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(*Editor-in-charge*)
SURYA P. SHARMA

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CONTENTS

ARTICLES

COMPANIES AND THE FUNDAMENTAL RIGHT TO PROPERTY (A case of Summum Ius Summa In Iuria) ..... *S. S. Nigam* 1

PROPERTY RELATIONS IN INDEPENDENT INDIA: CONSTITUTIONAL AND LEGAL IMPLICATIONS, TRENDS & PROSPECTS ..... *M. P. Jain* 28

THE ROLE OF THE JUDICIARY AND THE BAR IN THE MODERN DEMOCRATIC STATE ..... *A. Kenneth Pye* 81

FRAME WORK OF PEACE: EXPERINCES & ALTERNATIVES ..... *I. N. Tewary* 97

INTERNATIONAL SOCIETY: APERSPECTIVE FOR LAW OF SPACE ..... *S. Bhatt* 114

THE ROLE OF THE U.S. SUPREME COURT IN POLICING THE U.S. FEDERAL SYSTEM ..... *J. G. Gettman* 124

WHO MAY COMPLAIN UNDER SEC. 33A OF THE INDUSTRIAL DISPUTES ACT ..... *Sadanand Jha* 144

NOTES AND COMMENTS

REMARKS ON THE RESPECTIVE PREROGATIVES OF A LEGISLATIVE ASSEMBLY AND ITS PRESIDING OFFICER (OR SPEAKER) ..... *C. Dallas Sands* 184

PROBLEM OF ADMINISTRATIVE JUSTICE AND SCOPE OF CERTIORARI ..... *S. N. Singh* 193

SCOPE OF ENQUIRY UNDER S. 33(2)(g) OF INDUSTRIAL DISPUTES ACT 1947 ..... *Yogendra Singh* 200

BOOK REVIEWS

K. P. MISRA, INDIA'S POLICY OF RECOGNITION OF STATES AND GOVERNMENTS ..... *R. P. Dhokalia* 209

M. P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY ..... *Dieter Conrad* 212

ARJUN P. AGGARWAL, INDIAN AND AMERICAN LABOUR LEGISLATION AND PRACTICES—COMPARATIVE STUDY ..... *Durga Prasad and S. P. Raman* 215

MINES AND FACTORIES JOURNAL ..... *Suresh Chandra Srivastava* 218

J. N. CHOUDHARY, ARMS, AIMS AND ASPECTS ..... *P. K. Jha* 221

JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES ..... *H. Saharay* 223

COMPANIES AND THE FUNDAMENTAL RIGHT TO PROPERTY

(A Case of *Summum Ius Summa Iniuria ?*)

S. S. NIGAM*

"Metaphors in law are to be narrowly watched, for starting as devices to liberate thought they end often by enslaving it."

The enduring relevance of the above warning, given from time to time, by eminent judges and jurists, was again illustrated by two recent decisions of the Supreme Court of India[1] which gave the quietus to the aspirations of the Indian mercantile community to secure for Indian-owned companies the fundamental rights to acquire, hold and dispose of property, and to carry on any trade or business, as guaranteed by Article 19 of the Constitution of India, subject, of course, to the restrictions mentioned therein. The decisions turned, especially in the first case, on the question whether companies were included in the word "citizen" as used in Art. 19(1) since, in the opinion of the Court, the rights guaranteed under Art. 19 were available only to the citizens of India. The Court held that being artificial or juristic persons companies were not comprehended within the term 'citizens' and, consequently, could not claim the fundamental rights mentioned in Art. 19(1)(f) and (g). The second case, in a sense, was a corollary of the first, the attempt therein being directed mainly to circumvent the constitutional hurdle raised by the earlier case. It was contended in that case that the Court should 'lift the corporate veil" and give recognition to the real beneficiaries of the rights claimed, that is, to the members of the company who were undoubtedly citizens of India. The Court rejected the contention holding that the companies could not in this way achieve indirectly what they could not achieve directly.

The reasoning and conclusions of the Court were based upon the twin concepts of "corporate personality" and its offshoot "lifting the corporate veil". The former is too well known to need any comment, although it may be observed that it is now beginning to wear rather thin. The latter

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1 *State Trading Corporation of India Ltd. v. Commercial Tax Officer*, A.I.R. 1963 S.C. 1811; (1963) 2 S.C.J. 605;
Tata E. & L. Co. Ltd. v. State of Bihar, A.I.R. 1965 S.C. 40.

is still in the process of growth and is gradually encroaching upon the former by engrafting exceptions upon it. In the words of Gajendragadkar, C.J.:

> in course of time these exceptions may grow in number, and to meet the requirements of different economic problems the theory about the personality of the corporation may be confined more and more.[2]

In the two cases before it, however, the Supreme Court did not feel it necessary to re-examine the concept of corporate personality or to add any further exception to it under the doctrine of "lifting the corporate veil". Lastly, underlying the whole discussion was the concept of citizenship, in as much as the two others had to be fitted into it in order to attract Art. 19 of the Constitution.

The last word thus seems to have been said on the law as it stands. The Court has indicated that for any change recourse should be had to the legislature[3]. Nevertheless, it is proposed to examine again the implications of the concepts underlying the Supreme Court decisions mentioned above, lest an undue emphasis on *summum ius* might have resulted in *summa injuria*. As observed by a learned German writer:[4]

> The constitutional judge may and should ascertain whether in a case where the *summum ius* appears to lead to *summa injuria*, it is not in truth a question of insufficient examination of the *ius* the correct and full result of which must lead to a correction of an outcome which is "unjust" "injurious to the public" or "politically false.[4a]

The rights to property and to trade have always been regarded so essential to the existence of a corporation that without them the very purpose of its institution would fail and its objectives frustrated.[5] In an underdeveloped country like India, particularly, the economic well-being of the community depends upon maximization of corporate opportunity and effort. A denial of such basic rights as the right to acquire property or to carry on a chosen trade or business is bound to weaken, if not to stifle, the most powerful incentive to develop and expand corporate enterprise

2 A.I.R. 1965 S.C. 40 (46); see also *Palmer's Company Law* 130 (Schmitthoff & Curry eds., 1959) and Gower, *Modern Company Law* 193, 195 (1957).

3 A.I.R. 1965 S.C. 48.

4 Otto Bachof "The Constitutional Judge between Law & Politics", 8 *Universitias* 321 (1966).

4*a* One might also add "economically false".

5 Corpus Juris Secundum, Vol. 19, s. 1088, pp. 626-627.

in the country. It may be underlined that the right of the State to impose reasonable restrictions is not questioned. Indeed, Art. 19 itself contains suitable provisions in that behalf. But the effect of the Supreme Court decisions seems to be that companies may be totally deprived of the aforesaid rights without any reference to the reasonableness of the restriants. Any view of the law which would affect so drastically the full development and utilization of the main resources of this important instrument of economic growth may well be regarded as injurious to the public welfare, and calls for a careful re-examination.

To begin with, it may be helpful to appreciate the full significance of the aforesaid decisions of the Supreme Court. Until 1963, it had almost been taken for granted that Indian companies, at any rate, were entitled to the fundamental rights enshrined in Part III of the Constitution—that is to say, to such rights as were not inconsistent with their basic nature and peculiar features. As remarked by Shah, J.:

> In this court it seems to have been consistently assumed that corporations aggregate are entitled to claim protection of the courts against violation of fundamental freedoms enumerated in Art. 19(1)...*there have been scores of cases in this court in which it has been assumed without contest that a company is a citizen and competent to enforce fundamental rights under Art. 19(1)(f) and (g) of the Constitution.*[6]

It is true that in none of the cases contemplated by Shah, J., the point presently in issue was raised or decided, and in that sense the Supreme court cannot be said to have overruled any previous decision, or even to have differed from any definite opinion expressed earlier by it. Nevertheless, the inarticulate premise underlying those cases was clear and unmistakable, and the court has certainly negatived a basic assumption which had run persistently through them. It is highly significant that in none of the cases was any preliminary objection taken that the company, not being a citizen, was immediately and automatically out of court. On the other hand, all the cases were decided on merits. The proper inference to be drawn from such a consistent course of conduct has been thus indicated by the Privy Council: "When, if an evident plea had been taken and upheld, the decisions would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad."[7] To put it somewhat differently: if a succession of cases has been

6 (1963) 2 S.C.J. 605 (644-645), italics mine.

7 *Brij Narain Rai v. Mangala Prasad*, 51 I.A. 129.

is still in the process of growth and is gradually encroaching upon the former by engrafting exceptions upon it. In the words of Gajendragadkar, C.J.:

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decided by the highest courts on merits, after elaborate and sometimes painstaking inquiry, when they could have been enpeditiously and satisfactorily dismissed on a preliminary objection, a strong presumption arises that the objection was not raised, by counsel or by court, because it was felt to be without force.

Long-established state or court practice exerts a strong influence on the judgment of courts regarding the validity, constitutionality or interpretation of a law or an act. This is particularly true of constitutional courts. "The jurisprudence of the Supreme Court", observed the aforesaid German writer,[8] "is derived to a marked degree from the dead weight of the state practice." He proceeds to elucidate the point as follows:

> Can one as a jurist and a judge argue that a law is constitutionally irreproachable and, in case of doubt, valid on the strength of the mere fact that it has long been in usage without being challenged ? Werner Weber has in fact stated in reference to the Price Act that one can do so:
>
> 'But one may well ask whether the State practice of the application of the Price Act which has endured for 7½ years under the authority of the Basic Law does not constitute such a powerful confirmation of this Act's compliance with the Basic Law that it cannot be refuted by means of any theoretically devised considerations that may now be emerging....The late discovery that the Price Act is not compatible with the Basic Law cannot be indicated in view of the realities of the life of the State.,[9]

The argument acquires greater force when the practice referred to is the practice of the Supreme Court itself, extending over a much longer period (13 years in the instant case). In this context, the following observations of Mukherji, J., (as he then was) in *Charanjit Lal's case*[10] become meaningful:

> The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well, except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons.

8 *Op. cit supra* note 4, at 324.

9 *Id.* at 323. The more liberal view of the U.S. Supreme Court is well known and, of course, ideally admirable, but an underdeveloped country like India might profitably examine the practice of other constitutional Courts as well, especially in countries which have successfully built up their shattered economics.

10 A.I.R. 1957 S.C. 41 (52).

Of course, the above dictum does not lay down a binding rule of law and was rightly held to be *obiter:* nevertheless, it cannot but be regarded as an important source, and authoritative expression, of Court practice, prevalent or contemplated, which, if not departed from on presentation of suitable opportunity, would constitute a powerful argument against subsequent declaration of its unconstitutionality or illegality. This is not to detract from the undoubted plenary powers of the Supreme Court to review or even over-rule its previous decisions, but, on the other hand, to emphasise the fact that decisions of a constitutional court have wide repercussions, much wider than is often realised and frequently in spheres extra-legal. Indeed, not only the decision but also the practice of the court —that is to say, those assumptions, expressed or tacit, on which the court has proceeded for a long time in deciding cases—may give rise to irreversible conditions in the political, social or economic sphere. Any attempt to alter them by judical process based on a formalistic interpretation of the law without a corresponding change in the basic values may cause serious injury to the whole national economy. Paradoxically, therefore, a constitutional judge has less freedom in deciding cases than an ordinary civil judge. While the latter is mostly concerned with doing justice in the individual case, the former has also to keep in sight the consequences—political, social and economic—of his judgment. His decisions may indeed, while doing full justice in the individual case, damage the entire political or economic structure of the community. A purely formalistic approach would therefore, tend to result in a deficient sense of 'the realities of the State' and render the decisions out of harmony, or even make them incompatible, with public interest. A learned judge of the German Court of Appeals has observed that

> to disregard formal, let alone seemingly formalistic considerations in such cases is the task of a teleological jurisprudence which should be the business precisely of the Federal Constitutional Court, because of its duty to regulate the pulsating life of the community to which it is linked by the Constitution.[11]

In *Charanjit Lal's case*, Mukherji, J., was giving expression to an economic reality underlying the view, held at that time almost universally, that the fundamental rights enshrined in Part. III of the Constitution were available to corporate bodies as well. This view was repeatedly confirmed—tacitly, it is true—over a long period by the Supreme Court itself in "scores

11 *B verf CE* (Federal Constitutional Court) 8, 274, quoted in *supra* note 4, at 318.

of cases" where it was "assumed without contest" that a company is a citizen and competent to enforce fundamental rights under Art. 19(1)(f) and (g) of the Constitution. It may reasonably be assumed that by 1963 it had, in the estimation of all concerned, crystallised into a well-established practice of the Court and, as such, permeated deep into the economic life of the nation affecting it profoundly. It is submitted, therefore, that the real question before the Supreme Court in the *State Trading Corporation case*[12] was not whether companies could be regarded as citizens under Art. 19(1) and be entitled, as such, to the fundamental rights contained in clauses (f) and (g) thereof, but whether, to quote Mukherji, J., "the language of the provision or the nature of the right compels the inference" that companies must perforce be excluded from the beneficent operation of those provisions and denied the fundamental rights guaranteed therein.

II

Corporate Personality

The idea of corporate personality has had a tremendous impact on the development of modern industrial economy. It not only overcame the negative attitude of the common law towards a pressing economic need, but also provided a revolutionary medium for the expansion of economic enterprise on a scale which staggered imagination. However, this epochmaking idea which started primarily as an intellectual abstraction later hardened into a legal concept and ultimately overshadowed even the reality. It thus exhibits many of the vices of conceptual thinking in law. Concepts, it is true, are as essential in legal theory as in any other sphere of higher thought, but in law the concept has mainly a symbolical function expressive of a certain attitude or approach. Its significance certainly goes beyond the aggregate of the rules existing or ascertainable at any given moment, but it would be a mistake to regard it as the *fons et origo* of all the rules and principles which alone would be accorded validity by the legal system. Such a view would result in undue rigidity and a tendency that the courts have no alternative but merely to work out the strictly logical implications of the rules. However, as regards the concept of corporate personality, this view has long dominated the English law. Thus, Professor Gower observes that "the fundamental attribute of corporate personality—*from which indeed all the consequences flow*—is that the corporation is a legal entity distinct from its members."[13] The hold of con-

12 (1963) 2 S.C.J. 605.

13 *Op. cit. supra* note 2, at 62 (Italics mine).

ceptual rigidity cannot be illustrated better than by the refusal of the English law to recognize un-incorporated associations and groups for legal purposes, becausse "juristic theory decrees that only an entity possessed of legal personality can enjoy legal rights."[14] Again, in *Salomon's case*,[15] Lord Halsbury was not prepared to visualise a situation in which the corporate personality of the limited company could be disregarded without destroying the concept altogether: "either the limited company was a legal entity or not...it is impossible to say at the same time that there is a company and there is not."[15] Legal thinking has become more sophisticated since then, and today the law disregards the legal entity of the corporation in many areas while preserving it in others. Echoes of Lord Halsbury's words are, however, still heard from time to time.[16]

The concept of corporate personality was worked out to its logical limits by English Courts in cases like *Salomon v. Salomon Co.*,[17] *Ashbury Railway Carriage Co. v. Riche*,[18] *Foss v. Harbottle*,[19] and *Percival v. Wright*.[20] The decisions clearly proceed on the basis that the concept is not merely an idea in the human mind but a concrete entity, an embodiment of living reality, and that the company must be treated as a separate person in the same way as a human being, having its own rights and obligations which could not be appropriated, exercised or assumed by anybody else.[21] In the eye of the law, it seems, the concept is the only reality. This tendency is well expressed by Dennis Lloyd:

> the temptation to treat abstractions as real entity has been and remains particularly strong in the field of legal and political concepts...so far may this line of thought be carried that an abstract concept may be treated not only as a real entity but as a super-personality, more real and more sublime than any actual perceived physical entity or person.[22]

This line of approach was no doubt considerably strengthened by the use made of the concept of corporate personality in the political and philo-

14 Dennis Lloyd, *The Idea of Law* Ch. 5 (1964).

15 (1897) A.C. 22 (31).

16 Cf. the remarks of Villiers, C.J., in *Ochberg v. C.I.R.* (1931) A.O. 215, quoted in Gower, *op. cit. supra* note 2, at 209.

17 (1897) A.C. 22.

18 (1875)L.R. 7 H.L. 653.

19 (1843) 2 Hare 461.

20 (1902) 2 Ch. 421.

21 Cf Gajendragadkar, C.J., in A.I.R. 1965 S.C. 40 (46); and Wilmot, L.J., in *Tunstall v. Steigmann* (1962) 2 W.L.R. 1045 (1053).

22 Dennis Lloyd, *op. cit. supra* note 14, ch. 12.

sophical fields culminating in the Hegelian doctrine of the state as a supra-real person representing a higher reality than its constituent members.

In the mercantile view, however, the limited company had a different significance. Incorporation, to businessmen, did not mean the self-effacement of the members, but only a means to secure certain commercial advantages. Professor Holdsworth has listed eight advantages which accrued upon the incorporation of a joint stock company, the more important of these being (1) capacity to sue and be sued, (2) transferability of shares, (3) distinction between the corporate liability of the company and the personal liability of the members for corporate debts, (4) limitation of the personal liability of the members to the creditors of the company and to the company itself.[23] Thus, apart from the procedural advantages, important though they were, the real economic need to which the company may be regarded as owing its inception was the attainment of limited liability for corporate debts.[24] The common law view of partnership, viz., that each partner was an agent of the firm and was personally liable without any limitation to all the creditors of the firm, was a serious handicap to large scale commercial or industrial enterprise. The law, however, knew of no method, apart from trust, to confer limited liability except by separating the corporate entity from the members comprising it. Thus alone could the incidence of liability be shifted from the shoulders of the members. Legal theory demanded that only an entity possessed of legal personality could be the subject of legal rights and liabilities. The response of the lawyers, therefore, to this urgent economic need was to create the concept of corporate personality. Once, however, the concept was created it transcended the limited purposes of its creation and led to the development of a vast new legal world dominated by the conception of a company distinct from its members.[25] Indeed, the very first attempt at incorporation, namely, the Chartered company, gave rise, in legal contemplation, to an almost complete legal *persons* having plenary capacity "to deal with its property, to bind itself by contracts and to do all such acts as an ordinary

23 VIII Holdsworth, *History of English Law* 202-203 (1925); Palmer has also given a similar list; *supra* note 2, at 7.

24 Cf. the observation of Maitland: "If the State had not given way we should have had joint stock companies unincorporated, but contracting with limited liability." Maitland, *Selected Essays* 141, 210.

25 This tendency of concepts has thus been aptly summarised by Dennis Lloyd: "When lawyers have breathed meaning and purpose into their legal concepts and found these to be good, these concepts tend to develop a life of their own which may carry them into many and unexpected paths by their own vitality and by what are felt to be the laws of their own inherent logic." *Supra* note 14, chapter 12.

person can do;"[26] and so complete was this corporate autonomy that it was unaffected even by a direction in limitation of the corporate powers contained in the creating charter itself. Moreover, the members were under no liability for the debts of the corporation, the Crown having no power at common law to attach liability to individual members.[27] It is significant that subsequent measures for incorporation were directed towards limiting the corporate powers and the extreme dissociation between the corporation and its members which was characteristic of Chartered Companies.

The legal entity theory has taken deep root in our law and it is no use assailing it now, though as far back as 1884, an American writer decried it as a "vestigial organ requiring excision."[28] Cogent criticism has, however, been made against its pervasiveness, formalism and rigidity, as spelt out by the cases mentioned above. Professor O. Kahn Freued has castigated the *Salomon case* as a "calamitous decision,"[29] while the distinguished American Professor, Louis Loss, would only accept it if it is "not read as laying down the general proposition that a one-man company is necessarily a legal person for all purposes."[30] In a pointed reference to the rule in *Foss v. Harbottle*, Professor Loss remarks that "it is essential for lawyers to avoid being hypnotized by the fictions they have created. The fact that it is a useful fiction to regard a corporation as a person does not oblige us to honour the fiction when it serves no purpose, or perhaps an ill purpose."[31] His criticism of *Percival v. Wright* is almost trenchant: "I think that *Parcival v. Wright* is an excellent example of what makes American legal scholars impatient about much in English law; a trend towards what we think is excessive formalism, excessive regard for sheer logic for its own sake; insufficient attention to a rational approach to law and what law stands for and what is supposed to do. It is a fact that few American courts have ever liked, and hardly any American writer has ever approved, the view expressed in *Percival v. Wright*."[32]

The rules laid down in these cases have been considerably modified through subsequent experience. Thus, *Salomon's case* has lost much of

26 *Sutton's Hospital case*, (1912) 10 Co. Rep. 30 b.

27 *Palmer's Company Law*, *supra* note 2, at 778, 779.

28 Taylor, *Private Corporations* iv (1884).

29 (1944) 7 M.L.R. 54.

30 *Proceedings of the seminar on current Problems of Corporate Law, Management and Practice* 6 (Indian Law Institute, 1964).

31 *Ibid.*

32 *Id.* at 34.

its rigour after the American case of *Taylor v. Standard Gas & Electric Co.*[33] laying down that in a winding up a debt claimed by the controlling Shareholder may be postponed even to the claims of preference share-holders on the ground of "fairness". The extended objects clause in Memoranda of Association has reduced the doctorine of *ultra vires* almost to irrelevance.[34] The rule in *Fose v. Harbottle* had always been held primarily to regulate only procedure; after the development of the shareholder's "derivative action," its applicability has been further limited.[35] The doctrine of "special circumstances" (e.g. material inside information) as developed in the U.S. has considerably extended the liability of directors to the individual shareholder, and virtually brushed aside the screen of corporate personality erected by *Percival v. Wright*.[36]

These, and similar, developments call for a reappraisal of the function and scope of this "basic postulate" of company law. In that task, however, we are likely to get more assistance from American law which has displayed greater flexibility and awareness of the issues involved than English law where

> the court starts off with strong disposition to maintain the separate nature of the corporate entity, which means inevitably that exceptions will be accepted only sparingly and then usually without admitting that the cases are exceptional but rather seeking to justify them on some other ground, so as to leave the fabric of legal logic intact."[37]

The progressive American view regarding the nature of a corporation has been summarised in *Corpus Juris Secundum* as follows:

> A corporation is more nearly a method than a thing and the law in dealing with a corporation need not define it as a person or entity, or even as an embodiment of functions, rights and duties, but may treat it as a name for a useful and usual collection of jural relations each one of which must in every instance be ascertained, analysed and assigned to its appropriate place according to the circumstances of the particular case having the due regard to the purposes to be achieved.[38]

33 306 U.S. 307 (1939).

34 *Ashbury Ry. Carriage Co. v. Riche*, (1875) L.R. 7 H.L. 653; see the remarks of Company Law Committee (1952) (Bhabha Committee) p. 29.

35 Gower, *supra* note 2, at 531-536.

36 *Strong v. Repide*, 213 U.S. 419 (1909); *Proceedings of the seminar on Current Problems of Corporate Law, Management & Practice, op. cit. supra* note 30, at 35.

37 See *op.cit. supra* note 14, chapter 13,

38 Corpus Juris Secundum, vol. 18, p. 366, § 1, note 1.

Again:

> It is clear that a corporation is in fact a collection of individuals and that the idea of a corporation as a legal entity or person apart from its members is a mere fiction of the law introduced for convenience in conducting the business in this privileged way.[39]

Even if the empirical approach suggested above is not totally accepted in view of the prevailing conditions of corporate life in India, there is little justification for a *priori* assumption that the incorporation of a company results, for all practical purposes, in the creation of a legal *persona* to which all its future activities would necessarily have to be ascribed or attributed. The concept of corporate personality was created in response to certain economic needs of the mercantile community and its proper application lies in the fulfilment of those needs. The advantages conferred by the concept would inevitably carry corresponding responsibilities and liabilities, and the company, as the subject of rights and obligations, would in certain respects resemble an individual, but it is not necessary "to ride the analogy to death". Corporate personality is a flexible concept, pulsating with the economic life of the community, and not a syllogism for a network of logical deductions.

Lifting the Corporate Veil

If the abstract conclusions from the nature of corporate personality were pushed to their logical consequences, it would follow, on the one hand, that a corporation, as such, could not be held liable for a number of acts e.g. torts or crimes, and, on the other, the actual doers of many an act would escape liability by interposing the screen of corporate personality. The difficulty, in the one case, would be to invoke the legal *persona* and, in the other, to disregard it. The law overcame the former long ago holding that so far as criminal and civil liability was concerned, a corporation was as capable of being liable as a natural person, even in cases involving personal fault or malice. The law, indeed, went further; it endowed the corporation with rights and capacities peculiar to natural persons. As Professor Holdsworth says, "Equity, contrary to Blackstone's dictum, found no difficulty in ruling that a corporation would be a trustee; and the Legislature has recently enabled a corporation to hold jointly with another person or corporation."[40] Obviously, the doctrines derived from the nature of corporate personality have not materially impeded the deve-

39 *Id.* at 376, § 6.

40 IX Holdsworth, *History of English Law* 52 (1926).

lopment of the law regulating the activities permissible to a corporation. Practical convenience rather than theoretical considerations has in most cases determined the issue. It may, however, be pointed out that in this type of cases the concept of corporate personality itself was never questioned. The only point in issue was whether a particular act was within the competence of the company as a legal *persona*—that is to say, whether some liability, right or capacity not flowing logically from its juristic personality could be attributed to it. Paradoxically, the concept itself seems to have acquired added strength and amplitude as a result of the progressive disregard of the incapacities stemming from its inherent logic.

The problem posed by the other type of cases is essentially of a different nature, namely, to examine the circumstances in which the fundamental principle of corporate personality is itself disregarded. Here, however, a remarkable rigidity seems to have gripped the English courts which showed extreme reluctance to admit any exception or qualification to the *Salomon* principle. The judicial attitude is, broadly speaking, reflected in the remarks of Devlin, J., (as he then was): "No doubt the legislature can forge a sledgehammer capable of cracking open the corporate shell, and it can, if it chooses, demand that the courts ignore all the conceptions and principles which are at the root of company law."[41] With the greatest respect, it may be that a shell covers the company but judicial approach too, it seems, is a little shell-bound, and while the legislature did deliver a few sledgehammer blows, economic factors have ultimately forced open the shell so that the courts might take notice of economic realities which had come into existence since the *Salomon case*. The abuses which the corporate entity principle was put to, especially in cases of the one-man company, the holding-subsidiary complex, tax-evasion and enemy trading, forced the courts to recognise numerous situations in which that principle had to be disregarded. Specific instances need not be mentioned; they are to be found in every standard text-book, as also in the extensive legal literature on the point. A warning may, however, be uttered. While it is perhaps true that "judicial inroads into the corporate entity principle are few compared with examples of its application,"[42] it would be misleading to assess the extent of the breach by confining one's attention to the 'summary' or 'conclusions' of the authors. The instances are not as few as the above statement seems to suggest. Moreover, there are various provisions of the company law which, for proper implementation, involve

41 *Bank Voor Handel v. Slatford*, (1953) 1 Q.B. 248 (278).

42 Gower, *op. cit. supra* note 2, at 207

a disregard of the separate entity concept, but have not yet been formally regarded as 'inroads', e.g., protection of minority against oppression.

It is difficult to lay down any general rule applicable to the cases in which the law disregards the separate entity of the corporation and takes cognizance of the individuals comprising it. Attempts in that direction have been found to be imperfect or incomplete.[43] Courts have acted under widely differing circumstances which cannot be reduced to any consistent principles and the only standard for court action seems to be "a just and equitable result." This, again, has been expressed differently, but almost always with a certain degree of flexibility and vagueness.[44] Indeed, it has been observed that in determining whether corporate entity should be disregarded, each case is to be considered *sui generis*,[45] and each decision, in the ultimate analysis, is virtually a policy decision depending upon the court's view of what is just, equitable and desirable in the circumstances of the partcular case.[46]

43 Perhaps the best is the oft-quoted statement in *United States v. Milwaukee Refrigerator Transit Co.*, (1905) 142 Fed. 247:

The existence of the corporation as a distinct legal entity is a legal fiction, and where to recognize the corporation as a legal entity will *justify wrong, protect fraud or defend crime the law will disregard this fiction and view the corporation as* an association of individuals. (Italics mine)

(Cf. *Corpus Juris Secundum*, Vol. 18, p. 376, §6, note 49. It is confined, however, to cases involving culpability).

44 A few dicta may be profitably quoted:

There has been a growing tendency on the part of the courts to disregard corporate entiry and to *treat the stockholders there as an association of individuals when the interest of justice* are to be served. (Italics mine)

Metropolitican Holding Co. v. Snyder, 79 F. 2nd. 263 (1965). A corporation is not only a legal entity or artificial person separate and distinct from the natural persons who compose it *but is also a collection of individuals* and this conception is recognized by the Courts *whenever the fiction of the legal* entity is urged to a purpose not within its reason." (Italics mine)

Corpus Juris Secundum, Vol. 18, p. 866, § 1; also at 376, § 6. Cf. also Gower, *op. cit. supra* note 4, at 208 para 6.

45 *Corpus Juris Secundum*, Vol. 18. p. 377, § 6, note 49; *Industrial Research Corp. v. General Motors Corp.*, 29 F. 2nd 623.

46 The simple truth of the matter is that whether the court will sustain or disregard corporate personality *depends upon the policy which the court sponsors in a particular case.* Nowhere is this better illustrated than in the cases involving government-owned corporations. In these cases corporate personality is sometimes sustained and sometimes disregarded *depending upon the end result considered judicially desirable in the given case.* (Italics mine) Cataldo, "Limited Liability with one man companies and subsidiary Corporations," 18 *Law and Contemporary Problems* 482 (1953). A striking illustration in English Law of a policy decision is *Daimler v. Continental Tyre and Rubber Co.*, (1916) A.C. 307.

The modern view, thus, is definitely against the inviolability of the Salomon principle, and already seems to be considerably in advance of its earlier expression in the Milwaukee Refrigerator case.[47] Formerly, the corporate entity was disregarded when some wrong, fraud or crime was perpetrated, or the corporate form was used for some other activity of a culpable nature. The aim of the law was to reach the guilty persons behind the corporate facade and fix liability upon them. Judicial approach to the problem is now much more liberal and far-reaching as the above dicta show.[48] Besides the element of culpability, which used to be almost a condition precedent for court action, other circumstances have also begun to move the court to disregard corporate entity. The emphasis is progressively on a just and equitable result, and it is anticipated that in relieving against inequity and injustice the court would also act as readily for the benefit of the shareholders, and the protection of their legitimate interests.[49]

Characteristically, a metaphor has been coined to describe this iconoclastic activity of the court, to wit, "lifting (or piercing) the corporate veil." This picturesque phrase is by now too well established in legal phraseology to be dislodged; nevertheless, its implications may as well be examined in order to guard against likely misapprehensions. In the first place, 'corporate veil' does not by any means imply concealment of the internal affairs of the company. On the contrary, "the legislature has always made it an essential condition of the recognition of corporate personality that it should be accompanied by the widest publicity."[50] Secondly, the phrase "lifting the corporate veil" refers to cases in which the fundamental principle of corporate personality is itself disregarded.[51] The law, in such cases, takes no cognizance of the fictitious *persona* of the company, and deals with the actual individuals concerned. It seems to be a euphe-

47 (1905) 142 Fed. 247, note 43 supra.

48 *Supra* notes 44, 46.

49 A striking illustration is the "deep-rock" doctrine, *Taylor v. Standard Gas and Electric Co.*, 306 U.S. 307 (1939), where a debt of the controlling shareholder was postponed to the claims of preference shareholders; see also *Gower, op. cit. supra* note 14, at 208 para. 7; Cataldo *op- cit* supra note 46, at 482, n. 37.

Moreover, in the sphere of taxation "the veil of incorporation has been torn to shreds," and not unoften has the beneficiary been the shareholder. See Gower, *supra* note 2, chapter 9.

50 *Id.* at 183; Professor Gower suggests that "there is something in the nature of a curtain formed by the company's public file, and what goes on behind is concealed from the public gaze," but himself mentions many instances when this curtain too is raised. It seems that the veil or curtain, taken in this sense, is almost riddled with holes.

51 *Id.* at 184.

mism to call it a "lifting" of the corporate veil, it is virtually its denial, at least as regards the case in hand. Again, continuing to speak metaphorically, incorporation may more correctly be said to provide a mask rather than a veil for the company.[52] This mask of corporate personality is put on for certain purposes,[53] but there may be other purposes for which the company would be regarded as a mere association of individuals. It may be recalled that the plenary powers conferred by the common law on the chartered corporation were gradually whittled down, and the juristic personality of the modern registered company is circumscribed by specified objects and conditions. Even within the sphere of permissible activity, corporate acts, together with concomitant rights and liabilities, may variously be attributed to this fictitious legal *persona* or to the individuals concerned according as the interests of justice demand.[54] The line of demarcation does not seem to be as clear and well-defined as once it was supposed to be.

It seems, however, that English law, as well as our own, still adheres to a rigid approach to this problem: "the courts have only construed statutes as 'cracking open the corporate shell' when compelled to do so by the clear words of the statute; indeed they have gone out of their way to avoid this construction whenever possible."[55] Summarising the principles on which the corporate veil may be lifted, Professor Gower confines himself to those indicated in the *Milwaukee Refrigerator case.*[56] Indeed, he specifically says: "But we lag far behind the U.S.A. in applying this principle, e.g. we have nothing comparable to the socalled "Deep-Rock" doctrine evolved by the U.S. Supreme Court."[57] In *Tata E. & L. Co. Ltd. v. State of Bihar* our Supreme Court, following English law, refused to lift the veil on the ground that "it would really mean that what the corporations or the companies cannot achieve directly can be achieved by them indirectly by relying upon the doctrine of lifting the veil."[58] With greatest respect, it may be pointed out that achievement of 'indirect' results, at least in the

52 *Id.* It has thus been described, rather disparangingly, in a judgment: "the paper mask of the charter, for it is nothing more, will not be permitted to hide the features of the individual behind it.—"*Great Oak Building v. Rosenheim*, 341, pa. 132; 19 A 2nd. 95 (1941) quoted in Cataldo, *op. cit. supra* note 46, at 481, n. 33.

53 VIII Holdsworth, *History of English Law* 202-203; See also *Palmer's Company Law, op. cit. supra* note 2, at 7.

54 *Supra*, notes 44-46.

55 Gower, *op. cit.* note 2, at 193; A. I. R. 1965 S.C. 40 (47).

56 Gower, op. cit. note 2, at 308.

57 *Id.* at 208, note 2.

58 A.I.R. 1965 S.C. 40 (48).

sphere of liability, has long been the business of law. If a tort or crime was committed in the course of the corporate business, the veil was lifted to find out the actual parpetrators and, in proper cases, liability was imposed on the company. It was clearly a case of indirect liability. A superficial resemblance with ordinary vicarious liability (which in itself is indirect) of the principal for the acts of his agent should not cloud the issue. The company, being an abstract legal *persona*, could not conceivably have the capacity to commit many a tort or crime for which it was held liable. Again ,if a corporate act involving an element of culpability has been done and the liability arising therefrom, so far as the company is directly concerned, cannot be enforced against it, or is regarded as inadequate penalty, the corporate veil is lifted and the individuals operating behind its protective facade made liable. It seems that the doctrine of lifting the veil was evolved to achieve precisely such 'indirect' results. The question is whether it should be confined to cases in which some liability is sought to be fixed on the company or its shareholders, or should it also be extended to cases in which some benefit might accrue to them. On principle, there seems hardly any reason to make the distinction and restrict its operation to cases of liability. Courts in the United States, the country which is in the vanguard of economic advancement, have already proceeded to apply it in all cases where interests of justice and considerations of policy demand its application. The attitude of English and Indian courts continues, on the whole, to be 'cautious and circumspect,' and it seems they would not lift the corporate veil unless compelled to do so.[59] The thraldom of the original concept still grips their mind. However, instances are not unknown where, by lifting the veil, some benefit has accrued to the shareholders or the company.[60]

The conclusions emerging from the above discussion appear to be as follows : firstly, the corporate entity concept has been greatly exaggerated, far beyond its original intendment, as the sole repository of all functions and activities permissible to the company, and should be confined to the reason and purposes of its creation ; secondly, for other purposes the company continues to exist as an association of individuals, with corresponding rights and obligations ; thirdly, when the legal *persona* of the company is used to perpetrate fraud or crime or other wrongful act, or the

59 A striking exception in English law is *Daimler v. Continental Tyre and Rubber Co.*, (1916) A.C. 307.

60 For the present, such instances seem mostly to be legislative, for instance, in the fields of the holding-subsidiary complex (*Gower, op. cit. supra* note 2, at 188-192), and Taxation (*Id.*, chapter 9).

interests of justice or public policy demand it, the corporate veil may be lifted ; and, lastly, each case involving above matters should be regarded as *sui generis* and examined on its merits in the contest of economic realities rather than on the basis of logical deductions from the concept of corporate personality.

III

Of all juridical conceptions, the concept of property is the most comprehensive and perhaps equally vague. The term 'property' has been used in a wide variety of senses and meanings having 'different applications and different degrees of generality.' In its common, and narrowest, use it signifies a physical object ; very often it denotes the legal relation between a physical object and one or more persons, or between various persons *inter se* respecting a physical object ; and sometimes, again, it indicates merely the inter-relationship of legal rights without any reference to a physical object. It has been classified also in diverse ways ; for instance, corporeal and incorporeal, material and immaterial, tangible and intagnible, movable and immovable, real and personal, and so on. Indeed, in the domain of law, the concept of property possesses a degree of universality which led Salmond to remark that "in its widest sense, property includes all a person's legal rights, of whatever description."[61] Be that as it may—and exceptions to the above generalisation can be cited without much difficulty—the statement of Salmond is substantially true in the economic sphere. In company law, particularly, there is hardly any right, obligation or other jural relation arising from or incidental to corporate activity which does not involve some aspect of this cyclopaedic concept. Indeed, the very purpose of the creation of a commercial corporation is to acquire, hold, exploit, or otherwise use—in a word, to concern itself primarily with property in some one or the other of its varied forms and connotations. The statutory definition of a company makes this quite clear. A company registrable under the Act is one "formed for the purpose of carrying on... *business that has for its object the acquisition of gain* by the company."[62] No clearer enunciation of the basic purpose and object of a company could be made—"business" and "gain" would be classified as property in any sense of that term.

The vital importance to a company, or corporation, of the right to property—its acquisition, possession and disposal—is thus beyond any

61 Salmond on *Jurisprudence* 451 (Glanville williams ed., 1957).

62 Sec. 11, Indian Companies Act (1956) ; Sec. 434 English Companies Act (1948). (Italics mine).

doubt. If this right were denied to it, the corporation would have practically no function to perform, since all corporate activity is unavoidably concerned with some right or obligation of a proprietary nature.[62a] Regarding the right to acquire property it has been observed in *Corpus Juris Secundum :*

> It is *essential* to corporations, as well as individuals, that they should have *the capacity...to acquire property*. Without these powers *the purposes of their institution* could not be accomplished.[63]

Blackstone lays it down that "to every corporation aggregate there is *inseparably annexed as of course* the following five incidents : 1. To have perpetual succession. 2. To sue or be sued... 3. *To purchase lands and hold them for the benefit of themselves and their successors.* 4. To have a common seal. 5. To make bye-laws or private statutes...."[64] Holdsworth, while accepting that limitations could be laid upon the powers of common law corporations, observes that

> *a general limitation*, for instance, of the right to alienate property or to contract ... *would be invalid.* It might well be, however, that in any given case an alienation or a contract might be held to be void, if it was directed to give effect to purposes wholly foreign to those fowhr ich the corporation was ovated.[65]

As far as the modern law is concerned, it would perhaps be sufficient to give a few quotations from the *Corpus Juris Secundum.* Thus, in Vol. 19, p. 628, § 1088, Note 36, it has been observed :

> Among the powers or capacities *incident* to a corporation at common law, *without any especial mention in their charter*, was that of taking, holding and conveying lands ; and *these incidents still remain even in this country* where charters are granted only by legislature, subject only to such restrictions as the legislature has seen fit to impose. (italics mine).

62a As Lewis Mayers observes : "A corporation may be regarded as merely a name for the corporate property which is being managed in the fashion described. When dealing with a corporation one is really dealing with property. One making a contract with a corporation is really assuming an obligation towards, and more important, is seeking to impose an obligation upon a certain body of property." *Law of Business Corporations* 18 (1939).

63 *Corpus Juris Secundum,* Vol. 19, p. 627, § 1088, Note 19 (italics mine).

64 Comm. (i) 463-464, quoted in Holdsworth, IX *History of English Law* 53-54 (1926) (italics mine).

65 *Id.* at 61-62 (Italics mine).

Again,

> Subject to constitutional, statutory or charter limitations a corporation has the capacity to acquire and hold property *as an incident of corporate existence...the power need not be expressly conferred but is incident to and inherent in its corporate existence.... Grants of power are merely declaratory of the common law power* of corporations to acquire and hold lands for the purposes of their creation.[66]

The limit of permissible restrictions has been expressed as follows :

> The powers of a corporation may be enlarged, but *except in so far as a proper exercise of the police power and the eminent domain permits it, powers essential to the object for which it was organized may not be restricted or repealed* without unpairment of the obligation of the contract contained in the corporate charter.[67]

Again :

> A corporation's power to acquire and hold property may be limited by express constitutional or statutory provisions...*statutes controlling the power are construed reasonably to avoid defeating the purpose of incorporation.*"[68]

It is thus clear that the right to property is inherent in the corporation and is an essential incident of its corporate existence.[68a] It need not be specifically granted by the charter or statute ; a grant, if made, would be merely regarded as declaratory of the common law power already possessed by it. In early times, a general limitation of the power would, it seems, be invalid, but, with the rise of the supremacy of the legislature, constitutional or statutory limitations have been upheld, but only if they were reasonable and did not defeat the legitimate purposes of the corporation. Since the corporation is created for certain specific purposes which, by the way, receive the stamp of legality by the formal act of incorporation, the right to property can be relied on only for those purposes and cannot be extended beyond them. Within those limits, however, the right to

66 *Corpus Juris Secundum,* Vol. 19, p. 626-627, § 1088 (italics mine) ; Sec. 14(i) of the English Companies Act, it is true, makes specific provision for holding land, but that is merely to get over the Mortmain Acts of 1888 and 1891. The power to 'acquire' property is taken for granted in English Law.

