reservation[65].

In the case of the International Sanitary Regulations, reservations are submitted to the World Health Assembly. It is the Assembly that decides whether or not to accept them, after taking note of the relevant recommendation by the panel on quarantine. If the Assembly objects to the reservation, a letter is sent to the state in question asking whether it is able to withdraw its reservation or to modify it so as to make it acceptable. If the answer is negative, the Regulations do not enter into force with respect to that state.

In the case of Regulations regarding Nomenclature, the Legal Committee, basing its view on article 22 of the Constitution, recommended in its report to the Assembly that the Regulations should come

62. *U. N. Doc.* A/5687, *op. cit*, at 90.
63. *Ibid.* at 91.
64. *Ibid.* at 92.
65. *Ibid.* at 93.

into force for all member states, including those making reservations, and that only those parts on which reservation had been made would not apply. The Assembly adopted this report. Consequently, for states whic have made reservations the date of entry into force of the articles of the Regulations which are not the subject of any reservation is determined in the same manner as it is in respect of states which have not made any reservations[66].

Thus it is clear that except the F. A. O. all other organizations declined to accept the unanimity rule and are following the flexible system. The W. H. O. has followed the compatibility rule laid down by the I. C. J. in the Reservation Case.

III. Practice of States Regarding Reservations :

The available documents[67] throw light on the practice of the following states only,

1. *Dominican Republic*[68] : It does not maintain standard reservation clauses. It is guided by the resolution XV of the Third Meeting of the Inter-American Council of jurists and a number of articles (2-6) adopted at Sixth Inter-American Conference and the rules of procedure and "provisional understanding" of the Governing Board of Pan-American Union 1932. The submission of a reservation which is clearly excluded by the terms of a reservation article contained in the convention does not completely rule out the possibility of the convention entering into force in regard to the state which submitted the reservation explicitly excluded by the agreement. The Dominican Republic takes the view that the state which submits the reservations and the the signatory states which object to them may agree expressly that the convention shall become effective between them in regard to all matters not affected by the reservations in question.

When a state indicates the desire to sign a convention subject to reservation which is not expressly permitted by the text of the convention

66. *U. N. Doc.* A/5687, *op, cit*, at 96.
67. The Secretary General of U. N. invited all States and international Organizations which are serving as depositaries of multilateral conventions to provide him with information regarding their depositary practice in relation to reservation. Only two States have given the full information regarding their depositary practice in relation to reservation. The other sources which throw light on depositary practice of States are Hyde, *International Law Chiefly as Interpreted and Applied by U.S.A.*, Vol II, Second Edition, 1947, at 1439-1444; *Hackworth, Digest of International Law*, at 105-153; *Clive Parry, British International Law Cases*, 1967, Vol. 6; Lauterpacht, *International Law Reports*; Malkin, *op. cit.*, at 141-162.
68. *U. N. Doc.* A 5687, *op. cit.*, at 71 to 99.

or otherwise already accepted the signature is not received for deposit unless the states which drafted the convention are consulted, and these states are notified of the terms of the reservation.

The terms of the reservation are inscribed on the inscription sheet at the place of signature subject to the contrary provision in the convention, and in accordance with its terms, further signatures may be authorised and received after the closing of the conference adopting the convention.

A reservation which is not reiterated in the instrument of ratification is regarded as not having been made.

The Dominican Republic treats the instrument of ratification, accession or acceptance accompanied by a reservation which is not expressly permitted or prohibited by the text of the convention and not otherwise already accepted, as having been tendered for deposit pending consultation with the interested states regarding the reservation.

The text of the reservation is communicated to the interested states, excluding the negotiating states which has not signed the convention and are requested to inform their attitude towards the reservation. One year is regarded as the time-limit within which states have to indicate their attitude towards the reservation made by another state. This period is counted from the time of notification. If on the expiration of one year after having been notified of a reservation the consulted state has not commented on the reservation, it is regarded as not having objected.

The legal effect is that the convention does not enter into force, between the reserving state and the objecting state, unless the two states expressly agree that the convention shall become effective between them as regard all but reserved clauses. Objections to reservations have as much forces as the reservations themselves so far as the obligations assumed by states submitting them are concerned.

The Dominican Republic, as a depositary, makes no assumption as to any given legal effect but merely gives notice to interested states of the terms of the objection.

The convention enters into force among the states which ratify it unreservedly in the terms in which it was drafted and signed. In the case of reserving and objecting states, the convention enters into force as modified by reservations not rejected by objections. It follows that the purpose of objection is precisely to prevent the creation of any rights and obligations between the reserving and the objecting states.

An objection submitted by a state which is merely entitled to become a party to the convention has no legal effect. If the objection is submitted by a signatory state, it is communicated to the other states for comments. Of course, if the convention is subject to later ratification by the states submitting the objection the legal effect of the objection extends only to the parties in contention, as from the time of ratification, according to whether or not the objecting states maintains its objection. It recognises no difference between the treaty entered into force and the treaty not entered into force.

A state attaching a reservation may be counted among the number of the states necessary for bringing the convention into force, notwithstanding the objections to the reservation.

2. *United States of America*: The United States Government[69] does not maintain reservation clauses for use in multilateral conventions. United States Government as depositary could not accept an instrument of ratification, accession, acceptance, or adherence submitted for deposit with a reservation which is clearly excluded by the terms of a reservation article contained in the convention. Unless a reservation is clearly excluded by the terms of the convention the United States Government as depositary does not put any limitation on the right of a state to sign the convention subject to such reservations as that state may deem necessary for its purposes.[70]

Regarding the procedure of establishing the terms of the reservation, the United States maintains that it depends on the terms of the convention and where there is nothing to the contrary in the convention to govern the matter, the inscription on the face of the convention at the place of signature is considered appropriate, because all the parties to the treaty may, previous to and in considering ratification, understand to what extent each signatory is bound by the terms of the agreement[71]. This has been the practice followed in signing the conventions by the U. S. A., where the United States and numerous other countries stated their reservations at the time of signature, e. g. Hague Conventions 1899 & 1907, Radio-telegraphic Convention 1912, General Act of International Conference at Algiers 1906, etc[72]. The United States Government as depositary does not favour the formal process verbal procedure

69. *UN. Doc* A/5687, *op. cit.*, at 76 to 99.
70. *Ibid*; C. C. Hyde, *op. cit.*, at 1444; Hackworth, *Digest of Int. Law*, Vol. V, 1943, chapter XVI, at 104.
71. C. C. Hyde *Ibid*, at 1442; Hackworth, Vol. V. *Ibid*, at 107 see the instruction of Secretary Colby to the Ambassador wallace.
72. Hackworth, *ibid.*, at 108.

for this purpose unless it is clearly provided for by the convention. So for as the Final Act of a conference is concerned, the conference itself would determine the procedure for establishing the terms of the reservation. This would not be left for determination by the depositary. If, on the other hand, the depositary is given the responsibility for receiving signatures after the close of the conference, then the U. S. Government, so far as its depositary procedures are concerned, would not itself draw up a "Final Act" for reservations. The U. S. Government as depositary does not, as a rule, consider it appropriate for reservations to be set forth merely in a letter or note accompanying an instrument of ratification, acceptance, adherence, or accession. If the instrument is to be qualified by reservation, it is considered that the reservation should be embodied in the instrumement itself. The text thereof then being notified, even after a convention has entered into force, to all the states which participated in the conference at which the convention was formulated and adopted, whether signatories or not, and all other states which being non-signatories, have deposited instrument of adherence or accession, at the same time they are notified regarding the deposit of formal instrument[73]. The notification will be sent as soon as practicable after the actions to which they relate, have been taken i. e. unless the terms of the reservation have been duly established. If the signatures to a convention are affixed at the conference at which the convention was adopted, it would be assumed that the participating states in the conference have had the effective notice of the terms of the reservation and in such cases, after the closing of the conference, the depositary will transmit to the interested states certified true copies of the reservation showing all signatures and accompanying reservations, meaning thereby that the depositary will not send any special notification in regard to the terms of the reservation[74]. If further signatures are authorized after the closing of the conference it is incumbent upon the depositary to notify the interested states with respect to each additional signature and with respect to any reservation attached to such signature, otherwise they will not be legally bound by the terms of the reservation[75]. It will notify to the states specifically designated in the convention as being eligible to become a party, e. g. where it is named in an annex to the convention.

While notifying it usually requests a statement from each of the interested states about its attitude in regard to the reservation[76]. Unless the United States Government is authorised by the convention

73. Hackworth, *op. cit.*, at 108-130.
74. C. C. Hyde *op. cit.*, at 1443.
75. *ibid.*
76. Hackworth, *op. cit.*, at 110.

it has no authority to fix a time-limit within which the states must inform of their attitude towards the reservation. But for extraordinary reasons the notification may point out the necessity for receiving prompt responses and urge the states to take prompt action in this respect.

The United States Government as depositary applies as an absolute rule that the reservation made at the time of signature should be confirmed and reiterated in the instrument of ratification if it is the intention of the reserving state that such reservation continue in effect[77].

The United States depositary does not make any assumption as to any g ven legal effect. There are many factors to be considered, including the specific terms of the convention,[78] its inherent character, and the evident intent of the states which concluded the convention, hence within this indefinite framework, United States Government maintains, that it is not appropriate to extrapolate an absolute rule to cover all conceivable situations, and, therefore, each case must be considered in the light of particular circumstances of that case[79].

The United States Government maintains that unless the convention provides specifically to the contrary, an objection made by a signatory or a state which is merely entitled to become a party, is not conclusive until such time as the objecting state has itself taken the definite measures necessary to become a party. Objections to reservations made on signature would be no less valid than those made to reservations at the time of ratification or accession, but such objections may become meaningless if the reserving state thereafter, withdraws its reservations or fails thereafter to become the party to the convention[80].

The United States understands that a reservation makes a material addition or substantial change[81]. In the proposed treaty hence other parties will not be bound unless they assent and thus it recognises also the diff rence between the reservations and understandings short of reservation[82]. Reservation merely serves as a limitation to the provisions agreed upon in the treaty or convention and confers no substantive rights[83].

77. Hackworth *op. cit.*, at 102-104.
78. C. C. Hyde, *op. cit.* at 1440. "The terms of the acceptance of reservation and its related problems governed by the treaty provisions, if any".
79. Hackworth, *op. cit.* at 130; C. C. *Hyde*, *ibid.* at 1441.
80. C. C. Hyde, *ibid.*
81. *Lauterpacht*, *International Law Reports*, 1957, Vol. 24, at 557-572, *Power Authority of the State of New York* v. *Federal Power Commission*, Supreme Court.
82. Hackworth, *op. cit.* at 103, 130.
83. Lauterpacht, *op. cit.*, 1955, Vol. 22. at 589, 590; Savelis Etal v. V. Lochos ET AL. 'U. S. District Court, Eastern District Virginia, Nov. 25, 1955.

In the case of a reservation permitted by the treaty which lessens the obligation, if a signatory or prospective party ratifies the treaty after the reservation is made, its consent to the reservation will be presumed. As to the signatories whose ratification had been deposited prior to the receipt by them of the notice of deposit of a ratification with reservation, acceptance by such states of the reservation by some positive act is necessary.[84] On the other hand the rejection of the reservation demands affirmative steps. But where the reservation enlarges the obligation inaction on their part in relation to such reservations would not amount to acceptance of it e. g. the inaction on the part of other parties in relation to Soviet reservation to the treaty for the Renunciation of War, 1928, did not amount to acceptance of the reservation.[85]

Whether or not the reserving state will be counted among the number of the states to bring the convention into force, the United States Government maintains, will depend upon the terms and character of the convention.

3. *United Kingdom* : [86] United Kingdom neither maintained any standard reservation clause nor adopted any rule for the regulation or for guidance of the depositary. The Government of the United Kingdom maintained that in the absence of any right to make reservations a party or intending party can make reservation but its validity will depend upon the acceptance by the other party. An objection will make the reservation invalid against the objecting party. It has no fixed procedure for establishing the terms of the reservation made at the time of signature but the reservation should be written on the face of the convention at the place of signature.

The instruments of ratification, accession on acceptance with reservations are received by the United Kingdom for deposit. But such instruments are not received for definite deposit because they are reg - rded to have only the provisional effect and open to further considerations by the interested states. Sir Samuel Evans, President, held in the *Marie Glaeser*[87] and in the *Schlesien*[88] cases that because Germany had made a reservation against art. 3 of the Sixth Hague Convention of 1907, therefore she would not in any event be entitled to any benefit which might accrue from the terms and the conditions laid down in that

84. Hackworth, *op. cit.* at 130.
85. C. C. Hyde, *op. cit.* at 1441 & 1443.
86. *Clive Parry, British International Law Cases*, 1967, Vol. 6, at 538, 583; and *H. W. Malkin, op. cit.*, at 143-144.
87. *Clive Parry, Ibid.* at 538; Marie Glaeser (1914) probate Division, in prize.
88. *Ibid*, Schlesien (1916) probate Division, in prize, at 583.

article, Thus the Court has emphasized that the reservation limits the legal effect of the treaty in so far as it may apply in relations to that state with the other state or states parties to the treaty[89].

The United Kingdom as a depositary did not make any assumption as to the legal effect of reservation but only took note of the reservations and brought them to the knowledge of the other signatory powers of the treaty.[90]

The practice of the Depositary States as examined above has very clearly established the flexible rule.

IV. Practice in Regard to Reservations in the Declarations Under the Optional Clause of the Statute of the International Court of Justice

Article 36 (2) of the Statute of the Court lays down that states by making declarations may accept the compulsory jurisdiction of the International Court of Justice.[91] This provision is intended to give each party to the Statute the option, either at the time of signing or ratifying the Statute, or at any time afterwards, to make a unilateral declaration by which on the basis of reciprocity, it recognizes the Court's compulsory jurisdiction [92] A state is free to frame the terms of its declaration without consulting the other states and the fixed element in the legal relation between them is to be found in the clause.[93] Its importance lies in providing for a simple means of accepting compulsory jurisdiction generally for all legal disputes and as against any state undertaking the same obligation. Its purpose is not merely to provide for a possible basis for a judicial settlement of disputes, but also to promote between the parties to the Statute a general system of compulsory jurisdiction,[94] through the multiplicatcn of declarations by individual states.

89. *I. L. C. Report*, 1962, Vol. 11, Doc. A/CN. 4/144, Art. 1 (1), at 31.
90. Malkin, *op. cit.* at 143-144, United Kingdom was depository of the Treaty respecting the Navigation of the Danube, London, 1883.
91. E. Hambro, "The Jurisdiction of the International Court of Justice," *Hague Recueil*, 1950, Vol. I, at 138; H. W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of International Court of Justice", '*Hague Recueil*, 1958, Vol. I, at 229; R. P. Anand, *Compulsory Jurisdiction of International Court of Justice*, 1961, chap. V. at 141; *K. Holloway, Modern Trends in Treaty Law*, 1967, chap. XXIV, at 652
92. C. H. M, Waldock, "Decline of the Optional Clause", *B. Y. I. L.* 1955-56, vol. XXXII, at 244.
93. *Ibid*, at 247.
94. *Ibid.* at 245.

NATURE : The declarations accepting compulsory jurisdiction are unilateral in form in the sense that they are drafted unilaterally,[95] but they create consensual agreements,[96] with states having made or which might make similar declaration under Art. 36 of the Statute. In the *Electricity Company of Sofia and Bulgaria*[97] case the P. C. I. J. was quite explicit as to the contractual nature of the obligations resulting from the declarations. The dissenting judges Anzilotti[98] and Urrutia[99] said that the declarations under Art. 36 resulted in an agreement between the two states accepting the compulsory jurisdiction of the Court. The same view was held by the P. C. I. J. in *Phosphates in Morocco* case.[100] In *Anglo Iranian Oil Company* case,[101] the I. C. J. while emphasizing the unilateral drafting of the instrument did not deny its legal character as a treaty text. Judges Alvarez[102] and Read[103] had no doubt that declarations create consensual agreements between each pair of states making them. In the case of *Right of Passage Over Indian Territory*, the I. C. J. has emphasized the contractual nature of these declarations.[104] The Secretariat of the United Nations considered these declarations made under A rt. 36 (2) of the Statute, in the category of

95. Anglo Iranian Oil Co. case, *I. C. J. Reports*, 1952, at 105. "But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of Unilateral drafting by the Government of Iran,....."
96. K. Holloway, *op. cit.* at 653; R. P. Anand, *op. cit.*, at 143 to 147.
97. *PCIJ*, (1939) Series A/B, No 77, at 64.
98. *Ibid.*, at 87, Judge Anzilotti Said, "As a result of these Declarations, an agreement came into existence between the two States accepting the compulsory jurisdiction of the Court, in conformity with Art. 36 of the Statute....."
99. *Ibid.* at 103, Judge Urrutia said, "The adherence of the two parties to Art. 36 of the Statute of the Court is equivalent in law to an international agreement between them within the limits fixed by the reservations....."
100. *PCIJ.* (1939); Series A/B, No. 74, at 22.
101. *I. C. Jl Report*, 1952, at 105; The case of Right of passage over Indian Territory, *I. C. J. Reports* 1957, at 146, and see the dissenting opinion of Judge M. Badawi, at 157 and ad hoc Judge Chagla at 170,
102. *Ibid.* 1952, at 125. Alvarez said, "the Declaration is a multilateral act of a special character, it is the basis of the treaty made by Iran with the States which has already adhered and with those which would subsequently adhere to the provisions of Art. 36, para 2, of the Statute of the Court".
103. *Ibid.* at 142, Judge Read said, "Admittedly it was drafted unilaterally. On the other hand, it was related, in express terms, to Art. 36 of the Statute, and to the declarations of other States which had already deposited or which might in the future deposit, reciprocal declarations. It was intended to establish legal relationships with such States, consensual in their character, within the regime established by the provisions of Art. 36.'
104. See FN 91, *supra.*

"treaties and international agreements."[105] These declarations are notified to the Secretary General of the United Nations and registered by him as international agreements under Art. 102 of the Charter. Admittedly, the Court is an organ of the United Nations but no doubt the Secretary General receives the declarations not as an officer of the Court but as a depositary of the instrument relating to an international agreement.[106] They are, therefore, multilateral acts,[107] albeit of special character, but are not substnatially different from unilateral act of adhesion or accession to pre-existing treaty or ratification of a text previously negotiated or drawn up,[108] The relation between two states under the Optional Clause appears to be more a bilateral than a multilateral relation. On the other hand, the relation is not exclusively bilateral because the whole Statute is brought in with the Optional Clause and, under Art. 62, parties to the Statute, with a legal interest which may be affected by the decision, may apply to intervene in the case.[109] Thus, while the relation established between states by their declarations is for most purposes bilateral, it has also a multilateral aspect.[110] The fundamental difference from general multilateral treaties is that the legal relationships which these declarations establish are strictly on bilateral and contractual basis, witness the importance states attach to the conditions of reciprocity.

Reciprocity : Paras 2 and 3 of Art. 36 appear to establish a condition of reciprocity applicable to all declarations envisaged in Art, 36 and, therefore, require no reservation of reciprocity in the declaration.[111] Thus reciprocity is a basic constitutional provision of the Statute[112] and it is in fact this condition of reciprocity which governs the scope of any state's obligation under the Optional Clause, regardless of whether it has accepted the Court's compulsory jurisdiction subject or not to any condition, reservation, or limitation.[113] The jurisprudence of the

105. Note by Secretariat, *U. N. T. S*, vol. 1, (1946-47), at XVI.
106 C. H M. Waldock, 'Decline of the Optional Clause', *op. cit.*, at 252.
107. See Fn. 92. *supra.*
108. K. Holloway, *op. cit.*, at 65[illegible].
109. R. P Anand, *op. cit.* at 222.
110. C. H. M. Waldock, "Decline of the Optional Clause" *op, cit.*, at 254.
111. H. W. Briggs, *op cit.*, at 237; R. P. Anand, *op. cit.*, at 157.
112. Briggs, *Ibid*, at 239; C. H M. Waldock, *op. cit.*, at 55.
113 J. Hudson is quite categorical in asserting, "From a legal point of view, the formulae seems to serve no purpose; all of the declarations contain the limitation *ipso facto*, and this is true even though they are said to be "without condition", and Prof. Verziji observed, "reciprocity really consistuted an ineluctable principle of law which would apply equally and *ipso jure* either where a partieular declaration made no mention of reciprocity or even formally excluded it". Briggs, *Ibid*, at 239. 240; K. Holloway, *op.*

Court establishes with precise clarity that Art. 36 (2) of the Statute stipulated the condition of reciprocity applies to the limitations, conditions, reservations contained in declarations.[114]

It is said that para 3 of Art. 36 permits unconditional declarations of acceptance of Court's compulsory jurisdiction and, therefore, is contrary to para 2 of the same article.[115] This para 3 of Art. 36 does not relate to reciprocity as a jurisdictional limitation. It deals with the reciprocity on the part of several or certain states i. e. it simply authorizes states to accept compulsory jurisdiction under the Optional Clauses for limited periods, and to make their liability to jurisdiction conditional on compulsory jurisdiction having been also accepted by a particular number of states or by the particular named state.[116] By accepting the compulsory jurisdiction of the Court unconditionally a state cannot, therefore, be regarded as having eliminated the condition of reciprociiy found in Art, 36 (2) of the Statute. The Court's jurisprudence gives no comfort to the Advocates of the thesis that para 3 is contradictory to para 2 of Art. 36, since in the *Phosphates in Morocco*, *Electricity Company of Sofia and Bulgaria* and *Anglo Iranian Oil Compaay* cases the Court specifically indicated that the statutory condition of reciprocity was contained in para 2.

The purpose of the statutory condition of reciprocity is to establish the equality of the parties before the Court, which is an elementary requirement of justice. The effect of applying the condition of reciprocity is limitative of Court's jurisdiction. States which have accepted the Court's jurisdiction without reservation are given the opportunity for modifying this offer in order to claim the benefit of reservations contained in adverse party's declaration. Thus the application of

cit. at 653; E. Hambro, *op. cit.* at 184-185. He said that on the basis of art. 36(2) of the Statute, recoprocity is an absolute condition and therefore a declaration under Art. 36 without any mention at all of reciprocity may still contain this reservation since it forms part of Art 36

114. Phosphates in Morrocco case, *P, C. I. J.* (1930), Series A/B No. 74 at 22; Electricity company of Sofia and Bulgaria case, *P. C. I. J*, (1939), series A/B, No. 77. at 81, and in this case see the seperate opinion of Judge Anzilotti at 87, 89 and the dissenting opinion of Judges Urrutia at 103 and Judge Eysinga at 109; In the *Anglo Iranian Oil Company case* (*I. C. J.*) *Reports* 1952, at 105 and in the Norwegian Loans case (*I. C. J.*) *Reports* 1957, at 23, 24) the present Court followed the jurisprudence of Permanent Court; see the individual opinion of President McNair at 116 in the *Anglo Iranian Oil Co*, Case.

115. Briggs has quoted the opinion of Prof. Verziji and Prof. Giuliano Eniques, Briggs, *op. cit*, at 240.

116. Briggs, ibid. at 241; C. H. M. Waldock, "Decline of the Optional Clause" *op. cit.*, at 255.

condition of reciprocity tends to equalise declarations made with or without reservation[117]. Despite this conclusion that reciprocity applies to reservations as well as to declarations, there are exceptions, e. g. a state not a member of the British Commonwealth of Nations cannot claim the benefit of the reservation by which disputes between two members of the Commonwealth are excluded from the Court's jurisdiction. The other example is that time-limits specified by states for the entry into force or termination of their declarations are not in themselves jurisdictional reservations *ratione temporis* to which reciprocity applies and the application of the condition of reciprocity to such dates would be absurdly destructive of the system of compulsory jurisdiction[118].

The absence of any provision concerning the insertion of limitations, reservations and conditions in the declarations accepting the Optional Clause allows states to insert such terms as are not incompatible with the basic provisions of the Statute[119]. In the Ninth Assembly of the League of Nations, Plenary Meetings[120], it was pointed out that states might accede to the Optional Clause with "appropriate reservations limiting the extent of their commitments, both as regards duration and as regards scope"; and it was said that

> the reservations conceivable may relate either generally to certain aspects of any kind of dispute or specifically to certain classes or lists of disputes, and that these different kinds of reservations can be legitimately combined.

A state is free to accept or not to accept the obligations of the Clause. In absence of express provisions the liberty not to accept covers the liberty to place conditions on acceptance.

While the Court has made no formal pronouncement on the permissibility of attaching reservations to declarations accepting its compulsory jurisdiction, its consistent practice has been, as in the *Phosphates in Morocco* case, to hold that its compulsory jurisdiction "only exists within the limits within which it has been accepted"[121]. In his separate opinion in the *Norwagian Loans* case, Judge Lauterpacht observed that—

> the right to append reservations which are not inconsistent with the Statute is no longer in question, however, while the

117. Briggs, *op. cit*, at 245.

118. *Ibid*, at 246 to 248 and 276, 277

119. R. P. Anand, *op. cit.* at 187; Briggs *Ibid*, at 232, 233.

120 R P. Anand, *Ibid*, at 188.

121. *P. C. I. J.* (1939) Series A/B No. 74, at 23.

Statute as interpreted in practice permits reservations to its jurisdiction it does not permit reservations as to the functioning and the organization of the Court''[122].

Thus the permissibility of making reservation which are not inconsistent with the Statute thus appears to be clearly established in practice and to be accepted by the Court, although as Rosenne observed,

the admissibility or validity of any specific reservation is a matter to be decided in each particular case[123].

There are two limitations which limit the liberty of the states to make reservations to the Optional Clause. The first limitation is that although the Optional Clause leaves to an individual state a large discretion as to the terms on which it accepts the compulsory jurisdiction, it does not permit a state to make a declaration which is incompatible with the fixed constitutional provisions of the Court's Statute because Optional Clause does not stand by itself but it is an integral part of the Statute and adherence to it means the adherence to the Statute.

The other limitation is that in order to be admissible a reservation must be compatible with the object and purpose of the convention as laid down by the Court in *Reservation* case[124]. As the object of a declaration under Article 36 (2) of the Statute is to accept the compulsory jurisdiction of the Court, any reservation that has the effect of frustrating that object will be regarded as contrary to the very purpose of the Optional Clause and as such invalidating the signatures.

Certain reservations will be examined as to how for these are compatible with the Statute and are compatible with Arts. 36 (2), 36 (6) of the Statute and Art. 12 of the Charter and the consequences of such types of reservations to the Court's compulsory jurisdiction.

(1) *Reservations as to Domestic Questions* : Art. 2, para 7 of the Charter of United Nations provides that United Nations shall have no right to intervene in the matters essentially within the domestic jurisdiction of any state or to require the members to submit such matters for the settlement under the present Charter[125].

The Court is instructed by the Statute to decide the case brought before it in accordance with international law, but its competence does

122. *I. C. J. Reports*, 1957, at 45-46
123. Briggs, *op. cit*, at 233.
124. *I. C. J. Reports*, 1951, at 24, 29.
125. Waldock, 'The Plea of Domestic Jurisdiction Before International Legal Tribunals', *B Y. I. L.*, 1954, vol. XXXI, at 96; R. P. Anand, *op. cit.* at 190; Hambro, *op. cit.* at 188.

not extend to domestic questions[126]. Hence the domestic jurisdiction limitation, apart from reiterating an already accepted principle, cannot offer any additional protection other than that already provided by the Statute itself and by the fundametal nature of international law. This view has been affirmed by I. C. J. in *Interhandel* case by holding,

by implication, that a reservation of that kind is inherent in every declaration of acceptance and there is no need to spell it out expressly.[127]

Prof. Briggs believes that the exclusion of disputes with regard to the matters of domestic jurisdiction is implicit in the Statute of the Court and may be raised, even in the absence of a reservation to that effect[128]. Thus no such reservation is necessary and if made is harmless[129].

But the reservations excluding domestic matters made under the new Statute have been phrased under such terms as to take away with one hand what it purported to be given by the other. For example, the American declaration accepting the compulsory jurisdiction retains the right to determine the matters of domestic jurisdiction[130]. This means that an obligation whose scope is left to full appreciation of the obligee, so that this will constitute a legally recognized condition of the existence of the duty, does not constitute as legal bond. The provision of unilateral, rather than international determination of the scope and application of the reservation gives to the United States of America a political veto on a question of judicial character[131]. Thus it involves a recourse to a veto power on judicial commitments which would be stultifying all the proclamations the members of the United Nations make to the effect that in legal matters they wish to be ruled by law rather than by political decision[132]. This is a contradiction of the compulsory jurisdiction itself, the essence of which is the assurance that the competence of the tribunal cannot be excluded or paralized after a dispute has arisen by the resistence of one of the parties or by the disag-

126. R. P. Anand, *op. cit.*, at 191; Briggs, *op. cit.* at 310; Waldock, *BYIL*, 1954, *op. cit*, at 96-142.
127. *I. C. J. Reports*, 1959, at 6 *Norwagian Loans case; I. C. J. Reports*, 1957, at 23, 24, in this case see the opinion of Judge Moreno Quintana at 28 and separate opinion of Judge Badawi at 29-33.
128. Briggs, *op. cit.*, at 307 to 335; R. P. Anand, *op. cit.*, at 192.
129. Hambro, *op, cit.*, 187; Waldock, *B. Y. I. L.*, 1954, *op. cit.*, at 104; Briggs, *Ibid.*, at 363.
130. It is known as Connally Amendment clause see R. P. Anand, *op. cit.*, at 197 to 204; Briggs, *Ibid.* at 328. to 335.
131. Waldock, *B. Y. I. L.*, 1954, *op. cit.*, at 135.
132. R. P. Anand, *op. cit.*, at 198, 200.

reement between them and, therefore, strikes at the very heart of the system of compulsory jurisdiction[133]. The United States declaration does not finally define before hand the matters in regard to which it accepts jurisdiction and thereby creates an illusion of compulsory jurisdiction. The unambiguous meaning of the United States reservation is that the United States reserves to itself an absolutely general right to insist, in any given case, upon its own determination of the matters considered to be within its domestic jurisdiction and to decline jurisdiction of the Court with respect to such matters[134].

It will not seem justiciable to leave the jurisdiction and proper functioning of the Court to the discretion and good faith of a party when its own action is challenged before the Court. Whether a state has exclusive jurisdiction or whether the jurisdiction is limited to international limitation, can only be determined with respect to the particular state, in a specific case and within the field in which the controversy arises. The determination of so complex a problem, therefore, is one which can be adequately performed only by a judicial tribunal. To entrust it to the interested party is to add to the risk of evasion than of error committed in good faith.[135]

The question of determining what is properly a matter of international law is appropriate for the decision of the Court itself and that is the intention of Art. 36 (6) of the Statute. If it were left to the decision of each individual state, it would be possible to withhold any case from adjudication on the plea that it is a matter of domestic jurisdiction and therefore the American reservation is contrary to Art. 36 (6) of the Statute.

In the *Norwagian Loans* case,[136] this type of reservation came before the Court. Judge Badawi, though expressed no final opinion on the validity of French reservation on matters of domestic jurisdiction as determined by declarent state, he regarded the reservation as 'subjective' and preferred that the Court should not base its judgement on the reservation unless it considers that the objection relating to municipal law an objection—by its very nature objective–is not adequate for a finding of lack of jurisdiction.[137] Judges Guerrero and Lauterpacht specifically rejected such reservations as invalid on the grounds : (i) that they were incompatible with the provisions of the Statute, since under

133. Waldock, *B. Y. I. L.*, 1954, *op. cit.*, at 135.
134. *Ibid*. at 136.
135. R. P. Anand, *op. cit*, at 202.
136. *I. C. J. Reports*, 1957 at 9.
137. *Ibid*. at 29.

Art. 36 (6) the Court had the competence to decide disputes as to its jurisdiction; (2) that they were incapable of giving rise to the legal obligation of compulsory jurisdiction, since they reserved the unilateral right of declarant state to determine itself the limit between its own national jurisdiction and the jurisdiction of the Court;[138] (3) that such reservations are devoid of all legal valdity and were contrary to the spirit and letter of the Statute and for that reason null and void;[139] (4) that it was not possible to establish a system of law if each state reserved to itself the power to decide itself what the law is; and (5) that a state making such a reservation should be considered as not having accepted the compulsory jurisdiction of the Court under Art. 36 of the Statute.[140]

Judge Lauterpacht observed that such reservation was contrary to a clear specific provision of the Statute i. e. Art. 36 (6) and Art. 92 of the Charter, since, (1) in that reservation the State was in fact claiming the right to decide, and the Court to accept, whether the court had jurisdiction or not;[141] (2) that the Court should declare such reservations as invalid because they were contrary to the provision of the Statute and Court could not function except in conformity with its Statute which was the basis and the very source of the declaration of acceptance;[142] (3) that the exclusive right of a state to determine the extent or the very existence of its obligation was not a legal undertaking is a generally recognized priniciple of law which the Court was authorised to apply by virtue of Art. 38 of its Statute;[143] (4) that when the state was the sole judge of the question, the element of legal obligation was reduced to a vanishing point;[144] (5) that as regards the effect of principle of good faith, he observed, that it had a meaning in terms of legal obligation, only when room was left for an impartial finding whether the duty to act in accordance with good faith had been complied with.[145] Thus, for Lauterpacht, the domestic jurisdiction reservation thus formulated was invalid in as much it deprived the acceptance of essential element of legal obligation[146] and he concluded that such reservations were crucial limitation of the obligation undertaken under Art. 36 of the Statute.[147]

138. *ICJ*. Reports, 1957, at 68 (Judge Guerrero), at 44, 66 (Lauterpacht.).
139. *I. C. J*. Reports. 1957, at 69-70; Also Judge Read's Dissenting opinion at 94-95.
140. *Ibid*. at 68.
141. *Ibid*, at 44, 47.
142. *Ibid*. at 46.
143. *Ibid*. at 49.
144. *Ibid*. at 52.
145. *Ibid*. at 52, 53.
146. *Ibid*. at 54-55.
147. *Ibid*. at 57.

In the *Inierhandel* case, the President Klaested,[148] Judge Armand[149]-ugon and Judge Lauterpacht[150] held such reservation as invalid, because this particular reservation purported to veto both the Court's competence to decide disputes with respect to its jurisdiction and the applicant's claim to jurisdiction. *Norwagian Loans* case was followed in this case.

Thus for the reasons stated above such reservations are incompatible with the Statute and Art. 36 (2) and 36 (6) of the Statute and Art. 92 of the Charter, which under the form of escape clause would render the professed acceptance of ccmpulsory jurisdiction in the declaration illusory because of the highly subjective character of any such appreciation and the sensitiveness of the states to such probing into their presumed intentions.

2. *Reservations Regarding Disputes Under Multilateral Treaties :* Exception (c) of the United States declaration excludes—

> disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) United States specially ageed to jurisdiction.

The effect of this reservation is not clear. Hudson[151] interpreted this reservation by reference to Arts. 62 and 63 of the Statute, which deal with the right of the third state to intervene in a case. On that basis he concludes that in a case involving the state's interest of a legal nature which may be effected by the decision, or involving the interpretation of a multilateral treaty, to which United States is a party, the reservation requires every party to the treaty to have become the party to the case, before the Court will be invested with the compulsory jurisdiction over the United States and because of the reciprocal nature of the declaration, the United States may not be able to proceed against any state unless the same condition is fulfilled.[152] This is the broad interpretation and Lauterpacht expresses the same view.[153] If this view is correct the Court's jurisdiction will depend on the express submission to jurisdiction by United States.

A narrow interpretation is given by Dr. Wilcox,[154] who suggests that the words 'Parties to the treaty affected by the decision', means the

148. *I. C. J. Reports*, 1959. at 76-77.
149. *Ibid.* at 90-93.
150. *Ibid.* at 99-100.
151. Waldock, *B. Y. I. L.*, 1955-56, *op. cit.*, at 273-74.
152. R. P. Anand, *op. cit.*, at 222-223.
153. Lauterpacht, *Openheim's International Law*, vol. II, at 53-63.
154. Waldock, *B. Y. I. L.*, 1955-56, *op. cit.*, at 274.

parties 'directly or legally affected' by the decision and not the parties merely interested in the decision by reason of their general rights and obligations under the treaty. The distinction between these two types of parties is not easy to draw and if this narrow interpretation is adopted, the effect of the reservation will be very small then appear to have been intended by the Senate. The uncertainty and difficulty attendant on its application will still leave the legal effect of the Court's juridiction dependent on the will either of third states or of the United States itself.

This reservation has been generally condemned as sweeping and tending to withdraw from the Court, at the will of the United States, a large fraction of legal disputes covered by Optional Clause, because a sensible proportion of international legal disputes arise under multilateral treaty.[155] Thus such reservations will seriously prejudice the effectiveness of the Optional Clause system of compulsory jurisdiction in a most important sphere of legal disputes.

In view of the fact that one of the important functions of the Court is to interpret and apply multilateral instruments, such reservations will greatly curtail the usefulness of the Court as the great interpreter of World Law. Most of the present day international law is contained in treaties and, if the Court is really to play its rightful function, its interpretation and application of their provisions should not be stigmatised by such reservation.[156] Thus the American reservation is a bad precedent and definitely a retrogressive step. It is only Pakistan which had also adopted American reservation and fortunately others have not followed.

3. *Reservations Ratione Temporis* As a general rule the declarations are made to apply only to disputes subsequently arising[157] or arising hereafter[158] and thus limiting the jurisdiction of the Court *ratione temporis.*[159] The origin of this reservation lies in the wish of certain states to exclude certain definite claims. The declarations are drafted in so ambiguous terms as to make the determination of exclusion date difficult, hence they are indefinite and uncertain.[160] Professor Lauterpacht criticised this reservation as indefinite, arbitrary and as least capable of explanation in terms of general principle.[161]

155. Waldock, BYIL, at 955-56, *op. cit.* at 275; R. P. Anand, *op. cit.*, at 225.
156. R. P. Anand, *Ibid*, at 227.
157. *Ibid*, Australian declaration, at 228.
158. *Ibid.* U. S. A. declaration, at 228.
159. *Ibid*; Briggs *op. cit*, at 280.
160. *Ibid.*, at 229; Briggs, *Ibid.*,
161. Briggs, *Ibid*, at 282.

The Court in interpreting this reservation[162] has found that the situation or facts falling under the Optional Clause are those which are subsequent to the ratification, signature, deposit of declaration, or of a prior declaration[163] and with regard to which the dispute arose, i.e., those which must be considered as being the source of the dispute. In the *Phosphates in Morocco* case, P. C. I. J. showed the difficulties and dangers of these reservations,

> ...it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of the retroactive effect, in order to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise.[164]

Thus from the point of view of the jurisdiction of the Court it would be better that this type of reservation is not made. As Edvard Hambro observes,

> It frequently happens in the life of States that disputes take a long time to mature. Lengthy diplomatic negotiations take place before it is finally decided that the conflict has become definite and concrete enough to be formulated as claims and counter-claims before an international tribunal. The Court might, therefore, be most useful when called upon to deal with older claims and conflicts.[165]

In the absence of such an express reservation, it seems to be clear that the Court is competent to deal with conflicts of long standing.

There are uncertainties on other parts of this reservation. When does a dispute arise? Does the verb refer to the time at which the injurious event occurs? Or to the time when the claim is first put forward through appropriate channel? Or when the claim has been rejected and parties have finally disagreed? What does a situation prior to exclusion date mean? If legislation injuriously affecting aliens and alleged to be contrary to international law has been passed prior to

162. *P. C. I. J.* decision in *phosphates in Morocco case, op. cit.*, at 23; *Eleltricity Company of Sofia and Bulgaria* case, *op. cit.*, at 82 and I. C. J. decsion *Right of Passage case, op. cit.*, at 160-61.
163. These are the various formulae by which exclusion date is determined.
164. Phosphates in Morocco case, *op. cit.*, at 24.
165. Hambro, 'Some Observations on the Compulsory Jurisdiction of the International Court of Justice', *B. Y. I. L*, (1948), Vol, XXV, at 144.

the declaration, would the continued application of such legislation fall under the terms of the reservation[166]? Thus the phrase "situations and facts prior to the declaration" is vague and admitting of variety of interpretations.

4. *Reservation of a Right to Terminate the Declaration on Giving Notice and Reservation of a Right to Vary by Giving Notice :* Para 3 of Art. 36 of the Statute of the Court provides that "declarations may be made unconditionally....or for a certain time", to which states have interpreted as authorising them to make declarations which have no set period but are to remain in force until notice of their termination is given[167]. Declaration terminable upon six months or one year's notice does not violate the spirit of the requirement since all states will have knowledge of any notified terminal date with opportunity to find a timely application[168]. Very different is the position of the states whose declarations are terminable immediately on notice being given to the Secretary General.

These reservations of a right to terminate the declaration immediately on notice give right to states to dodge out a particular case which appeared likely to be brought and thus put pressure on states to institute proceedings under the Optional Clause without first exhausting the possibilities of settlement out of Court[169]. Such reservations undermine the whole purpose of the Optional Clause. It serves as a means to withdraw from the Court's compulsory jurisdiction a particular dispute in which the vital interest of the state is involved[170]. Such reservations

166. R. P. Anand, *op. cit.* at 230.
167. Briggs, *op. cit.*, at 227; Waldock, *B. Y. I. L.* 1955-56, *op. cit.* at 265-66
168. For examples of the declarations having such provision of termination see Briggs, *Ibid.* at 272; Waldock, *Ibid*, at 266; on this convention the judgment of the I. C. J. in the *Nottebohm* case (1953, at 111) is decisive where the court held that the Optional Clause and the declarations of States there under relate to the seizing of the Court with jurisdiction and not to the adjudication of the suit (at 122) and therefore termination of declaration is ineffective if the other State has already invoked the compulsory jurisdiction of the Court by filing an application; See third Preliminary Objection of India in the Right of passage case, *I. C. J. Reports*, 1957, at 132, 148-149.
169. The prior exhaustion of diplomatic means of settlement is not a condition of the exercise of the Court's jurisdiction under the Optional Clause It appears that there must have been sufficient interchanges between the parties to establish the existence of a dispute, but that is all that the Statute requires. See the *Electricity Company of Sofia and Bulgaria* case, *op. cit.*, at 83; Briggs, *op. cit.* at 274-75.
170. Waldock, *B. Y. I. L.* 1955-56 *op. cit.*, at 267; For the practice of States in this regard see Briggs, *Ibid.* at 267 to 269, 274.

are with an absolute minimum of actual commitment to submit to jurisdiction and therefore are not in conformity with the Statute[171].

The flexibility of this form of declaration and the freedom of manoeuvre is a retrogressive step and is responsible to make the instrument of judicial settlement of disputes an extremely fragile.

The reservation of a right to vary the terms of the declaration by a notice[172] was made by Portugal in 1955, which is analogous to the reservation terminating immediately the declaration on notice and therefore open to all the same objections. Such reservations make the acceptance of compulsory jurisdiction completely illusory.

Thus the very purpose of the compulsory jurisdiction of the Court is defeated by such reservations discussed above. The attitude of the states towards the Optional Clause is degenerating into one of opportunism. The virtual absence of any restrictions on the making of reservations is responsible for the lack of international confidence in the Court as a judicial tribunal and the order and stability of international affairs, while it has opened the gate to a larger adherents. The states have followed the flexible system.

Conclusion

The practice of the Secretary General of the League of Nations and of the United Nations, the practice of international organizations, the practice of depositary states and the practice of states in regard to reservations in the declarations under the optional clause have amply reflected the desirability of permitting the reservations to be made to the multilateral conventions and that the consent of interested states is necessary for the reservations to become effective or valid.

In view of the importance of treaties as especially of those codifying international law, the maximum participation of states alone makes them broad-based and expressive of the consensus of the contemporary international society. If the rigid rule requiring the consent of all the contracting states is applied, it will hit at the very root of maximum participation, and thus it will reduce the area of common action and international cooperation. Thus the very purpose of such treaties will be defeated. Hence some flexibility is required to achieve the maximum participation in the treaty without sacrificing the main object and purpose of the treaty.

171. Briggs, *op. cit*, at 278,
172. Waldock, *B. Y. I. L.* 1955-56. *op. cit.*, at 275. 276.

The practice of the Secretary General of the League of Nations and till the Resolution 598 (VI) of 12.1. 1952 of the General Assembly in regard to Secretary General's depositary practice in regard to multilateral treaties concluded after the date of Resolution, the practice of the United Nations revealed the unanimity rule. The Assembly directed the Secretary General to receive the reservations and communicate them to the states concerned and to communicate the observations received on reservations. The restriction on the power of Secretary General to pronounce upon the legal effect of the reservation, left the states to make their own evaluations of the legal consequences. The reserving states will be counted by the Secretary General among the parties required for the entry into force of treaty. Thus making the Secretary General as post office and leaving the evaluation of the reservation to the state, prevented the operation of unanimity rule. The Resolution approximated the flexible system which after 1951 governed the practice of the Secretary General of the United Nations.

The practice of international organizations discussed above except the Food and Agricultural Organization establishes their decline to accept the unanimity rule. They followed the flexible system. The World Health Organization has followed the compatibility rule laid down by the International Court of Justice in the *Reservation* case.

The examination of the practice of the Depositary states has very clearly established the flexible system. Likewise, the states followed the flexible system, in regard to reservations in the declarations under the optional clause. They have rejected the unanimity rule.

THE DOCTRINE OF HUMANITARIAN INTERVENTION AND THE 'DOMESTIC JURISDICTION CLAUSE' : A RE-EXAMINATION*

R. A. MALVIYA**

I. General:

Minimum human rights is one of the focal points of the present day international society. To focus on man is to focus on the matrix of all the world's problems.[1] Long ago, Kant, argued that it was illusory to expect an international association to enforce peace among nations without a common morality and a consensus on human rights. He stressed on the rights and liberties of the individual as a condition for all the true morality and constitutionalism at home and abroad.[2]

'All men are born free and equal in dignity and rights'. This is an uncompromising principle. It is the pillar which supports the whole modern movement for self-determination and independence. It underlies the universal striving for equality among races, nations and peoples. This principle is incontestable and represents one of the primary values of the world community.[3]

To-day almost all the constitutions of the countries of the world incorporate certain basic rights. But these constitutional provisions do

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1. The problem of war and peace; racial, national, cultural and linguistic diversity; and other problems which involve the destiny of man cannot be understood and solved when torn of their human context.
2. For an analysis of Kant's Essay "Towards Perpetual Peace", see Friedrich, *Inevitable Peace*, 1948.
3. The international Society recognises certain primary values, e. g. Self-Determination, *Minimum Human Rights* (emphasis added), Minimum World Public Order and Modernization: Tom J. Farer in Falk (ed.) Vietnam War and International Law, Vol. II, 1968, p. 1095. But, in order that this world community value may get priority, it is desirable to subordinate the absolute claims of internal sovereignty and political autonomy to the commitment to sustain minimum standards of human dignity. And, therefore, it is desirable to protect men against severe abuses from their own state.

not guarantee their enjoyment. In the last resort individual fundamental rights are subject to the will of the state. They may be taken away by legislation, judicial interpretation or by decisions of an unfree judiciary. In these varieties of circumstances the individual affected is left to his fate, since there is no positive law, higher than that of his state, to which he can appeal. International law cannot come to his aid because of the classical doctrine according to which the individual does not have the status of the 'subject' under that law, with the result that he cannot claim rights thereunder.[4]

How dangerous this phenomena could be was recognised in the years immediately before and after the II World War. The Nazi tyranny demonstrated that, apart from humanitarian considerations, it was in the interest of the world peace generally that states should not have unfettered freedom to deny their citizens the basic human rights and freedoms. The experience of the War, therefore, resulted in the widespread conviction that the effective international protection of human rights was one of the essential conditions of international peace and progress.[5] That widespread conviction was repeatedly given expression in various Declarations of War Aims such as the Atlantic Charter of 1941 and the Declaration of January 1, 1942.[6] Consequently, at the end of the War, there arose a worldwide movement for the international protection of the rights of man (so that they could be effectively secured by a body of law superior to the power of the state) and most of the writers began to dedicate themselves especially to the subject, elaborating doctrines that could make intervention in the name of humanity tolerable.[7]

II. The Doctrine of Humanitarian Intervention Explained:

The doctrine is based on humanitarian considerations and invoives the protection of certain basic rights and fundamental freedoms which

4. Although under modern practice, the number of exceptional instances of individuals or non-state entities enjoying rights or becoming subject to duties directly under international law, has grown and, thus, the classical doctrine has been subjected to strains. Yet, the bulk of international law consists of rules which bind states and it is only in the minority of cases, that lawyers have to concern themselves with individuals and non-state entities as subjects of international Law. Starke, *An Introduction to International Law*, (5th ed.) 1963, pp. 64-65.
5. See generally, M. Moskovitz, *The Politics and Dynamics of Human Rights*, 1968.
6. Vol. 36, *A. J. I. I.* (Supplement), 1942, p. 191.
7. Vol. 35, *A. J. I. I.* (Supplement), 1941, p. 191; Finch, "The International Rights of Man", Vol. 35, *A. J. I. I.*, 1941, pp. 662-665.

may be termed as inlienable natural rights of man.[8] It may be defined as the right of one state to exercise international control over the acts of another when such acts are contrary to the laws of humanity. Thus, where a government imposes extreme conditions of oppression upon its population it is an affront to common international morality. In such particular situations it seems desirable to make intervention, by foreign powers, legally permissible. It also appears evident that international stability, and hence world peace, is threatened by internal oppression in a state, Therefore, should the decision makers in a state abuse members too much "humanitarian intervention" might become legal. The doctrine has been authoritatively summarised as preseribing that—

> Each state has a legal duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end it must treat its population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind—

and is alleged to—

> require of each state a minimum protection of all inhabitants of its territory.[9]

This principle may be explained thus : International law is principally concerned with relation between states. Generally it does not deal with relations bewween state and its people.[10] Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war or religious persecution are acts which have nothing to do directly with international relations.[11] Further, a state by virtue of its personal or territorial supremacy, can treat its own nationals according to its dis-

8. The expression "human" or "fundamental rights" is the modern name for what have been traditionally known as natural rights. Natural rights may be defined as moral rights which every human being, everywhere, at all times, ought to have. The natural rights are something to which every human being, everywhere is entitled by virtue of the simple fact of being human and rational. See generally, Cranston, *Human Rights Today*, 1962; Ezejiofor, *Protection of Human Rights under the Law*, 1964; M. Moskovitz, *The Politics and Dynamics of Human Rights*, 1968.
9. Vol. 38, *A. J. I. L.* (Supplement), 1944, pp. 55, 75. See also *American Bar Association Journal*, Vol. 30, 1944, pp. 35-37 and Oppenheim as cited in McDougal and Bebr, "Human Rights in the United Nations," Vol. 58, *A. J. I. L.*, 1964, p. 609, f. n. 18.
10. So important are the local considerations which shape those relations, so difficult is the appreciation of them by other peoples, that it must be permitted to order them without external interference.
11. Hall, *International Law*, 1924, p. 342.

cretion.[12] Yet this precept of State discretion cannot be absolute. There is a substantial body of opinion and practice in support of the view that there are limits to that discretion and that when a state renders itself guilty of cruelties against and persecution of its nationals in a way as to deny their fundamental human rights and to shock the conscience of man intervention in the name of humanity is permissible.[13] Acts like brutality, tyranny and massacres are inconsistent with the charaeter of a moral being. They constitute a public scandal which the body of States, as representative of it, are competent to suppress. Therefore, intervention for purposes of checking gross tyranny or helping people to free themselves is very commonly regarded without disfavour.[14]

The principle of humanitarian intervention finds its expression mainly in two ways : (i) protection of national citizens abroad : the right of protection over citizens aboad, which a state holds, may cause an intervention to which the other party is legally bound to submit. And, it matters not whether protection of life, security, honour of property is concerned;[15] (ii) protection of nationals against their own state: when a state renders itself guilty of cruelties against, and persecution of, its nationals in a way as to deny their fundamental rights and to shock the conscience of mankind intervention in the name of humanity is justified under international law.[16]

To sum up : A state cannot be free to permit conditions to prevail in its territory which menace international peace and order, and it cannot be free to treat any part of its population in such a way as to produce that menace. Living as a neighbour in a community of States, an indi-

12. The ordinary rules of international law do not impose on states the obligation of preventing barbarity on the part of their neighbours Lawrence, *Principles of International Law*, 1928, p. 127. That a state's treatment of its nationals is, in the absence of treaty protection, a domestic matter which it may decide at its own discretion : Brierly, Law of Nations, 1963, p. 403. At state may go far in regulating as it sees fit the habits of life, education and thought, aswellas conditions of occupation, of its nationals without running counter to the law of nations; Hyde, *International Law*, Vol. 1, 1947, p. 209.
13. Hyde, *International Law*, Vol I, 1947, p. 209.
14. Hall, *Supra* note 11, p. 343.
15. Oppenheim, *Supra* note, 12, pp. 309, 338-368; Bowett, *Self-Defence in Internationl Law*, 1958, p. 87; Moore, *American Diplomacy*, 1905, p. 131; Lauterpacht, *International Law and Human Rights*, 1950; Vol. 63, L. Q. R., 1947, pp. 438-60; Hall, *Supra* note 11, para 87; Westlake, *International Law*, Vol. I, (2nd ed.) 1910-13, pp. 327-337; Moore, *Digest of International Law*, Vol. VI, 1908, paras 979-997.
16. Hyde, *Supra* not 13, pp. 209, 210 f.n. 2; Hall *Supra* note 14, pp. 341-343; Stowell, *Intervention in International Law*, 1921, p. 23; Dunning, *Political Theories from Luther to Montesque*, 1905, p. 55; Winfield, "The Grounds of Intervention in International Law", Vol. 5, *B. Y. I. L.*, 1924, p. 161.

vidual state may be called upon to place its own house in order. Thus, it cannot commit wholesale murder of its people or cannot enslave them. It has to accord them a treatment which conforms to a world standard of humanity. A state which acts in violation of this principle invites foreign intervention by a state acting individually or by a group of states acting collectively.[17]

III. Determination of the Meaning of the Term 'Domestic Jurisdiction' : Arts. 2(4) and 2 (7) of the U. N. Charter :

Since admittedly many writers believe that it is doubtful whether the principle of humanitarian intervention has survived the entry of the U. N. Charter.[18] Obviously, therefore, the question of meaning of Art. 2(7) along with Art. 2(4) of the Charter, is of decisive importance for the international protection of human rights. The sole purpose of humanitarian intervention is to protect individuals or groups of individuals against their own government. The question, therefore, that we have to examine is whether, in the light of para 4 of Art. 2 of the Charter, there exists any right of humanitarian intervention in the traditional sense.[19]

The effect of the U. N. Charter on the above two doctrines (namely, the protection of nationals abroad and the protection of nationals against their own state), has not received considerable atten-

17. This doctrine, therefore, serves the significant purpose and the community need of securing a state's compliance with the minimum standard of humanity and civilization; it serves as an important institution for the protection of basic rights and freedoms of man.
18. Akehurst, "Enforcement Action by Regional Agencies with Special Reference to the Organization of American States", *B. Y. I. L.*, Vol. 2 (1967), pp. 175, 205 n. 4; R. P. Qaudri, "Status of the Doctrine of Humanitarian Intervention in the Light of Present State of International Law" (*Unpublished*), 1971; R. A. Malvity, "Humanitarian Intervention..." (*Unpublished*) LL. M. Dissertation), 1972, pp. 74-111.
19. International Law Association, *Report of the 52nd Conference* (Helsinki, 1966), p. 751, at 759.

The existence and application of this principle of humanitarian intervention is not debatable under traditional international law although its extent may be. But its svrvival and existence under modern international law is questioned, particularly, in view of the two basic principles of the U. N, Charter, namely, Art. 2 (4) and Art. 2 (7). Therefore, it becomes necessasy to re-examine this principle in the light of the modern international law, particularly, the Law of the Charter. And the question to be examined is : Whether there exists in modern times any right of humanitarian intervention in the traditional sense. Its re-examination is also necessary in view of the increasing concern of the international community for the protection of human rights and freedoms and of the shocking efforts that are being made in more than one part of the world to exterminate the whole group of human beings. The most recent example being the happenings in Bangla Desh.

tion in the literature on human rights.[20] The question, whether or not, these doctrines were to survive the Charter, did not receive the attention of the Charter designers. Although the signatories have undertaken the obligation to promote the protection of human rights and fundamental freedoms, yet, they did not divert their attention to the nacked fact of Charter's being devoid of an effective compulsive machinary to secure compliance with the obligations under the Charter.[21]

However, it is frequently asserted that the effect of Art. 2 (7), Charter, is to reduce to a minimum or to render altogether nugatory the protection of human rights in purauance of the Charter. For example, Professor Rappard,[22] Kelsen,[23] Kunz,[24] Robinson[25] hold the above view. According to Brownlie,[26] the two provisions in the Charter make it "very doubtful" whether forcible self-help to protect human rights is still permissible under international law.

Art. 2 (4) states :

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.[27]

The States U. S. Department has just released a 426 page report on the denial of human rights in 105 countries which receive American military or economic aid. Some of the major offending countries listed are : Iran, Philippines, Thailand, Indonesia, Morocco, Israel. *Times of India*, New Delhi, Feb. 2, 1978 Co. 1, p. 4.

20. *Iowa Law Review*, Vol. 53 (1967), p. 325; *McGill Law Journal*, Vol. 15 (1969), p. 205. See also *infra* notes 67 and 74.
21. See generally Huston, "Human Rights Enforcemeat Issues of the U. N. Conference on International Organization", *Iowa Law Review*, Vol. 53 (1967), p. 272.
22. *The Annals of the American Academy of Political and Social Science* (Jan. 1946), p. 119.
23. *Yale Law Journal*, Vol. 55 (1946), pp. 997-1007.
24. Kunz, *A. J. I. L.*, Vol. 43 (1949), p. 316, 317.
25. Lauterpacht, *International Law and Recognition of Human Rights*, (1950), p. 173.
26. Brownlie, *International Law and Use of Force by States* (1963), p. 433.
27. Of course, this Art. 2 (4) is subject to the self-defence provision contained in Art. 51 of the Charter.

Art. 2 (7) incorporates the traditional international law principle of non-intervention The principle of non-intervention was ratified by a resolution of the General Assembly, Reso. 2131 (XX).

Also, the principle enshrined in Art. 2 (4) has long been discussed at the Special Committee on Principles of International Law Concerning Freindly Relations and Cooperation Among States. Report of the Special Committee on Principles of International Law Concerning Friendly Relations of Cooperation Among States, *U. N. Doc. A/16799, 26th Sept., 1967.*

Art. 2 (7) states :

> Nothing contained in the present Charter shall authorise the U. N. to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Art. 2 (4) :

The U. N. Charter in Art. 2 (4) prohibits "the threat or use of force" by states in their international relations and the organization is pledged to "the suppression of acts of aggression", in furtherance of its main aim "to maintain international peace and security" (Art. 1 (1)). "Use of force" and "acts of aggression" cover more than overt attacks by the organized forces of a state, for otherwise recourse to the covert use of force by irregular troops would be permitted. These phrases must be interpreted to include such activities as the support for insurgents in the territory of another state, to arming and training of rebel bands and the granting of permission by a state to such bands to use its territory as a base for military sorties into other states. These activities are classified as "support for armed bands" and fall clearly within the prohibition of aggression and the use of force.[28] This interpretation was accepted in the days of the League[29] and has frequently been followed by the U. N.[30] The most recent condemnation of support for armed bands in U. N. practice is to be found in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 1965, in which it is proclaimed that—

> No state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state (para 2).

On the other hand, the General Assembly affirmed the principles of international law recognized by Nuremberg Tribunal's Charter and affirmed that Genocide is a crime under international law, and hence punishable. Kunz, *U. N. Convention of Genocide*, (1949).

28. Brownlie, "International Law and the Activities of Armed Bands, "*Int. and Comp. Law Quartarly*, Vol. 7 (1958), p. 712; Higgins, *The Development of International Law Through the Political Organs of U. N.* (1963), p. 177.
29. *G. A. O. R.*, 7th Session, Annexes, Vol. 2, Agenda Item 54, p. 35 (1933).
30. *G. A. O. R.*, 6th Session, Suppl. 9 (A/1858), para 47; *G. A. O. R.*, 9th Session Suppl. 9, (A/2693), para 54

Art. 2 (7) :

The term "domestic jurisdiction" is used in the U. N. Charter (Art. 2 (7)) as it was in the League of Nations Covenant,[31] to draw the line between the spheres of action of the international organization and of the member states. It is therefore important to determine what the term means and who is competent to apply it in particular situations. Upon the answer of these questions depends on the one hand the competence of the organs of the U. N. to give practical effects to its purposes and on the other the freedom of the governments of member states to pursue national interests as they see them. In other words, it is upon the interpretation of the key terms namely, "intervene" and "matters which are essentially within the domestic jurisdiction of any state" that the answer to the question of the limits of an action undertaken by U. N. organs to encourage and promote the observance of human rights depends.

Domestic Jurisdiction and Intervention :

According to international law, intervention' means dictatorial interference by a state in the internal affairs of another state or in the relations between other states.[32] Tenders of good offices, representations seeking information or cooperation, and protests against brcaches of international law do not constitute intervention. Intervention may, however, be diplomatic as well as military. A diplomatic communication of peremptory or threatening tone, implying possible use of military or other coercive measures, may constitute intervention. The U. N. as such is authorised to intervene in this sense only if the Security Council decides upon enforcement measures under Chapter VII of the Charter, but such intervention even though affecting the domestic jurisdiction of the State against which the measures are taken, is expressly permitted by the last clause of Art. 2 (7).

The Charter permits the Security Council to "call upon" members or to "utilise" regional agencies to preserve international peace and security (Arts. 33, 40, 53); permits the General Assembly and the Security Council to "recommend" actions by members to carry out the purposes and principles of the Charter (Arts. 10, 11, 14, 36, 37, 38, 39);

31. The League of Nations Covenant provided "if the dispute between the parties is claimed by one of them and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."
32. Oppenheim, *International Law*, Vol. I, 7th Ed., S. 134; Hyde, *International Law*, 1945, p 245; G. C. Wilson, *Handbook of International Law*, 1939 (3rd Ed.), p. 58.

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and permits the ECOSOC and the Trusteeship Council (within the scope of their functions) to make "recommendations" to members (Art. 62, 85, 87). Such resolutions would not usually constitute intervention by the U. N. itself. To place a matter on the agenda, to discuss it, to study it, or to pass a general resolution on principles would clearly be not to intervene.[33] The U. N. organs have thus felt free and competent to discuss a situation arising from any alleged non-observance by states of their obligation to respect human rights and freedoms. The same is true about initiation of a study, a recommendation. A recommendation may be of a general nature or of a specific nature. In the former case it is addressed to the members at large, while in the latter case it is addressed to the state directly concerned.[34] Nor would an inquiry amount to intervention so long as it does not take place in territory of the state concerned against its will. None of these steps amounts to intervention as none of them constitutes dictatorial interference. None of them subjects the unwilling state to coercive action or to a threat thereof. They may influence or mould the attitudc of the unwilling state, but this is a matter quite different from compulsion.

We switch now to the 2nd key term ; "matters essentially within the domestic jurisdication of any state."

Domestic Jurisdiction and International Law :

Admittedly, the limitation expressed in Art. 2 (7) is, because of its generality, one of the governing rules of the Charter. But that governing effect does not reach beyond its ascertainable terms. The natural meaning of Art. 2 (7) and other provisions of the Charter these two together determine the operation of Art. 2 (7).

National Decrees case[35] remains the guiding light for the interpretation of Art. 2 (7). The words "by international Law" and "solely" are absent in the Charter in Art. 2 (7) but they were used in the Covenant. The word "solely" has been substituted by the word "esentially". The Court said in this case that the decision about the character of a matter can only be taken after considering the development of international relations pertaining thereto. In other words, the absence of phrase "by international law" would not bring any change in the mode by which the contents of 'domain reserve' would be determined because the court has to base its judgment on the presence or absence of substantive rules of international law. As the rules of international law are always in flux, affecting the contents of 'domain reserve', an argument which questions the above interpretation by giving technical meaning to the word "essentially" would not be in conformity with the current practice of international law.

33. Q. Wright, "Is Discussion Intervention ?" Vol. 50, *A.J.I L.*, 1956, p 102.

34. It is suggested by Goodrich and Hambro, in relation to Art. 2 (7) that "while discussion does not amount to intervention, the creation of a Commission of Inquiry, the making of a recommendation of a procedural or substantive nature or the making of a binding decision constitutes intervention under the terms of this paragraph." *Charter of U. N.* (2nd ed., 1949), p. 120

35. *P. C. I. J., Series* B, No. 4 (1923), pp. 24-25.
Since the presence or absence of an international obligation is critical question in determining whether a matter is domestic, the issue is necessarily one of international law. The P. C. I. J. interpreted Art. 15 (8) of the League of Nations Covenant in the *Tunnis Morocco Nationality Decrees Case* in this sense : The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question, it depends upon the development of international relations.... It may well happen that in a matter which...is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by the obligations which it may have undertaken towards other states *Ibid*, p. 18.
To the contention that the U. N. General Assembly and the Court could not consider the procedure for determining treaty obligations of Bulgaria, Hungary and Rumania Concerning human rights because the matter was essentially within the domestic jurisdiction of these states the Court said, "the interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a state. It is a question of international law which, by its very nature, lies within the competence of the Court." *Bulgaria, Hungary and Rumania Peace Treaties Case*, I. C. J. Reports, 1950, p. 71, Vol. 44, *A. J. I. L.*, 1950, p. 745.
The conclusion that Art 2 (7) can only be interpreted by determining whether or not in dealing with a dispute or a situation a state is under obligations of international law is re-inforced by considering the relation of this clause to paragraphs I and 2 of Art. 2 of the Charter. The international law concept of sovereignty and equality, which these provisions assert, implies that a sovereign state is free to act at discretion except in so far as it is bound by international obligations. And, Art 2(7) States the same thing in different terms. The U. N. is bound not to intervene in the domestic jurisdiction of states but resolutions to assure the fulfilment of their obligations by the members is within the competence of U. N. organs and is not a matter of domestic jurisdiction. H. Lauterpacht, *International Law and Human Rights*, 1950, p. 177.

Therefore, in conformity with the pronouncement of P. C. I. J. in he above case, we submit that the term "international law" has to be interpreted by reference to the developing content of customary and conventional international law, and not by reference to any rigid conception obtaining at the time of the adoption of the Charter.

According to international law, as it stands at present, a matter may be within the exclusive domestic jurisdiction of a state. But, at the

same time, because of its international implications and the growing interdependence of states, it may be essentially an international matter. In particular, it is not essentially a matter of domestic jurisdiction if it has become the subject of international obligations undertaken by a state. It is submitted that the respect for, and observance of, human rights have become a subject of international obligations in the legal sense of the term. It is further submitted that a dispute or situation ceases to be essentially within the domestic jurisdiction of a state, if its nature or repercussions are such as to constitute a direct or potential threat to international peace and security. This applies to recommendations of the General Assembly under Art. 14 as well as to the jurisdiction of the Security Council under Chapters VI and VII.

In excluding matters which are essentially within the domestic jurisdiction of states they (the authors of the U. N. Charter) did not include within that exception matters which are the subject of international obligation; that the international obligations include the observance of, and respect for, human rights and freedoms – one of the fundamental principles of the Charter. The U. N. practice is a definite pointer in that direction. The provisions of the Charter in the matter of human rights would be rendered meaningless if Art. 2 (7) were interpreted as excluding, for instance, the right of recommendation and investigation. What in that case would be the meaning of Art. 62 (2), which lays down that the Economic and Social Council "may make recommenda:ions for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all? Art. 2 (7) retains a sense and purpose even if we consider it as not excluding recommendations; Art. 62 (2) retains no sense and purpose if, by reference to Art. 2 (7), we exclude the right of recommendation. However, we must put a caution here: Although the question of human rights has become an international matter by virtue of the Charter and is as such outside the prohibition of intervention, must nevertheless be deemed to admit only of such measures of protection and implementation as fall short of coercive intervention (except in extreme cases involving the peace of the world).

Violation of human rights and freedoms might lead to international friction or endanger the maintenance of international peace and security or constitute a threat to the peace. Situations or disputes of this nature may arise in relation to states which by reason of flagrant and systematic denial of human rights become a source of international friction and of an actual or potential danger to peace; or they may originate in isolated outrages of such magnitude or cruelty as to shock

the conscience of civilized mankind and impose an intolerable strain upon peaceful relations. Such perversions of the power of the state as those evidenced in the racial, religious and political persecutions in Germany before the 2nd World War would be a proper subject of action by the Security Council, under both Chapters VI and VII, inasmuch as they caused international friction through forced emigration and inasmuch as they were a link of the design against the peace of the world.[36]

There was no dissent from the statement of the rapporteur of the relevant Committee that if human rights were greviously outraged so as to create conditions, which threaten peace, then they cease to be sole concern of each state.[37].

Once a matter is recognized as one of legitimate international concern, no exception to the general rule is needed to bring it within the powers of the Organization. The general rule itself ceases to apply as soon as a matter ceases to be one of domestic jurisdiction.[38] The prohibition of intervention applies to matters which are essentially within the domestic jurisdiction of any state. If they are not essentially of that character and if they do bear upon international security, then U. N. is not only entitled, but bound too, to act in appropriate cases.[39]

When we look at the international affairs of a country we start with the postulate that it is no business of any other nation to concern itself how the people of that country govern themselves. That is, prima facie, primarily a matter of domestic concern, but if the facts indicate that that regime by its nature, by its conduct, by its operations, is likely to interfere in international peace and likely to be a menace to its neighbours, then the existence of that regime is no longer a matter of essentially domestic concern.[40]

IV. Humanitarian Intervention Short of Force :

(i) South Africa : The Aparthied Policy :

From the above account it follows that Art. 2 (7) is no bar to an action by U. N. in appropriate cases. Thus, the problem of international protection of human rights and the possible relation of Art. 2 (7) was

36. For a similar attitude see *House of Commons*, Debates, Vol. 413, pp. 663-671; *Documents of San Francisco Conference*, Vol. IV, Doc. 2-G7 (O) and Doc. 976-1/1/40, p. 5; *Journal of the ECOSOC*, First Year, No. 14, p. 162.
37. Doc. 723, 1/1/A/19, p. 10.
38. *Journal of the Security Council*, First Year, No. 37, June 12, 1946, p. 728.
39. *Journal of the Security Council*, First Year, No. 39, June 22, 1946, p. 767.
40. *Supra* note 22.

not an obstacle for the consideration by the General Assembly of the policy of racial segregation (aparthied). The South African government has subjected the Indian settlers there to various discriminatory measures. Racial inequality and colour bar are against the canons of modern civilization. Such racial discrimination violates the basic human rights and fundamental freedoms of citizens of a state.

The General Assembly on Dec. 5, 1952, approved the appointment of the Three-Nation Commission of Good-Offices to arrange negotiation between South Africa, India and Pakistan. Its report was presented to the Special Committes of the U. N. in 1953, recommending that South Africa should reconsider the components of its policy towards various ethnic groups.

South Africa relied on Art. 2 (7) and therefore denied the competence of the General Assembly to deal with the issue. It was also argued that, as the Charter does not define human rights, no one could be sure what rights are included in that instrument. Instead, South Africa wished that the question of the competence of the General Assembly be referred to I. C. J. for its advisory opinion. South Africa was supported by U. S. A., U. K., Sweden and others.[41] The South African representative most emphatically asserted that the Organisation lacked competence even to discuss the matter in view of Art. 2 (7) of the Charter. He recalled that the Para 7 begins with the words—

> "Nothing contained in the present Charter.....", and then continued :
>
> The word 'nothing' is clear and unequivocal. It means simply that nothing in the Charter, no provision therein, be it interpreted as it may, shall authorise U. N. Intervention in the domestic affairs of a member state.[42]

He further argued that the right of discussion under Art. 10 cannot be invoked if such discussion amounts to interference in the domestic affairs of a state. To the allegation that the situation in South Africa constituted a threat to international peace, he answered that allegation was a reprehensible attempt to persuade the U. N. to intervene in the domestic affairs.[43]

India did not accept the above view since, according to it, the General Assembly was competent to deal with the matter and there was no necessity to go to the Court. Mrs. Pandit, the Indian representative,

41. *Journal of the U. N.*, No. 54, Suppl., A-A/P.V/50, pp. 350-353.
42. *G. A. O. R.*, 7th Session, (1952-53), Plennary Meetings, p. 51.
43. *G. A. O. R.*, 7th Session (1952), Ad hoc Political Committee, p. 66.

argued that the policy which implied the subjection of about 80% of the country's population to a perpetual state of inferiority vis-a-vis the Whites did create dangerous tension in South Africa, with serious consequences for harmony and peace in the world. That policy, moreover, was calculated to force the non-whites into perpetual economic and social servitude through segregation and discrimination.[44]

She argued that one of the purposes of the U. N. was to promote respect for human rights and fundamental freedoms for all. She recalled the provisions contained in Arts. 10, 13, 14, 55, 56 and 2 (2) of the Charter. In view of all these provisions, she submitted, that it was clear that the General Assembly was competent to deal with the question of aparthied. Mrs. Pandit further remarked :

> It is too late now to argue that fundamental violations of the principles of the Charter are matters of domestic jurisdiction of member states. If this was the case, the Charter would be a dead letter, and our professions about a free world, free from inequalities of race, free from want and free from fear, are empty mockery.[45]

India's stand was supported by an overwhelming majority of nations. For example, the Chinese representative put it thus :

> There can be no doubt that member states incurred, by signing the Charter and ratifying it, a definite obligation under the Charter, so we need not refer to the Court to say whether a member state has or has not obligatiion under the Charter.[46]

The Panamian delegate meant the same when he said :

> Now, is para. 7 a real barrier ? Are human rights essentially within the domestic jurisdiction of the state ? My answer is no and a hundred times no. I submit that by the San—Francisco Charter, human rights have been taken out of the province of domestic jurisdiction, and have been placed within the realm of international law. I submit that the U. N. have undertaken collectively to proclaim, to promote and protect human rights and by so doing, the members of the community of states have given birth to a new principle of the law of nations.

44. See also reviewed the main legislative measures adopted by South Africa to implement the aparthied policy. See generally, *G. A. O. R.*, 7th Session (1952), Ad hoc Political Committee, p. 67.
45. *Supra* note 44, p. 356; And most of them were of the opinion that the Charter imposed a definite obligation on the members to preserve human rights and that matters involving them can not therefore be within domestic jurisdiction of State members.
46. *Ibid*, p. 363.

He, therefore, did not support reference to the Court on the question of General Assembly's competence. He continued :

> We cannot destroy faith in the Charter and wrest authority and prestige from our own Organization. We cannot nail down human rights to the pillory of evasion, inconsistency and ineffectiveness.[47]

A few representatives, including those of U. S. A. Canada and Scandinavian Countries, took a middle view. They felt that U. N. was competent to discuss the matter but at the same time they doubted the political value of any action other than an appeal to all members to bring their policies in conformity with the Charter obligation of promoting the observance of human rights.

A number of other representatives, on the other hand, tried to have the question of competence referred to the World Court for an authoritative opinion. But the attempt failed.

At the end of the debate South Africa's request[48] was rejected and a Franco-Mexican draft was adopted[49] by the General Assembly. This resolution (i) confirms what we have suggested above about the effect of human rights provisions of the Charter; (ii) emphasizes the majority view expressed by the delegates during the debate which is this : that questions involving human rights are not matters essentially within the domestic jurisdiction of a state and that General Assembly or any other competent organ is entitled to take action, including discussion and recommendations, with respect to such matters; and (iii) affirms that member states have accepted obligation to protect fundamental human rights and freedoms.[50]

India again reported the matter since the South African government had not changed its attitude. The General Assembly adopted another resolution[51] which once again supports our view.

In 1953, the General Assembly established that the continuance of the policies of aparthied would make peaceful solution increasingly difficult and endanger friendly relations among states,[52] and latter

47. *Supra* note 46, p. 370.
48. *Supra* note 47, p. 404.
49. *Ibid*, p. 405
50. Though this view has been disputed but it is difficult to understand what else can be implied by the words "the treatment should be in conformity with international obligations under...the relevant provisions of the charter". Kelson, *The Law of the U. N.* (1951), p. 31.
51. *U. N. Yearbook* (1947-48), p. 59.
52. *Gen. Ass. Reso.* 721 (VIII) of Doc. 8, 1953.

shared the profound conviction that these policies constituted a grave threat to the peaceful relations between ethnic groups in the world.[53]

The Security Council dealt with the question in 1960[54] and in 1962 the General Assembly requested the Security Council to take appropriate measures, including sanctions, to secure South Africa's compliance with the resolutions of the General Assembly and of the Security Council.[55] Afterwards, the report of the Expert Committee of the Security Council considered that "decisive mandatory measure under the provisions of Chapter VII of the Charter should be taken without delay," and reaffirmed its conviction that economic sanctions, were the "only effective peaceful means available to the international community" to resolve the situation in South Africa.[56]

The international conference on human rights of Teheran declared "its emphatic recognition and vigorous support of the legitimacy of the struggles of the people and partiotic liberation movements in Southern Africa towards the achievement of their inalienable rights to equality, freedom and independence in accordance with the Charter of U. N.," and "appeals to all states and organizations to give appropriate moral, political and material assistance to the non-white people of South Africa in their legitimate struggle to achieve the rights recognized in the Charter."[57]

In its latest resolution[58] the Security Council reaffirmed its previous resolutions on South Africa in regard to the policies of aparthied and racial segregation. The Council reiterated its total opposition and condemnation of the policies of aparthied and called upon the states to observe strictly the arms embargo against South Africa and to assist effectively in the implementation of this resolution.

The Third non-Aligned Summit Conference[59] which met in Lusaka (Zambia) in Sept., 1970, also noted with profound concern the South Africa's arrogant attitude to continue to pursue the policy of racial discrimination and aparthied in flagrant violation of the various resolutions of the U. N. on human rights and fundamental freedom. The

53. *Gen. Ass. Reso.* 820 (IX) of Doc. 14, 1954.
54. *Security Council Reso.* 134 of April 7, 1960.
55. *Gen. Ass. Reso.* 1961 (XVIII), Nov. 6, 1962.
56. *Report of the Special Committee to the Security Council*, U. N. Doc. A/5932.
57. *Declaration of Tehran and Reso. II approved by the International Conference on Human Rights*, May, 1968.
58. *Security Council Reso.* 282, 1549th Meeting, 23rd July, 1970.
59. *Indian J. I. L.*, Vol. 10 (1970), p. 561.

conference condemned such an attitude. It recommended to all non-aligned countries to refrain from entering into diplomatic, economic or relations of any other nature with South Africa. It further recommended to all such non-aligned countries as may be maintaining such relations with South Africa to break them forthwith.

(ii) *Rhodesia: The U. D. I.* :

Let us take another case. On Nov. 11, 1975, the White regime of Prime Minister Ian Smith unilaterally declared Southern Rhodesia independent. On the same day the General Assembly condemned "the Unilateral Declaration of Independence (U. D. I.) made by Racialist Minority in Southern Rhodesia" and called the situation to the Security Council's attention.[60]

Also, by several resolutions of the General Assembly and of the Security Council, the U. K. as the administrator of Rhodesia, was invited to intervene in the region, being allowed even the use of force if necessary. Later on the General Assembly condemned the inaction on U. K.'s part.[61]

The Smith regime, representative of at most 6% of the population, continues to rule and pursue its questioned policies within Rhodesia. Internal public order has taken an increasingly authoritarian and racist character.[62] The negotiations with regard to the transfer of power to the Black Majority are still going on, however.

The activities of the Whith Rhodesian minority are, they argued, essentially within their domestic jurisdiction and hence insulated from the appraisal and supervision of authoritative international processes.[63] But this argument is no longer acceptable.[64] Because once certain activities constitute a threat to international peace and security, they cease to be, if even they were, matters essentially within demestic jurisdiction. "A matter is no longer essentially within the domestic

60. Reso. 2.24 (XX) No. 11, 1965; *A. J. I. L*, Vol. 60 (1966), p. 921.
61. *Gen. Ass. Reso.* 2022 (XX), 2151 (XXI), 2262 (XXII).
62. For detailed surveys see Leys, "The Growth of Police Powers and the 1959 Emergencies", in Leys and Pratt, *A New Deal in Central Africa* (1960), p. 131.
63. Kilpatrik, "Rhodesia and the U. N. Charter," *The Plain Dealer*, Jan. 5, 1967; Editorial in the *Washingion Post* Dec. 9, 1966, p. 420, Col. 2; Letter to the *Washington Post*, entitled "Acheson on Rhodesia", Dec. 11, 1966, p. 64, Cols. 5-5.
64. This contention is fatually incorrect. In the contemporary intensely interdependent world people interact not only through the modalities of collaborative or competitive operations but also through shared subjectivities—not only through the physical movement of goods and services or exercises

jurisdiction of a state if it has become a matter of international concern to the extent of becoming an actual or potential danger to the peace of the world."[65] Further, even if such activities should be thought to remain within the compass of domestic jurisdiction, the very words of the Charter Clause, Art. 2 (7), which created the vague and elusive limitation upon the Organization's competence, explicitly provide in a well known exception that this principle (that of domestic jurisdiction) shall not prejudice the application of enforcement measures, unde- Chapter VII. The basic constitutional frame-work of an Organization whose basic purpose is to maintain international peace and security could scarcely prescribe otherwise. If states were to be permitted to impede the organized community's cfforts to rectify situations by claims that activities, however threatening, are immune from concern because they are within the domestic jurisdiction, the principal purpose for which the whole constitutive structure is established and maintained could be easily defeated.

The invocation of the principle of domestic jurisdiction in the Rhodesian context, is further, ultimately founded on a serious misunderstanding of the contemporary relation between human rights and matters of "international concern." The point is that, even in the absence of a finding of a threat to the peace, The U. N. could have acquired a considerable competence with respect to Rhodesia because of the systematic suppression of human rights practiced there,[66] the concept of domestic jurisdiction in international law has never been impermeable.[67] Actions occurring within the territorial boundary of one state with tangible

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67. Tunnis-Morocco Nationality Decrees Case, *P. C. I. J. Series B.*, No. 4(1923).

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deprivatory effects upon others have always been subject to claim and decision on the international plane. Where transnational effects have been precipitated, the principle of domestic jurisdiction hard'y operates. Hence, domestic jurisdiction means little more than a general community concession of primary, but not exclusive, competence over matters arising and intimately concerned with aspects of the internal public order of states. Where such acts precipitate deprivations beyond its territory, jurisdiction is internationalized.

The important provision in Art. 2 (7) that "this principle shall not prejudice the application of enforcement measures under Chapte VII" is only the most urgent example of the permeability of domestic jurisdiction to international supervision. Any matter originating in one state with deprivatory effects going beyond its borders may become a matter of international concern.[68] Thus, even if there were no finding of a threat to the peace of major international proportions, the claim of domestic jurisdiction could not be invoked to insulate the systematic deprivation of human rights in Rhodesia from international scrutiny and rebuke.[69]

The Security Council in its resolution of 1970 reaffirmed its condemnation of the illegal declaration of independence in Southern Rhodesia.[70]

68. McDougal and Reisman, "Rhodesia and the U. N. : The Lawfulness of International Concern," *A. J. I. L.*, Vol. 62 (1968), p. 115.
69. Recent decades have witnessed tremendous changes in the perception by peoples of their interdependences with respect to human rights and in their efforts to clarify the established appropriate prescriptions and structures to take these interdependences into account. Under Arts. 55 and 56, it is made basic constitutive prescription that the minimum conditions of a dignified human existence are to be realized and maintained by Member States by "joint and separate action in cooperation with the Organization." For further discussion see McDougal and Leighton, "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action," *Yale Law Journal*, Vol. 59 (1949), pp. 80, 80-81; Brierly, "Matters of Domestic Jurisdiction," *B. Y. I. L*, Vol. 6 (1925), p. 8; Bentwich, "The Limits of the Domestic Jurisdiction of States," *Grotius Society Transaction*, Vol. 31 (1946), p. 59.
The Universal Declaration of Human Rights (1948) has recommended to all peoples the enhanced protection of fundamental rights of a free society. Many different conventions for the protection of many different particular rights have been drafted under the auspices of U N. The movement towards a system of enforcement by individual petition, though as yet in primitive form, is only further corroboration of important progress in internationalizing concern for human rights.
70. Also, called upon the U. K. as the administering power to take effective and urgent measures to bring to an end the illegal rebellion in Southern Rhodesia and enable the people to exercise their right of self-determination in accordance with the U. N. Charter and the *Gen. Ass. Reso.* 1514 (XV). It urged all the states to fully implement the Security Council's resolutions in accordance with their obligations under Art. 25 of the U. N. Charter. It further decided that the present enforcement measures against Southern Rhodesia will continue. See *Security Council Reso.*, 288, 1557th Meeting, 17th Nov., 1970.