67 *Id.,* Vol. 16, p. 1383, § 336, Note 71. (italics mine)

68 *Id.,* Vol. 19, p. 637, § 1089 (Italics mine).

68a Indeed, Lewis Mayers says that "a corporation may be regarded as merly a name for the corporate property which is being managed in the fashion described" (*Law of Business Corporations, supra* note 62 a, at 18).

property possessed by a corporation is as fundamental as it could be in the case of any other person.

It is not necessary to examine the concept of citizenship in detail at this stage, for the present inquiry is primarily concerned with the concepts of corporate personality and of propoerty with a view to ascertaining whether there is anything inherent in them which would be repugnant to the enjoyment of a fundamental right to property by corporations. As the above discussion shows, not only is there no antithesis between the two, on the other hand, the right to property is inherent in commercial corporation and a *sine qua non* for its corporate life and activity. The Constitution of India has, however, linked the fundamental right to acquire, hold and dispose of property with the concept of citizenship, and the Supreme Court relied heavily on it to deny that right to companies. A few remarks may not, therefore, be out of place just to show that the concept of citizenship admits of a degree of flexibility which may, without violating the canons of interpretation, enlarge the apparent scope of its applicability. Indeed, it is not necessary that a company should fulfil all the attributes of citizenship before it could be permitted to enjoy the fundamental right to property. Instances are not wanting where citizenship has been attributed, or denied, for certain purposes while a strict interpretation would have permitted neither. Moreover, it may perhaps not be absolutely necessary to bring the corporation under the category of citizens in order to confer the corresponding right to property upon it; the object may be achieved in other ways also.

The diversity of citizenship cases under the American law provide a striking instance of the sub-ordination of conceptualism to practical expediency. To appreciate the full significance of the doctrine evolved by the Court it is necessary to remember that under the U.S. Constitution, only "*persons born or naturalised* in the United States...are citizens of the United States and of the State wherein they reside."[69] All the seven clauses of the Immigration and Nationality Act, 1952, passed by Congress under the power conferred by Art. I Sec. 8, Cl. 4, of the Constitution, specifically refer to "*a person born.*" Thus, it will be seen that under the law governing citizenship of the United States, it is out of question for any one except a natural person to be a citizen. As remarked by Chief Justice Marshall, "that invisible intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen;"[70] and, as

69 XIV Amendment Section, 1 (Italics mine).

70 *Bank of United States v. Deveaux*, 5, Cr. 61, 86 (1809); although the action was permitted by 'lifting the veil'.

a general proposition it is as true today as when it was uttered. But the necessity to protect corporations from arbitrary state action was urgent, and 'lifting the veil' would not help in all cases. Corporations had to have access to the federal courts, but the jurisdiction of the latter was circumscribed by Art. III Section 2, of the Constitution to "controversies between citizens of different states." The Supreme Court in 1844 boldly declared that

> a corporation created by and doing business in a particular state is deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, *for the purposes of its incorporation, capable of being treated as a citizen of that State as much as a natural person.*[71] (Italics mine).

The basis of the above rule, as explained later,[72] is a conclusive and irrebuttable presumption that all the stockholders are the citizens of the State which created the corporation. This, 'jurisdictional fiction' gives rise to a logical anomaly in cases where a stockholder, being actually a citizen (say) of Kentucky, brings a diversity suit against a corporation chartered in (say) Ohio. The anomaly has been very well expressed by Gray:

> Since he is a stockholder of an Ohio corporation, the Court conclusively presumes that he is a citizen of Ohio, but if he were a citizen of Ohio he could not sue an Ohio corporation in the Federal Courts. Therefore, the Court considers that he is and he is not at the same time a citizen of Ohio; and it would have no jurisdiction unless it considered that he both was and was not at the same time a citizen both of Ohio and Kentucky.[73]

Federal Courts, however, take cognizance of such suits notwithstanding the grave anomaly involved. A better illustration of the adaptability of the concept of citizenship could hardly be given. In the first place, an artificial person, which is outside the ambit of the specific definition of a citizen as laid down in the Constitution and the Immigration and Nationality Act, is regarded as a citizen; and, further, in order to support this citizenship, a natural person is regarded *at the same time a citizen and not a citizen of a State*, and again, as *a citizen and not a citizen of two States at the same time.* This remarkable development took place because "the interests of corporations in docketing cases in the federal courts as citizens of different States appeared more important to the Supreme Court than the weight to

71 *Louiseville, Cincinnati and Charleston R. Co. v. Letson*, (1844) 2 How 497.

72 *Muller v. Dows*, (1877) 94 U.S. 444.

73 Gray, *Nature and Sources of the Law* 185-186 (1927).

be attached to precedents, even those set by John Marshall.[74] Of course, corporations are not regarded as citizens for most other purposes, but this does not detract from the proposition that the concept of citizenship is dynamic and can be expanded, or restricted, to implement a particular public policy. It may be mentioned that the recent trend seems to be in favour of a liberalisation of the concept and applying it, in the case of corporations, to areas appropriate only for natural persons, e.g. liberty of the press,[75] freedom to use streets and parks and assemble peacefully for discussion.[76] The *Corpus Juris Secundum* summarises the modern view as follows:

> a Corporation is a citizen within the meaning of a statute conferring rights, defining the jurisdiction of Courts, or otherwise relating to citizens if the purpose and intent of the statute renders it applicable.[77]

An illustration of the restriction of the concept may also be given. As recently as the year 1957, the Swiss Federal Supreme Court ruled, in reference to a constitutional provision under which *all* Swiss citzens (*tous les Suisses*) were entitled to vote, that in conformity with the legal tradition "Swiss citizenship" should be understood to include only 'male' Swiss citizens.[78]

The Indian law of citizenship is contained in Part II of the Constitution and the Citizenship Act of 1955. The former is supposed to prescribe the conditions of citizenship at the commencement of the Constitution, and the latter thereafter. It is not intended to analyse in detail the provisions of either at this stage, and, in any case, the Act specifically excludes companies and need not be considered further. The provisions of Part II of the Constitution also are proposed to be examined only by way of comparison with the U.S. Constitution in order to ascertain the comparative freedom of action permissible to the Courts in the two countries.

Under the American Law, as pointed out above, citizenship is confined to natural persons. Both the U.S. Constitution and the Immigration and Nationality Act, 1952, restrict the term to persons 'born or naturalised.'

74 *Constitution of the U.S.A.*, official version 601.

75 *Grosjean v. American Press Co.*, 297 U.S. 233.

76 *Hague v. C.J.O.*, (1939) 307 U.S. 496.

77 *Corpus Juris Secundum*, Vol. 18, p. 388, § 8(c).

78 B G E 83 I 173, quoted in *supra* note 4, at 327.

Nevertheless, the Courts, in furtherance of justice and public policy,[78a] did not hesitate to invest corporations with some of the attributes of citizenship for certain purposes.

Part II of the Indian Constitution contains the provisions for the acquisition of citizenship. Generally speaking, citizenship, as laid down in the relevant Articles (5 to 8), is by birth, descent, residence, migration and registration. For the present discussion, the provision relating to citizenship by residence alone is important; the rest apply obviously to natural persons. Article 5 lays down as follows:

> 5. At the commencement of this Constitution every preson who has his domicile in the territory of India and—
>
> (*a*) who was born in the territory of India; or
>
> (*b*) either of whose parents was born in the territory of India; or
>
> (*c*) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement.
>
> shall be a citizen of India.

It will be noted that the above clauses follow one another through the disjunctive 'or', and may, therefore, be taken to prescribe for different and independent situations. They are self-contained, and the implications of one cannot be imported into another. Disregarding, for the present, clauses (a) and (b) which obviously apply only to natural persons, three conditions have been laid down for cases governed by clause (c), namely, (i) person, (ii) domicile in India at the commencement of the Constitution, and (iii) residence in India for not less than five years immediately preceding such commencement. A corporation, in the contemplation of law, is a person,[79] and possesses both residence and domicile.[80] *Prime facie*, and without any feat of interpretation, it comes within the purview of clause (c). There seems to be no reason to deprive it of the benefit of that clause, so far, of course, as may be appropriate to its nature and condition. Indeed, to do so may involve a straining of the language, and would certainly provide an instance of *summum ius* resulting from a conceptual obsession. It thus seems clear that the Indian Constitution, unlike that of the U.S., contains in itself a provision under which courts might, without committing any

78a E.g., "to avoid robbing the federal courts of their jurisdiction"—(Willis, *Constitutional Law of the United States* 580).

79 Art. 367; Sec. 3 (42) of the General Clauses Act, 1897.

80 Cheshire, *Private International Law* 187 and 193 (1952).

judicial impropriety, admit corporations to appropriate privileges and benefits of citizenship.[81]

This question may also be looked at in another way. As explained earlier, the concept of corporate personality is a legal abstraction, or fiction, and behind this fiction there exists the reality of individuals.[82] Whenever the interests of justice or public policy demand, the corporate veil is lifted and the law takes cognizance of the individuals behind it.[83] It is true that in the majority of cases the corporate veil has been lifted in order to fix or impose liability for some wrongful act, but this is not exhaustive of the circumstances under which courts may take action. With respect to corporate property, it has been observed that

> *When necessary to do justice*, courts of equity recognise that the beneficial interest in corporate property is in the members, and stock-holders have been held to be "interested" in such property.[84] (Italics mine)

Again,

> While the title to corporate property is in the corporation it is clear that the substantial beneficial ownership, in the case of private corporations, is, in equity, except for corporate purposes, in the members or the stock-holders who own the corporation, and *this obvious fact must be recognised in equity* for purposes of distribution of assets on a dissolution, *and in other cases in which such a view is necessary to do justice.*[85] (Italics mine)

In the case of Indian-owned companies, at least, the members are undeniably Indian citizens having the fundamental right to acquire and own property under Art. 19(1) (f). This Article, it has been held,[86] is analogous to Art. 17(1) of the U.N. Declaration of Human Rights which declares that

> every one has the right to own property alone *as well as in association with others.* (Italics mine)

81 It has been held that a company incorporated before 26th January 1950 is a citizen under Art. 5(c) and entitled to enforce fundamental rights under Art. 19(1). M/S *T. D. Kumar Ltd., v. Iron and Steel Controller*, A.I.R. 1961 Cal. 258.

82 "It is clear that a corporation is in fact a collection of individuals and that the idea of a corporation as a legal entity or person apart from its members is a mere fiction of the law introduced for convenience in conducting the business in this privileged way." *Corpus Juris Secundum*, Vol. 18, p. 366 § 1, Note 1.

83 *Supra* notes 44 to 46.

84 *Corpus Juris Secundum*, Vol. 18, p. 382 § 7(C).

85 *Ibid.*

86 *State of Bengal v. Subodh Gopal*, (1954) S. C. A. 65 (75).

It is therefore clear, although not laid down in so many words, that the right would exist unimpaired when Indian citizens acquire and own property in association with one another. There would, it is submitted, be no difference even if the association takes the corporate form. With regard to the right of inter-state commerce, the U.S. Supreme Court has observed :

> To carry interstate commerce is not a franchise or a privilege granted by the State ; it is a right which every citizen of U.S. is entitled to exercise under the Constitution and laws of the United States ; *and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right*, unless Congress should see fit to interpose some contrary regulation on the subject.[87] (Italics mine)

In similar vein, perhaps, Hidayatullah, J., also expressed an opinion in the *State Trading Corporation* case that "there is sufficient guarantee there, and if more is needed then any member (if citizen) is free to invoke Art. 19(1) (f) and (g), and there is no doubt that the corporation in most cases will share the benefit. We need not be apprehensive that corporations are at the mercy of State Governments."[88] However, it is doubtful whether much comfort can be drawn from his Lordships' assurance after the decision in *Tata Electric & Light Co. v. State of Bihar* (A.I.R. 1965 S.C. 40).

IV

In conclusion, an illustration given by Das Gupta, J., in the *State Trading Corporation case*[89] may be cited, especially because it also serves to illustrate the main theme of this article, namely, *summum ius summa iniuria :*

> The peculiar position that results from the strict legalistic approach to the problem can be best shown by means of an illustration.
>
> A, a citizen of India...is entitled to the fundamental right to acquire, hold and dispose of property under Art. 19 of the Constitution. When A engages with another such citizen, B, in business the two can still come to the courts to claim the benefit of the same fundamental right. The position remains the same if A and B join more persons without incorporating them-

87 *Crutcher v. Kentucky*, (1891) 141 U.S. 47. Congress regulation, of course, can only be under police power or eminent domain.

88 A.I.R. 1963 S.C. 1811 (1836).

selves into a company; even if the number is seven or more they can still join in the same application and come to the court jointly for enforcement of their fundamental right under Art. 19 when they are jointly engaged in the same business. For, in all these cases the claim of each to the fundamental right cannot be in law defeated by the fact that several other citizens have joined him in making a similar claim for themselves. As soon as, however, two more persons who are in their own right citizens of India form themselves into a private company, or seven or more persons, each of whom is a citizen in his own right, form a public incorporated company, they are faced with the proposition that the company not being a citizen it is excluded from the right which they could have claimed.

The illustration may be carried a little further so as to bring out the full extent of the incongruity: At first, however, a statutory provision may be noted. By virtue of Sec. 11 of the Indian Companies Act incorporation is obligatory if more than ten persons carry on the business of banking, or more than twenty persons carry on any other business having for its object the acquisition of gain.[90] As regards the illustration given by Das Gupta, J., it might be said that, incorporation at that stage being optional, if A and his associates chose to be incorporated they might as well forego, or be taken to forego, the fundamental right mentioned therein. However, a stage is reached when there is no option and insistence on *summun ius* at that stage would undoubtedly lead to *summa iniuria*. Thus,

> If A and nine other associates, each an Indian citizen in his own right, jointly carry on the business of banking, or if A and nineteen other associates, each an Indian citizen in his own right, jointly carry on any other business, they are still entitled to their fundamental rights to the property and the business under Art. 19, and can jointly apply to the court for their protection. But no sooner do they take, in either of the above cases, one more associate, himself an Indian citizen, than they must be incorporated as a company

89 A.I.R. 1963 S.C. 1811 (1838).

90 S. 11. *Prohibition of associations and partnerships exceeding a certain number:*

(1) No company, association or partnership consisting of more than ten persons shall be formed for carrying on the business of banking unless it is registered as a company under this Act.....

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain....unless it is registered as a company under this Act.....

> which, in the contemplation of law, is not a citizen and consequently, not entitled to the fundamental rights under Art. 19. At the same time, A and his associates are perforce deprived of their former fundamental rights under Art. 19, because the property and the business in respect of which they could have exercised those rights now belong to the company and not to them: "the shareholders cannot claim that the property of the companies is their property and...that the business of the companies is their business *in the strict legal sense.*"[91]

It is the company alone which could now present a petition for the enforcement of any fundamental right in respect of such property and business (it has none under Art. 19). Moreover, the Court would not lift the corporate veil for this purpose and allow the shareholders to apply because to do so would "really mean that what the corporations or the companies cannot achieve directly can be achieved by them indirectly."[92]

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91 A.I.R. 1965 S.C. 40 (47), per Gajandragadkar, C.J., (Italics mine).

92 *Id.* at 48.

PROPERTY RELATIONS IN INDEPENDENT INDIA: CONSTITUTIONAL AND LEGAL IMPLICATIONS TRENDS & PROSPECTS*

M. P. JAIN†

In Independent India, regulation of property rights has been undertaken by the Government on a very large scale. To have an idea of what has happened in this area, one has just to look at the statute book and the law reports to see how massive is the legislation enacted by the Central and State Governments, and how vast is the case-law that has accumulated around property relations during the last sixteen years. It might perhaps be true to say, as a rough generalisation, that since 1950, no single subject has given rise to so much litigation between government and citizens, and between the citizens *inter se*, as the government regulation of property. Important constitutional battles have been fought in the courts on the subject of land legislation. At times, passions and emotions have risen to a high pitch. There has been a measure of bitterness between the courts and the legislatures, the role of the judiciary being criticised on the ground of thwarting essential land reforms by resorting to legal quibblings, and, in the process, the Constitution itself had to be amended thrice in order to enable the government to effectuate its land policy. The most important constitutional provision which has been in the forefront in all this development is Art. 31 ; to a lesser extent, Art. 19(1)(f) has also been in the picture.

The great bulk of the legislation has been generated as a result of the government undertaking a thorough reconstruction of the agrarian economy through such measures as abolition of zamindaris and other intermediaries, giving security to tenants, fixing a maximum ceiling on personal holdings of agricultural land and redistributing the surplus land among the landless, consolidation of landholdings *et cetra* . This has involved a large scale uprooting of vested interests and hence there has been a good deal of case-law around agrarian reform. To a lesser extent, legislation and litigation have centred around the acquisition of land by the Government for multifarious purposes. In practically every area of land policy—whether agricultural or urban—acquisition of property comes into the picture

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in one way or the other. This has necessitated passage of legislation for meeting various types of situations, at times laying down a summary procedure of acquisition. In both the areas, agrarian reform and acquisition, the main bone of contention has been the question of compensation to be given to one whose property has been acquired by the Government. Regulation of landlord-tenant relationship has been a major theme of legislation in urban property and by and large litigation in this area arises between private individuals. Another major area of government regulation has been the field of private industrial and economic sector, but by and large legal controversies in this area pertain to Art. 19(1)(g), and hence are not discussed in this paper. Some reference would be made, however, to questions of compensation on nationalisation of private undertakings, or on taking over their managements for temporary periods, which fall within the purview of Arts. 19(1)(f) and 31.

In this paper, an attempt will be made to bring in bold relief some of the major trends discernible in the area of property regulation, mainly in the sphere of the Constitution law, and to project into the future to assess what prospects in this area loom large on the horizon.

II

POLICIES

Most of the 'property regulation' in the post-independence era can be explained and appreciated only when some clarification is made of the goals and perspectives which the framers of the Constitution had in view, the steps taken to effectuate these goals, and of the policies and objectives which have been adopted from time to time by the planners and policy-makers in the country.

An idea of the goals and perspectives of the framers of the Indian Constitution can be gathered by a reference to the Preamble of the Constitution and Directive Principles of State Policy, Articles 36 to 51 contained in Part IV of the Constitution. The Preamble states that the Constitution is being adopted to achieve for all citizens of India 'justice, social, economic and political.' A few of the relevant directive principles are : The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life ;[1] that the ownership and control of the material resources of the community are

1 Art. 38.

so distributed as best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;[2] that the State shall organise agriculture on modern and scientific lines.[3] The accent of the Constitution is thus towards a welfare state. The ideal of a socialist pattern of society has not been spelled out in the Constitution but it was adopted later. Parliament accepted, in 1954, the ideal of a socialist pattern of society as the goal of social and economic policy. This approach has influenced the growth of policies in the area of land as in the industrial sector.

It needs no proof to say that the economic conditions of the people in the villages has been very unsatisfactory. The agriculturists have been heavily indebted; agriculture has been stagnating and needs to be promoted on modern and scientific lines. These difficulties could be removed by implementing measures of land reform in the rural area. As the second Five Year Plan very aptly points out, "measures of land reform have a place of special significance, both because they provide the social, economic and institutional framework for agricultural development and because of the influence they exert on the life of the vast majority of the population."[4] Thus it was felt necessary to take steps so as to give to the tiller of the soil his rightful place in the agrarian system and also to lessen the burdens on him so as to provide him with incentive to increase agricultural production. The basic measure of socio-economic reconstruction envisaged was the abolition of the Zamindars, the intermediaries between the State and the tillers of the soil. This was the first major event in the agricultural sector soon after independence. In fact, this was already on the horizon at the time of the Constitution-making. This was the upper-most thought in the minds of the framers of the Constitution and it coloured their vision, as a number of provisions in the Constitution would testify. The shape of Art. 31, and much of what happened later by way of constitutional development ,can be attributed to the dedication of the ruling party to this goal. Abolition of Zamindari was regarded as the first and the foremost task before the Government.[5] Another measure envisaged at the time was to

2 Arts. 39(b) and (c).

3 Art. 48.

4 *Second Five Year Plan*, 177; *First Year Plan*, 184.

5 A number of acts have been enacted for this purpose. To name only a few, The U.P. Zamindari Abolition and Land Reforms Act; The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1949; The Bihar Land Reforms Act, 1950; The Ajmer Abolition of Intermediaries and Land Reforms Act, 1955. The First Plan at 185 asserted, "The abolition of intermediary rights has been the major achievement in the field of the land reform during the past few years."

afford protection to the tenants against eviction from their lands. This was regarded necessary if tenants were to improve land so that in the long run agriculture could be improved.[6]

When these measures were got out of the way, other policies of socio-economic reconstruction of the rural and agricultural sector were conceived. The Second Plan touched upon a new aspect of land reform, that of reducing large disparities in the distribution of wealth and income, which were regarded as 'inconsistent' with economic progress. The area of cultivable land in India is limited and therefore "for building up a progressive rural economy, it is essential that disparities in the ownership of land should be greatly reduced."[7] Redistribution of land in excess of a ceiling though "may yield relatively limited results" was yet adopted as a policy "so as to afford opportunities to landless sections of the rural population to gain in social status and to feel a sense of opportunity equally with other sections of the community." This was also in line with the directive principle enjoining on the State to reduce concentration of wealth.[8] The Second Plan therefore advocated that an absolute limit on the amount of land which an individual could hold was necessary. This involved acquisition of excess land from those who had more than the maximum and redistribution of the same amongst the landless. The justification for this policy may be found in the fact that land-holdings are concentrated in fewer hands. One per cent of the rural households own one fifth of land, and 50 per cent of rural households have either no land, or less than one acre and account

6 A large number of Acts have been enacted for the purpose, *e.g.*, The Mysore Tenancy Act, The 1952; The Bombay Tenancy and Agricultural Lands Act, 1948; The Berar Regulation of Agricultural Leases Act, 1955; The Assam (Temporarily settled Districts) Tenancy Act; The Kerala Agrarian Relations Act, 1960.

7 In its incipient stage, the idea was put forward in the First Plan: "In relation to land (as in other sectors of the economy) individual property in excess of any norm that may be proposed has to be justified in terms of public interest, and not merely on grounds of individual rights or claims. We are, therefore, in favour of the principle that there should be an upper limit to the amount of land that an individual may hold," at 188. But, as regards the question whether principle of imposing a limit should be applied to existing holdings, the commission cautioned that it raised 'wider issues'. The question was whether, if a limit be imposed, could the excess land be acquired at less than the market value and on this the commission said, "Merits of the proposal apart, we are advised that such a course would not be consistent with the provisions of the Constitution;" at 190. The commission therefore advised enactment of land management legislation to improve standards of cultivation and management in respect of large land-holdings under personal cultivation of the landowner.

8 Art. 39(c).

for only one-eighth of the land.[9] To reduce uneconomic agricultural holdings, a programme of consolidation of holdings, quite an old policy in India, was again reiterated and its urgency stream-lined by the Second Plan. This envisages allotment of a compact area in lieu of scattered plots of land to a land-holder to facilitate agriculture. Steps to prevent fragmentation were also advocated.[10] Desirability of giving of security of tenure to the agriculturists was again emphasized. Steps to regulate rents payable for land were found necessary: "a rate of rent exceeding one fourth or one fifth of the produce should be regarded as requiring special justification." All these steps were advocated in the interests of reorganising agrarian economy on sound lines with a view to increase agricultural production. These policies have since been reiterated in the Third Plan. Instead of envisaging any new policy, the Third Plan merely sought to review the implementation of the policies during the Second Plan period.

In the field of urban property, the plans have emphasized three main approaches: Housing; slum clearance and improvement; urban planning and land policy. In the area of housing, the First Plan emphasized the provision of housing for weaker sections of society, both in urban and rural areas, as a part of its own functions.[11] A stress has been placed on the improvement and clearance of slums and the major difficulty in doing so, besides finance, has been pointed out to be the "lengthy and time-consuming procedures of acquisition of slum areas."[12] In the sphere of urban planning, emphasis has been laid on such measures as control of urban land values, physical planning of the use of land, prescribing minimum standards for housing and other services. To achieve the objective of control of urban land values, the Third Plan proposes such measures as the freezing of land values with a view to early acquisition, allotment of land as lease-holds, betterment levies, capital tax, taxation of vacant plots, ceiling on urban

9 Bhattacharya, *Indian Plans* 117 (1963). Some of the Acts enacted for the purpose are: The Assam Fixation of Ceiling on Land Holdings Act, 1957; The U.P. Imposition of Ceiling on Land Holdings Act, 1961; The Andhra Pradesh Ceiling on Agricultural Holding Act, 1961; The Gujrat Agricultural Lands Ceiling Act, 1960.

10 A lot of legislation has been undertaken in pursuance of these objectives, *e.g.*, The Prevention of Fragmentation and Consolidation of Holdings Act, Hyderabad, 1956; The Holdings (Consolidation and Prevention of Fragmentation) Act, Rajasthan, 1954; The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948.

11 First Five Year Plan 598.

12 First Plan, at 604. Adoption of simple and summary procedures to issue clearance-orders was advocated. Compensation was also to be given on a restricted basis.

land holding, control of rent etc.[13] These proposals lie at the base of planned urbanisation.

It is interesting to note that the Second Five Year Plan in the area of urban sector dilated mainly upon 'housing' and 'slum clearance' and the proposals formulated in other respects were mostly embryonic in character. However, a specific recommendation for enactment of town and country planning legislation in all states, and setting up of the necessary machinery for its implementation, had already been advocated in the first two plans.[14] The Third Plan is more elaborate on urban problems. The Second Plan articulated policies regarding rural economy and the Third merely looked into the implementation of these policies. On the other hand, the Third Plan went much further ahead in articulating policies in the area of urban planning.

Partition and independence of the country generated a colossal problem in the form of refugee rehabilitation. Nearly nine million people migrated from Pakistan into India and one aspect of the problem of their rehabilitation was the distribution of property left behind in India by the evacuees. A lot of legislation had to be enacted to assist in their resettlement creating a host of legal problems, *e.g.*, The Administration of Evacuee Property Act, 1950, The Evacuee Interest (Separation) Act, 1951. A lot of litigation took place between the government agencies, evacuees, non-evacuees and the refugees. This however has now declined in relative importance.

Another area of 'property control' has been the imposition of supervision by the government over the management and administration of religious endowments. There were complaints of mismanagement and wastage of properties attached to religious endowments and the governments of the States took steps to check and control this wastage. A large body of legislation and consequent case-law have arisen in this regard.

Another sector to be controlled is 'Industrial' property. India has been declared to be a socialist society and this envisages the creation of a public sector and the control of the private sector, *inter alia*, from two main points, *viz.* minimizing the concentration of economic power in a few hands and reducing and minimizing abuses of mismanagement by private

13 Some of the Acts imposing restriction on rent for urban property are: The East Punjab Urban Rents Restriction Act, 1949; The U.P. (Temporary) Control of Rent and Eviction Act, 1947.

14 In fact, the First Plan suggested the enactment of a National Town and Country Planning Act.

entrepreneurs. This is being done in the context of the Industrial Policy Resolution, 1956. A vast amount of regulatory legislation has come into being. For the purposes of this paper it is not necessary to go into this area. We may make some reference only to the nationalisation of private undertakings with a view to promote the public sector from the point of view of compensation paid by the government for the property acquired.[15]

It might be of interest to note that many a time in the course of their interpretative process, courts have taken recourse to the prevailing doctrines of social justice and socialist pattern of society. In *Kameshwar Singh's case*,[16] we find Justice Das pleading with the majority not to read a measure implementing our mid-twentieth century Constitution through spectacles tainted with early nineteenth century notions as to the "sanctity or inviolability of individual rights."

III

TRENDS IN CONSTITUTIONAL DEVELOPMENT: ART. 31

The effectuation of the land policy, articulated after the independence, and mentioned above, did not prove to be a very smooth process. A major hurdle that came in the way of the Legislature was from the side of the Constitutional norms relating to private property as developed and interpreted by the Supreme Court during the period 1951 to 1954, with special reference to Art. 31. It is clear from a perusal of the cases at the time that there was a clear conflict between the value sought to be promoted by the judiciary and the value held important by the Legislature and the Executive. In the beginning, the orientation of the court was more in favour of private property interests, more reminiscent of the security of private property approach of the early 20th century in the U.S.A., rather than an approach which might be more in accord with the socio-economic realities of India. Unfortunately, for the development of the Fundamental Rights relating to property, the very first issue that came before the courts was that pertaining to agrarian reforms in general, and that of abolition of the Zamindari in particular. The Zamindari abolition issue was highly surcharged with politico-economic overtones. The ruling party was deeply committed to this policy. The Constitution framers

15 Reference can be made for discussion of this aspect of government regulation to the writer's another paper, "Public Control of Private Enterprise"—a paper delivered at the Bombay Seminar on Indian Constitutional Law.

16 (1952) S.C.R. 889, 996-97. Also, *Ranjit Singh* v. *Punjab*, A.I.R. 1965 S.C. 632. Other cases are noted below.

were anxious that judicial interference against legislative measures depriving a person of his property should be reduced to a minimum. They had, according to their widsom, taken all the necessary precautions in the drafting of Art. 31 so as to avoid any difficulties that could be anticipated in effectuating this policy. Even a warning had been administered to the judges that no legal quibbling would be tolerated from their side so far as the question of abolition of the Zamindari was concerned.[17] But as the judicial process unfolded itself after the independence, it was found that it would not be easy for the Government to implement the policy regarding the abolition of the Zamindari. Various laws enacted by the State Legislatures for this purpose were challenged in the courts, by the interests adversely affected, mainly under Arts. 14, 19, and 31. The Patna High Court declared the Bihar Legislation to be bad under Art. 14;[18] the Allahabad High Court, on the other hand, declared the U.P. law to be valid.[19] Before, however, the Supreme court could give its opinion on the validity or otherwise of this type of legislation, Parliament became restive at the delay being caused by litigation in furthering the programme and, therefore, thought of short circuiting the judicial process by amending the Constitution in 1951. It will be noted that the amendment came within one year of the inauguration of the Constitution. A new provision, Art. 31A, was added to lay down that no law providing for the acquisition by the State of any estate or of any rights therein, or for extinguishing or modifying of any such rights, would be void on the ground of inconsistency with any Fundamental Rights. Another Art., 31 B, with IX Schedule, were added providing that the Acts mentioned in the Schedule would not be deemed to be void on the ground of their taking away or abridging any of the Fundamental Rights. In the Ninth Schedule were listed at the time 13 Acts enacted during 1948 and 1950, of which the breakdown state-wise was: Bihar 1, Bombay 6, Madhya Pradesh 1, Madras 2, U.P. 1, and Hyderabad 1. These Acts were to be valid in spite of the fact that any court had declared any of them

17 In the Constituent Assembly, Nehru had said that no undue judicial interference by way of setting itself up as a third chamber would be tolerated. 9 *Const. Ass. Deb.*, 1195. Nehru regarded agrarian reform as a process of social reform and social engineering. He even referred to the Executive appointing judges of its own choice to get decisions in its favour, like, packing of the Court-Plan of President Roosevelt. The debates in the Constitution Assembly show that there was a view that acquisition of Zamindari should be treated on a different footing as regards compensation from other forms of acquisition. Merillat, "Compensation for the Taking of Property—A Historical Footnote to Bela Banerjee's Case", 1 *J.I.L.I.* 1375 (1958).

18 *Kameshwar* v. *Bihar*, A.I.R. 1951 Pat. 91.

19 *Suryapal Singh* v. *U.P.*, A.I.R. 1951 All. 674.

invalid. Thus a new technique, that of incorporating Legislative Acts in the Constitution, was initiated in India primarily with a view to implement the policy of abolition of Zamindari and to make it fully unchallengeable in a court of law under any Fundamental Right. Even an Act declared unconstitutional was thus validated with retrospective effect.[19a] All the Acts mentioned in the Schedule were thus immunized from any attack in the courts under the Fundamental Rights.

The first Amendment of the Constitution was taken not on any planned, but on an *ad hoc* basis. It was merely a kind of by-passing the judicial process. It may even be characterised as a 'panick action' on the part of Parliament because it was undertaken to forestall the verdict of the Supreme Court on the constitutional validity of Zamindari abolition measures. The amendment was enacted before the Supreme Court had given any judgment on the Zamindari abolition laws. Also, it may be noted that Parliament had at this time an extremely limited vision. The scope of the first Amendment was very narrow ; it had a very limited objective, *viz.*, only to protect the legislation abolishing Zamindari and other intermediaries from attack under the Fundamental Rights. This did smoothen the process of abolition of Zamindari and intermediaries between the State and the tiller of the soil but it did not remove anticipated hurdles in the implementation of the land policy as a whole. It did not even seek to redefine the word 'compensation' which the courts had interpreted by now "as just equivalent to the property taken." After the first Amendment, the Supreme Court decided the bunch of petitions which had been filed against the verdicts of the High Courts in the Zamindari abolition laws. The U.P. Act was held valid, but the Bihar Act was held invalid.[20] The Bihar Act could not be saved even by the First Amendment. According to one commentator, the varying reasons in the majority judgments of three Justices 'leave considerable doubt as to what was held.'[21]

Zamindari abolition having thus gotten out of the way, other steps were taken for the effectuation of agrarian land policy, e.g., putting a ceiling on the extent of individual holding of the agricultural land. The inevitable consequence of putting a ceiling on the extent of individual occupation or ownership of such agricultural land was to provide for the acquisition of the excess land held over the prescribed maximum limit for distribution among the tillers of the soil. This was the next important item on the programme of agrarian reform of the ruling party. The socio-economic policies of the government were also becoming diversified and control and regulation of industries was also being envisaged on a large scale so as to discipline and re-orient the private industrial sector. In executing this programme two questions became crucial. For what type of state action should compensation be payable ? Should it be paid only when a property interest was being taken over by the State for its own use or should it be payable even when the State was not acquiring anything for itself but was merely trying to regulate and control property rights, and such regulation depreciated the value of the concerned property rights ? Similarly, about compensation ? Who should decide finally the question of adequacy of compensation ? The Legislature or the courts. The legislative decision was bound to be policy-oriented, as it would take into consideration the nature of the property being acquired, its socio-economic value and the resources of the State.

19a *N. Krishnaraju* v. *Authorised Officer, Land Reforms*, A.I.R. 1967 Mad. 352.

20 *Visheshwar Rao* v. *M.P.*, (1952) S.C.R. 1020 ; *Suryapal Singh* v. *U.P.*, (1952) S.C.R. 1056 ; *Bihar* v. *Kameshwar Singh*, A.I.R. 1952 S.C. 252.

21 Merillat, "Chief Justice Das and Right to Property," 2 *J.I.L.I.* 186 (1960). On historical background to the First Amendment see, Rama Rao, "The Problem of Compensation and its justiciability in Indian Law," 4 *J.I.L.I.* 480 (1962).

On both these questions, the courts took certain positions which went against the political thinking at that time. On the question of compensation, the courts took the position that it had to be equivalent to the interest in property affected.[22] On the second question, the courts equated the words 'taken possession of' and 'acquired' in Art. 31(2) to 'deprivation' in Art. 31(1) and held that for any 'substantial deprivation' of property, compensation was payable whether or not the State was taking over the interest concerned for public use or just seeking to regulate the interest in the hands of the person concerned. The crucial question however was whether in a given case the deprivation complained of from governmental regulation was 'substantial' or not.[23] This involved a value judgment by the courts—to draw a dividing line between state regulation and private property. Such questions have been handled by the courts in the U.S.A. but they have always led to many difficulties—uncertainty, litigation etc. This approach could be illustrated by a case decided by the Supreme Court of India in 1965 but where Art. 31(2), as it stood before the IV Amendment, was applicable. S. 6(2) of the Bhopal Reclamation and Develop-

22 See below, Part IV, *West Bengal* v. *Bella Bannerjee*, A.I.R. 1954 S.C. 170.

23 *Charanjit* v. *India*, A.I.R. 1951 S.C. 41; *Sholapur Mills' case*, A.I.R. 1954 S.C. 92, 126 ; *West Bengal* v. *Subodh Gopal*, A.I.R. 1954 S.C. 92 ; *Saghir Ahmad* v. *U.P.*, A.I.R. 1954 S.C. 728; *Commr. HRE* v. *Lakshmindra*, A.I.R. 1954 S.C. 282.

ment of Lands (Eradication of Kans) Act, 1954, put a ban on the owner of Kans—infested land till the Reclamation Officer restored its possession to the owner. The court held that the possession of the Reclamation Officer amounted to 'taking possession' within Art. 31(2) and as no provision for compensation was made, the provision was bad. Foregoing of land revenue for the duration of dispossession was not regarded as compensation in the eyes of law.[24]

From the point of view of the government, this judicial approach created many difficulties in its way of furthering its socio-economic programme. The State was required to pay compensation even if a mere regulatory law curtailed a right to property in a substantial manner without transfering it to the State. This appeared to restrict too much the capacity of the government to order the economic field, especially in the industrial field, where the government might have to be called upon to take over managements of industrial undertakings for temporary periods under the Industrial (Dev. and Reg.) Act, or implementing its policy to abolish the managing agency system in companies. Also, by the rule that compensation should be adequate to the property being acquired, the government would have been effectively immobilised as it could not re-order the agrarian sector, by fixing of a ceiling of land-holding and redistributing the excess land among the peasants. The Central Government felt that its whole economic programme was in the danger of being thwarted by these judicial attitudes. Thus the Fourth Amendment was undertaken in 1955 to nullify the effect of these judicial pronouncements.[25]

24 *Madhya Pradesh* v. *Champalal*, A.I.R. 1965 S.C. 124.

25 Reference may be made here to an interesting controversy. The Statement of objects and reasons for the Fourth Amendment Bill referring to its need, commented on the judicial pronouncements and asserted that even where deprivation was caused by a purely regulatory provision of law and the State did not acquire any right, compensation became payable. The Bill, therefore, sought to restate more precisely the State's power of compulsory acquisition and requisitioning of private property, and distinguish the same from cases where operation of regulatory and prohibitory laws of the State resulted in deprivation of property. This provoked retired Chief Justice Sastri to assert that the court had not decided that any curtailment of a property right would be interpreted as a deprivation. "In fact," he said, "they decided the contrary, and recognising that the operation of regulatory and prohibitory laws should not entail liability to pay compensation, left reasonable scope for the exercising of such regulatory powers by the State....There is reasonable scope left under these decisions for the exercise of the State power of regulation and control in relation to private property. The cases represent an earnest attempt to reconcile the rival demands of state control and regulation of private property." Merillat, *op. cit. supra* note 21, at 198.

Through the Fourth Amendment, Art. 31(2) was amended and a new clause 31(2)A was added. Clause 31A added by the First Amendment was expanded so as to lay down a few more categories of 'deprivation' of property which were now immunized from an attack under the Fundamental Rights under Arts. 14, 19 and 31. The categories of laws exempted under Art. 31A from challenge now extended from the field of land reform to that of industry and mining.

The Fourth Amendment also added a few more items to Schedule IX. Seven more Acts were immunised from any attack (either past or future) on the ground of breach of any of the Fundamental Rights. These Acts cover a wide canvass ; some relate to land acquisition for rehabilitation of refugees ; one relates to the field of insurance, one to railway companies ; one to taking over of management of industrial undertakings under the provisions of the Industries (Development and Regulation) Act, and one is for land development and planning.

The Fourth Amendment did one thing more. It immunized laws creating state monopolies or nationalising any undertaking from the operation of Art. 301.

During 1955 to 1964, things went well from the government point of view so far as the regulation of property rights were concerned. The judicial review of property legislation under Art. 31 had been effectively curtailed by the Fourth Amendment. As a review of the case law during the period would show, there was no major set-back to the legislative programme in the area and the government policies were being implemented without much difficulty from the judiciary. But in 1964, the government felt that another amendment of the Constitution was called for. This was to expand the definition of the word 'estate' in Art. 31A so that a wide coverage of the law could become immune from challenge under Arts. 14, 19 and 31. The main purpose of the amendment was to include 'ryotwari' tenure within the definition of the word 'estate', so that legislation dealing with 'ryotwari' tenure became immune from attack under Art. 14, 19 and 31.

The Seventeenth Amendment also added 44 new Acts passed by the various State Legislatures to the IX Schedule. Thus, at present, the IX Schedule consists of 64 Acts, which cannot be challenged under any Fundamental Rights. These Acts cover an extremely wide field, *e.g.*, ceiling on agricultural holdings ; abolition of certain types of tenures, acquisition of land belonging to religious and charitable endowments, fixation of rent, protection of tenants from eviction etc.

From the above summary of amendments of the Constitution during the last 16 years the following trends may be discerned. The government has taken the programme regarding reform of land laws and reordering of industrial sector quite seriously and it has not hesitated even in effecting a drastic rewriting of the constitutional provisions to the extent of removing any constitutional obstacles in the way of fulfilment and implementation of its programme. Thus the right to claim compensation has been drastically curtailed; legislation has been immunized from Fundamental Rights. This has been done in two ways—one, by laying down broad categories of land legislation and declaring that legislation pertaining to those categories would not be challengeable under certain Fundamental Rights. Second, and this may be regarded as a new technique of Constitutional amendment, a large number of specific Acts have been immunized from attack under the Fundamental Rights;[26] and some of these Acts were even those which had been held unconstitutional by the courts and even such Acts have been validated retrospectively. This is a very drastic way of dealing with the Constitution. In *U.P.* v. *Brijendra Singh*[27] an interesting question was raised. Some portions of the U.P. Land Acquisition (Rehabilitation of Regufees) Act, 1948, had been held to be unconstitutional by the Allahabad High Court in 1954. Later, in 1955, the Act was validated by being included in Sch. IX. In the instant case, the Supreme Court refused to accept the argument that the Act could not be so validated which had earlier been declared as unconstitutional. There was dispute about the validity of the West Bengal Estates Acquisition Act, 1954, on the ground that it did not provide for compensation for some of the interests acquired. By the Amendment XVII, the Act was included in the Sch IX. The Supreme Court held that the absence of a provision for compensation for acquisition of the appellant's rights would not render the Act invalid.[28] The Supreme Court has given a very broad interpretation to Art. 31B so as to hold that not only the Acts held bad under Art. 32(2), but even those which were invalid under S. 299(2) of the Government of India Act, 1935, if included in Sch. IX, are protected. In *Dhirubha Devi Singh Gohil* v. *Bombay*,[29] the validity of the Bombay Taluqdari Tenure Abolition Act, 1949, was impugned. The Act was passed in 1949, it received assent of the Governor-General on Jan. 18, 1950, was gazetted on

26 *West Bengal* v. *Natakumar*, A.I.R. 1961 S.C. 16.
27 A.I.R. 1961 S.C. 14.
28 *Ram Kissen* v. *Div. F.O.*, A.I.R. 1965, S.C. 625.
29 Decision of the Supreme Court dated 20-8-1964, cited in A.I.R. 1965 S.C. 1096.

Jan. 24, 1950, and was included in the Sch. IX by the First Amendment. The challenge against it on the ground that it contravened S. 299 was not accepted on the ground that the language used in Art. 31B covered not only Art. 31(2) but even S. 299. By a strange argument, the right conferred by S. 299 was treated as having been conferred under the Constitution. Similarly in *U.P.* v. *H. H. Maharaja Brijendra Singh*.[30] Explaining Art. 31B in *Jeejeebhoy* v. *Asstt. Collector.*,[31] the Supreme Court said that if an Act was mentioned in Sch. IX, the question whether it was void or not would not arise. The Acts mentioned in the Sch. IX would have the immunity even if they did not attract Art. 31A. If every Act in the IX Schedule was covered by Art. 31A, the Art. would be redundant. Some of the Acts mentioned in the Sch. (14 to 20) do not relate to estates as defined in Art. 31A(2). 31B is therefore not governed by Art. 31A. 31B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe the Fundamental Rights. The result was that even an act void at the time the Constitution came into force could be regarded as validated if it was mentioned in Sch. IX but if not so mentioned Art. 31A could not revive it.[32]

It might be of interest to note that in *Sajjan Singh* v. *Rajasthan*[33] the Supreme Court rejected a challenge to the XVIIth Amendment of the Constitution that it was unconstitutional. But the attack was again revived in the *Golak Nath*[34] *case* and this time the Supreme Court came to some startling conclusions regarding the inviolability and unamendability of the Fundamental Rights. Amendment XVII has been held to be unconstitutional.

IV
COMPENSATION

Over the period since independence, a very clear trend has been to restrict and limit the right to compensation for property acquired by the State.

The right to compensation has been drastically curtailed through various amendments of the Constitution mentioned above. By the Fourth Amendment of the Constitution, in Art. 31(2) the words 'acquisition and taking possession of' were replaced by the words 'compulsorily acquired

30 Decision of the Supreme Court dated, 3-3-64, cited in ibid.
31 A.I.R. 1965 S.C. 1096.
32 Also see *Jiban* v. *Assam*, A.I.R. 1966 Assam 51 on relation between Arts. 31A and 31B.
33 A.I.R. 1965 S.C. 845. See note 149, *infra*.
34 *L.C. Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643.

or requisitioned.' To explain these terms, a new provision, Art. 31(2)A, was added. It says that unless a law provides for the transfer of ownership or right to possession of any property to the State etc., 'it shall not be deemed to provide for the compulsory acquisitioning or requisitioning of property, notwithstanding that it deprives any person of his property.'

The position under Art. 31(2)(A), therefore, is that deprivation of property is divided into two categories : to the first belong compulsory acquisition and requisitioning of property by the State for a public purpose which can be effected by law providing for compensation or specifying principles for it. To the second category belong all cases in which the ownership or right of possession of the property is not transferred to the State. This kind of deprivation can be effected by law. Compensation is compulsorily payable now only in the first case, when the ownership or possession of property is transferred to the State or a corporation owned or controlled by it. In the second case, the Legislature has a compl ete. discretion in the matter of giving compensation ; it may give compensation if it so desires ; there is no obligation on it under the Constitution.[34a] The result therefore is that no one can claim the right to compensation under Art. 31(2) now in a situation like the one which was presented in the *Sholapur Mills Case*, or *Saghir Ahmad's* case or *Subodh Gopal's* case.[35] A few examples may be taken here to illustrate the working of the principle. Imposition of full assessment over inam (i.e. revenue free) lands, it has been held, does not amount to acquisition by the State and so Art. 31(2) is not attracted.[36] The Bombay Tenancy and Agricultural Lands

34a In the U.S.A. compensation is payable for 'taking' which does not necessarily mean vesting of possession or ownership in the State. As observed by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Thus in *United States* v. *Causley*, 328 U.S. 256, it was held that the respondents' property was 'taken' by frequent and regular flights of army and navy aircraft over respondent's land at low altitudes which did depress the value of the land. Other cases are : *Ports Mouth Co.* v. *U.S.*, 260 U.S. 327; closure of non-essential gold mines during the war temporarily was held as not amounting to taking : *U.S.* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958); a restrictive order on the working of coal mines was held as 'taking' : *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). It might have been possible for the courts in India, if Art. 31(2) had stood as it did before the Fourth Amendment, to create a body of working rules, on the basis of what constituted 'substantial deprivation', to lay down in what kinds of deprivation of property should compensation be payable. But the Fourth Amendment caused a change of great consequence as it took out such matters from the area of compensation and restricted its payment only to situations where the State takes possession or ownership.

35 Jain, *Indian Constitutional Law* 485-8 (1962).

36 *V. Sesha Sharma* v. *A.P.*, A.I.R. 1960 A.P. 461.

Act imposed certain restrictions on sale of lands by an occupant and also provided that if he sold lands contravening these conditions the sale would be invalid and land forfeited to the government. The provision was held to be valid under Art. 31(1). It was held to be not an acquisition within Art. 31(2) and failure to pay compensation was not an infirmity.[37]

Under chapter IV A of the Motor Vehicles Act, 1939, the State Transport Authority is authorised to cancel existing permits of a person carrying on his transport business, and issue the same to the State Transport undertaking. The Supreme Court has held in the *Gullapalli case* that cancellation of one man's permits and issuing permits to the government does not involve the transfer of business or undertaking of the qūondam permitholder to the new entrant. The true position is that one permit comes to an end and another permit comes into being. Chapter IV A of the Act does not provide for the transfer of ownership or the right to possession of any property to the State and, therefore, under Art. 31 (2) read with Art. 31 (2) (A) no compensation is payable. This thus overrules *Saghir Ahmad's case* on this point.[38]

The question of the quantum of compensation payable by the government for the property acquired has been one of the most controversial aspects of the Constitution of India over the years. The position in this connection may be discussed in two parts, as it obtained before 1955, and as it exists after that date.

In Art. 31 (2), the word 'compensation' was not qualified by any adjective like 'just' or 'adequate'. Nevertheless, before 1965, courts took the position that such an omission was immaterial, that the very meaning of the word 'compensation'was a 'just' and 'equivalent' compensation for the property interest affected; the word 'compensation' by itself denoted the 'just equivalent of the property acquired.'[39] This approach was adopted in a number of cases, the first and the foremost being *State of West*

37 *Kuberdas* v. *Bombay*, A.I.R. 1960 Bom. 459.

38 *Gullapalli G. Rao* v. *A.P.S.R.T.Corp.*, A.I.R. 1959 S.C. 308, ; *Krishnayya* v. *A.P.*, A.I.R. 1959 A.P. 292.

39 In the U.S.A., the Fifth Amendment expressly requires the payment of 'just compensation' when the federal government takes private property for public use. The due process clause of the Amendment XIV is interpreted to impose the same limitation upon the States. The question of compensation is subject to judicial review and determination as it is a matter of constitutional right. In general, just compensation is determined by the market value of the property at the time of the taking. There is abundant case-law and legal literature on this point: Kauper, *Constitutional Law : Cases and Materials* 1083-4 (1960)

Bengal v. *Bella Banerjee.*[40] The West Bengal Land Development and Planning Act, 1948, enacted by the West Bengal Legislature, to acquire land for settling refugees from the East Pakistan, provided for payment of compensation to the owners of the land aquired, but it was not to be more than the market value on Dec. 31, 1946. The Supreme Court declared the provision regarding compensation as unconstitutional, it being arbitrary and having no relation to the market value of the land on the date of acquisition which might be much more than that on the date prescribed. Land may be acquired under the Act many years after its enactment but in all cases compensation was to be assessed with reference to the prescribed date and not with reference to the date of acquisition, and this was held to be objectionable. The court emphasized that the word 'compensation' meant 'just equivalent of,' 'full and fair money equivalent of,' the property taken, and that it was a justiciable matter, to be adjudicated by the courts, whether the Legislature while laying down principles for the assessment of compensation took into account all the elements making up the true value of the property appropriated and excluded matters which were to be neglected.

The operation of the rule developed by the Supreme Court in *Bella Banerjee's* case may be illustrated by reference to a few more cases which, though post-1955, nevertheless were based on the Art. 31 (2) as it stood before that year. In *West Ramnad Electric Distribution Co. Ltd. v. Madras,*[41] the Madras Electricity Supply Undertakings (Acquisition) Act, 1954, was challenged. The Act prescribed three alternative bases for the payment of compensation to the licensees whose undertakings were acquired under the Act, and the choice to select any of the three bases was left to the licensee concerned. As the Act was enacted in 1954, its validity had to be adjudged with reference to Art. 31 (2) as it stood then. Holding the Act constitutional, the Supreme Court pointed out that alth-

40 A.I.R. 1954 S.C. 170. This case was applied in a number of cases by the High Courts, *e.g., Than Singh* v. *India,* A.I.R. 1955 Punj. 55; *H. P. Khandelwal* v. *State of U.P.,* A.I.R. 1955 All. 12; *Sm. Chhaya Devi* v. *State of Bihar,* A.I.R. 1957 Pat. 44.

41 A.I.R. 1962 S.C. 1753. The three alternative bases were: (A) compensation to be paid at 20 times the average net annual profit of the undertaking during a period of five consecutive account years immediately preceding the vesting date, (B) compensation to be paid at the aggregate value of the shares constituting the share capital of the undertaking reckoned in a certain manner, and (C) the aggregate value of the amount of the book value of all works in gross, the book value of all stores, the book value of all other fixed assets, of all plants and equipment, the book value of all intangible assets, and the amount due from consumers subje o certain limitations prescribed.

ough the term 'market value' had not been used in the three bases, yet it was possible thereunder to give a fair and just equivalent of the property to be taken, that the company had produced no material before the court to substantiate its plea that just equivalent had not been provided for, and that the choice of selecting the bases was that of the company. In the *State of Madras* v. *D. Namasivaya Mudaliar,*[42] the constitutional validity of the Madras Lignite (Acquisition of Land) Act, 1953, was considered. The Act provided for the acquisition by the State of lignite bearing lands and compensation was to be provided on the basis of the value of the land as on April 28, 1947. The State explained that as soon as lignite was discovered, the value of the land started to soar and that on the date prescribed, the government had issued a notification warning the people that the land would be taken over by the government. The Supreme Court struck down the Act on the ground that it froze, for the purposes of acquisition, the prices of land and deprived the owners of the benefit of the appreciation of land values since April 28, 1947. The Act was a permanent piece of legislation and lands thereunder might be acquired many years after it was passed and many years after the date on which land values were frozen; the owners were denied all increments in land value between a fixed date and the date of issue of the notification acquiring land under the Act. This *prima facie* denied to the landowner the equivalent of the land expropriated and it was for the State to show that fixation of compensation on the basis of market value on an anterior date did not violate the constitutional guarantee, and the State had failed to discharge that onus.

In *Kamalabai* v. *Desai,*[43] the Bombay High Court considered the validity of the Requisitioning and Acquisition of Immovable Property Act, 1952. The Act laid down two alternative bases of compensation—market value on the date of acquisition, or, twice the value of the property on the date of requisition, but there was a rider 'whichever is less'. So, the owner was to be given compensation on one of the bases which resulted in paying him less, and the choice was not that of the owner but that of the officer giving compensation.[44] The court declared the provision unconstitutional. The second basis, fixing the compensation with reference to the date of requisition (which was anterior) and not the date of acquisition, was held to be arbitrary and indicative, *prima facie,* of the

42 A.I.R. 1965 S.C. 190.

43 A.I.R. 1966 Bom. 37.

44 This differentiated the case from the *West Ramnad's* case, *supra* note 41.

fact that the law did not seek to award a just and fair compensation. The very fact that out of the two bases one was to be adopted which resulted in less compensation, showed clearly that the fair or just equivalent of the property was not being paid to the owner.

N. B. Jeejeebhoy v. *Assistant Collector*,[45] is a case on Sec. 299(2) of the Government of India Act, 1935, but is relevant to denote the interpretation of Art. 31(2) as it stood prior to 1955, for the two provisions were held to be in *pari materia*. The word 'compensation' in S. 299(2) was held to have the same meaning as was given to it in the *Bella Bannerjee case* which laid down the following principles: (1) compensation means just equivalent of what the owner has been deprived of; (2) whether principles laid down by the Legislature to determine compensation so defined have taken into account the relevant elements to ascertain the true value of the property acquired is a *justiciable* issue; (3) fixation of an anterior date for ascertaining the value of property acquired without reference to any relevant circumstances which necessitated the fixing of an earlier date for purposes of ascertaining the real value is arbitrary. Therefore, the Land Acquisition (Bombay Amendment) Act, 1948, which fixed January 1, 1948, as the date to fix compensation irrespective of the later date when property was acquired, was held to be beyond the power of the legislature and so void. The Act could not even be saved under Art. 31(5) (*a*) for it could not be regarded as an 'existing law' as it was not a law at all. Similarly, Art. 31A could not revive a law void at the time it was made.

These cases depended on the Article as it existed prior to 1955. Soon after the *Bella Bannerjee case*, the government became uneasy as it thought that the judicial insistence on payment of full market value of the property acquired would place such a burden on its resources that it would throw out of gear the socio-economic programme which it then envisaged, mainly, the abolition of Zamindari. By the Fourth Amendment of the Constitution, therefore, Art. 31(2) was so amended as to make the question of 'adequacy' of compensation a 'non-justiciable' matter.[46] But as the recent judicial pronouncements have shown, it has not been possible to keep the courts completely out of this area. The precursor of this trend is the Bombay High Court which, in a decision in 1962, declared the principle for payment of compensation laid down in the impugned legislation as arbitrary in spite of the constitutional provision that 'no such law shall be called in question in any court on the ground that the compensation pro-

45 A.I.R. 1965 S.C. 1096.

46 *Supra*, Part III.

vided by that law is not adequate.' In that case, the court considered the validity of the Poona Mutha River Limits (Prohibition of Building) and Provision for Alternative Building Sites Act, 1961. The Act was necessitated because of the bursting of the Panshet Dam at Poona. Compensation for property acquired was to be assessed with reference to the market value on 1st January, 1948. The Court held that the fixation of such a date was arbitrary. Dealing with the implications of the Fourth Amendment, the court pointed out that the interpretation put on the word 'compensation' by the Supreme Court still stood. Compensation might not be exact equivalent but it must in fairness amount to compensation before it could be declared valid. Anything that is called a principle of valuation, if arbitrary, would cease to be a principle. The court held that the amended Article 31(2) did not permit expropriation of property by providing for nominal compensation, or such compensation as could not reasonably be called compensation.[47]

In 1961, in *Barrakur Coal Co.* v. *India*,[48] the Supreme Court had refused to go at all into the question of non-payment of compensation for minerals acquired alongwith land. Under the Coal Bearing Areas (Acquisition and Development) Act, 1957, provision has been made for payment of compensation for the land acquired but not for minerals therein. The Supreme Court held that the Act specified the principles for determining compensation. That is all that is required by a law under Art. 31(2) and such a law could not be challenged on the ground of inadequacy of compensation. The plea that no compensation was payable for minerals referred to the question of adequacy of compensation which the court could not go into. But, recent cases show that the view expressed in the *Barrakur case* is no longer tenable and that the judicial approach to the present Art. 31(2), as propounded in the Bombay case, has now come to be accepted by the Supreme Court as well. The position therefore is that if the law makes provision for *no* compensation, or if the compensation proposed is *illusory*, or if the principles computing compensation are more in the nature of a device to refuse compensation, then the courts can intervene and hold the law invalid.[49] Two Supreme Court cases may be mentioned here to illustrate the judicial attitude on the question of compensation. In *Vajravelu* v. *Special Deputy Collector*,[50] the Supreme Court pointed out that the

47 Referred to in *Kamalabai* v. *Desai*, *supra* note 43.

48 A.I.R. 1961 S.C. 954.

49 Jain, *Indian Constitutional Law* 488 (1962).

50 A.I.R. 1965 S.C. 1017.

amended Article, by retaining the word compensation, must be interpreted as having accepted the meaning of the expression 'compensation' and 'principles' given to them in the *Bella Bannerjee case*. Therefore, a legislature in making a law of acquisition or requisition should provide for a 'just compensation' of what the owner was being deprived of or should specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner was being deprived of. The principles prescribing the 'just equivalent' cannot be questioned on the ground of 'inadequacy.' If the principles laid down are not relevant to the property acquired at the time of acquisition, then courts can intervene and scrutinize the validity of the principles. This has reference not to the 'adequacy' of the compensation but to 'no compensation' at all. "If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition" then it could be said that the legislature has played a fraud on the Constitution. In the instant case, however, the formula giving the compensation was not found to be bad, as the court did not apply the principle thus stated by it to its logical conclusion. The Act laid down the following scale of compensation for land acquired for housing purposes: (1) value of the land at the date of publication of the notification or an amount equal to the average market value of the land during five years immediately preceding such date, whichever is less; (2) solatium of 5% of the value. As regards (1), the court held that it was not a fraud on the legislative power. Land prices have been continuously rising from year to year and so fixation of price over a period of five years is a principle of ascertaining the price of land. Potential value of land was excluded and though compensation is not the just equivalent of what the owner has been deprived of, neverthless, such an exclusion only pertains to the method of ascertaining the compensation. Although the compensation given was not adequate, yet it did not constitute a fraud on the legislative power.[51] It may however be noted at this point that the Act was declared void under Art. 14. The Act sought to lay down that a person would get less value for his land when acquired for housing purposes than he would get for the same or similar land if it was acquired for a public purpose like hospital. The Court held that such a classification between persons whose lands were acquired for housing scheme and those whose lands were acquired for a public purpose was discriminatory and not reasonable.

51 See for a full discussion on this point, *Guir Nitay Tea Co.* v. *Assam*, A.I.R. 1966 Assam, 58 where the scale of compensation laid down in the Assam Land (Requisition and Acquisition) Act was held as not illusory by 2 judges but illusory by one judge.

Recently, however, the Supreme Court has declared[52] the Metal Corporation of India (Acquisition of undertaking) Act, 1965, invalid as it did not provide for 'compensation' within the meaning of Art. 31(2). The corporation was acquired on October 23, 1965, with a view to providing for the orderly and full development of the lead-zinc deposits at zawar (Rajasthan) and for the expeditious completion of the scheme undertaken by the company. The court struck down the Act on the ground that it did not provide for 'compensation' within the meaning of Art. 31(2). In cl. B of paragraph 2 of the Schedule in the Act, two principles of valuation were contained. The plant, machinery and other equipment which had not been used and was in good condition was to be valued at the actual cost of acquisition to the company. The used equipment was to be valued at the written down value determined in accordance with the provisions of the Income-tax Act. The court did not agree that the basis of cost-price of the unused machinery when it was acquired was relevant to the fixing of compensation at the time of the nationalisation of the company; nor did the doctrine of written down value accepted in the Income-tax Act afford guidance for ascertaining compensation for the used machinery. Both the principles of compensation were thus held as not relevant to the fixing of compensation for machinery at the time the government was acquiring the same and so the Act was held as not providing for compensation within the meaning of Art. 31(2).

The latest judicial trend to break through the shackles imposed by Art. 31(2) and asserting that the government can not escape by providing shadowy compensation merely to fulfil the letter of the law, are notable developments in the constitutional jurisprudence of the country. In this era of nationalisation, this will provide a bit of much needed protection to the private property. It is too early to say as to how the government would react to the latest trend. During 1950 to 1955, the government displayed much emotion on the question of compensation and this resulted in the Fourth Amendment of the Constitution. No such reaction is visible at present after the latest judicial verdict. On the other hand, the government has accepted the judicial pronouncement as it has promulgated an ordinance to lay down new principles of compensation keeping in view the objections advanced by the judiciary in the Metal Corporation case. There is one essential difference, though, between the position as it obtained before 1955 and as it exists to-day. At that time, the government was committed to

52 *Union of India* v. *The Metal Corp. of India*, A.I.R. 1967 S.C. 637.

abolish the zamindari, and the government neither thought it necessary[53] nor possible to pay the 'just equivalent' of the rights being acquired, for the land was to be distributed amongst the masses, and this was regarded more as a matter of social justice or social engineering. Zamindari has now been practically abolished. Further, as will be discussed later, Arts. 31A and 31B specifically exclude from the purview of Art. 31(2) cases of social engineering and, therefore, the judicial approach in the *Vajravelu* and other cases is of very limited application only. Most of the cases today relate to acquisition of industrial undertakings or urban property. Industrial undertakings produce wealth and here the government is not so much emotionally involved. It has never been the policy of the government to deny reasonable compensation in such cases. On the whole, the record of the Central Government has been fairly good in this respect and even before the latest judicial pronouncement, it had endeavoured to provide reasonable compensation in those cases where it sought to nationalize existing undertakings.[54] In fact, at the time of the Fourth Amendment, Prime Minister Nehru gave an assurance in Parliament that there was no question of any appropriation without compensation.[55] Some of the major nationalization projects of the Central Government have been air transport, 1953 ;[56]

53 Zamindars had come to be dubbed as parasites and exploiters and as obstacles to economic development of the country. Zamindari abolition was regarded as a matter of social justice or rather undoing long-standing injustice to the peasantry perpetrated by a foreign government to keep its hold on the people.

54 Kust, *Foreign Enterprise in India* 100 (1964).

55 *Lok Sabha Debates*, Vol. II, Part II, Col. 4840 (1955). Also, 9 *Constituent Assembly Debates* 1192. Nehru, however, always drew a distinction, from this point of view, between nationalization of industries and programme of agricultural land reform—the latter being characterised by him as social engineering.

56 The air transport industry was not doing well financially. It was inefficient and poorly organized. Many airlines were pressing the government for financial assistance. Therefore, the government thought of nationalizing air transport so as to expand it and better organise it. The government was careful in devising a scheme of fair compensation. It followed the British pattern and predicated compensation on the valuation of the assets of the private airlines. Moreover, many concessions were made. Debts were assumed by the government without any deduction from the value of the assets; depreciation was reckoned on extermely favourable terms; special compensation was allowed for overhauls before appropriation. On the whole, the quantum of compensation was considered very favourable. Terms of payment were also good. Ten per cent was paid in cash and the balance in the form of five year bonds bearing 3.5 percent interest.

Imperial Bank of India, 1955,[57] Life Insurance, 1956,[58] and generally, the policy of fair compensation has been carried out in practice in all cases.

The latest judicial pronouncement does not therefore fall out of the trend of government thinking in this matter. This judicial attitude may make the government slow down projects of nationalization if it had any in view and make it divert its resources to developing new enterprises. Thus, there is less likelihood of nationalization of private sector in the immediate future. Now that the obligation to pay fair compensation has been spelled out by the courts and is not based merely on moral grounds, the government does not possess resources enough for undertaking nationalization on a grand scale. Moreover, the planning and policy-makers feel that whatever resources are there should be better utilized for starting new and additional productive units.

V

PUBLIC PURPOSE

Art. 31(2), as it stood before the Fourth Amendment, did not in so many words provide that no acquisition could be made save for a public purpose. In *Bihar* v. *Kameshwar Singh*[59] it was argued on behalf of the

57 About 10% of the bank was owned by the British. The position regarding rural credit was deplorable which affected India's agricultural development programme. The government therefore decided to nationalize the Imperial Bank with its large number of branches throughout the country rather than establish a new bank. The name of the bank was changed to the State Bank of India. Compensation was based upon the average price of the shares of the Imperial Bank during the year preceding the announcement of the nationalization on December 20, 1954, which resulted in a payment of three times the par value of each share. Upto Rs. 10,000/- were paid in cash, the rest was paid through bonds. Foreign shareholders were compensated fully in cash.

58 Though the middle class in India had come to depend on the life insurance as a facile means of saving, the condition of life insurance business was not too happy. During a period of 10 years, 1944-54, some 25 companies had failed involving losses to policy-holders. In 1953, the Dalmia scandal was revealed. Dalmia had used funds of the Life Insurance Company for other purposes in his industrial empire. The government also wanted to marshal public savings for economic development of the country. The annual life insurance premium payments were in excess of Rs. 500 million with possibilities of growth. Nationalization of life insurance was therefore thought of for giving security to the policy-holders and for effective mobilisation of the people's savings. Liberal principle of compensation was adopted. Of the two methods of compensation laid down, the company concerned could choose one: compensation at 20 times the annual average of the surplus allocated to shareholders in the two acturial years preceding January, 1955, or ten times such average plus paid-up capital.

59 A.I.R. 1952 S.C. 252.

State that such a provision was implicit in the words of Art. 31(2). Mahajan and Chandrasekhara Aiyer, JJ., rejected the argument, but Patanjali Sastri, C.J., and Das, J., accepted it and held that the requirement of public purpose being a condition for compulsory acquisition laid down by Art. 31(2), and law in question was saved, in spite of the violation of such condition by Art. 31(4) and also by Art. 31A. Mukherjea, J., also said that the requirement of public purpose was a condition implied in the provisions of Art. 31(2). However, the Fourth Amendment of the Constitution expressly made 'public purpose' a condition for compulsory acquisition by the State. Under Art. 31(2), the State can acquire or requisition property for a public purpose. Therefore, no Legislature in India has power to acquire private property for a private purpose. It may however be noted that under the Legislative entry 42 in List III the Legislature can acquire property even without a public purpose and that the only obstacle to such a law would be Art. 31(2). Even that obstacle would disappear if the law is one which falls within Art. 31A.[60]

The concept of public purpose connotes public welfare. With the onward march of civilization, notions as to the scope of the general interests of the community are fast changing and widening. The emphasis is unmistakably shifting from the individual to the community. It is, therefore, difficult to lay down any hard and fast definition of public purpose; it is an elastic, not a static, concept and varies with the time, state and needs of the society. Whatever furthers the general interest of the community as opposed to particular interests of the individuals, must be regarded as a public purpose. It is not necessary that the property taken must be made available to the public at large or that the public benefit aimed at must apply to the whole community. Even if the acquisition benefits only certain individuals, it may still be for a public purpose where the individuals are benefited not as individuals but in furtherance of a scheme of public utility. Even acquisition of property for an individual may be a public purpose if public derives an advantage from the scheme.[61]

A few examples of what have been held judicially as public purpose are: requisitioning of a building for finding accommodation for an indi-

60 *Bihar* v. *Rameshwar Pratap*, A.I.R. 1961 S.C. 1649.

61 *Thambiran* v. *Madras*, A.I.R. 1952 Mad. 756; *Gundachar v. Madras*, A.I.R. 1953 Mad. 537; *Moosa* v. *Kerala*, A.I.R. 1960 Ker. 96; *Province of Bombay* v. *Khusaldas Advani*, A.I.R. 1950 S.C. 222; *Kamalamma* v. *State*, A.I.R. 1960 Ker. 321; *Jhandulal* v. *Punjab*, A.I.R. 1959 Punj. 535; *Vajrapuri Naidu* v. *New Theatres Talkies*, A.I.R. 1960 Mad 108; *Jain, Indian Constitutional Law* 489 (1962).

vidual, having no housing accommodation;[62] requisitioning of a building for housing a member of the staff of a foreign consulate;[63] acquisition of accommodation for an employee of a Road Transport Corporation—a statutory body;[64] nationalization of land;[65] agrarian reform to abolish the intermediary between the government and the tillers of the soil;[66] establishing a technical institution to give technical education.[67] It has been held to be a perfectly legitimate policy on the part of the government, in view of extraordinary shortage of housing accommodation at Delhi, to encourage the development of co-operative housing societies on a non-profit basis and it amounts to a public purpose if the government acquires land for them.[68]

The term public purpose has been used in the Land Acquisition Act in its generic sense as including any purpose in which even a fraction of the community may be interested or by which it may be benefited. The Act authorises acquisition of land for a company for constructing dwelling houses for its employees, for providing amenities to them, or to construct some work which is likely to prove useful to the public. The Supreme Court has held in *Barkya Thakur* v. *Bombay*[69] that acquisition of land for a company to construct residential houses for industrial labour is a public purpose.

It is not necessary to state in express terms in the statute itself the precise purpose for which property is being taken, provided that from the whole tenor and intendment of the Act it could be gathered that the property was being acquired either for purposes of the State or for purposes of the public and that the intention was to benefit the country at large.[70]

Justiciability of Public Purpose: The existence of public purpose is an essential condition for the acquisition or requisitioning of property under Art. 31(2) and when the court finds that there is no public purpose to support a law of compulsory acquisition, the court is bound to declare the law to be unconstitutional. As has been stated by the Supreme Court

62 *Bombay* v. *Bhanji Munji*, A.I.R. 1955 S.C. 401.

63 *Bombay* v. *Ali Gulshan*, A.I.R. 1955 S.C. 810.

64 *Bombay* v. *Nanji*, A.I.R. 1956 S.C. 294.

65 *State of Bihar* v. *Kameshwar Singh*, A.I.R. 1952 S.C. 252; *Visheshwar* v. *M.P.*, A.I.R. 1952 S.C. 252.

66 *Anil Kumar* v. *Dy. Commr.*, A.I.R. 1959 Assam 147.

67 *Arjan Singh* v. *Punjab*, A.I.R. 1959 Punj. 538.

68 *Bhagwat Dayal* v. *India*, A.I.R. 1959 Pun. 479.

69 A.I.R. 1960 S.C. 1203.

70 *State of Bihar* v. *Kameshwar Singh* (Mahajan J.), *supra*, *Bombay* v. *Nanji*; *Arjan Singh* v. *Punjab*, A.I.R. 1959 Punj. 538.

in *Bombay* v. *Nanji*,[71] "*Prima facie* the Government is the best judge as to whether 'public purpose' is served by issuing a requisition order, but it is not the sole judge. The Courts have the jurisdiction and it is their duty to determine the matter whenever a question is raised whether a requisition order is or is not for a 'public purpose.'"

Usually, the courts have taken a very liberal attitude on the question of 'public purpose' and it will be a rare case indeed where a court will hold that a purpose is not a public purpose. The courts pay a good deal of deference on this matter to legislative determinations, but the ultimate power still vests in the courts.[72] A provision excluding the jurisdiction of the courts and making decision of either the Executive or the Legislature as to public purpose binding and conclusive on a court of law is *ultra vires* Art. 31(2).[73] It is the duty of the courts to see that no acquisition or requisition of property is allowed for other than a public purpose. In the *Bella Bannerji case*,[74] the Act in question sought to make a declaration by the government conclusive evidence that the land for which the declaration was issued under it was needed for a public purpose. The Supreme Court held the provision bad as a declaration by the Government could not be conclusive on the question of public purpose.

S. 6(3) of the Land Acquisition Act, 1894, provides that the declaration by the State Government of the existence of the public purpose for land acquisition "shall be conclusive evidence that the land is needed for public

71 A.I.R. 1956 S.C. 294.

72 See, on this question, generally, J. Narain, "The concept of Public Purpose in Art. 31(2) of the Constitution of India", 6 *J.I.L.I.* 175 (1964). He maintains, "No doubt, technically speaking, the judiciary still has the final power to determine whether public purpose has been served in a given case, but the nature and complexity of functions of a modern state in general, and in particular the immensity of the problems of social and economic reform in India calling for the need of giving far greater discretion to the government in choosing the means whereby social welfare can be promoted in an under-developed country makes the judicial power in this regard as of no practical consequence. Despite occasional acceptance (though reluctant and partial) of this truth in theory, courts in India obviously have not fully acted upto it in practice." In *Berman* v. *Parker*, 348 U.S. 26, the U.S. Supreme Court stated that the role of the judiciary in determining whether the power of eminent domain is being used for a public purpose, 'is an extremely narrow one', as it was more a matter of legislative determination. "In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."

73 *Kamalamma* v. *State*, A.I.R. 1960 Ker. 321.

74 A.I.R. 1954 S.C. 170.

purpose." This section would have been *ultra vires* Arts. 31(2) had it not been for the fact that its validity is saved by Art. 31(5) (*a*).[75]

Under the Land Acquisition Act, land can be acquired for (*a*) public purpose and (*b*) for a company. In case (*b*), the compensation is to be paid by the company, while in case (*a*), compensation is payable wholly or partly out of the public revenues.[76] This provision came in question in *Somavanti* v. *State of Punjab*.[77] The petitioner's land was requisitioned to enable the respondent to erect a refrigeration plant thereon. The petitioner—the owner of the land—was about to start a paper factory for which he had obtained a licence when his land was requisitioned. The government contributed a sum of Rs. 100 only towards the total compensation of about Rs. 450,000 payable to the petitioner for the land. The Supreme Court held that S. 6(3) of the Land Acquisition Act completely barred judicial review of 'public purpose' of an acquisition except when it was colourable. A declaration by the State that a particular land was needed for a public purpose, made conclusive by the Land Acquisition Act, did not infringe the Constitution as it was saved as noted above and Art. 19(1) (*f*) was not attracted as was decided by the Supreme Court in *Bhanji Munji's case*.[78] Thus neither the 'meaning' nor the 'existence' of public purpose under the Land Acquisition Act are justiciable. The 'public purpose' is bound to vary with times and prevailing conditions in a given locality, and the government has power to treat one industry more beneficial to the society than the other. The finding of the government under S. (6)3 of the Act is conclusive not only regarding the public purpose but also regarding its 'need' and the government's satisfaction thereon. The court however held that where acquisition did not serve 'any purpose' the acquisition could be

75 *Brij Nath* v. *U.P.*, A.I.R. 1953 All. 182; *Lilavati* v. *Bombay*, A.I.R. 1957 S.C. 521; *Arjan Singh* v. *Punjab*, A.I.R. 1959 Punj. 538; *Barkya Thakur* v. *Bombay*, A.I.R. 1960 S.C. 1203; *Jhandu Lal* v. *Punjab*, A.I.R. 1961 S.C. 343.

76 *Jhandulal* v. *Punjab*, *supra*. A declaration under S.6 of the Land Acquisition Act stating that the land is needed for a public purpose when the entire compensation for the land being acquired was payable by the company was quashed by the Supreme Court: *Shyam Behari* v. *State of M.P.*, A.I.R. 1965 S.C. 427; *Girdhari Lal Amrit Lal* v. *State of Gujrat*, A.I.R. 1966 S.C. 1408. In *State of W.B.* v. *P.N. Talukdar*, A.I.R. 1965 S.C. 646, though the notification did not say so in so many words yet it did indicate that the land was needed for a company at its expense, and the notification was held valid. The word 'company' does not mean only an industrial concern. Ramakrishna Mission, a registered Society, was held to be a company for the purposes of this clause: *West Bengal* v. *Talukdar*, *supra*.

77 A.I.R. 1963 S.C. 151.

78 See, *infra*, under Art. 19(1) (*f*).

impeached as being 'colourable'. The token payment of Rs. 100 by the government towards the compensation was held to amount to acquisition at public expense and so it was held as not being to a colourable exercise of the power.

The clause in the Land Acquisition Act authorising the government to acquire land for companies when compensation is wholly payable by the company concerned[79] was called in question in *R. L. Arora* v. *U.P.*[80] The question was whether it meant that the work 'should be useful to the public directly' or did it mean that since the company by itself might be useful to the public, therefore, land could be acquired for it even though the specific work to be constructed thereon might not be directly useful to the public. The contest thus was between a narrow and broad view of the relevant clause in the Act. The broad view would have made the government a general agent of the companies to acquire land. The Supreme Court refused to sanction this position. It adopted the narrow interpretation on the ground that the legislature would not have intended that individuals should be compelled to part with their lands for private profit of others, who might be owners of companies, through the companies simply because the company might produce goods which would be useful to the public. The court thus held that the particular work for the construction of which the land is sought to be acquired must itself be useful to the public directly. In the instant case, the government wanted to acquire the land in question for construction of a textile machinery parts factory by a company. The court held that the acquisition proceedings were not justified, for the relevant clause in the Act meant that the 'work' and not the 'product' of the mill should be useful to the public. The work itself should be such as may be used by the public. It is, of course, for the government to decide whether the proposed work is useful to the public or not. The court quashed the land acquisition proceedings as the satisfaction of the government was based on the wrong view of the law. This was a 4:1 decision. Sarkar, J., took the view that the work contemplated in S. 40 (1) (b) did not have to be one for a philanthropic purpose or such as can be used by the public. Land could be acquired for any work from which the public can in any way

79 The relevant provision is s. 40(1) (*b*) under which land could be acquired for a company when it is needed for erection of dwelling houses for workers employed by the company, or when such acquisition is needed for construction of a work which is 'likely to prove useful to the public.' The company concerned is to enter into an agreement with the government to provide for payment to the government of the cost of acquisition and to lay down the terms on which the public can use the work to be executed.

80 A.I.R. 1962 S.C. 764.

derive benefit, whether by direct use of the work or by enjoyment of the fruits of the activities carried on there, or may be otherwise. This liberal interpretation did not find favour with the majority.[81]

The view propounded by the majority in the *Arora* case was not palatable to the government which wanted to have broad powers to acquire land in view of the increasing industrialisation in the country. There was also a danger that this view of the law might render many acquisitions for compaines invalid, for the State Governments had often assumed that use of land for construction of buildings to be utilised by the companies for which land was acquired which manufactured goods useful to the public, justified acquisition of land. Therefore, to override the interpretation given by the court, the Land Acquisition Act was amended and a new clause (*aa*) was inserted after the original provision.[82] In *R. L. Arora* v. *State of U.P.*,[83] again the amended clause came into question. It was argued that under the amended clause the company for which acquisition was sought to be made should be engaged in any industry or work which was for a public purpose. In such a case, it was possible to acquire land under this clause even though the particular building or work for the construction of which land was being acquired might not be for a public purpose and this amounted to a contravention of Arts. 31(2) and 19(1) (*f*) as such acquisition would amount to an unreasonable restriction on the Fundamental Right to hold property.

For that purpose, the petitioner laid emphasis on the literal interpretation of the clause. But the argument was set aside by the majority on the ground that keeping in view the setting under which the legislature

81 This view of s.40(1) (*b*) was reiterated in *R. K. Agarwalla* v. *State of W.B.*, A.I.R. 1965 S.C. 995. The construction of public hall for cultural and social activities etc, has been held to be a purpose falling under this clause: *Chirkut Tiwari* v. *State of W.B.*, A.I.R. 1967 Cal. 89.

82 The newly added clause runs: "That such acquisition is needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose." In *West Bengal* v. *Talukdar, supra* note 76, the Supreme Court has left the question open whether the word 'work' in this clause refers to some kind of productive activity which would result in the production of goods useful to the public or it has a wider connotation than that. In this case, the notification was quashed *for while* the purpose for which land was sought to be acquired fell partly under S.40(1) (*a*) and partly under S.40(1) (*b*), the State Government had considered the necessity of giving consent only under S.40(1) (*b*) and the matter had not been considered by it under S.40(1) (*a*). It was a case of the government not applying its mind and thus not exercising its discretion given under the law.

83 A.I.R. 1964 S.C. 1250.

amended the provision, literal construction was not possible. Interpretation should be such as to conform with the intention of the legislature, i.e., the building or work which is to be constructed must be such as to subserve the public purpose of the industry or work in which the company is engaged or is about to be engaged.[84]

Ayyangar, J., gave a dissenting opinion. According to him, the said clause is capable only of one meaning. The criterion of the justification for the acquisition is that it is for a company of a designated nature, not that land acquired is needed for a building or work which is essential for carrying on of an industry which serves a public purpose. The company might be engaged in an industry which might be informed by a public purpose or whose products might be essential for the needs of the community, but it is not necessary that land acquired is needed for being used for the purpose of that industry but may be needed for any purpose of the company.