(iii) U. S. S. R. : The Measures Taken with Respect to Married Women :

The question of the violation by U. S. S. R. of fundamental human rights is another case brought to the notice of U. N. In 1947, the Soviet government made it unlawful for any Soviet women married to a British subject to leave the country. Later on this measure was extended to all Soviet women married to foreigners. It thus affected the nationals of many countries. Protests were made by many governments. But these were of no avail. In 1948, the Economic and Social Council adopted a resolution deploring the measures taken by U. S. S. R.[71] The Chilean delegate brought the case before the General Assembly.[72] The Chilean delegate maintained that anything relating to human rights could not be legally treated as a matter of domestic jurisdiction of the signatories of the Charter.[73]

The Chilean argument found overwhelming support. For example, Uruguayan delegate stated that the Charter—

> imposed on member states the obligation to respect the fundamental rights of human persons, an obligation which was not merely within the national competence of each state.[74]

The Soviet Union opposed the above view since it was contrary to the notion of non-interference in the domestic affairs of a state. It, therefore, argued that U. N. had no competence to deal with the complaint.

But the Soviet stand was not accepted and the General Assembly eventually adopted the Chilean draft[75] resolution. It recalled the Preamble, Art. 1(5) and Art. 55 of the Charter; the relevant provisions of the Universal Declaration of Human Rights; and, finally, the resolution of the Economic and Social Council.[76] The General Assembly re-

71. *Reso.* 154 (III) D.
72. *G. A. O. R.*, 3rd Session, Part I, 1948: 6th Committee, p. 921.
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commended that Russia should withdraw the measures adopted by her in the matter since such action was inconsistent with the Charter.[77]

(*iv*) *Situation in Northern Ireland :*

Before the adoption of the agenda a discussion took place in the Security Council during which it was maintained that no provision of the Charter could be regarded as prevailing over Art. 2 para 7. It was maintained, on the other hand, that since the situation brought to the attention of the Security Council (1969) could lead to international friction, it was appropriate for the Council to consider under Art. 35 of the Charter.[78]

The U. K. representative, objecting to the adoption of the agenda, quoted Art. 2 (7) prohibiting U. N. intervention in matters which are essentially within the domestic jurisdiction of any state. He stated that the principle of domestic jurisdiction set out in Art. 2 (7) was fundamental. If this principle was breached or eroded, the consequences would be most serious for the U. N. He noted that the Northern Ireland had been an integral part of the U. K. and accordingly events taking place in that area were an internal matter for the U. K. Government. He added,

77. Reso. 283 (iii); Doc. A/P V. 197.
It is relevant here to state in brief the Soviet concept of domestic jurisdiction. From the very beginning of the U. N. and until very recently, the Soviet Union opposed any suggestion which as much as questioned the absolute authority of the states to order its relations with its own citizens without the intervention of the international community. The Soviet Union has been consistent in its emphasis on national sovereignty and opposition to compulsory international jurisdiction. Its concept of domestic jurisdiction has been almost unlimited and it has vigorously opposed any effort to define in advance the precise bounds of this 'reserve domain', arguing that the notion of domestic jurisdiction was embeded in positive international law, that it went hand in hand with the idea of state sovereignty and the need for invoking its protection could not be predetermined but depended upon the nature of concrete disputes. Thus Soviet representatives at the U. N. have been intolerant of proposals which envisage even the bare international supervision over international treaties on human rights, let alone of suggestions that would give individuals international procedural rights to assert their liberties before international bodies. For details see Rajan, *U. N. and Domestic Jurisdiction* (1959); A. Dallin, *The Soviet Union at the U. N. : An Inquiry into Soviet Motives and Objectives* (1962), p. 205; Zile, "A Soviet Contribution to International Adjudication : Professor Krylov's Jurisprudential Legacy", *A. J. I. L.*, Vol. 58 (1964), pp. 359-388.

78. *Repertoire of the Practice of the Security Council* (Supplement 1969-1971), 1976, p. 224; *Ibid.*, pp. 16, 139.

In any event, Art. 2 (7) is clearly overriding. Neither Art. 35 nor any other article can possibly be regarded as prevailing over the specific provisions of Art. 2 (7).[79]

The Minister of External Affairs of Ireland stated that the persistent denial by the U. K. Government of the civil rights to a large part of the population of Northern Ireland which had culminated in the present crisis, would be sufficient to justify the consideration of the matter by the Council.[80] The U. K. could not maintain that such a course would be in conflict with the Charter since the Foreign Minister of the U. K. addressing the General Assembly stated that—

> Art. 56 of the Charter makes it clear that no country can say that the human rights of its citizens are an essentially domestic matter. A country that denies its citizens the basic human rights is by virtue of Art. 56 in breach of an international obligation.[81].

The representative of the U. S. S. R., supporting the request by Ireland convening the Council, stated that the civil rights of the overwhelming mass of the population had been curtailed.[82]

However, the Council adjourned without taking a vote on the adoption of the agenda.[83] But this case indicates the trend that human rights situations are not excluded by Art. 2 para 7.

(*v*) *Situation in East Pakistan :*

The Pakistani alternative member of the U. N. Sub-Commission on Human Rights objected to Non-Governmental Organizations' representatives being given hearing on the subject of human rights violations in East Pakistan (now Bangla Desh) and argued that what happened in East Pakistan was Pakistan's internal matter. The Sub-Commission, however, heard Non-Governmental Organisations (NGOs) on the subject. This example too establishes that Art. 2 para 7 is no obstacle to inviting statements where the question of violation of human rights is involved.

(*vi*) *Question of Human Rights in the Occupied Territories : Study of Violations* :

On Dec 19, 1968, the General Assembly established a Special Committee to investigate Israel's practices affecting human rights of

79. *Repertoire of the Practice of the Security Council*, (Supplement 1969-1971), 1976, p. 225.
80. *Ibid.*,
81. *G. A. O. R.* 23rd Session, Plennary Mtg., 93rd Mtg., para 109; *Ibid.*, p. 225.
82. *Ibid.*
83. *Ibid.*, p. 182, f. n. 84.

the population of the occupied territories. The Special Committee proposed that the General Assembly should recommend to states whose territory was held by Israel that they appoint either a neutral state or an international organisation offering all guarantees to safeguard human rights of the population of the occupied territories. The General Assembly by a resolution asked Israel to implement the recommendation and also to comply with the Geneva Conventions, 1949.[84]

In 1969, the U. N. Commission on Human Rights appointed Special Working Group of Experts to investigate allegations concerning Israel's violation of the 1949 Geneva Convention relating to the protection of persons in times of war in territories militarily occupied by Israel[85] and on the report of the Working Group, the Commission condemned Israel for violation of human rights in occupied territories.

During the year 1974, the question of violation of human rights in the territories occupied as a result of hostilities in the Middle East was considered again in the Commission on Human Rights and in the General Assembly. The Commission on Human Rights considered the report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories.[86] The Commission adpopted a resolution expressing its alarm at the continuation by Israel of violations of human rights and fundamental freedoms in the occupied Arab territories, in particular, ill-treatment of prisoners, ex-propriation of Arab properties, interference in family life and religious freedom and practices. The Report of the Special Committee in 1974 concluded that Israel continued to act towards the population of the occupied territories in flagrant violation of the basic rights and in definance of relevant international conventions. The report of the Special Committee was considered by the General Assembly in 1974. Concern was expressed by the General Assembly at the continued and persistent disregard by Israel of the relevant Geneva Conventions and other international instruments. The Assembly declared that the Israeli policies were not only a direct contravention of international law but also an impediment to a just and lasting peace in the Middle East. It also re-affirmed that all Israeli measures in the occupied Arab territories were null and void.[87]

The above case shows that the establishment of the special committee by the General Assembly and the appointment of the Special Working Group of Experts by the U. N. Human Rights Commission to investigate certain facts about human rights do not constitute intervention. It also illustrates the willingness of the U. N. to encroach upon the traditional concept of domestic jurisdiction in discharge of its responsibilities under Charter despite the limitation of Art. 2 para 7.

84. *G. A. Reso.* 2727.
85. *U. N. Year Book*, 1970, pp. 522.
86. *U. N. Year Book*, 1973, pp. 538-39.
87. *U. N. Year Book*, Vol. 28, 1974, p. 630-33.

(vii) Sovient Union's Treatment of Dissidents :

The alleged violation of human rights by socialist countries, particularly Soviet Union's treatment of dissidents was raised by the U. S. A. before the Human Rights Commission of the U. N. This was resented by the U. S. S. R. which codemned it as interference in the internal matters of the Soviet Union. The Soviet President, Mr. Brezhnev, remarked that constructive development was impossible without observance of the principle of non-interference in internal affairs.[88] On the other hand, the U. S. President, Mr. Carter, told the U. N. that under each nation's pledge to the U. N. Charter no member can claim that mistreatment of citizens is solely its own business.[89] However, to cool-down the explosive human rights issue which had threatened to generate East-West tension, the U. S. A. withdrew the proposals concerning the Soviet dissidents at the annual session of the Human Rights Commission in Geneva.[90] As a matter of fact, the withdrawl of the proposal was because of the attitudes of many delegates who were reluctant to vote on a proposal which would damage the Commission.

Some Other Examples :

We may name certain other cases which go to illustrate the essential ineffectiveness of the 'domestic jurisdiction clause' :

(i) The issue of Spain (reference by Poland to Security Council in 1946);[91]

(ii) Outbreak of hostilities between Holland and Indonesian Forces (issue was brought before the Security Council in July, 1947);[92]

(iii) Dutch troops offensive action against the forces of the Indonesian Republic on 1948;[93]

88. *The Statesman*, March 30, 1977.
89. *Ibid.*, March 19, 1977; *Indian Express*, June 15, 1977.
90. The proposal was for the Commission to send a telegram to Moscow for "information" about Soviet dissidents. *Hindustan Times*, March 11, 1977.
91. Lauterpacht, *International Law and Human Rights* (1950), p. 188.
92. *Ibid.*, p. 200.
93. *Supra* note 92, p. 200.

(iv) Situation resulting from the change of regime in Czechoslovakia—a change due to interference by Russia (issue brought before the Security Council in March 1948);[94]

(v) The case of observance by Bulgaria and Hungary of their obligations under the Peace Treaties of Paris and the principles of the Charter in the matter of human rights;[95] and,

(vi) The Security Council in 1958 rejected the contention that the situation is Lebanon was purely internal.[96]

The above are the examples where the plea of domestic jurisdiction was raised but failed and the U. N. organs, therefore, could not be barred from dealing with the issue before them.[97]

Up-till-now we have been trying to establish that the protection of human rights and basic freedoms have become a matter of legitimate international concern and hence Art. 2 (7) of the Charter presents no difficulty in that regard. If we take into account the Arts. 25, 39 and 41 of the Charter, it is evident that the right of non-intervention in the domestic jurisdiction of any state is not absolute but relative, and the U. N. reserved its right to take action, especially when it concerns human rights. The majority of U. N. members maintain that the matters related to the promotion of human rights do not fall within the purview of Art. 2 (7). This thesis is reflected in the resolutions adopted by the General Assembly. Further, the thesis that the Charter imposes obligation on the member states to protect human rights is also accepted.

v. Forceful Humanitarian Intervention[97-A] :

Henceforth, we proceed to examine the most crucial question, whether Arts. 2 (4) and 2 (7) prohibit the right to intervene with force

94. *Ibid.*

95. *Id.*, p. 205. This case is important because of the attempt to apply the Charter principles in the matter of human rights to states which are not members of the U. N. and because of the contribution to a clarification of the position with regard to the interpretation of the 'domestic jurisdiction clause'.

96. *Proceedings of American Society of International Law* (1963), p. 212.

97. This indicates that resolutions addressed to a particular state and dealing with a definite international obligation of the state addressed have not been matter within its domestic jurisdiction. Benjamin V. Cohen, "Human Rights under the U. N. Charter", *Law and Contemporary Problems*, 1949, p. 434.

97A. There are 6 principal cases of military intervention, subsequent to 1945, in which humanitarian grounds, including various human rights and the right of self-determination, were advanced as justification : (i) Hungary (by U. S. S. R., 1956); (ii) Congo (Stanleville) by Belgium, U.K. and U. S. A., 1964; (iii) Dominican Republic (U. S. A., 1956; (iv) Vietnam (by U.S.A., 1965); (v) Czechoslovakia (by U. S. S. R., 1968); and (vi) Bangla Desh (by India, 1971) Thomas and Rodley, *Supra Note* 13, p. 285. The Bangla Desh case is an instance, by far the most important in our times, of the unilateral use of military force justified, inter alia, on human rights grounds.

to protect one's nationals against a 3rd state or the nationals of the state against which the intervention is directed. The questions that arise in this regard are : Whether intervention by force to protect the lives or property of nationals abroad or to protect nationals against the maltreatment by their own state is any longer permissible ? Can it be said, e. g., that by maltreating foreigners in its own territory, a state commits an act of aggression against the country, of which the foreigners are nationals; and that, in seeking to defend them, the state intervening is exercising a right of self-defence ? In other words, whether armed intervention to protect nationals or their property is an exercise of a right of self-defence, which (i. e., the right to protect nationals or their property) has survived the introduction of Art. 2 (3) and (4), although it is not expressly reserved by Art. 51 ? Until recently, there has been little discussion about these questions.[98]

However, shortly after the U. N. establishment, Jessup examined the impact of the above two provisions and concluded that forcible self-help was no longer permitted because the Charter supplanted the individual measures approved by the customary international law.[99] However, he carefully entered the caveat that if the Security Council, "with its Military Staff Committee," was unable to act with the speed requisite to preserve life, then forcible self-help might be allowable.[100] Thomases, in their treatment of the problem, apparently came to the conclusion that only non-forceful measures may be used now by individual states to protect their nationals overseas. Thus they comment ironically that "from a practical point of view it would seem that the Charter encum-

98. A recent graduate thesis at the Institute of Comparative and Foreign Law, McGill University, is the first extended examination of the subject. See D. Thapa, *Humanitarian Intervention (unpublished thesis* 1968). The writer concludes that "an absolutist view that the Charter has abolished the customary principle of humanitarian intervention, is not defensible...this principle continues to exist as an exception to all rules, whether set forth by customary or conventional international law which bans (sic) forceful intervention for such purpose." *Ibid.*, p. 13.

99. Jessup, *A Modern Law of Nations* (1948), p. 169-70.
It was a customary rule of international law that a state might intervene, by force if necessary, to protect the lives or property of its nationals in the territory of another state, when they were imperilled by the acts or failure to act of the authorities of that state. A state could also intervene *by force* to protect the nationals against their own state when they were treated in a manner so as to shock the sensibilities of other states.

100. *Supra* note 99, pp. 170-171.

bers rather than advances the human rights and fundamental freedoms involved in the protection of aliens abroad.[101] They suggest, however, two arguments that might be used to justify such action, first, that it does not impair the territorial integrity or political independence of a state,[102] and secondly that, in any event, when it comes to the protection of nationals abroad intervention is permissible as an extension of the concept of self-defence.[103] The latter argument seems unacceptable[104] but it does not seem impossible to reconcile a limited right to intervene for humanitarian purposes with the strictness of Art. 2(4)[105].

The problem has also been considered by Fawcett. He does not regard the maltreatment of nationals or the infringement of their property rights as an armed attack within the scope of Art. 51 so as to invite armed intervention in self-defence[106]. However, he allows such intervention if there was such a breakdown of order in a country as to make armed intervention the only effective protection of foreign nationals or their property. But such intervention would be strictly governed by the principles of present danger and proportionality, he adds[107]. He concludes that though the customary right of intervention

101. Thomas and Thomas, Non-Intervention (1956), p. 312. The authors reach the same conclusion regarding humanitarian intervention. *Ibid.*, p. 384.

102. *Ibid.*, p. 15 see text *infra* note 92.

103. *Id.*, p. 13.

104. See "Forcible Self-help by States to Protect Human Rights." Iowa L. Rev., Vol. 53 (1967), pp. 325-327. See also Bowett, *Self-Defence in International Law* (1958), p. 105.

105. Reisman, in an excellent study of Art. 2(4) problem, contends that a close reading of it indicates no prohibition of coercion *perse*, but rather the prohibition of the use of force for specified unlawful ends. "Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of U. N. but is rather in conformity with the most fundamental per-emptory norms of the Charter, it is distortion to argue that it is precluded by Art. 2 (4)." Reisman, *Memorandum upon Humanitarian Intervention to Protect the Ibos* (unpublished paper written with the collaboration of McDougal, 1968 pp.15-16. Accord and Harlow, "The Legal use of Force.... Short of War," Vol. 92, *U. S. Naval Institute Proceedings* (1966), pp. 88, 97.

106. *Hague Recueil*, Vol. 2 (1961), p. 404.

107. *Ibid.*, p. 405. In particular, the principle of proportionality will not only require that force used must not as regards its instruments, extent or duration, go beyond what is necessary for the protection of person, life or property from immediate danger, in particular it must not be either punitive or serve ulterior purposes, but may also impose limitations upon the type of the property or interests in property, which may be protected in this way; and Bowett has well argued that intervention in force to protect property may, if at all, be justifiable only in those cases where its damage or destruction will be irremediable, and there is no place for a restitution in integrum or compensation. *Ibid.*

for the protection of nationals is now severely restricted but its exercise is, nevertheless, admissible[108]. Obviously, Fawcett admits the existence of the right today.

When it comes to Art. 2 (7) the U. N. definitely has the legal right to use force for humanitarian purposes if the state violating basic human rights causes an actual threat to the peace.[109] As the U. N. has learned from the Rhodesian and South African cases, and as it would have learned with respect to Biafra had it taken the matter[109A], it is not always easy to devise procedures to implement resolutions in human rights matters[110]. Nevertheless, the U. N. has the power to take collective action in such cases, and perhaps some day, as Falk has stated, we shall see "supranational interventions to overcome the intolerable injustices that are found today in Angola, Rhodesia, and the Republic of South Africa[111].

When the Charter was adopted in 1945, its signers intended to secure effective guarantees for protecting the human rights, but they did not provide enforcement provisions in the Charter[112]. For this reason, some have argued that at the present stage of international law, intervention by use of force by a single state or a group of states, in a 3rd state, is not permissible under the Charter, unless there is a decision of

108. *Ibid.*

109. See, e. g., Thomas and Thomas, supra note 101, p. 384. The domestic jurisdiction clause no longer shields states where grave breaches of human rights have occurred. McDougal and Bebr, "Human Rights in the U. N.", *A. J. I. L.*, Vol. 58 (1964), pp. 603, 612. See generally Gilmour, "The Meaning of 'Intervene' within Art. 2 (7) of the U. N. Charter...An Historical Perspective", *Int. and Comp. Law Quarterly*, Vol. 16 (1967), p. 330.

109A. The situation in Biafra, according to Professor Lillich, is one that would have been ideal for collective humanitarian intervention of the 19th century type...R. Lillich, "Intervention to protect Human Rights" Vol. 15, *McGill Law Jl.*, 1969, p. 205 at 216. See also, R. Lillich, "Humanitarian Assistance and Intervention" J M Paxman and G. T. Boggs, *The United Nations*, 1973, pp. 103-148

110. Yet, as McDougal and Reisman have stated with respect to Rhodesia, the quest must continue. "Failure to act there might not merely fail to fulfil contemporary policies in the inclusive promotion of human rights; it might, further, set back or undermine the whole U. N. programme In the most realistic sense, the impossibility of achieving perfection is scant justification for total inaction". McDougal and Reisman, "Rhodesia and U.N. : The Lawfulness of International Concern", *A. J. I. L.*, Vol. 62 (1968), p. 1.

111. Falk, "Historical Tendencies, Modernizing and Revolutionary Nations, and the International Legal Order, *How. L. J.* Vol. 8, (1962), pp 128, 150.

112. This happened probably because they failed to foresee the importance that the protection of human rights was going to have in future

the Organisation[113], or of the Security Council[114]. But this argument, of course, cannot be taken to mean that no forceful measures can be used by states to protect the human rights of nationals abroad or of nationals from their own states, as has been demonstrated by recent events. In other words, forceful measures by individual states are permissible in appropriate cases. For example, where the U. N. is unable or unwilling to act for any reason whatsoever or where speedier measurers than the U. N. can take are required to preserve human life and property, individual initiative and action is open and it would not be an unlawful interference in the affairs of another state.

VI. Humanitarian Intervention : Contemporary trends :

Four doctrines tending to 'maximise' the internationally sanctioned minimum standards of human conduct have appeared or re-appeared in the post-war world :

1. The doctrine that respect for human rights and fundamental freedoms was not a mere aspiration of the Charter signatories, but a substantive legal duty imposed upon states and, therefore, these are matters which remain no longer within the domestic jurisdiction of the states. This position we have already examined.

2. The affirmation by the communist states of the justice of wars of national liberation, by raising, anew the doctrine of the legitimacy of intervention on the just side of a civil war.[115]

3. The third-world doctrine of self-determination extending franchise of sovereignty to groups within states.[116] It has now been established through the general acceptance by most members of the U. N. that state practice of racial discrimination on a large scale and denial of the exercise of the right of self-determination to inhabitants of colonial territories are no longer matters of domestic jurisdiction of the

113. M. Ganji, *International Protection of Human Rights* (Geneva, (1962)).

114. The doctrine may not constitute a satisfactory solution for the future, however. Instead, it should be substituted by effective procedures for the international protection of human rights by peaceful means so that the threat or use of force against the territorial integrity or political independence of any state could be avoided as provided by Art. 2 (4) of the Charter. If the use of force in certain case were indispensable, it should take place through a collective action taken in pursuance of the decision of the U. N. Security Council.

115. But, on caution with which the U. S. S. R. expounded this doctrine see R. J. Vincent, *Non-Intervention and International Order* (1974), Ch. V, Sec 4 and 7, pp. 347, 154, 182.

116. R. J. Vincent, *Supra note* 115, pp. 346, 242, 248, 349.

states,[117] Question of France's violation of the principle of the Charter and the Declaration of Human Rights in Morocco; Tunitian question; Algerian question; question of Southern Rhodesia (Zimbabwe)[118], Namibia[119] and Palestine;[120] question of territories under the domination of Portugal like Angola;[121] question of Spanish Sahara;[122] question of Belige;[123] and question of South Africa[124]—in all these cases

117. *GAOR*, 7th Session, I Com., pp. 190-1, 209, 251; *Ibid.*, 8th Session, Plennary Meeting, p 291; *Ibid.*, 8th Session, I Com., p, 23; *UN Monthly Chronicle*, Vol. 7, March 1970; Gunter, Self-Determination in the Recent Practice of the U. N., "Vol. 137, *World Affairs*, 1974, pp. 150-65.

118 The Security Council recalling its resolutions 277 of 1970 and 318 of 1972, reaffirmed inalienable right of the people of Southern Rhodesia to self-determination and independence and the legitimacy of the struggle to secure the enjoyment of such rights in accordance with the Charter. *S. C. Reso.*, 386, 1976: 15 *Int Legal Materials*, 1976, pp, 718-19; *G. A. Reso.*, Dec. 7, 1976; Vol. 16, *I. J. I. L.*, 1976, p. 539.

119. General Assembly reaffirmed the inalieable rights of the people of Namibia to self-determination, independence and sovereignty. *G. A. Reso.*, Dec. 7, 1976: Vol. 16, *I. J. I. L.*, 1976, p. 539. The General Assembly at its 9th Special Session on Namibia endorsed a Declaration on Namibia and Programme of Action in Support of Self-Defence and National Independence for Namibia which had been recommended by the Council for Namibia and expressed full support for the armed liberation struggle of the Namibian people under the leadership of SWAPO. *UN Monthly Chronicle*, Vol XV, No. 6, 1978, p. 5. The Security Council also reaffirmed the inalienable right of the Namibian people to self determination and independence and the legitimacy of their struggle to secure the enjoyment of such rights as set-forth in the Charter, *S. C. Reso.* (428), 1978; *U. N. Monthly Chronicle*, Vol. XV, No. 6, 1978, p 14. *S C. Reso.* (358) 1976, *Ibid.*

120. The General Assembly recognised that the problem of Palestine continues to endanger international peace and security and requested all states to desist from supplying Israel with any military or economic aid as long as it continues to occupy Arab territories and deny the inalienable national rights of the Palestine people. *G A. Reso* 3414 (XXX), Dec. 5, 1975: 15 *Int. Legal Materials*, 1976, p. 183. By another resolution of the same year, the General Assembly expressed its grave concern that no progress was achieved towards the exercise by the Palestinian people of its inalienable rights in Palestine, including the right of self-determination, and the right to national independence and sovereignty. *G. A. Reso.* 3376 (XXX), 1975 : 14 *Int. Legal Materials*, 1975 p. 1518. By the 1976 resolution the General Assembly reaffirmed the inalienable rights of the Palestinian people to self-determination, independence and sovereignty. *G. A. Reso.* Dec. 7, 1976: Vol. 16. *I. J. I. L.*, 1976, p. 539.

121. *G. A. Reso.* 3294 (XXIV), Dec. 13, 1974

122. *G. A. Reso.* 3292 (XXIV), Dec. 13, 1974.

123. *G. A. Reso.* 3432 (XXX), Dec. 8, 1975.

124. The General Assembly, among other things, condemned the intolerable conditions in South Africa and else where, including the denial of the right of self-determination and odious application of aparthied and racial discrimination. It also reaffirmed the legitimacy of the struggle of oppressed

the U. N. practice has established that the question of self-determination has now been removed from the matters essentially within the domestic jurisdiction of states and has become a question of international concern and the U. N. competence is not subject to Art 2 para 7 because repressive human rights measures and denial of self-determination constitute a source of international conflict and tension as well as a serious threat to international peace and security.

4. The argument for the legitimacy of humanitarian intervention against genocide has found support in recent years in view of the events in Burundi, Nigeria, Sudan and Bangla Desh.[125] If the goal is one of the preventing wholesale slaughter, it may seem but a quibble to object to intervention on the ground of its want of impartiality or of the impurity of the motives of the intervening state or states. It can be strenghtened by the argument that the protection of human rights was, with the maintenance of peace, a major purpose of the U. N. Charter and that the in absence of collective action authorised by the world body, a humanitarian purpose might be achieved only by allowing unilateral intervention. And the case can be taken further by pointing to the absurd position in which some 19th century positivists found themselves when, by conceding that humanitarian intervention might sometimes snatch a remedy beyond the law, they seemed to deny its legality while recognizing it to be state practice.[126]

It is not necessary to rely upon a "restrictionist" interpretation of the legitimacy of the use of force under the Charter or upon showing a lack of altruism by states intervening purportedly on humanitarian grounds, in order to point out the practical difficulties[127] and hence doctrinal doubts—about a principle of humanitarian intervention. But if a right of humanitarian intervention is to be allowed despite the partiality of the intervening state, and notwithstanding its mixture of motives,

people to liberate themselves from aparthied and alien domination It urged all states, U. N. Organs and bodies, special agencies, governmental and non-governmental organizations to ensure immediate termination of all military and economic aid to South Africa and full support and assistance to the liberation movements. *G. A. Reso.* 3223 (XXIX), Nov. 6, 1974 : *Year Book of the U. N.*, Vol. 28, 1974, pp. 618-19.

125. R. J. Vincent, *Supra note* 115, p. 347. This claim arises in part from the concern with human rights in the U. N. Charter and seems more pressing than above three assertions regarding minimum standards of international conduct. For an examination of the question whether genocide is a justifiable ground for humanitarian intervention see, *Ibid.*, p. 340.

126. For example, Lawrence (*Principles of International Law*, p. 121) and Harcourt (*Letters by Historicus on Some Questions of International Law*, 1863 (London), pp. 14, 41).

127. R. J. Vincent, *Supra note* 115, pp. 294-310.

then the less worthy consequences of that doctrine have to be tolerated alongwith any good effect that it might achieve.[128] In the case of India's intervention in Pakistan's affairs against the slaughter of Bangalis in East Pakistan, it may be upheld as humanitarian intervention against that slaughter, may also be taken as intervention on behalf of the self-determination of Bangla Desh[129] and even as intervention to hobble the power of a disagreeable neighbour.[130]

Large scale deprivations as "mass killings" receives U. N. attention on ground of humanitarian concern and not taken a violation of Art. 2 (7). Thus the General Assembly strongly condemned the massacres of the innocent and defenceless people, including women and children, by the racist minority regimes of Southern Africa in their desperate attempt to thrawt the legitimate demands of the people.[131] The occurrence of an armed conflict in an internal dispute presents a challenge to the U. N. even in the absence of trans-boundary impact to show its concern over severe failure of respect for human life. The Secretary-General, Waldheim, has described these difficulties in the way of the U. N. in the following words :[132]

> The Secretary-General faces a recurring dilema whenever and wherever large scale military conflict or civil strife within a state results in massive killings of innocent civilians. In the latter case, the Secretary-General has to reconcile Art. 2 (7) of the Charter with the moral principles, and especially those concerning the sacredness of life, which the Charter embodies. No matter what criticisms or set backs may arise, the unwritten moral responsibility which every Secretary-General bears does not allow him to turn blind eye when innocent civilian lives are placed in jeopardy on a large scale.

There has been much criticism of the tardiness of the U. N. response to the tragic events in Nigeria, Biafra and East Pakistan (now Bangla Desh) as a failure to meet its responsibilities to protect human life against large scale assault.[133]

128. *Ibid.*, p. 348.

129. A doctrine which, if adopted, might have uncomfortable consequences within the frontiers of India (e. g., Kashmir & Nagaland).

130. A doctrine whose legitimacy few international lawyers would concede.

131. *G. A. Reso.* Dec. 7, 1976: Vol. 16, *I. J. I. L.*, 1976, p. 539.

132. S. C. Khare, Human Rights and the U. N., 1977, I ed., 1977, pp. 53-54

133. *U. N. Monthly Chronicle*, Vol. 7, March 1970, pp. 26-36; *U. N. Press Release* SG/SM/1151, Sep. 5, 1956; Salzberg, "Non Prevention of Human Rights Violations; The Bangla Desh Case", Vol. 27, *International Organization*, 1973, pp. 115-127.

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129. A doctrine which, if adopted, might have uncomfortable consequences within the frontiers of India (e. g., Kashmir & Nagaland).

130. A doctrine whose legitimacy few international lawyers would concede.

131. *G. A. Reso.* Dec. 7, 1976: Vol. 16, *I. J. I. L.*, 1976, p. 539.

132. S. C. Khare, Human Rights and the U. N., 1977, I ed., 1977, pp. 53-54

133. *U. N. Monthly Chronicle*, Vol. 7, March 1970, pp. 26-36; *U. N. Press Release* SG/SM/1151, Sep. 5, 1956; Salzberg, "Non Prevention of Human Rights Violations; The Bangla Desh Case", Vol. 27, *International Organization*, 1973, pp. 115-127.

Conclusions :

From the foregoing analysis and examination of Arts. 2 (4) and 2 (7) certain conclusions can be derived as below :

(i) The domestic jurisdiction article cannot be interpreted to give each state a right of self-interpretation of its domestic jurisdiction thus permitting every state involved in a dispute or situation to veto action by U. N. organs. Such an interpretation would seriously impair the capacity of U. N. to carry out many of its important functions. Consequently in practice each organ has decided its own competence, thus itself interpreting the meaning of domestic jurisdiction.

(ii) Art. 2 (7) denies the right of intervention. But it does not exclude measures short of intervention as understood in international law.

(iii) Matters within domestic jurisdiction do not comprise questions which have become a subject of international obligation by custom or treaty or which have become of international concern by virtue of constituting an actual or potential threat to international peace and security.

(iv) Domestic jurisdiction is therefore the residuum of sovereignty remaining outside a State's international obligation.[134] The sphere of domestic jurisdiction cannot be determined directly, but only indirectly through ascertaining the obligations applicable in a given situation. The U. N. cannot make recommendations to a State concerning matters within the State's domestic jurisdiction, but it can make recommendations concerning the fulfilment of the state's international obligations. This interpretation is essential if internatioual law is to be regarded as a genuine law the essence of which is that a subject cannot ultimately determine its own legal obligations.[135]

(v) The observance of fundamental human rights and freedoms is outside the prohibition of Art. 2 (7) inasmuch as it is a basic legal obligation of the members under the Charter and insamuch as it may become a matter of international concern in the sense indicated above.

(vi) There is no substantial legal difference between the wording of the Charter referring to "matters which are essentially within the

134. International obligations flow not only from treaties to which a state is a party, including the Charter itself, but also from general international law established by custom, general principles of law, and the authority of Courts and text writers. All of these sources must be examined to determine whether in a given situation a State is under international obligations. This is indicated by Art. 38 of the I. C. J. Statute.

135. G. Schwarzenburger, *International Law as Applied by International Tribunals*, 1945, p. 45; Q. Wright, "Recognition and Self-Determination", Proc. Am. Soc. Int. Law, 1954, p. 29.

domestic jurisdiction of any state" and terms of the corresponding provision of Art. 15 (8) of the League Covenant, which exempted from the purview of recommendations of the Council matters which the Council finds to be, "according to international law," "within the exclusive domestic jurisdiction of a state." For, in practice a matter ceases to be one essentially within the domestic jurisdiction of a state if it becomes a subject of international obligation. Further, nothing prevents states from especially making a particular matter of international concern even though that matter is normally dealt with domestically by states.[136]

(vii) The use of forceful measures of self-help by states to protect human rights of its nationals as well as of the nationals of the state against which intervention is directed does not seem to be impossible.

(viii) Finally, therefore, Art. 2 (7), if construed, in accordance with well accepted canons of interpretation, the history of its adoption, and its actual application in practice, forbids us to concede to the conclusion that the result of that Clause is to nullify the legal purpose of the Charter provisions in the matter of human rights and freedoms and to reduce them to a political declaration and a statement of a "social trend." These provisions are intended to be and remain an international obligation. And how far they will be materialized depends, inter alia, upon the strength and authority of the U. N.

VII. The Scope of U. N. Action Spelled Out :

In the light of the above discussion and conclusions arrived, the scope of U. N. action in matters involving human rights can be spelled out thus :

(i) Art. 2 (7) does not exclude on the part of U. N. organs the procedures of investigation, study, report and recommendation since they do not amount to intervention in the accepted legal connotation of the term.[137] The prohibition of Art. 2 (7) applied, therefore,

136. See, for example, Nationality Decrees Case, *P. C. I. J.*, *Series B*, No. 4, p 24. Here the court held that the questions of nationality which normally fall within the domestic competence of states can be matters of international concern; see also Peace Treaties Case, *I. C. J*, Reports (1950), pp. 85, 70.

137. Hence the term intervention is to be attached a scientific connotation as distinguished from its popular meaning. Thus the overhelming opinion of writers and U. N. bodies is that investigation of facts outside a territory of a given state is not intervention, also not a discussion on a human rights point.

only to a resolution of U. N. organ which is both an 'intervention' and on a matter within the domestic jurisdiction of a State.

(ii) Therefore, the two principal organs of the U. N., namely, General Assembly and Economic and Social Council are free to discuss, study and make recommendations with respect to matters involving human rights. However, they do not have any executive or legislative powers of binding decision.

(iii) But in so far as a recommendation, although not implying a legal obligation to accept it, is calculated to exercise direct pressure, likely to be followed by enforcement measures, upon a state in a matter essentially within its domestic jurisdiction, it is probable that it would come within the terms of article 2 (7). Other recommendations, even if addressed to individual states, are not excluded by the terms of that provision The same applies to recommendations which are general in character.

(iv) The Security Council has, ordinarily, no jurisdiction in the matter of human rights—except, when the degree and scope of their violation are such as to constitute a threat to international peace and security and, therefore, in such cases the action of the Security Council can legally extend to intervention[137A]. Varying the expression, any dispute or situation which is likely to endanger international peace and security falls outside the realm of domestic jurisdiction and the Security Council is entitled to intervene dictatorially. This is beyond doubt.

To sum up : Whatever may be the effect of Art. 2 (7) on other matters, it does not affect the U. N.'s competence in the field of human rights. The organization is not barred from intervening since human rights question has been removed from the domestic jurisdiction of states. Indeed, the Organization is entitled to take any action short of intervention in the technical sense to achieve respect for human rights and freedoms. If, however, violations of these rights threaten world peace, then intervention in its orthodox meaning is permitted under Chapter VII of the Charter.

VIII. Concluding Observations :

In conclusion, inspite of the widespread activities of the U. N. in the promotion of human rights, the goals setforth in the U. N. charter

137A. An action by the Security Council provides an instance of enforcing the Universal Declaration of Human Rights. In 1972, the Security Council was considering a situation which had arisen in Namibia in the field of labour relations. In this context, the Reso. 310 (1972) condemned the recent repressive measures against African labourers in Namibia and called upon the Government of South Africa to abolish any system of labour which may be in conflict with the basic provisions of the Universal Declaration of Human Rights. Vol. 22, *I. C. L. Q.*, 1973, p. 161.

on this snbject are not yet realised. Some of basic causes of dysfunction of the U. N. organs concerning human rights can be enumerated as below:

(i) First of all, the issue is complicated by the fact that there is no agreed definition of the term "human rights" and often no agreed understanding of the several facets about that term.[138]

(ii) The second issue is that by what means shall respect for an observance of human rights be promoted ? The Charter states that the U. N. shall seek to achieve international cooperation in promoting and encouraging respect for and observance of human rights, but it does not specify the methods whereby this shall be done.[139] However, it may be assumed that U. N. action on the violation of human rights will be possible under the Charter in the fourth or fifth instances (as given in the foot note) where international issues are involved.[140] What can be done by way of international action when violations do not constitute a threat to world peace or security is a question which the U. N. Charter does not answer.[141]

(iii) The issue is further complicated by the fact that the efforts to deal with human rights have been profoundly influenced by the political atmosphere in the U. N.[142]

(iv) Difficulties have also arisen relating to the extent to which the U. N. might encourage the promotion of these principles within member states. The fact that the members of the U. N. differ so greatly in their custom, history, religion and their attitudes towards the individual, raises profound questions as to the degree to which there can be fundamental agreement on what is encompassed by the subject of human rights.[143]

138. *Mike Supra Note* 9; J. F. Green, *The U. N. and Human Rights*, 1956, p. 3; M. Shepart, *Human Rights, Domestic Jurisdiction and the U. N. Charter*, 1955, p. 42.

139. The Charter authorises the U. N. in most instances, the Security Council—to take action in 6 type of situations which are understood to fall not within domestic but within international jurisdiction. These are : (i) an act of aggression; (ii) a breach of peace; (iii) a threat to the peace; (iv) a dispute, the continuance of which is likely to endanger the maintenance of international peace and security; (v) a situation which might lead to international friction or give rise to a dispute; and (vi) a question relating to the maintenance of peace and security, to armaments or disarmaments, or to general principles of cooperation.

140. See Art. 35 of the U. N. Charter.

141. Frederick O. Nolde, *Freedom's Charter, Headline Series*, No. 76, 1949 (New York), p. 16-17.

142. As the split between the Soviet bloc and the free world became more evident, and as the differences between the underdeveloped and the more advanced countries became more serious, there appeared to be less and less agreement on the detailed application of basic principles.

143. Shepart, *Supra note* 138, p. 42 ; J. F. Green, *Supra note* 138, p. 4.

(v) Further, some actions of the U. N. on the subject of human rights have met with mixed reactions. Methods that have satisfied one group in the U. N. have tended to antagonise another and to precipitate controversy over the nature of the powers and functions of the organization, and also have tended to obscure the extent to which the U. N. can act without violating Art. 2 para 7 of the Charter.

In sum, the difficulties in attaining a full measure of human rights as an international guarantee are derived from coldwar tensions, ideological differences, cultural and historical diversities among the states, and the obstinacy of each state in asserting its prerogative of national sovereignty in all matters generally considered to be within its own jurisdiction.

Effective functioning of the various U. N. organs could not be expected without active support of the States and the people in the world. Therefore, their first duty is to support a strong and effective U. N., since only a viable world organization can effectively advance the cause of human rights; their second duty is to abide by the principles and purposes of the Charter provisions on human rights; and, their third duty is to encourage and support the adoption by the U. N. of the Covenants on Human Rights and their ratification by the member states.

LEGAL SCIENCE AND PROMOTION OF INTERNATIONAL LAW*

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I. Introduction

Notwithstanding differences of ideology, forces of discord and deep social tensions marking both the national and international approaches to economic development, the human society seems to be moving toward the recognition that global inter-dependence spells common progress rather than common disaster. A series of U. N. General Assembly resolutions pertaining to the improvement in the economic condition of mankind, or the issues of world peace and security, or the furtherance of social progress, justice and human rights, or the use of the oceans and their resources as the common heritage of mankind and the like, forge a sense of common purpose based on equality and cooperation of states and consciousness of our common destiny. None can deny that some of these resolutions have had an important, sometime even determining, effect as material sources on the formation of new law. Indeed there exists no realistic alternative to shared responsibility in dealing with the international agenda of peace, security, economic well-being and justice and responding to deep universal aspiration for dignity and equal opportunity. Evidently, in the present and emerging world we must agree to transcend the stereotypes of the past in the search for a cooperative future and to extend the reach of international law in international affairs. The concept of a universal order is implicit in the very concept of a world-wide international community. As larger and larger areas of the international behaviour of states come under the formative influence of the principles of unity, which are conducive to the welfare of all the units as part of the whole and are substantially conformed to by a substantial majority, a normative discipline springs out of life itself which is largely self-enforcing and far more effective than the one imposed from outside.

Traditional public international law, purely European in its origins, nutriment and growth, had in course of its evolution and in the middle of this century cut-off itself from its old root of Christian morality and

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universalism and limited itself to the narrow European segment of humanity and its off-shoots overseas. Not only did it not deny legal validity to the former colonial relationship between the European and the Afro-Asian world, but it was also not flexible enough for the latter's needs and aspirations and of the new world society which is slowly but surely emerging into view under the impact of new forces. Since the complexion of the international society has been radically changed beyond recognition during last three decades, the assumpticn of universal applicability of international law—the body of law developed since the middle of the seventeenth century—has been questioned in three different quarters : Communist States, developing and new born states of Asia, Africa and Latin-America,[1] and protagonists of regionalism in international organizations.[2]

Besides, material conditions of the world have undergone fundamental transformation during last few decades and, whilst the process is a continuing one, the contemporary changes have profoundly modified the substance and structure of the present-day international law[3]. New initiatives and emphasis, in terms of both legal doctrine and legal institutions, have today created a demand for rethinking and reconstruction of international law and even for creation *ex-novo* of new international legal order.

This paper proposes to discuss briefly the dimensions of the challenges faced by the contemporary world society with a view to highlighting the new problems and the role the legal science can play in extracting from the international social order those fundamental norms which constitute its cementing material and provide the foun-

1. The attitudes of these states have been exhaustively examined by several international lawyers, see Oliver J. Lissitzyn, *International Law in a Divided World, International Conciliation*, March, 1963; B. V. A. Roling, International Law in an Expanding World. *Howard Law Journal*, Spring 1962; R. P. Anand, Attitude of the Afro-Asian States Towards Certain Problems of International Law, *International and Com. Law Quarterly*, 1966, p. 55; V. Maya Krishnan, African State Practice Relating to Certain Issues of International Law, *Indian Yr. Book of Int'l Affairs*, 1965, p. 196.
2. See Potter, Universalism Versus Regionalism in International Organization, *American Political Science Review*, 1943, p. 858; Castanada, "Pan Americanism and Regionalism: A Mexican View", *International Organization*, 1956, p. 373; Wilcox, "Regionalism and the United Nations" in Padelford and Goodrich (ed). The U. N. in the Balance, 1965, p. 425, Starke, *Regionalism as a Problem of International Law* in Lipsky (ed), *Law and Politics in the World Community*, 1953, p. 120, Akzin, *New States and International Organization*, 1953.
3. Kirk, *The Changing Environment of International Relations*, 1956; Friedmann, *The Changing Structure of International Law*, 1964.

dation of the common law of mankind—a law yet to be evolved and thus a law of the future world order that is more responsive to human aspirations. Intellectuals, scholars and jurists are capable of glimpsing humanity as one indivisible whole. They can inaugurate a new era of transition from the 'classical' law of Nations to some 'new' universal law of mankind. A creative effort on the part of legal scientists and philosophers of reconstructing and renovating international law can produce a general atmosphere of respect for it if that law in quest of justice is formulated with reference to the contemporary conditions and the needs of that ideal, and links the past with the present without ignoring the pressing claims of the future. Whilst the belief and the conviction of legal scientists, that a desirable social change through law can be effected, may create human awareness, analysis and understanding of the present needs and of probable and possible future conditions, and may even create conditions which make innovations possible, the changes in material conditions by themselves also compel them to give attention to the need of modifying or revolutionising human institutions. Thus social entities arise from the interaction of human ideas as well as of material conditions and this creates a consensus upon the character of a better and attainable social system. However, in choosing institutions, values, and procedures in international life with a view to improving human life, it is necessary to evaluate the material conditions of the actual and potential world environment in which they are to function.[4]

II. Basic Changes in International Society and New Dimensions of the Challenges :

Among the causative factors which have changed the material conditions of the world in the present century are : Techonological evolution in the means of instantenous communication over long distances and of rapid dissemination of information and ideas among large populations, and in the means of rapid transport of men and materials with supersonic speed; thc development of knowledge of the human psyche capable of influencing the attitudes, opinions, behaviour of individual by brain-washing techniques and of the masses through the mass media; diffusion in the knowledge almost all over the world of nuclear fission ending the monopoly of the U. S. A. alone and exposure of the world to the terrifying spectre of nuclear distruction; the world population explosion and the widening gulf between the rich and the poor because of the massive growth in numbers below the poverty line ; and

4. See Harold D. Lasswell, *The World Revolution of our Time*, Rader Study, Standford University Press, 1951.

the rapid expansion of the sphere of state and corresponding shrinking almost everywhere of the sphere of individual freedom, initiative and enterprise. These principal factors, among several others, have shrunk the world and tend to broaden human relations across traditional barriers toward a truely universal human society.

There are also other changes in the material conditions of the world which have contributed to important developments in the political world. Most empires have disappeared and, in consequence of decolonization, has emerged a large number of new states from Asia, Africa and Latin America which are economically and technologically backward and are rebellious against such rules of traditional international law, (in particular those relating to state responsibility, protection of foreign property and investments, and titles to territory acquired in the colonial era) as appear to them antiquated or inequitable by present standards of civilization. Professor B. V. A. Roling has compared their increasing influence, along with that of the revolutionary bloc of Eastern Europe, in the international legislative process of accelerating the revision of rules of international law with the rise of the working classes to power in the West. In both cases, there has been a process of democratisation of the legal community. The proliferation of states, overwhelmingly representing non-Western cultural and legal systems, has brought about quantitative as well as qualitative changes in the international community. Whilst the 'new' countries are disinclined to accept certain norms of traditional international law developed mainly by the stronger states of the West and to protect Western public and private interests, the 'old' countries regard the so-called 'expansion' of international law to Asian and African countries to be proceeding at the price of a continuous dilution of its content for the benefit of the new-comers.[5] The anti-colonist surge, the anti-*apartheid* compaign, the demand for a new international economic order and sharing of resources of the world etc. emanating from the 'new' countries, have been looked upon as a threat to the well-established international legal norms by the countries which have been the beneficiaries of this legal system all along in the past.[6] However, considering the widening gap between the resources and military strength of the developing countries and those of the super and the middle powers, the role of the developing countries seems limited at the bargaining counters in wresting concessions from the affluent

5. Julius Stone, *Quest for Survival* : The Role of Law and Foreign Policy, 1961, p. 88; B. V. A. Roling, *International Law in an Expanded World*, 1960, 56-58; Wilhelm Ropke, "Economic Order and International Law", *Hague Recueil*, 1954, II, pp. 209-273.
6. Uerich Scheuner, Solidarity Among Nations as the Basic Principle of International Society Today in *Law and State*, Vol. 15, 1977, pp. 38-57.

nations. Similar to the previously sub-merged classes in the municipal societies, the new states have demanded fuller participation in the law-making process and in the revision of the legal system developed by the older ruling *elite*.

Second in political importance have been demands for ideological expansion which have gained strength after the communist revolution of 1917 and have inaugurated the age of 'Cold War' between the two mutually antagonistic camps led by the principal rivals the—U. S.A.and an increasingly powerful and articulate Communist China rather than the U.S.S.R. This has resulted in the division of the world into communist, anti-communist, and non-aligned segments of about equal population, though these groups have at times tended to disintegrate because either differences of doctrinal interpretation developed or divergencies arose among the nationalities within each group. This factor of communist expansionism and animosity has been considered by the Western World as a threat to international law and the fundamental values and premises of the Western international public order.[7] The communist nations have stressed on antagonism rather than cooperation as the primary characteristic of the relations between the states of the two blocs, and some principles of international law of uncertain content, such as 'self-determination and equality', 'non-intervention', 'non-aggression', 'peaceful co-existence', 'unequal treaties', have accounted for some distrust of the motives and promises of the socialist bloc among the Western nations as the former's ideology and public order in the latter's view stand in the way of the gradual evolution of mankind toward the rule of law in world affairs. However, the process of reinterpretation of Communist ideology, furthered by the participation of communist as well as non-communist nations in joint or cooperative international activities, such as the exploration and peaceful uses of the outer space and Antarctica as well as by an intensification of cultural relations at various levels, tend to permit international law to play a greater role in the affairs of mankind.[8]

A third political force of great significance has been the demand for economic progress on the part of the poorer and technologically underdeveloped nations of the world from Asia, Africa and the Latin America because of a "revolution of rising expectations" in the masses

7. Wolfers (ed), *Changing East-West Relations and the Unity of the West*, 1964; K. Wilk, International Law and Global Ideological Conflict, *A. J. I. L.* 1951, Vol. 45, p. 648; Ann Wagner Thomas, *Communism Vs. International Law*, 1953.
8. See O. J. Lissitizyn, Western and Soviet Perspectives on International Law, A Comparision, *Proceedings of the American Society of International Law*, 1959.

of the peoples in these parts. The economic distance separating the rich and the poor within these countries and a wide gap between the rich and the poor nations at international level have created a perceptible current of discontent with the international economic order and legal system which favour the technologically advanced and rich countries of the world. To-day, in a world in deep economic crisis, when the growth models of the affluent world have been wrecked by runaway inflation, all alignments between nations are under qualitative change and the developing nations are collaborating in taking collective initiatives which will remedy old discriminatory practices and establish a new economic world order. Since the nature of thermo-nuclear war is the consequence of the scientific and technological revolution, which has transformed both capitalism and communism to a great extent, there seems no need for the two systems to lead themselves into conflict. Capitalism is moving towards a phase where it will not need exploitation at home and abroad and Communism is dropping its dogma and becoming liberal and human. The two of them are prepared, for political ends, simultaneously to help other countries irrespective of their system of society. However, disillusionment with the 'Isms' and the co-ordination of the policies by erstwhile power blocs and the superpowers in relation to developing countries; desperation of the developing countries over massive poverty and miseries of life as lived by bulk of their population; articulation of their demands affirming their right to dispose off their natural resources and, by implication, to de-emphasize the right of capital exporting states to protect the investments of their nationals in these resources, the traditional international standard of compensation, and the norm of 'prompt' adequate and effective compensation; and reaffirmation of state sovereignty in political as well as economic spheres—are some of the motivating factors which tend not only to limit the operation, or decrease the relevance of some traditional legal norms but create the need for a kind of international system that might be adequate to amoliorate the prevailing conditions and at the same time be acceptable to governments and people.

Since the problems and the solutions deemed effective are now seen to be world-wide, there is growing recognition of the need for a new global international economic order under which destitution in its most severe forms is banished all over the world before the end of the century.[9] Though the legal and political orders of developing countries are pledged to the promotion of social and economic development through planned and co-ordinated efforts of their governments, they

9. See G. Schwarzenberger *Economic World Order*, 1970; Leontief, *The Future of the World Economic Order*, 1977.

by themselves are unable to meet squarely the problem of poverty and backwardness. Their problems of population explosion and abject poverty, engendered both by lower rates of agricultural and industrial productivity and by vast multitudinous pools of unemployment and destitution, require a new pattern for the Third World development inside a global framework of policy.[10] In the broad context of world affairs, the whole notion of development expects that every nation on the globe will shift its emphasis from 'growthism' and 'GN Pism' to horizontal development and will adopt a strategy for achieving a balanced social and economic growth and world economic development involving commitments of both the affluent and the poor. This will require a two-pronged strategy: one consisting of actions designed to provide the engines of structural change and to consciously denationalize the nation state, and the other consisting of actions to accelerate activities and to build institutions of a supra national character which can mobilize the Third World resources and the Western economic and scientific equipment and technology in pursuit of global social objectives. Since trade has been an engine of growth for all countries and a crucial factor of development, what is required is a five point global programme of: (i) ensuring sufficient financing for resource development and for equitable sharing in their benefits by the host nation; (ii) improving the conditions of trade and investment in individual commodities and moderating excessive price fluctuations; (iii) stablizing the over-all export earnings of developing countries; (iv) improving access to markets for products of developing countries; and (v) a rapid and effective technology transfer to developing nations. All this requires unprecedented international collaboration and regulation by harnessing international law and organization for meeting a global challenge of historic proportions.

Greater awareness among states of the role of international law in modern world is indicated by a spurt in the signing of treaties and multilateral conventions and in the establishment and membership of regional and international organizations which are steadily growing in importance in the life of nations. Considerations of sovereignty and ideology do not prevent nations from entering into complex economic and financial arrangements. The network of bilateral and multilateral treaties and regional and international legal institutions continue to increase in complexity and they operate within the framework of the more

10. J. E. S. Fawcett, *International Economic Conflicts*, 1977. The demand for a new International Economic Order and adjustment to the special development needs of the roughly 160 less-developed countries has been voiced by many conferences in Dalro (1962), Algiers (1967), Lima (1971), Dakar (1975), and Manila (1976).

basic and general rules that constitute 'universal' international law. Although these international treaties and institutions deal increasingly with mutual and common interests, the more exacting demands relating to basic needs of human beings such as survival, health, food, clothing and shelter, employment and general human welfare addressed to the world public order of individual nations as well as of international community are not likely to be fully satisfied in the immediate future. However, the dramatic changes in the inter-governmental component of international society, together with the precocious current growth of international machinery and of the number and size of international organizations have opened out a wide vista in the field of international law.[11]

III. Sources of Universal International Law :

In the development and promotion of International Law cognizance has to be taken of the acceleration in the aforesaid process of changes that have taken place in the world of today because of rapid technological progress, rise of new ideologies and systems of public order promising to respond to the "revolution of rising expectations" of the masses all over world, decolonization and appearance of many new states with different levels of development and cultural background, rising demands of emergent nations in order to bridge their economic distance from the affluent nations, and increasing numbers and functions of regional and international organizations as expositors of the ground rules which the world society is demanding with unprecedented intensity. All these factors pose a challenge to the long established concepts and principles of traditional international law and have inaugurated a new era of transition from the ethnocentric and narrow law of nations to some new common law of mankind. This involves a spectrum of tasks ranging from codification and progressive development to the devising of new concepts and even new principles of international law, and the range of different purposes precipitates correspondingly novel questions about the sources of legal obligation, the delicate relationship and interaction between international custom and the specific obligations created for parties to a treaty, and the distinction between a proposition *de lege lata* and a proposition *de lege ferenda*.

Indeed the body of International Law has, after the Second World War, been very greatly enriched by the Geneva maritime law treaties of 1958 and by the Vienna Convention on Diplomatic Relations, Consular Relations and the Law of Treaties and by intensive scientific

11. D. W Bowett, Development of International Law by International Organizations *Proceedings of the ASIL*, 59th Mtg. 1965, pp. 108-158.

studies undertaken at the right time by the International Law Commission.[12] Frankly speaking, precisely at the time when new law is to be made, and not merely that the old law is to be developed, the pitfalls and limitation of our present international law-making process by multilateral treaties become most visible. There exist formiddable difficulties in the way of making really new law by multilateral treaty and the problems indeed multiply where the proposed treaty is to have a scope without precedent, ranging from criminal jurisdiction to the prices of raw materials, and from artificial islands to the management of marine resources or establishment of International Seabed Authority.[13] If we are to progress towards effective legislative machinary in International law, juridical questions about making of International Law and the need of imaginative new procedures for making new law require comprehensive and rigorous juridical investigation and analysis. This is very important as reconciliation of goals and means for achievement of universal international law cannot be brought about by an accumulation of voting victories at international conferences. It is only by a process of compromise and adjustments of interests, national, regional, or ideological, and by patient and persistent confrontation of reasoned arguments that universally acceptable rules can be created.[14]

The positivist approach has all along stressed highly the practice of states in the sense of "concordant and recurring action of numerous states in the domain of international relations" and also required proof that in each case "such action was enjoined by law".[15] The new States have occasionally criticized positivism and its reliance on the practice of states, which has been sometimes identified with the practice of the Great Powers. Perhaps a good deal of what has been presented as law in the textbooks and invoked by Governments in political discourse may have to be eliminated if subjected to the close scrutiny of the International Court of Justice which has, in conformity with Art. 38 of its Statute, affirmed the need of *opinio juris*, i. e. of the conviction of respecting a legal norm.[16] But *opinio juris* very often comes near to an assertion of expression of the particular powerful interests which on occasion

12. R. P. Dhokalia, *The Codification of Public International Law*, Manchester 1970; H. W. Briggs, *The International Law Commission*, N. Y. 1965.
13. See R. Y. Jennings, *The Discipline of International Law* Lord McNair Memorial Lecture delivered in the University of Madrid, 1976, International Law Association, 57th Conference.
14. S. Prakash Sinha, *New Nations and the Law of Nations*, 1967, p. 145.
15. Manley O. Hudson, *The Permanent Court of International Justice*, 1920-1942 (1943), p. 609; Clive Parry, *The Sources and Evidence of International Law*, 1965, p. 62.
16. *Asylum case*, *I. C. J.* Reports 1950 pp. 266, 276-77, *The Anglo-Norwegia Fisheries Case*, *ibid.* 1951, pp. 131.

and for a time can be more powerful than true law. This poses a danger, because rules of international law may be submerged under the rival assertions of political leaders and diplomatists who are endeavouring to overreach each other in the assemblies of government delegations. When governments choose to question, ignore or defy the rules, which because of present laxity and excessive flexibility in the limits of what may plausibly be alleged to be or not to be international law, we find international law becoming more and more merely a series of expressions in juridical guise of the ambitions of different political and economic pressure groupings.

Potentially, treaties, custom, general principles of law and judgments of the ICJ and arbitral tribunals are accepted as sources. Treaties are important instruments of the stability as well as of change in international relations. They are both tools of progress and catalysts of political forces in international relations. Whilst treaty process offers a useful approach to the universalization of international law in certain areas of transnational relations, it is not likely to formulate the law unless it is supported by essential states without whose consent and acceptance the treaty is not likely to achieve its intended purpose. International treaties in force bind the contracting parties with regard to rights and duties specified in them and they constitute an example of written law which however is inseparably bound up with principles of unwritten law. All written law generally is the expression of particular underlying demands and precepts, practices linked to moment of time, and customary rules. Therefore, there exists indissoluble connection between written international law and unwritten norms as treaty law and customary law exert a constant influence on each other.[17] Contrary to treaty law, where the binding force is the consent of each state to submit itself to treaty customary international law depends rather on the collective *opino juris* of the international community. Customary international law consists in principle of two essential elements: the practice of States and the conviction of States that the practice is based upon and required by law.[18] Whilst on the question of the time element in the creation and continued validity of rules of customary international law, there is traditional assumption of a slow process of growth, the generally held current view is that even an isolated and sporadic practice can give rise

17. Rudolf Bernhardt, Unwritten International Law, *Law and State*, Vol 16, 1977, pp. 48-70.

18. See the *Continental Shelf Case, ICJ Reports*, 1969, p. 43, *the Asylum Case, I. C. J. Reports*, 1950, p. 276; A. A. D'Amato, *the Concept of Custom in International Law*, 1971, p. 74, K. Wolfke, *Custom in Present International Law*, 1964, p. 20 et seq.

to a customary rule if it is universally accepted or recognized.[19] The number of State acts and the length of time for which a state practice has continued are no longer decisive in the formation of new rules of customary international law. But in the absense of a widespread and unchallenged *opino juris* a new rule can not come into existence in a very short time and on a very spare evidence of state practice. If new rules of law cannot be created spontaneously to meet new situations as they arise, custom as a source is indeed very slow in emerging as law from the practice of states, and so, is looked upon as inadequate to cope with the rapidly evolving needs of society expanding horizontally as well as vertically. Customary rules are being most directly affected by important social and political changes, such as the international protection of human rights, possibility of exploitation of sea resources outside coastal waters, the growth of internatianal organizations, possibility of stationing weapons of mass destruction in space or in the sea, or the retrogession in the law of neutrality. Extreme instability of international relations, profound and often exclusive national motivation, growing control of public authority over private interests and activities, acceleration of history and diminishing homogeneity in the moral and legal ideas are the causes that today curtail the development of customary international law. Also, collection of data of state practice and marshalling the evidence of existing custom on a global basis require a major effort of collective research involving substantial use of oriental and slavonic languages. Non-availability of authentic and full material on the state practice and custom is a major problem. Legal scientists can play a major role in providing a central repository of diplomatic precedents, the preparation of indexes of the precedents of international experiences of governments, a substantial body of evidence of customary international law and a regular publication of material legislation bearing on international law.

Whilst treaties and customs have their own role and importance, general principles of law recognized by civilized nations, though providing inexhaustible reservoir and potential source of legal principles which can enrich and develop public international law, have been only sparingly invoked on rare occasions. For a long time, the international legal system has consisted of a number of basic principles or indispensable "constitutional" rules, on the one hand, and the rules of customary international law on the other, though both sources left much to be desired with respect to clarity, completeness and substantive appropriateness.[20]

19. See Wolfke, *op. cit.* p. 67.

20. For instance, in 1955, Lauterpacht had said that one could always detect agreement on broad fundamental principles of international law like the principle *pacta sunt servanda* yet even the validity of this principle was called into question by the *clausula rebus sic stantibus*.

The most important fundamental principles of the international legal order are contained in one form or another principally in the UN Charter, thereby attaining the binding force of treaty obligations for more than 150 current member states. Although importance of these fundamental principles is recognized, profound differences exist on their scope and application in particular situations. For instance, the principle of sovereign equality of states, prohibition of the threat or use of force, and non-intervention in matters within the domestic jurisdiction of a state by third states or by international community, demonstrate very clearly how agreement on principles may conceal profound differences of opinion and disparity between the ideal and the reality. These fundamental principles as well as the call for self-determination and demands for the protection of human dignity and fundamental rights, which involve value judgements, require critical examination to which international lawyers and legal science should direct more attention than they have hitherto done with a view to exploring tendencies, possibilities and dangers in contemporary developments particularly in the context of such developments as the greater emphasis on obligation to the world community at the expense of state sovereignty, and the international recognition of the fundamental human rights limiting the sovereign power of the state with its consequential implications for international law.

In addition to the fundamental general principles of international legal community, the general principles of municipal law also have their own importance in the fact that question of law can arise at international level for which more or less appropriate solutions have been found in municipal systems of law on rare occasions. If these principles are to be applied by reference to the practice and experience of municipal laws, of which the possibility cannot be excluded in the future and under appropriate circumstances, the recourse may be had to such principles as source of universal international law.[21] Considerations of order, stability, peace, justice, social and economic development occupy an essential place in any legal system and human values are the reason behind the legal rule, and, therefore, all these merit application in international law as well. But the use and adaptation of general principles of law in the development of international law is a task of staggering proportions as it would involve comparative study of legal principles of different legal systems of the world and legal science alone can play a constructive role in identifying and bringing out the universal element from the main systems of law. These fundamental legal principles, which have a

21. Lord McNair, "The General Principles of Law Recognized by Civilized Nations, *British Year Book of Int'l Law*, Vol. 33, 1957, pp. 1-20.

consensus of the greater part of the whole world, need be stated in the form of a Declaration of General Principles of Law. Legal science can contribute enormously in initiating a pioneering experiment of identifying a common code of legal principles.

The contribution which the international tribunals can make in the future to the development of substantive universal international law depends upon the nature and number of disputes which are submitted to them. Every application of law is itself a law creating act,[22] and so judgements as well as advisory opinions of the ICJ are the sources of universal international law. However, since states alone can be parties before the ICJ and they seem generally disinclined to litigate dispute for one reason or the other as the Court does not have compulsory jurisdiction, recourse to justice remains an expedient which is conditional on political is contingencies rather than a normal mode of regulating interests in an organized community. Despite resistances of states to accept compulsory jurisdiction of the Court, the continued accumulation of case law during the last three quarters of a century resulting from arbitral awards and judicial decisions has completely transformed the international *corpus juris* into a body of hard law.[23] Whilst there are several valuable collections of arbitral awards and decisions of the International Court, scanty efforts have been made to assemble the decisions of national courts of all states on questions of international law. Decisions of national courts of states as well are of great value as evidence of state practice. Legal scientists can collaborate in order to undertake the herculean task of assembling judicial decisions of national tribunals on questions of international law. They can organize a comprehensive study of government publications bearing upon any question of international law, or containing full information about state practice, diplomatic correspondence and judicial decisions of national courts of all states.

The traditional sources of international law, as restated in Article 38 of the Statute of the ICJ and briefly discussed above, are not the exclusive and the ultimate basis of rules. Two potential new sources of great significance which have emerged after the Second World War are : (A) Resolutions of the UN General Assembly and (B) International Codification work done under the auspices of the United Nations through International Law Commission. These need be elaborated and clarified.

(A) *Resolutions of the UN General Assembly* : The question, whether and if so to what extent, resolutions and declarations of General

22. H. Lauterpacht, *The Development of International Law by the International Court of Justice*, 1958. *passim*

23. Sir Arnold McNair, *The Development of International Justice*, 1954, p. 16.

Assembly can be considered as a source of international law has been widely debated.[24] Particularly controversial is the question whether the resolutions and declarations purporting to state or declare principles of international law are legally binding. Those who deny the legally binding character argue that since the General Assembly lacks a true legislative character its resolutions by themselves cannot create new rules of law. The resolutions and declarations of the G. A., the ILO and similar international bodies, being the authoritative pronouncements concerning rules of international law or their interpretation, are characterized as evidence of international custom referred to in Article 38, para 1 (b) of the Statute of the ICJ and can be regarded as a new method of generation of customary international law. This method is augmenting a new trend of transformation of an individualistic custom-creating process into a collective process in which consensus is substituted for consent as the basic law-creating energy in international society. This is also indicative of transformation of a sovereignty-centered international system to a community-centred international system[25]. But, any normative (law-making) resolution, the content of which is too far in advance of developments in international relations, is likely to remain still-born to the extent the social data are not firmly integrated in the rule of law. As long as the state system does not abandon sovereignty-centrism in favour of community-centrism, legislative character of the G. A. resolutions and declarations based on consensus rather than consent may remain only starting point for the development of customery international law or conclusion of conventions. For instances, the Universal Declaration of Human Rights, 1948 was later followed by Resolution 220 (XXI) promulgating the International Convention on Civil and Political Rights. This shows potentiality of the U. N. General Assembly through the medium of resolutions and Declarations as a law-making institution. A series of almost unanimous G. A. resolutions on current problems like "self-determination", activities in the outer-space, permanent sovereignty over natural resources and the like, have made significant contribution to the development of universal International Law. In my view, in respect of G. A. resolutions one may not insist on juridical formalism, or on categorical and

24. Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, 1966; D. H. N. Johnson, The Effect of Resolutions of the General Assembly of the United Nations, *BYIL* Vol. 32, 1955-56, p. 97.

25. See *South West Africa* (Second Phase) case ICJ Reports, 1966 for the Dissenting Opinion of Judge Tanaka p. 292-294, Richard A Falk, The South-West Africa Cases : An Appraisal, *International Organization*, Vol. 29, 1967 pp. 1-24.

radical distinction between what is absolutely binding and what is not, but should take cognizance of emerging norms of nascent legal force covering hazy, transitional, embryonic and inchoate situations and having 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 the Principles and Purposes of the Charter".[26] Besides, if in the international legal order states are at 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 a reaction of the organized body against the divergent attitudes of the delinquent. Considering that the whole problem of international law has been and remains one of confidence[27] i. e. of creating universal confidence in the system and of extending its scope, the resolutions of G. A. and other similar international organizations can be regarded as declaration of international public policy and representing the notion of consensus of states as they embody the best and most objective discription of how states view international law on a given new problem and the 'consensus' can be regarded as equivalent of *opinio juris* to the extent it contains the two constitutive elements : the material and the psychological.[28] This new source of international law however riquires regorous investigations and analysis in view of admirable response of international bodies to deal with the novel, complex and challenging problems of our times. If international law is to be developed for States in their totality rather than for the transient benefit of the individual state or group of states and if it is to be transformed into universal law of the world community dedicated to universal welfare and justice, conscious efforts should be made to clarify and improve the content of international law on the basis of widest possible community-oriented consensus. This involves a radical change in the science and study of international law for a successful breakthrough towards universality. In this regard legal scholars can and should play a constructive role in bringing about the development of a more adequate theory of legal obligations which not only emphasizes the need to supplant a sovereignty-oriented notion of consent by the community-

26. Lauterpacht's individual opinion annexed to the Advisory Opinion of the *ICJ* in 1955, in S. W. Africa (Voting) ICJ, Reports, 1955 p 120.

27. See for an excellent study of the juridical effects of UN resolutions Jorge Castanada, *Legal Effects of United Nations Resolutions*, 1969 pp. 1-21, 165-166.

28. R. P. Dhokalia, The Problem of Aerial Hijacking and the Emerging International Law, *Banaras Law Journal*, Vol. 12, 1976, pp. 38-41.

oriented notion of consensus but also strives to build universal public opinion to support the evolution of universal law.[29]

Notwithstanding the actual conduct of self-interested policies of nations, a characteristic of our times, manifested in the speculation of scholars and in the eloquence of statesmen, consists in accelerated drives towards the supra-national or transnational co-ordination of mankind. These drives have achieved some reality in particular spheres of activity, as in postal services or regions of safety at sea or in the air, or in particular geographical regions which have witnessed the growth of consultative, legislative and judicial organs in so-called European Economic and other communities. Scholars have recently directed their attention to an international cultural inheritance[30], common interest in mankind's survival[31], and moral values[32] as a basis for reconstruction of international law. The community of nations in our times is oriented more and more towards economic interdependence as the economic fate of each people is intertwined with that of all other and in which the questions of the population explosion, of migration, of the conservation of natural resources of the earth, of inflation, of exploring and exploiting the ocean bed for resources as the common heritage of mankind, have become ever more pressing to demand common action and collaboration for shaping the future economic development of the world. Fashioning of rules to meet the needs of a more complicated society is a normal part of any legal development and in international law too the process is as desirable as it is inevitable in view of the impact of science and technology which is the most incisive of the decisive forces reshaping the contemporary universe of nations. This demands a review of the whole spectrum of current scientific enquiry and technological ingenuity in order to examine the problems in full context for developing the general principles of law in such a manner that they provide reasonable answers for the plethora of current problems.

(*B*) *International Codification :* Post-Second World War history of internatioal law has shown a marked extension of its domain to new relationships, adaptation of old rules to new conditions, reaching of agreements upon matters about which there has been institutionalization of a quasi-legislative process of international codification and progressive

29. R. P. Dhokalia Contribution that can be made by law teachers in the Future Development of International Law, in *International Law, Nainital Seminar* (1969), Allahabad, 1972 p. 50.
30. C. W. Jenks, *The Common Law of Mankind*, 1958.
31. J. Stone, *Quest for Survival*, 1961; *ibid*, *Aggression and World Order*, 1958; A. Larson(ed), *A Warless World*, 1962.
32. P. E. Corbett, *Morals, Law and Power in International Relations*, 1956.

development of the law of nations. The codification and progressive development of international law is looked upon by a large section of the world community less as process of ensuring mere certainty and preciseness in its rules than a rightful opportunity and responsibility to achieve a synthesis of diverse legal traditions into a generally accepted common law of mankind which embodies the will of the world community, recognizes the inter-dependence of states for peace, freedom, justice, prosperity and technological progress ensuring global security and welfare. In this process of universalization and democratization of contemporary international law, learned societies and scientific institutions engaged in the study of the legal science as well as individual jurists and social scientists can play a significant role by rendering practical service; by selecting for their scientific investigation the topics for study or those currently under study of the International Law Commission, not only can they stimulate new proposals and draw attention to important developments, but also develop attitudes and understanding which emphasize the long-range interests in international cooperation and compliance with international decisions. For instance, the Indus Water Treaty between India and Pakistan laying down sound principles of equitablly sharing of the waters of International rivers owe much to the International Law Association, in particular to Professor Eagleton and Dubrovink Session of the ILA in August 1956. It appears that scholars have not paid much attention to the question what are the most important factors which either promote or obstruct the work of codification which is mainly carried out within the frame-work of international organizations ? What are the forces which work in favour of codification and which are counter-acted by strong obstructing forces ? Apparently, the factors like the desire for technically more perfact law, concrete self-interest of the parties, commitment of states to certain non-material values, sense of participation in the formulation and modification of rules of law, sense of responsibility for an international effective order, membership in a particular group of states favouring a particular codification project, and institutionalization of codification movement in the establishment of the International Commission, are counteracted by opposing forces, like national self-interest, specific national values, political and ideological climate of conflicting opinions, antagonism of political and ideological blocs, reluctance of states to commit themselves to a codification treaty, non-existence of a superior legislative authority, intricate and time-consuming codification process of successive stages, obstructions created by the lengthy procedures prescribed by the domestic law for ratification of treaties and limited facilities of international organization. Insufficient attention seems to have been paid by legal scientists to improve upon the codification procedures and to evalute

the impact of codification treaties and the reasons behind a limited number of ratifications to these treaties. The uncertainties of the existing international legal order have given rise to the wish to replace those rules of international law, which lack clarity in content and are often of controversial validity, by a set of maximally clear and minimally controversial norms. The goal can be achieved by conclusion of codification treaties aiming at universal application, provided serious attention is given to improvement in codification procedures so that at least in essentially crucial areas of international legal order agreed solutions of the great problems are sought on the basis of consensus as a mode of law-making.

The International Law Commission (ILC) is engaged, since its establishment, in a very arduous task of formulating and developing norms of an universal legal order in a society which lacks intensive integration socially, culturally, ideologically or otherwise. Universal public order can formulate values acceptable to all the mankind only if they are derived from sources accepted by universal public opinion. President Abraham Lincolon had rightly said that he who moulded public sentiments went deeper than he who enacted statutes or pronounced decisions. Considering the heterogenity of the present-day international community with its diverse religious, social, economic, cultures and legal systems and its political and ideological divisions, the rules of contemporary international law require to be drawn from a wider range of sources than ever before. It is the identification of international law with national policy which militates against the speedy development of universal international law. The dynamic ingenuity of private groups of social and legal scientists, who are aware of mankind as a whole and are prepared to collaborate with experts in all international disciplines, may relieve the ILC of considerable labour involved in the extensive preparatory work and drawing up of preliminary draft codes. Development of new principles and rules, exposition of analysis and criticism of the existing legal norms and modification of and additions to age-old rules necessitated by the conditions of age involve a herculean task for any single body like the ILC even with all the backing of the resources of the U. N. O. Any quest for an efficient legal system, whether it be national or international, must transcend the interests of the individual or the state, as the case may be, in order to accommodate the general or universal interest. This calls for study by legal science of what Julius Stone compendiously named "sociological substratum" of law i. e. those factors of social and political life and enviornment which determine stability and change in the form and contents of law or the relations between the law and the social, political, economic and psychological

facts as are relevant to an understanding of its origins and stability, change and breakdown in its development.[33] It also calls for extensive scientific investigation and research and an all-round comparative study of different legal systems in order to identify and bring out the universal elements in the experience of administering justice. Parallel efforts of scientific investigation in all the main regions and comparative and sociological enquiries concerning international law can indeed bear rich fruits. Learned societies and scientific institutions at national as well as international levels can play an important role in the development of appropriate public opinion and in the formulation of values and principles acceptable to all mankind. The question arises of methods and approaches to be used for deriving such "general" principles of law as are recognized in substance by all the main systems of law and correspond with the needs and the basic concept of interdependence of diverse communities and interaction of different legal systems in contemporary life.

IV. New Approaches to the Study of International Law and the Role of Legal Science :

Until the middle of the 19th Century, the natural law, under variety of disguises and shapes, had remained ascendant as the final hypothesis of legal truth as it was thought to consist of universal principles adaptable for all times to every system of law. But as the 19th Century ended and the 20th began, the dominant doctrine was positivism. Until the second world war, the approaches associated with legal positivism denied the relevance to law of any norm superior to those willed by the state. The positivist school of international law substituted for the vague suggestions of a deformed natural law the rules evolved from agreements between states and resorted to very rigid analysis of the regulation of state-conduct by invoking supposedly fixed and unambiguous rules of restraint. It evinced inadequate appreciation of the social and political difficulties of transforming agreed legal rules into effective behavioural norms. The legalistic and moralistic approaches failed to understand the limited effect of rules of restraint, embodied in the League Covenant and the Kellogg-Briand Pact, upon the behaviour of nation states. They froze the international law of their times in positions which were ill-adapted to the profound changes and demands of international life and placed a large premium on stability at the cost of aspirations of change. During the inter-war period, the sociological positivism of Leon Duguit and Hans Kelsen's "Pure Science of law" rejected voluntarist positivism. But whilst the former's objec-

33. See his Problems Confronting Sociological Enquiries Concerning International Law, *Hague Recueil*, 1956, Vol. 1, p. 65.

tive realism was unconsciously associated with the idea of purpose the latter's neo-positivism accepted total separation between the world of facts and the world of norms and stripped law of the teleological direction. In fact, the pure theory of law in the words of Professor Visscher, manifested "a certain contemporary tendency to limit arbitrarily, on pretext of science or unity of method, the subject matter of law, narrowing or distorting legal reality".[34] Kelsen's purely formal image of the legal order led him to an unreal identification of state with norms which was dangerous for his objectivist view of law.

Perhaps there is no other branch of law that exposes itself less easily than international law to be reduced to a system of the mere imperatives of abstract logic. It is propensity to formal generalization by abstract concepts or temptation for sterile formalism, where logic alone animates the systematized relations between abstract norms and which has prevented legal science from making its contribution to world order that is expected of it. Also, legal science has been historically devoted primarily and almost exclusively to the study of law of municipal societies with the result that it has tended to be mainly national in outlook by identifying law with the state law in terms of the historical incidents of its creation or the assembled facts of its legal evolution. The traditional notion of sovereignty has been incompatible with a true international legal order with the result that the theory of international law has been oscillating between an individualist conception of the state and a universalist conception of humanity, between the subjectivism of state primacy and the objectivism of the primacy of the world order.

Ideology of national sovereignty as forged by centuries of history has become part of politics as well as law. Since the violent connotations of the present century shattered the stability of international relations of the 19th Century and revealed a yawning gap between the formal completeness of law and the needs of a society in full transformation, leading international lawyers in the period following the Second World War have emphasized the need of examining the role of law in the overall setting of international politics. Myres McDougal, C. Wilfred Jenks, Julius Stone, Wolfgang Friedmann, Mortan Kaplan, Charles De Visscher, P. E. Corbett, Eric Stein and Quincy Wright are some of the most well-known scholars who have paid attention to the definition of realistic goals for international law in the light of the decentralized character of international society and have brought study

34. Charles De Visscher, *Theory and Reality in Public International Law*, 1957, p. 65.

of international law into ever closer association with the outlook, method and concerns of the social scientist. Such an approach required shifting of the focus of inquiry from a mechanical search in international society for functional equivalents of legislature, court and executive to a systematic examination of the attitudes, activities and behaviour of national, regional and international actors and legal institutions of the world society in the institutional context. Growing sensitivity of contemporary scholars to the need of adapting the framework of enquiry, which takes account of the present-day structure of the world society and encompasses the role and behaviour of nation states as well as other entities having transnational implications, has resulted during last few decades in development of more sophisticated methodologies. Professor Richard A Falk[35] has presented an excellent survey of the following four main methodological orientations used in the study of law and which are not mutually exclusive :

(i) Tho functionalist approach is only a jurisprudential orientation with its own style of inquiry with a view to bringing the nations together in practical tasks of mutual interest and benefit. Its known spokesmen are Wolfgang Friedmann, Julius Stone, C. Wilfred Jenks, and Percy Corbett. Functionalism attempts to improve upon the traditional positivist rule-oriented approach by corelating the development and study of international law with the satisfaction of certain social functions in the international system. Distinguishing between interests perceived by national states as vital or as non-vital, the functionalists favour inventive capacity of legal technique to fashion solutions for social problems without in any way appearing to challenge prerogatives of sovereign states. They concentrate on the role of law at the margins of international conflict in respect of those activities not regarded by national governments as politically significant.[36]

(ii) The policy science approach, associated with the works of Myres S. McDougel, Harold D. Lasswell and other distinguished collaborators, seeks to conduct inquiry in terms both of factual events in community process and of the decision maker by taking account of all the variables including the factors bearing upon common interest and arising from what has happened in the past, what is expected of the present and what is desired in the future. The basic focus of attention for legal inquiry in this approach is the national decision-maker (rather than the

35. Richard A. Falk, New Approaches to the Study of International Law : *AJIL* Vol. 61 1967, pp. 489-495.

36. Wolfgang Friedmann, *An Introduction to World Politics*, 1965, p. 57, Ernest Hams, *Beyond the Nation State*, 1964, Other representatives of this school are Percy Corbett, C. Wilfred Jenks, Julius Stone.

central institutions of international affairs) who participates in the claiming process on behalf of the national system. Its value lies in efforts to restate major portions of the substance of International Law, and to promote the fulfilment of social values specified in terms of human dignity together with the realism reflecting the genuine shared demands and expectations of people.[37]

(iii) The systems approach to international law is represented by Mortan Kaplan, Nicholas de B. Katzenbach, Stanley Hoffman and others like Saul Mendlovitiz and Richard A. Falk, who have vindicated the use of systems theory as the basis for the study of international law.[38] It stresses the relevance of political factors in the operation of law in world affairs and the usefulness of investigating the extent to which the character and role of international law are conditioned by the character of international system. Whilst one trend of analytic mode (Kaplan approach) permits greater freedom of enquiry and is future-oriented and calls upon international lawyers to engineer and posit a new international legal order that fulfills the values of human dignity, another trend of historico-sociological mode (Hoffman) is responsive to the conceptualization of the main systematic alternatives derived by Kaplan. Yet another model lays stress on transition from the present international system to another posited as a preferred future by assessing the prospects for and the obstacles to and the limits of political attainability of a better international legal order.[39]

(iv) Phenomenological perspectives of the international legal order provide an emerging approach which is not so well-established as the other three and which stresses upon intensive depth analysis of single 'cases' with a view both to clarifyin g the particular set of issues involved in a dispute and illuminating the general structure of the legal order.[40] The case studies pertaining to concrete phenomena of legal experience, such as civil wars in the contemporary world, or fundamental legal controversies involved in *Sabbatino, Shimoda* or *South West Africa cases*, or

37. McDougal, Lasswell and Reismann The World Constitutive Process of Authoritative Decision, in *The Future of the International Legal Order*, ed (C E Black and Falk), 1967.

38. Kaplan, *System and Process in International Polities*, 1958; Kaplan and Katzenbach, *The Political Foundations of International Law*, 1961; Hoffmann International Systems and International Law in Klaus Knorr and Sidney Verba (eds), *The International System*, 1961.

39. Richard A. Falk, *The Future of the International Legal Order*, 1967, Idem, The Strategy of World Order, 4 Vols.

40. Q. Lauer, *Phenomenology : Its Genesis and Prospect*, 1958, A. T. Tyieniecha, *Phenamenology and Science in Contemporary European Thought*, 1962; E. Husseri, *Ideas : Generol Introduction to Pure Phenomenology*, Eng. trans., 1962.

a prolonged debate in the Security Council on matters like *apartheid*, or the scope of domestic jurisdiction, or the peacekeeping operations, or protection of human rights, provide phenomenological basis for an international lawyer for the development of a general theory from a phenomenological perspective which on the basis of the concrete phenomena of legal experience discovers the general attributes of the legal system for the evolution of legal doctrine. The phenomenological approach combines concrete analysis of legal problem in a line of cases with the formulation of legal doctrine about the relationship between international law and international behaviour.[41]

These newer methodologies available for the study of international law are significant in according attention to the social and political setting of law and in taking cognizance of the bearing of the interests, goals and values of the participants in international society upon the character and nature of international law and its prospects of development. They mark a departure from strict adherence to the precepts of legal positivism and consequent distance between the "is" of international politics and the "ought" of international law. These approaches are seeking to move legal research techniques beyond impressionism of earlier approaches and tend to acquire a scientific character to the extent they adopt a systematic framework of inquiry and formulate their propositions based on generalizations about the relation of law and behaviour which are subject to validation and refutation.