Somawanti's case reveals once more the unsatisfactory state of law regarding land acquisition. The distinction drawn by the Land Acquisition Act between 'acquisition for a public purpose' and 'acquisition for a company' has been largely obliterated by the instant case, for here even though the purpose was to establish a factory as a private venture and the compensation was to be paid by the Company, the court, nevertheless, held that the 'acquisition was for a public purpose,' merely because a token payment of Rs. 100/- was being made by the State. Thus, it is quite possible to convert an acquisition for a company into an acquisition for a public purpose by the simple expedient of the State making a token payment towards compensation payable for the land acquired. By this simple expedient, the conditions imposed by the Act on acquisitions for the companies could be bypassed. Thus, though the letter of the law may be said to have been fulfilled, yet the spirit of the law is hardly satisfied. This raises the question whether the state power should be invoked to acquire land and to pay compensation on a reduced scale for establishing private business concerns? Is it not more fair to require commercial enterprises to acquire land by normal methods at commercial prices? Another question which needs consideration is whether the determination of 'public purpose' should

84. The construction of staff quarters by the Rama Krishna Mission has been held to be not falling under the new clause (*aa*) in *West Bengal* v. *Talukdar, supra*. In *R. K. Agarwalla* v. *State of W.B.*, A.I.R. 1965 S.C. 995, the construction of social workers' quarters, students' home, publication department, guest house for the Bharat Sevashram Sangha, a registered charitable society, has been held to subserve the public purpose of the Sangha for the purposes of S.40(1) (*aa*).

remain, 'non-justiciable' under the Act? In 1894, when the Act in question was enacted there was not so much industrial activity and state acquisitions of land were within modest proportions; nor was there any concept of Fundamental Rights then. Today, however, the position has changed. There is enormous economic activity going on in the country needing vast state acquisition and thus opportunity for wrong use of power has enormously increased. The Land Acquisition Act is an anachronism in the modern times when it is kept alive in the face of Art. 31(2). It, therefore, stands to reason that the law be reviewed and necessary safeguards incorporated therein against undue deprivation of private property for commercial ventures. Also, the court cited *Bhanji Munji case* to refuse to go into the validity of the law under Art. 19(1) (*f*). But in the *Kochunni case*,[85] the court has already held that a law depriving land has also to be valid under Art. 19(1) (*f*). In this view of the matter, the question arises how far *Bhanji Munji* represents good law and why not the constitutional validity of the Act be tested under Art. 19(1) (*f*).

VI

ARTICLE 31-A

The Congress Party was very anxious that the zamindari be abolished at an early date and that legislation concerning it should not meet with any difficulty. The Party was much more particular about the payment of compensation. It was clear that payment of just equivalent to the interests affected would be beyond the resources of the country. The framers of the Constitution therefore thought of several built-in safeguards against any such eventuality arising in future. First, the use of the word 'compensation' without any adjective, it was thought, would mean that compensation need not be adequate or equal to the property interest affected. But they did not let the matter rest there. They went further and through Article 31(4) and 31(6) it was declared that provisions of Art, 31(2) would not apply to a law pending in the form of a bill in a State Legislature at the commencement of the Constitution, and also to laws enacted within eighteen months before the Constitution came into force, subject to presidential assent or certification.

As things developed, however, these provisions did not prove adequate to keep the land legislation immune from challenge in the courts. Art. 31(4) and (6) saved the legislation from contravention of Art. 31(2), but

85 A.I.R. 1960 S.C. 1080. See *infra*.

did not do so from a challenge under any other provision of the Constitution, especially the Fundamental Rights under Arts. 14 and 19(1)(f). The point was settled at the High Court level in *Kameshwar Singh's case.*[86] The Bihar Land Reforms Act, 1950, provided for the transfer to the State of Bihar of the interests of the proprietors and tenure-holders in land, and of mortgages and leases of such interests including interest in trees, forests, fisheries, ferries, huts, etc. Compensation to the expropriated land-owners was to be paid not on a uniform basis, but on a basis varying between 3 to 20 times of the net income. The court found that the Act was bad under Art. 14 on the ground that the classification of the zamindars for the purpose of payment of compensation was discriminatory. This was sufficient to throw into confusion the projected programme of land reform. Therefore, through constitutional amendments two new Articles, 31A and 31B, were added.

Clause (1) of Art. 31A as it came to be after the Fourth Amendment protects from the operation of Arts. 14, 19 and 31 a law providing for: (*a*) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights; (*b*) the taking over of the management of any property by the State for a limited period either in the public interest or to secure its proper management; (*c*) the amalgamation of two or more corporations either in the public interest or to secure proper management of any of them; (*d*) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or directors, managers of corporations, or of any voting rights of shareholders thereof; (*e*) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license. A law made by a State with respect to any of these matters would be immune only if it secures the assent of the President. It would be seen that the immunity granted by Art. 31A is much wider than that granted by Arts. 31(4) and (6); under 31A, law is immune from challenge under Arts. 14, 19 and 31, while that under Arts. 31(4) and (6), the immunity extended only from Art. 31(2), i.e. from the conditions of compensation or public purpose.

Art. 31A(1) (*a*) seeks to protect a law dealing with agrarian reform; Clause (*b*) seeks to protect the State from a claim of compensation in a situation like the *Sholapur Mills Case*[87] Clauses (*c*) and (*d*) were thought necessary to save a number of reforms being introduced in the company law; clause (*e*) was felt necessary so that the government could exercise full control over the mineral and oil resources of the country.[88]

86 A.I.R. 1951 Pat. 91.

87 See, *Municipal Corp., Amritsar* v. *Punjab*, A.I.R. 1966 Punj. 232. State taking over management of municipal schools along with property etc. for 10 years held protected under Art. 31A (1) (*b*).

Art. 31A (1)(*a*) has been the most active as it has been invoked in a very large number of cases. The word 'estate' therein, as explained in Art. 31A (2) (*a*), has the same meaning as is given to it by a local law. As the connotation of the word 'estate' was not uniform throughout the country, but differed from place to place, one uniform definition of the term would not have sufficed and so the term was so defined as to bring within it all variety of definitions prevailing in the country. Thus to define 'estate', we have to look to the local law and the definition so given has to be adopted for the provision in the Constitution. To make it still broader, it has been laid down that if in any area the term 'estate' is not defined then its 'local equivalent' would be included in it. It was realised that in many cases the existing law relating to land tenures may not expressly define an estate as such though the said areas had their local equivalents described and defined.[89] That is why Art. 31(1) (*a*) has deliberately used both the word 'estate' as well as its local equivalent. To decide whether the local equivalent is synonymous with the word 'estate', the basic concept underlying the term 'estate' has to be kept in view which is that the person holding the estate should be proprietor of the soil and be in direct relationship with the State paying land revenue to it except where it is remitted in whole or in part.[90] The term 'estate' was further explained to include any jagir, inam or muafi or other similar grant, and in States of Madras and Kerala, any junamam right. The expression 'rights in relation to an estate' in Art. 31A(1) (*a*) has been explained (Art. 31A (2) (*b*)) to include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat, or other intermediary and any rights or privileges in respect of land revenue. This therefore covers all possible kinds of rights in estates.[91]

88 *Barrakur Coal Co.* v. *India*, A.I.R. 1961 S.C. 954. An Act not providing for compensation to the lessee on account of any adverse modification in terms of a of mining lease is protected by Art. 31A(1) (*e*): *Salendra Nath* v. *State*, A.I.R. 1967 Pat. 68. Also, *Gujarat Pottery Works Pri. Ltd.* v. *B. P. Sood*, A.I.R. 1967 S.C. 964. A law providing for premature termination of a lease for extracting minerals is protected by Art. 31A (1) (*e*): *The Bihar Mines Ltd.* v. *Union of India*, A.I.R. 1967 S.C. 887.

89 *Mahadeo Paikaji Kulhe* v. *Bombay*, A.I.R. 1961 S.C. 1517. The Supreme Court has recently discussed the meaning of the word 'estate' in *Gulabbhai* v. *Union of India*, A.I.R. 1967 S.C. 1110.

90 *Purushottam* v. *State of Kerala*, A.I.R. 1962 S.C. 694; *Salubai* v. *Chandu*, A.I.R. 1966 Bombay 194.

91 Art. 31A(2) (*a*) (iii) has been interpreted to mean that forest land or waste land cannot be deemed to be an estate unless it has been held or let for purposes ancillary to agriculture: *State of U.P.* v. *Anand Brahma*, A.I.R. 1967 S.C. 661.

As larger and larger volume of legislation has been enacted dealing with acquisition or modification of rights in agricultural land, Art. 31A (1) (*a*) has been invoked more and more to seek immunity for the legislation from challenge under Arts. 14, 19 and 31. The result has been that in a large number of cases the courts have found themselves debarred from assessing the validity of tenancy legislation even though containing very drastic provisions. A few examples would illustrate this point. The Bombay Personal Inams Abolition Act, 1953, was held protected even though it extinguished all inams and subjected all inam lands to payment of land revenue without providing any compensation for extinction of certain rights.[92] The Bombay Tenancy and Agricultural Lands Act, 1956, passed the title to the land, which vested originally in the landlords, to the tenants on a fixed day, who were regarded as having purchased it compulsorily. The law, it was held, provided for extinguishment of rights in estates and so was protected under Art. 31A (1) (*a*).[93] The fundamental idea was the prevention of concentration of lands in the hands of a few land holders. Redistribution of lands, so that a few may not monopolise it, is the cardinal principle on which agrarian economy in a socialistic pattern of society rests. The court justified the Act as a measure of agrarian reform to achieve the objective of establishing a socialistic pattern of society within the meaning of Arts. 38 and 39. The Act was designed to bring about such distribution of ownership and control of agricultural lands as best to subserve the common good thus eliminating concentration of wealth and means of production to the common detriment. The Punjab Security of Land Tenure Act sought to limit the area to be held by a land-owner for self-cultivation, the surplus area being purchased by the tenants at a price, to be determined according to the procedure laid down in the Act, which was to be less than the market price. The Act was held protected by Art. 31A(1) (*a*).[94] Similarly, a provision of law authorising the collector to cancel leases with retrospective effect was held to fall within Art. 31A(1) (*a*).[95] It has also been held that along with acquisition of an estate, the legislature may provide as an ancillary measure, for acquisition of buildings within such estates.[96]

92 *Gangadhar Rao* v. *Bombay*, A.I.R. 1961 S.C. 288.

93 *Sri Ram Ram Narain* v. *Bombay*, A.I.R. 1959 S.C. 459.

94 *Atma Ram* v. *Punjab*, A.I.R. 1959 S.C. 519.

95 *Raghubir Singh* v. *Ajmer*, A.I.R. 1953 S.C. 373.

96 *Gajapati* v. *Orissa*, A.I.R. 1953 S.C. 375. Also see, *Pritam Singh* v. *State of Punjab*, A.I.R. 1967 S.C. 930, in which a Punjab Act fixing ceiling of land for personal cultivation and acquiring any surplus land was held to fall under Art. 31A.

Art. 31A(1) (*a*) protects an Act even if its provisions are confiscatory as well as discriminatory. It gives a complete answer to any challenge under Arts. 14, 19 and 31. The protection afforded by this provision is therefore very wide.[97] In a large number of cases land legislation has been held valid because of this provision in the Constitution.[98] Earlier in *Raghubir Singh's case*[99] the Supreme Court had held the view that the word 'modification' used in this clause did not include 'suspension' of a right for a temporary period. But in a later decision, this view has not been followed; the view taken was that 'suspension' has been included within the term 'modification.'[100] There exists a difference of opinion on the interesting question whether Art. 31A(1)(*a*) can be invoked in all kinds of 'extinguishment', or 'modification' of 'estate' for whatever purpose, or whether it should be limited only to cases of agrarian reform. In the *Kochunni case*,[101] however, the Supreme Court has held that the purpose of this provision was to bring about a change in the agricultural economy, and facilitate agrarian reforms and it was, therefore, to be applied to legislation affecting the rights of landlords and tenants. It was not applicable to a legislation seeking to modify the rights of the owner without reference to the law of land tenures, as for example, regulation *inter se* of the rights of a proprietor in his estate and the junior members of the family. Art. 31A(1)(*a*) does not enable the State to divest a proprietor of his estate and vest it in another without reference to any agrarian reform.

Doubt was thrown on this view by the Supreme Court in *Ranjit Singh* v. *State of Punjab*.[102] There the court considered the validity of the East

97 *Umeg Singh* v. *Bombay*, A.I.R. 1955 S.C. 540.

98 The Bihar Land Reform Act which empowered the collector to annul anticipatory transfers of land designed to defeat the object of the Act was held to be valid though the section itself did not provide for the extinguishment or modification of any rights in an estate, *State of Bihar* v. *Umesh Jha*, A.I.R. 1962 S.C. 50; The Assam Fixation of Ceiling on Land Holdings Act, 1957, held protected in *Sonapur Tea Co.* v. *Dy. Commr.*, A.I.R. 1962 S.C. 137; The Kerala Agrarian Relations Act, 1960, upheld in *Purushottam* v. *State of Kerala*, A.I.R. 1962 S.C. 694. The Bombay Tenancy and Agricultural Lands (Viderbha & Kutch Area) Act, 1958, held valid in *Salubai* v. *Chandu*, A.I.R. 1966 Bombay 194.

99 *Supra* note 95.

100 *Sri Ram Ram Narain* v. *Bombay*, A.I.R. 1959 S.C. 459; *Atma Ram* v. *Punjab*, A.I.R. 1959 S.C. 519. In *Barrakur Coal Co.* v. *India*, A.I.R. 1961 S.C. 954, the Supreme Court took the view that the suspension of the rights of a mineowner or lessee of the mine for a certain period is covered by the term modification in Art. 31A(1) (*e*). The same reasoning would apply to Art. 31A(1) (*a*).

101 A.I.R. 1960 S.C. 1080.

102 A.I.R. 1965 S.C. 632.

Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. In the instant case, portions of land commonly owned by the proprietors had been reserved for the village panchayat and given over to it for diverse purposes, and other portions were reserved either for non-proprietors or for the common purposes of the villages. The situation had some analogy with that in the *Kochunni* case. The court had to consider whether the Act under which these adjustments had been made was protected under Art. 31A(1)(*a*). Considering the *Kochunni case*, Hidayatulla, J., first pointed out that the objects and statements of the Fourth Amendment did not refer only to agrarian reform but also to 'planning of urban and rural areas' which require the beneficial utilisation of vacant and waste lands and the clearance of slum areas, and pointed out that consolidation of holdings 'is really nothing more than a proper planning of rural areas.' The *Kochunni* case, the judge said, involved a bare transfer of the rights of the *sthanee* to the *tarwad* without any alteration of tenure and without any pretence of agrarian reform, not contemplated by Art. 31A, however liberally construed. That was a special case which cannot be applied to a case where the general scheme of legislation is definitely agrarian reform and under its provisions something ancillary thereto in the interests of rural economy, has to be undertaken to give full effect to the reforms. The Supreme Court thus refused to apply the *Kochunni case* to decide the validity of the Act in question and held it covered by Art. 31A(1)(*a*). The court emphasised that the scheme of rural development at the present time involved not only equitable distribution of land so that there was no undue imbalance in society resulting in a landless class, on the one hand, and the concentration of land in the hands of a few, on the other, but envisaged also the raising of economic standards and bettering rural health and social conditions.

What the Supreme Court said about the *Kochunni case* in the *Ranjit Singh* came to be reviewed by *Subbarao*, J., himself, who had earlier delivered the opinion in the *Kochunni case*. In *Vajravelu* v. *Special Deputy Collector*[103], certain agricultural land on the fringe of Madras City was sought to be acquired with a view of slum clearance within the city. This was sought to be done under the Land Acquisition (Madras Amendment) Act, 1961. The question was whether the validity of the Act could be adjudged under Arts. 14 and 31(2) and that depended on the question whether or not the Act was protected under Art. 31A(1)(*a*). Thus the Court was inevitably drawn to a consideration of the observations made in the *Ranjit Singh*

103 A.I.R. 1965 S.C. 1017.

case regarding the *Kochunni* case. Subbarao, J., held that the *Ranjit Singh case* accepts the view that Art. 31A was enacted only to implement agrarian reform, but has given a comprehensive meaning to the expression 'agrarian reform' so as to include provisions made for the development of rural economy. Subbarao, J., emphasised that the object of agrarian reform was implicit in Art. 31A(1)(*a*). If the State were enabled to acquire the lands of citizens without reference to any agrarian reform in derogation of their Fundamental Rights without payment of compensation, Art. 31(2) would be deprived practically of its content. If Parliament had wanted to make Art. 31(2) a dead letter, it would have clearly expressed its intention. Therefore, Art. 31A(1)(*a*) would apply only to a law made for agrarian reform. Slum clearance in the city cannot be regarded as agrarian reform in any sense of the term. But the Act in question refers not only to slum clearance but to housing schemes as well as creation of modern suburbs which do not refer to agrarian reform at all. The Act in question was thus not saved by Art. 31A(1)(*a*).[104]

An interesting point which arose before the XVII Amendment was whether Ryotwari tenures would be included within the term estate in Art. 31A(1)(*a*). In *Purushotam* v. *State of Kerala*,[105] the majority took the view that a Ryotwari tenure would be covered within the 'local equivalent' of estate as the latter term was not defined by the local law. Ayyangar, J., dissented and held that Ryotwari tenure would not be an estate unless the local law said so. In *K. Kunhikoman* v. *State of Kerala*,[106] the same question was considered with respect to that portion of Kerala which had come to it from Madras after the States Reorganisation in 1956. In this area, the existing law, the Madras Estates Land Act, 1908, so defined the term 'estate' as to exclude the Ryotwari tenure. Therefore, the Kerala Agrarian Relations Act, insofar as it sought to acquire ryotwari land, was not protected by Art. 31A(1)(*a*) and could be challenged under Art. 14. The court further held that the scheme of giving compensation on a *graduated* basis, less to the holder of larger property, was discriminatory. In the words of the court, "There is no reason why when two persons are deprived of their property

104 See *Gam Nitay Tea Co.* v. *Assam*, A. I. R. 1966 Assam 58, for an interesting discussion on this aspect with respect to the Assam Land (Requisition and Acquisition) Act. Two judges held it not protected while one held it protected, under Art. 31A. He even took the view that acquisition of agricultural land for any purpose irrespective of agrarian reform is envisaged by Art. 31A. It may be hoped that after the *Vajravelu Case* such confusion would be avoided.

105 A.I.R. 1962 S.C. 694.

Case 106 A.I.R. 1962 S.C. 723.

one richer than the other, they should be paid at different rates when the property of which they are deprived is of the same kind and differs only in extent. No such principle can be applied in a case where compensation is being granted to a person for deprivation of his property." In this connection, the court specifically approved the principle laid down by the Patna High Court in *Kameshwar Singh* v. *Bihar*.[107] On practically the same grounds, the Supreme Court held in *Krishnaswami* v. *Madras*[108] that the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961, was bad under Art. 14. The Act dealing with Ryotwari tenure was not protected under Art. 31A and suffered from the same vices as the Kerala Act in respect of definition of family and payment of compensation.

These were very inconvenient decisions as they come in the way of agrarian reform in a part of Kerala and Madras. To set matters right, XVII Amendment adopted in 1964 added the word 'Ryotwari settlement' in el. 31A(2)(*a*). Also, within the term 'estate' was included 'any land held or let for purposes of agriculture or for purposes ancillary thereto'. The definition of term 'estate' has therefore been made very broad and so practically the entire corpus of agrarian land legislation would now be protected from challenge under Arts. 14, 19, 31. However, one limitation has also been imposed, *viz.*, that the land under personal cultivation upto the ceiling fixed would not be acquired by the State unless the law provides for compensation at the market value.[109] The fact therefore remains that by the process of amending the Constitution, a very rigorous restriction has been placed on the right to claim compensation for agricultural property acquired by the State. In three cases, *Kameshwar Singh's*, *Kunhi Koman's* and *Krishnaswami's*, the scheme of compensation had been declared to be discriminatory, but in all cases the Acts were sought to be validated by the process of constitutional amendment.

VII

Arts. 19(1)(f) and 19(5)

There have been several discernible trends in the interpretation of Art. 19(1)(f) read with Art. 19(5). To begin with, the courts started with taking

107 A.I.R. 1951 Pat. 91.

108 A.I.R. 1964 S.C. 1515.

109 This provision has been interpreted by the Supreme Court in *Ajit Singh* v. *State of Punjab*, A.I.R. 1967 S.C. 856. Under Land Consolidation proceedings, some land of a cultivator having land within the ceiling was reserved for common purposes without payment of any compensation. He claimed compensation under this provision. The court held that as the beneficiaries of the taking away of his land were the proprietors and not the State as such, his case did not fall under the provision. The court has taken a very technical view of the fact situation and it is arguable whether the spirit of the provision in question has been kept in view by the decision.

a very restrictive view of the term 'property' in the constitutional provision. Ordinarily, the word 'property' is a term of wide import and is indicative and descriptive of every possible interest which a person can have. Not only the thing which is the subject matter of ownership but even dominium or the right of ownership, possession etc. fall within the scope of the term. As against this broad connotation of the term 'property', the judiciary sought to limit its import with a view to restrict the guarantee under Art. 19(1)(f)[110] In the earliest Supreme Court case, *Chiranjit Lal* v. *India*,[111] the right of voting enjoyed by the shareholders of a company, or their right to select the directors, or their right to pass resolutions, or institute winding up proceedings, were held as not 'property'. The view taken was that a share in a joint stock company was property and these rights or privileges were appurtenant to or flowed from the ownership of the share, but by themselves, apart from the share, were not property being incapable of being acquired, disposed of or taken possession of. This restrictive view struck at the very roots of the protection of incorporeal rights. In the instant case, the law in question affected the right of the shareholders to manage the company and so the right to hold property could be said to have been affected as management constitutes an important incident of holding property. Further, by regulating these incidents the right to property, i.e. the share, was certainly affected (undoubtedly the value of the share must have fallen), and so the matter could still be brought under Art. 19(1)(f).

In *West Bengal* v. *Subodh Gopal*,[112] Sastri, C. J., propounded the theory that Art. 19(1)(f) dealt only with the natural rights inherent in a citizen to acquire, hold, dispose of property in the *abstract* without reference to rights to any particular property; that the Article concerned only with the abstract right and capacity to hold, acquire and dispose of property and had no relation to concrete property rights. In other words, the Article forbade the State to deny to particular individuals or classes of individuals the right to own property, but did not protect a citizen's interest in a particular piece of property or business from State intereference.

In course of time, the court has, to some extent, moved away from these restrictive interpretations of the word 'property'. In *Subodh Gopal's*

110 Jain, *Indian Constitutional Law* 408.

111 A.I.R. 1951 S.C. 41.

112 A.I.R. 1952 S.C. 92.

case, Jagannadhadas, J., had protested against the view taken by Sastri, C.J. He stated there that to construe Art. 19(1)(*f*) as not referring to concrete property rights would enable the legislature to impose unreasonable restrictions on the enjoyment of concrete property interests. In *Dwarka* v. *Sholapur Mills*[113], Das, J., held that the mills, machinery, stocks etc. were property as also contract or agreement which a person might have with another. In *Commissioner, H. R. E.* v. *Lakshmindra,*[114] the Supreme Court observed that there was no reason why the word 'property' as used in Art. 19(1)(*f*) should not be given a liberal and wide connotation and should not be extended to those well recognized types of interest which have the insignia or characteristics of proprietary rights and that the court has all along proceeded on the footing that Art. 19(1)(*f*) 'applies equally to concrete as well as abstract rights of property'. Thus it was held that restrictions placed by law on the mahant of a math can be adjudged under Art. 19(1)(*f*), for he was not only the manager but he also held a beneficial interest in the property attached to the math.

In *Amar Singh* v. *Custodian General,*[115] the interest of a quasi-permanent allottee of evacuee property was held as not falling within the scope of Art. 19(1) (*f*). The allotment was more in the nature of a license which could be cancelled by the grantor; it did not amount to qualified ownership of the land allotted and it could not be transferred to anyone else. A right of management, without any interest in the property managed, has been held to be outside the protection of Art. 19(1) (*f*).[116] A right to carry away the produce of a forest, like timber or tendu leaves, is a mere licence not falling within the protection of Art. 19(1) (*f*).[117] The interest of a tenant in the demised premises has been held to be property for purposes of Art. 19(1) (*f*).[118]

113 A.I.R. 1954 S.C. 119.

114 A.I.R. 1954 S.C. 282.

115 A.I.R. 1957 S.C. 599.

116 *Bira Kishore Deb* v. *State of Orissa,* A.I.R. 1964 S.C. 1501; *Katra Education Society* v. *State of U.P.,* A.I.R. 1966 S.C. 1307; *Board of Trustees Tibbia College* v. *State of Delhi,* A.I.R. 1962 S.C. 458; *Sindhraj Bhai* v. *Gujarat,* A.I.R. 1963 S.C. 540.

117 *Shanta bai* v. *State of Bombay,* A.I.R. 1958 S.C. 532; *Mahadeo* v. *State of Bombay,* A.I.R. 1959 S.C. 735; *A. K. Mehboob Co.* v. *State of M.P.,* A.I.R. 1966 S.C. 1637. In *Chhotabhai Jethabhai* v. *M.P.,* A.I.R. 1953 S.C. 108, the Supreme Court had issued a writ under Art. 32 to prohibit the State from interfering with such rights, as the law in question did not extinguish these rights. This case can no longer be regarded as good law, for if licences are not property, no Fundamental Right is infringed and so no writ can be issued under Art. 32. Relief can be had in such a case under Art. 226.

118 *Municipal Corp. of Bombay* v. *Pancham,* A.I.R. 1965 S.C. 1008.

In *S.M. Transport (P) Ltd.* v. *Sankaraswamigal Mutt,*[119] the court held definitely that Art. 19(1) (*f*) applied equally to concrete as well as to abstract rights of property. The court stated, "To suggest that abstract rights of a citizen in property cannot be infringed by the State, but his concrete rights can be, is to deprive Art. 19(1) (*f*) of its real content."

Another interesting development with respect to Art. 19(1) (*f*) has been the varying judicial attitudes towards its inter-relationship with Art. 31. Initially, the judicial attitude was that Art. 19(1) (*f*) did not apply to a law depriving, as distinguished from restricting, a citizen of his property. In *Bombay* v. *Bhanji Munji,*[120] the Supreme Court upheld ss. 5(1) and 6(4) of the Bombay Land Requisition Act, 1948, under Art. 31(2) and refused to adjudge their validity under Art. 19(1) (*f*) on the following grounds: Art. 19(1) (*f*) 'postulates the existence of property which can be enjoyed and over which rights can be exercised' because otherwise the resonable restrictions contemplated by Art. 19(5) could not be brought into play; Art. 19(1) (*f*) deals with substantial and substantive rights and not with illusory phantoms of title; when every form of enjoyment which normally accompanies an interest in property is taken away leaving only the husk of title, Art. 19(1) (*f*) is not attracted; if there is no property which can be acquired, held or disposed of, no restriction can be placed on the right to acquire, hold, dispose of it, and as clause (5) contemplates the placing of reasonable restrictions on the exercise of these rights it must follow that the Article postulates the existence of property over which those rights can be exercised.' In short, the judicial view developed in the case was that the validity of a law depriving a person of his property should be adjudged under Art. 31 and not under Art. 19(1) (*f*).[121] But then the view underwent a change and in the *Kochunni case* it was overruled.[122] This change was due to the amendment of Art. 31(2) by the Fourth Amendment of the Constitution. Before the Amendment, Art. 31(1) and 31(2) were not regarded as mutually exclusive in scope and content, but were regarded as dealing with the same subject, *viz.*, aquisition or taking possession of property referred to in Art. 31(2). On this view, Art. 31 was a self-contained Article providing for a subject different from that dealt with in Art. 19 and therefore, to harmonize Arts. 19 and 31, the court could hold in the *Bhanji Munji* case that Art. 19(1) (*f*) would not apply when property was

119 A.I.R. 1963 S.C. 864. The opinion of the court was delivered by Subba Rao, J.

120 A.I.R. 1955 S.C. 41.

121 **Jain,** *Indian Constitutional Law* 411 (1962).

122 A.I.R. 1960 S.C. 1080, Subba Rao, J.

requisitioned. But no scope was left for drawing such an analogy after the Fourth Amendment, for Arts. 31(1) and 31(2) came to deal with two different concepts—Art. 31(1) with deprivation of property by authority of law, and Art. 31(2) read with Art. 31(2) A with acquisition and requisition. The law depriving a person of property as envisaged by Art. 31(1) should be a *valid* law which means that it should not infringe any other Fundamental Right including Art. 19(1) (*f*).

By the Fourth Amendment of the Constitution, much of the efficacy of Art. 31 was watered down and the *Kochunni case*, and the judicial view propounded therein, is a consequence thereof. The advantage of this judicial view is that the resonableness of a law depriving a citizen of his property can now be adjudged under Art. 19(5) as was done in the *Kochunni case*. The view taken in the *Kochunni case* was again reiterated by the Supreme Court in the *Sidharaj Transport Case*.[123]

It is suggested that the *Bhanji Munji* case did not represent a correct approach to the problem of correlation between Arts.19(1)(f) and 31(1), but the *Kochunni case* does. Both Articles 19(1)(f) and 31 deal with 'property' and, therefore, in the very nature of things they have to be coordinate with each other. They cannot be regarded as existing in isolation from each other. Then, the *Bhanji Munji case* led to this curious result that while the Legislature could freely take the drastic step of depriving a person of his property, it was not so free to take the less drastic step, *viz.*, to affect only the enjoyment or possession of property. It cannot be argued that 'deprivation' does not affect the right to hold, acquire and possess property. And after all what does Art. 19(1)(f) represent. In many cases, the restrictions have been held to be reasonable. Barring exceptional cases, courts do not apply Art. 19(1)(f) easily, without there being a strong ground to declare a restriction unconstitutional. In most cases, Art. 19(1)(f) has been invoked only to challenge procedural lacunae in the legislation in question. There is also nothing in the argument that the *Kochunni case* represents a view which goes against the intentions of those who sponsored the Fourth Amendment. Others argue that the *Kochunni* case does not follow the pattern of the *Gopalan case* where the court refused to apply Art. 19 to Art. 21.[124] These arguments emanate out of too literalistic, and not liberal,

123 A.I.R. 1963 S.C. 864.

124 Basu, *I Constitution* 646.Also, J. Narain, "Deprivation of Property and the Right to hold Property under the Indian Constitution: A Study of Kochunni Decision," 6 *J.I.L.I.* 410 (1964). T. Rama Rao, "Chief Justice Sinha and Property Rights", 6 *J.I.L.I.* 152, 157, who regards the logic of the court in the *Kochunni case* impeccable, but refers to the application of the same to Arts. 19 and 31.

interpretation of the Constitution. The Constitution is not to be interpreted strictly as a statute. Fundamental Rights are meant to be broadened by judicial interpretation and not curtailed or restricted. After all, the reasonableness test under Art. 19(1)(f) is not very onerous and courts have not been too demanding or critical under it. The courts will hold a law bad only in extreme cases of injustice and there is no reason why such a reserve power should not vest in the courts in the last resort.

It might also be of interest to note that after quite a good deal of hesitation,[125] the Supreme Court has also come to hold the view that 'restriction' in Art. 19(5) would include 'prohibition' as well.[126]

Generally speaking, Art. 19(1)(f) has not proved to be much of a hindrance in the way of the Government programme regarding land reforms and regulation of property interests. Courts have characterised as 'reasonable' a very drastic reordering of the agrarian economy which shows that the courts themselves have assimilated and imbibed, and been influenced by, the prevailing economic philosophy of the time. Any number of cases can be cited in support of this statement. Thus legislation controlling accommodation and rents in urban areas have been held to be valid on the ground of shortage of accommodation.[127] Several laws regulating the relationship between landlord and tenants, or restricting the landlord's right to eject tenants, or regulating the rent to be charged by the landlords, have been declared to be constitutional.[128] The Fundamental Right, it has been held, only imports a right to recover reasonable rent from cultivators and therefore a law whose object is to fix fair and reasonable rent cannot be said to invade that right.[129] In *Madras v. Kannepali*,[130] the Madras Estates Land (Reduction of Rent) Act, 1947, which in some cases reduced the rent to as much as 25% of the prevailing rent, and even took away the right to collect rent from the landholders, the government realising the rent and paying over to the landholders, was held valid. Refusing to

125 *Quareshi* v. *Bihar*, A.I.R. 1958 S.C. 731, question left open; *R.M.D.C. case*, A.I.R. 1957 S.C. 699; *Saghir Ahmad's case*, A.I.R. 1954 S.C. 728; Jain, *Indian Constitutional Law* 424-425 (1962).

126 *Narendra Kumar* v. *Union of India*, A.I.R. 1960 S.C. 430.

127 *Ishwar Pd.* v. *Sen*, A.I.R. 1952 Cal. 273; *Prem* v. *U.P. Coop. Bank*, A.I.R. 1953 All. 51.

128 *Indar Singh* v. *Rajasthan*, A.I.R. 1957 S.C. 511; *Kishan* v. *Rajasthan*, A.I.R. 1955 S.C. 795; *Madras* v. *Kannepali*, A.I.R. 1962 S.C. 1687; *Vasantlal Maganbhai* v. *Bombay*, A.I.R. 1962 S.C. 4.

129 *Kishan* v. *Rajasthan*, A.I.R. 1955 S.C. 795.

130 A.I.R. 1962 S.C. 1687.

accept the argument that it would be unreasonable to reduce the income to 25%, the Supreme Court stated that the Act in question was designed to stop rack-renteering and the ratio by which the net income of the landholder would be reduced would depend upon whether the landholder whose rents were being reduced was a "rack-renteer or a humane person; in the case of a rack-renteer the fall may be heavier while in the case of a humane person the fall may be less." Similarly, a law preventing the dispossession or ejectment of cultivators from his land by a landholder or regulating tenant—landlord relation has been held valid as the law sought to ensure to the actual tiller some fixity of tenure and so could not be held to be unreasonable.[131] A law promoting consolidation of holdings,[132] a law limiting the size of holdings in the hands of a single individual to a specified limit, and permitting the landlords to sell the excess, have been held to be valid.[133] The Administration of Evacuee Property Act which imposed drastic restrictions on evacuee property was held valid in view of the special circumstances in India.[134] Limitations imposed on owners of land to construct have been held valid.[135] Drastic restrictions on eviction of tenants from urban property have been upheld.[136] Further, as already pointed out, Art. 31A and 31B have also curtailed the operation of Art. 19.[137] In addition, the Supreme Court has held that Art. 19 does not apply to corporations as they are not envisaged to be citizens.[138]

The one important case in which Art. 19(1)(f) came alive was the *Kochunni case*. The legislation making *sthanam* property as *tarwad* property was characterised as a legislative device to take property of one and vest it in another without compensation and so was held to be unreasonable. The article has also been used by the courts to hold the law of pre-emption to be bad in several respects. A significant use of the Article is however made in enforcing certain procedural norms in exercising administrative powers relating to property. These subjects are discussed below.

131 *Hari* v. *State*, A.I.R. 1954 Raj. 117; *Bhagirath* v. *Punjab*, A.I.R. 1954 Punj. 167; *Shambhouge* v. *Mysore*, A.I.R. 1960 Mys. 236.
132 *Attar Singh* v. *U.P.*, A.I.R. 1959 S.C. 561.
133 *Bhagirath* v. *Punjab*, A.I.R. 1954 Punj. 167.
134 *Asiatic Eng. Co.*, v. *Achhru Ram*, A.I.R. 1951 All. 746
135 *Vibhuti* v. *Improvement Trust*, A.I.R. 1954 All. 520.
136 *Jyoti Pd.* v. *Administrator, Union Territory of Delhi*, A.I.R. 1961 S.C. 1602.
137 *Supra*.
138 *State Trading Corporation* v. *Commercial Tax Officer*, A.I.R. 1963 S.C. 1811; *Tata Engineering* v. *Bihar*, A.I.R. 1965 S.C. 40.

Pre-emption: For long there existed a cleavage of opinion among the High Courts on the question of constitutional validity of the right of pre-emption under Art. 19(1)(f) read with Art. 19(5). The law of pre-emption imposes restrictions on the right of the vendee to acquire and hold property and the right of the vendor to dispose of property, for he can not dispose it off to whomsoever he may please and this clog on his freedom to sell diminishes the market value of his property. All the High Courts were not agreed whether the law of pre-emption constituted a reasonable restriction on the right to hold, acquire and dispose property. The Punjab, Allahabad, Nagpur, Bombay High Courts upheld it;[139] the Hyderabad and Rajasthan declared the law to be unreasonable;[140] the Madhya Pradesh held it valid as regards the agricultural property but not with respect to the urban property.[141] Till 1962, the Supreme Court had not had occasion to consider the matter. In *Bhau Ram* v. *Baij Nath*,[142] the Supreme Court held the law of pre-emption on the ground of vicinage with respect to urban property as unreasonable. The Court stated that such a law raised litigation and was not in the interest of the general public. The law of pre-emption was introduced during the Muslim period; the real reason behind pre-emption by vicinage is to prevent strangers, *i.e.*, people belonging to different religions, race or caste, from acquiring property in a locality. Such division of society into groups, and exclusion of strangers from any locality, cannot now be considered reasonable. The ruling in the *Bhau Ram's* case had a limited scope as it applied only to urban property and not to agricultural property; also, it outlawed pre-emption merely on the ground of vicinage and not on any other ground like that of a common staircase or entrance between properties. The right of pre-emption in favour of a co-sharer was specifically held to be reasonable for introduction of an outsider would make common management of the property extremely difficult and destroy the benefits of ownership in common, and there were clear advantages if property eventually comes into the hands of one co-sharer. In *Ramsarup* v. *Munshi*,[143] the right of pre-emption in respect of agricultural land in favour of son or brother against a sale by

139 *Sardha Ram* v. *Haji Abdul*, A.I.R. 1960 Punj. 196; *Abdul Hakim* v. *Jana Mohd.*, A.I.R. 1951 All. 247; *Ram Chandra* v. *Janardan*, A.I.R. 1955 Nag. 225; *Bhimrao* v. *Patilbua*, A.I.R. 1960 Bom. 552.
140 *Moti Bai* v. *Kand Bai*, A.I.R. 1954 Hyd. 161; *Nathuram* v. *Patram*, A.I.R. 1960 Raj. 125.
141 *Yakub* v. *Karim*, A.I.R. 1960 M.P. 191.
142 A.I.R. 1962 S.C. 1476.
143 A.I.R. 1963 S.C. 553.

father or brother was held to be reasonable as it sought to preserve the integrity of the village and village community, implemented agnatic rule of succession and avoided fragmentation of holdings. In *Sant Ram* v. *Labh Singh*,[144] following *Bhau Ram's* case, the Supreme Court again declared a custom conferring right of pre-emption on the ground of vicinage in respect of urban property unreasonable. As yet, the Supreme Court has not ruled definitely whether pre-emption on the ground of vicinage in respect of agricultural land would be good or bad, but there appears a strong probability that it would be sustained as it avoids fragmentation of holdings and leads to consolidation of agricultural land, a policy which is being promoted at present.

Administrative Process: An interesting use made of Art. 19(1)(f) is to enforce some procedural (and at times even substantive) norms on the exercise of administrative power relating to private property. Speaking generally, it may be said that the courts have not taken kindly to conferment of absolute discretion on administrative officers uncabined by procedural safeguards like the right of hearing to the person whose property interest is sought to be affected. Any number of cases may be cited to illustrate this thesis. To take only a few sample cases here, in *Raghubir* v. *Courts of Wards*,[145] the court held a law void under which the Deputy Commissioner could in his subjective determination assume the superintendence of property of a landlord who habitually infringed the rights of the tenants, and the affected landlord had not been given right to go to a court of law against the decision of the administrator concerned. In *Bombay Corp.* v. *Pancham*,[146] the Bombay Municipal Act was held valid in so far as it authorised the Municipal Commissoner to make a clearance order because the tenants affected by such order had a right to file objections against such an order, and then to appeal to the civil court against the order. The Bhopal Reclamation and Development of Lands (Eradication of Kans) Act authorised the Reclamation Officer to declare any land as Kans infected and to enter and start reclamation operations. No provision was made for giving an opportunity to the landowner to show that his land was not really so infected. In *State of M.P.* v. *Champalal*,[147] the Act was held void for its failure to provide any procedural safeguard. In the *Moopil Nair case*,[148] a tax on property was struck down for its

144 A.I.R. 1965 S.C. 314.
145 A.I.R. 1953 S.C. 373.
146 A.I.R. 1965 S.C. 1008.
147 A.I.R. 1965 S.C. 127.
148 A.I.R. 1961 S.C. 552.

failure to provide procedural safeguards necessary in a quasi-judicial proceeding like assessment of tax on property.

At times, even objections of a substantive nature have been advanced against the administrative power conferred by law to affect property interests. In *Vasantlal Maganbhai Sanjanwala* v. *State of Bombay*,[149] the Supreme Court rejected the objection that the Bombay Tenancy and Agricultural Lands Act, 1948, suffered from the vice of excessive delegation. The U.P. (Temporary) Accommodation Requisition Act, 1947, conferred unguided discretion to requisition property ; the Act authorised the Government to make rules for the purposes of the Act, but no rules were made to guide the exercise of unfettered powers.[150] It was held that the Act was void. In another case, the court held that interference by government by taking coercive action in implementing a scheme beneficial to the public must be strictly sanctioned by law. Merely because the scheme is beneficial will not, by itself, justify any coercive action.[151]

In order to protect religious endowments from frittering away their resources on activities other than those envisaged by the objectives of the endowment, several States have undertaken to impose government regulation and supervision on the working of Hindu religious endowments. Apart from the problems which such regulation raises under Arts. 25 and 26,[152] problems of maintaining due procedure in exercise of administrative powers have been looked into by the courts under Art. 19(1)(f). Thus, in *Jagannath* v. *Orissa*[153] power given to the executive officer to settle a scheme for the due administration for the endowment without there being any provision to take recourse to a court at some stage has been held to be unreasonable. Similarly, a power given to an executive officer to take over administration of an endowment for five years without any provision to take recourse to courts to have the order set aside has been characterised as being too drastic and so bad.[154] Thus in the area of religious endowment, it might be correct to say that the courts have been careful to see that undue powers are not conferred on administrative officers and that they should function under judicial supervision.[155]

149 A.I.R. 1962 S.C. 4 ; reiterated in *R. S. Swamiji* v. *Mysore*, A.I.R. 1966 S.C. 1178.
150 *H. A. Sarkies* v. *D. M. Meerut*, A.I.R. 1966 All. 458.
151 *Kartar Singh* v. *Chief Engineer*, A.I.R. 1966 Punj. 362.
152 Jain, *Indian Constitutional Law* 474 (1962).
153 A.I.R. 1954 S.C. 400.
154 *Commr., H.R.E.* v. *Lakshmindra*, A.I.R. 1954 S.C. 282.
155 *Sadasib Prakash* v. *Orissa*, A.I.R. 1956 S.C. 432 ; *Moti Das* v. *Sahi*, A.I.R. 1959 S.C. 942 ; *Bihar v. Bhabapritananda*, A.I.R. 1959 S.C. 1073 ; Jain, *Indian Constitutional Law* 415-418 (1962).