Any progressive development of international law indeed entails : an extensive and systematic scientific investigation; collection of required contextual data; co-ordinated efforts at all levels—official as well as unofficial, national, regional and international, individual as well as collegiate—by lawyers as well as social scientists within a suitable framework of inquiry for accurate exposition of existing laws, examination of the law-creating potential of international crises and conflicts in their historical and sociological background; and orientation towards the future for positing of possible future international systems which fulfill the values of human dignity and unity of mankind. This kind of compendious work justifies establishment of a well-endowed centre of international studies capable of identifying and bringing out the universal element in experience of administering justice which will be usable for

41. Richard A. Falk, The Shimoda Case : A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki, *AJIL*, 1965 Vol. 59, pp. 759-793; *Idem, The Role of Domestic Courts in the International Legal Order*. 1964; James N. Rosenau (ed), *International Aspects of Civil Strife*, 1964; Erik Castren, *Civil War*, 1966; Linda B. Miller, *World Older and Local Disorder : The United Nations and International Conflicts*, 1967. R. P. Dhokalia, *New Norm-creating Potentialities of Bangla Desh Tragedy in the area of the Right of self determination*, in Essays on Human Rights in India, (ed), Dhokalia, 1978, pp. 159-185.

world justice. Also, it is apparent that this kind of task is beyond the resources of individual scholars or even groups of people interested in particular problems. Well-equipped scitentific institutions and learned societies, like the International Law Association, or the Institute of Law and other bodies like the recently establishmed International Centre of Legal Science are alone capable of institutionalizing international dialogue and cooperation for fruitful development of a universal legal order which can cope with the problems that now lie beyond the reach of established doctrines. They can indeed render valuable services if they undertake : (1) a careful survey of the points of stress within the body of the rules of traditional international law in order to expose the concealed contradictions, gaps, evasions, and ambiguities revealed by the facts of contemporary international life; (ii) an intensive study of behaviour and attitudes of states in respect of segment of rules affected by impending or actual change or breakdown; (iii) an extensive study of state behaviour in relation to functional international agencies which may contribute to our understanding of the limitations within which adjustment of national policies can take place in order to conform to international public policies; (iv) an objective and comprehensive study of particular controversial segments of international law in the whole complex of social realities or their social, political and economic context, and (v) analysis of the law-making and codification process and the potentiality and fertileness of the sources of the international community, in particular general principles of law universally recognized and deduced from diverse systems of the world.

The central concern of legal science today should be neither merely a live interest in the philosophy of law, which is traditional study of lawyers and of scholars of jurisprudence, nor the interest of more practical sort in policy formation, but should be compendious enough to acquire proper understanding of international legal system, as it operates in particular cultural or societal contexts, and of contemporary problems of legal pluralism. Perhaps better results may be forth-coming if studies are based on extensive field work and on data and knowledge of the cross cultural materials on law; if the goals of legal studies are scientific, rather than philosophical; and if the doctrines or theories are derived from emperical research. Legal science is empirical and so theories which are postulated should be supported by all relevant facts available and presented systematically as ideas that can be ultimately proved by empirical methods. In order that Legal Science contributes to the emergence of a universal legal order, it should liberate the concept of law from ethnocentric bias by conceiving human culture as an interrelated whole. If law is studied as an integral part of the human

culture and society is not viewed as a static social equilibrium, which is disturbed by delicts, but is conceived as a dynamic phenomenon so that the social role of law is not limited solely to maintaining the *status quo*, then a systematic theory of universality of law in human societies or law as central concept in any kind of society will emerge. Also, as the present-day world is faced with new economic problems of peculiar difficulty and urgency, it is imperative that progressive steps are taken in the development of humanitarian thought in law based on economics and sociology. Law should embody not only rationalization of competing expectations but should provide for practical compromises between the competing ideals of what ought to be and the possibilities of the situation as determined by given equilibria of vital social and economic forces. In the rapidly changing present century, faced by disorders, revolutions, wide-spread violence in words and deeds, civil wars, and threats of total war, "the only hope is for horror to become conscious" so that it can be "transmuted into active concern",[42] the task of legal science is to contribute what knowledge is within mankind's reach in order to enable it to shape its future to the heart's content.

Perhaps, establishment of an International Centre of Legal Science at the Hague may be most welcome in the light of detailed statement of Director Mahmoud which clarifies the guiding principles, tasks, means, action programme and organization for the promotion of legal science and legal education throughout the world. It takes full cognizance of the progress of social sciences and stresses the multidisciplinary approach in the study of legal phenomena. As an academic focal point of legal and social concerted sciences for combining the methodologies and findings of the different schools, such a centre can indeed make serious and concerted efforts to overcome the handicaps in promoting the progressive tendencies of the study of law so as to level it to the standards of a "science."

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42. K. Jaspers, *The Origin and Goal of History* (Trans, Bullock) 1953, p. 149.

DISMISSAL AND REMOVAL OF A CIVIL SERVANT ON PROBATION*

MANIK CHANDRA SINHA†

Introduction

(I)n modern democratic State the efficiency and incorruptibility of public administration is of such importance that it is essential to afford to civil servants adequate protection against capricious action from their superior authority. If a permanent civil servant is guilty of misconduct, he should no doubt be proceeded against promptly under the relevant disciplinary rules, subject of course, to the safeguard prescribed by Art. 311 (2); but in regard to honest, straight-forward and efficient permanent civil servants, it is of utmost importance even from the point of view of the State that they should enjoy a sense of security which alone can make them independent and truely efficient.[1]

It is a common belief that the employment in the government provides maximum security of tenure in comparison to the private sector, However, a student who has gone through the cases related to civil servants begins to doubt the correctness of the above assumption. The Civil Servant may be in the better position only in the sense that he does not have to worry about the personal prejudices of a private employer, but so far as the protection against arbitrary termination of service is concerned, the position of the civil servant does not appear to be better than an employee working in the private sector.

Apart from the issue of confirmation the other basic issue which confronts a probationer is the extent of protection available to him against arbitrary dismissal, removal or reduction in rank during the period when he is not confirmed in his status irrespective of the fact whether or not the probationary period has expired The Constitutional protection

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1. Gajendragadkar C. J. in *Moti Ram Deka* v. *N. E. F. Railway*, A. I. R. 1964 S. C. 600 at 610-611.

available under Article 311 (2) of the Constitution[2] applies to the following four categories of the Civil Servants :

(1) A member of the civil service of the Union;

(2) A member of an all India service;

(3) A member of a civil service of a State; and

(4) A person who holds a civil post under the Union or a State.

However, every Civil Servant coming under the above four categories is not entitled to the protection of Article 311 of the Constitution. The availability of protection also depends upon the nature of the service and the nature of the reasons responsible for the action taken against the Civil Servant. So far as the nature of the service is concerned, the Civil, Servants can be grouped into the following categories :

(1) A Civil Servant holding a permanent post;

(2) A Civil Servant holding a quasi-permanent post;

(3) A Civil Servant officiating in a higher post;

(4) A Civil Servant who is a probationer; and

(5) A Civil Servant holding a temporary post.

Further, it is well established by the judicial decisions that a Civil Servant is entitled to protection of Article 311 only when the action is taken against him by way of punishment. In other words, the services of a Civil Servant can be terminated either by way of dismissal or removal or he can be reduced in rank without fulfilling the provisions of

2. Article 311 (2) of the Constitution runs as follows :
"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, while he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry;
Provided that this clause shall not apply—
(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a crininal charge; or
(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is statisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry."

Article 311 if the state can convince the court that the reason for the termination of service or reduction in rank does not amount to inflicting of punishment on the Civil Servant, as defined under the rules approved by the judicial decisions. Therefore, on the one hand decisions of the Supreme Court in *Parshottam Lal Dhingra* v. *Union of India*[3] and other cases have extended the application of Article 311 (2) by laying down that the protection of Article 311 (2) is available to every Civil Servant irrespective of the fact that he is holding a permanent or a temporary post or that he is merely a probationer, but on the other hand the application of Article 311 (2) has been restricted by laying down the principle that the action taken must amount to punishment.

So far as the position of a probationer is concerned, the applicability of the so-called punishment theory further restricts the availability of protection of Article 311 (2). It is well established by the decision of the Supreme Court in *State of Bihar* v. *Gopi Kishore Prasad*[4] that if the services of a probationer are terminated on any ground which may amount to punishment then he is entitled to the protection of Article 311 (2). However, the services of a probationer can also be terminated on the ground that his services have not been satisfactory during the period of probation. Therefore, there are two methods available to the government to punish the probationer, namely, by starting an enquiry against him and giving him all the protections available to him under the constitution and the civil service rules, or the government can simply say that during the probationary period the services of the Civil Servant have not been found to be satis actory, and, therefore, are no longer required. It may also be pointed out that for the same reason either of the two methods can be used by the government. But if the government uses the later method, the Civil Servant is likely to be deprived of the constitutional protection.

As we have stated earlier, the services of a probationer can be simply terminated during the period of probation without following the procedure prescribed under Article 311 (2). Because of this, the main issue which dominates the case law on the point is in what situations the termination of services of a probationer amounts to dismissal or removal and what are the situations when the termination of the service of a probationer technically does not come within the coverage of Article 311 (2). Like other categories of Civil Servants, the courts have applied the theory of punishment or the theory of stigma to the cases of probationers as well. The cause of the Civil Servants, particularly of

3. A. I. R. 1958 S. C. 36.
4. A. I. R. 1960 S. C. 689.

probationers, would not have been harmed if the terms like punishment or stigma would have been interpreted by the courts in the literal sense. However, the courts in India provided a technical meaning to these terms, and thus narrowed down the scope of protection available to the Civil Servants. Apart from giving technical meanings to the terms "dismissal", "removal" and "reduction in rank" the courts have further damaged the cause of the Civil Servants by taking the view that unless a full-fledged enquiry is held before the termination of service, it will not be considered that the termination amounts to punishment or that the termination casts a stigma upon the Civil Servant. An attempt has been made to show the extent of damage caused by the above stated judicial approach, and to prove that the judicial legislation in this field has neither promoted the cause of the Civil Servants nor benefited the government.

We shall show that under the Constitution and the civil-service laws, as interpreted and applied by the courts, the probationary Civil Servants are not adequately protected. We will feel satisfied if this work is able to provoke further discussion about the sad state of Civil Servants on probation which may lead to judicial re-thinking and may also encourage the law making bodies to make suitable changes in the civil-service laws so that the probationers may be adequately protected.

Scope of Protection :

Article 311 of the Indian Constitution provides two-fold protection to Civil Servants, namely, that a Civil Servant should not be dismissed or removed by an authority subordinate to that by which he was appointed; and second, that he should not be dismissed or removed or reduced in rank without giving a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.[5] The aforesaid protections are available to Civil Servants irrespective of the fact whether they hold a permanent, quasi-permanent or a temporary post or they happen to be on probation against a substantive post.[6] However, in

5. "Article 311 is a reproduction of Section 240 of the Government of India Act, 1935, with slight changes and some necessary verbal alteration. Section 240 of the Government of India Act, 1935 was based in its turn on Section 96B of the Government of India Act, 1919 with an added protection in sub-section (1) of Section 240 aforesaid." CHAKRAVORTY—WRONGFUL DISMISSAL, 6 (1966 Ed.).
6. *See*, Generally, *P. L. Dhingra* v. *Union of India*, A. I. R. 1958 S. C. 36; *Jagdish Mitter* v. *Union of India*, A. I. R. 1964 S. C. 449; *State of Bihar* v. *Gopi Kishore Prasad*, A. I. R. 1960 S. C. 689.
Different High Courts were also of the same view before the Supreme Court gave its seal of approval. *See*, for example, *Jayanti Prasad* v. *State of U. P.*

varicus decisions the Supreme Court and the High Courts have taken the view that the provisions of Article 311 (2) are not applicable in all cases of termination of services. The protection of Article 311 (2) is available to only those Civil Servants who are dismissed or removed or reduced in rank by way of penalty or punishment.[7] In other words, if the action taken against a Civil Servant does not amount to punishment, he is not entitled to the protection given by Article 311 (2). Not only this qualification restricted the scope of protection available to Civil Servants, it also created the problem of finding out in every case whether the termination of service was by way of punishment or not. Since there was nothing in the constitution or in any act of Legislature to give any indication regarding the cases where the termination of service could be considered as a punishment, the courts naturally took the help of civil service regulations where the punishment has been defined and classified. Apart from the fact that under this situation a constitutional provision has to be applied in accordance with the rules and regulations framed by the administrative authorities, this situation also created the problem of uncertainty since the rules and regulations can be changed by the delegated authorities. In order to solve this problem, the Supreme Court in *Parshottam Lal Dhingra* v. *Union of India*[8] suggested two tests: (1) whether the Civil Servant had a right to the post or the rank; and (2) whether he has been visited with evil consequences as a result of the action taken. So far as the scope of the term "evil consequences" is concerned, the Supreme Court had already elobarated in *Shyamlal* v. *State of Uttar Pradesh*[9] that the action taken against the

A. I. R. 1951 Alld. 793; usn. *Gopi Kishore Prasad* v. *State of Bihar*, A. I. R. 1955 Pat. 371. *Punit Lal Saha* v. *State of Bihar*, A. I. R. 1957 Pat. 357; *Kishanlal Laxmi Prasad* v. *State of Madhya Bharat* A. I. R. 1956 M. B. 100. *Tribhuvan Nath Pandey* v. *Government of India*, A. I. R. 1953 Nag. 138; *P Venkateshwara Rao* v. *State of Madras*, A. I. R. 1954 Mad. 1043; *Appa Rao* v. *Dy. Inspector General of Police*, A. I. R. 1958 A. P. 209; *Dada Rao Tidke* v. *State of Madhya Pradesh*, A. I. R. 1958 Bom. 204; *Dr. K. R. Anand* v *State of U. P.*, A. I. R. 1958 Alld 844.

7. See, *Dhingra*, *supra* note 2
c. f. *Sukhbans Singh* v. *State of Punjab*, A. I. R. 1962 S. C. 1711; Chief Conservator of Forest v. D. A. Lyall, A I. R. 1961 All. 450.
"The probationer cannot insist that the appointing authority should hold an enquiry and give him an opportunity to controvert the grounds on which his services are intended to be terminated." In this case the services of the petitioner who was a Lecturer in Hindi on probation were terminated by the Vice-Chancellor. *Shivenarayan* v. *Vice-Chancellor, University of Sagar*, A. I. R. 1960 M. P. 2 8.

8. A. I. R. 1958 S. C. 36.

9. A. I. R. 1954 S. C. 369.
c. f. *M. V. Vichoray* v. *The State of Madhya Pradesh*, A. I. R. 1952 Nag. 288; *Kamta Charan Srivastava* v *Postmaster General Bihar*, A. I. R. 1955 Pat. 381.

Civil Servant must in the first instance cast a stigma on his capacity or conduct or character; and second, that Civil Servant must suffer the loss of the benefit already earned.

As mentioned above, a probationery Civil Servant is entitled to the constitutional protection given by Article 311 (2); however, his position is more precarious than a Civil Servant holding a permanent post, because, as noted above, the Supreme Court in *Parshottam Lal Dhingra* has laid down the condition that for getting the constitutional protection the Civil Servant must have a right to the post, since a probationer has no right to the post until he is confirmed, it is clear that the Government can terminate his services before the expiry of the period of probation. However, the courts have said that if the services of a probationer are terminated after charge-sheeting him and conducting an enquiry against him, then in that case it will be assumed that the action taken against him is by way of punishment and in such situation he is entitled to the constitutional protection. The reason is that when an enquiry is conducted and the Civil Servant is found guilty, then the stigma is cast on the competency and the character of the Civil Servant, which may effect his future career. Because of this, he becomes entitled to the protection of Article 311 (2) only when the action has been taken against him after an enquiry; otherwise, the simple termination of service without conducting an enquiry will not entitle him any protection. The real motive of the authority has not been considered a material fact by the courts.[10] The court is only concerned with the mode of termination of service rather than the reasons for termination of service. Without going in to the details at this stage, we would like to submit that this judicial approach has caused hardship to the Civil Servants since a clever dismissing authority can get rid of a Civil Servant and also avoid the necessity of fulfilling the constitutional obligation merely by changing the phraseology of the order dismissing or removing a Civil Servant.

It is difficult to formulate any definite principle on the basis of judicial decisions that in which situation a Civil Servant on probation will get the benefit of Article 311 (2) of the Constitution. The following discussion of case law will make the point clear. To begin with, we can discuss the case of *State of Bihar* v. *Gopi Kishore Prasad*.[11] In this case

10. Motive operating in the mind of the Government is not relevant-*Union of India* v. *R. S. Dhaba* (1969) 3 SCC 603, 606; *Champaklal* v. *Union of India* (1964) 5 SCR 190, 204; *Dalip Singh* v. *State of Punjab* (1961) 1 SCR 88, 95; *Jagdesh Mitter* v. *Union of India*, A. I. R. 1964 S. C. 449, 452-53; *Appar Apar Singh* v. *State of Punjab*, 1970 (3) S. C. C. 338.

11. *Supra* not 2; The Bench consisted of Sinha C. J. Gajendragadkar, Subba Rao, DasGupta and Shah JJ.

the service of the respondent, who was a probationary Sub-Deputy Collector, was discharged for unsatisfactory work, misconduct and for charge of corruption. An enquiry had been conducted against the respondent and the decision of the Government was based on the findings of the enquiry committee. The respondent had not been given any opportunity of showing cause against the discharge. The contention of the State of Bihar was that since the respondent was a probationary Civil Servant he was not entitled to the protection of Article 311 (2) of the Constitution. The Supreme Court, however, did not agree with the contention of the State Government. In view of the court, since an enquiry had been conducted against the respondent and the Government had come to the conclusion that the respondent was not suitable for holding the post, the action of the Government amounted to punishment, and therefore, the respondent was entitled to the protection of Article 311 (2) of the Constitution. However, the Supreme Court made it clear that if the State Government had simply terminated the services of the respondent without casting any reflection on his competency, integrity, conduct or character, then the termination of service could not have amounted to removal within the meaning of Arttcle 311 (2) of the Constitution and the respondent would not have been able to get any remedy from the court. The aforesaid observation of the Supreme Court supports the point made earlier that because of judicial decisions the availability of the constitutional protection depends upon the method adopted by the Government in terminating the services of a Civil Servant, in particular the language used in the letter of termination. A probationary Civil Servant has no protection in cases where the authority simply terminates the service without giving any reason or conducting any enquiry even though the action of authority may be highly arbitrary and ill-motivated. The point is worth consideration because in cases where the dismissing authority will be baised against the probationary Civil Servant, it will be expedient to terminate the services without giving any charge-sheet or conducting any enquiry as it will deprive the judiciary from reviewing the case and the probationary Civil Servant will have no judicial protection.

In *Jagdish Mitter* v. *Union of India*[12] the Supreme Court followed its decision in *Gopi Kishore Prasad* case. The appellant who was a probationary Civil Servant had been discharged as he was found "unsuitable to be retained in Government Service." Before his discharge an investigation had been conducted against him. The Supreme Court took the view that since the appellant had been discharged as a result of a departmental enquiry, the action amounted to punishment, and therefore, the appellant was entitled to the protection of Article 311 (2) of the Constitution. It may be noted, however, that in this case the Supreme Court has made a distinction between those cases of termlnation of service where the termination of service is directly related to the formal departmental enquiry and those cases where the termination of service is not the direct result of departmental enquiry. According to the Court, while in the former case the constitutional protection is available to a Civil Servant, in the later case it may not be so available. In our view, the decision of the Supreme Court is correct but the reasoning adopted by the Court may create various problems in implementing the decision. First of all, as Professor P. K. Tripathi[13] has pointed out it will be very difficult to determine whether or not the discharge of the Civil Servant was a direct result of the enquiry conducted against him. The result will be that in each case the courts will draw their own conclusions on the basis of facts and no fixed principle can emerge. The problem will be more acute in cases where after a departmental enquiry has been set up and charges framed but before the enquiry could conclude the competent authority abandons the formal enquiry. In such cases it will be impossible to determine that the discharge was directly connected with investigation. It is quite possible that the action of the competent authority may be motivated because of his assessment that the charges may not be proved in the enquiry, and therefore, it will be expedient to take the action without concluding the enquiry.[14] It may be submitted

12. *Supra* note 2. In the instant case a complaint was received against the appellant who was a probationery Civil Servant and consequently after investigation into the said compliant the Director of Postal Services terminated his services on the ground of unsuitability. The relevant portion of the order reads as under :—

> Shri Jagdish Mitter, a temporary 2nd Division Clerk of this office having been *found undesirable to be retained in Government Service* (emphasis added) is hereby served with a month's notice of discharge with effect from November 1, 1949.

13. "How is the Court or any one else to determine whether, after the formal departmental inquiry, the order of termination is a 'direct result' of the inquiry or not ? The learned judge indicates no test. In fact, the illustration the learned judge gives following the enunciation of the 'direct result' test, appears to be inadequate in as much as it contemplates a case where a formal inquiry is initiated but is abondoned before findings are reached. Obviously, in such a case it will be difficult to visit that the order of termination following the abondoned inquiry was a 'direct result' of such Inquiry" Tripathi, P. K.—*Spotlights on Constitutional Interpretation* (1972), p. 31.

14. *See*, for example, *A. G. Benjamin* v. *Union of India*, (1967) I L. L. J. 718; In this case Benjamin was working in the Central Tractor Organization and was a temporary employee. On receiving a complaint against him, the Chairman of the Organization started disciplinary proceedings against him, where an Enquiry Officer was appointed, charge sheet was served, but before the completion of the whole proceeding the chairman asked to terminate his services without disciplinary proceedings because he felt that

that the decision of the Supreme Court proceeds on the assumption that if the Civil Servant is removed from the service after an enquiry, there a stigma is cast upon his efficiency, conduct and character, but if he is discharged without conducting an enquiry, then he does not suffer from any stigma. However, every termination of service casts a stigma on the Civil Servant, as it effects the chances of his future employment. It is obvious that the services of Civil Servant will not be terminated unless there is some deficiency regarding his performance of his conduct. In fact, it would have been better if the Supreme Court had held that the Civil Servant will be entitled to the protection of Article 311 (2) of the Constitution whenever his services are terminated on the ground of unsuitability. It makes no difference whether a formal enquiry is held or not to determine his unsuitability and his unfitness to remain in the Government service. Since the decision in *Jagdish Mitter* was delivered by Mr. Justice Gajendragadkar (as he then was) it was expected that the Supreme Court will lay down principles clearly which will protect the probationary Civil Servant against arbitrary actions of administrative authorties.[15] There is one more aspect of this case which requires consideration. Though Justice Gajendragadkar rightly emphasized that the courts should not take into consideration the form of the termination order but should consider the substance of the matter responsible for the termination of the service,[16] however, at the same time he departed from the principle when he said that there is a difference in saying that it is *undesirable to continue* a Civil Servant in service and in saying that it is *unnecessary to continue* a Civil Servant in service. Unless the learned justice was using the word "unnecessary" in the sense that the post which the Civil Servant is occupying has become superfluous, the distinction in reality may not reflect the true situation. If it becomes

the departmental proceedings would take long time and was not sure that the charges might be proved. He was terminated under rule 5 of the Central Civil Service (Temporary Service) Rules, 1949. The Supreme Court upheld the termination order.

15. *See, Supra* note 9

16. On the point that :—The use of the expression "terminate" or "discharge" is not conclsive.

"... form of the order is inconclusive, it is the substance of the matter which determines the character of the termination of service. In dealing with this aspect of the matter, we must bear in mind that the real character of the termination of service must be determined by reference to the material facts that existed prior to the order "*Jagdish Mitter* v. *Union of India* AIR 1964 Sc. 449 at 451

The Supreme Court has reiterated the same view in these cases : *S. E. Tiwari* v. *District Board, Agra*, AIR 1964 SC. 1680; *State of Bihar* v. *Sheva Bhikshu Misra* AIR 1971 S. C. 1011.

unnecessary to retain a Civil Servant in service because of his personal deficiencies, then it is as good as saying that it is not desirable to retain in service. If the action is taken against a civil servant for his personal shortcomings then the use of the word "*unnecessary*" will simply deprive the Civil Servant from getting the constitutional protection. It is also not correct to say that no stigma is attached when the service is terminated on the ground that it becomes unnecessary to continue the Civil Servant in service. In fact, the theory of stigma has been developed by the courts to mean that termination of service will not affect the future employment potentialities of Civil Servant. But realistically speaking any future employer will be interested in knowing the reason why it became unnecessary to retain the person in service. If such an enquiry affects the future employment of the person then the theory of stigma is deprived of its utility and effectiveness.

It may be mentioned that the Supreme Court in *Gopi Kishore Prasad* and *Jagdish Mitter* adopted the same view which the Nagpur High Court had taken earlier in *Tribhuwan Nath Pandey v. Government of India.*[17] In this case also the services of the appellant had been discharged because his work was not found to be satisfactory. Relying on the Explanation 2 to Rule 49, Part I Serial No. 13 of the Government Book Circulars where it was provided that the discharge of a probationer on the ground of some specific fault or because of his unsuitability for the service amounts to removal or dismissal, the court held that the

17. A. I. R. 1963 Nagpur 138 : The applicant, in this case, was a Diwan in the erstwhile Udaipur State. After the integration of the State with the Union of India, the applicant Tribhuvan Nath Pandey was absorbed as an Extra Assistant Commissioner in Madhya Pradesh. He was placed on probation though he was a confirmed Civil Servant of the erstwhile Udaipur State and his period of probation was extended from time to time He was placed under suspension and eventually discharged by an order dated January 1, 1952 as the Governor did not find his work to be 'Satisfactory". The relevant portion of the Governor's order dated January 19, 1952 was as follows: "As your work during the period of your probation was not found *satisfactory* (emphasis added) you were asked to show cause why your services should not be terminated. After taking into consideration your reply and the advise of the Public Service Commission, Government have decided to terminate your service..."

In the charge-sheet the Government asked the applicant to submit his explanation, One of the charges being that his work was unsatisfactory. The extract of the charge-sheet run as follows :—

"It appears to Government that you are *Unsuitable* (emphasis added) for being retained in service for the following reasons :

(i) That your work during the period of your probation is found to be *unsatisfactory*", (emphasis added).

petitioner was entitled to the protection of Article 311 (2). The importance of the decision in this case lies in the fact that the court emphatically said that whenever the services of a probationer are discharged on the ground of unsuitability for service, he is entitled to the protection of Article 311 (2) of the Constitution.[18]

The question whether the termination of service of a probationery Civil Servant on the ground of medical unfitness, amounts to dismissal or removal within the meaning of Article 311 (2) came up before the Allahabad High Court in *Dr. Kanshi Ram Anand v. State of Uttar Pradesh.*[19] Dr. Anand was appointed on probation of two years with effect from June 20, 1949 as Medical Officer in the U. P. Health Depart-

18. The case of *Tribhuwan Nath Pandey* also involved a very interesting issue, namely, the nature of show cause notice issued to the Civil Servant In this case the petitioner had been informed that his services were not satisfactory and he was asked to explain. The question arose whether the petitioner has been sufficiently informed about the nature of the charge against him as it is well established that if the Civil Servant is not given sufficient information about the nature of the charge, then it will be assumed the reasonable opportunity was not given to him to explain his case. Because if the charge is vague and cannot provide to the Civil Servant concerned any idea about his defects or shortcomings for which he was being charged, then he will not be in a position to submit satisfactory explanation. In this case the Court said that merely telling the petitioner that his services were unsatisfactory, he was not given any idea about the complaint against him.

In this connection we may also refer the case of *Naresh Chandra Gangopadhyaya* v. *Director of Fisheries, Government of West Bengal* (A I R. 1959 Cal 100) where the Director of Fisheries, who had complained against the petitioner, had called the petitioner to explain his case, and no formal enquiry committee or enquiry officer was appointed to conduct the enquiry. The court held that the proceedings were illegal and the enquiry was not conducted as envisaged under article 311 (2) of the Constitution.

The question of fairness of enquiry also arose in *Dr. (Miss) Jyotirmoyee Sarma* V. *Union of India* A. I. R. 1962 Cal. 349. The petitioner in this case, who was a probationery Anthropologist, was discharged in 1952 after an enquiry had been conducted by the Director of the department. The petitioner had demanded before the enquiry was conducted that the Director should not be asked to conduct the enquiry as he was interested in getting rid of the petitioner, so that his wife might be appointed to the post held by the petitioner. The Government, however, did not pay any attention to this demand, but the Court held that the enquiry should not have been conducted by the Director when a serious charge had been made against him.

19. A. I. R. 1956 All. 330.

ment against a permanent post.[20] He was examined by a Medical Board in 1949 and was found fit. But surprisingly, he was again called for medical examination in 1950 and was declared fit by the Medical Board; but it appears that the Government was not satisfied, so he was again asked to appear on Feb. 9 1954 for medical examination and was again declared fit. Within a month he was again asked to appear for medical examination before the State Medical Board and this time he was found unfit because of impediment of speech, and therefore, he was discharged from service. Naturally he was not given the opportunity of hearing as envisaged under Article 311 (2) of the Constitution. The contention of the State Government was that it was a case of simple discharge under the service rules. However, the Single Bench of the Allahabad High Court held that Dr. Anand's discharge on the gound of physical incapacity amounted to dismissal under Article 311 (2). Later, the Division Bench[21] of the same High Court upheld the decision of the Single Bench. It is interesting to mention that the petitioner suffered from the defect of stammering even at the time of his appointment and the Goverment had full knowledge about this defect,[22] and one of the members of the Medical Board was of the opinion that the defect of stammering in no way affected the efficient discharge of his functions. Therefore, it was necessary to provide him the protection of Article 311 so that he may be able to explain that the discharge of his service on the ground of stammering was neither proper nor necessary.

The discussion in the foregoing pages indicates that when the services of a probationery Civil Servant are terminated on the basis of unsatisfactory work, the courts have held that the Civil Servant is entitled to the protection of Article 311 (2) as the termination of service amounts to removal or dismissal within the meaning of Article 311 (2).

20. Relevant portion of appointment letter ran as follows :

"The post on which you have been appointed is permanent and pensionable and you will be confirmed on it in due course provided your work is satisfactory".

21. A. I. R. 1958 All. 844.

22. Chief Justice Mootham observed that a physical defect such as stammering did not come into existence after the entry of the applicant in the Government service, he was a victim of stammering since birth and Government knew about this defect when he entered into the Governmet service because he was examined medically several times. The court observed :

"In fact it seems that he has been removed for a defect which he had when he was engaged and for which, if it impairing his efficiency his services could have been dispensed with during the probationary period." *Supra*, note 17 at 546.

The same view was also adopted by the Calcutta High Court in *Union of India* v. *Someshwar Banerjee* A. I. R. 1954 Cal. 399.

However, in some cases the courts have departed from the principle laid down in cases mentioned earlier in this chapter. For the purposes of illustration, we will discuss the case of *State of Orissa v. Ram Narayan Das.*[23] The respondent, who was a probationary Sub-Inspector, was discharged from service as several adverse reports had been received against him.[24] A show cause notice was also served on him, and in this notice ten specific instances of neglect of duty and two instances of misconduct were mentioned. The charges against him were quite serious in nature as they concerned the neglect of duty, misconduct, acceptance of illegal gratification and fabrication of official records. The Deputy Inspector General of Police, after considering his explanation discharged him on the grounds of gross neglect of duties and unsatisfactory work. The respondent was neither given the protection under Article 311 of the Constitution nor the procedure laid down in rule 55B of Civil Service (Classification, Control and Appeals) Rules"[5] was followed. It should be noted that a probationer under the provisions of rule 55B is entitled to an opportunity to rebut the charges levelled against him. The High Court of Orissa quashed the order of discharge on the ground that neither the provision of Article 311 (2) nor the provision of rule 55B were followed. The High Court also came to the conclusion that an indelible stigma had been cast upon the respondent affecting his future career. The decision of the High Court, in our view, was correct and it was in line with the decisions in *Gopi Kishore Prasad* and *Jagdish Mitter*, but surprisingly the Supreme Court in this case did not agree with the decision of the Orissa High Court. The Supreme Court made a distinction between an order dismissing a probationer from service and an order terminating the employment of a probationer. The Supreme Court in this case took the view that the enquiry in this case was conducted to determine whether the probationery Civil Servant be confirmed in the service or not, and the enquiry was not conducted to remove him or dismiss him from the service within the meaning of Article 311 (2) of the Constitution. In other

23. A. I. R. 1961 S. C. 177.

24. The portion of the order of termination ran as follows :—

"Probationary S. I. Ramanarayan Das of Cuttuck District is discharged from service *for unsatisfactory work and conduct* (emphasis added) with effect from the date the order is served on him."

25. r. 55B of the *Civil Service (Classification, Control and Appeal)* Rules :—

"Where it is proposed to terminate the employment of a probationer, whether during or at the end of the probation, for any specific fault or on account of his *unsuitability* (emphasis added) for the service, the probationer shall be appraised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment."

words, the Supreme Court said that where the enquiry is conducted to determine the suitability of a probationer for confirming him in the service the provisions of Article 311 do not apply. The decision in this case can be compared with the decision of the Supreme Court in *Jagdish Mitter* where the court has drawn the distinction between a discharge which was directly the result of a departmental enquiry and a discharge which was not the direct result of enquiry. In this case the Supreme Court has said that on the same facts and on the same issues the Government can either conduct an enquiry to determine whether or not the probationer should be confirmed or the enquiry may lead to dismissal or removal from service. While in the former proceedings the probationer is not entitled to the protection of Article 311, he will be so entitled in the later proceedings.[26] It may be submitted that the decision of the Supreme Court in *Ram Narayan Das* basically suffers from the same defect which we have pointed in connection with the decision of the Supreme Court in *Jagdish Mitter.* In that connection we pointed out that it would be very difficult to determine whether or not the termination of service was a direct result of the departmental enquiry. In this case also who will decide whether the enquiry was conducted for determining the issue of confirmation or whether the enquiry was conducted to dismiss or remove the probationer from service as a punishment. Further, it may also be considered that so far as the probationery Civil Servant is concerned he is similarly affected in both the cases and as far as he is concerned it makes no difference whether the object of enquiry was simply not to confirm him or to remove him from service. Once the enquiry is conducted against a Civil Servant, and he is found guilty, then in our view the Civil Servant is bound to suffer from stigma and the distinction drawn by the Supreme Court will become superficial and meaningless. Further, if the dismissing authority is given power to determine the object of enquiry and that determination becomes conclusive, then the possibility of misuse of power will be immense and the Civil Servent will be virtually deprived of every protection, against arbitrary authority.

It may also be pointed out that in *Gopi Kishore Prasad* the Supreme Court had emphatically laid down that the probationary Civil Servant is entitled to the protection of Article 311 (2) whenever his discharge

26. In this connection we may refer the decision of the Calcutta High Court in *Purnanand Patra* v. *Collector of Central Excise*, AIR 1960 Cal. 314, where the High Court has held that if a probationer is discharged simply under the service rules and according to the terms of appointment, he will not be entitled to the protection of Article 311, but if the Government decides to remove the probationer from service as a punishment then the provisions of Article 311 will be attracted.

follows an enquiry against him.[27] In our view, the Supreme Court in *Gopi Kishore Prasad* was not contemplating any distinction between an enquiry held for determining the issue of confirmation and an enquiry held to dismiss or remove the Civil Servant. As we have mentioned earlier, any such distinction would only adversely affect the interest of the probationary Civil Servant and would not achieve any beneficial purpose. At this point we will like to draw attention to a decision of the Supreme Court in *Binary Kumar* v. *State of Bihar*.[28] In this case the services of a probationer were terminated. Subsequently, the probationer applied for service in some other department and that department asked from the former department about the petitioner. The former department communicated that the petitioner was unsuitable for service. In this case the petitioner claimed that such communication by the former employer cast a stigma upon him. The Court, however, held that provisions of Article 311 were not attracted. If we consider this case in the light of the decision in *Ram Narayana Das*, the Civil Servant can be severely affected if the result of an enquiry conducted for the issue of confirmation is communicated to the future employers. On the one hand the Civil Servant could be deprived of his constitutional protection and on the other hand he could be as severely affected as if the enquiry had been held for dismissing him from service, wherein he would have been entitled to the constitutional protection. In other words, the communication of findings of a confirmatory proceedings will affect the probationary Civil Servant in the same manner as if he would have been dismissed from the service without giving him the protection of Article 311 of the Constitution or rule of 55B of the Civil Service (Classification, Control and Appeal) Rules.

It may be argued that the competent authority will not be so vindictive as to spoil the future career of the probationary civil servant. But such assumption shall be far from the reality. Even though such cases may be rare, but it cannot be denied that sometimes higher administrative authorities do behave in a vindictive manner. In this connection, just to provide an illustration, we may refer to decision of the Supreme

27. One of the principles laid down in *Gopi Kisore Prasad* was as follows :—

"3 But, if instead of terminating such a persons' service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency or for some similar reason, the termination of service is by way of punishment; because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Article 311 of the Constitution" A.I.R. 1960 S. C. 689 at 691.

28. Civil Appeal No. 1268/1967 decided on 4.4. 1971 by the Supreme Court, Cited in NAIR, N.N.—*The Civil Servant under the Law and the Constitution* (1973), p. 156.

Court in *Dr. T. C. M. Pillai* v. *Indian Institute of Technology, Madras*.[29] In this case Dr. Pillai, who was workiug as an Assistant Professor on probation, could not be confirmed as he developed strained relations with the Director of the Institute. The Director become so vindictive that not only he did not forward the application of Dr. Pillai to other institutions, but applied adverse report whenever any prospective employer confidentially enquired about Dr. Pillai with the result that Dr. Pillai had to leave India for good. The Supreme Court could not do anything except to express its hope that such attitude is not adopted by higher authorities. This case makes it evidently clear that depending upon the nature of relationship the findings of confirmatory proceeding where the probationer has not been given reasonable opportunity to defend himself, can be communicated to prospective employers and adversely affect the chances of future employment. Thus the distinction drawn by the Supreme Court in *Ram Narayan Das* regarding the object of enquiry can cause hardship to the probationary Civil Servant in violation of the fundamental principle of natural justice. In our view, the decision of the Supreme Court requires serious consideration.

The recent decision of the Supreme Court in *Hari Singh Mann.* v. *State of Punjab*[30] drastically narrows down the scope of protection available to a probationer against improper or arbitrary termination of service. The petitioner, who was a probationary Deputy Superintendent of Police, was discharged without giving him the constitutional protection of Article 311 on the ground that he was "unfit for appointment" to the State Police Service.[31] It may be pointed out that the Government in this case avoided the term "unsatisfactory service" so that the petitioner may not be given an opportunity to show cause either under Article 311 (2) of the Constitution or under rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules 1952,[32] which specifically

29. A. I. R. 1971 S. C. 1811.

30. A. I. R. 1974 S. C. 2263.

31. Order of termination reads as under :—

"The President of India is pleased to dispense with the service of Shri Hari Singh Mann, Probationary Deputy Superintendent of Police, Amritsar on the expiry of his extended period of probation with effect from 2,2, 1969 (A. N.) under R. 8(b) of the Punjab Police Service Rules, 1959 having *considered him unfit for appointment* to the State Police Service (Emphasis added)."

32. Rule 9 of the *Punjab Civil Service (Punishment and Appeal)* Rules, 1952.

"Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation for any specific fault or *on account of the unsatisfactory record* (emphasis added) or unfavourable reports implying the unsuitability for the service, the probationer shall be appraised of the grounds of such proposal, and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the appointment."

provided that when employment of a probationer is to terminate either for committing any specific fault or because of unsatisfactory record of service cr because of unfavourable reports received against him indicating his unsuitablity, then the probationer must be informed about the reasons and he must be given a reasonable opportunity to defend himself. Since the word "unflt" does not appear in rule 9, *supra*, most probably the Governmet used the term in discharge order[33] so as to avoid the applicability of the rule. The petitioner in this case had contended that the removal from service amounted to punishment and did cast a stigma, and therefore, he should have been given an opportunity to explain his case. Even though it is clear from the affidavit filed by the Inspector General of Police that the petitioner was discharged because of of his unsatisfactory record, Chief Justice Ray has drawn a distinction between *unfitness* and *unsatisfactory service* or *unsuitability* for continuing in the post. He agreed that if the services of the petitioner had been terminated on the ground of unsatisfactory records then rule 9, mentioned above, could have applied in this case, bu he has held that there is a distinction between *unfitness* and *unsatisfactory* service. Cheif Justice Ray observed :—

> It is obvious that at the time of confirmation fitness is a matter to be considered. The order terminating the services is unfitness for appointment at the time of confirmation, it is not passed on the ground of any turpitude like misconduct or inefficiency. To hold that the words "unfit to be appointed" are a stigma would rob the authorities of the power to judge fitness for work or suitability to the post at the time of confirmation of services on account of inadequacy for the job or for any tempramental or any other defect not involving moral turpitude is not a stigma which can be called discharge by punishment.[34]

It is apparent that the Chief Justice drew a dlstinction between *unfitness* and *unsatisfactory service or unsuitability for the job* so that Government may not be compelled to give opportunity of hearing in every case of termination of service of a probationary Civil Servant. As he has rightly pointed out that at the time of confirmation it is very essential for the employer to consider the fitness of a probationer to continue in service, and according to him if the term unfitness is equated with the term unsatisfactory service, then the right of the employer to determine whether or not the probationer should be confirmed will be seriously affected as he will have to give a full opportunity of hearing to the

33. *Supra*, note 31

34. *Supra*, note 30 at 2264-65.

probationer. Therefore, the argument of Chief Justice seems to be that there must be some situations in which the employer should be able to terminate the service of a probationer without involving himself in a disciplinary proceeding under Article 311 (2) or under the civil service rules. In our view, the Chief Justice has drawn the distinction to achieve the aforesaid objective. Though we may concede that there can be cases where unfitness may not be related to unsatisfactory service[35] but at the same time it is also not correct to say that in all cases of unfitness the element of unsatisfactory service will not be involved. In fact in order to deprive the probationer from an opportunity of hearing the government may terminate the service of probationer without mentioning the term unsatisfactory service, even though that may be the fact, if by using this device the Government is saved from the trouble of going through a disciplinary proceeding. Though in this case one may agree with the Chief Justice that on the basis of the facts it was not possible to say that any stigma was attached because of termination of service, but the general principle laid down by the Chief Justice puts a great burden upon the courts to see that the Government does not misuse the use of term "unfitness" only to evade the provisions of Article 311 (2) or the civil service rules.

Conclusion

The foregoing discussion makes it clear that the scope of protection as envisaged in Article 311 of the Constitution has been narrowed down by the Courts by evolving the so called "theory of punishment." In fact many civil servant has been the victim of this doctrine. It is surprising that the constitution does not mention any such theory and under Article 311 it was intended to give protection in all cases of dismissal, removal or reduction in rank. Much injustice has been done to the Civil Servants by giving narrow and restricting meaning to the words dismissal

35. For the purposes of illustration, we may mention the cases of Civil Servants who may become medically unfit during service, though otherwise their record may be excellent. In such cases it may be argued that there is no point in giving a show cause opportunity as the unfitness is beyond his control and opportunity to show cause may not lead to a fruitful result. However, we may mention the case of *Union of India v. Someshwar Banerjee* A. I. R. 1954 Cal. 399, where the respondent had sustained a severe back injury as a consequence of which he was declared unfit by the doctors and which resulted in the termiaation of service. But even in this case Chief Justice Harris of the Calcutta High Court took the view that even though the word dismissal was not used, the termination of service amounted to dismissal and the respondent was entitled to the protection of *Sec. 240 (3) of the Government of India Act* 1935 *infra*, note 37., which was similar to the present Article 311 of the Constitution.

or removal, and that objective has been achieved by developing the theory of punishment. The Courts in India have totally ignored the economic and social conditions prevailing in the country, because it should be evident to any one that the loss of job is the greatest punishment which can be inflicted on a person. Similarly, the theory that there is no punishment until stigma is attached is also far from the reality. In fact, in every case of termination, whether expressly or impliedly, the stigma is attached. Even if the Government does not disclose the reason for discharge, the chances of future employment become restricted. In fact, non-disclosure of reasons can create more suspicion in the mind of future employer because the very fact that the services have been terminated does indicate that the Civil Servant must be suffering from some deficiency. Therefore, whether the Government discloses the reason or not or calls the termination punishment or not, the result is that the probationery Civil Servant is punished. He looses the Government service and also chance of getting other employment.

It is also strange that the Courts have interpreted the provisions of Article 311 and the civil service rules in such a manner that those Civil Servants who are guilty of any misconduct can take the full advantage of the constitutional protection, while an innocent employee, whose services are terminated arbitrarily, is deprivcd of the protection. In this connection, the eloquent dissenting opinion of Justice Bose is worth quoting :

> Were it otherwise, the blameless man against whom no fault can be founded would be at a disadvantage. It would be anomalous to hold that a man who has been guilty of miscoduct should have greater protection than a blameless individual. But any man who is visited with evil consequences that would not ensue in the case of another similarly placed, but free from blame, can, in my opinion, claim the protection of Art. 311.[36]

Mr. Justice Bose further added :

> The constitutional guarantees of Art. 311 cannot be evaded by passing a non-committal order that is innocuous and at the same time making another order in secret that would have attracted Art. 311 had it been made openly .... consequences of Art, 311 cannot be evaded by cleverly splitting upon order into two parts.[37]

36. *Parshotam Lal Dhingra* v. *Union of India*, 1958 S. C. R. 828 at 868.
37. *Id* at 869.

The learned judge concluded :

> I do not think the article can be evaded by saying in a set of rules that a particular consequence is not a punishment or that a particular kind of action is not intended to operate as a penalty. In my judgement, it does not matter whether the evil consequences are one of the "penalty" prescribed by the rules or not. The real test is, do they in fact ensue as a consequence of the order made ?[38]

It may be pointed out that the dissenting opinion cf Justice Bose in *Dhingra* quoted above was relied upon by the Pakistan Supreme Court in *Khawaja Gulam Sarwar* v. *Pakistan*[39] where Justice Fazle-Akbar disagreed with majority opinion in *Dhingra*, as it was likely to effect adversely the interest of civil servants. Justice Fazle-Akbar made the following observation regarding the majority opinion in *Dhingra* :—

> (A) according to this judgement; even if the termination of service is impelled, by a most frivolous case, but so long as the Government does not make that course to be the reason of termination of services, the Courts would not be justified in trying to probe into the motives of the Government in terminating the services of the Government servant. This would mean that Constitutional guarantee would be available to the Government servants who are guilty of misconduct, negligence and other disqualifications, but not those who may have unblemished records of service.[40]

The learned judge indicated, while agreeing with Chief Justice Cornelius, that any discharge by notice was removal. Justice Fazle-Akbar further disagreeing with the *Dhingra's* doctrine where a distinction between removal by way of punishment and termination brought about otherwise than by way of punishment, observed :

> I think that this tendency and its consequences will be lessened if it is born in mind that the consequence is the same both in removal and termination of service by notice. The effect of construction .... would involve the great injustice of limiting the constitutional guarantee only in cases of punish nents. I, therefore, venture to think that the provisions of Sub-seection (3) of Section

38. *Id* at 871.
39. PLD 1962 S. C. 142 : The Bench consisted of A. R. Cornelius C.J. Fazle—Akbar, B. Z. Kaikuas, Hamoodur Rahman, S. Mursheed, Inamullah and Bashir Ahmed JJ.
40. *Id* at 170.

240[41] cannot be evaded by saying that the action taken under the notice clause of the service agreement is not a punishment.[42]

The Civil Servants in India will not be able to get adequate protection unless the courts adopt the view that the termination of service will amount to punishment unless otherwise proved; and, the burden of proof should be on the government to prove that the termination of service was not by way of punishment.

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41. Section 240 (3) of the *Government of India Act 1935* which was anologous to Article 311 of the India Constitution ran as under :—

No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :

Provided that this sub-section shall not apply,

(a) Where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, or

(b) Where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

42. *Supra*, note 35 at 170-171. Justice Kaikaus in his concurrent but seperate judgement rightly observed : "If the Government has qualified power, apart from penal proceedings, to terminate services of its employees the question as to whether the termination is arbitrary will not arise." PLD 1962 S. C. 142 at 171.

SUCCESSION BY MALE ISSUE : A CONFLICT BETWEEN THE HINDU SUCCESION ACT AND THE DEMANDS OF THE REVENUE

J. DUNCAN M. DERRETT*

It is well known[1] that the Supreme Court follows the old principle that emerged in England, namely that ambiguities in the revenue legislation must be resolved in the (apparent) interests of the taxpayer. It is up to the legislature to close loop-holes. However, there are other aspects. As I have already explained, it seemed to be in the interest of the taxpayer who is a member of a joint Hindu family that his income should be assessed as that of an individual, rather than that it should be assessed as part of the income of the Hindu undivided family in a case where the income was earned as a result of an investment of joint-family funds.[2] However, by deciding that the manager had discretion to determine that he or a nominee of his, being a coparcener or a female who inherited on the death of her husband between 1937 and 1956, should earn, as a result of investment of joint-family funds, for him-or herself to the exclusion of the family chest, the Supreme Court has made it possible for the earners, at a partition, to claim that the funds, or hoards, accumulated by themselves are separate and self-acquired property at Hindu law, and thus, indirectly, the harmony and efficiency of a joint family is undermined.[3] The co-existence of the revenue law with the personal laws, which is quite natural, produces some odd situations in which not everyone has taken, or expressed, the interest which they deserve.

Here I want to criticise *Commissioner of Income Tax, Gujarat I* v. *Dr. Babubhai Mansukhbhai*[4] (hereafter, 'the *Babubhai* case') and *Savitri*

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1. K. D. Gaur, 'Tax avoidance : a critical appraisal', *Law Quarterly* (Calcutta) 14, no. 4, 1977, pp. 319 ff.
2. The story is told in 'Acquisition of joint family property through a coparcener...,' (1969) 71 Bom. L. R., Journal, 75-81; 'Acquisition of joint family property and recent decisions of the Supreme Court', (1969) 1 S. C. W. R., Journal, 29-35; and a further discussion at (1971) 1 S. C. W R., Journal, 7-10.
3. On this subject see R. Dhavan, *The Supreme Court of India* (Bombay, Tripathi, 1977), 279-305.
4. (1977) 108 I. T. R. 417 (Guj.).

Devi v. *Commissioner of Income Tax, Bihar*[5] (hereafter '*Savitri's* case'). The want of a discerning and comprehensive mind to oversee all India's teeming legal problems, a want to which I have drawn attention before,[6] finds in both cases modest exemplifications. In both cases the revenue law is in very uneasy alliance with the personal law. For one thing, it is evident that for Wealth Tax purposes it is sometimes advantageous to claim that assets belong to a Hindu undivided family, not to an individual : yet the same principles which have been applied rather crudely in Income Tax cases (where the advantages lie in the other direction) figure in Wealth Tax contexts, and the want of harmony has gone unnoticed (so far as I am aware).

In *Commissioner of Wealth Tax* v. *Harshadlal Manilal*[7], a Gujarat case, joint Hindu family consisted of *F*, the father, *M* the mother, *S*, the son, *D*, the daughter, and *SW*, the son's wife. It will be noticed that *S* had, at all material times, no son of his own. In 1927 *F* died leaving self-acquired property which, under the law as it stood in those far-off days, descended upon *S* exclusively. B. J. Diwan, C. J., and T. V. Mehta, J., had to determine whether the estate should be assessed, for purpose of Wealth Tax, as properry of *S*, as an individual, or as property of a Hindu undivided family. Their decision was that the self-acquired property of a father could descend to his son as joint family property, for the possibility of this had been left open in *Arunachala Mudaliar* v. *Murugunatha Mudaliar*[8] (which was really about the effects of a father's gift or testamentary disposition); and moreover, under the basic law defining a 'Hindu undivided family',[9] the group consisting of *S*, *M*; *D*, and *SW* were in any case such a 'family'. The second argument may not be entirely sound, since the theory upon which this 'revenue' definition of a 'Hindu undivided family' is based is that the group actually live off the property which is former ancestral or joint-family property. It does not seem to me that the leading cases[10] embrace a situation in

5. (1976) 104 I. T. R. 385 (Pat.).
6. Notably in my *Critique of Modern Hindu Law* (Bombay, Tripathi, 1970). Dr. R. Dhavan, also, has adverted to this in several places.
7. (1974) 97 I. T. R 86 (Guj.).
8. A. I. R. 1953 S. C. 495.
9. *Gowli Buddanna* v. *Commr. I. T., Mysore* A. I. R. 1966 S. C. 1523; *N. V. Narendranath* v. *Commr. of Wealth Tax* (1969) 3 S. C. R. 882, 74 I. T. R. 190 (S. C.); *Commr. I. T.* v. *Veerappa Chettiar* (1970) 1 S. C. W. R. 31. The leading cases do not suggest that a group of persons living on property once *inherited* is a H. U. F.
10. The cases cited in the last note are concerned with persons whose assets derived from a joint family fund, whether by partition, survivorship, or the operation of the Act of 1937; the widows who took under that Act being widows of former coparceners, and still living undivided.

which they possess assets which the only male member acquired by inheritance from some quarter. Neverthless it could be argued that the birth of a son to *S*, or his widow's adoption of a son could at any moment turn the inheritance into joint-family property (for it came from *F* originally), within the meaning of 'joint-family property' as the phrase appeared in the Hindu Women's Rights to Property Act, 1937.[11] Thus it was, at least, *potential* joint family property. The *Harshadlal* case (1974) is thus a somewhat precarious decision and precedent, and deserves to be throughly reconsidered. Meanwhile different approach was very naturally, taken in Allahabad.

In *Commissioner of Income Tax* v. *Ram Rakshpal*[12] and in *Commissioner of Iucome Tax* v. *Chander Sen*[13] the position was taken that an inheritance from the father will be separate and self-acquired property in the son's hands and income from it must be assessed as the income of an individual, and it will be assessed for purposes of Wealth Tax as property of an individual. In the latter case, which interests us more, L. L. Gulati and C. S. P. Singh, JJ., were faced with a family in which *F* died in 1965 leaving an interest in joint-family property, and self-acquired property. The interest in joint-family property passed under section 6 of the Hindu Succession Act, and the self-acquired property under section 8. Not concerned (why?) as to the tenure in respect of the interest in joint-family property which was ascertained under the provisions of section 6, their Lordships concentrated on the self-acquired property. *F* left a son and two grandsons by that same son. Naturally the son excluded the grandsons under the Act of 1956. They held that the son acquired it as an individual and not as a *karta* of his joint family. This must be taken to imply that his sons had no birthright in it. This indeed was the view taken in some quarters,[14] but the view is challenged.[15] It is not good that the matter was passed over without a thorough discussion.

Now the *Chander Sen* case[13] impressed their Lordships in Gujarat in the *Babubhai* case[4] as unsound. They specifically point to *Ram Rakshpal's* and *Chander Sen's* cases as wrong. In *Babubhai's* case[4] a son inherited the self-acquired property of his father, who died after the

11. *Umayal Achi* v. *Lakshmi Achi* A. I. R. 1945 F. C. 25. *Manoharlal* v. *Bhuri* A. I. R. 1972 S. C. 1369.
12. (1968) 67 I. T. R. 164 (All.).
13. (1974) 96 I. T. R. 634 (All.).
14. G. K. Dabke, 'Unobstructed heritage', (1966) 68 Bom. L. R., Journal, 113-15. *Ghasiram* v. *Commr. of Gift Tax* A. I R. 1967 A. & N. 48.
15. Derrett, *Introduction to Modern Hindu Law* (Bombay, 1963), sec. 411, p. 252. I have not seen the matter handled in standard textbooks.

Hindu Succession Act came into force. It was argued that surely the effect of that Act was to make each heir an absolute owner of his share. No, said their Lordships, since the position originally was that even the self-acquired property passed to male issue as joint-family property between them, and the Hindu Succession Act made no difference to the basic position.[15] The judgment expresses trust in the case of *Harshadlal Manilal*,[7] and relies upon it. There is no further, discussion of the effect of the co-existence of other heirs of the father, who could be taken to be a Hindu undivided family wherever the inheritance in question came from.

My objection to *Harshadlal Manilal's* case[7] and to the *Babubhai* case[4] amounts to this, that, whereas it could be argued (but was not) that the Hindu Succession Act made no difference to the Mitakshara birthright as between grandsons and the sons who are actual heirs, and that therefore sons who are heirs and have sons of their own take the self-acquired property (*and the share in the undivided interest also*) as ancestral and joint-family property, it is not at all clear that when a single son inherits his fathers self-acquired property in the presence only of his mother, his own wife, and his sister, for example, the assets belong to that miscellaneous collection of people as a 'Hindu undivided family' for revenue purposes. That remains to be proved to my satisfaction.

I pass on now to consider the case of *Savitri Devi*[5] which is a very extraordinary case in the effects of adoption. *H* died before the Hindu Succession Act. He died in 1953. *H* left his father, his widow, two undivided brothers, a daughter, and a son, who himself died in February 1955. On Oct. 14,1955 a partition took place, in which the widow correctly obtained a quarter share. This she invested in the family firm. She adopted a son in 1957 and registered the adoption deed in 1964. She was assessed to Wealth Tax. The officer held, and in *two* subsequent appeals it was argued, that (1) she adopted to herself, and not to her deceased husband and therefore no undivided family was created; (2) the share which she took was her absolute property, and if it were

15a. If it is argued that Hindu Succession Act, 1956, sec. 19 provides that 'If two or more heirs *succeed together* to the property of an intestate, they shall take the property... (b) as tenants in common and not as joint tenants', and that this would make the shares absolute for all takers, the answer could be (and I suppose it is) that this is intended to apply to all cases except that in which a son or son's son inherits and has, or later begets, a son or sons of his own. For if *F* is the propositus, *S* his son, *SS1* is *S's* son born before the death of *F*, and *SS2* the son of *S* conceived after the death of *F*, it cannot be argued that *S*, *SS1*, and/or *SS2* 'succeed together' to the property of *F*, whatever the origin of that property. Textbook (e. g. Srinivasan) Comment Poorly on sec. 19.

not so in 1955 it became so by the operation of section 14 of the Hindu Succession Act; (3) an adoption could not convert absolute property into joint-family property; (4) under the explicit terms of section 12 of the Hindu Adoptions and Maintenance Act, 1956, no divesting could take place by virtue of the adoption, divesting such as could call in the adopted son as a co-owner with, e. g., the widow. With the greatest respect, all these contentions are right, and more ! However N. L. Untwalia, C. J., and S. K. Jha, J. brushed them aside. The appellate tribunal's rulings revealed, their Lordships imply, ignorance of the law laid down on the subject of adoption by the Supreme Court. The leading cases of *Sawan Ram*[16] and *Sitabai*[17] make it plain that an adopted son is also a son of the deceased husband of the adopting widow, and therefore *upon the adoption* the widow and the daughter (was she still unmarried, I wonder ?) became immediately a Hindu undivided family. Their Lordships even assume that they were so before ! But this is obiter apparently.

My protest amounts to this. In favour of the assessee the courts tend to hold against the Revenue when they can. Well and good. But what if the result distorts (and it were) scandalises the personal law ? It will be remembered that *Savitri Devi's* case[5] was a Patna case (Sept. 18th, 1974). *In Bihar widows could not adopt without their husbands' explicit consent.*[18] Therefore the adoption made by our present widow was a non-sastric, secular adoption as made available to her for the first time by the Hindu Adoptions and Maintenance Act in 1956. 'Relation back' as we know it, so that the widow's adoption will create a coparcener with her deceased husband (no matter how long ago he died), is a phenomenon strictly applicable to a *dattaka* adoption. It does not apply to the *kritrima* adoption, also formerly in use in Bihar.[19] Therefore the decisions and dicta in Supreme Court cases on adoption and those that followed them,[20] cases which, with one rogue exception,[21]

16. *Sawan Ram* v. *Kalawanti* A. I. R. 1967 S. C. 1761.
17. *Sitabai* v. *Ramchandra* A. I. R. 1970 S. C. 343.
18. In the Mithila area of Bihar the Hindu widow could not adopt at all, and in the other parts of Bihar where the Benares School prevails she could not adopt without her husband's authority. D. F. Mulla, *Principles of Hindu Law*, 13th edn. (Bombay, Tripathi, 1966), paras. 452-454, pp. 480-2.
19. On the kritrima adoption see Mulla, op. cit., para. 515, p. 521. It is almost certain that the Kritrima adoption was abolished by the Hindu Adoptions and Maintenance Act. Derrett, *Introduction* (cited above), para 200. See for the general problem *Kartar Singh* v. *Surjan Singh* U. J. (S. C) 1974, 603, A. I. R. 1974 S. C. 2161.
20. Derrett, 'Adoption : the whole hog', (1972) 74 Bom. L. R., Journal, 97-99.
21. *K. Lavminarayan* v. *K. Padmanav* A. I. R. 1973 Or. 3 (an adoption by the widow to herself given retroactive effect).

are all concerned with *dattaka* adoptions, have no bearing on this Bihar case. Since there could not have been a 'relation back', and since a partition had already taken place, the adopted son could divest no-one (which literally fits with the provisions of section 12), her own share remains her absolute property which even as an inheritance, the Supreme Court has shown, cannot be divested by the adopted son,[22] and therefore there is no basis whatever for divining a 'Hindu undivided family in this motley crew.

I beg, in conclusion, that these revenue cases involving an application of personal law should be given more mature, and more comprehensive, consideration.

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22. *Punithavalli Ammal* v. *Ramalingam* A. I. R. 1970 S, C. 1730. Derrett, 'Adoption and relation back : the position in 1971', (1971) 73 Bom. L. R., Journal, 31 ff, at p. 34.

THE NEED FOR A NEW KIND OF LAW COMMISSION AND NEW HORIZONS OF LEGAL POLICY RESEARCH IN INDIA

RAJEEV DHAVAN*

We need to re-examine the task of our Law Commission and other policy and research institutions so that their work may be linked up to the tasks of 'development' which face the nation.

The 'development' tasks that face the nation are to transform India's economy and the socio-political system for the betterment of the nation as a whole and all its citizens in particular. This is not an easy task. This is partly because the task itself is gigantic and partly because no developmental programme can succeed without a proper understanding of India's traditional ways and after determining how these traditional ways can be geared to the achievement of India's developmental aims.

What we need is a sponsored research programme (SRP) which can link up the policies underlying the law with law in action. In order to do this, we need to look seriously at the institutions, which are, at present, responsible for reforming and researching into, the law.

From the development point of view, the following questions are important :—

A. What kind of laws should reflect India's developmental needs ?

This is directly related to governmental policies.

B. At what level should a law be pitched ? Four possible levels on a continuing scale are possible :

1. the law may be purely declaratory;
2. the law may be declaratory as well as intended to persuade but not requiring strict compliance;
3. the law may be declaratory, voluntarily persuasive but requiring a minimum compliance to be helpful for developmental ends;
4. the law may require maximum compliance.

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The categories may be tabled below

Category	Deelaratory	Voluntary	Partial Enforcement	Maximum Enforcement
I.	v			
II.	v	v		
III.	v	v	v	
IV.	v	v		v

Thus, agricultural reform may belong in Category IV, as would smuggling laws, while some social laws may belong to other categories. A lot may depend on resources.

C. What institutions are needed to enforce the law at the level determined and what kind of problems will be encountered ?

D. How has the law and correlated institutions actually succeeded in achieving their designated ends.

A New Law Commission

Question A, B and C are planning functions. D is a latent function that arises later. Now let us try and find an institutional arrangement for research related to A, B and C. The logical place for this research would be the Planning Commission. But the Planning Commission will only look at some socio-economic laws not all of them. Somebody must look at other social laws and changes. Equally there is continuing need to confine the task of law simplification and systematization. All these three tasks must be done. It is proposed that all these tasks can be given to a new Law Commission. This Law Commission would have three Divisions.

Division I. The Planning Division (to liase with the Planning Commission).

Dlvision II. The Social Change Division (looking at social changes).

Division III. Law Reform Division (looking at law simplification and codification).

Post Law Creation Monitoring by The Indian Council of Social Science Research (ICSSR) and other Institutions.

We have deliberately overlooked Question D : *Post Law Creation Monitoring.* Some laws will have their own post law monitoring mechanisms. Thus a Statute may create a monitoring body. An example of this is the Council of Tribunals in the United Kingdom. This body looks at the working of Tribunals. Equally some monitoring units could be established in various Ministries.

But some pilot schemes could be referred to the ICSSR specially in the areas of agrarian reforms, untouchability, and minorities, anti-poverty laws and socio-economic regulation. The priorities would have to be determined by the Planning Commission. The ICSSR would in turn call for academic help.

This is where the SRP programme ends. The programme is called 'Sponsored' because the government would sponsor it for governmental purposes.

One important point raised by the programme is the availability of statistical information. This is lacking even in relation to courts. The answer to this problem is three fold :

1. Various instiuttions like courts must maintain proper statistical information themselves.
2. Overall legal statistical information should be compiled by the Ministry of Law or some other institution created for this and other purpose.
3. There should be a special government office to look generally at social trends attached to the Planning Commission.

This should be part of the official programme because without it much background information is lost.

The Non-sponsored Programme.

In all this research, the academic will, of course, be involved. But his main contribution will be on a non-sponsored basis.

At the very outset a distinction must be made between Teaching Curricula and Research. This distinction is important because one cannot really use undergraduate or introductory courses for serious research. They impart training and ideas.

(a) Introductory Courses.

Although most LLB courses in India are post-graduate, they are introductory in nature. One of the best things that can be done is to make the LLB a first degree coverning four years. Without actually trying to map out actual courses, the following emphasis could be placed in the undergraduate curricula :

(a) hard law should be taught in context e. g. Planning law in the context of urbanization;

(b) theoretical study of law should be taught in the following order : juristic techniques and legal thought; analytical jurisprudence; sociology of law and development;

(c) law courses should encourage work at a practical level (e. g. sandwich courses at Brunel University on the basis of Course work (6 months), placement period (2 months) etc.) ;

(d) law courses should include training in retrieval of information;

(e) a dissertation element should coordinate practieal work and research techniques.

(b) Professional Qualifications.

This must be in the hands of the professionals working with the government. Particular emphysis must be on :

—practical training in law;
—practical experience in law situations;
—practical experience in social situations faced by a lawyer.

(c) Post-Graduate Work.

Postgraduate work could fall into two lots :

(a) Postgraduate courses which could contain a dissertation element (e. g. an M. A., or Diploma's in Law and Sociology, Criminology, Law and Development etc.).

(b) **Dissertations**
These would be of the hard Law type as well as a socio-legal nature. Indeed, some of it could be part of the SRP.

In resource terms it means that the University Grants Commission would have to allocate more resources to postgraduate law studies. I will not elaborate too much on the nature of this programme. A second academic wing of the ICSSR would sponsor research in this area as well.

It is futile to exactly delineate areas for university research but the following could be looked at in the socio-legal field :

(a) Pilot studies as part cf the SRP or otherwise;

(b) monitor the process of legislation;

(c) monitor the effectiveness of laws and institutions;

(d) look at informal methods of
  (a) decision making;
  (b) discretion qualification;
  (c) dispute settlement;

(e) look at various professions with a special emphasis on the police and legal professions.

Summary and Conclusions

The main suggestions in this paper are :

1. This paper puts the emphasis on developmental needs rather than proliferating socio-legal research generally.
2. The SRP is defined to fit into the developmental pattern.
3. The general socio-legal aspects are made part of the non-sponsored programme.
4. The programme outlined here is resource oriented and clearly stresses who is going to do what.
5. The academic lawyer will be involved in the SRP through institutional bodies like an expanded Law Commission, the Planning Commission and the ICSSR. But he will undertake to further socio-legal research through changing the undergraduate and postgraduate curricula.

Broadly speaking the suggestions can be tabled as below :—

Jobs to be done	*Institutional arrangement*
A. SRP	
1. Planning ahead in selected planning areas.	Law Commission Division I : (Planning) coordinating with the Planning Commission.
2. Planning ahead for social reforms.	Law Commission Division II (Social and cultural changes) liasing with relevant Ministries.
3. Law simplification and codification.	Law Commission Division III (Law simplification and codification) liasing with Ministry of Law.
4. Post Law creation Monitoring.	(a) Special bodies created by statute in certain areas. (b) ICSSR : Division I (Sponsored Research Division) liasing with Law Commission or relevant Ministry.
5. Statistical outlay of the performance of various institutions.	By the institutions themselves.
6. General Civil and Criminal Statistics.	By the Law Ministry coordinating the work of various institutions.

7. Specialized Social Trends Statistics and Informations.	The creation of a special office in the Planning Commission to deal with this.
B. Non SRP	
8. Introductory Legal Education.	The Universities introducing developmental, socio-legal and research and practical elements.
9. Post Graduate	(a) The Universities offering interdisciplinary courses. (b) The Universities sponsoring research getting further tied and untied resources from the University Grants Commission. (c) The Universities sponsored by (a) the Planning Division of the ICSSR (b) the academic socio-legal wing of the ICSSR (Division II) (Note : It is doubtful that there will be so much resources; there will also be an overlap).
10. Professional Education.	The Bar Council along with the Law Ministry.

The above plan demands resources. It is doubtful if they will be made readily available. Indeed, since this is purely an introductory note, the resources need is not been quantified. Although the above plan is a part of package, separate parts can be implemented separately. In the long run, the government has to use 'law' to affect social change along with other mechanisms. It is imperative that more resources be made available for socio-legal research. The blind cannot lead the blind for too long.

PROBATION OF ECONOMIC OFFENDERS*

MAHENDRA P. SINGH**

The share of law in social evolution is a matter of constant re-examination in the light of changing political, social and legislative conditions.***

I

The process of transition from a simple agrarian to a complex and industrialized society necessiated an increasing attack on malpractices which were unknown to the traditional criminal jurisprudence.[1] Accordingly, the requirement of *mens rea* or guilty mind for an offender, one of the basic postulates of traditional criminal jurisprudence, has undergone modifications and even elimination in respect of what have come to be known as quasi-criminal offences. However, notwithstanding this development, a controversy is still on as to how far such departure is justified.[2] Indeed, even 'Public Welfare Offences' have all the requisites of a criminal act.[3] The elimination of *mens rea* in such offences has not only affected the process of conviction but also that of sentencing and this becomes a matter of concern.

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* This Comment is partly based on the LL. M. Dissertation of the author submitted in 1976.

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*** W. Friedmann, *Legal Theory*, 81 (5th ed.) (1967).

1. See, *47th Report of the Law Commission of India* on "Trial and Punishment of Social and Economic Offences".
2. In a number of cases, viz., *Sheras* v. *De Rutzen* (1895) 1 Q. B. D. 918; *Brend* v. *Wood* (1946) 175 L. T. 306; *Shriniwas Mall* v. *King Emperor*, A. I. R. 1947 P. C. 135; *Ravula Hari Prasad Rao* v *The State*, A. I. R. 1951 S. C. 204; *State of M. P.* v. *Magan Bhai Desai Bhai*, A. I. R. 1954 Nag. 41; *K. M. Kunju Ismael* v. *M K. Umma*, (1959) Cr. L. J. 591; *Lim Chin Aik* v. *The Queen*, 1963 A. C., 160; *Nathu Lal* v. *State of M. P.*, A. I. R. 1966 S. C. 43; *Sweet* v. *Parsley*, (1969) 2 W. L. R. 470; *Atul Chandra Pal* v. *The State*, (1970) Cr. L. J. 212; it was held that the mere fact that the object of a statute is to promote welfare activities or to eradicate a great social evil is by itself not decisive of the question whether the guilty mind is excluded.
   On the other hand there are following cases, viz., *Madan Lal Arora* v. *State* (1961) 1 Cr. L. J. 488; *Regina* v. *Cummerson* (1 68) 2 Q. B. 534; *Alphacell Ltd.* v. *Woodword* (1972) All. E. R. 472; *State of Maharashtra* v. *M. N. George*, A. I. R. 1965 S. C. R. 123; *State of Gujrat* v. *D. P. Pandey*, A. I. R. 1971 S. C, 866: in which such offences were treated those of strict liability and *mens rea* was ruled out.
3. Pande and Bagga "Probation : The Law and Practice in India", 16 *Journal of Indian Law Institute*, 68 (1974).

To a criminologist, 'conviction' and 'sentencing' are two distinct processes in the administration of criminal justice having their own ends. Determination of guilt, irrespective of *mens rea*, should never determine the mode of treatment for a particular offender. A variety of treatment methods for the offenders have since been evolved in civilized countries and 'Probation of Offenders' is one of them. It is an individualized extra mural mode of treatment and a postconviction process wherein the offender assumes more importance than the offence. The probationary disposition depends upon the potentialities for reformation and, thus, the mental element becomes significant for a successful paobationary disposition of the convict. However, inspite of the fact that Public-Welfare Offences were once held to be within the purview of the probationary disposition, a new judicial trend is discernible today manifesting marked reluctance to grant probation in such cases. There has been an undue emphasis on the offence in exclusion of any individualization in the treatment of offenders.

In the following lines an attempt has been made to analyse the the trend noted above and the justifiability or otherwise thereof.

II

The fact that earlier our courts had regarded social and economic offences as being within the purview of the Probation of Offenders Act, 1958 even regardless of the age of an offender, is borne out by the following cases :

In *Salem Govinda Chetty's case*[4] decided in 1970, the offender was convicted under section 16 (1) read with section 7 and 2 (1) (g) of the Prevention of Food Adulteration Act for selling 'Mysorepak', a sweetmeat, which was found to contain metanil yellow coaltar dye and also kheshari dal which were prohibitted. Anantnarayan Ayyar J. set aside the order of sentence and released the offender on probation of good conduct in special circumstances of the case as the accused was a petty shopkeeper aged over 60 years.

Again in *Visnumoorthi* v. *State of Mysore*[5] it was held that though smuggling was an anti-social act affecting the economy of the state, yet a person could be released on probation of good conduct if special circumstances of the case are indicative of reformative attitude in the offender.

4. A. I. R. 1970 A. P. 293; See also, *Municipal Corporation, Delhi* v. *Rattan Lal*, 1971 Cr. L. J. 1485.
5. (1971) Mys. L. J. (Or) 451; See also, *Assistant Collector of Central Excise* v. *Basik Lal Chandamal Bora*, (1972) 2 Mys. L. J. 189.

In *State of Haryana* v. *Ramji Lal Devi Sahai*[6], the respondents were convicted for being found working a still for the distillation of illicit liquor at their residence under Section 61 (1) (c) of the Punjab Excise Act, 1914 which provided for a minimum sentence to be imposed. The Punjab High Court in the course of judgment observed :

> Even this providing of minimum sentence cannot be construed to mean that the legislature at any time intended to exclude the application of section 562 of the Code of Criminal Procedure or the provisions of the Probation of Offenders Act to such offences.[7]

In *State (Delhi Administration)* v. *Om Prakash*[8], the offender was convicted for an offence punishable under section 27 (a) (ii) of the Drugs and Cosmetics Act, 1940. It was observed, with a note of caution,[9] that :

> The provisions of section 4 of the Probation of Offenders Act are applicable when a person is convicted under the Drugs and Cosmetics Act. Although aware of the provisions of Section 27 (a) of the Act the legislature did not in it's wisdom exclude the application of the Probation Act. Except for the cases enumerated in section 18 of the Probation of Offenders Act and where an offender has been found guilty of having committed an offence punishable with death or imprisonment for life, the provisions of the Probation Act would be applicable in all other cases notwithstanding any thing contained in any other law for the time being in force.[10]

In *Arvind Mohan Sinha* v. *Anil Kumar Viswas*[11] the Supreme Court acted in consonance with the spirit of the Central Act, regarding

6. (1972) Cr. L. J. 796.
7. *Id.*, pp. 798-799.
8. 1975 Cr. L. J. 177.
9. It was observed in the instant case that : "In the case of an offender under Section 27 (a) of the Drugs and Cosmetics Act which prescribes a minimum sentence...the court should not, however, lightly resort to the provisions of Section 4 of the Probation of Offenders Act."
10. *Supra* note 8.
11. A. I. R. 1974 S. C. 1818.
cf. *K. Vishnumoorthi* v. *The State of Mysore* (1972) Cr. L. J. 399, the Mysore High Court denied the benefit of probation to an offender convicted of gold smuggling. The decision was not based on the principle of individualization. It becomes manifest when the grant was denied on the reason that the offender had hidden the gold in his underwear.
Again the Supreme Court in *Uttam Singh* v. *The State*, (A. I. R. 1974 S. C. 1230) failed to apply the principle of individualization when it sent the young offender, who was convicted of selling obscene playing cards, straightway into prison.

probation when they based their decision mainly on the principle of individualization of treatment along with the nature of the offence.

The respondents in the above case were charged and convicted under the Customs Act and the Defence of India Rules as a result of a seizure of foreign gold bars which were being brought without the requisite permission. They had pleaded guilty to the charges but cited facts in extenuation of the offence. In view of the report of the concerned probation officer, the learned Presidency Magistrate of Calcutta was of the view that the offenders should be released under section 4 (1) of the Probation of Offenders Act, 1958 on the following grounds; firstly, they were young boys normally engaged in agriculture; secondly, they purchased the gold for the marriage of the sister of one of them; and lastly, the gold had already been confiscated. The High Court also took the stand that inspite of the fact that the Rule 126 PP (2) (ii) of the Defence of India Rules prescribes a minimum sentence of imprisonment, for a term of not less than six months, it could not override the provisions of the Probation of Offenders Act. The Supreme Court, in it's turn, held :

> We are unable to accept the appellants' contention that the Probation of Offenders Act can have no application to offences consisting of the contravention of the Customs Act or the Gold Control Rule contained in Part XII-A of the Defence of India Rules, 1962.[12]

Their Lordships further observed :

> "True, that these offences are fundamentally of a different genus and are calculated to involve consequences of a far-reaching character as compared with offences under the general law of crimes. These are mostly economic offences which in concievable cases may pose a great threat. But every contravention of the Customs Act or the Gold Control Rules cannot, without more, be assumed to be fraught with consequences of national dimensions. The broad principles that punishment must be proportional to the offence is or ought to be of universal application save where the statute bars the exercise of judicial discretion either in awarding punishment or in releasing an offender on probation in lieu of sentencing him forthwith.[13] The words of section 4(1) of the

12. *Supra* note 11 at 1819-1820.
13. Section 18 of the Probation of Offenders Act :
> Nothing in this Act shall affect the provisions of section 31 of the Reformatory Schools Act, 1897, or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947, or the Suppression of Immoral Traffic in Women and Girls Act, 1956, or of any law in force in any state relating to juvenile offenders or brostal schools.

> Probation of Offenders Act, 1958 are wide and would evidently include offences under the Customs Act and the Gold Control Rules.[14]

III

In contrast to the above cases, in *Isher Das* v. *State of Punjab*[15] though granting probation to the offender, the Punjab High Court laid undue emphasis on the nature of the offence as also on the age of the offender. In this case an ice-cream vendor in a cinema canteen was convicted, under the Prevention of Food Adulteration Act, 1954 for selling adulterated stuff. Admittedly, he was under 20 years of age. The trial court granted probation under section 6(1) of the Probation of Offenders Act, 1958. The High Court withdrew it on the ground that a minimum sentence of imprisonment for a period of six months and a fine of Rs. 1,000/- had been prescribed by section 16 of the Act; and that the offences under the Act were against the public and called for deterrent punishment. When the case came before the Supreme Court, Khanna J., rightly, observed that :

> As regards persons under 21 years of age, however, the policy of the law appears to be that such a person inspite of his conviction under the Prevention of Food Adulteration Act, should not be deprived of the advantage of the Probation of Offenders Act which is a beneficient measure and reflects and incorporates the modern approach and latest trend in penology.[16]

In the instant case all the arguments that offences of such type are beyond the scope of the Probation of Offenders Act were repelled by the Supreme Court. However, by way of a note of caution the court pointed out :

> Adulteration of food is a menace to public health. The Prevention of Food Adulteration Act has been enacted with the aim of eradicating that anti-social evil and for ensuring purity in the articles of food.... The courts should not lightly resort to the provisions of the Probation of Offenders Act in the case of persons above 21 years of age found guilty of offences under the Prevention of Food Adulteration Act.[17]

The decision, it is submitted, is admirable regarding persons below 21 years of age, but the court, perhaps unconsciously, inhibited the discretion of the lower courts in the matter of granting probation to offenders

14. A. I. R. 1974 S. C. 1818 at 1820.
15. A. I. R. 1972 S. C. 1295.
16. *Id.*, pp. 1299-1300.
17. *Id.*, at 1299.

above 21 years of age. Later judicial decisions have been indicative of the fact that this dicta of the Supreme Court adversely affected the fate of offenders above 21 years of age seeking probation.

Thus, in *Jai Narain* v. *Delhi Municipality*[18] wherein the offender was charged with the offence of adulterating patisa with unpermitted coaltar dye, under the Prevention of Food Adulteration Act, the Supreme Court reiterating it's earlier stand in *Isher Das* v. *State of Punjab*[19] observed :

> ....the sale of such an article of food was anti-social activity, deleterious to the health of those who would consume them as article of food, the eradication of which is the principal aim of the Act and in particular of section 16 thereof.[20]

This case essentially, shows a departure from the earlier judicial attitude of extending probation of offenders to any class of offences; a departure also in the sense that the court has started a movement of emphasis from the offender to the offence which is against the idea of individualization of punishment and treatment as incorporated in the Probation of Offenders Act.

Again in *Ram Prakash* v. *The State of Himanchal Pradesh*[21] wherein the appellant, Ram Prakash, was convicted for selling mixed cow's and buffalo's milk and was sentenced to a term of six months rigorous imprisonment and a fine of Rs. 200/- under Prevention of Food Adulteration Act, 1954, the High Court denied the benefit of probation saying that section 4 of the Probation of Offenders Act was not meant to cover cases of the present nature. However, the Supreme Court through Grover J. held, rightly, that the benefits of the probation could be extended to the offences under the Prevention of Food Adulteration Act. But on the point whether it should be granted to the accused who was above the age of 21 years, the *obiter* of Khanna J. in *Isher Das case*,[22] unfortunately came in the way. The offender, it appears, was not given the

18. A. I. R. 1972 S. C. 2607.
19. A. I. R. 1972 S. C. 1295.
20. A. I. R. 1972 S. C. at 2609.
21. A. I. R. 1973 S. C. 780.
22. It was observed in *Isher Das* case :

> While in the case of offenders who are above the age of 21 years absolute discretion is given to the courts to release them after admonition or on probation of good conduct subject to the conditions laid down in appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that...it is not desirable to deal with the offender under sections 3 and 4 of the Act.

Isher Das v. *State of Punjab*, A. I. R. 1972 S. C. 1295, at 1298.

benefit of probation as his age was more than 21 years. The Supreme Court was conspicuously silent on the point as to why a person above 21 years should not be given a chance for reformation and rehabilitation.

The court, in the instant case, could not appreciate the fact that section 6 of the Probation of Offenders Act is a speci of section 4 which is the genus. It only directs that the case of young persons below 21 years of age should be treated with special care. Section 4 is the source of judicial discretion throughout. If provisions of section 6 are used in eroding the legislative will incorporated in section 4, it amounts to raising the stream higher than the source.

Emphasis over the nature of the offence, in exclusion of the personality, character, and potentiality for reformation of the offender, as also the circumstances of the offence culminated in the decision of *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange and others.*[23] In this case the accused was convicted of selling adulterated supari with prohibited sweeteners saccharin and cyclamate under the Prevention of Food Adulteration Act, 1954.

Mr. Justice V. R. Krishna Iyer, of the Supreme Court, following the *Isher Das Case*[24] held that the beneficial provisions of the probationary measure should receive wide interpretation and should not be read in a restricted sense. However, in deciding the fate of the offender, he diluted the authority of the *Isher Das Case*, to the point of extinction when he observed :

> The kindly application of the probation principle is negatived by the imperatives of social defence and the improbabilities of moral proselytisation. No chances can be taken by society with a man whose antisocial operations ,disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, those economic offences committed by white-collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit making from number of consumers furnishes the incentive—not easily humanised by the therapeutic probationary measure. It is not without significance that the recent report (47th) of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments.[25]

23. A. I. R. 1974 S. C. 228.
24. *Supra* note 19.
25. A. I. R. 1974 S. C. 228 at 237.

It is evident from the above that it is the nature of the offence and not the offender that has assumed undue prominance. The inner contradiction of the judicial reasoning came up glaringly when the learned Judge observed :

> In the current Indian conditions the probation movement has not attained sufficient strength to correct these intractables. May be, under more developed conditions a different approach may have to be made. For the present we cannot accede to the invitation to let off the accused on probation.[26]

With due respect it is submitted that :

(i) in a developing judicial system, like ours, where social values change faster than the legal norms, it is the judicial dynamism which can strike a balance between different conflicting interests. The judicial responsibility is not carried to its end, by laying emphasis only on the nature of the offence. The observation in this case that the present unsatisfactory situation needs legislative remedy is a distinct mark of judicial failure;

(ii) the learned judge has not even taken a firm stand about the nature of social and economic offences which call for different treatment, when he observed :

> May be, under more developed conditions a different approach may have to be made.[27]

It is difficult to understand from these words what his Lordship really meant. Did he mean thereby that the nature of such offences and the gravity thereof would change when the probation system would develop further ? Surely, non-user of probation system in its present under-developed condition, can hardly be conducive to its further development.

There are judicial decisions of the U. S. Supreme Court wherein it is held : firstly, that even the economic and social offences are under the shadow of the Probation Act;[29] and secondly, the nature of the offence is not the conclusive element, instead, it should be granted when it appears to the satisfaction of the court that ends of justice and best interests of the public as well as defendant, will be subserved.[30]

26. *Ibid*
27. *Ibid*.
28. *Ibid*.
29. See, *Heidrich* v. *U. S.*, 389 U. S. 893, *Sullivan* v. *U. S.*, 348 U. S. 170, *U. S.* v. *Reynolds D. C. Ark*, 1961, 198 F. Supp. 712.
30. See, for instance, *Kirsch* v. *U. S.*, C. A. Iowa 1949, 173 F 2d. 652; *U. S.* v. *Nix*, D. C. Cal., 1925, 8 F. 2d. 759.