VIII

Art. 14:

Through Arts. 31-A and 31-B, operation of Art. 14 has been eliminated from a large segment of property legislation. It is only in a very few cases that the courts find their way to adjudge land legislation under Art. 14.[156] One important trend noticeable in the cases is that the courts do not like classification of those who have been deprived of their property in such a way as to reduce the amount of compensation without very strong justification. Two such discriminations have been held bad. One to give a graduated scale of compensation reducing with the increasing quantum of property acquired. The ruling of the Patna High Court on this point in the *Kameshwar Singh* has been specifically approved by the Supreme Court in the *Kunhikonam* and *Krishnaswami cases.*[157]

Then in the *Vajravelu* case,[158] a distinction made between those whose land was acquired for housing purposes and those whose land was acquired for any other public purpose, and to pay the former less compensation than the latter was held to be discriminatory. Another interesting case in which Art. 14 was invoked to invalidate a land tax is *K. Moopil Nair* v. *Kerala.*[159]

IX

CONCLUDING REMARKS

The developments around property relations in India, and the action and interaction which have been produced between the legislative and judicial processes as a result thereof, may be regarded as forming a very fascinating chapter in the Indian Constitutional development during the last 17 years.

156 In *Swami Motor Transports* v. *Sri Sankaraswanigal Muth*, A.I.R. 1963 S.C. 864, differentiation between tenants of residential and non-residential building from the point of safeguarding them against eviction of tenants, held not unreasonable. In *Kunshikonam*, the differentiation made by the Kerala Act between Areca and papper plantations, on the one hand, and tea, coffee and rubber plantations, on the other, for the purpose of fixing a ceiling on the landholding, was also held bad as there was no appreciable difference in the economies of all these various types of plantations. The Act was also held discriminatory because it gave an artificial definition to 'family' which did not conform to any of the three kinds of families prevalent in the State. In the *Krishnaswami* case also, the Act was held bad because the artificial definition given to family caused discrimination.

157 *Supra* notes 106, 107, 108.

158 *Supra* note 103.

159 *Supra* note 148.

The three constitutional amendments noted earlier in this paper have always remained a subject of controversy. It is, however, difficult to say that these were completely unjustified and unwarranted. It would not have been possible for the government to implement the programme of land reforms had Art. 31 remained as it originally stood under the Constitution in 1950. But, even accepting the need for some modifications in Art. 31, one could still argue that the amendments went too far. Art. 31B read with IX schedule has however the least justification, for the State Acts have been made immune from judicial review without any critical esamination of the principles and policies underlying them. The technique of constitutional amendment should be to lay down broad principles and then leave the courts free to work out their implications. On this view, while the need for Art. 31A may be accepted, Art. 31B & IX schedule cannot be justified.

The three constitutional amendments, coupled with a broad judicial interpretation of Art. 31A(1)(*a*), and the import of the concept of social justice to give a wider connotation to the expression 'agrarian reform,' have given more than adequate powers to the legislatures to introduce and implement agrarian reform programme. The Supreme Court has specifically referred to social justice as the basis of agrarian reforms and emphasized that this aspect of the matter cannot be ignored.[160] But if, in spite of this, deficiencies exist in the formulation and implementation of policies of agrarian reform, and if the full programme of agricultural land-reform has not been executed yet, it is not because of any legal quibbles or constitutional hurdles or legal incapacity of the legislatures to do the right; the blame must be laid clearly and squarely at the dcors of the State Legislatures for failure to enact necessary legislation, and the Executive for lack of will and faulty implementation of the legislation already enacted.[161]

160 *Vasantlal Maganbhai Sanjanwala* v. *Bombay*, reiterated in *Swamiji* v. *Mysore, supra* note 149; *Vajravelu* and *Ranjit Singh's* cases, notes 102 and 103, *supra. In Sajjan Singh's case supra*, note 33, the Supreme Court referred to the preferred policy of agrarian reform adopted by the ruling party in order to ascertain the pith and substance of XVII Amendment of the Constitution and held that it was validly enacted as it did not affect Art. 226 and so did not need the consent of the States. But, see, *Golak Nath's case* A.I.R. 1967 S.C. 1643.

161 The implementation of the programme of agrarian reform has recently been reviewed by the Implementation Committee on Land Reforms of the National Development Council. The committee has pointed out that during the past 15 years, about 20 million tenants of former intermediaries now have a direct link with the State. Legislation has been enacted to deal with the problem of tenants at will in Ryotwari areas and sub-tenants in zamindari areas. Security of tenure, regulation of rents and bringing tanants into direct relationship with the State have been provided for in several States.

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In spite of the efforts made through constitutional amendments to exclude judicial review from the area of property legislation, and especially from the area of compensation, it has not been possible to achieve the objective completely. On the other hand, recent trends show that the courts are anxious to make their presence felt in this area more and more. Thus ,the *Kochunni* and other cases, by linking Art. 19(1)(f) with Art. 31, have achieved the significant result that a law depriving a person of his property has to satisfy the test of 'reasonableness'.[162] Another fascinating development in the sphere of judicial process is typified by such cases as *Vajravelu* and the *Metal Corporation* in which the Supreme Court has retrieved some lost ground on the question of Quantum of compensation.[163] It may however be emphasized that this judicial approach in no way creates the danger of jeopardising the legislation concerning agrarian reforms, for Art. 31A(1)(*a*), as interpreted by the courts, exempts such legislation from Arts. 14, 19 and 31. The new judicial approach becomes meaningful only in that limited area which is left uncovered by Arts. 31A and 31B, which means acquisition of indistrial undertakings, urban property etc. It may also be noted that the fact that the Supreme court has confined Art. 31A(1)(*a*) to matters of agrarian reforms only, is also a welcome development from the point of view of property rights, for those measures which have no relevance to agrarian reform may still be challenged under Arts. 14, 19 and 31.

At times, it is loosely stated that the Indian Constitution, as it stands at present, gives practically no protection to private property rights. But the trends reviewed in this paper would show that nothing is farther from the truth. The linking of Arts. 19(1)(f) with Art. 31, the purposive interpretation of Art. 31A(1)(*a*) i.e. on the one hand, restricting it to agrarian reforms, and, on the other, giving it a very broad interpretation in that

A large number of tenants have thus been given afixity of tenure and about three million tenants and share-croppers have acquired ownership of more than seven million acres. Ceilings on holdings have been imposed in all States and over two million acres of land has been declared surplus. But the committee also points out several shortcomings in many directions. There are deficiencies in the laws and delays in their implementation; substantial areas in some States are still cultivated through informal crop sharing arrangements; ejectment of tenants continues through the device of voluntary surrenders; fair rent provisions are not enforced effectively; ceilings have been defeated through transfers and partitions and not much land has been made availaable for distribution among the landless. These deficiencies affect improvement of agriculture and need to be looked into and vigorous steps need be taken to do away with the defects and anomalies pointed out.

162 *Supra* note 122.

163 *Supra* Part IV.

area—and the newly emerging judicial attitude in matters of compensation as revealed by the *Metal Corporations case*, would amply show that there is a good measure of constitutional protection still available to private property interests, at least in the spheres falling out of Arts. 31A and 31B, and this constitutes quite an important segment of private property in the country.

The practical application to factual situations of the principles regarding compensation evolved by the Supreme Court in the *Vajravelu* and *Metals Corporations* cases, however, is not going to be an easy matter. There is going to be a lot of confusion, and, consequently, one may look forward to a good deal of case-law on the point whether compensation provided for under an Act is 'illusory' or 'inadequate'. *Guir Nitay Tea Co.* v. *Assam*[164] forecasts the shape of difficulties bound to arise on this question. In this case, ten times the annual land revenue on fallow or uncultivated land as compensation for property acquired, was held to be 'absurd' by one judge; but the other two judges held that to question this would be to question the 'adequacy' of compensation which was not open to the courts under Art. 31(2). A search of law reports may perhaps reveal many such instances of cleavage of judicial opinion on the 'illusory-inadequate' dichotomy. At any rate, after the *Metal Corporation case*, one may forecast that many cases of this type are bound to arise in course of time.

A large number of land acquisition laws have been enacted by the various State Legislatures during the last several years. In every State, quite a few such laws have been enacted authorising the State to acquire land for various purposes. These laws differ in procedure and the scale of compensation to be given for land acquired depending upon the purposes of land acquisition. It would be rendering a yeoman service if all these various laws are analysed, and some rational and uniform norms developed on such matters as procedure and compensation, which might be adopted uniformly by the States in all cases. It would avoid a lot of confusion and litigation. In this connection, attention may also be paid to the anomalies which arise at present in the working of the Land Acquisition Act which still remains as one of the most important land acquisition laws. The judicial view propounded in the *Somawanti* case,[165] needs some close consideration. It is necessary to have the law amended suitably so that

164 A.I.R. 1966 Assam 58.

165 *Supra* note 77.

a proper balance may be maintained between the state power of eminent domain and the right of private property. The present position is not very satisfactory.

Looking into the future, one matter, it may be surmised, is going to assume more and more significance as time goes by. Agrarian reforms having been implemented, attention is now being directed to regulation and control of urban property. The socialist views are being projected in this area as well. An oft-repeated argument is that just as a ceiling has come to be imposed on holding of agricultural property, so also a ceiling should be imposed on the holding of urban property. This is advocated in the interest of reducing concentration of wealth. That involves state acquisition of urban property over and above the ceiling fixed. An academic constitutional question for consideration may be whether under the present constitutional dispensation the legislature would be in a position to reorder urban property relations, to the extent of acquiring it at less than the market price, as was done in the sphere of agricultural economy. Though a view has been expressed that Art. 31A(i)(*a*), as it now stands after the XVII Amendment, may cover urban property[166] as well, and thus immunize legislation dealing with that from an atttack under Arts. 14, 19 and 31, the position is not clear and the validity of this view is open to grave doubts. The word 'estate' in that provision, by its very nature, envisages agricultural property. The expression 'Ryotwari' tenure itself has a special connotation of its own. Moreover, the historical processes indicate that the various constitutional amendments have been undertaken to further agrarian reforms and this has been repeatedly emphasised by the Supreme Court. Thus legislation imposing a ceiling on urban property and acquiring the excess will fall out of the purview of Art. 31A(1)(*a*). In that case, the question of compensation becomes very important. The latest judicial view would make it very difficult, if not impossible, for the legislature to embark on a policy of acquiring urban property on the same basis as was done in the case of zamindaris. In such a situation, the question would arise whether it is worthwhile at all to seek to impose a ceiling on urban property if the excess property is to be acquired by the State on near-market price.

166 Errabi, "Constitutional Developments pertaining to property and the XVII Amendment", 6 *J.I.L.I.* 196, 211 (1964).

THE ROLE OF THE JUDICIARY AND THE BAR IN THE MODERN DEMOCRATIC STATE

A. KENNETH PYE*

Few issues are of such great importance to the peoples of the world as the role of the judiciary and the bar in the modern democratic state.

The few months which I have lived in India is too short a period to justify comments by me concerning how the judicial processes function in this great country. Consequently, my comments will be confined to a few general observations concerning the role of courts and the legal profession in any modern democratic state. My approach is motivated by a firm conviction that the basic nature and the problems which the democratic legal systems of the world have in common are at least as significant as the distinctive national characteristics which differentiate each. I shall leave it to the reader to exercise the lawyer's craft in rejecting the application of a generalization where the facts of the Indian experience render it inapposite.

It is not possible to explore all of the many facets of the role of the judiciary in the modern democratic state. A fruitful morning could be spent in discussing the role of the judiciary in declaring and clarifying the law. Modern law possesses many uncertainties and courts are needed to clarify them. Sometimes this may be accomplished simply by ascertaining the clear intention of the Legistature. Situations arise, however, when a court is faced with a problem which the legislative body never considered when it passed the statute, or where the intention of the legislature is not readily discernible. In such cases the courts must either refuse to decide the case or make new law[1].

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1 See Cardozo, *The Nature of the Judicial Process* (1921).

Moreover, all disputes which require adjudication cannot be answered by reference to statutes. Two inconsistent lines of authority may come into conflict in one case before a court. New problems of modern living bring novel questions before the courts for resolution. Principles of law decided in bygone days may lose their vitality when examined in the light of knowledge made available from the medical and social sciences or the thrusts of national aspirations.

Sometimes these problems are more appropriately the subject of legislative determination and the courts should defer to the law making bodies. In other cases, however, a court may be a more appropriate agency for declaring the law and society will profit from its assumption of the role. One of the great questions facing courts today is to decide when an issue should be left to the legislatures and when it should be decided by the judges.

The courts are making law whenever they act in such cases, whether in interpreting a statute when legislative intention is not really capable of being ascertained, applying the common law to a new type of problem which did not exist in previous centuries, or overturning or qualifying an ancient precedent. This should not trouble us because this is what courts have been doing since their inception, despite frequent protestations to the contrary by the judges. The challenge of insuring stability in the legal process while permitting the law to grow sufficiently to meet modern needs faces the judiciaries of today as it confronted their predecessors.[2]

Nevertheless, modern democratic states impose limitations upon their judiciaries in making law. Law making by courts cannot be arbitrary or be dictated by vested economic interests. The judge in the modern democratic state must carefully consider the new purposes which law must serve in such societies. Decision-making cannot ignore national purposes. Notions of human freedom, equality of opportunity, national development and the fair distribution of existing national resources to meet current human needs might have been ignored by the courts of the past, but the accomplishment of these objectives are among the most important purposes of law today.

A judge who makes law in a modern democratic society must ask himself whether his decision advances the objectives of the new social order or whether it is inconsistent with them. Decisions which ignore the purposes which law is called upon to play in the modern democracies will often be overturned by the legislature and may bring the judiciary into disrepute.

2 The thesis of the preceding four paragraphs is developed in detail in Hart and Sacks, *The Legal Process* (Tentative Edition, 1958).

The judiciary has a fundamental role in the modern democratic state in providing protection to the citizen from the exercise of excessive power by the state itself. Over-reaching by administrators, who exceed the authority delegated to them by legislatures, is one of the hallmarks of the complex societies in which we live. There seems to be a tendency in all bureaucrats to regard a citizen who disagrees with a proposed course of action as an obstructionist. Even legislatures exceed their constitutional powers and on occasion infringe upon the fundamental rights of the citizenry.[3] In some modern democratic societies, such as India and the United States, the judiciary is entrusted with the obligation of protecting the individual citizen. The United States and India also place upon their judiciaries the duty of "umpiring" the conflicts which inevitably will arise out of federalism,[4] a difficult task in any society, but one of particular significance in a centrally planned economy.

These functions give to the courts the role of judicial review of the actions of democratically elected governments. In a sense, the concept of judicial review is an anomaly in a democracy. The initial assertion of that power has frequently resulted in attacks on the courts.[5] One of the most astute American scholars, John P. Roche, has referred to judicial review as "essentially...a Platonic graft on the democratic process—a group of wise men insulated from the people having the task of injecting truth serum into the body politic, of acting as an institutional chaperone to insure that the sovereign populace and its elected representatives do not act unwisely."[6] We all know the dangers which can exist if judges seek to advance their own concepts of sound social and economic policy through the guise of judicial review. But we also know that no other agency has been able to provide as effective protection to citizens victimized by arbitrary governmental action. Sometimes it is wise to remember that one of the reasons why people choose

3 It is interesting for the foreign observer to note how few of the over 1,000 Acts of the Parliament enacted since independence have been declared to violate the Constitution. See Markose, *The First Fifteen Years of the Indian Constitution* in Aiyar and Srinivasan, *Studies in Indian Democracy* 109-110 (1965).

4 See Freund, *The Supreme Court of the United States* 92-116 (1961).

5 It may be remembered that in the first real assertion of judicial power by the Supreme Court of the United States, when it held that states were subject to suit by citizens of other states in *Chisholm* v. *Georgia* ; 2 Dallas 419 (1793), resulted in the Eleventh Amendment to the Constitution of the United States. Compare *Ramesh Thappar* v. *State of Madras*, A.I.R. 1950 S.C. 124 and the First Amendment to The Constitution of India.

6 Roche, *Courts and Rights* 104 (1961).

a democratic form of government is the belief that it will assure them a high degree of human liberty. However, history has demonstrated that the mere choice of a democratic form of government does not necessarily guarantee respect for individual freedom. Government in a democracy may be intolerant of the rights of a minority, or even of an inarticulate majority. It is for this reason that fundamental rights are enumerated in written constitutions. These may quickly be relegated to the status of social myths in times of stress in the absence of judicial review. Judge Charles E. Wyzanski Jr., has reminded us that the real reason why people have chosen to adhere to the institution of judicial review is because they would enjoy a larger measure of democracy within its framework than they would without it.[7] This popular delegation to the judiciary is as great a trust as the people can entrust to their judges, and poses the great challenge to the judiciary in the modern democracies.

The judiciary has an educational role to play as well. In many modern democratic societies the constitutions have been written by an educated elite. They express views about secularism and equality which are sometimes more advanced than the beliefs of the average citizen who is the product of an environment which has changed little over the years and whose daily quest for a livelihood has precluded much speculation concerning the ideal society. The judiciary must strive to elevate the intellectual horizons of the people. During the last two decades the courts in the United States have played a major educational role in matters of race relations,[8] the procedures which a democratic society should follow in prosecutions for crime,[9] and in church-state relations.[10] The Supreme Court of India has played a similar role in articulating the concept of social justice.[11]

The judiciary must also educate the public concerning the limitations of the judicial process. Judges rarely have the range of alternatives available to administrative bodies or legislatures in settling controversies. Each decision is limited in its effects. Courts decide the disputes before them,

7 Wyzanski, *Introduction to Learned Hand, The Bill of Rights* XIV (1963).

8 See, e.g., *Brown* v. *Board of Education of Topelca*, 347 U.S. 483 (1954).

9 *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Miranda* v. *Arizona*, 484 U.S. 436 (1966).

10 *Engle* v. *Vitale*, 370 U.S. 421 (1962).

11 See e.g. *Crown Alumunium Works* v. *Their Workmen*, A.I.R. 1958 S.C. 923; *State of Mysore* v. *Workers of Goldmines*, A.I.R. 1958 S.C. 923; *J. K. Cotton Spinning & Weaving Mills Co.* v. *L.A. Tribunal of India*, A.I.R. 1955 S.C. 33. See also Tiwari, *The Concept and Evolution of Welfare in India*, paper submitted to Seminar on *The Indian Constitution at Work : A Study in Trends* (1966).

not broad programs of public policy. Often too much is expected of court decisions. The inherent limitations of judicial decision-making must be understood if the people are to appreciate how their system of government works.[12] As Professor Denis W. Brogan of Cambridge University has noted, the task of the law (and hence the judiciary) is "to remind people, not so much of the wisdom of their ancestors, not so much to go back to legal procedures invented in the Middle Ages or later, as to remind them that not at this moment are all questions to be decided, that we do not know the whole terms of the problem and still less the whole terms of its solution."[13]

These matters all constitute significant aspects of the role of the judiciary. However, my principal concern this morning is with a different facet, the basic function of the judiciary—the settling of disputes by adjudication.

Courts were created for this purpose before states were modern or democratic, but the original need for an institution which could resolve fairly disputes among citizens and between citizens and their state is as great today as it was a thousand years ago.

Obviously, the judiciary does not have the role of solving all the disputes which arise in society. Most disputes are settled by compromises without the necessity of utilizing any forum. Voluntary associations such as families, churches, and private clubs solve other kinds of controversies. Some are resolved by arbitration. In addition, all modern states have created specialized tribunals, other than courts, such as labor or tax tribunals, to decide special kinds of cases. There are some kinds of disputes which call for an expression of the preference of the people rather than the application of a pre-existing standard or natural reason, and these are usually entrusted to legislative bodies ranging from town meetings and panchayats to Parliaments and Congresses.[14]

Nevertheless, the courts remain the cornerstone of society's system for determining the rights and duties of persons and organisations engaged in controversies. Not only do the courts provide the machinery for the settlement of many disputes which defy private solution; they do so in a manner which usually results in community acceptance of the decisions reached. The availability of the courts also serves to encourage the recalcitrant disputant to utilize less formal, slow, and expensive methods of

12 Hart and Sacks, *The Legal Process* 139 (Tentative Edition, 1958).

13 Brogan, "Law and Change In A Democratic Society," 1956 *U. of Ill. Law Forum* 242, reprinted in Henson, *Landmarks of Law* 83, 87 (1960).

14 Professors Hart and Sacks refer to this obvious truth as "The Great Pyramid of Legal Order" in *op. cit.* note 2, at 312.

settlements. In areas generally entrusted to administrative tribunals, the omnipresence of the judicial machinery serves to encourage fairness in decision, making through the aegis of the limited powers of judicial review. Even legislatures initiate dynamic programs of change against the backdrop of the existing social order, the fundamental principles and policies of which were often proclaimed in court decisions of the past.[15]

Few things are more important to a citizen in any society than an appreciation that the state provides him a forum in which any dispute in which he is involved may be resolved promptly by a procedure which insures that the facts of his controversy will be determined impartially, that appropriate principles of law will be applied correctly, and the reasons for the decision will be made understandable to him. In a democratic society where each citizen is equal in the eyes of the law and where the state itself is beneath the law, the functioning of such a system of adjudication acquires special significance. The democratic state imposes new responsibilities upon the judiciary to make equal justice under law a reality instead of a slogan. The role of the judiciary can no longer be limited to deciding the controversies of the few whose cases come before the courts. It now has the obligation of taking such action as is within its constitutional power to make the processes of justice available to all.

Inevitably this will require[16] consideration of a system for providing legal aid to the indigent. This is of particular importance in societies which have chosen the adversary system to determine the truth in judicial proceedings.[17] A lawyer is less important in a system where the court determines the validity of rival contentions by its own investigations, or under a procedure in which a judge, aided by a pre-trial study of a dossier containing witness statements, police reports, and a lower magistrate's findings, is able to develop the facts through personal interrogation of the witnesses before the court. The presence of a lawyer becomes crucial in a system which settles disputes in proceedings in which each party has an opportunity to develop his own evidence and to contradict or question the evidence of his adversary before an impartial finder of facts, who determines the controversy solely on the basis of the evidence introduced in the courtroom. Such a system simply does not work well when one side is unrepresented. A defendant without a lawyer either defaults in a civil case, pleads guilty in a criminal case, or attempts in an amateurish manner to present a case which could be tried competently only by an experienced lawyer. A sympathetic

15 *Id.* at 2-9.

16 See Fourteenth Report of The Law Commission of India 477-486, 587-624 (1958).

17 See Pye, "Recent Developments in Legal Aid in America," *9 J.I.L.I.* (1967).

judge may be placed in the dilemma where he may be required to depart from his role as a judge and assume the role of the advocate if justice is to be done. Even then he will rarely have knowledge of the facts which a pleader should have before he enters a courtroom to represent a client. The indigent plaintiff may be unable even to initiate a proceeding to seek redress for an infringement of his rights. Legal aid in a democratic society is not a matter of charity, it is a vital requirement of justice. Without it, many of the fundamental rights set forth in the constitutions are illusory.

It is not enough for a constitution to guarantee the right to counsel. The right to counsel must be implemented if it is to be meaningful. In most modern democracies the law, lawyers, and the legal process are the domain only of the rich. The poor have contact with the law too often at the end of a policeman's club, before a judge while waiting to be sentenced, as a tenant about to be evicted, as a laborer who has been fired, as a debtor whose creditor has demanded and rceived exorbitant interest, or as a supplicant whose request for assistance has been denied by government administrators.

The poor in the modern democratic state must be given a stake in the legal process. They must come to see the law as their protection against the overzealous policemen, the usurious creditor, the unscrupulous landlord, and the arbitrary government official. The poor must feel that they have received a fair trial when they appear before the courts. The legal system must mean the same thing to the poor as it means to the rich. The best way we have yet devised is to provide a poor man with a lawyer when he needs one. Providing counsel to the poor not only helps them ; all of society is helped by the greater stability achieved through providing a legal outlet for their real and supposed grievances.

The judiciary has the principal obligation for promoting the cause of legal aid. It is the custodian of the legal process. Legislative action and appropriations may be needed for a sound system but the poor seldom have an effective lobby, nor do they fully appreciate what real access to the judicial process means in terms of liberty and the security of the individual. The judges, supported by the bar, must provide the leadership. Furthermore, these are steps which can be taken without the enactment of a comprehensive program for legal aid. Would not the interests of justice be better served by the appointment of counsel by the courts in some non-capital criminal cases and unusual civil cases ?[18] Is a requirement that bail be posted by a penniless accused the only method of assuring him attendance at trial or are

18 Cf. *State of M.P.* v. *Shobha Ram*, A.I.R. 1966 S.C. 1910.

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there other alternatives which can accomplish the same objective ? Have we really ever considered what an indigent must think of a legal system which locks him up before trial when he is presumed to be innocent because he is unable to post bail, and then releases him on probation after his guilt has been proved beyond a reasonable doubt ? Are there expenses in the judicial system other than attorney's fees and bail which could be waived upon proof that the litigant is too poor to pay them ? A judiciary has not performed its role in a modern democratic society unless it has done all within its power to insure that every citizen has an opportunity to have his day in court.

Justice is not only denied because of the expense of adjudication. It may also be denied because of excessive delay in its processes or needless technicalities in its procedures. Careful study of the adjective law is necessary to insure that the contribution of particular procedures to the ascertainment of the truth is not counter-balanced by their tendency to frustrate determinations upon the substantive merits of the issues before the courts. The factors which cause docket delay must be examined to determine whether the business of the courts can be handled more expeditiously.[19]

A judiciary in the modern democratic state must ask itself whether it has done as much as it can to speed up or limit the pre-trial proceedings of cases, to arrange judicial calendars to minimize the waste of time in reaching trial, to limit procedural objections to matters of basic prejudice, and to shorten the time between the arguments and final decision.[20] It must be certain that it is devoting as much attention to rights as to writs.[21] It must concern itself with judicial administration, as well as adjudication.

One of the problems is that the complexities of modern society, particularly the great increase in the scope of governmental activity, have produced an increase in the volume of litigation which has not been accompanied by a proportionate increase in the number of judges. Our judges have more than enough to do in deciding the cases which come before them. We must consider whether the judiciary should be provided with more assistance in the important task of judicial administration. Would the administration of the judicial system of a state be improved if it had an administrative office headed by a lawyer, who was not a judge, who could devote his complete time to maintaining adequate statistics of the activities and workloads of

19 See Fourteenth Report of the Law Commission of India.

20 See Vanderbilt, "The Five Functions of the Lawyer," 40 *A.B.A.J.* 31 (1954).

21 I am not unmindful of Maitland's observation that the history of freedom may be found in writs, not rights.

the lower courts and assisting the judges in preparing studies and making recommendations for improvements in the judicial system ? Would it be helpful to hold yearly judicial conferences of appellate judges, senior trial judges, and leaders of the bar and legal education to discuss the activities of the court system and make proposals for change ? Should the law schools of the state have the obligation of making scholars available to perform special studies upon request by the courts ? These and other alternatives may be profitably explored.

The task of the judiciary is not limited to providing prompt and inexpensive adjudication. It must also concern itself with the quality of justice which is being administered. This means independence of the judiciary in fact as well as theory. It also means improved methods of judicial selection, provision for adequate salaries and reasonable retirement benefits, and arrangements for an adequate well paid clerical staff. The problems of achieving these objectives exist in all modern democratic societies, but, despite inadequacies everywhere, most states may take pride in a judiciary of high quality at the top echelons. The most glaring weaknesses in quality of justice in the modern democracies is found at the bottom of the judicial hierarchy. These are the judges who provide the average citizen with his only contact with the judicial system. Few citizens ever have a case before the Supreme Court of a nation. Millions depend upon local lower court judges for the administration of justice. Their attitude toward the judiciary, the legal process, and to government in general will be affected by the quality of justice which they encounter in these lower courts.

Yet legal education provides no curriculum for training in judicial methods and techniques. Lower court judges frequently come to the bench at an early age without substantial experience in practice. Ascension to the bench does not automatically enlarge a judge's competence. The trial judge tends to work in relative isolation. His opportunity to learn from his colleagues is often minimal[22].

In most modern democratic societies there is an urgent need for educational programs designed to assist in the transformation of a law trained citizen into an effective jurist.[23] Fortunately, there seems to be a growing appreciation throughout the free world that the assessment of credibility of

22 These observations are made in The Institute of Judicial Administration (New York University), *Judicial Education in the United States : A Survey* 2 - 3 (1965). They seem equally applicable to other countries.

23 Id. at 14-365. See Fourteenth Annual Report of Law Commission of India.

witnesses; the application of the rules of evidence; the proper conduct of a trial; and the drafting of judgments are skills which can and should be taught to the men who will judge cases involving the life, liberty and property of their fellow citizens. Judicial training is an area where partnership between the law schools and the judiciary can make valuable contributions to the rule of law.

The judiciary in a modern democratic state must also concern itself with what Sybill Bedford has called "the atmosphere of justice."[24] There may have been a time when a judge could assume the smug complacency of the Lord Chancellor in *Iolanthe*.[25] If it ever was true, such times are gone forever. The judiciary of a modern democratic state are the servants of the people and must treat the persons who come before them with the courtesy due to a fellow citizen. I do not suggest that the judiciary is entitled to less respect or that a judge should not exercise firm control over the proceedings before him. I do argue that the attitude and demeanor of some royal judges who owed allegiance only to the King is inappropriate in a democratic society. The proper function of the judicial process requires public acceptance and appreciation of the role of judges. This will not develop in a democratic society unless the people view their judges as fellow democrats. A judge can do much to persuade the average citizen that equal justice under the law really means something if the average citizen is treated in the same manner as the official and if his counsel is afforded the same prerogatives as a government advocate.

I appreciate that programs such as legal aid, judicial training, and improvement in judicial administration cost money. Ultimately, legislatures must provide the funds. Until they do, the judiciaries must experiment with make-shift alternatives and constantly remind their fellow citizens of what the distinguished American Judge, Learned Hand, has called the great commandment, "Thou shalt not ration Justice."[26]

The bar, also, has valuable contributions to make in the modern democratic state. The late Chief Justice Arthur V. Vanderbilt of the New Jersey Supreme Court described the functions of the bar as counselling,

24 Bedford, *The Faces of Justice* (1961).

25 In Gilbert and Sullwan, *Iolanthe*, the Lord Chancellor sings:

> The Law is the true embodiment of everything that's excellent. It has no kind of fault or flaw. And I, my Lords, embody the Law.

quoted in Mc Williams, *The Law, a Dynamic Profession*, 41 *A. B. A. J.* 18 (1955).

26 Judge Hand's admonition provided the title for the recent need for legal assistance, Trebach, *The Rationing of Justice* (1964).

advocacy, improving the profession (including the courts and the law itself), leadership in moulding public opinion, and the unselfish holding of public office.[27]

These functions imply that the bar has a professional responsibility above the duty of competence and fidelity owed by lawyers to their clients. This responsibility is not a matter of charity. It inheres in the nature of the profession and the obligation which a democracy expects it to assume.

In a democracy the bar cannot ignore the needs of the public or sacrifice its welfare for parochial interests. The American experience provides a good example. Forty years after the American Constitution, the astute Frenchman, de Toqueville concluded that the bench and bar composed the "American Aristocracy."[28] Thirty years later the status of the profession had declined to such a degree that laymen were permitted to practice law in many American States.[29] The last century has witnessed a struggle by the bar to regain a prestige which was lost with the advent of Jacksonian democracy. It has largely succeeded in doing so because it gradually came to appreciate that a democratic society will not in the long run permit any profession to exercise monopoly power while restricting its services for private profit at public expense.[30]

The bar can serve the public in many ways. One great contribution of the bar which we tend to ignore is what Dean Cavers of Harvard Law School has called "lawyer-made law."[31] For generations skillful lawyers have created sophisticated arrangements to regulate business, governmental and personal affairs, most of which never involve litigation.[32] In the past lawyers have produced contracts, deeds, mortgages, trusts and corporate charters.[33] They must now develop new instruments to deal with problems such as attracting capital, encouraging export, promoting joint ventures

27 Vanderbilt, *The Five Functions of a Lawyer*, 40 *A.B.A.J.* 31 (1954).

28 See Stone, *Legal Education and Public Responsibility* (1959); *Report of the Joint Conference on Professional Responsibility*, of the Association of American Law Schools and the American Bar Association 44 *A.B.A.J.* 1159 (1958). Countryman, "The Scope of the Lawyer's Professional Responsibility," 26 *O.S.L.J.* 66 (1965).

29 de Toqueville, 2 *Democracy in America* 184-85 (2nd. ed. 1836) quoted in Griswold, *Law and Lawyers in the United States* (1964).

30 Griswold, *op. cit.* note 29, at 15-18.

31 See Modern, "Equal Access to Justice: The Challenge and the Opportunity," 19 *Wash & Lee L. Rev.* 153, 154, (1962). Mr. Oreson S. Marden is now President of the American Bar Association.

32 Cavers, "Legal Education and Lawyer Made Law," 52 *W. Va. L. Rev.* 177 (1952).

33 *Ibid.*

between the private and public sectors, facilitating urban renewal, distributing water resources, and proceeding for agricultural credit. They are the problems which face modern states attempting to develop their economies while maintaining a stable democracy. The lawyers of this and the next generation must show ingenuity in meeting the challenges of the social and economic revolutions which are hallmarks of our age. Some of these tasks may be performed for private clients others for governmental agencies. In either case the fashioning of the major institutions upon which the future of the modern democracies rests will require the utmost in constructive skill on the part of the legal profession.

Few lawyers may be engaged in such ventures. All have the capacity of acting as the "intelligent, unselfish leaders of public opinion."[34] Their efforts are needed to provide the support the judiciary requires in order to obtain reforms. Many can assist more directly in serving on committees to study and propose change in existing laws and procedures. Such voluntary activity may be of great assistance to legislatures which often suffer from inadequate staffs.

The legal profession has the direct responsibility of making legal services available to all. This involves a willingness to accept appointments to represent indigents in litigation and the establishment of procedures to provide legal consultation at low cost for citizens who while not destitute, have insufficient funds, to pay the kind of fees normally required by competent lawyers.[35] Such a device is the so-called Lawyer's Referral Service now functioning in most American cities. The local bar association acts as a clearing house to make the services of qualified attorneys available at reasonable cost to people who need such services but who have been deterred from seeking legal advice because of the expense. A member of the public may come to the association's offices and speak with its secretary, a lawyer, determines without charge whether a real legal problem is involved. If there is such a problem, the individual is referred to a qualified lawyer who has agreed to participate in the program. The secretary maintains a list and refers the cases in rotation. A participating lawyer agrees to confer with the client once for a minimum fee less than his usual compen-

34 Vanderbilt, *op. cit.* note 27.

35 Professor Cheatham has recently reminded the American Bar that urbanization and inflation require that the bar concern itself with the availability of legal services to the middle class, as well as the poor. Cheatham, "Availability of Legal Services. The Responsibility of the Individual Lawyer and of the Organized Bar," 12 *U.C.L.A.L. Rev.* 438 (1965); Cheatham, "*A Lawyer when Needed : Legal Services for the Middle Classes,*" 63 *Colum. L. Rev.* 973 (1963).

sation. If any further legal work is necessary, an additional fee in an amount agreed to between the lawyer and the client may be charged. This kind of program may not be workable everywhere, but popular discontent with the profession and distrust of the legal process will inevitably result unless some way to provide consultative legal services can be found.

The bar may contribute to the improvement of judicial administration by self-discipline.[36] Lawyers must engage in the kind of counselling which discourages litigation if a reasonable compromise is possible. Not every case involves a violation of fundamental rights. Clients must be told that their cases lack merit when this is the fact, even though larger fees could be obtained by representing them during the brief interval before a petition is dismissed. A lawyer helps to solve the problem of docket congestion every time he dissuades a client from filing a frivolous suit or compromises a genuine controversy at an early stage before it has consumed the time of the courts.

Lawyers must also proceed expeditiously in those cases which require litigation. Many of the delays of justice are caused by counsel. We must by our conduct refute the charge that "procrastination is our occupational disease."[37]

The bar must always be prepared to defend the most unpopular cause with courage and vigor. Effective representation of the unpopular is a bulwark of human liberty.[38] The task is not easy. One case can ruin a lawyer's reputation, because his former clients identify him with his new client. At the same time it is vitally important that the bar think through the problem of the conflicts which sometimes arise between the obligation which a lawyer owes to his client and his responsibilities to the court and the state. Is a lawyer privileged to fail to reveal to the court authorities facts which are contrary to the position he is arguing ?[39] May he vigorously seek recovery for a plaintiff whom he knows is not entitled to judgment ? May he neglect to reveal evidence in his possession which would

36 See The Bar Council of India, Resolution No. 51/1965, 10-11 April 1965 *Standard of Professional Conduct and* Exequette.

37 Mc Williams, *op. cit.* note 25.

38 "One of the highest services the lawyer can render to Society is to appear in court on behalf of clients whose causes are in disfavour with the general public." *Report of the Joint Conference on Professional Responsibility, of the Association of American Law Schools and the American Bar Association,* 44 *A.B.A.J.* 1159 (1958).

39 Cf. Opinions of American Bar Association No. 146 (1935) and No. 280 (1949). *Cf.* Mac Millan, *The Ethics of Advocacy, in Jurisprudence in Action* 303, 325 (1953).

permit his adversary to prevail if its existence were known ?[40] May he call a witness he thinks will lie or attempt to discredit a witness he knows has spoken the truth ?[41] Does the lawyer for the state have obligations greater even than those of the private practitioner ?[42] These problems have always posed difficulties to the legal profession, but they require solutions in the modern democratic state.[43] In the long run, people will not tolerate conduct which they consider to be dishonest. The bar, like the judiciary, requires public confidence in order to function effectively.[44] Lawyers must be regarded as ministers of justice, not the manipulators of the legal process.[45] This requires that the bar maintain standards higher than the people expect of it. It also requires that the legal profession police its own ranks and exercise sanctions against those who fall short of its professed standards.

The bar must also devote its efforts to the maintenance of the proper standards of legal education and for admission to the practice.[46] Jointly with the law schools it has the obligation to see that the unfit in either knowledge or character, are not admitted to practice. There is no "inalienable right" of the inadequately trained to practice law. The bar in a modern democratic society must ask itself whether the next generation of lawyers and judges will be as well prepared to perform the functions required of it by the people as are the incumbents.

Finally, members of the legal profession must be prepared "not necessarily to seek public office, but to answer the call for public service when it comes."[47] No greater contribution can be made by a profession to the modern democratic state than to serve as the training ground for its leaders.

40 Cf. Drinker, *Legal Ethics* 76 (1953).

41 Freedman, 64 *Mich. L.R.* (1966).

42 See Schwartz, *Cases and Materials on Professional Responsibility and the Administration of Criminal Justice* (1961).

43 Several of the foregoing and other similar problems are posed in Matthews, *Problems Illustrative of the Responsibilities of members of the Legal Profession* (1966).

44 Maxwell, "The Public View of the Legal Profession," 43 *A.B.A.J.* 785 (1957); Seltzer, "The Bar and the Public Trust," 37 *A.B.A.J.* 743 (1951).

45 See Von Mehren, "Law and Legal Education in India : Some Observations," 78 *Harv. L. Rev.* 1180, 1184 (1965).

46 Chief Justice Charles Evans Hughes of the Supreme Court of the United States once stated : "The first aid to the development of expertness in the administration of justice is in maintaining proper standards of legal education and for admission to the Bar." Hughes, "*Liberty and Law*," 11 *A.B.A.J.* 563 (1925). Cf. The Bar Council of India Resolution no. 2/1966, 8 March 1966, Standards of Legal Education and Recognition of Degrees in Law for Admission as Advocate.

47 Vanderbilt, *op. cit. supra* note 20.

Legal education, also, has a vital role to play in the contributions which the legal profession can make in the modern democratic state. Obviously the law schools have the principal responsibility for training the future members of the legal profession. In performing this role they have both the opportunity and duty to teach lawyers not only what they need to know to practice law today, but also to impart an understanding of the legal process and the social and economic forces at work in the country in order that students will be able to adjust to the changes which will take place during the next half century.[48]

Hopefully, some will receive the kind of education which will permit them to become the architects of some of these changes.

But the contribution of a law school does not have to end with the instruction of youth. It should develop into a research center for the study of the legal problems facing the modern democratic state.[49] Law school professors have traditionally written books and articles, usually working as solitary scholars in libraries. Frequently their work has been too esoteric to be translatable into practical contributions to the nation's needs. A different type of research is needed. We need research directed at immediate specific problems facing the nation. Law school professors should be available at the request of the courts or the legislatures to study problems of judicial administration or proposed legislation. Their studies must be performed not only in the library but in the field. They must study the legal process as it operates, not only as it appears in the statutes, cases, and texts. Their studies must often be performed in conjunction with other social scientists whose disciplines provide different insights into the problem being studied. Legal research in the law school must cease to be a desultory avocation and begin to relate directly to the crucial problems of maintaining a stable democracy, developing a sound economy, and achieving world peace.

The law schools can also serve as experimental laboratories to test demonstration projects aimed at reform. A graduate legal internship program may provide an alternative to an apprenticeship system in providing the practical training needed by those entering the practice of law.[50] A legal aid society begun in a law school may reveal the dimensions of the problem, the effectiveness of representation, its effects on community

48 See, Anandjee, Dean's Report, 1. Banaras *L.J.* 1 (1965).

49 Griswold, *Educating Lawyers for a Changing World*, 37 *A.B.A.J.* 805 (1951).

50 Pye, "The Legal Internship Program at Georgetown," 49 *A.B.A.J.* 554 (1963).

attitudes and the probable costs of a broader based program.[51] A less ambitious program might provide law school student to assist members of the bar who have been appointed to represent indigents.[52] A law school might develop a fact-finding service which could advise a local magistrate whether there is any reasonable danger that a defendant might flee if released without bail before trial.[53] A law school, jointly with the judiciary, might develop a program for training young lawyers who are about to become judges.[54] A law school could provide refresher courses to government officials charged with the responsibility of applying the law in their daily tasks.[55] It could also undertake to develop programs of continuing education for the bar. Such programs are not cheap, but the results can be worth the expense. They are only examples of the many possible ways in which legal education could engage in cooperative ventures with the bar and bench in fulfilling their joint obligations.

The role required of the judiciary and the bar in the modern democratic state is demanding. However, the rewards are rich. When we become discouraged it may be appropriate to recall how a great American jurist, Chief Justice Charles Evans Hughes characterised our role :

> We call ourselves the ministers of justice, but we are reminded that the justice to be administered is justice according to law—the expression of the democratic will—and our still nobler privilege is that of prophets and guides of society, versed in the long history of human progress, who may not forget so easily the standards which must be maintained if justice is not to be an illusion and democracy a mockery of our highest hopes.[56]

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51 The Law College of Banaras Hindu University is considering such a program. Anandjee, *op. cit.* note 98, at 23.

52 Such a program is under consideration at the Law College of Delhi University in conjunction with an Indian Law Institute pilot project.

53 See. Mc Carthy and Wahl, "The District of Columbia Bail Project : An Illustration of Experimentation and a Brief for Change," 53 *Geo. L.J.* 675 (1965).

54 The Law College of Banaras Hindu University is considering such a project.

55 Professor A. T. Markose of the University of Kerala (Ernaculam) has proposed such a program.

56 Hughes, *op. cit.* note 46.

FRAMEWORK OF PEACE : EXPERIENCES & ALTERNATIVES

I. N. TEWARY*

One of the most distinctive features of the United Nations Charter and a development of far-reaching significance in the history of international organization is the immense power conferred on the Security Council under Article 24 and the entire Chapter VII of the Charter. The Security Council has been given the power to determine threat to the peace, breach of the peace or act of aggression and to take necessary enforcement action. This power seems to be almost absolute, at least theoretically, and is further reinforced by Articles 11 and 12 of the Charter. In practice, however, except in the Korean case, and that too in the absence of the Soviet Union from the Council, and partly in the case of the Congo, hardly any effective use has been made of these provisions. They have been more or less in desuetude.[1] On the other hand, the power has shifted to the General Assembly which has fully exploited its potentialities for keeping peace, in spite of the fact that the Assembly was originally conceived as merely hortatory organ. The use of this power has resulted in the containment of the use of force by the permanent members or States supported by them in settling international questions. The exercise of this power, though done within the framework of the method laid down in Chapter VI, took into account the urgency implied in Chapter VII. The frequency of the use of this power by the General Assembly,the adoption of the "Uniting for Peace" Resolution (1950) and the Advisory Opinion of the International Court of Justice (1962) in the "Certain Expenses Cases" are important milestones in the way of progressive interpretation of its power and also manifestation of its acceptance by the international community.[2] That nothing short of a fully representative body can really assume responsibilities for maintaining peace and security was demonstrated by the practice of the League Assembly and was implied in the setting up of the abortive Interim Committee.

The Charter has accorded unique privileges to the permanent members who are so ranked by Article 23. Article 24, conditioned by the principle of unanimity among the permanent members, makes them guardians

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1 Marc Lee, *The United Nations and World Politics* 231. (London, 1965). Specially see the section : "Must the Security Council Remain Moribund ?"

2 See I.C.J. Pleadings, *Oral Arguments and Documents* (1962), p. 321.

of the world peace. Article 27 (3) which contains the principle of unanimity among permanent members becomes the essence of operation of the United Nations in the maintenance of international peace and security. According to Article 106, the permanent members are required, until the Security Council begins to act, to consult one another with a view to take such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security. But in practice, they have failed in discharging this responsibility. A study of the five cases of Korea, Suez, Hungary, Lebanon and the Congo reveal that, instead of discharging the solemn responsibility entrusted to them by the Charter,the permanent members or states supported by them have been mainly responsible for the breaches of the peace and threats to the peace of the world. The privileges conferred upon these members, on the other hand, have prevented any enforcement action from being taken against them. Whatever action has been taken by the General Assembly, it has been taken against the wishes of one or more permanent members.[3] This leads to the inescapable conclusion that the Assembly, with the help of the small States, particularly the new States of Asia and Africa, has exercised significant influence in the maintenance of peace by responsibility and fully exploiting the principle of sovereign equality of States as laid down in Article 2(1), and the majority voting principle of Article 18 of the Charter.

The Security Council commands the power to employ punitive, suppressive and repressive measures for maintaining peace and security. But such measures have hardly been used. On the other hand, the Assembly, by a judicious use of the methods of conciliation and collective pressure, has proved effective in most of the cases.[4] In all of the above cases, the Assembly fully exploited the provisions of the Charter making it a representative body and providing for conciliation under Articles 33 and 35. The Security Council has the power to impose economic, diplomatic and military sanctions under Articles 41, 42 and 43. Such provisions have remained largely unutilised. As against this, the Assembly created and made use of its own pattern of sanctions—diplomatic, economic and para-military,

3 Krzysztof Skubiszewski, "The General Assembly of the United Nations and its Power to Influence National Action," *Proceedings of the American Society of International Law* 153-62 (1964).

4 Leo Gross, "Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice" *International Organization* 1-35 (1963); R. Khan, "Peace-Keeping Powers of the UN General Assembly: Advisory Opinion of the ICJ," *6 International Studies* 317 (New Delhi, January 1965).

even though it is true that some of these measures have not proved effective in a few cases because of various reasons.[5]

The Council has the authority to utilise the Military Staff Committee provided in Chapter VII of the Charter for the purpose of conducting operations against an aggressor. This power has also remained unused. The Assembly, on the other hand, under Article 22, has created four types of peace keeping machinery, i.e. investigatory, conciliatory, advisory and executive.

As noted earlier, the whole super-structure of the Organization is built on the basic principle of unanimity among the permanent members. However, in practice this principle has resulted in compromises for inaction. On the other hand, the Assembly has been able to develop its conditional power in this field—conditional upon the Security Council's failure to act and upon the willingness of the victim state to permit peace-keeping operation. It has developed what has been called by the world Court a special power, which has proved in effect to be a sanction against the lack of unanimity among the permanent members of the Organization.

Another significient trend brought out in the case study is the interchanging competences of the Security Council, the General Assembly and the Secretary-General. The Secretary-General at times has been obliged to face a situation of legal vacuum where the policy-formulating organs have been unable to act. In these situations, the Secretary-General with his technique of "preventive diplomacy" has tried to play his role well in maintaining peace. But all the same, whenever the possibilities of "preventive diplomacy" were exhausted which happened a number of times, he had to go to the Security Council or the Assembly for fresh mandate.

Though the Assembly's role in the maintenance of peace has been based on the progressive interpretation of the Charter, the ultimate sanction behind the power of the Assembly has been the world opinion. This was mobilized quite unmistakably in all the cases whenever there was a breach of the peace in the international community. It was expressed through the representatives of governments on the floor of the Assembly, declarations in national legislatures, public leaders in their communications to the UN, or to the parties concerned.[6]

The operation of the two power-blocks in the Assembly has sometimes tried to cut the root of the basic principles of peace and security. These

5 L. B. Pearson, "The Present Position of the United Nations," *1 International Relations* 329 (1957).

6 F. P. Walters, "UN Reform: Responsibility at Centre," *id* at 339.

blocs have been indulging in voting victories and in struggle for prestige and power. In this process the need and urgency for peace and security was ignored and expediency became the substitute for principles. The study of the five cases has indicated, however, that the Assembly with the help of the new Asian-African states, and also some other states like Canada, Sweden, Norway, Mexico and Brazil, not only tried to neutralize bloc politics but also forced the two power blocs to be constructive in their approach to the question of peace and security.

The cases show that the powers of the Assembly, in practice, have assumed various forms.[7] In the first place, it turned out to be a power to effect ceasefire. This became the first objective of its peace-keeping power. In the case of the Chinese intervention in Korea, the Assembly initially tried to effect a ceasefire but it failed because of certain diplomatic and political reasons. Nevertheless, the Assembly ultimately evolved a formula which later became the basis for the ceasefire agreement among the parties concerned. In the Suez case, the Assembly was successful in effecting a cease-fire. It would be too much to say that in this case only the Soviet threats of nuclear war accomplished the result. Subsequent Soviet policy in the Cuba episode exposed the hollowness of such a threat. It is also not quite convincing to suggest that American threat to suspend economic aid to Britain, France and Israel led to the conclusion of cease-fire. These two factors might have played their part in bringing pressure to bear on the involved parties, but ultimately it was the collective effort of the Assembly for peace and security that proved most decisive. The Assembly, it is true, was not able to secure immediate cessation of military excesses in Hungary. But subsequently, the Soviet Union modified its policy in the light of the attitude of the Assembly as there was no flow of refugees from Hungary after November 1956, and there was no need of emergency special session. Other regular sessions were efforts to implement the recommendation of November 1956. The Assembly successfully secured the end of mutual propaganda warfare among the Arab States in 1958. By appointing the Conciliation Commission it underlined the important fact that the only way to secure ceasefire in the Congo was through the withdrawal of the Belgian troops.

The second form of peace-keeping power of the Assembly is to secure withdrawal of foreign troops. It is a fact that the Assembly failed to effect the withdrawal of foreign troops from Korea and Soviet troops from

7 G. S. Murray, "United Nations Peace-keeping and Problems of Political Control," *18 International Journal* 442 (1962-63).

Hungary. There were various reasons for it. But in the case of the Suez crisis, the Assembly slowly but steadily accomplished the withdrawal of British, French and Israeli troops from Egypt. It is often argued that this withdrawal was nothing but the result of agreement among the parties concerned. But, so far as Britain, France and Israel were concerned, their consent or agreement had no meaning, for the Assembly was not ready to condone an act of aggression and its fruits. Neither was it the dictate of the Egyptian Government which made the withdrawal possible. Opinions were prevalent on the floor of the Assembly which wanted to employ UNEF on the Egyptian soil in case Egypt did not comply with the resolution of the Assembly. Such a step was contemplated in the light of Egyptian delay in giving permission for the operation of the force on its soil. Every time it had been made clear to all concerned that withdrawal of troops did not have any preconditions as such. Similarly, the Assembly secured the withdrawal of forces of two permanent members from Lebanon and Jordan. For more than one year, Belgium evaded the resolution of the Security Council. The Assembly located the "central fact" of the Congo problem and that was the "continued presence of Belgian troops in the Congo." Ultimately, it held Belgium responsible for all its activities in the Congo threatening international peace and security.

The third form of its power is to secure *status quo ante* by securing full withdrawal of foreign forces and placing the UNEF or ONUC in respective places. And lastly, the General Assembly has been responsible for maintaining quiet in some of the troubled areas for more than nine years.

The above forms of power apart, the General Assembly has acquired the right to create its own instruments to secure the objectives of its recommendations. These instruments so far have been of four types: investigatory, conciliatory, advisory and para-military like the UNEF.

The Assembly does not possess the mandatory power to impose sanctions against the parties responsible for the breach of the peace for the compliance of its resolution. However, the Charter itself provides that effective collective measures must be taken for the prevention of aggression.[8] Article 14 states that the Assembly may recommend "measures" in case of "violations of the provisions of the Charter." Article 5 provides that on the recommendation of the Council it can suspend a member from the

8 Philip C. Jessup, "Parliamentary Diplomacy", *89 Recueil Des Cours* 185-316 (1956, I).

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Organization in the course of enforcement action. Article 6 grants the Assembly power of expelling a member in the same manner. However, such provisions do not by themselves create binding obligations for the members. It is a fact that the "Uniting for Peace" resolution intends to confer on the Assembly power to recommend not only economic and diplomatic but also military measures. In practice, however, the Assembly unsuccessfully recommended diplomatic boycott of Spain. It also made a recommendation asking members to impose economic sanctions against the parties of Palestine dispute. It again recommended economic sanctions against the people's Republic of China witb limited success. On various occasions, proposals were discussed but were found impracticable. For example, many states proposed that the Assembly must impose economic and military sanctions against Britain, France and Israel in 1956. Similarly, the Soviet Union always proposed that the Assembly should locate the fact of aggression in the Suez, Lebanon and Jordan and the Congo and take military action. But such proposals were never endorsed by the members of the Assembly.

However, the Assembly created its own techniques for getting the compliance of its various resolutions. They were persuasive in nature and, except in few cases, proved to be quite effective in application. In certain cases, the Assembly was so sure of its authority that it stipulated a deadline for the compliance of its resolution even by the permanent members of the Security Council. By so doing, it sometimes put serious overtones of gravity and sometimes looked demanding. Thus, in the Suez crisis, it not only regretted, deplored and expressed "grave concern" at the non-compliance of the resolution, but also demanded withdrawal of the British, French and Israel forces from Egypt "forthwith." It went one step further by "noting the repeated failure" of the parties concerned in not complying with its resolution against permanent members like Britain and France. The significant fact, however, is that it accomplished its task. In the Hungarian case, the Assembly never intended to take any action, but it collectively deplored the use of force, and later, after refusal of the Soviet Union to permit observers, condemned it outright for its military excesses in Hungary. Not only that, along with Britain, it asked another super-Power, the United States, to withdraw its forces from Lebanon within a specified period. In the Congo, it placed the main responsibility on Belgium for its military operation, asked it to bear the consequences for its military activities, and demanded "immediate withdrawal" of its forces.

The present study demonstrates that the Assembly's effectiveness depends on some basic favourable conditions.[9] In the first place, the Assembly must have *locus standi* or authority to intervene, supported by some specific provision of the Charter on which its recommendation can be based. To illustrate, some of the Members, in 1946, questioned the competence of the Assembly to recommend diplomatic boycott of Spain. It was considered to be enforcement action which the Assembly had no right to take. In general, it has authority to recommend anything under the Charter and the Charter includes everything. But to be effective, it must be precise in its application, for otherwise it leads to wide disagreement among its members. It is thus generally held that the Assembly did not have the power to declare China as an aggressor since the declaration would amount to its recognition by the United Nations which the Assembly was not prepared to concede. Though some of the Members did not challenge the competence of Assembly in the Hungarian case, they were aware of the invitation extended to the Soviet Union by the Hungarian government for Soviet intervention in Hungary. The operation of the Warsaw Pact created another difficulty. The invitation of the American military aid by the legally constituted government of Lebanon in 1958 also created uncertainty as to the authority of the Assembly to recommend action. The friendship treaty between Belgium and the Congo created the same kind of misgivings about its competence in the minds of some of the African and Western members.

The second important aspect of the General Assembly's effectiveness is the formulation of objectives in its recommendations. Such objectives must not try to discipline any of the parties or aim at immediate solutions to what look like perennial problems. Their chief purpose is to secure maximum agreement in the immediate interests of international peace, i.e. cease-fire, withdrawal of foreign troops, restoration of law and order and physical peace. To illustrate, a very important section of the Assembly was not interested in declaring People's Republic of China an aggressor. While it might appear as an act of appeasement, they thought any step to brand China as an aggressor was bound to destroy the atmosphere of reconciliation and peaceful settlement. Nor could the Assembly as a representative body be effective in recommending military measures. It can be effective only if it employs a steady collective pressure on the parties for securing the immediate ends. During the Suez crisis, though proposals

9 Rosalyn Higgins, "Law, Politics and the United Nations" cited in Richard A. Falk and Saul H. Mendlovitz, *The United Nations* 39 (1966).

were made by the Soviet Union and some Arab states to declare Britain, France and Israel as aggressors, a majority of the Assembly members were not ready to take such a drastic action. The Soviet proposal to declare the United States and Britain as aggressors in Lebanon and Jordan did not have support of even a fraction of membership of the Assembly. Repeated Soviet and some of African representative's demands to brand Belgium as an aggressor was not received favourably in the Assembly. Nevertheless, whenever peace and security were at stake, the Assembly almost always rejected partisan pleas of the members. Thus, in the Suez case, it rejected the British and French justification for the use of force, viz., safeguarding their vital interests, their nationals, and their property. Nor did the Israeli claim of self-defence and self-help got any support from the Members. The Assembly even rejected the Egyptian claim of compensation for damages in the Suez war. In the Hungarian case, the Assembly could not secure agreement relating to change of internal constitution and election under the auspices of the United Nations. It is interesting to note that the United States wanted to avoid in Spain what it was trying to do in Hungary. And the Soviet Union wanted the Assembly to do in Spain, what it refused to be accomplished in Hungary.

Thirdly, the nature of approach of the Assembly is also significant. The competence and clarity of immediate objectives apart, to be effective the Assembly must approach the problem in a spirit of conciliation. Its search for maximum agreement makes the pacific approach inevitable. As a matter of fact, the very heart of the philosophy on which the Charter is based is to secure maximum agreement on vital issues. Article 27(3) is nothing but a manifest admission of the fact that concurrence among the permanent members of the Security Council is a precondition for the working of the United Nations system. Article 33 defines the various techniques for reaching a pacific settlement. This provision has been described as "the real genius" of the Charter. In its earlier provisions the Charter enjoins the States to settle their disputes without the use of force. Chapter VII is preceded by Chapter VI which is based on the principle of pacific settlement. The whole scheme of enforcement action is graduated from provisional measures through diplomatic and economic sanctions, to military actions. Even the question of organizing international force under Article 43 is based on agreement. Experience also suggests that methods other than conciliation are not effective in producing the result. The Assembly resorted to coercion in the case of the Chinese intervention in Korea. Its efforts proved futile. Right from the beginning it condemned the Soviet

Union which gave it an excuse for becoming more and more recalcitrant and non-responsive. None of the Soviet suggestions to the Assembly to adopt the coercive methods was accepted by the Members. Coercive method not only postpones the solution of the problems, but also makes them squarely difficult, removes the atmosphere of mutual give and take and negates the efficacy of parliamentary techniques. Earlier, the Assembly had realized that it had gained nothing by resorting to diplomatic boycott of Spain. In fact, later it had to abrogate its earlier decision to this effect. Nor could it solve the problem of Palestine. It is informal contact and constant search for agreement which makes the representative body efficacious.

Fourthly, to make its resolutions acceptable to the maximum number of the Members, the Assembly must take into account the vital interests of the affected parties. For example, in the Suez case, Britain and France were assured of compensation becuase of nationalization of the Suez Canal Company by Egypt. Again, the Israeli government was given the assurance that there would not be any attack on its territory by Egypt.

Fifthly, the type of language used in a particular resolution also affects the degree of its acceptability by the Members. In the case of the Soviet intervention in Hungary, one of the reasons why the Assembly could not secure agreement was the use of the word "condemnation" in the very first resolution. As opposed to this, most of the Members supported the United States draft resolution in the Suez case because it was conciliatory in its tone. Sometimes, drafting skill applied to a resolution brings maximum agreement among Members and achieves immediate compliance by the parties involved. Thus, the most important fact of withdrawal of the US and British forces from Lebanon and Jordan was put in a suggestive way in the last paragraph of the resolution adopted by the Assembly. Patience and perseverence also count much. In the case of Chinese intervention in Korea, there was every likelihood of securing agreement. But the adoption of the United States draft resolution on February 1, 1951 did not leave any chance for further negotiations for some time. In the Hungarian case, the Assembly was too hasty in its diplomatic offensive to secure maximum agreement. As opposed to this, it studiously tried to reconcile all the views in the Suez case. In the Lebanese case, it took the Assembly nearly fifteen days to reach a negotiated settlement. In the Congolese case despite heavy pressure from various groups in the Assembly, it never took hasty measures against repeated failures by Belgium.

The structure of voting in reaching its decisions is another very important element that affects the objectives that are sought to be achieved by the resolutions of the General Assembly. It may be pointed out at the same time that from the experience of the League the framers of the Charter realized the impossibility of attaining unanimity, and carefully avoided it in the decision-making process of the General Assembly.

Sixthly, the Charter provides for the principle of "one state one vote." This corresponds to the principle of sovereign equality of states which makes the representative organ politically important. However, the Charter provides that any question relating to the maintenance of peace and security must be adopted by a two-thirds majority. This provision has met at times with serious criticisms. It is contended that numerical or arithmetical majority does not serve the purpose of a resolution. It carries with it a sense of "voting-victory"—a manifestation of power struggle. For example, the resolution condemning Soviet Union for intervention in Hungary was adopted by more than two-thirds majority. Such condemnation might have been desirable later on, but it had done little good on November 4, 1956. Earlier, the Assembly on Soviet, Ukraine and French initiative, adopted a resolution recommending boycott of Spain, but there were serious reservations in this regard by the Latin American countries and Britain and the USA. In the Palestine partition case, the Assembly had the support of more than two-thirds majority but such support had little meaning, despite big Power support, since it did not take into account the views of the vitally affected parties—Arab states—and that of the other Asian neighbours.

If numerical voting perpetuates power struggle, it also neutralises the importance and purpose of a recommendation. Such voting reflects the gap between the desire of Member States to seek peaceful settlement of disputes in their statements on the floor of the Assembly and diplomatic necessity for voting in favour of their political partners. For example, in the case of Chinese intervention in Korea, Australia, Britain, Canada, France and Norway tried their best to bring about a pacific settlement, but because of bloc affiliations they had to support, even if regretfully, the United States draft resolution branding China as an aggressor. In fact, two-thirds majority was there but such voting brought serious schism in the resolution itself. In the Suez case, the Soviet Union and the East European countries expressed repeatedly their desire to secure peace. But later, they took serious exceptions to the manner of implementation of the Peace-Keeping resolution.

However, because of extraordinary consensus the Assembly was able to implement its recommendations.

Another phenomenon that must be noted in this connection is that of bloc-voting in the Assembly. Often such voting is used to serve certain regional interests. This trend of bloc-voting began at San Francisco itself when the Latin American countries, led by the United States, exercised tremendous influence on the course of deliberations. It is often said that American bloc dominates the scene at the United Nations. However, so far as the exercise of peacekeeping power by the Assembly is concerned, except in a few cases, the principle of two-thirds majority has been scrupulously adhered to. The most effective voting is reflected in a consensus arrived at after serious study, patient negotiations, and due deliberations for the purpose of securing the objectives of peace and security. For example, such a consensus was found, despite Soviet opposition on December 12, 1950, leading to long negotiations between the parties concerned in the Far Eastern question. So also, at the time of the Suez crisis the Assembly, before resorting to voting, took into account the grievances of the affected party, Egypt, the opinion of the other Arab members, and the overwhelming support of the entire Assembly. Unanimous resolutions were also adopted by the Assembly for securing withdrawal of troops from Lebanon, Jordan and the Congo.

Various criticisms have been made of the principle of two-thirds majority. It is pointed out that the principle of 'one-state one-vote' breeds undue egalitarianism that is based on expediency, confers powers on sovereign States without responsibility, and above all encourages a sense of "localism" and "particularism." It is, therefore, suggested that it should be changed and the principle of weighted voting accepted which gives power to a state in proportion to its responsibility. This suggestion, however, ignores the voting experience in the Assembly as well as the practice in national legislatures. Any acceptance of the doctrine of weighted voting would cut at the root of democratic voting on the global scale.

Finally, it should not be underestimated that it is the world public opinion which makes the implementation of Assembly's recommendations possible. Such crystallization of world public opinion is found on its floor. Sloan describes it as the expression of "collective conscience of mankind." But Professor Schachter, "it is too vague to carry conviction." Some of the writers take it to be a sheer "myth." It is true that some "target-states" do not care to respond to the call of the Assembly. Sometimes such opinion

is itself universal but not urgent in nature. For example, public opinion on social and economic and racial problems is certainly one of universal nature, but it cannot be described as an "opinion of emergency." Nor can it be denied that there are certain inherent gaps in the international community, despite the reality of "one world or none," which neutralise the importance of social-interdependence and make world opinion ineffective.

Notwithstanding all these limitations, the Assembly is no longer merely the "town-meeting of the world." Unlike the other Councils and especially the Security Council, it is the most representative body where big and small States ventilate their feelings on matters of immediate concern. An occasion for such an expression is found when there is an imminent threat to international peace and security. This was mobilized quite unmistakably in every case where there was a breach of the peace in the international community. It was expressed through various means by the representatives of governments on the floor of the Assembly, by declarations in national legislatures, and by public leaders in their communications to the UN or to the parties concerned.

Particularly, the discussion on any point of inter-state dispute on the floor of the Assembly results in the formulation of world public opinion which has now emerged as a potent factor in influencing international law. If the Assembly helps in crystalising world opinion, it only helps to promote the enshrinement of *Vox Populi* which, in the national or municipal sphere, has always been *Vox Dei*. But in the international field, it has been such as not to make the *Vox Populi* be heard. The credit for the elevation of *Vox Populi* to *Vox Dei* in the international sphere goes to the UN General Assembly, which is a memorable achievement indeed.[10] According to Mr. Schachter that makes the states responsive to the resolutions of the Security Council and the General Assembly. The resolutions have an effect on state conduct and are not merely verbal admonitions.[11] It is true they fail to have much weight in the face of a determined stand by the "target" governments. But one can hardly disregard the evidence that resolutions of United Nations organs, criticising the States for their actions which are against the peremptory principles of the Charter, have played a role both in

10 See Alfred Zimmern, "International Law and Social Consciousness," 20 *Grotius Society Transactions* 25-44 (1934).

11 Oscar Schachter, "Quasi-Judicial Role of the UN Security Council and General Assembly," *Am. Jr. Int'l L.* 962-65 (1964).

domestic and external criticism of the government concerned.[12] Even if it is admitted that these are points on which verifiable data is fragmentary, it is difficult to deny that influential groups within national states generally believe that the self-interest of their states not only extends to immediate gains and losses but also includes the factor of reciprocity and a long-term interest in order and stability.[13] Rarely do responsible national officials lose sight of the possibility that a failure on their part to observe the rules can be used "against" them in the future, and thereby weaken the basis of their own reliance on commonly accepted restraint.[14] This is not to say that all Assembly recommendations are given effect or enforced, but only the resolutions asserting legal requirements possess a degree of authority that generates pressure - internal or external - in favour of compliance.

Secondly, the test of "effectiveness" of a resolution is not measured merely by compliance, for a government may flout an Assembly recommendation and then pay a price for it. This price may take various forms, such as defections from political parties ideologically disposed to support the recalcitrant state, or perhaps a weakening of confidence in internal order which reduces the flow of investment to the non-complying country. It is not inconceivable that the governments affected would modify their position in future, or that others in similar circumstances would profit by the example.[15]

In the third place, the political organization like the Assembly is more than a place for debate and the adoption of resolutions addressed to the states. It is rather a centre of authority for a complex institutional system through which activities are undertaken that have an impact in a variety of ways on the policies and conduct of governments. These institutional activities are typically fact-finding procedures which range from investigations to continuing verification and supervisory operations, as in the Middle

12 *Ibid.* Thus, in regard to Suez and the Congo—it was apparent that, in the countries directly concerned—important political groups and personalities were influenced by the positions of United Nations organs in relations to the commitments of their governments and that their criticism had an impact on governmental policy. Nor can one overlook the consequences of a resolution on the officialdom of a government. Just as a superior official will rarely direct a subordinate to disobey a rule, officials in most governments would probably be reluctant, except under great pressure, to disregard an authoritative decision of a United Nations organ which asserts a legal requirement based on the Charter.

13 *Ibid.* See also F.A. Vallat, "Law in the United Nations," *Annual Review of United Nations Affairs* 138-48 (1953).

14 *Ibid.*

15 *Ibid.*

East and the Congo. They may also extend considerably beyond fact-finding and, as we have seen in he case of the Congo, include an elaborate and costly apparatus necessary to eliminate unilateral military intervention and develop viable administrative and economic machinery to fill a government vacuum. In almost all of these cases, the action of the Organization has been undertaken on the basis of a normative judgment made by a political organ, a judgment which is generally considered as an essential premise in the formulation of the general will of the Organization and in the justification of "corporate" measures taken in the name of the institution.[16]

In the fourth place there is another dimension which should be borne in mind. When an organ applies a Charter principle or any other rule of law to a particular set of facts, it asserts, as a matter of logic, a new rule of a more specific character. This is a "law-creative act," even though the members of the organ maintain that their decision is confined to the specific facts and they do not intend to establish a precedent.[17] It may be that the "rule" of that case will not be followed in other situations and its applicability will prove to be limited. But the contrary may also prove true, since, once a decision is rendered by an authoritative body, it has entered into "the stream of decisions that will normally be looked to as a source of law."[18] Considerations of equity and equal treatment will tend to favour its application in "equivalent" situations; moreover, the reasons which impelled its adoption in the one case are liekly to have some influence in other cases.

The "precedents" or case law thus generated have further significance in matters of peace and security because the body of principles is still so fragmentary and abstract.[19] Such precedents contribute to the specificity which is essential to convert the "soft" law of the Charter into the "hard" law needed for effective implementation.[20] Greater precision through case law may also contribute to more rational treatment of particular problems. Broad concepts such as "intervention" are now used to describe a wide variety of situations which differ markedly in their facts and in their bearing on policies and purposes. More specific concepts would facilitate inquiry into the particular facts and encourage consideration of policies that are relevant to achieving the major purposes of the Charter.

16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 *Ibid.*

It is taken for granted that the Charter embodies community interest and it is suggested that the process of applying its principles in concrete cases is a reasonable, if sometimes faltering way of determining new points of common interests and giving a measure of efficacy to recognize goals of international order and security.

In the light of the above discussions it is difficult to agree with Stanley Hoffman that the General Assembly's peace-keeping power is *ad hoc* in nature and is a matter of improvization.[21] Certainly, such a role was not visualized by the framers of the Charter. It is fact that the Assembly created temporary subsidiary organs for the implementation of its recommendation, and these organs largely functioned on an *ad hoc* basis. But so far as this power is concerned, it has strong historical antecedents, a constitutional basis and a regularity of operation.

Again, it is hard to agree with the view of Geoffrey Goodwin that the new peace-keeping power of the Assembly is nothing but a "diplomatic consensus."[22] Facts tell a different story. It is true that the diplomatic technique has been employed to arrive at a consensus. But that technique is a part of the parliamentary process. Moreover, the consensus struck at a particular time is more than a diplomatic technique. It is relative to international interests, that is, the maintenance of peace and security in a particular area of the world. Finally, it is harder still to agree with the former Secretary-General, Dag Hammerskjold, who described the whole development in terms of "preventive diplomacy."[23] It is an inadequate description of the peace-keeping power of the Assembly. This power of the Assembly is not just limited to the preventing of the Great Powers from heading on to a major conflict. This power is more than that. It has its own significance in the scheme of the Organization. Its constitutional basis apart, the exercise of this power involves employment of specific emergency procedures for recommending measures for the maintenance of international peace and security. Moreover, it has its own operational efficacy. Above all, it has behind it the sanction of the world public opinion.

Despite its above merits the Assembly has met with a number of difficulties in the exercise of its powers. These difficulties have been partly institutional and partly organisational in nature. First of all, a represenat-

21 Stanley Hoffman, "Sisyphus and the Avalanche : The United Nations, Egypt, and Hungary, 11 "*International Organization*," 446-69 (1957).
22 Gefforey Goodwin, "The Role of the United Nations in World Affairs," 34 *International Affairs* 25-37 (1958).
23 Dag Hammarskjold, *Servant of Peace* 132 (1962).

tive body can only represent the interests of its members. It can deliberate and can formulate broad policies. But to combine the functions of representation and execution may lead to confusion. Secondly, whatever may be the strength of a recommendation of the Assembly, its status remains recommendatory with political overtones in a community of sovereigns., Thirdly there is always a possibility of disagreement in a large body like the Assembly at each stage of its deliberation on important matters like the peace and security. Fourthly, the question of financing the peace-keeping operations has given rise to numerous problems. True, the Internatinal Court of Justice in its Advisory Opinion in "*Certain Expenses Case*" has declared that the Assembly has legal right to finance peace-keeping operations. But the difficulty of its acceptance by some important members remains. This has led to default in the payment of subscriptions by some of the member states and ultimately to financial crisis which has threatened to paralyse the whole United Nations.

Removal of these defects requires reconstruction of the peace-structure. But such reconstruction does not mean disapproval of the development of some of the tested principles of liberalism—organization of life by discussion, method of reaching common interest "by clash of ideas" and not "by clash of arms," "Majority Voting," "one nation one vote"—upon which not only the peace-keeping authority but the very existence of the General Assembly's power, position and prestige is based. Of course, growing authority of the Assembly must not be so concentrated that it may destory the very initiative of hundred twenty two sovereign participants. In the interest of efficiency, therfore, the principle of general formulation and the principle of execution must be separated. This requires reforms that may affect specifically the present peace-structure of the Organization. Therefore, instead of nullifying the entire representative body, it should be given enough of initiative and opportunity to solve the basic international problems. To that end it is necessary that the Assembly should try to win over the confidence of nations, great and small, and for that, first of all, it must remove the constitutional anomaly that we find in the privileged position of the five permanent members as it is provided in Article 23 of the Charter. Secondly, it must try to remove the procedural hypocricy of Article 27 of the Charter. Unanimity on international scale would have been desirable but, in the light of performances of the permanent members of the Security Council, to subject the entire Organization to the will of few is nothing but systematic and organized tyranny. Therefore, it should be gradually substituted by majority voting. Thirdly, the principle of the accountability

of the Security Council to the General Assembly should be introduced. If the Trusteeship Council and the Economic and Social Council can be so effective under the direction of the representative organ, why should the Security Council miss the chance of being effective ? Fourthly, the structure of the Security Council should be based on elective principle with the presumption that informal and unstated parliamentary processes should provide the opportunity for ensuring the presence of the Great Powers in the Council. The recent amendment to the Charter increasing the membership of various Councils indicates that the principle of wider and wider representation has good future. But it is difficult to conclude on a movement that still has its currency.[24] However, despite various limitations, the power and prestige of the General Assembly has reached a stage where we can hope that control of international conflicts by discussion will turn the "spears into pruning hooks and swords into plowshares."

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24 The General Assembly has met at its Fifth Emergency Special Session to solve the West Asian crisis in the last week of June 1967.

INTERNATIONAL SOCIETY : A PERSPECTIVE FOR LAW OF SPACE

S. BHATT*

The need for an assessment of the nature and character of international society becomes important from time to time in order that the perspectives of law may conform to the requirements of the society. At the present juncture when outer space is under intensive exploration by mankind signifying the dawn of space age the assessment of international society becomes imperative for two reasons : subjectively, international society, under the impact of space break-through brought about by modern science and technology, has undergone considerable changes resulting in fantastic integration and common survival. Objectively, the form of society is a basic consideration for any framework of space law.

It is necessary therefore to devote to the consideration whether there exists an international community[1] and analyse its characteristics and assess the Community goals to which space law may conform in its formative era. The problem is to find whether the present international community can be considered as fully integrated. Or, is it incapable of achieving integration to the extent of a national community ? Or, is the international community in the process of integration whereas, there is a society of mankind whose members share certain common values and interests ? Nevertheless, to the sociologist of international law, as Professor Julius Stone points out, the concept of international community is perhaps the most vital question. Some aspect of it, indeed, transcends through any formulation of law.[2] In particular, when related to a developing legal system such as space law, nothing is more important than that governing the development of law itself, namely, the structure of the international society.[3]

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1 International Community and Society are used interchangeably, the former signifying greater integration.

2 See Julius Stone, "The Problem of Sociology of International Law." 86 *Recueil des Cours* 129 (1956-I).

3 See Jenks, *Space Law* (1965). The fundamental concept in which contemporary international law is based is that of interdependence, as stated by Jenks.

Human society has undergone through a period of evolution in history. The perspectives of contemporary international society can therefore be better guaged by tracing its growth and development.

HISTORICAL DEVELOPMENT OF INTERNATIONAL COMMUNITY

The Treaty of Westphalia (1648) in laying the birth of modern state system established certain principles and procedures for interstate relations. This treaty marked a distinguished change in the international order which prior to the treaty was based upon papal supremacy especially in the European society. The treaty inaugurated sovereign nation-states system with distinct geographical identities and national groups. However, while laying down the principles which would promote sound relationship between members of the international community the said treaty was interpreted to emphasize the absolute sovereign rights of states. As Professor Leo Gross observes : "In this era, the liberty of States becomes increasingly incompatible with the concept of international community governed by the international law independent of the will of States."[4] It is apparent now onwards that the community sentiment which would provide the uniting force for the members of the international community is opposed by the doctrine of absolute sovereignty of States. Between these two opposing forces, one demanding the unrestrained sovereign powers of states and the other emphasizing the common interests and interdependence of the world society, the struggle has been going on during last three hundred years. The absolute sovereignty of the Prince had come as a reaction to the papal supremacy preceding the Peace of Westphalia. With the declining authority of the Pope and in the absence of any other central authority over the nation state, this notion multiplied in strength. This feud between the secular and religious powers, as Hall points out, resulted in the sovereign assuming greater powers for absolute independence.[5]

The jurists of seventeenth and eighteenth centuries generally provided the doctrinal arguments in support of what may have suited the Prince and the nation states. In particular the doctrine of legal sovereignty was given a hallowed place in the minds of men by these scholars. However, Grotius stands a shining example who campaigned for an international order based upon common interests of international community. His fight for freedom of seas which he won against another distinguished jurist, Selden,

4 Leo Gross, "The Peace of Westphalia 1648-1948," 42 *American Journal of International Law* 39 (1948).

5 W. E. Hall, *International Law* 18 (7th ed. A. Pearce Higgins, 1917).

was epoch-making. In an age marked by intense national rivalries his doctrines of law based upon reason and natural justice provided basis for interstate relations and thereby helped the effective growth of an international community order. Grotius further secularized natural law from the divine law precepts of the mediaeval period which further helped towards growth of an international society free from religious bigotism.

The period between the Peace of Vienna (1815) and the First World War is conspicuous for growing contacts among States and peoples. The communication system, a basic institution of the society of mankind, expanded in all proportions due to rapid advance in science. The consequent integration produced an inter-dependent economic and social order which strengthened the peoples minds for a common destiny and a common community. Further, beginning from the middle of the nineteenth century, there was an increase in the number of participating States of Asia and Latin America in the international forums such as the Hague Peace Conferences. The injection of these new members in the society of nations made the international order broad-based and democratic.

The rapidly changing political, social and economic factors in the world saw further integration of the international society during the 20th century. The communication system and the aerial transport brought far flung areas of world closer. The political map of the world changed drastically as witnessed by the growth of innumerable number of newly independent States chiefly in Asia and Africa.[6] Thus almost the entire international community is free from colonial exploitation, and capable of unfettered participation in the affairs of the community. Further, due to the proliferation of international organizations both political and functional, the community sentiment is enhanced by the development of common links and principles of mutual intercourse. Above all the impact of nuclear weapons on international society has been profound. It has made survival a common problem for all peoples of the globe. The breakthrough into outer space universally recognized as a joint enterprise of all mankind, completes a process of evolution where the world society is a closely knit and interdependent community. An estimate of the fast shrinking world

6 The increase in the number of States partcipating in international relations is evident from following :

The Berlin Conference (1885) was attended by fifteen States, the first Hague Peace Conference (1899) by twenty seven States, the Second Peace Conference (1907) by forty-three States, the League of Nations had between forty two to sixty-three States and the United Nations has by now 121 States participating. See Roling, *International Law in an Expanded World* 5 (1960).

society can be visualized from the fact that an astronaut while circling around the globe in about ninety minutes crosses a national frontier each minute of its journey in space. Amidst this growing process of integration and interdependence of the world community Lauterpacht formulated a thesis in regard to the existence of international community that has been of great essence in the estimation of the concept of the international community.

LAUTERPACHT'S HYPOTHESIS

Lauterpacht put forth his thesis that there is an international community beyond doubt. In support of this contention he stated that international community was based upon common interests of its members and the law operated in this community on account of consent of the community members. He defined community thus : "A community may be said to be the body of a number of individuals more or less bound together through such common interests as to create a constant and manifold intercourse between the single individuals."[7] That international community is based upon common intersts has been supported by such eminent jurists like Grotius and Westlake, as Lauterpacht points out.[8] Further, the "intercourse" in the fields of art and science has created common scientific, cultural and humanitarian values in the international community.[9]

To illustrate the functioning of law in the international community Lauterpacht explained thus : According to him there are three essentials for international law e.g. an international community, a body of rules and the consent of the community.[10] The mistaken notion of the initial hypothesis-pacts sunt servanda - (treaties must be honoured) considered as basis of obligation of international law, has caused confusion in regard to the true meaning and functions of international community.[11] In actual practice, says Lauterpacht, it is the consent as expressed in the form of custom and treaty which forms the basis of obligation. In the improperly organized world community and in absence of a proper legislature, the consent of the community as Lauterpacht states, is given by States acting as representatives of the world community.

Lauterpacht's views have greatly contributed to the development of the ideal of an international community. His assumption of existence of

7 Oppenheim, *International Law* (8th ed. 1955) ; see also n. 2 on the same page in regard to discussion on the subject of international community.