(iii) The learned judge, uses the words "let off."[31] It is submitted, that if at all the learned judge used the words "let off" seriously, this seems to have been uttered out of a deep-rooted misconception. To regard release on probation as a 'let off' is a legacy of the draconion punitive approach towards the offenders which arises out of the belief that the probationers escape penalty for their offence.[32] Probation, it is submitted, is not a pardon but is an authorized mode of mild and ambulatory punishment intended to reform and discipline the offenders. Probationer is not a free man but he is subject to surveillance and to such restrictions as the court might impose. A person on probation is not at large nor at liberty, except within the circumscribed limits permitted by his probation order and is, in law and in fact, in custody and under control of his probation officer.[33] He can, under the law, be subjected to most stringent conditions for his release on probation. If at all such conditions have hitherto not been imposed by the judiciary, this can neither be the fault of our legislature nor that of the executive.

Applicability of the probationary process to public welfare offenders was given a *coup de grace* by the Supreme Court in *Prem Ballab and other* v. *The State*.[34] In this case. the appellants were owner and salesman respectively of a grocery shop situated at Maharani Bagh, New Delhi. The appellants were convicted for selling misbranded and adulterated linseed oil containing artificial dye under the Prevention of Food Adulteration Act, 1954. Bhagwati J., speaking through the Court, sacrificed the principle of individualization in the matter of punishment and thus the claim for the grant of probation was rejected. The learned judge attached optimum and exclusive value to the nature of the offence. Inspired by the *Isher Das*[35] and the *P. K. Tezani* cases[36], he observed :

> The imperative of social defence must discourage the probation principle. No chances can be taken by society with a man whose anti-social activities in the guise of a respectable trade, jeoparadise the health and well being of numerous innocent consumers. The *adulterator*[37] is a social risk. It might be dangerous to *leave him*

31. "For the present we cannot accede to the invitation to let off the accused on probation." *Supra* note 23 at 237.
32. Jyotsna H Shah, *Probation Services in India*, 2 (1973).
33. See, *Cooper* v. *U. S.*, C. C. A. 1937, 91F, 2d. 195; *Dillingham* v. *U. S.*, C. C. A. Fla, 1935, 76F. 2d. 35; *U. S.* v. *Koppelman*, D. C. Pa. 1943, 53F. Supp. 499.
34. A. I. R. 1977 S. C. 56.
35. *Supra* note 15.
36. *Supra* note 23.
37. Italics supplied.

free[38] to carry on his nefarious activities by applying the probation principle to him. Moreover, it must be remembered that the adulterator is an economic offender prompted by profit motive and it is not likely to lend itself easily to therapeutic treatment by the probationary measure. It may be pointed out that the law commission also in it's 47th Report recommended the exclusion of applicability of the probationary process in case of social and economic offenders and presumably in response, to this recommendation, the legislature amended the provisions of the Prevention of Food Adulteration Act, 1954 by introducing section 20AA providing that nothing contained in Probation of Offenders Act, 1958 or section 360 of the Code of Criminal procedure, 1973 shall apply to a person convicted of an offence under the Act unless that person is under 18 years of age. This amendment of course would not apply in the present case but it shows the legislative trend which it would not be right for the court to ignore. We cannot, therefore, give the benefit of the Probation of Offenders Act, 1958 to the appellants and release him on probation.[39]

The view propounded by Justice Bhagwati, it is submitted with great respect, is most pejorative because both at the conceptual and the functional level, the probationary process has not been given serious thought. The development of probation is indicative of a progressively humanitarian approach—a more general concept of "social defence" representing the twin objects of protection to society and prevention of crime.[40] If the probationary process is excluded in cases of economic offenders in the name of social defence it would yield a conflict between the two aspects of 'social defence' mentioned above. The only solution to reach a harmony is the individualized treatment of the offenders. If the learned judge was not ready to leave the adulterator to carry on his nefarious activities, he could have reached the same decision through individualization, if the offender proved to be immune of any therapeutic treatment, like probation. The process adopted by decision makers laying emphasis only on the nature of the offence excluding altogether the other aspects of 'social defence, axiomatic which has become to a progressive criminal jurisprudence, is a matter of regret.

IV

Criminal intent, in relation to probation of offenders, is of great criminological significance. If the objective of punishment, *inter-alia*,

38. Italics supplied.
39. *Supra* note 34 at 63.
40. *Supra* note 32 at 5.

is correction and social reinstatement of the offender, then it is useless to reform the intent which is not criminal or delinquent at all. Even if strict liability is imposed for a public welfare offence and offenders are convicted even in absence of a blameworthy intent, no purpose would be served by incarcerating people whose punishment could not in any way favourably affect the observance of law.

An economic offence can be committed either at the level of planning or production or at the distribution or exchange level or at both. Offenders at the plan or production level, it is true, cannot be easily treated by the probationary process as they know the full implications of their anti-social acts right from inception and are motivated by malignant desire of profiteering through unlawful means. Such offenders, not due to the nature of the their offence but due to their conciousness, motives and dimensions of their indulgence, in most cases, may not be amenable to reformation by such therapeutic measure as probation.

At the level of distribution and exchange, are the petty grocers, vendors and victuallers, who inspite of their best efforts do not and cannot know the chemical constitution and degree of purity or otherwise of the stuff they have to deal with. The indiscriminate incarceration of such persons is not only bereft of reformative potentialties but is the vanishing point of deterrence also. To deter those with no guilty mind or those who would not be a menace in prospect would mean, ultimately, to oust such persons from economic activities altogether. Such persons can always be helped by probation officers either to look for things known for purity or to seek an alternative means of livelihood. Surely, imprisonment, with all its evil potentialities, is no answer, by any means, to their problems.

BOOK REVIEW

The Supreme Court of India : A Socio-Legal critique of its Juristic Techniques by Dr. Rajeev Dhavan, 1977 (pp. Lxiii-524) N. M. Tripathi, Bombay.

The book under review is based on the author's Ph.D. dissertation approved by the University of London in 1972 which has been updated as far as possible. It is a pioneering work by the author who has attempted to study the decision making habits of the judges of the Supreme Court and their juristic techniques. The arduous task has been ably taken up by Dr. Dhavan especially in view of the fact that he has handled areas which are disparate in character. Apart from analyzing the background of the Supreme Court judges[1] and their juristic techniques[2] the author has chosen specific areas[3] for illustrating his thesis. It is true that the topics dealt with in Chapters II to VII have been the subject matter of a large number of research papers; however, the author has adopted a unique approach in handling these topics.

Chapter I is an excellent analysis of the background of the Supreme Court judges and their voting behaviour. It presents some interesting information hitherto not available to legal scholars. In this Chapter Dr. Dhavan has made some observations regarding the quality and equipment of the members of the bar and the legal education in this country with which it would be difficult to disagree. It is indeed a truism that an excellent judiciary emerges out of an excellent bar the members of which have received a well tailored legal education. The reviewer would like to go further and say that erosion of the standards of the judiciary, bar and legal education would ultimately affect the very vitals of the society.

While examining the role of a lawyer in the decision-making process Dr. Dhavan rightly observes "It is true that a lawyer must defend his client at all costs, but should the lawyer in his quest for work and prominence forget some of the fundamental social obligations of his profession ? Latterly, one Chief Justice of India has accused lawyers

1. Chapter I.
2. Chapter II.
3. Right to property, (Chapter III) Law and Order with reference to Preventive Detention (Chapter IV) Hindu Joint Family (Chapter V) Pious obligation, Adoption and Hindu Women's Rights (Chapter VI) and Miscellany of Cases (Chapter VII), which, *inter alia*, touches Industrial Law also.

of sometimes deliberately misstating the law."[4] A survey of Indian cases reveals how sometimes a patently absurd stand[5] is taken by the counsel even before the highest court of the land resulting, apart from the imporevishment of the litigant parties, in the wastage of the invaluable time of the highest court. It is difficult to disagree with Dr. Dhavan when he observes that "Littigation is becoming a favourite pastime instead of a remedy for real grievances....The lawyer is an important part of the litigation process. He has the capacity to reduce the number of cases that reach the court. Unfortunately it appears that he has not chosen to do so." However, it is only a pious wish to expect the lawyers to discharge this social responsibility. The temptation to amass wealth within the existing legal framework is amoral[6] and the solution lies not in merely appealing to the social responsibilities of the lawyer but by drastically pruning the existing provisions of the legal process which foment litigation and unduely drag on the litigation.[7]

4. P. 10.
5. For instance see *Eramma v. Veerupana*, AIR 1966 S. C. 1879 and *Krishna Prasad v. C. I. T. Mysore* (1974) 97 ITR 493. In *Eramma's* case, the step mother, who had no locus standi in relation to the property and were, in fact, trespassers, were pleading for the application of Section 14 of the Hindu Succession Act, 1956. Their stand was as ridiculous as if a woman-tenant were to plead after the enactment of the Hindu Succession Act, 1956 that she should be treated as an absolute owner because she was in possession of the property. In *Krishna Prasad's* case a Hindu male who was a mere 'individual' and had not even married pleaded before the Supreme Court that he constituted a Hindu Undivided Family by himself.
6. The reviewer has an interesting analogy from the field of medicine. A doctor had amassed considerable wealth in his practice. He was however suffering from some chronic ailment for which he used to take regularly a home specific which was quite effiacious and cheap. On the contrary he used to prescribe expensive allopathic medicines to his patients for the same ailment. When his son who was charge with idealism, observed this double standard of his father, he confronted his father with the query whether it was not unethical to prescribe expensive medicines while he was aware of cheap home specific. The doctor had the ready wit to answer. "If I prescribe that home specific for my patients, could you think of living in this mansion ?"
7. The late Justice Dhavan had narrated during his visit to Banaras Law School an illustration of the law's delays. When he was the inspecting judge of the Allahabad High Court he had the occasion to visit one of the lower courts in the hill district of U. P. He was shocked to find an original suit pending in the Munsiff's court for over sixty years, the current litigants being the grand children of the original parties. Cases are not isolated ones and gradually their number is increasing. It is the procedural lacunae that aid the lawyers in this cymical game.

After analyzing interesting personal data of the Supreme Court judges, Dr. Dhavan has portrayed a typical Supreme Court judge in the following words : "Thus it appears that a Supreme Court judge on appointment is usually in his mid fifties, has been the Chief Justice of some High Court, and does not usually have a political background. Forty percent of them have been educated in England. A judge can be chosen from anywhere in India but more recruitments have been made from the Calcutta, Delhi (including Punjab) and Bombay High Courts. Before appointment he may have served on several Commissions of Enquiry but this is not essential. During his term, and after he tends to write and say very little extra-judicially. But after his term of office there is a good chance that he may be appointed to some post like the Chairman of a Commission. The majority of the judges have been Hindus, but the Muslims, Christians and Sikhs have been represented."[8] A brilliant profile indeed ! However the reviewer has an observation to make regarding the Table II (P. 29) which gives some information regarding the judges. In column 8 the author has given the classification on the basis of religion[9] and the categorization of Brahmin as distinguished from Hindu on the ground of religion is patently inapt. Further the author has not drawn any specific conclusion based on the caste of the judge to justify this classification.

Focussing our attention on separate but repetitive opinions of the judges the learned author observes "Recently some judges have adopted the practice of delivering separate assenting judgments containing theoretical discourse indicating the judge's divergence of outlook, which in view of the assent may not be very relevant to the points raised in the main judgement."[11] Such a trend may be delightfully welcomed by the lawyers but it sacrifices clarity and accentuates confusion further. About the pattern of dissent Dr. Dhavan observes "There is in fact hardly any pattern of sustained dissent in the Supreme Court. Judges put forward token dissents which did not outline the judgments they are inserted in, because the authors of the dissents abandoned their dissents in later cases on the same subject in which they participated."[12] "Dissent is usually on a specific non-recurring matter, or of taken nature where the judge merely expresses another point of view, and having made his point makes no attempt to try to get the others to adopt his opinion."[13] After analyzing meticulously a large number of judgements

8. P. 26.
9. Hidayatullah, C. J. has been wrongly stated as a Hindu, P. 29.
10. See p. 31.
11. P. 33.
12. pp. 31-32.
13. P. 32.

Dr. Dhavan rightly remarks that "the technique of dissent has not infact matured as an important technique by which the judges in the court have made their opinions felt,"[14] and finally he concludes that "the Court appears not to have relied on the technique of dissenting and separate opinions to achieve a constant dialectic in the court."[15]

In Chapter II, Dr. Dhavan has made an excellent study of the doctrine of precedent and various other juristic techniques. Under the title 'The Revolt of a Single Judge'[16] the learned author has given some interesting illustrations wherein the Supreme Court has been very strict in ensuring that the interhierarchial structure of precedent is retained. The author has rightly concluded that "the Supreme Court has made an independent contribution to the doctrine of prospective overruling and Indian Courts generally have made a very varied and rich contribution to the Common Law rules of precedent."[17] The author has examined further various juristic techniques adopted by the Supreme Court in the field of constitutional law. Dr. Dhavan does not mince words in conveying his views on several constitutional law matters. While dealing with 'the Court and the Legislature the learned writer concludes that "The Court has thus safeguarded its position from outside criticism, from the legislature and from executive interference. At the same time it has controlled the powers of the other two branches of government and asserted its right to review their actions. *It appears to have exceeded the role that the Constituent Assembly intended for it.*"[18] In the Chapter on Right to Property,[19] while examining the agrarian reform cases Dr. Dhavan observes "The techniques used are inconsistent and of doubtful validity. What the court did in fact was to convert a rule of construction, namely, all statutes connected with agrarian reform must be liberally construed into a test of validity, namely, all statutes not connected with agrarian reform will not be protected under the provisions of Article 31A. But even this test, which on its own terms must apply universally, has been relatively and inconsistently applied."[20] "The essential technique is thc basic doctrine of English administrative law that a power must not be used for purposes other than for which it is given. But the agrarian reform test is clearly an invention of the Court achieved by reference to the Statement of Objects of an Amend—

14. P. 37.
15. P. 35.
16. pp. 45-46.
17. P. 56.
18. P. 86.
19. Chapter III.
20. P. 158.

ment Act and by erratic voting behaviour."[21] "In the area of agrarian reform the court was *frustrated* by constitutional amendment which had deprived it of the power to review statutes which (it thought) obviously violated the *principles of cosmopolitan jurisprudence.* To remedy this the Court tried to reintroduce respect for these principles by the use of any Western techniques and ideas which lay to their hand."[22] While dealing with the Doctrine of Eminent Domain the learned author observes "once again the Court made a dubious use of Western techniques in interpreting the Constitution and Statutes."[23] "We can see how the judges by inconsistent voting patterns had changed the whole basis of constitutional interpretation in India and expended the reasonableness test to situations to which it was not intended to apply."[24]

He admonishes the Supreme Court by stating "In a sense the Supreme Court seems to perpetuate a colonial, if not foreign, legal system unaffected by Independence— the law is not yet independent."[25] He concludes that "In effect the Court has used all possible techniques to acquire judicial review in such areas whence parliament had taken away the power of judicial review."[26] Examining the topic of Law and Order,[27] Dr. Dhavan observes "What has happened in effect, is that the Court has rejected the broad powers of review as afforded by American due process techniques, but acquired virtually the same powers by using the broad 'ultra vires' test and the English administrative law technique. It has interpreted these English law techniques to give them wide powers of review while retaining the theoretical stance of non-interference."[28] "The Court's use of techniques reflects on its ability to use and even *distort* English and American techniques to suit *its own purposes.*"[29]

It is submitted that the constitutional law pandits may not agree with these observations of Dr. Dhavan. However one is impressed by the sincerity with which the author makes out his point though not with his vehemence.

While in Chapter V, Dr. Dhavan has made a study of the Hindu joint family relating to coparcener's acquisitions and some problems

21. P. 164.
22. P. 167.
23. P. 172.
24. P. 204.
25. P. 203.
26. P. 203.
27. Chapter IV.
28. P. 243.
29. PP. 255, 256.

of partition, in Chapter VI, he has examined some questions relating to pious obligation, adoption and Hindu Women's Rights. Dr. Dhavan is not happy with the traditional approach of the Supreme Court in handling problems relating to Hindu Law. He observes "(I)f we consider the Supreme Court's performance while arbitrating between the individuals and joint family claims to property, the Court has preferred to adopt a strict Hindu Law approach, rather than explore ways and means of balancing equities in the modern context by an extensive use of both traditional and cosmopolitan techniques in combination. Hegde J., represents a reforming trend in the Court but even he seems content with expanding the Privy Council's methods rather than evolving a pattern of his own."[30] "In considering the law relating to the joint family the Supreme Court has merely played the role of third Court of appeal rather than that of a powerful agency responsible for creatively and sensitively reforming an uncodified part of the Hindu law "[31] The reviewer is not happy with the reference to the religion of the presiding judges such as the "the judgement was read by a Muslim judge"[32] "Immam J, a Muslim judge reading the judgement."[33] "Hindu and Muslim judges from Allahabad"[34], inspite of the explanation the author has given in the footnote.[35] The fact that a presiding judge has been the adherent of one religion or the other, the reviewer submits, has fortunately not influenced the trend of decisions. In one of seminars conducted by the Indian Law Institute in which Beg, J. presided over a session, he deprecated rightly the condescending references made by some authors to the religion of the judges.

Dr. Dhavan's criticism on the decision making habits of the Supreme Court judges are on the whole justified. With his brilliant and incisive style the author has analysed a large number of decisions and has succeeded in presenting a coherent picture in each of the divers branches of law. The book is a mine of information for a researcher, and the legal scholars are grateful to Dr. Dhavan for giving a trend setting work. Though the book is neatly produced, it needs to be said that proof-reading has not been entirely satisfactory.

B. N. Sampath*

30. P. 305.
31. P. 324.
32. P. 305.
33. P. 371.
34. P. 423.
35. P. 371 footnote 66.

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Shigeru Oda, The Law of the Sea in our Time–I : New Developments 1966-1975. Sijthoff : Leyden (1977), 269+viii pp.

Judge Oda has brought together a number of his most significant articles, several of which were originally published in the Japanese language, for the purpose of recording his thoughts and philosophy in the form of a permanent record.[1] Not by accident, Judge Oda has selected those works dealing with the most controversial aspects of sea law, presently undergoing important changes as to both customary and codified law. State practice has modified the traditional law of the sea and the 1958 Geneva Conventions, in such areas as exploitation of fisheries and mineral resources, especially in continental shelves and seabed regions. Thus, the book consists of a series of essays, each of which is devoted to a specific topic.

Starting from the proposition that the law governing the formerly free high seas "is now about to undergo a drastic change,"[2] the author anticipates that : "This change might be the greatest in scope experienced by any field of international law."[3] As is true of many rubrics of international law (as for example human rights protection, development law, law of outer space) the present situation is far more complicated than it was twenty years ago when the author acquired a keen interest in the law of the sea. Indeed, one of the book's main objectives is to register those opinions and ideas, which were held at each stage of his research and writing. Utilizing a time sequence, there emerges a definite order to the entire volume, which in turn is part of a series on ocean development. The logical sequence of the presentation is facilitated by the inclusion of a table of contents for each of the seven distinct essay—chapters. In addition, a bibliography of related studies, published in European languages, is provided by way of supplementary information.

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1. S. Oda, *The Law of the Sea in our Time*—I : New Developments 1966-1975 viii (1977) (hereinafter cited as Law of Sea).
2. *Id.* at vii.
3. *Id.*

Chapter One, *The Dawn of a Regime for the Deep Ocean Floor*,[4] presents the necessary historical background with considerable detail; accordingly, the author demonstrates his special competence. In particular, the First Chapter, by far the longest, is most helpful in providing an insight into the sharp divisions at the present United Nations Conference on the Law of the Sea (UNCLOS III). More precisely, this Chapter concentrates on the manner in which the legal concept of the deep ocean floor evolved and the severe legal controversy that resulted. The diverse, often bitterly opposed, viewpoints that are held by scholars, private interests, non-governmental organizations, and sovereign states are examined. As of the spring of 1977, this single issue of the utilization of mineral resources from the deep seabed for the benefit of mankind is one of the most diffcult "blockages" facing UNCLOS III. Hencc, it is appropriate that approximately one half of the text is devoted to this single topic, in view of the growing confrontation between the relatively few industrialized states and the developing world, primarily the threat that if no agreement concerning the regulation of the deep sea is obtained, the major powers may institute unilateral action, similar in nature to that undertaken in regard to fisheries.

The author is censcious of the interest of the industrialized states; nevertheless, he also manifests considerable sympathy for needs of the developing world. Beginning with the Maltese Proposal,[5] which sought to place those areas beyond the continental shelves outside of national appropriation and reserve their resources (and resulting income) for the common heritage of mankind, the author objectively discusses the precise issues, e. g. the regulation of exploitation, the protection of the interests of all states, the reservation of these interests of all states, the reservation of these areas for peaceful purposes, and the creation of a regulatory agency. In turn, subsequent debate highlighted additional problems, such as the right to conduct research, the allocation of revenues to land-locked and disadvantaged states, and the establishment machinery. These topics are reexamined in subsequent chapters.

Events following the Maltese Proposal demonstrate the basic clash of interests; yet there appeared a strain of common agreement to the extent that provision should be made for the internationalization of the area, and regulation by an international authority. The level of agreement, at the very least,centered on the necessity for international cooperation, as the foundation for subsequent exploitation.

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4. *Id.* at 1-112.
5. U. N. Doc. A/6695; cited id. at 16.

As becomes evident in this First Chapter, the theme of the book is the need for international cooperation between the severnl groups of affected states. As became evident in Judge Oda's 1969 Hague Academy lectures,[6] the thrust of his more recent work has stressed this necessity for international cooperation, with less emphasis upon the defence of national positions.[7] In fact, this single conclusion—arising from the judgments of the International Court of Justice in the *North Sea Continental Shelf Cases*,[8] and at the basis of the judgments in the *Fisheries Cases*[9]—becomes the book's main recommendation, that in turn must be evaluated in terms of national positions, dominated by political considerations. But this is not to say that far-sighted proposals were not offered,[10] even though the United States favoured national exploitation. This reviewer is considerably more in sympathy with the U. S. position, supporting unilateral action, than is Professor Oda.[11]

6. S. Oda, International Law of the Resources of the Sea, 127 *Recueil des Cours* 355-484 (1969 II).
7. It might prove helpful to contrast the author's position in his Hague lectures, supra note 6, and his earlier study, Oda, The Hydrogen Bomb Tests and International Law 53 *Die Friedenswart* 126 (1956). Cf. this reviewer's prior analysis, as follows : "Japanese scholars appealed to the world's academic community.....Professor Oda in his more recent work is placing greater emphasis on co-operation by States (within the scope of the United Nation) to properly utilize the resources of the oceans. S. Oda, International Co-operation in Ocean Exploration, in *International Law of the Resources of the Sea*,... (supra note 6, at 364-69). Oda, Towards a New Regime for Ocean Development, 1 *Ocean Development & Int'l L.* 291 (1973) " W. Gormley, *Human Rights and Environment : The Need For International Co-operation* 28 n. 75 (1976).
8. *North Sea Continental Shelf Cases* (*Germany* v. *Denmark*; *Germany* v. *The Netherlands*), (1969) I. C. J. 3.
9. *Fisheries Jurisdiction Case* (*United Kingdom* v. *Iceland*) (Merits) (Judgment), (1974) I C. J. 3; id. (*Germany* v. *Iceland*), (1974) I. C. J. 175.
Accord generally, the discussion of the legal norm of international cooperation as it was developed by the Court, in W. Gormley, Ch. 7, The Need For International and Regional Co-operation To Conserve the Earth's Living Resources : The Fisheries Cases, supra note 7, at 186-212.
10. See e. g., the position of the realists within the United States, *Law of the Sea*, 26-31.
11. It is essential to consider the position of the United States in the General Assembly, i. e. only the industrialized States are in a position to perfect the technology required to exploit the deep seabed; consequently, no restrictions should be placed upon their embryo experiments and research. The greatest need at present is to perfect methods for the economic exploitation of the oceans.

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

U. N. GAOR, Report of the First Committee, U. N. Doc. A/7834, 1883d Plenary Meeting, 15 December 1969 (Agenda Item 32), at 1-2, 15 December 1969).

For an expression of the extreme position, rejected by Oda, compare R. Anand, *Legal Regime of the Sea-Bed and the Developing Countries* (1975); Gormley, Book Review, 23 *N. I. L. R.* 114 (1976).

12. *Supra* note 6.
13. *Law of Sea*, 58.
14. U. N. Doc. A/AC. 138/25. See The Draft United Nations Convention on the International Seaded Area, discussed in *Law of Sea*, 98-104.

Without debating the issue in this review, it can be mentioned that it is only the industrialized states that possess the technology to exploit the seabed; only a relatively small group of companies have the financial resources to gamble on the possibility of striking oil in commerically exploitable quantities; and only the industrialized interests are capable of developing existing techniques of extraction to a level where such utilization is economically feasible. The third world tends to minimize the hazards faced by the few industrialized powers. Yet, the book has achieved a high sense of both objectivity and realism, in its attempt to strike a balance between the various ligitimate claims. Distributive justice demands that no single interest be favoured at the expense of the world community.

While not offering specific conclusions, the author cites some of the recommendations originally presented in his 1969 Hague Academy course.[12]

> The Principle of non-appropriation of the deep ocean floor should not lead to the conclusion that exploitation of the resources of the area should come to a halt.
>
> The developing nations, on the other hand, expect to receive some portion of the profits derived from the exploitation by the developed States. From the quite different motives of both the developed and developing nations, support will probably be given to a highly developed international management of the deep ocean floor. . . .[13]

Many additional ramifications await the reader, as the author examines the events following the establishment of the *ad hoc* Seabed Committee in 1968. The final portion of the Chapter leads up to the 1970 *Draft United Nations Convention on the International Seabed Area*.[14]

Of special significance to this reviewer was the discussion of the United States position (including the views of special pressure groups), which, according to the author, had the effect of confusing the precise stand to be assumed by their government regarding the limit of continental shelves. Pressure from private petroleum groups, coupled with conflicting opinions within several agencies of the American Government, had the effect of preventing the formulation of a consistant stand.[15]

> The United States Government, blamed for taking a "no-policy", still was unable to declare a definite policy concerning marine affairs. What, however, was clear only to the United States was that, the way in which the extent of the continental shelf might be decided, or whatever regime might be established, the American enterprises should be able to continue the exploitation of the seabed beyond the 200-metre isobath, and their invested capital would be protected under any future regime.[16]

With the submission of the Draft United Nations Convention, a shift in emphasis occurred. Several governments (e. g. the United Kingdom and France) introduced working papers, with the result that serious consideration could be given to the possibily of creating an entirely new legal regime governing deep sea exploration.

Beyond question, the discussion of events leading up to the 1970 Draft Convention will serve as a useful review of the divisions preceding the years of dispute at UNCLOS III.

Chapter Two continues the examination of the work of the U. N. Seabad Committee and the issues faced, particularly efforts to prepare a draft of legal principles, designed to govern the exploration and exploitation of the deep ocean floor; still, "the difference of views between the developed nations and the developing nations was so great that the work did not produce any fruitful results"[17]

Part of the difficulty brought about very forcefully was the insistance of the United States Government to preserve the traditional concept of of freedom of the seas, particularly to assure the manoeuverability of its naval forces, for America could not tolerate a territorial sea in excess of six miles. On the other hand, developing states were concerned

15. Efforts by the United States Government to Formulate its Policy, id. at 92-94.
16. *Id.* at 93.
17. *Id.* at 116.

with the protection of offshore fisheries, because of the fact that a twelve mile fishing zone, as proposed by the United States, would not adequately safeguard their resources against unlimited exploitation from high seas fishing fleets. The difficulties faced at the 1958 and 1960 Geneva Conferences continued to haunt efforts to resolve these conflecting viewpoints, during the early part of the 1970's. In order to resolve these difficulties, the Seabed Committee was enlarged from forty-two member states to eightysix in 1970. It was to assume the task of preparing for UNCLOS III, rather than the International Law Commission, owing to the political nature of the issues to be resolved.[18] This decision does not appear to have been well taken

Most of the deliberations were held within three Sub-committees; thus, the work of the First Sub-Committee carried forward the discussion of the future regime of the seabed, whereas the Second Sub-Committee examined the law of the sea in general. The Third Sub-Committee dealt with marine pollution and scientific research.[19] The Second Sub-Committee had the task of preparing a comprehensive list of topics to be dealt with at UNCLOS III. Part of the difficulty faced by the subsequent meetings at Caracas, Geneva, and New York can be traced to the inability of the Second Sub-Committee to draft an adequate list of subjects and issues.

The book is especially competent in its analysis of the work (and shortcomings) of U. N. organs, as for example in its examination of the concept of an exclusive economic zone as it gained support from the third world.

The Prospects For the Future Law of the Sea[20] are anticipated by the author when he contends, and quite properly :

> I believe that the time will shortly come when the idea of international control in lieu of freedom will be raised also for fishing in the oceans..... It appears to me that the division between the exclusive interest of coastal States in the extended exclusive economic zone and the international control of the vast oceans for the exploitation of their resources, either fishery or mineral, will take the place of the traditional dualism between the exclusive interests in the narrow territorial sea and the freedom in the wider high seas. I may say in fact that this trend has already been emerging.[21]

18. *Id.* at 122.
19. See e. g., *id.* at 123-27.
20. *Id.* at 133-40.
21. *Id.* at 137.

The fundamental position advanced is that such problems as fisheries, mineral exploitation, preservation of the ocean environment, and prevention of marine pollution cannot be resolved exclusively by legal techniques; moreover, these diverse fields (including economic, fishery, and conservation zones' cannot be resolved by means of a single legal solution. Professor Oda, therefore, supports the special requirements and legal compotence of coastal states, though attempting to strike a balance by means of distributive justice. The strongest illustration is the right of a coastal state to prevent pollution within its two hundred mile economic zone. He seeks "simply to strengthen the competence of the coastal State to protect its interests without violating any legitimate interests of others. I believe that the idea of an antipollution zone will be acceptable as a logical development of the concept of the contiguous zone."[22] Within this context, considerable attention is given to the accommodation of such competing subjects as pollution control as contrasted with freedom of navigation. Likewise, the traditional concept of "the law of the flag" must be reconsidered. The author continues:

> The idea that the actions of coastal States are necessarily harmful to the international community is not necessarily true. It is submitted that categorical approaches, such as "the territorial sea or the high seas", or "the freedom of the high seas or its denial" should be re-examined in view of recent developments.[23]

Priorities must be established, albeit a hierarchy of legal norms governing the formerly free high seas, in the opinion of this reviewer. But this is not to say that legal solutions should be considered apart from other aspects. For instance, the exploitation of offshore resources "is not simply a question of international law, but is related to the fundamental character of the international community."[24]

In his conclusions originally written in 1973 the author foresaw the institutionalism of a regime for fishing and exploitation of resources, with the creation of possible intermediate zones. The goal sought was to recognize the competing claims of various states. The conclusion advanced was that :

> The road has been paved for international control of the ocean floor far from the continents. I would think that this trend will eventually be a model for a fisheries regime. As to the scope of international control, we must give consideration to distributive justice in the international community.[25]

22. *Id.* at 139.
23. *Id.* at 139-40.
24. *Id.* at 140.
25. *Id.*

Preservation of the marine environment is more susceptible to legal regulation. The main problem, of course, is one of jurisdiction. Who will enforce standards ? If not the international community then either the costal or the flag state must exercise its legal jurisdiction. While flag state will retain its traditional competence, "it may be feasible to grant part of such competence and resposibility to the coastal State for the prevention of pollution in its off-shore areas, since the coastal State would be most seriously affected by the pollution of the ocean."[26]

The Chapter concludes with the undeniabl. observation : "It is, however, impossible to talk of the law of the sea without understanding the new trend promoted by the bloc of developing nations which has rapidly gained power in the international community.[27] Judge Oda continues :

> I would like finally to pose the question as to whether the developed nations will profit or lose, if the Third Conference on the Law of the Sea fails, or if they themselves do not comply with the results of the Conference on the sole ground that the outcome of the Conference is not acceptable to them. I think the answer is clear.[28]

Chapter Three continues the analysis of this trend in that it comes to grip with those difficuties all too obvious to scholars and lawyers in 1977, as of the time that UNCLOS III has resumed its deliberations. Thus, the issues that originally divided the several blocs of states within the seabed committee and the United Nations General Assembly continue to split the delegates; but, in addition, other issues, such as voting procedures, resulted in deadlock. However the greatest drawback to reaching agreement was the fact that states had begun to take unilateral action, even as toward the seabed. National actions, as for example by the United States Congress, had the effect of threatening the extension of municipal jurisdiction over additional areas of the seas.[29]

Significantly, the convening conference held in New York attempted to utilize a consensus method of agreement, thereby avoiding formal votes, whenever possible. Such a choice—frequently favored by scholars[30]—seeks to avoid open confrontation between competing blocs. However, little was achieved, since "these very basic matters of conference organization took up so much time that the New York session was

26. *Id.* at 141.
27. *Id.*
28. *Id.*
29. Cf. R. Anand, supra note 11, at 110-116.
30. See e. g., H. Cleveland, The Third Try at World Order (1916).

unable to prepare the important rules of procedure."[31] Following the adoption of rules of procedure, after a week of debate at the opening session of the Caracas Conference, the delegates again determined to reach some degree of consensus. Only in the event that there failed to be any possibility of reaching such a consensus would formal voting be held by which a two-thirds majority of participating states would be required. The events at the series of UNCLOS III meetings, since 1974, demonstrate the difficulty—indeed impossibility—of achieving a two-thirds majority, let alone a consensus !

The book, in its third chapter, reviews the activities of three main committees, the competence of which patterned those of the seabed sub-committees, discussed above. Their progress was tortoise-little more than summary results were achieved, "and the prospects for meaningful negotiations seemed hopeless."[32] The spirit of the Caracas and Geneva meetings is perhaps typified by the evaluation of the efforts of the Third Committee at the Caracas Session. "Amazingly, the Committee again failed to tackle successfully the important subjects of environmental standards, enforcement of regulations and establishment of liability for damages."[33]

> Starting from the premises that in 1969, the International Court of Justice, in the North Sea Continental Shelf cases, confirmed the principle that a coastal State maintains jurisdiction over the continental shelf off its coasts and that the principle is valid even as respects countries which have not ratified the Convention.[34]

The issue of the outer limit of the continental shelf has yet to be resolved by UNCLOS III, in view of the position taken by coastal states that they should retain jurisdiction over shelf areas even beyond the two-hundred mile limit.

The book rejects the traditional argument that acquired rights cannot be altered by new definitions or legal solutions. The author reaches two conclusions :

> In conclusion, however, two premises seem to be quite clear : (i) mineral resources within the 200 mile distance from the coast will fall under the exclusive control of the coastal State; (ii) the exclusive control of the coastal State will probably not encom-

31. Law of Sea, 154.
32. Id at 159.
33. Id. at 158.
34. Id· at 163; citing North Sea Continenental Shelf Cases supra note 8.

> pass those mineral resources other than oil and gas—in other words, hard minerals such as manganese nodules—which exist beyond the 200 mile distance.[35]

The first conclusion is certainly valid, even as to other subjects, as for example fisheries. But may it be suggested that the jurisdiction of coastal states may yet be founded on geographical factors (in addition to the technological and financial ability to exploit).

In 1974, the author clearly foresaw the problem still confornting UNCLOS III.

> The conflict of view on the delimitation of coastal State jurisdiction and the problems concerning boundary disputes are evident in tne fundamentally different positions assumed by the negotiating countries, and their handling of these issues illuminates more clearly than anything else the true complexity of attempting to formulate a new comprehensive law of the sea treaty.[36]

Clearly, the author does not anticipate an extension of national jurisdiction beyond the two-hundred mile zone; accordingly, the con cept of a two-hundred mile partimonial sea, as originally favored by developing states, particularly as concerns fishing zones, has now become a reality. In this regard, the author is especially conscious of the disadvantage that would result to land-locked or geographically disadvantaged states if national jurisdiction was extended beyond the two hundred mile limit.[37] The validity of Oda's position is beyond challenge. Conversely, if the 1977 session of UNCLOS III cannot resolve the seabed issue, unilateral action may be taken beyond these limits. In fact, he foresaw the possibility "that national jurisdiction may continue beyound the 200-mile limit in the event of the continental shelf stretching farther seaward."[38]

The *Prevention of Pollution and the Changing Concept of Innocent Passage*[39] continues to haunt current efforts to redefine traditional concepts. On the one hand, freedom of passage remains a fundamental principle of American foreign policy, while on the other, "sensitive coastal and archipelogic States are beginning to formulate a new defini-

35 Law of Sea, 165.
36. Id.
37. Id. at 171. A similar conclusion was reached by a special task force of experts, acting on behalf of the Trilateral Commission. S. Oda, D. Johnston, J. Holst, A. Hollick, & M. Hardy, A New Regime For the Oceans (1976); Gormley, Book Review, 23 N. I. L. R. 378 (1976).
38. Law of Sea, 172.
39 Id. at 176-78.

tion of innocent passage.....,"[40] owing to the danger caused by oil tankers and also by nuclear-powered vessels often carrying nuclear weapons, nuclear materials, and dangerous. Prior damage, caused by sea pollution, coupled with potential threats, pose a danger to the marine ecology. Therefore, the book recognizes the validity of these competing interests; yet the reality of the situation (in 1974) was recognized : classical sea law was being reexamined in light of the necessity "to control pollution and encourage a stable order in the oceans."[41] Examples of such modification (and simultaneously of unilateral actions) can be seen in the creation of conservation and antipollution zones. Accordingly, states can draw up rigid standards, which may affect certain classes of vessels. Taking the opposing view, the shipping industry and the maritime states seek to retain the classical flag-state formula, "whereby the flag-state exercised exclusive jurisdiction over its ships on the high seas. However, from the standpoint of adequate protection for the marine environment, this procedure may not be the best way to guarantee such protection."[42] For instance, flag-states have often been selected because of their lower standards; consequently, such states are not primarily concerned with pollution control. This reviewer is most certainly in agreement with the author's conclusions, concerning environmental protection, though still dedicated to the classical principle of "freedom of navigation,"[43] somewhat in line with U. S. policy.

Easy solutions will not be forthcoming at UNCLOS III or within United Nations organs. As Judge Oda contends, "it still remains to be seen how we should define the tong-range goals of the international community, and how to accommodate the national interests of the various nations under differing conditions."[44] Japan, with its major high seas fishing fleets, cannot insist on the application of classical doctrines. Japan's equally compelling dedication toward ecological preservation necessitates its adherence to newer standards, while simultaneously protecting its shipping and fishing industries. As a matter of necessity, major powers must resolve this basic (and over-lapping) conflict of legal and economic interests. An identical conclusion can

40. Id. at 177.
41. Id. at 178.
42. Id at 179.
43. Gormley, The Unilateral Extension of Territorial Waters : The Failure of the United Nations to Protect the Freedom of the Seas, 43 U. Det. L. J. 695 (1966); Gormley, The Development and Subsequent Influence of the Roman Legal Norm of "Freedom of the Seas", 40 U. Det. L. J. 561 (1963).
44. Law of Sea, 181.

be advanced as concerns the world community acting through UNCLOS III. Judge Oda has indicated the course of action that should be followed by way of international cooperation.

Chapter Four, *New Trends In the International Law of Fisheries*,[45] beings a new thrust by the book; in fact, it could have represented a distinct part if the author had chosen to make a major division between the chapters. Whereas the prior two-thirds of the text dealt with the broad scope (or the macroscopic level), plus the interrelationship between the several distinct areas of conflict, though concentrating on the deep seabed, the remaining four relatively short chapters center their attention on precise issues (or the microscopic approach). Thus, Chapter Four, the shortest text, begins by posing some of the author's prior approaches to the extension of national competence over contiguous zones for exclusive fishing. Starting, in 1973, from the proposition that traditional law faced fundamental changes, his basic philosophy was that

> the contiguous zone might be claimed only to protect the legitimate interests to which the coastal State has inherently been entitled its own territory, but not to enlaage the extent of the actual interests of the coastal State at the sacrifice of the legitimate intererests which other nations may enjoy in the seas.[46]
>
> But the basic clash of interests can be traced to our fundamental philosophies concerning the problem of world resources. It is submitted that if there is any difference in the approaches to the law of the sea among the nations, this is because different nations have different philosophies concerning marine resources.[47]

It is not unrealistic to conclude that this chapter reveals the authors philosopy to a more precise degree than those dealing with the seabed. Specifically, he clearly reconizes the evolution of sea law in terms of the special interests of coastal states, with emphasis placed on those which can also be classified as developing. Even in 1973 the extension of exclusive fishing and economic zones to a distance of two hundred miles had become a reality. At the very least, the United States, Japan, and the Soviet Union had begun to concede that "the coastal State would be granted special right to off-shore fishery resources. One can find herein a revolutionary change in the attitude of these major maritime countries.[48] But in 1973 these states still sought to retain historic rights

45. Id. at 187-98.
46. Id. at 189.
47. Id. at 190.
48. Id. at 191.

of access by all states to distant offshore fishing resources beyond the territorial sea. Consequently; these three states submitted proposals, designed to accommodate the fishing interests of both the coastal power and fishing states, as for example by recognized preferential treatment. Yet, the fundamental clashes in philosophy prevented agreement. In theory, at least, agreement was reached relative to the need to conserve fishery resources; nonetheless, major powers demanded equal access. Dtstributive justice, therefore, is the solution, but realistically it cannot be achieved. "It would be difficult, homever, to devise general principles of allocation *in abstraco* which could find universal approval."[49] Nevertheless the author continues : "It is the task of politicians to reconcile the two opposite concepts, which *prime facie*, seem to be categorically contradictory."[50] The alternatives are to prescribe universal rules applicable to all cases of management, or to establish international machinery to allocate resources and similarly, to issue licences in addition to collecting royalties. "In this respect, I am forced to admit that the latter concept will gradually gain support."[51]

The Fifth Chapter, *Marine Pollution and International law*,[52] takes the position, and quite properly, that "neither the social nor physical sciences alone are able to yield a satisfactory solution, and a truly interdisciplinary approach is essential.[53] Furthermore, this topic of primary concern to UNCLOS III also falls within the purview of private law. Starting from the proposition : "There is only one ocean, and the world is now aware that the future of that ocean will brighten environmental terms only when it is subjected to international law and regulations which are world-wide in scope."[54] the author reviews existing international conventions dealing with oil pollution, the first of which was the 1954 *Inernational Convention for the Prevention of Pollution of the Sea by Oil.*[55] It was the only international convention designed to prevent oil pollution at the time the 1958 Convention on the High Seas was prepared. In view of the urgency of preventing the complete destruction of all life within the oceans, during the next fifty years,[56] it is amazing, on reflec-

49. Id. at 196.
50 Id. at 197.
51. Id. at 198.
52. Id. at 201-28.
53. Id. at 203.
54. Id.
55. 327 U. N. T. S. 3.
56. W. Gormley, supra note 7, at 7, citing The Human Environment : New Challenges for the United Nations. OPI 43-02726 (1971). See also B. Ward & R. Dubos, Only One Earth : The Care and Maintanance of a Small Planet (1972).

tion, to realize that serious attention has only been directed toward this topic for a period of approximately a quarter century.