8 Lauterpacht, *The Fnnction of Law in International Community* (1933).

9 Lauterpacht, *op. cit.* note 7 at 11.

10 Lauterpacht, *op. cit.* note 7 at 10.

11 Lauterpacht, *op. cit.* note 8 at 421.

an international community has, however, provoked discussions among contemporary jurists and scholars. A reference to these discussions becomes necessary for a perspective of the international community at the threshold of space age.

SURVEY AMONG WRITERS' OPINION ON LAUTERPACHT'S THESIS

The Realists

The jurists of the "realist" school believe that the national interests are primary considerations for all purposes. They do not generally approve of the concept of international community as conceived by Lauterpacht. A leading jurist of this School Professor Schwarzenberger states : "To conceive international relations in terms of a community requires a certain sense of humour."[12] Emphasizing the role of national interest and national survival Professor Schwarzenberger continues"...every State has uppermost in its mind its own existence and survival and in the case of a Greater power, this means survival as a Greater power."[13] Moreover, the breakdown of the international system resulting in two world wars, and the bitter national rivalries do not warrant, according to Professor Schwarzenberger, any consideration for a concept of international community.

This "realism" as seen in retrospect had its merits as some may consider in providing guidelines to law and relations in the international system. This was the ideology which was by and large supported by Professor Morgenthau and his "realist" school based upon national interest in terms of power. However, the advent of nuclear weapons and the new dimensions of war and peace in the space age have forced some rethinking and made these "realist" assumptions mostly untenable.[14] The national interests have merged into international interests and the national survival can be conceived only within the common survival of mankind. As Professor Morgenthau himself recently states : "The point can indeed be made...that the technological resolutions of our age, of which the atomic revolution is the most spectacular one, have made the political organization of the world into nation States as obsolete as the first industrial revolution did the political organizttion based upon the feudal States."[15]

12 G. Schwarzenberger, "International Law and Society", *Year Book of World Affairs* 160 (London 1947).

13 *Id.* at 161.

14 See generally Hans J. Morgenthau, *Decline of Democratic Politics* (1962).

15 *Id.* at 93.

International Community Only a Potential Order :

Certain jurists are cautious while assessing the established nature of international community order. Charles de Visscher states that "international community is a potential order in the minds of men, it does not correspond to an effectively established order."[16] Another jurist Professor Julius Stone states that although the international community is expanded and the law is widespread, yet integration is not to such an extent that the law becomes operative in significance."[17] To Professor Brierly international community may still be a precarious thing.[18]

Nevertheless, these jurists have a lurking feeling that the fact of international community cannot be ignored. Professor Brierly points out : "If, however, we admit, as I think *we ought to admit* (italics supplied) that to believe even in a world wide community is to believe in a reality and not in a myth let us make no mistake about its character."[19] He calls it a "tender plant" which must grow in the minds of men.

The School of Interdependence and Interdetermination

The support to Lauterpacht's hypothesis on international community based upon common interest comes from a cross-section of jurists and writers from all over the world.[20] These jurists consider that the common interests among the members of the international community have created interdependence among its constituent parts and the danger of survival has further accentuated the element of interdetermination. When survival is common, there has to be of necessity "minimum public order" based upon the rule of law and when coercive means[21] are entrusted to the international community. The need for such legal process has been never so compelling and "...the time has come for mother necessity to compel nation states to

16 Charles de Visscher, *Theory and Reality in Public International Law* 99 (1957).

17 Julius Stone, "The Problem of Sociology of International Law," 86 *Recuil des Cours* (1956-I).

The author characterizes international community in three categories, e.g. based upon (*a*) interaction or (*b*) interaction and part integration or (*c*) complete integration. He personally prefers (*a*) above ; see also *Idem*, "A common Law of Mankind," 6 *International Studies* 414-442 (1959-60).

18 J. L. Brierly, *Basis of obligation in International Law and other Papers* 252 (Lauterpacht & Waldock ed. 1958). The relevant chapter No. 19. "The Rule of Law and International Society" was written in 1936.

19 *Id.* at 253.

20 Some of these prominent jurists are Professor McDougal, Professor Friedmann, Dr. Nagendra Singh, Professor Leo Gross *et. al.*

21 McDougal, Lasswell & Vlasic, *Law & Public Order in Space* 1037 (1963).

accept the rule of law or to perish *en masse*."[22] In view of the precarious nature of world peace these writers consider that it is vital to treat international community as one whole. In the opinion of this school the international community may not be fully integrated and has a federal outlook with its component parts differing in cultural and social values. Until the international community achieves "optimum order" as put forth by Professor McDougal—when the contitutive process within the community gets integrated fully[23]—until then the "consent of the community expressed through the states is the basis of law."[24] This fully explains Lauterpacht's basis of community, and consent as basis of law. Apart from the common danger to the survival, the members of the international community, as some jurists point out, have common economic, scientific and other social links whereby the international community admits of some interaction and some integration. Further the international society has had an evolutionary process through history while also expanding in its dimensions, as pointed out by Leo Gross.[25] "One of the most conspicuous features of the present international society is its extended nature," writes Dr. Anand, "with the emergence of participation of so many Asian and African States, international society has become, for the first time in history, a true world society."[26] Similarly, Professor Roling advocates for a world public order based upon law in an expanded world.[27]

The Idealists

Among jurists who whole-heartedly support Lauterpacht's concept of international community, Dr Jenks is outstanding in his contribution. In fact the idealism reflected in his views sometimes surpasses even that of Lauterpacht. Dr. Jenks states that during the last one hundred years the former exclusively Christian international society has been transformed into a world community.[28] There have occurred enormous changes in the world political and social order as a result of emancipation of 750 million people.[29] He cites Westlake's authority that, "Society of States is the most comprehensive form of society among men, but it is among men that it exists.

22 Nagendra Singh, *Nuclear Weapons and International Law* 255 (1959).
23 See note 21 *supra*, at 1036.
24 Nagendra Singh, note 22 *supra* at 3.
25 See Leo Gross, *op. cit.* supra note 4.
26 Dr. R. P. Anand, "Attitude of the Asian-African States towards certain problems of International Law." *Int'l & Comp.* L. Q. 55 (London, Jan. 1966).
27 Roling, *International Law in an Expanded World* (1960).
28 Jenks, *Common Law of Mankind* 62 (1958).
29 *Id.* at VI.

States are its immediate, men its ultimate members. The duties and rights of States are only the duties and rights of the men that compose them."[30] The existence of the United Nations, as Dr. Jenks believes constituutes a forum for world community: "Politically we have for the first time the formal framework of a universal order; our problem is to create a political reality within this framework."[31] Dr. Jenks concludes that "we now have an international community formerly organized on a world basis,"[32] These views are further reiterated more eloquently in his latest writings.[33] He states that Grotius, Suarez, and Vittoria held similar conviction about the international community under a common law of mankind evolved with the integration of the various legal systems of the world.[34]

CONCLUSIONS

A Society of Mankind

The international community of Lauterpacht's concept may appear a matter of aspirations to some jurists or an accomplished fact to others. From pragmatic considerations it is partly an aspiration and striving and partly a fact of everyday life. It becomes clear that there is an established community of nations whose members irrespective of their nationalities, are bound by vital common interests which by itself suggests that there is also a universal society of mankind although not fully developed.

The evidence of history goes in favour of an evolving society of mankind. Arnold Toynbee has presented the picture of rise and fall of score of civilizations. The intrinsic value of such historical evidence supported by the work of historians under UNESCO project entitled "A History of the Scientific and Cultural Development of Mankind" suggets that ".....man..... has been evolving towards a conception and awareness of mankind, and the universal principles of peace, justice, freedom and progress in that conception."[35] The sociologists lend support to the society of mankind by analysis of four vital factors within a society: communication, culture, co-operation and organization.[36] The global communications represented by the aerial net-

30 Westlake, *Chapters on the Principles of International Law* (1894), reprinted in Collected Papers at 1 (1914) cited by Jenks, see not 28.
31 Jenks, note 28 at 80.
32 *Ibid.*
33 Larson, Jenks *et. al.*, *Sovereignty within the Law* (1965).
34 *Id.* at 12.
35 See Quincy Wright, "Towards Universal Law of Mankind," *Colum, L.Rev.* 441 (1963).
36 See Wright in *Contemporary International Law; A Balance Sheet* 8-9 (R.C. Synder ed. (1935).

work of airlines and the latest addition of communication satellites have produced a considerable integration of the world community. The common cultural values associated with scientific humanism along with the values associated with scientific humanism along with the values enshrined in Kellogg Pact, Atlantic Charter, the United Nations Charter and the Universal Declarations of Human Rights represent a process of cultural integration in progress. The cooperative aspect of international society is evidenced by the collaboration among its members in the economic, scientific, and other fields of human activity and the universal desire among people, and efforts put in, for the elimination of war and the pacific settlement of disputes. Finally, the United Nations symbolises the organisational aspect of the international society.[37]

Objectives of Space Law

Having arrived at a perspective of the international society of space age as that of a rapidly developing society of mankind, space law has to be developed in order to meet its demands and priorities. The central problem for space law is to ensure peace in the earth-space arena. For this purpose almost all the leading jurists in the field of space law agree that the outer space be used for peaceful purposes only. The many resolutions of the United Nations[38] for the peaceful uses of space supported by the overwhelming opinion of the mankind as a whole augur well that, by and large, space will be exploited for the "common interests" and "peaceful uses" of the international community. This "utilitarian" and "inclusive" tendency in space law is predominent than the more "exclusive" and nationalistic attitudes in the law of air. Further, in order that peace is preserved at all costs "the most inclusive community must centralise authoritative control of coercive instruments."[39] For this purpose the United Nations, as cenrally placed organization of the international community, should be in-

37 See Wright, *Supra op. cit.* note 35.

38 The earliest reference to Outer Space in the United Nations was made in General Assembly Resolution 1148 (XII) of November 14, 1957 on the subject of Disarmament. Para 1 (f) of this resolution called for "The joint study of an inspection system designed to ensure that the sending of objects through outer space shall be exclusively for peaceful and scientific purposes only";

General Assembly Resolution 1721 (XVI) of December 20, 1961 entitled "International Cooperation in the Peaceful Uses of Outer Space" began as follows :"The common interest of mankind in furthering the peaceful uses of outer space and urgent need to strengthen international cooperation in this field....";

The overriding consideration that outer space be used for peaceful purposes only was further endorsed by the General Assembly in Resolution 1802 (XVII)of December 14, 1962.

39 *Op. cit, supra* note 21, at 1037.

vested with overall jurisdiction for space activities. "The problems of space must therefore be tackled and mastered within the general framework of the Charter of the United Nations."[40]

Finally the individual for whom the society exists may hope that the law of space as part of the law relating to science and technology ensures freedom and dignity. The "dignity and worth of human person"[41] have been underlined in the preamble of the Charter of the United Nations. The centralization of power and authority achieved by the process of integration of the international community by modern science and technology leaves an individual person bereft of his natural freedom and initiative. By the growing mechanization of human civilization man according to Bertrand Russell has become a "cog in the machine."[42] By accepting the status of a cog, an individual works largely for the nationalistic purposes of competitiveness whether in outer space or on earth, and thereby, generates envy and greed to the exclusion of a sense of compassion. Compassion, which is largely a feeling of mutual consideration among individuals, can create as Bertrand Russell points out, "...a motive for existence, a guide in action, a reason for courage, an imperative necessity for intellectual honesty."[43] In order that the feelings of compassion become widespread, emphasis is to be laid on maintenance of individual initiative and freedom in spite of the growing chains of science and technology. For this the perspectives of space law must conform to a decentralized structure of power, society and organization.

In conclusion, it may be submitted that towards attainment of the goals of peace, and prosperity through individual freedom and happiness, space law should permit centralization to the extent of the United Nations jurisdiction over such space activities as may affect world peace and security, and decentralization wherever possible for the sake of human freedom and dignity, and this therefore may provide the guidelines for the law of space in the society of mankind.

40 Jenks, *Space Law* 316 (1965).

41 The preamblar second para of the Charter states: "We the peoples of the United Nations determined....to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

42 See Bertrand Russell, *The Impact of Science on Society* 104 (Indian ed. 1954) wherein the author states that "you are a cog in the machine if you work in an organized group e.g., the army or the mining industry." The inference by the author is not against working in an organized group but only to highlight the net effect of science on man: "What science has done is to increase the proportion of your life in which you are a cog, to the extent of endagnering what is due to you as a hero or as a common man.'

43 *Id.* at 149.

THE ROLE OF THE UNITED STATES SUPREME COURT IN POLICING THE U. S. FEDERAL SYSTEM*

J. G. GETMAN†

To a large extent it is the U.S. Supreme Court which defines and adjusts the relationship between state and national law in the American Federal System. The purpose of this paper is to discuss the nature of the Court's power and the real and potential limitations upon it.

I

THE COURT'S ROLE IN INVALIDATING EXERCISES OF STATE POWER.

A. Review of the Constitutionality of state Action.

In the United States the primary law making responsibility has traditionally rested with the states. This was obviously so in the early days of American history when the body of federal law was insignificant. Today even though the body of federal law has grown dramatically covering many aspects of business and personal life, basic relationships are still governed primarily by state law. It is state law which determines whether a crime has been committed, a contract made or a duty of reasonable behaviour breached.

Each state has its own system of courts which has final authority to determine the meaning of its law. The Federal courts also enforce state law, but in so doing they recognize the primary authority of the state courts.[1] The United States Supreme Court itself does not and it will not hear an appeal from a state court on an issue of state law.[2]

Although the states are permitted considerable autonomy they are not free to establish any system of law they choose. By virtue of Article VI of the U.S. Constitution state law is made subordinate to the Constitution and to valid Federal legislation.[3] Exercises of state power which

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1. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

2 C. Wright, *Federal Courts* (1963) § 107. But as is discussed more fully below it instructs the lower Federal Courts as to which aspects of case are to be governed by state and which by federal law.

3 Article VI. This Constitution and the Laws of the United States which shall be made in pursuance thereof....shall be the supreme Law of the Land...anything in the Constitution on Laws of any state to the contrary notwithstanding.

are inconsistent with the U.S. Constitution or Federal law are invalid. The Supreme Court has the final authority to determine the meaning of the Federal Constitution and laws. As an adjunct of that power the court has from the earliest days of the American Republic exercised the authority to determine whether state action is inconsistent with the Constitution or Federal law.[4]

Originally the Constitution contained very little direct limitation on state action. The framers were concerned with preventing the national government from acquiring too much power. The bill of rights and other historic protections were directed primarily against Congress and the President. In the early days of the Republic when state action was invalidated it was usually on the grounds that it was inconsistent with a grant of constitutional power to the national government.[5] The passage of 13th, 14th and 15th amendments after the civil war increased the restrictions on state power. For a long time however these amendments were construed fairly narrowly.[6] In recent years the Court has, by construing the reach of the 14th amendment, greatly increased the area of real and potential conflict between state action and the U.S. Constitution. The 14th amendment specifies that no state shall deny to any of its citizens the equal protection of its laws. For many years the Court had accepted the idea that a state could enforce racial segregation without breaching its duty of equal treatment.[7] In 1954 the Court reversed itself and adopted the conclusion that segregation by race necessarily involves disparity of treatment.[8] The Court's action marked a milestone in American Constitutional development. It brought vast amounts of existing state legislation into conflict with the Constitution and it challenged the existing socal order in areas of the country.

The Court has recently concluded that the equal protection clause requires the states to apportion their electoral districts so that the districts will include substantially the same number of people.[9] The Court's willingness to deal with this question marked a departure from its previous decision which indicated that the apportionment of political districts should be controlled politically rather than judicially.[10] This new application of

4 *Martin* v. *Hunter's Lessee*, 1 Wheat 304 (1816)

5 See e. g. *Gibbons* v. *Ogden*, 22 U.S. 1 (1824) holding that the power of Congress to regulate interstate commerce prevented New York from granting an exclusive license to operate a steam boat between New York and New Jersey.

6 See e.g. *Strauder* v. *West Virgina*, 100 U.S. 303 (1880)

7 *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)

8 *Brown* v. *Board of Education*, 347 U.S. 483 (1954)

9 *WMCA IMC* v. *Simon*, 370 U.S. 196 (1962)

10 *Colegrove* v. *Green*, 328 U.S. 549 (1946)

the equal protection clause has required the redrafting of electoral districts and has changed the political power alignment in the majority of states in the union.

The Court has also significantly expanded the reach of the 14th amendment by its recent decision construing the due process clause which provides that no state may deprive any person of "life, liberty, or property without due process of law."

Until fairly recently the Court interpreted this language in such a way as to impose only a limited restrain upon state power. In *Palko v. Connecticut*[11] the Court held that the due process clause did not prevent a state from trying a person twice for the same crime. Although the bill of rights prevents the Federal Government from subjecting anyone to double jeopardy in this fashion the Court rejected the contention that the 14th amendment imposes upon the states the same restrictions that the bill of rights imposes upon the Federal Government. One of America's great jurists, Justice Cardozo, speaking for the Court stated that the 14th amendment barred the states only from such actions as were basically incompatible with a "scheme of ordered liberty." In recent years the doctrine of the *Palko case* has been under steady attack. Led by Justice Black, who has long maintained that the 14th amendment incorporates the entire bill of rights, the Court has steadily widened the coverage of the due process clause so that today there are few if any parts of the bill of rights not applicable to the states.[12] Simultaneously the Court today reads the prohibitions of the bill of rights more broadly than it did previously. In particular it has given great scope to the language denying the right of Congress to abridge freedom of speech or to establish religion. Because of the movement away from the *Palko case* the broadening of the bill of rights has meant a concomitant limitation upon state power.

B. Resolving Conflict Between State Action and Federal Legislation.

The Court also invalidates exercises of state power if they are inconsistent with congressional legislation. In many ways this task of delineating the relationship between federal action and state power is the most difficult of the court's functions. Federal legislation dealing with a specific

11 302 U.S. 319 (1937)

12 See generally Cox, "The Supreme Court 1965 Term, Constitutional adjudication and the Promotion of Human Rights," 80 *Harv. L. Rev.* 91-122 (1966). Forward, 1962 Term of the Supreme Court, 77 *Harv. L. Rev.* 81 et. seq. 1963.

part of a general area assumes a background of state law. As Professors Hart and Wechsler have observed in a splendid note, "Federal legislation on the whole has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationship established by the states altering or supplementing them only so far as necessary for the special purpose. Congress acts in short against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."[13] Accordingly, in most cases federal statutes could not operate as intended without some residual state power. On the other hand, to permit inconsistent state action after the passage of national legislation threatens the goal of uniform national policy implicit in any federal legislation.

I have chosen labor relations to illustrate the nature and difficulty of the court's task in accommodating the reach of state and federal law. During the first 150 years of the American Republic labor law was almost entirely state law. The rights of employees to organize into unions varied from state to state as did the legality of union activity. The Supreme Court's role was primarily limited to review of state action in accordance with constitutional standards.[14] The only sizeable exception to this scheme was in the application of federal anti-trust laws to unions. Indeed, until fairly recently, there was considerable doubt that whether the Federal Government had general power to regulate labor relations as such.[15]

In 1932, Congress legislated a comprehensive national system of labor relations. The basic purpose of the legislation was to grant employees the rights to join unions and to require an employer to bargain with a union chosen by a majority of his employees. The rights of unions to strike and picket were guaranteed. A federal agency was established and given the primary task of determining the wishes of the employees and enforcing their rights under the Act. The passage of the Wagner Act, or NLRA, created four different types of legal issues with respect to each of which the United States Supreme Court has the final power of decision.

13 Hart & Wechsler, *The Federal Courts and the Federal System* 435-436 (1953), Jereinafter cited as H & W.

14 To some extent federal courts did get involved in labor relations matters but their jurisdiction was largely limited to cases involving citizens of different states in which, as indicated more fully below, they are required to apply state law.

15 For an analysis of the development of constitutional doctrine and federal jurisdiction in labor relations, see Williams, *Labor Relations and the Law* 5-100 (1965)

The Court had to determine :

1. The constitutionality of the legislation,
2. The meaning to be attributed to the general language of the statute,
3. The relationship between the National Labor Relations Board and the Courts, and
4. The extent to which the Federal Act displaced state power.

Of these tasks the first although in many ways the most significant was the easiest. The court in a single, long, carefully written opinion held that the power to regulate interstate commerce granted to Congress by the Constitution comprehended the power to regulate labor relations.[16] The second and the third of these issues have recurred frequently. The Supreme Court has issued innumerable decisions construing the language of the Act and working out the relationship between the Board and the Courts. There is no end in sight. The Court's role in this regard is a permanent part of its work.

For my present purpose in seeking to explain the role of the Supreme Court in the American system of federalism it is the question of the impact of national labor law on state power that is most significant. Comprehensive though it was there was no suggestion that the Wagner Act displaced state power entirely. The Wagner Act dealt with abuses by employers only. The reason given by its proponents for not creating union unfair labor practices was that state law was able to deal effectively with flagrant union misconduct. Similarly the federal law did not deal with the relationship between a union and its members nor with most general aspects of the employment relationship. Moreover, once collective bargaining was established and an agreement signed the Wagner Act did not speak of the nature of the rights arising thereunder. In all of these areas it was understood that state law would continue to govern and the same was true with respect to state and municipal employees who were excluded from the operation of the Federal Act. As Justice Jackson stated, it was clear that Congress had left much to the states although it did not specify how much.[17]

On the other hand, it was equally clear that inconsistent state law could not be applied to employees whose activities were covered by the National Labor Relations Act. Thus, state rules outlawing peaceful picketing or outlawing union activity or permitting employers to enforce so

16 *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

17 *Garner* v. *Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485 (1953).

called yellow dog contracts were displaced by the federal statute.[18] It was decided fairly early that state labor laws could not seek to govern conduct dealt with by the National Labor Relations Act even if the state sought to conform its law to the federal law. The reason for denying such power to the states is that a significant aspect of national policy is to develop a coherent system of regulation by channelling labor relations disputes through the National Labor Relations Board. The Court has had more difficulty deciding when conduct not dealt with directly by the Federal Act can be regulated by the state. The question is whether the absence of federal regulation is tantamount to a congressional decision that conduct should be free of regulation or was on the contrary a decision that such matters should be left to the states. Matters such as accident compensation for employees or internal union affairs were so far outside the scope of the NLRA that it has been generally understood that state law was permitted to continue in force. On the other hand, where employer response to union activity is involved the question is considerably different. The National Labor Relations Act prohibits many of the traditional responses by which employers formerly sought to defeat union activity. Therefore, the conclusion that Congress did not outlaw a certain type of response is likely to be taken as a decision that an employer should be free to engage in it. When-collective bargaining relations have been established the court has determined that the National Labor Relations Act favors the free use of economic pressure by both sides. Thus, for example, most scholars are agreed that although the hiring of strike replacements is not dealt with by the NLRA state laws seeking to limit an employer's ability in this regard are invalid because inconsistent with the federal policy favoring free use of economic pressure.

The issue is more complicated where union conduct is involved. Some union conduct is outlawed by §8 of the NLRA and some union conduct is specifically approved (or protected as it is referred to) by §7. Thus by construing §7 and §8 the courts determine which conduct Congress disapproved of and which it meant for unions to be able to engage in. There is a small category of union conduct neither protected by §7 nor prohibited by §8. In an early decision in *UAW* v. *WERB* (*The Briggs Stratton case*)[19] the Supreme Court held that some activity which fell into this category could be regulated by the states. The impact of this decision was severely limited however because the court refused to permit the states to make their own

18 *LaCross Tel Corp.* v. *WERB*, 336 U.S. 18 (1949) ; *Hill* v. *Florida*, 325 U.S. 538 (1945).

19 336 U.S. 249 (1949)

determination of whether activity is prohibited or protected by the NLRA. In the famous case of *San Diego Building Trade Council* v. *Garmon*[20] the Supreme Court stated :

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §.7 of the Taft-Hartley Act, or constitute an unfair practice under §.8, due regard, for the federal enactment, requires that state jurisdiction must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[21]

Since it is possible to argue with some plausibility that any union action is either protected or prohibited by the NLRA the area of preemption thus established is very great and the *Briggs Stratton case* has almost never been applied. The Supreme Court also held in the *Garmon case* that state laws may be preempted to the extent they overlap with the reach of the NLRA even though the laws in question are general laws, for example, tort or contract, and not directed primarily at labor relations. This conclusion may lead to some unfortunate results. For example, the NLRA does not provide for damages for an employer injured by union misconduct nor does it provide complete recompense for an employee whose rights are interfered with by an employer. This is explained on the theory that the National Act is concerned with the public interest not private rights. The result, however, may be to say that by declaring conduct which was previously tortious an unfair labor practice Congress in effect deprived the person injured of the ability to obtain his traditional remedy. It is doubtful that Congress intended any such result but the Court has found it necessary in order to achieve a uniform national labor policy.[22]

As the foregoing brief survey indicates in ruling upon the displacement of state power by the enactment of Federal legislation the court has been

20 359 U.S. 236 (1959)

21 *Id.* at 244

22 *Ibid.* The effects of this holding are considerably mitigated by an exception which the court recognizes to the general doctrine of preemption in areas of "state concern deeply rooted in local feeling and responsibility." Two such areas have been recognized, cases involving violence or breach of the peace and cases of defamation. In cases involving violence states may both enjoin the conduct and grant damages to the victim on the basis of assault and battery. In cases of defamation the states are permitted, subject to considerable restriction, to grant damages to the victim. It is not clear whether other exceptions will be found. For example, a state may grant damages to a person who becomes emotionally upset and, as a result, physically ill from abusive language on a picket line. Arguably all state tort law is based on a "compelling state interest."

attentive to legitimate state interests. Nevertheless the effectuation of Federal policy almost always requires that some traditional exercises of state power be invalidated. The tremendous growth of Federal law therefore has necessarily multiplied the number of occasions upon which the Court is required to hold improper some form of state action.

II

THE DIVISION BETWEEN LEGISLATIVE AND JUDICIAL JURISDICTION.

One of the most significant and least publicized of the court's functions is in overseeing the application of state law by federal courts and federal law by state courts. The Constitution provided for federal court jurisdiction over cases between citizens of different states. This class of cases commonly referred to as diversity cases has from the beginning been the major source of federal court jurisdiction.

The Constitution did not specify the nature of the law to be applied in such cases but it was generally understood that state law was to govern. This understanding was incorporated into one of the first federal statutes i.e. the rules of decision act which provided that the laws of the states would govern diversity cases.[23] There was no doubt that state statutes were thereby made applicable in federal diversity cases. It was also generally understood that determinations by state courts of the meaning of state statute were binding in federal court. However, most state law was not statutory. The basic law of contracts and torts in each state has been created by the courts from the background of the English common law. Since each State's rules of contract and tort derive from a common background it was the view of many scholars and judges that there existed a "general common law" which the decision in any state reflected imperfectly. The implication of this view was that in the absence of state law or local custom in diversity cases the federal courts need not accept the decisions of the state courts as to the meaning of state law.

In the famous case of *Swift v. Tyson*[24] the Supreme Court held that the decision of a state court was not dispositive of the meaning of "state law" in a diversity case except where a state statute or a particularly local issue was involved. The great Justice Joseph Story articulated a generally accepted view of the nature of law when he stated "it will hardly be con-

23 "The laws of the several states....shall be regarded as rules of decisions in trials at common law, in the courts of the United States, and in cases where they apply."

24 16 Pet. 1 (1842).

injunctions in such cases. Although the Norris Laguardia Act does not apply to state courts, state courts are supposed to follow federal policy in enforcing collective bargaining agreements. The issue will undoubtedly come before the United States Supreme Court fairly soon. The court's task will be a difficult one. As indicated above, good arguments can be advanced either way. This is but another example of the delicate task which the court performs in permitting two systems of laws and two systems of courts not only to exist side by side but to work cooperatively together.

As the foregoing analysis indicates the area of conflict between state power on the one hand and the Constitution and Federal legislation on the other has increased greatly in recent years. Partly as a result of judicial developments and partly because of the growth of national legislation the court has increasingly rendered decisions limiting or invalidating exercises of state power. In the United States with its tradition of majority rule and state sovereignty people have often resented the Court, an institution responsible to no electorate, vitiating the actions of local public officials. From the earliest days of the Court's existence until the present its exercise of the function of judicial review has produced bitter, often violent, reaction. The increased use by the court of its power to declare state legislation unconstitutional has led to customary and expected charges of judicial tyranny by those opposed to the thrust of the court's decisions. It has also moved thoughtful commentators to expressions of concern and in general it has led to increased interest in the nature of the available limitations upon the exercises of power by the court.

III

LIMITATIONS ON COURTS

There are several techniques by which the power of the court is or may be limited.

I. SELF LIMITATION

A. DECISIONAL LIMITATION

Aware of the controversial nature of its decisions holding state and federal laws unconstitutional and of the undesirability of its playing too prominent a role the Court early in its history developed several doctrines which mitigate the impact of judicial review.

(*i*) *Presumption of Constitutional*

The Court has formally adopted the concept that state legislation should only be struck down when it conflicts with the Federal Constitution or legislation is clear. The dificulty with this limitation, of course is that

it rarely serves to decide particular cases. In cases of constitutional adjudication this principle is generally in conflict with some immediate interest of the party being adversely affected by an exercise of state power. Moreover, it is inevitably inconsistent with the broad constitutional language limiting state power which is likely to be involved in cases before the court. It is thus easy to pay lip service to this doctrine while holding that in the particular case it does not apply.

(*ii*) *Limitation Based on Precedent*

According to traditional legal theory, the Court in the absence of a compelling reason to the contrary is required to adhere to its own previous decisions and to decide cases in accordance with previously enunciated principles. The extent to which the Court actually relies on established doctrine is a matter of great debate. Unquestionably it does exert some limit. There are many questions about the meaning of the Constitution that have become settled to the point where the Court would not consider revising earlier decisions. Moreover the force of established doctrine may affect decisions by keeping certain contentions from being presented to the Court. Counsel will almost always try to structure the argument in such a way as to avoid asking the court to overrule its own precedent. On the other hand the meaning of earlier decisions and the application of existing principles is rarely completely clear. The extent to which judges are willing to stretch, shrink or overrule previous precedent in order to reach a desired result varies greatly. Some judges view the allegiance to precedent as a negative factor on the grounds that it makes the law outdated and an impediment to progress. Others see it as a necessary in order to prevent decisions from mirroring the personal predelictions of the judges. Supporters of this view (and I am one of them) maintain that the concept of the rule of law implies that the judges will decide in accordance with established rules. Unless the Court pays careful attention to existing doctrine and gives respect to earlier decisions it will be functioning as a non-elected legislature rather than a judicial body.[32]

It is not true that respect for doctrine is necessarily inconsistent with adequate development. There are well known techniques by which the law grows in which doctrines are created, developed, and discarded, but these techniques do not leave the court free to decide cases in terms of which party the court desires to see victorious. The Court should apply the same yard stick to state action which it views as undesirable as it does to those it

32 The classic statement of the position is Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1 (1959).

tended that the decisions of courts constitute laws. They are at most only evidence of what the laws are and are not of themselves laws. They are often reexamined, reversed, and qualified by the courts themselves whenever they are found to be either defective or ill founded or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws." Thus the law governing a tort or a contract within a state might vary not because of a division of legislative authority but because of the competing jurisdiction of the federal courts. Forum shopping by potential plaintiffs in diversity cases become common. This led to criticism of *Swift* v. *Tyson*, which increased as the view of the nature of judicial authority therein articulated became outmoded.

In *Erie Railroad Company v. Tompkins*[25] the Supreme Court abandoned the position taken in *Swift v. Tyson*. Adopting the language of Justice Holmes it held that "the common law so as it is enforced in a state whether called common law or not is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else. The authority and only authority is the state and if that is so the voice adopted by the state as its own (whether it be of its legislature or of its Supreme Court) should utter the last word." Henceforth in diversity cases the federal courts were required to apply state law solely and to look to state court decisions to determine its meaning.

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30 Clark, "State Law in the Federal Courts : The Brooding Omnipresence of Eriev. Tompkins," 55 *Yale L. J.* 267, 291-92 (1946).

31 *King* v. *Order of United Commercial Travelers*, 333 U.S. 153 (1948).

the equal protection clause has required the redrafting of electoral districts and has changed the political power alignment in the majority of states in the union.

The Court has also significantly expanded the reach of the 14th amendment by its recent decision construing the due process clause which provides that no state may deprive any person of "life, liberty, or property without due process of law."

Until fairly recently the Court interpreted this language in such a way as to impose only a limited restrain upon state power. In *Palko v. Connecticut*[11] the Court held that the due process clause did not prevent a state from trying a person twice for the same crime. Although the bill of rights prevents the Federal Government from subjecting anyone to double jeopardy in this fashion the Court rejected the contention that the 14th amendment imposes upon the states the same restrictions that the bill of rights imposes upon the Federal Government. One of America's great jurists, Justice Cardozo, speaking for the Court stated that the 14th amendment barred the states only from such actions as were basically incompatible with a "scheme of ordered liberty." In recent years the doctrine of the *Palko case* has been under steady attack. Led by Justice Black, who has long maintained that the 14th amendment incorporates the entire bill of rights, the Court has steadily widened the coverage of the due process clause so that today there are few if any parts of the bill of rights not applicable to the states.[12] Simultaneously the Court today reads the prohibitions of the bill of rights more broadly than it did previously. In particular it has given great scope to the language denying the right of Congress to abridge freedom of speech or to establish religion. Because of the movement away from the *Palko case* the broadening of the bill of rights has meant a concomitant limitation upon state power.

B. Resolving Conflict Between State Action and Federal Legislation.

The Court also invalidates exercises of state power if they are inconsistent with congressional legislation. In many ways this task of delineating the relationship between federal action and state power is the most difficult of the court's functions. Federal legislation dealing with a specific

11 302 U.S. 319 (1937)

12 See generally Cox, "The Supreme Court 1965 Term, Constitutional adjudication and the Promotion of Human Rights," 80 *Harv. L. Rev.* 91-122 (1966). Forward, 1962 Term of the Supreme Court, 77 *Harv. L. Rev.* 81 et. seq. 1963.

part of a general area assumes a background of state law. As Professors Hart and Wechsler have observed in a splendid note, "Federal legislation on the whole has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationship established by the states altering or supplementing them only so far as necessary for the special purpose. Congress acts in short against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."[13] Accordingly, in most cases federal statutes could not operate as intended without some residual state power. On the other hand, to permit inconsistent state action after the passage of national legislation threatens the goal of uniform national policy implicit in any federal legislation.

I have chosen labor relations to illustrate the nature and difficulty of the court's task in accommodating the reach of state and federal law. During the first 150 years of the American Republic labor law was almost entirely state law. The rights of employees to organize into unions varied from state to state as did the legality of union activity. The Supreme Court's role was primarily limited to review of state action in accordance with constitutional standards.[14] The only sizeable exception to this scheme was in the application of federal anti-trust laws to unions. Indeed, until fairly recently, there was considerable doubt that whether the Federal Government had general power to regulate labor relations as such.[15]

In 1932, Congress legislated a comprehensive national system of labor relations. The basic purpose of the legislation was to grant employees the rights to join unions and to require an employer to bargain with a union chosen by a majority of his employees. The rights of unions to strike and picket were guaranteed. A federal agency was established and given the primary task of determining the wishes of the employees and enforcing their rights under the Act. The passage of the Wagner Act, or NLRA, created four different types of legal issues with respect to each of which the United States Supreme Court has the final power of decision.

13 Hart & Wechsler, *The Federal Courts and the Federal System* 435-436 (1953), Jereinafter cited as H & W.

14 To some extent federal courts did get involved in labor relations matters but their jurisdiction was largely limited to cases involving citizens of different states in which, as indicated more fully below, they are required to apply state law.

15 For an analysis of the development of constitutional doctrine and federal jurisdiction in labor relations, see Williams, *Labor Relations and the Law* 5-100 (1965)

The Court had to determine :

1. The constitutionality of the legislation,
2. The meaning to be attributed to the general language of the statute,
3. The relationship between the National Labor Relations Board and the Courts, and
4. The extent to which the Federal Act displaced state power.

Of these tasks the first although in many ways the most significant was the easiest. The court in a single, long, carefully written opinion held that the power to regulate interstate commerce granted to Congress by the Constitution comprehended the power to regulate labor relations.[16] The second and the third of these issues have recurred frequently. The Supreme Court has issued innumerable decisions construing the language of the Act and working out the relationship between the Board and the Courts. There is no end in sight. The Court's role in this regard is a permanent part of its work.

For my present purpose in seeking to explain the role of the Supreme Court in the American system of federalism it is the question of the impact of national labor law on state power that is most significant. Comprehensive though it was there was no suggestion that the Wagner Act displaced state power entirely. The Wagner Act dealt with abuses by employers only. The reason given by its proponents for not creating union unfair labor practices was that state law was able to deal effectively with flagrant union misconduct. Similarly the federal law did not deal with the relationship between a union and its members nor with most general aspects of the employment relationship. Moreover, once collective bargaining was established and an agreement signed the Wagner Act did not speak of the nature of the rights arising thereunder. In all of these areas it was understood that state law would continue to govern and the same was true with respect to state and municipal employees who were excluded from the operation of the Federal Act. As Justice Jackson stated, it was clear that Congress had left much to the states although it did not specify how much.[17]

On the other hand, it was equally clear that inconsistent state law could not be applied to employees whose activities were covered by the National Labor Relations Act. Thus, state rules outlawing peaceful picketing or outlawing union activity or permitting employers to enforce so

16 *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
17 *Garner* v. *Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485 (1953).

called yellow dog contracts were displaced by the federal statute.[18] It was decided fairly early that state labor laws could not seek to govern conduct dealt with by the National Labor Relations Act even if the state sought to conform its law to the federal law. The reason for denying such power to the states is that a significant aspect of national policy is to develop a coherent system of regulation by channelling labor relations disputes through the National Labor Relations Board. The Court has had more difficulty deciding when conduct not dealt with directly by the Federal Act can be regulated by the state. The question is whether the absence of federal regulation is tantamount to a congressional decision that conduct should be free of regulation or was on the contrary a decision that such matters should be left to the states. Matters such as accident compensation for employees or internal union affairs were so far outside the scope of the NLRA that it has been generally understood that state law was permitted to continue in force. On the other hand, where employer response to union activity is involved the question is considerably different. The National Labor Relations Act prohibits many of the traditional responses by which employers formerly sought to defeat union activity. Therefore, the conclusion that Congress did not outlaw a certain type of response is likely to be taken as a decision that an employer should be free to engage in it. When collective bargaining relations have been established the court has determined that the National Labor Relations Act favors the free use of economic pressure by both sides. Thus, for example, most scholars are agreed that although the hiring of strike replacements is not dealt with by the NLRA state laws seeking to limit an employer's ability in this regard are invalid because inconsistent with the federal policy favoring free use of economic pressure.

The issue is more complicated where union conduct is involved. Some union conduct is outlawed by §8 of the NLRA and some union conduct is specifically approved (or protected as it is referred to) by §7. Thus by construing §7 and §8 the courts determine which conduct Congress disapproved of and which it meant for unions to be able to engage in. There is a small category of union conduct neither protected by §7 nor prohibited by §8. In an early decision in *UAW* v. *WERB* (*The Briggs Stratton case*)[19] the Supreme Court held that some activity which fell into this category could be regulated by the states. The impact of this decision was severely limited however because the court refused to permit the states to make their own

18 *LaCross Tel Corp.* v. *WERB*, 336 U.S. 18 (1949) ; *Hill* v. *Florida*, 325 U.S. 538 (1945).
19 336 U.S. 249 (1949)

determination of whether activity is prohibited or protected by the NLRA. In the famous case of *San Diego Building Trade Council* v. *Garmon*[20] the Supreme Court stated :

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §.7 of the Taft-Hartley Act, or constitute an unfair practice under §.8, due regard, for the federal enactment, requires that state jurisdiction must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[21]

Since it is possible to argue with some plausibility that any union action is either protected or prohibited by the NLRA the area of preemption thus established is very great and the *Briggs Stratton case* has almost never been applied. The Supreme Court also held in the *Garmon case* that state laws may be preempted to the extent they overlap with the reach of the NLRA even though the laws in question are general laws, for example, tort or contract, and not directed primarily at labor relations. This conclusion may lead to some unfortunate results. For example, the NLRA does not provide for damages for an employer injured by union misconduct nor does it provide complete recompense for an employee whose rights are interfered with by an employer. This is explained on the theory that the National Act is concerned with the public interest not private rights. The result, however, may be to say that by declaring conduct which was previously tortious an unfair labor practice Congress in effect deprived the person injured of the ability to obtain his traditional remedy. It is doubtful that Congress intended any such result but the Court has found it necessary in order to achieve a uniform national labor policy.[22]

As the foregoing brief survey indicates in ruling upon the displacement of state power by the enactment of Federal legislation the court has been

20 359 U.S. 236 (1959)

21 *Id.* at 244

22 *Ibid.* The effects of this holding are considerably mitigated by an exception which the court recognizes to the general doctrine of preemption in areas of "state concern deeply rooted in local feeling and responsibility." Two such areas have been recognized, cases involving violence or breach of the peace and cases of defamation. In cases involving violence states may both enjoin the conduct and grant damages to the victim on the basis of assault and battery. In cases of defamation the states are permitted, subject to considerable restriction, to grant damages to the victim. It is not clear whether other exceptions will be found. For example, a state may grant damages to a person who becomes emotionally upset and, as a result, physically ill from abusive language on a picket line. Arguably all state tort law is based on a "compelling state interest."

attentive to legitimate state interests. Nevertheless the effectuation of Federal policy almost always requires that some traditional exercises of state power be invalidated. The tremendous growth of Federal law therefore has necessarily multiplied the number of occasions upon which the Court is required to hold improper some form of state action.

II

THE DIVISION BETWEEN LEGISLATIVE AND JUDICIAL JURISDICTION.