The opening section presents a concise summary of international efforts by international organization to prevent pollution. From the standpoint of present attempts by UNCLOS III to adopt comprehensive instruments, the beginning stages can be traced to the 1970 United Nations Conference on the Human Environment. Prior to the Stockholm meeting, the Seabed Committee (and its third sub-committee) has been reluctant to act (as for example by perfecting a draft treaty dealing with the preservation of the marine environment) until the completion of the Stockholm meeting. Concrete proposals did not appear until 1973; however, agreement could not be reached by the working group on marine pollution. Regrettably, little success has been achieved, since 1973. Aside from the application of general principles of international law to the oceans, specific types of sea pollution must be regulated by special agreements. As the author maintain : "[C]oncrete steps to prevent marine pollution do not automatically result even if the general responsibility of all nations to preserve the marine environment is elevated to the status of a principle of international law."[57]

Whatever the source of ocean pollution, be it the discharge of oil from ships or nuclear explosions, the primary legal issue in the absence of comprehensive international regulation is the extent of national jurisdiction that can be exercised over the formerly free high seas to protect the coastlines, continental shelves, and living resources. Several options are available as to the extent of national jurisdiction, e. g. prosecute after the act or undertake preventive measures.

In the 1960's, the author contended, and correctly, "that a coastal State can exercise complete jurisdiction over these waters (in the contiguous zone) for certain limited."[58] His position is now generally accepted; nevertheless, the remaining issue is extent to which a state can extend jurisdiction by means of anti-pollution zones, because 'the difference between contiguous zones and territorial waters is that rather then a coastal State expanding its legal interests at the expense of another State a contiguous zone merely enables the coastal State to strengthen means of protecting legal interests already in existence."[59] The Canadian position as exemplified by its anti-pollution zone was generally

57. *Law of Sea*, 210.
58. *Id.* at 223.
59. *Id.* See also Oda, The Territorial Sea and Natural Resources, 4 *Int'l & Comp. L. Q.* 415 (1955); and Oda, The Concept of the Contiguous Zone, 11 *Int'l & Comp. L. Q.* 131 (1962).

favoured by the author in 1973; "I personally believe we should support the Canadian line of resoning."[60] Nonetheless, he rejects the Canadian proposals to the U. N. Seabed Committee. Thus, the jurisdiction of coastal states must be qualified by the custodial concept, i. e. the coastal state must conform to international legal standards. "Moreover, to the extent that coastal States are preserving the seas not for themselves alone but on behalf of international society, their rights in that regard should be elevated to the status of responsibilities."[61] We should all support the qualified approach of Judge Oda. Previously, this reviewer adopted the position of Professor Lewis Henkin that "Canada has struck a blow against pollution and for today's crusade for the environment but it is also a blow at international law and its law of lawmaking,"[62] has strongly rejected Canada's unilateral action particularly the withdrawl of the jurisdiction of International Court of Justice. The reviewer, recognizing the motivation behind the Canadian action, has characterized the renuciation of the World Court's jurisdiction as sheer lawlessness.[63] Clearly, Canada has acted in its own interests rather than on behalf of the world community.

On the other hand, the inability of UNCLOS III to reach substantial agreement or to take even the first measures to safeguard the oceans from pollution lends support to the sheer necessity on the part of Canada to protect its arctic ecology. The author foresaw this trend in 1973; however he resisted claims that they were inconsistent with the custodian concept. He, therefore, concludes that

> it is inevitable that affective measures to control marine pollution will have to be administered by coastal States. On the other hand free passage by commercial shipping is in the best interest of all nations whether industrialized or developing.[64]

In this regard Judge Oda advances his basic philosophy, which can be traced to the influence of Professor Myres McDougal, namely that community expectations necessitate that :

60. *Law of Sea*, 223-24.
61. *Id.* at. 224.
62. Henkin, Arctic Anti-Pollution : Does Canada Make or Break International Law ?, 65 *Am. J Int,l L.* 131, 135 1971).
63. W. Gormley, *supra* note 7, at 16 The full statement reads : "The writer (reviewe) submits—regardless of the Self-Judging Reservation of the U. S , or the Connally Amendment (61 Stat. 1218; 15 Dep't of State Bull. 452 (1946)—that the withdrawal of the ICJ's jurisdiction is sheer lawlessness! It represents not only a violation of the spirit of the U. N. Charter but a severe setback for the rule of law." Id.
64. *Law of Sea*, 225.

> the discipline of international law must confront the important social issue of how we can reconcile progress with preservation and seek a solution to the problem of how to distribute the costs and sacrifices demanded by preservation, particularly between the already industrialized nations and the developing nations.[65]

A few sentences later the author concludes his chapter with a most profound observation that could have served as the conclusion to the book, because of his attempts to seek resolution of conflicting interests.

> While the ocean must be effectively protected from pollution care must be taken that untoward intervention by coastal States does not destroy free passage for shipping, a principle recognized the world over as serving the best Interests of all. We must continue our efforts to establish a legal system capable of justly reconciling those demands.[66]

Chapter Six returns to an examination of those problems posed in the earlier chapters, namely, fisheries and seabed exploitation, but from the standpoint of the position taken by the Japanese Government, as of 1974, at which time UNCLOS III was anticipated, and the extent to which the world community would have the opportunity to develop a new corpus of maritime law. Accordingly, Japan—as is true of many coastal states—seeks to protect its offshore areas, while at the same time assuring the maximum amount of freedom of movement for its high seas fishing fleets. Similarly, Japan is close behind the United States in perfecting the technology to exploit mineral resources from its continental shelf and even the deep seabed. Japan is one of the few states in a position to harvest manganese nodules. Accordingly, as shown in prior publications,[67] Japan will benefit to a greater extent than developing states by the adoption of a two-hundred mile economic zone; nonetheless Japan insists on the preservation of freedom of transit, even though it is not unaware of the new trends in the law and the needs of developing nations. These states regard their offshore resources as constituting their exclusive property, and, as such, an inalienable legal right; consequently, the custodial concept is rejected, as are the rights of other states (and their companies) to exploit resources, to conduct scientific research, or to undertake fishing. Since this observation was advanced in 1974, the trend has been toward unilateral extensions of exclusive national jurisdiction.

65. *Id.*
66. *Id.* at 226.
67. S. Oda, *A New Regime*, *supra* note 37.

On the other hand, the author is encouraged by the possibility of the acceptance of international management of seabed development, partially because the major powers are seeking to provide preferential treatment for developing and disadvantaged states. Examples would be forms of revenue sharing and a share of licence fees. Yet despite attempts to accommodate the demands of these groups of states, they continue to insist upon unreasonable claims, as for example at UNCLOS III. Conversely, the industrialized states take the position—and correctly so, in the opinion of this reviewer—that the seas, particularly the deep seabed and those portions of continental shelves beyond two-hundred miles, are free for research and exploitation until existing international law is changed by the imposition of an effective international regime.

The solution must be found by narrowing the conflicting positions between the two extremes. Beyond question, the poor and developing states, even though they possess considerable voting strength within United Nations organs, cannot become the controlling factor, in the opinion of this reviewer. As the author explains :

> One may even point out that there is in the attitudes of the developing nations an excess of idealism and a certain degree of shortsightedness fixed on immediate gains, all of which perhaps will need to be tempered in due course.[68]

Judge Oda proposes that "a new and flexible approach is required of the advanced maritime nations to enable an overall accommodation of the diverse interests involved."[69]

He further concludes :

> The division of the sea, according to the traditional concept, into two parss—the high seas and the territorial sea—as well as the consideration in a categorical way of either "complete freedom" in the other will both prove unsatisfactory and no longer suitable for a practical solution of the present-day problems of the sea. One is no longer justified, in a comprehensive examination of the law of the sea, in regarding the freedom of the high seas as an absolute axion from which no departure is permissible or in considering anything modifying it as against international law. The criticism of the developing nations that the "freedom of the sea" is nothing but an ideology used in the interests of the developed maritime nations alone, must be taken seriously.[70]

68. *Law of Sea*, 246.
69. *Id.*
70. *Id.*

This statement of basic policy—reflecting the philosophy of Professor McDougal—could also have served as the conclusion to the book. It can only be hoped that the 1977 session of UNCLOS III will head this enlightened plea.

As implied below, the book lacks a separate concluding chapter, because it is a collection of prior articles. Therefore, the reader must attempt to draw together the pertinent comments from the concluding portions of the three or four final chapters in order to gain insight into the author's philosophy. While in a sense the book "merely stops", since there are not even conclusions to the Seventh Chapter, the most precise and specialized topic is examined, i. e. *The Contenental Shelf Agreements Between Japan and The Republic of Korea* of 1974. Although now over a dozen years old, this final article suggests a potential solution to some of the problems discussed earlier within a global context. That ls to say, previous chapters sought global solutions through United Nations experiments. Although the interests of selected groups of states, particularly the industrialized countries, were critically examined, the thrust of the book was toward the ideal of international cooperation at the multilateral level. In the final chapter, however, the emphasis is placed upon the use of bilateral agreements to resolve a serious dispute (or even a series of incidents) between two governments. Thus, the book has moved from general-type discussions (as can be seen in the first two chapters) to a precise topic, for the purpose of indicating a pragmatic solution, through which two states can cooperate in an area not as readily susceptible to international regulation. In dealing with the limits of continental shelves and exploitation of minerals, the two sovereign states abandoned a strictly legal approach and sought a compromise; and, in those regions where claims overlapped, joint exploitation has been undertaken. Consequently, these bilateral agreements should be analyzed in terms of the means by which joint undertakings have been facilitated, plus the type of machinery that has been established, as a precedent for the resolution of disputes in other regions of the globe. In fact, a number of bilateral treaties have been negotiated, as for example between the United Kingdom and the Netherlands, w en seabed mineral deposits span a boundary line. Moreover, the Japanese-Korean treaty relied heavily on this North Sea precedent. In brief, Japan and Korea have found it to their mutual advantage to jointly exploit an area in dispute, since exploitation of oil, natural gas, and mineral resources can proceed, despite the fact that the question of ultimate sovereignty has not been resolved.

The concessionaries of both parties are entitled to equal shares of the resources that have been extracted. Additional treaty articles set

forth the means by which cooperation for development can be realized; arbitration procedures arc provided; and a joint commission in the form of a consultative organ can deliberate on those matters necessary to implement the treaties.

As one evaluates the seven closely related articles, as a total entity, it becomes obvious that the author has had a definite scheme in mind, as he researched this area throughout a twenty years period and composed these articles in the early 1970's—the most recent of which was published in 1974 The book has a definite organization, since the author worked according to a plan. As previously mentioned, the text moves from a general global-type approach to specific topics; but, of even greater significance, the opening three chapters are much more objective in their approach, for emphasis is centered on descriptive material, whereas the latter chapters are more subjective, thereby reflecting the author's philosophy, as he attempted to propose solutions to major problems, still hampering the United Nations and its UNCLOS III. Consequently, the text remains especially timely, since the author is aware of the historical evolution taking place in state practice, largely as the result of competing approaches and philosophies, relative to the utilization of ocean resources. The highest compliment that can be paid to Judge Oda is that he has dealt with one of the most controversial areas facing the international commuuity in an objective manner, as he sought to arrive at some new solutions that could accommodate the blocs of sovereign states. Owing to his scholarly approach, this volume will become a basic source in the area of sea law. It will certainly serve as a reference of prior events, for the discussion of legal and political issues has been precise and exacting, though, at the same time, his unique contribution and personal insight emerges. Accordingly, we can all hope that the author's plea for international cooperatlon will be headed by the world community, acting through the United Nations. Realistically an all too distinct possibility exists that UNCLOS III will be unable to reach agreement, with the effect that states will take short-sighted and purely selfish unilateral actions at the expense of the world rule of law. It would be tragic if Judge Oda's pleas for cooperation, rather than being headed were ignored, so that future generations would look back at the failures of the 1970's to mueh the same extent that we reflect on the experiments of the League of Nations.

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Kiss, Charles Alexandre, **Survey of Current Developments in International Environmental Law,** IUCN Environmental Policy and Law Paper No. 10. Morges, Switzerland International Union for Conservation of Nature and Natural Resources, 1976, 141 pp.

Utilizing the *Stockholm Declaration on the Human Environment* as the foundation of his enquiry, Professor Kiss seeks to isolate those norms of public international law that are emerging into positive regional and international environmental law. Beginning with the basic issue as to whether or not a distinct cropus of environmental law does in fact exist, and the corollary issue. whether in fact existing norms can be enforced, the author follows the approach, employed so successfully at the time he served as the editor of the 1973 Hague Academy's Colloquium on the *Protection of the Environment and International Law*, namely the detection of "soft law," which in turn evolves into "hard law" (or positive law). At the basis of the developing soft law is the need to improve the quality of life and preserve the existing ecology, while simultaneously accommodating economic growth, not only in the third world but also within sophisticated regional groupings in Western Europe, such as the EC. The interrelationships between competing interests, at the global, regional, and national levels, are examined but from the standpoint of future international cooperation, which aim constitutes one of the book's main themes. The need, consequently, for action at both the regional and international levels is stressed throughout the text.

Based upon the interactions "....between air, rivers, lakes, soil, oceans, underground water, wildlife, and even outer space" (p. 13), the conclusion reached is that a distinct international environmental law is in the process of development, the rules of which "....are not different in their nature from those of general international law as their object is to regulate either inter-State relations or the working of intergovernmental organizations" (p. 14). International environmental law is "....composed of international public law rules tending to safeguard the essential ecological balance of the biosphere. It is a part of international law, like the law of the sea or the law of treaties, but for convenience it may be treated separately from the rest of international law" (p. 15).

Of special significance to Professor Kiss' subsequent analysis is the interdisciplinary nature of environmental law. Including a parallel with the law of outer space, he stresses the contribution that can be

made by scientists, e. g. ecologists, physicists, and astronomers. He maintains : "This pattern of interdisciplinary cooperation can be found principally within the national legal systems; this is how legislative or decision-making processes within States generally work or should work" (p. 16). This approach is also indispensable at the international sphere.

Chapter Two (pp. 17-28) critically examines the sources of International environmental law. In addition to traditional sources, as enumerated in Article 38 of the Statute of the International Court of Justice, "....new sources of law appeared with the multiplication of intergovernmental organizations...." (p. 17). Within this context, the book places its emphasis on the declarations and decisions of multinational organizations. Even though not always mandatory, they contribute to the moral and legal climate of "soft law" and environmental safeguards. Moreover, the author is particularly conscious of mandatory regulations established by means of international conventions, as for example by the *Convention for the Prevent ion of Marine Pollution by Dumping from Shtps and Aircraft* of 1972. The European Communities represent the most advanced system of regulatory power.

At the regional level, the programs of the Council of Europe and the European Communities are examined. This reviewer was especially enterested in the coverage accorded the agreements and the Programs of Action of the EC. The directives of the Council of the Communities are rendering a major contribution to the development of law at the regional level in Western Europe, as are the efforts of the Council of Europe. The collective effect of these activities is resulting in the perfection of a corpus of international law, which in turn is influencing municipal law. (See pp. 27-28).

The *Fundamental Principles of International Environmental Law* constitutes the subject matter of Part II of the book. In addition to the consideration of such phases as the sovereign equality of states, due process, and the right to information, emphasis is place on existing (and to some extent, proposed) multilateral conventions. Resulting institutional experiments—as for example those of the OECD, Nordic Council, UNESCO, NATO, IMCO, ECE, EC, Council of Europe—are perfecting a distinct body of international law and environmental standards.

The deficiencies presently contained within environmental law are conceded. Accordingly, Chapter Four, *International Liability For Environmental Damages* (pp. 41-55), illustrates to all too frequent occurrence in

which injured persons or groups lack effective remedies in law, and those remedies that exist, pursuant to an international treaty, are "... not easily operative..... even when general treaty provisions are applicable" (p. 51). The difficulty facing even States is that such conventions "....usually do not prescribe immediate obligations for the Contracting Parties but instead provide for States to promulgate rules for individuals under their jurisdiction...." (p. 51) Nevertheless, the author concludes that there is a trend toward the imposition of liability on States.

The main solution, and indeed recommendation, is advanced in the Fifth Chapter, *The Principle of Prevention* (pp. 56-108), which Professor Kiss maintains is the ultimate legal solution, rather than the award of compensation, pursuant to the "polluter pays" principle In fact, this principle of prevention of environmental damage is contained in Recommendation 70 of the 1972 Stockholm Action Plan, in the European Communities Program of Action, and in the series of international conventions prohibiting ocean pollution. Here, then, is Professor Kiss' major contribution to the application of the evolving environmental law. That is to say, he is especially conscious, and correctly so, as regards preventive measures within regional frameworks and within sub-regional groupings. (See e. g., pp. 70-72). Still, the fundamental weakness remains: effective supervision is lacking, notwithstanding the fact that minimum legal standards have been promulgated, as can be seen from the Council of Europe's draft *European Convention for the Protection of International Watercourses against Pollution.*

This Fifth Chapter, by far, the longest portion of the book, covers approximately one half of the text, and it presents an analysis of marine pollution, pollution of rivers and lakes, air pollution, and the protection of wildlife. In this portion of the book, the numerous international conventions are indicated, although briefly, including those designted to safeguard wildlife. As was true of the earlier chapters, a complete survey of existing treaties, and their implementing structures, is provided.

The main conclusions to the book are contained in the final section of Chapter V, namely, *The Principal Characteristics of International Regulation for the Protection of the Environment* (pp. 103-08). Professor Kiss concludes that there is a heed for the implementation of environmental standards at the universal, regional, and local levels (p. 104), without implying that any of the three alternatives is superior. Rather, the unique qualities inherent in each problem area will determine whether or not a global type instrument, possibly within the framework of an

international institution (e. g., the U. N. or the OECD) might be adopted, notwithstanding the hesitancy of States to be bound by international commitments. (P. 105). He concludes, therefore, that :

> it seems almost impossible to draft at the international level one inclusive regulation, a sort of general Code of Environmental Law, concerning all the aspects of the protection of environment.... Of course, general statements, like the Stockholm Declaration, can be adopted and applied in proposing principles for all subjects relating to environment, but no strict, hard law rules can be made from them. (P. 105).

By way of comparison, the author cites the Council of Europe, which organization ".... has adopted several declarations and charters—on water, air and soil, as well as various recommendations on principles governing the protection of the environment, show that the formulation of general rules in a regional framework in view of the harmonization of national legislation can be effective" (p. 104). In fact, there are approximately forty instruments that entrust international bodies with tasks in the field of environmental protection. (P. 108.) Particularly significant is the role assumed by international regulatory commissions. Accordingly, one of the main recommendations is that greater use be made of supervisory machinery, not exclusively to supervise the implementation of treaties but, similarly, to facilitate cooperation.

In this regard, Chapter Six, *The Principles of International Cooperation* (pp. 109-14), serves as a postscript to the book, for the reason that one of the volume's underlying themes—drawn from Principle 24 of the 1972 Stockholm Declaration—is the need for greater legal cooperation, as enunciated by resolutions of the United Nations General Assembly and the Second Part of the Final Act adopted in Helsinki by the Conference on Security and Cooperation in Europe. Numerous other instruments, e. g. the United Nations Charter of Economic Rights and Duties of States adopted by the General Assembly in 1974, are considered within several distinct sections of the text. In the concluding chapter, the means sought to achieve this goal of international and regional cooperation is the adoption of multilateral conventions, also coordinating the activities of multinational organizations, as regards transfrontier pollution of the air and water, pollution of rivers and lakes, marine pollution, and the protection of wildlife. (See pp. 112-14.) International organs, exercising precise functions, are dealing with ozone depletion, long-distance pollution, and trade in endangered species of fauna and flora.

Though recognizing the value of UNEP, the specialized agencies, for example WMO, WHO, and IMCO, international institutions, e. g. FAO and UNESCO, Professor Kiss concludes :

> Regional organizations appear to be the best adopted framework for eliminating and controlling damage caused to the environment by the usual forms of pollution or by the depletion of natural resources. These organizations appear sufficiently large to enable the problem to be dealt with on a rarher high level...., while at the same time responding to the requirements of homogeneity in economic, social and even political structures. (P. 113.)

This book of moderate length, written in a concise manner, is one of the most significant texts to be produced during the past several years in the field of international environmental law. In the opinion of this reviewer, the book is particularly challenging because of the fact that the author, though conscious of the limitations imposed by positive law, continually looks to the future and the emergence of "soft law", as a means of safeguarding mankind. The text is well documented, and a Table of Treaties is exhaustive. Yet, the most significant feature is the objectivity of the author in analyzing a highly controversial area. His scholarship has resulted in the production of a significant contribution to the literature devoted to environmental safeguards.

W. PAUL GORMLEY*

LAW INDIA : Some Contemporary Challenges, V. R. Krishna Iyer, Judge, Supreme Court of India, Law Lecture Series Publication, University College of Law, Nagpur, 1976, pp. 145.

The University College of Law, Nagpur deserves congratulation for instituting the Law Lecture Series in the name of Hon'ble Mr. Justice Dr. Bhawani Shankar Niyogi in his life time. Mr. Justice Niyogi deserves great appreciation for extending help to augment the academic atmosphere in the College, Justice Niyogi has been a champion of social justice, and it is a matter of happy coincidence that the first Lecture Series has been inaugurated by Hon'ble Mr. Justice Krishna Iyer who is also a firm believer of social justice. He is one of the few judges of the Supreme Court of India who had varity of experiences before coming to the highest court of the country.

The monograph[1] is divided into two parts. The First part deals with some of the contemporary challenges which the Indian Society is facing today.

Justice Iyer starts with the state of affairs in the Indian Legal system. He is of the opinion that the present crisis in the system is due to its complete dependence on the Colonial Jurisprudence. According to Justice Iyer, we have inherited, as a hangover of the British Rule, the theory and practice of the English speaking legal system, and this has created a conflict between the 'old law' and the 'new Justice'[2]. He goes a step ahead and opines that the Indian legal system is suffering from a genetic malformation of the British Indian days; and therefore, we must discard without tears that dead legal wood.[3] It may be recalled that India got independence after two centuries of the British Rule. And therefore, the strong influence of the colonial Jurisprudence cannot be denied. A system which had such a long influence cannot be scrapped by a single stroke. There are certain concepts which still hold good apart from certain outmoded and outdated garments which may be replaced. It is true that during the British Rule the Indian legal system was nourished by the English system but that does not require to be uprooted.

Justice Iyer's theme of social Justice deserves great attention. He shows a great concern towards the efforts in attaining social justice.

1. V. R. Krishna Iyer, *Law India : Some Contemporary Challenges*. (Herein after refered to as *Iyer*).
2. *Iyer*, p. 36.
3. *Id.* at 7.

According to the author "the law has lawfully murdered social justice over the ages"[4]; and he warns in the tone of a Malayalam revolutionary poet, "change your laws or else your people shall push your laws aside"[5]. The goals of social justice cannot be attained unless the fate of those thinly flashed skeltons, tired,pavement progery and below the poverty line are not attended to. Further, the sex inequality, communalism, castism,rural and harijan primitivism are some of the inroads in achieving social justice. The author has drawn attention towards the pathetic conditions of the untouchables. This choetic condition is brought about by the legislative inaction.[6] It may be submitted with great respect that the law alone cannot be blamed for such a state of affairs. It is true that there are number of people in India who are not fortunate to get even one time meal and for generations they are the silent sufferers. But for this purpose mere bringing law nearer to slum heaps will not solve the problem. All those who are involved in the process of administring social justice are mainly responsible for this state of affair. The law has provided for eradication of untouchability, bonded labour and other economic inequalities. The question remain : How many untouchables or bounded labourers have been benefited ? How far the gap between the privileged and the underprivileged classes has been filled ? On the contrary one reads daily in the newspaper atrocities committed on the underprivileged class of the society and the gap between classes group is becoming more wider and deeper. Every year India celebrates the *Gandhi Jayanti* and enjoy holiday on that day. We take oath before *Gandhi Samadhi*. Have we achieved the Gandhian goals ? Have we made any headway in lessening the miseries of the downtrodens ? Lately we started the slogan of '*Garibi Hatao*' (abolish poverty) to attain social justice. But one wonders whether the slogan actually meant '*Garib Hato*' (abolish poor). The humble submission of the reviwer is that unless we all the People of India balance the Scale of justice, the above cancerous growth will continue on the soil of India and we will be playing a farce game in the name of achieving social justice. However such balancing will require tremendous courage, sacrificeses and change in our mentality.

Justice Iyer has also drawn attention towards legislative complexities and inadequacies. He feels that the lack of legislative simplicity has led to interpretative complexities and thus resulted in the layman's ignorance of law. Even though we know that it is presumed that everybody knows the law but the fact remains that many a

4. *Id.* at 17.
5. *Iyer*, p. 17.
6. *Id.* at 72.

time even the experts in law have expressed their doubts in this regard. The judges have also adopted varied meanings while interpreting the law. If this is the state of uncertainty how a man on the street be presumed to know his rights and duties. According to the author the legislative process is mainly responsible for the above scene. He opines that the legislative process including the pre-legislative preperations are dilatory and disappointing even unscientific.[7] The rewiewer also shares the above view. Take for example, had the legislative draftman taken a note of warning against section 14 of the Preventive Detention Act, 1950 given by the Supreme Court of India in the *Gopalan* case[8], they could have avoided section 17A of the Maintenance of Internal Security Act, 1971 from being struck down by the Supreme Court in the *Sarkar* case.[9] No doubt the time factor is important in the legislative process otherwise the law will lag behind but there should always be planning and detailed discussions in the process. The law School can also play a vital role by conducting researches and tendering opinions on complex problems involved in the above process.

The author has not spared the executive for their unchecked arbitrariness, hesitant and hostile attitude in implementing the law. He has equally blamed the representative of people for their lagging behind in action inspite of liberal promises and also operating through a mindless legislative majority. Though the Parliamentary rules or the Constitution of India requires legislative majority, that does not mean majority of those who without applying their minds, raise their hands. Justice Iyer is bringing an important ingredient of mindful majority apart from the requirement of present and voting in the legislative process. Can we not say that the criticisms levied against the Constitution (Forty Second Amendment) Act, 1976 or the legislative actions during the Nineteen Month's Emergency could have been avoided if the third requirement was also fulfilled ? The reviewer feels that this will serve an ideal base for the law contemplating human justice. The above problem could be solved according to the author by a dynamic new cooperative law or local self-government statute with power and purity without being cipherised by government or irritatingly interfered with or paralysed by courts and capable of canalising socio-economic progress.

Now coming to the judicial processs, Justice Iyer accepts that the judges trained in the colonial system have failed to deliver goods to the society and therefore, he suggests a training centre for the judges. It

7. *Iyer*, p. 32.
8. *A. K. Gopalan* v. *State of Mad.*, A. I. R. 1950 S. C. 27.
9. *Sambu Nath Sarkar* v. *State of W. B* A. I. R. 1973 S. C. 1425.

may be mentioned that the suggestion requires serious consideration. Take for instance in the industrialised age the judges cannot shirk their responsibility of examining any question merely by saying that it is a problem of scientific development over which they have no jurisdiction. The machine age has brought about manifold miseries to the human being. The environmental pollution, which is endangering the very existence of the society, cannot be an area immuned from the ivory tower of the justice. Justice Iyer further advocated that the process should be cheap, quick, rational, modern and informal. Who does not know the mammoth battle fought in the *Keshavanand* case[10] and its out-come? How far it has done social good? Has it brought clearity and certainty in Law? Were the judges ment for academic exercises instead of weighing the scale of justice ?

The Second Part of the Book deals with Processual justice or we may call it justice in action. Justice Iyer starts with reformation of the administrative justice which is based on the English legal system. As a practical man he opines that there is unequal justice under the law, perplexing, protracted legalistic and fear of pyramidical court-justice and worse of administrative tribunals and their anfractuosities.

The rural justice has attracted the immediate attention of the author. India lives in her villages where feudal justice prevails. The villagers dare not to touch the scale of justice against the landlord, *Zamindar* or Sahukar otherwise they will be parished. In order to uplift their lots, the hands of the humane justice will have to be extended to the villages. This can be possible if we render legal services in the villages, with the coordinated and dedicated efforts of the barefooted rural lawyers, judges, legal educationists, and social service men.

The "village-level justice and small claims tribunals, welfare programmes, legal campaigns to popularise, implement and audit their performances the involvement of the people in the judicial process, socio-legal researches and data-processing and feed back" are some of the authors' suggestions to achieve rural justice.

It may be pointed out that the above are mere ideals which may not see even the light of the day. Take for example, how many villages in India impart legal training ? Even though the Banaras Law School because of its location amidst villages impart legal training to majority of the students coming from villages, unfortunately only few return to their villages and that too very little involvement in the rurual justice. How many social workers have dedicated themselves to the cause of the

10. *Keshavananda* v. *State of Ker.*, A. I. R. 1973 S. C. 1461.

rurual justice ? The founding father showed great concern about the under-privileged, under-developed villages which is evident from the constitutional provisions but the question remains : Have we improved their lots ? Everytime when the election clouds comes nearer, the villagers are promised betterments and given high hopes. How many promises have seen concrete form ? Is not their condition same as that of a frog who awaits rain from the empty clouds ? The reviewer is of the opinion that unless we discourage urban development and give priority to the rurual development in reality, the villages will stand where they were.

The second point of reform is reducing delay and in expensive justice. Our complicated procedural laws are responsible for the present state of affairs. The court process, according to the author, with its artificial rules, escalating appeals, and many mystiques is sometimes a nightmare, not a sanctuary.

In order to lessen the above defects Justice Iyer makes certain important noteworthy suggestions : reforms in the *modus operandi* of the court and lawyers in the delivery of justice; speedy and cheap means of conciliation and adjudication; radical reorientation of the legal personnels including the judges, summary trails; etc. The number of cases before the courts in India has been multiplied many times for the reasons, *inter alia*, giagentic increase in the lawyers population whereas the number of judges had no correspond increase. The *modus operandi* was allowed to take its recourse. The microfine technical procedures, infinite arguments, thesis writing attitude of the judges etc, have resulted in delayed justice. It may not be irrelevant to mention here that apart from the above obstacles, the terror sticken world is experiencing fear of voilence before knocking the door of the justice. The hands of the Justice is available to all but number of cases do not see the light of the day because of extra legal force used to silent the victim. Every day one reads in the newspapers that number of murders, rapes, etc. are committed in the broad day light but by and longer culprits go scot-free because of reasons, *inter alia*, the witnesses avoid to confront with the professionals. Is not this a denial of justice ? Justice Iyer concludes his lecture with the suggestion that Law India needs a New Legal Deal based on a single-point programme of Development Law which shall ensure the interest of the 9/10 of the nation ill-housed, ill-clad, ill-nourished and what not. This will bring the law nearer to the society.

On the whole the University college of Law, Nagpur has rendered a great service to the Indian society by publishing such a monograph. It may be suggested that the Law College may dedicate the Justice

Bhawani Shankar Niyogi Lecture Series to the main theme of his life "Social Justice" and the next series may be devoted to the Poverty Law. Justice Iyer deserves great appreciation in delivering thought provoking feast to academic world at a time when the Indian legal system after 30 years' freedom still stands at a cross road. If we want to arouse law conclousness in India, an All India, including its villages, legal education programme should be launched. Dilogues of the judges, legislators, lawyers-including the academics with the people of India is a must. Justice Iyer's efforts in the present form is an important contribution in this regard. Justice Iyer's judgements have attracted a criticism that the language of the judgments is not meant for the lay-lawyers. But the reviewer feels that the present series of his lecture will enrich the lay lawyers and all those who are interested and involved in the present crisis including the laymen. The author has identified certain challenges facing the Indian legal system posing a threat to the Indian society and has suggested certain reforms Once the problems are identified and a public opinion is developed, this will bring new hopes in the horizons of Law India, No doubt there will be always some inroads, in the progress of the development of law but the consciousness of the contemporary challenges will avoid collusion.

We close with the authors appeal :

"....law the Bench and the Bar and, importantly the legislature—shall live with the poor work for the poor and listen to the poor, shall abolish the promisory distance between law and life".

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K. K. Mathew, Democracy. Equality and Freedom, Edited by Upendra Baxi, Eastern Book Company, Lucknow, PP. LXXXVI+364 (1978) Rs. 75/-

To understand the philosophy of individual judges is as important as to understand the philosophy of the court. Now it has been accepted, though reluctantly, that the thinking of individual judges does affect the decision of the court. This becomes more apparent when a controversial issue comes before the court. In the United States, the necessity of studying, the thinking and contribution of individual judges was recognised much earlier, and substantial work has been done regarding assessment of the contribution of judges to the development of law. Because of the influence of the common law tradition, this type of study did not attract attention of the scholars in India, nor was it encouraged. Therefore, it is a welcome change to see the book under review. However, It is not a full-length study of the impact of Mr. Justice Mathew on the development of Indian constitutional law. Even then, the publication of the book is to be welcomed as it gives to the reader the idea about the thinking of a distinguished judge, and students of constitutional law will be in a better position to understand and appreciate the opinions given by Mr. Jus ice Mathew after reading this book.

Professor Upendra Baxi, the celebrated author of "The Little Done, The Vast Undone", in his introduction of eighty six pages has made an assessment of the contribution of Mr. Justice Kuttyil Kurien Mathew to the Indian constitutional law, or to put it in a fashionable way, to the Indian Constitutional Jurisprudence. It may be pointed out that both Justice Mathew and Professor Baxi have adopted jurisprudence-oriented approach to the study of Indian constitutional law. Students of jurisprudence will appreciate the discussion on judi ial legislation by the appellate courts.

Justice Mathew was appointed to the Supreme Court on October 4, 1971 and retired on January 3, 1976. In his tenure of four years and three months, he delivered in all one hundred and thirty two opinions. It is worth noting that Justice Mathew wrote only eight dissenting and nine concurring opinions, and in the remaining one hundred and fifteen opinions he wrote for the court.[1]

In the book under review, the material has been organised under seven headings, followed by extracts from twelve opinions delivered

1 K. K. Mathew, Democracy, Equality And Freedom (1978) XVIII-XIX.

by Justice Mathew. The chapters are in the following order : I Democracy And Judicial Review; II The Welfare State, Rule of Law And Natural Justice; III Fundamental Rights And Distributive Justice; IV The Right to Property; V Freedom of Speech; VI Democracy And Equality; and VII Equality.

DEMOCRACY AND JUDICIAL REVIEW is actually the First Tej Bahadur Sapru Memorial Lecture delivered by Justice Mathew on March 26, 1976. In this lecture he has discussed the scope of judicial review under a democratic constitution. The debate regarding Judicial Activism or Judicial Self-Restraint will never come to an end. The line beyond which the judiciary should not review the decision or actions of the executive or the legislature cannot be drawn, otherwise the debate would have ended much earlier. According to Baxi, "Justice Mathew is a votary of judicial self-restraint."[2] This becomes evidently clear from the following observation :

"Judges must remember that shaping the future law is primarily the business of legislature; they must be keenly sensitive to the subtle forces that are involved in the process of review the judgment of others, not as to its wisdom, but as to the reasonableness of their belief in its wisdom. Tolerance and humility in the judgement on the experience and beliefs expressed by those entrusted with the task of legislation should become a decisive factor in constitutional adjudication. Judges must cultivate an imagination and humility which would enable them to transcend the narrowness of their personal experience, lest their emotional compulsions compel them to translate their own economic or social views as constitutional commands."[3]

Justice Mathew appears to be influenced by the judicial approach which in recent times Mr. Justice Felix Frankfurter adopted and tried to pursuade others to adopt in the United States. In this lecture, Justice Mathew has referred extensively to the American debate on this issue. According to him the legislature's choice of value should be respected by the courts. He comments :

"I have often wondered what reason can a court give for preferring one value rather than another adopted by the other departments. Who will say, if a legislature preferred in a legislation a scheme to achieve equality at the expense of liberty, the preference is unreasonable ? The choice of one value in preference to another cannot be rationalised."[4] At the same time Justice Mathew is aware of the fact that judicial self-

2. *Id.* at XLV.
3. *Id.* at 19.
4. *Id.* at 23.

restraint may be taken as a weakness of the judiciary. He makes it clear that 'the attitude of humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. This does not mean that a judge should not follow his conviction A judge who does not follow it is unworthy of his position, but his conviction must not be arbitrary or moulded only by what he is familiar with in his personal experience.[5]"

The second part dealing with THE WELFARE STATE, RULE OF LAW AND NATURAL JUSTICE is reproduction of Justice Mathew's address at the Second State Lawyer's Conference, 1974. In this lecture, Justice Mathew discusses a very important issue of administrative law, namely, the control of discretionary power of the administrative authorities in a welfare state in such a manner that objectives of a welfare state are achieved without affecting arbitrarily the interest of citizens. Agreeing with Professor Kenneth Culp Davis, Justice Mathew observes : "There has been no government or legal system in world history which did not involve both rules and discretion. It is impossible to find a government of laws alone and not of men in the sense of eliminating all discretionary powers. All governments are governments of laws and of men.[6]" Not only this, "the mechanical application of a rule means injustice.[7]" Further, "in adjudication, creativity is essential and that is impossible without discretion.[8]" Justice Mathew goes on to observe : "The proposition that arbitrary power has no place in a democratic system of government is pernicious in that it is false. Elimination of all discretionary power is both impossible and undesirable.[9]" However, at the same time, he emphasises the need to control the exercise of discretionary power. The concepts of Rule of Law and Natural Justice have been developed to regulate the discretionary power of the administrative authorities. He observes : "The great safeguard which modern administrative law has evolved to guard against the abuse of discretionary power is that the power can be exercised only in conformity with principles of natural justice."[10] Regarding the application of the principles of natural justice, Justice Mathew has raised an important point, namely, whether the rules of natural justice should apply when the authority is taking action to enforce the policy ?

The third part of the book dealing with the topic of FUNDAMENTAL RIGHTS AND DISTRIBUTIVE JUSTICE is reproduction of

5. *Id*, at 20.
6. *Id*. at 28-29.
7. *Id*. at 30.
8. *Ibid*.
9. *Id*. at 33.
10. *Id*. at 42.

an address delivered by Justice Mathew at the Evening Law Centre, Faculty of Law, University of Delhi. Justice Mathew has correctly pointed out that "distributive justice can be attained only when the comfortable classes in our society who are not injured by the present day economic order perceive the injustice associated with it."[11] The framers of the Indian constitution were aware of the problem of the distributive justice and the chapter on the Directive Principles was inserted to achieve the objective. In this regard, Justice Mathew correctly points out that "the single-most important problem in constitutional law for years to come in this country will be how to implement the Directive Principles and at the same time give full play to the Fundamental Rights."[12] For example, he points out that "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has."[13] Similarly, "if media of communication are concentrated in a few people, the right to freedom of speech becomes an empty guarantee without practical content for the vast mass of the people."[14]

The fourth part of the book is entitled The Right to Property, which is the second of the Dr. Rajendra Prasad Memorial Lectures and was delivered by Justice Mathew at the Institute of Constitutional and Parliamentary Studies, New Delhi in 1975. In this lecture Justice Mathew has discussed from jurisprudential point of view the nature of private property and its justification. Referring to the famous article of Professor Charles Reich entitled "The New Property" Justice Mathew has emphasised that the constitutional right to property should be interpreted in the changed context.

The fifth part of the book deals with the Freedom of Speech. In addition to the discussion of necessity and justification of the freedom of speech, Justice Mathew has discussed in detail the American case-law on the point. The discussion is relevant as our courts have generally referred to the American cases to interpret the scope of freedom of speech under the Indian constitution. Justice Mathew has raised a very important issue, namely, whether the freedom of speech can be regulated on any ground other than mentioned in Article 19 (2); and if so, then what criteria will be applied to decide the validity of the law. The students of constitutional law should ponder the following observation :

"(E)ven if the fundamantal right to freedom of speech under Article 19 (a) is expunged from the Constitution, the right to free expression in matters of governing importance which is a necessary implication

11. *Id* at 52
12. *Id* at 55.
13. *Id*. at 63.
14. *Id*. at 65.

from the provisions of the Constitution establishing the democratic form of government cannot be abridged in that area by an ordinary law or by an excutive action even in an emergency."[15]

According to Justice Mathew, the 'market place of ideas' theory is a myth, and a "realistic view of Article 19(1) requires the recognition that a right of expression is somewhat thin if it can be enjoyed only at the sufference of the managers of mass communication."[16] Thus, he rightly points out that "the phrase 'freedom of the press' must now cover two sets of rights and not one only. With the rights of editors and publishers to express themselves, there must be associated a right of public to be served with substantial and honest basis of facts for its judgment of public affairs."[17] Justice Mathew has emphasised that according to Article 19(2) the state should not make law which may restict or abridge the scope of freedom, but there is nothing to prevent the state if it makes law to enlarge or enrich the scope of freedom.

The sixth and seventh parts of the book deal with the theme of equality. The sixth part entitled Democracy and Equality is reproduction of Justice Mathew's lecture delivered in 1976 at the Evening Law Centre, Faculty of Law, University of Delhi. In this lecture the learned judge has made an attempt to analyze the various definitions of the concepts of democracy and equality, and has discussed the justification of the two concepts. The seventh part, entitled Equality is also reproduction of Dr. Rajendra Prasad Memorial Lecture delivered by Justice Mathew in 1975. Justice Mathew, while referring the Supreme Court's decision in *State of Kerala* v. *N. M. Thomas* (1976) 2SCC 310 emphasises that it has been accepted that elimination of in equality is the responsibility of the state. The duty of the state, in connection with the protection of human rights, is not merely negative, but it is positive and the state must perform its duty to guarantee equal treatment to the weaker sections of the society.

The reviewer hopes that the reading public will appreciate and encourage the endeavour of the editor and the publisher, so that in future the legal world gets more opportunities to know the thinking o other eminent judges.

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15. *Id.* at 99.
16. *Id.* at 107.
17. *Id.* at 110.

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