One of the most significant and least publicized of the court's functions is in overseeing the application of state law by federal courts and federal law by state courts. The Constitution provided for federal court jurisdiction over cases between citizens of different states. This class of cases commonly referred to as diversity cases has from the beginning been the major source of federal court jurisdiction.

The Constitution did not specify the nature of the law to be applied in such cases but it was generally understood that state law was to govern. This understanding was incorporated into one of the first federal statutes i.e. the rules of decision act which provided that the laws of the states would govern diversity cases.[23] There was no doubt that state statutes were thereby made applicable in federal diversity cases. It was also generally understood that determinations by state courts of the meaning of state statute were binding in federal court. However, most state law was not statutory. The basic law of contracts and torts in each state has been created by the courts from the background of the English common law. Since each State's rules of contract and tort derive from a common background it was the view of many scholars and judges that there existed a "general common law" which the decision in any state reflected imperfectly. The implication of this view was that in the absence of state law or local custom in diversity cases the federal courts need not accept the decisions of the state courts as to the meaning of state law.

In the famous case of *Swift v. Tyson*[24] the Supreme Court held that the decision of a state court was not dispositive of the meaning of "state law" in a diversity case except where a state statute or a particularly local issue was involved. The great Justice Joseph Story articulated a generally accepted view of the nature of law when he stated "it will hardly be con-

23 "The laws of the several states....shall be regarded as rules of decisions in trials at common law, in the courts of the United States, and in cases where they apply."

24 16 Pet. 1 (1842).

tended that the decisions of courts constitute laws. They are at most only evidence of what the laws are and are not of themselves laws. They are often reexamined, reversed, and qualified by the courts themselves whenever they are found to be either defective or ill founded or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws." Thus the law governing a tort or a contract within a state might vary not because of a division of legislative authority but because of the competing jurisdiction of the federal courts. Forum shopping by potential plaintiffs in diversity cases become common. This led to criticism of *Swift* v. *Tyson*, which increased as the view of the nature of judicial authority therein articulated became outmoded.

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31 *King* v. *Order of United Commercial Travelers*, 333 U.S. 153 (1948).

injunctions in such cases. Although the Norris Laguardia Act does not apply to state courts, state courts are supposed to follow federal policy in enforcing collective bargaining agreements. The issue will undoubtedly come before the United States Supreme Court fairly soon. The court's task will be a difficult one. As indicated above, good arguments can be advanced either way. This is but another example of the delicate task which the court performs in permitting two systems of laws and two systems of courts not only to exist side by side but to work cooperatively together.

As the foregoing analysis indicates the area of conflict between state power on the one hand and the Constitution and Federal legislation on the other has increased greatly in recent years. Partly as a result of judicial developments and partly because of the growth of national legislation the court has increasingly rendered decisions limiting or invalidating exercises of state power. In the United States with its tradition of majority rule and state sovereignty people have often resented the Court, an institution responsible to no electorate, vitiating the actions of local public officials. From the earliest days of the Court's existence until the present its exercise of the function of judicial review has produced bitter, often violent, reaction. The increased use by the court of its power to declare state legislation unconstitutional has led to customary and expected charges of judicial tyranny by those opposed to the thrust of the court's decisions. It has also moved thoughtful commentators to expressions of concern and in general it has led to increased interest in the nature of the available limitations upon the exercises of power by the court.

III

LIMITATIONS ON COURTS

There are several techniques by which the power of the court is or may be limited.

I. SELF LIMITATION

A. DECISIONAL LIMITATION

Aware of the controversial nature of its decisions holding state and federal laws unconstitutional and of the undesirability of its playing too prominent a role the Court early in its history developed several doctrines which mitigate the impact of judicial review.

(*i*) *Presumption of Constitutional*

The Court has formally adopted the concept that state legislation should only be struck down when it conflicts with the Federal Constitution or legislation is clear. The dificulty with this limitation, of course is that

it rarely serves to decide particular cases. In cases of constitutional adjudication this principle is generally in conflict with some immediate interest of the party being adversely affected by an exercise of state power. Moreover, it is inevitably inconsistent with the broad constitutional language limiting state power which is likely to be involved in cases before the court. It is thus easy to pay lip service to this doctrine while holding that in the particular case it does not apply.

(*ii*) *Limitation Based on Precedent*

According to traditional legal theory, the Court in the absence of a compelling reason to the contrary is required to adhere to its own previous decisions and to decide cases in accordance with previously enunciated principles. The extent to which the Court actually relies on established doctrine is a matter of great debate. Unquestionably it does exert some limit. There are many questions about the meaning of the Constitution that have become settled to the point where the Court would not consider revising earlier decisions. Moreover the force of established doctrine may affect decisions by keeping certain contentions from being presented to the Court. Counsel will almost always try to structure the argument in such a way as to avoid asking the court to overrule its own precedent. On the other hand the meaning of earlier decisions and the application of existing principles is rarely completely clear. The extent to which judges are willing to stretch, shrink or overrule previous precedent in order to reach a desired result varies greatly. Some judges view the allegiance to precedent as a negative factor on the grounds that it makes the law outdated and an impediment to progress. Others see it as a necessary in order to prevent decisions from mirroring the personal predelictions of the judges. Supporters of this view (and I am one of them) maintain that the concept of the rule of law implies that the judges will decide in accordance with established rules. Unless the Court pays careful attention to existing doctrine and gives respect to earlier decisions it will be functioning as a non-elected legislature rather than a judicial body.[32]

It is not true that respect for doctrine is necessarily inconsistent with adequate development. There are well known techniques by which the law grows in which doctrines are created, developed, and discarded, but these techniques do not leave the court free to decide cases in terms of which party the court desires to see victorious. The Court should apply the same yard stick to state action which it views as undesirable as it does to those it

32 The classic statement of the position is Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1 (1959).

favors. One of the hallmarks of competence in judges is respect for precedent coupled with an ability to recognize articulate and apply in a new context the policy considerations which led the Court to decide previous cases as it did. Although the question of the extent to which the court should feel itself bound by doctrine and precedent has provoked considerable debate, for the present at least, the day has pretty much been carried by those Justices least concerned with doctrinal consistency.[33]

B. JURISDICTIONAL AND PROCEDURAL LIMITATION.

The Constitution provides that the judicial power of the United States shall extend to "cases and controversies"[34] of various types. The Supreme Court has insisted that it may not act in the absence of a case or controversy. Accordingly, it has consistently refused to issue advisory opinions.[35] It will not rule upon the constitutionality of state or federal legislation until the matter comes before it as a part of a genuine lawsuit. The court will not entertain feigned cases or those already mooted, and it will not pass on the constitutionality of legislation unless it is required to.[36] Moreover a party challenging the constitutionality of a state statute must be directly affected by it. Usually he must be able to demonstrate some special injury will be caused him over and beyond that which will be suffered by taxpayers or members of the general public.[37] Unless someone with "standing" to sue can be found who is willing to challenge state legislation its constitutionality may in fact never be determined.

In order to obtain review by the United States Supreme Court a litigant must first pursue his state remedies and must have exhausted all avenues of relief. The case must be in a posture such that the court's decision will be a final adjudication of the rights involved.[38] Although theoretically

33 See e.g. Griswald, "Absolute Is In The DARU a Discussion Of The Approach Of The Supreme Court To Constitutional Questions 35, NYSBJ 212 (1963). Jaffee, "Was Brandeis An Activist," 80 *Harv. L. Rev.* 986 (1967).

34 Article III, U.S. Constitution.

35 H. & W., at 75-85.

36 See *United States* v. *Johnson*, 319 U.S. 302 (1943); *Burton* v. *United States*, 196 U.S. 283, 295 ; *California* v. *San Pablo & Tulare R. R.*, 149 U.S. 308 (1893).

37 In *Frothingham* v. *Mellon*, 262 U.S. 447. The Court refused to review the constitutionality of a federal statute on the grounds that the plaintiff as a taxpayer did not have a sufficient interest. This decision has been consistently followed as to taxpayers but in the apportionment cases the court held that a voter has significant enough interest in the value of his vote to challenge the constitutionality of a state legislature. It is not clear why a taxpayer as such doesn't have a recognizable legal interest but a voter does.

38 *Hayburns Case*, 2 Dall. 409 (1792).

a party is entitled to appeal as of right to the Supreme Court whenever the the state judicial system upholds the validity of a state action challenged on constitutional grounds, in fact the court has dismissed appeals from such state court's decisions on the ground that they do not raise a substantial constitutional question.[39] A dismissal for insubstantiality is not equivalent to a disposition on the merits because substantiality may be judged by the importance of the question rather than by the merits of the challenging party's contentions. Thus, for example, attempts to challenge the constitutionality of laws requiring students to salute the American flag were first dismissed for lack of substantiality although the court ultimately held such laws unconstitutional.[40] In order for a litigant to raise the question of the constitutionality of state action, absent special circumstances, he should have raised the issue in the state court and the question must have been the basis for the state court's decision. If the state court's determination can be sustained on the basis of a valid state rule other than the one being challenged the Supreme Court will deny review, since it is the state courts who are the final arbitrators of the meaning of state law.[41]

The operation of this rule presents interesting practical problems. For one thing when different substantive issues are dealt with it is often difficult to determine the basis of a state court's decision.[42] Frequently the Supreme Court is required to determine whether a state procedural rule which prevents a litigant from getting a determination on the merits of his claim constitutes an independent state grounds so as to preclude judicial review. Such a case results, for example, if a person convicted of a crime fails to make a timely appeal raising his constitutional claim and the state court refuses on this ground to deal with his constitutional claim and affirms his conviction. Traditionally the Supreme Court has treated decisions as resting on an independent state ground and it has refused to review the constitutional questions presented unless the state rule itself violates some constitutional standard.[43]

Recently, however, the court has shown an increased tendency to disregard state procedural rules limiting judicial review. In at least one recent

39 *Zucht* v. *King*, 260 U.S. 171 (1922).

40 See generally H & W, at 572-576.

41 *Murdook* v. *Memphis*, 20 Wall. 590 (1875) and *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

42 See H & W at 443-447.

43 See *Herndon* v. *Georgia*, 295 U.S. 441 (1935) and *National Mutural Mutual B L & Association* v. *Brahan*, 193 U.S. 635 (1904).

civil rights "decisions" it has held that the state court did not properly apply its own rule a departure from the traditional view that the state court is the supreme arbitrator of state law.[44]

The Supreme Court has also refused to review some questions of constitutionality on the ground that they were not appropriate questions for judicial review. Thus questions of the obligation of states to provide a republican form of government and questions of the abrogation of treaties and the right of recognition of foreign governments have been held to be political questions and outside the scope of the court's power.[45] Originally the court also took the position that the question of the apportionment of state legislatures was a political question not appropriate for judicial review.[46] The court has recently overriden its earlier opinion and concluded that a judicial question was raised by the question of apportionment of state legislatures.[47] Even when the court is willing to entertain a question concerning the constitutionality of state power it has generally limited the scope of its holding by the necessity of the case before it. The court has generally not passed on the legitimacy of the entire state statute in a case but only on the particular application of state power in question. Thus, for example, the court has generally not held state obscenity laws in general to be unconstitutional but has dealt with the application of the state laws with respect to particular books and movies. Recently the court has tended to go somewhat farther than it used to and on occasion it has held certain statutes void on their face and without regard to the nature to their application.[48]

Limitations on the power of judicial review are also contained within the Constitution which provides in the eleventh amendment that the "judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state." It was held that the eleventh amendment also prohibited suits against the state by its own citizens.[49] For a long time the eleventh amendment was thought to prevent courts from directly ordering state officials to take action. However, recently the court in the segregation and apportionment cases has been willing to order affirmative action by state officials.

44 See *NAACP* v. *Alabama*, 357 U.S. 449 (1958).
45 H & W at 192-209.
46 *Colegrove* v. *Green*, 328 U.S. 549 (1946).
47 *Baker* v. *Carr*, supra.
48 See, e.g., *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966).
49 See, e.g., *Georgia R. R. V. Banking Co.* v. *Redwine*, 342 U.S. 299 (1952).

As the foregoing brief discussion indicates the current trend of the court is to limit and sometimes disregard many of the traditional doctrine curtailing the scope of judicial review of state legislation.

II. EXTERNAL CONTROLS

A. Political Controls

(*i*) *Amendment*

There are various ways in which the role of the Supreme Court may be controlled through normal political processes. The technique that most people are aware of is amendment of the Constitution. If a decision by the Supreme Court or a line of decisions is generally opposed, the Congress and the States acting together can overrule it by amending the Constitution. However the amendment process is slow, cumbersome and largely ineffective. It requires a large majority against the Court's decision both nationaly and on the state's level. According to the Constitution a 2/3 majority in both Houses of Congress or application by 2/3 of the states is necessary to propose an amendment which may then be ratified by the legislature of 3/4 of the several states or by conventions in 3/4 thereof.[50]

Even if a large enough majority is opposed to the Court's decision an amendment of the Constitution is unlikely. The Court's most controversial decision generally involve construction of the bill of rights or other widely venerated language of the Constitution. To oppose the Court's decision is not necessarily to favour changing the language of the Constitution which the court applied. Thus a great majority of Americans probably oppose the Court's holdings that public school prayers are unconstitutional. But most Americans have learned to take pride in, and favor the first amendment's prohibition of an "establishment of religion" which is the language which the court applied.[51] Many people who oppose the decision would not favour any change in the language. Even among those willing to amend the Constitution to change this interpretation considerable concern has been expressed that any amendment be carefully drawn to leave in tact the essence of the constitutional prohibition against establishment and the prohibition against governmental interference with the "free exercise" of religion. It is a difficult task to amend the general language of the Constitution to change individual decision or even a series of decisions without changing the essential thrust of the original language. Most attempts to

50 U.S. Constitution Article V.
51 *Engle* v. *Vitale*, 370 U.S. 421 (1962).

amend the Constitution have failed to produce language capable of enlisting all who oppose the court's decisions.

(*ii*) *Appointment, Ratification and Impeachment*

According to the American Constitution, Judges are appointed by the President with the "consent" of the Senate.[52] They hold office unless they are guilty of improper behavior[53] in which case they may be impeached by the House of Representatives and tried by the Senate.[54]

Some political control exists in the power of appointment and ratification. A President opposed to a line of court decisions may when the occasion arises seek to appoint someone likely to seek to change it. The power is obviously limited because the opportunity to appoint comes sporadically and because it is extremely difficult to predict how a prospective judge will vote or what questions he will be called on to consider. The power of ratification is less significant because Congress can only reject not select and because politically the tradition is to permit the President wide latitude in the selection of judges. Impeachment does not purport to be a remedy for unpopular or improperly analysed decisions but only for improper behavior. All attempts to use the impeachment power to express disapproval of judicial decision have failed. No Supreme Court Justice has ever been impeached.

(*iii*) *Limitation of Jurisdiction*

A politically more significant control is provided by the Congressional power to make exceptions to the court's jurisdiction. The Constitution in article III, Section 2 provides that the court shall have appellate jurisdiction "with such exceptions and under such regulations as the Congress shall make." There have been bills introduced in the Congress seeking to eliminate in large part the court's power to declare state acts unconstitutional. There have been efforts to deprive the court of appellate jurisdictions in cases involving the apportionment of state legislatures and some attempts to eliminate judicial review of any state court decisions.[55] Since none of these efforts have been successful there is very little precedent dealing with the constitutionality of acts limiting the jurisdiction of the United States Supreme Court. The question has been however much debated by legal scholars. There are scholars who take the view that the Constitution plainly leaves the question of the court's jurisdiction up to

52 U.S. Const. Article II Section 2.

53 Article III Section 1.

54 Article I Section 2 and 3.

55 See. e.g. 5 2646 85th Cong. lst Session 1961.

Congress, and that if Congress were to eliminate the court's jurisdiction entirely this would be within its power.[56] Most scholars would probably conclude, however, that the power of the Congress to make exceptions to the court's jurisdiction is limited by the natural assumptions of the federal system.[57] Exceptions to the Supreme Court's jurisdiction does not carry with it the power to completely destroy the court's intended constitutional role. Only those exceptions consistent with the court's basic functions would be constitutional. There is historical evidence in support of this view which indicates that the term exceptions was understood to mean only a limited change in the Court's jurisdiction.[58]

(*iv*) *The Power to Change Federal Law*

To the extent the court invalidates exercises of state power as inconsistent with Federal Legislation Congress may overrule it by amending the legislation in question. Such action is of course much easier than amending the Constitution since it requires only the customary law making procedures and does not involve attempts to change historically cherished language. Such amendments are difficult to draft, however, because of the need to maintain the integrity of the original federal legislation. Because preemption decisions are rarely politically significant Congressmen are often unwilling to take the time necessary to undertake such a task. Often too, Congressmen are aware that attempts to amend legislation can rarely be limited to one aspect for amendment.

It is also theoretically possible for Congress to spell out in advance the extent to which it wishes to permit state legislation to continue in force. However it is difficult to anticipate the areas of potential conflict, and it is even more difficult to seek to include in a bill a scheme of preemption. In some limited cases, however, Congress has indicated that it wishes to permit state law to continue. When Congress deals with this question its mandate is obeyed.[59] However congressional attempts to deal directly with the

56 For a good statement of both positions see Hart, "The Power of Congress to limit the jurisdiction of the Federal Courts : An Exercise in Dialectic," 66 *Harv. L. Rev.* 1362 (1953).

57 Ibid. See also Merry, "Scope of the Supreme Court's appellate jurisdiction", 47 *Minn. L. Rev.* 53 (1962); Ratner "Congressional Power over the appellate jurisdiction of the Supreme Court," 109 *U. Pa. L. Rev.* 157 (1960).

58 Ibid.

59 Thus §8 (a) (3) of the NLRA permits employers and unions to agree that all employees in a plant are required to join the union after 30 days. But §8(a) (3) permits the states to outlaw such agreements within their own jurisdiction. In this limited area the policy of uniformity has been abandoned in favor of a policy of local option. Similarly Congress has specified that state law may be applied to employees who are theoretically

problem are rare and thankfully so. Although I wish not take the time to deal with this point at length in this article I have concluded that congressional enactments in this area generally cause more problems than they solve.[60] And the essential task of accommodating state law and federal policy must necessarily continue to be primarily for the courts.

B. Refusal to Cooperate

The impact of Court decisions have sometimes been reduced by the refusals of public officials to act in accordance with them. The Court has little power to insist that public officials generally implement its interpretations of the Constitution. Where court opinions are politically unpopular it is often possible for state officials to continue with their nonconforming behavior. Thus the Supreme Court's decision on school prayer is widely ignored and after 13 years some of its opinions outlawing racial segregation are still being resisted. Other state officials may choose to ignore the decision. There is no agency charged with seeing to it that state officials comply with Supreme Court decisions. The court's mandate is directed only to the immediate parties and it is only against them that the power of the Federal Government will be brought to bear to force compliance. Thus for some the question of compliance turns on the likelihood that the legality of their action will be tested in a law suit. Moreover, officials may have nothing to lose in the event their action is declared illegal and thus they may be willing to ignore the court's decision merely to delay its enforcement and to force its proponents to the expense of litigation. Even those who feel honor bound to follow explicit court holdings may lessen the impact of a decision by interpreting it strictly and forcing the court to spell out its meaning clearly before complying. But non-compliance has its difficulties. Americans generally accept the idea of the rule of law and outright defiance of the Supreme Court is only rarely acceptable political behavior. Further the Federal Government is committed to support the Court and ultimately defiance may lead to a confrontation with the Federal Government. And in many situations refusal to follow the court decisions will be self defeating. Thus for example refusals to integrate criminal juries has led the court to free many convicted Negro defendants and failure to follow guidelines established for the protection of criminal defendants means they are likely to go free.

covered by the National Act but whose rights are not adequately protected because the Labor Board on the basis of its own jurisdictional standards will not hear their cases. And in 1957 when Congress undertook to regulate internal union affairs it specified that state remedies protecting the same rights would be permitted to continue.

60 *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

C. Scholarly Criticism

Criticism of Supreme Court opinions has long been a staple of legal scholarship in the United States. The law journals are full of articles suggesting changes in the court's approach. That the Court pays attention to such articles is apparent from a reading of its path breaking decisions. In the *Erie Tompkins case* the court paid tribute to the work of an individual scholar who pointed out one of the errors in the courts previous approach.[61] The Erie doctrine itself has recently been softened in response to scholarly criticism.[62] Indeed in almost every major opinion in recent years the Court has referred to scholarly work.

Of course scholarly writing is often referred to by the court to justify decisions which the justices would have reached anyway. The number of citations does not prove that such work serves to limit the reach of Supreme Court opinions. Nevertheless after giving considerable attention to this question I am convinced that scholarly writing is effective in influencing the Court whenever the literature is fairly uniform. Unfortunately such uniformity is most likely to occur with respect to fairly techincal issues in specialised fields. With respect to many of the significant social issues on which society is divided, scholarly literature is also likely to be divided and thus less likely to influence the Court. Of course particular books or articles may persuade some of the justices to change their mind, or they may have an effect on the climate of legal opinion which climate often manifests itself in later court opinions.

Conclusion

The difficulties involved in exercising external control over the Court makes the question of self limitation more significant. To a large extent it is the judicial philosophy of the Justices which will determine how vigorously the court will exercise its role in the American federal system. But whatever the philosophy of the individual Justices the role of the Supreme Court will necessarily continue to be a highly significant one. For it is the Court which must permit two systems of law to exist side by side with ample scope for diversity and experimentation within a unified national system.

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61 In note 4 of his opinion, Justice Brandeis cited several Law Review articles to prove that the Court's previous approach was unsound. Justice Brandeis then singled out Charles Warren's article, "New Light on the Federal Judiciary Act of 1789," 37 *Harv. L. Rev.* 49 (1923) for special praise. "But it was the more recent research of a competent scholar who examined the original document which established that the construction given to it by the Court was erroneous," 304 U.S. at 72.

62 For a list of the relevant cases and articles see Wright Federal Courts 1963 §§ 59, 60.

WHO MAY COMPLAIN UNDER SECTION 33A OF THE INDUSTRIAL DISPUTES ACT ?

SADANAND JHA*

WHO MAY APPLY

A. General :

Section 33-A, *inter-alia*, provides :

where an employer contravenes the provisions of section 33 during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention, may make a complaint.

It follows that the complainant under section 33-A must be

(1) an employee,
(2) aggrieved,
(3) by an action of his employer,
(4) committed during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal,
(5) in contravention of the provisions of section 33.

We shall discuss these requirements in the reverse order and then proceed to examine whether a complaint under section 33-A can be lodged jointly by a group of aggrieved employees, or by union, or by an agent.

B. Action in contravention of the Provisions of Section 33 :

Section 33 regulates the exercise of management prerogatives during the pendency of proceedings. The scope of the ban and the procedure for the removal of the ban may be tabulated as follows :

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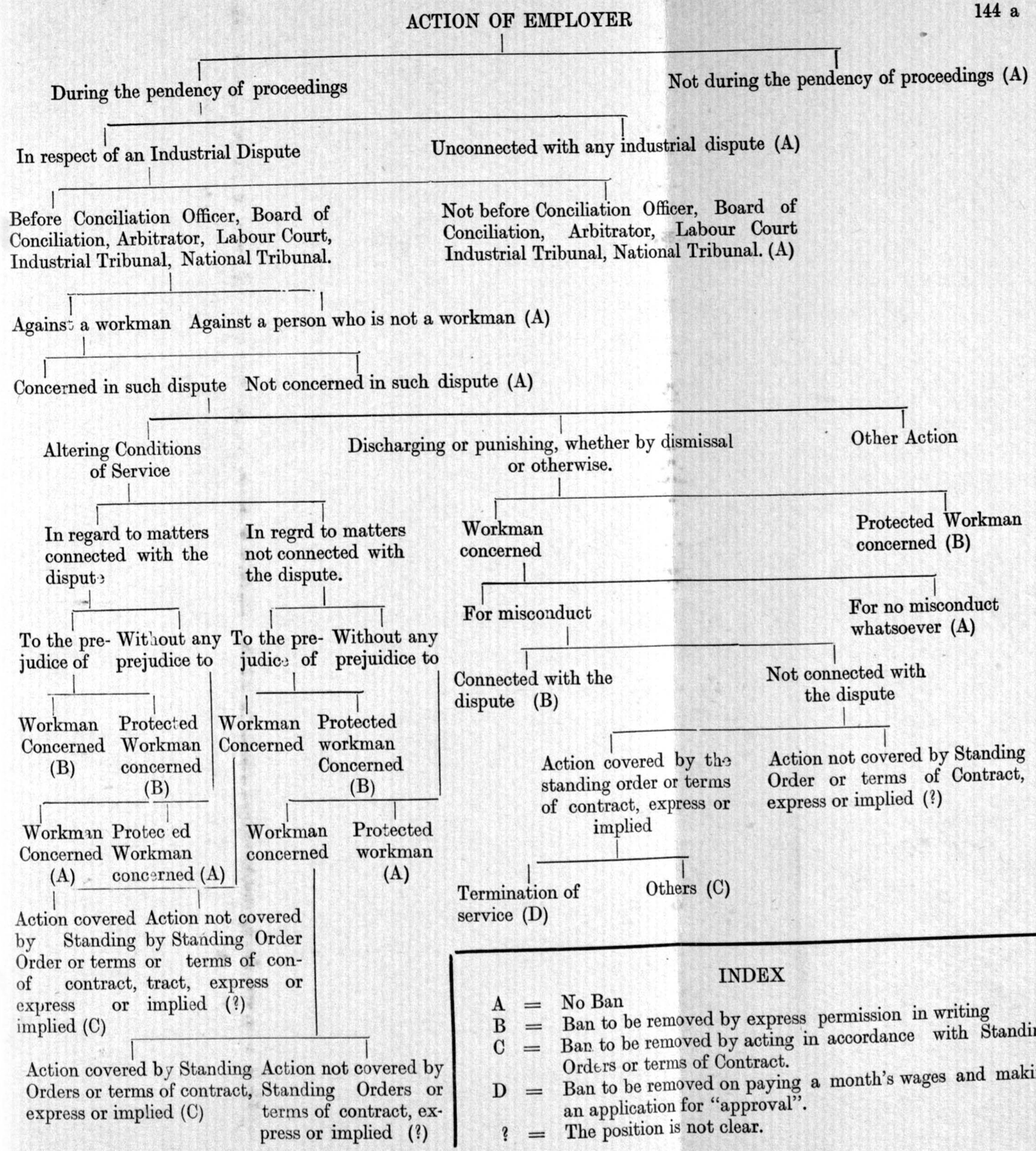

INDEX

A = No Ban
B = Ban to be removed by express permission in writing
C = Ban to be removed by acting in accordance with Standing Orders or terms of Contract.
D = Ban to be removed on paying a month's wages and making an application for "approval".
? = The position is not clear.

An employer violates the provisions of section 33 only if :

(1) he indulges in any one or more of the activities that are marked with the letter "B" without first obtaining express permission in writing of the concerned authority;

(2) he indulges in any one or more of the activities that are marked with the letter "C" in any manner otherwise than in accordance with the provisions of the relevant standing orders or, where there are no standing orders, otherwise than in accordance with the terms of the contract between him and the workmen; and

(3) he indulges in any one or more of the activities that are marked with the letter "D" without paying a month's wages and making an application to the concerned authority for approval of the action taken by him.

The last of the aforesaid three cases contemplates, besides, initial decision of the employer to take action, four distinct stages : (1) payment of wages for one month to the workman to be discharged or dismissed; (2) filing an application before the concerned authority for approval of the action contemplated to be taken or taken by the employer; (3) action by the employer; and (4) approval of the employer's action by the concerned authority. Employer's action in disregard of requirements (1), (2) and (4), is incomplete and ineffective in terminating employer-workman relationship. But, while the effect of the contravention of conditions (1) and (2) is also to render employer's action violative of the provisions of Section 33, the concerned authority's non-approval of the employer's action merely results in the continued uninterrupted employment of the workman.

C. During the Pendency of Proceeding Before a Labour Court. Tribunal or National Tribunal :

Section 33 regulates exercise of management prerogative :

during the pendency of *any conciliation proceeding before a Conciliation Officer or a Board or of any proceeding before an Arbitrator* or a Labour Court, or Tribunal or National Tribunal. (emphasis added).

However, section 33-A makes special provisions for adjudication only

where an employer contravenes the provision of section 33 *during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal.* (emphasis added).

Accordingly, a complaint under section 33-A cannot be lodged in respect of exercise of management prerogative in violation of the provisions of section 33 during the pendency of any conciliation proceeding before a conciliation officer or a board or of any proceeding before an arbitrator.

D. COMPLAINANT MUST BE AGGRIEVED BY AN ACTION OF THE EMPLOYER WHO IS A PARTY TO THE MAIN INDUSTRIAL DISPUTE PENDING ADJUDICATION :

(1) *A Factual Analysis :*

Reported decisions reveal the following pattern of fact situations :

(i) An industrial dispute between an employer and workmen of an industrial establishment is referred for adjudication. However, the employer leases the establishment before he receives, if at all, an official notification of the reference. The lessee, who is never informed of the reference and is not specifically enjoined as a party, to the proceedings, terminates the services of a workman employed by him in total disregard of the provisions of S. 33. The aggrieved workman lodges a complaint under section 33-A against the lessee.

(ii) An employer leases an industrial establishment and, while lessee is running the industry, an industrial dispute concerning the establishment is referred for adjudication. During the pendency of proceedings, the lease expires and the establishment reverts back to the lessor who is not as such impleaded as a party. The lessor refuses to employ workmen whose services are terminated by the lessee in total disregard of the provisions of section 33. The aggrieved workmen lodge a complaint under section 33-A against the lessor.

Are the complaints maintainable in any of the aforesaid cases ?

The critical question here is whether the employer against whom complaint under section 33-A is lodged, should be the same person (or heir, successor or assign or benamidar of the person) who took the action in disregard of the provisions of section 33 and/or who was a party in the main dispute pending adjudication.

Eventhough the question has not arisen as frequently as one would expect[1], the implications of it are of far reaching consequences. Assume

1 There is generally a time lag between the date of reference, the date of employer's action violating provisions of section 33 and the date of the complaint under section 33-A by the aggrieved employee. In a developing and dynamic society, industries not only frequently change hands but industrialists adopt different devices, including those of contracting and leasing, for the effective running of industry and maximization of gains.

for a moment that the lessee in the first case and the lessor in the second, can act in disregard of the provisions of section 33-A. Will the decision encourage grant of short-period leases ? What will be the impact of such practice on the adjudication process itself ? Will it be possible to have enduring award capable of maintaining and promoting hormonious labour-management relationship ?

(2) *S. K. G. Sugars Ltd.*[2]

(a) *The Contentions :*

It will be convenient first to chronologically state the facts of the case :

4 Nov.	1951 :	The Patna High Court ordered compulsory winding of Gaya Sugar Mills Ltd., Guraru.
1. Jan.	1952 :	The High Court appointed a liquidator.
Nov.	1954 :	Lease for running the sugar mills in favour of Guraru Cane Development and Cane Marketing Union, Ltd., expired.
2. Dec	1954 :	The Government of Bihar referred an industrial dispute concerning (i) retaining allowance to seasonal employees, (ii) leave and holidays, (iii) justification of certain deductions made in leave and holidays and, in case of their being unjustified, of compensation to be paid to affected workmen. between "*the management and workmen*" of certain sugar mills, including Gaya Sugar Mills, Ltd., for adjudication.
3. Dec.	1954 :	The High Court granted permission for a fresh lease of the Gaya Sugar Mills in favour of S.K..G sugars Ltd.
6 Dec.	1954 :	The lease deed executed and S. K. G. Sugars Ltd. entered into possession of the Gaya Sugar Mills Ltd. The lease deed provided, *inter-alia*, that the lessee was not to be in any way liable or responsible for any of the liability of the company or of

2 (1959 1 L.L.J. 420 (S.C.).

the liquidator or of the out going lessee incurred whether before or after the lessee entered into possession; and that the lessee was not bound to engage any or all of the employees of the lessor or of the outgoing lessee or of any of the persons who had been working from before, excepting those that were mentioned in clauses 11 and 13 of the deed.

11 Jan. 1955 : The first hearing before the Industrial Tribunal.

13. Jan. 1955 : The liquidator received a notice from the adjudicator to appear at the first hearing.

14. Jan. 1955 : The liquidator informed the adjudicator of the late receipt of notice and of his consequent absence at the hearing.

Jan. Feb. 1955 : The S. K. G. Sugars Ltd. acted in disregard of the provisions of section 33 *vis-a-vis* employees who were not mentioned in clauses 11 and 13 of the lease deed.

17 Feb. 1955 : The tribunal submitted its award to the Government of Bihar.

23 Feb. 1955 : The award was published.

23 March 1955 : Workmen aggrieved by the aforesaid action of the S. K. G. Sugars Ltd. lodged complaints under section 33-A with the industrial Tribunal.

25 March 1955 : The award became enforceable. However, an appeal was filed which was decided on 31 August 1956 and the resulting award became enforceable with effect from 10 October, 1956.

Under these circumstances, the S. K. G. Sugars Ltd. contended (1) that the Gaya Sugar Mills was the employer with whom an industrial dispute had been raised and who was a party to the adjudication proceedings before the tribunal; (2) that the S. K. G. Sugars Ltd. was not the heir, successor, assign or banamidar of the Gaya Sugar Mills Ltd., (3) that the *S. K. G. Sugars Ltd.*[3] was never impleaded as a party; (4) that, accordingly, the S. K. G. Sugars Ltd. had nothing to do with the adjudication proceedings; (5) that the provisions of section 33 regulated the exercise of management prerogative by only those employers who were parties to the adjudication Proceeding or were the heirs, successors, assigns or benamidars of such

3 (1959) 1 L.L.J. 420 (S.C.)

employers, and not of employers in the position of S. K. G. Sugars Ltd. (6) that, since section 33 did not control the exercise of management prerogatives by S. K. G. Sugars Ltd., it did not violate the provisions of that section; and (7) that, therefore, a complaint under section 33-A could not be lodged against S. K. G. Sugars Ltd.

(b) *The Decisions :*

The Patna High Court did not agree with the thesis that S. K. G. Sugars Ltd. was not an employer within the meaning of section 33 or 33-A. It argued that :

> If...the award of the tribunal under section 33-A could be made only against the lessor and not against the lessee...the lessor (who) was not in the position of an employer on the date the workmen were discharged...(would) be saddled with the liability for which he is not in any way to blame.[4]

This was an "unjust result" which could not possibly have been contemplated by the Legislature. Further,

> the object of the statute...to protect the workmen against victimization by the employers and to ensure termination of of the (adjudication) proceedings...in a peaceful manner... would be nullified.[5]

It accordingly held :

> The expression 'employer in section 33 and 33-A is unqualified and there is no reason why any limitation should be imposed on the plain meaning of the expression. I think that it is not necessary for the application of section 33 or 33-A that the employer who discharges or punishes the workmen or who alters the conditions of service of the workmen should be the identical employer concerned in the industrial dispute which is the subject matter of adjudication. It is, in my opinion, sufficient for the involving of the provisions of section 33 or 33-A that there is the relationship of employer and employee at the time the workman is discharged or punished or at the time his conditions of service are altered to his prejudice.[6]

We are in general agreement with this conclusion.

4 *S.K.G. Sugars Ltd.*, (1957) 2 L.L.J. 513 (H.C.) at 516

5 Id. at 516

6 Id. at 516

On appeal by special leave under Article 136 of the Constitution, the Supreme Court, however, reversed the decision of the High Court :

> ...the employer contemplated by section 33 and 33-A of the Industrial Disputes Act must be the employer with whom the workman mentioned as aggrieved under section 33 had a subsisting relationship of employer and employees at the commencement of the proceedings referred to in those sections. The identity of the employer at the commencement of the reference with the employer who intends to take proceedings within the ban of section 33 of the Act must be established and, if the latter has no concern with or relationship with the former, sections 33 and 33-A of the Act do not come into operation at all.[7]

We demur. None of the arguments advanced by the court appear to us to be sound.

(c) *Argument based on the definition of "industrial dispute."*

Mr. Justice Bhagwati referred to the definition of "industrial dispute" and observed :

> If this definition is bodily lifted from S. 2 (k) and substituted for the expression 'industrial dispute' occuring in S. 33 and Ss. 33 and 33-A of the Act are then read, it will at once become clear that the employer can be no other than the employer with whom thc workers had the industrial dispute and cannot mean merely an employer who discharges or punishes or who alters the conditions of service of the workmen concerned.[8]

These observations fail to appreciate that an "industrial dispute" may not only be between "employers and workmen" but also between "workmen and workmen." Assume for a moment that the electricians and the carpenters employed by Gaya Sugar Mills Ltd. have a jurisdictional dispute over the quesion as to who should fix casing for laying out electric wires. Assume further that this dispute is referred for adjudication. Is it the contention of Mr. Justice Bhagwati that in such cases[9] the *Gaya Sugar Mills Ltd.* may with impunity dismiss all the carpenters during the pendency of

7 *S.K.G. Sugars Ltd,*. (1959) I L.L.J. 420 at 428 (S.C.)

8 Id. at 427

9 There is obviously no dispute between the Mills and the workmen as to who should do the casing job and it is extremely doubtful if the order of reference would implead them as a party to the dispute. Even if called as a party before the tribunal, prudence will demand employers to adopt a neutral position and request that they be not made party.

adjudication proceedings and thereby render the award factually useless ? Take another illustration. In the instant case, the demands of the workmen were broadly of two kinds : (i) those that related to a past period e.g. compensation for reduction of leave and holidays; and (ii) those that related to future e.g. leave and holidays to be thereafter observed . Assume that the lease of Guraru Cane Development and Cane Marketing Union Ltd. expired on 5 December 1954 i.e. after the date of reference. The lease in favour of S. K. G. Sugars Ltd. became effective from the 6th Dec. 1954. It is obvious that S. K. G. Sugars Ltd. is not the heir, successor, assigns or benamidar of the former lessee in the sense in which those expressions are used in law relating to property. Unless, however, both the Guraru Cane Development and Cane Marketing Union Ltd. and S. K. G. Sugars Ltd. fall within the expression "employer" for the purposes of the adjudication proceedings, the change of management resulting from expiry of old lease and grant of new lease would partially frustrate the very object of the reference. Surely, the Supreme Court did not seriously suggest that the provisions of the Industrial Disputes Act can be set at naught by merely changing lessees.

Incidentally, even though the Supreme Court was at pains to emphasise that the dispute referred to the tribunal was a dispute between "the management of certain sugar factories and their workmen" as also to the fact that under section 2 (K), an "industrial dispute" was, *inter alia*, a dispute between "employers and workmen", it did not correlate the effect of its own literal interpretation and impliedly read the expressions "management" and "employer" as synonymous of each other. Our observation should not be taken to favour in any way, literal or technical interpretation. On the contrary, we are in complete agreement with the observation made in this regard in G. P. Sarathy case[10].

(d) *Arguments based on the scope of enquiry under Section 33 :*

The Supreme Court sought to buttress its opinion by another line of reasoning. Mr. Justice Bhagwati referred to the following observation of the Court in *Atherton West and Co. Ltd.*[11]

> (the authority) concerned would institute an enquiry and come to a conclusion whether there was a *prima-facie* case made out for discharge or dismissal of the workman and the employer, his agent or manager was not actuated by any improper motive or did not

10 (1953) I L.L.J. 174 at 180 (S.C.)

In view of the increasing complexity of modern life...Labour disputes should be peacefully and quickly settled...and the court should not be astute to discover formal defects and technical flaws to overthrow such settlements.

11 (1953) II L.L.J. 321 (S.C.)

resort to any unfair practice or victimization in the matter of the proposed discharge or dismissal of the workmen.[12]

Thereafter he concluded :

> If this be the criterion for determining whether an employer was *entitled* to discharge or punish the workmen or alter their conditions of service *without* the permission in writing of the authority concerned *that employer cannot be any other than the one who is concerned in the industrial dispute* which is the subject matter of adjudication.[13] (emphasis added)

We have no hesitation in confessing our lack of comprehension of the court's reasoning. *Atherton West and Co. Ltd.*[14] delineated the scope of enquiry on an employer's application under a provision analogus to that of section 33 for permission to discharge or punish, whether by dismissal or otherwise, a workman concerned in the dispute pending adjudication. It held that the enquiry contemplated by the section was limited to establishment of a *prima-facie* case for the action proposed by the management; and that the establishment of a *prima-facie* case did not depend upon a positive finding that the proposed action was justified on merits but on a finding that the proposed action was not prompted by motives which are deemed to be improper in the law relating to Labour Management Relations. It was because of this limited nature of enquiry that the Supreme Court went on to hold that grant of permission did not preclude affected workmen from raising an industrial dispute and getting it adjudicated on merits. We do not read that judgement as an authority for the proposition that, in the absence of improper motives, an employer is entitled to take action against concerned workmen during the pendency of adjudication proceedings *without* the permission in writing of the authority concerned, nor, to the best of our knowledge, have other decision-makers understood that case in the manner suggested by Mr. Justice Bhagwati.

Even assuming that Mr. Justice Bhagwati was right in his evaluation of the decision in the *Atherton West and Co. Ltd.*,[15] it is not clear how the "*criterion*" for determining whether an employer was "entitled" to take prejudicial action "*without the permission*" of the authority concerned would lead to the suggested conclusion, namely, "that employer cannot be any

12 Id. at 324-325.

13 S.K.G. Sugars Ltd., (1959) I L.L.J. 420 at 428 (S.C.).

14 (1953) II L.L.J. 321

15 (1953) II L.L.J. 321 (S.C.).

other than the one who is concerned in the industrial dispute" pending adjudication. The Court explained :

> If employer B has nothing to do at all with employer A who is really the party concerned in such industrial dispute which is the subject-matter of adjudication, there will be no question of attributing any improper motives or unfair practice or victimization to the employer B in regard to the action which he proposed to take against the workmen.[16]

However, improper motive is a question of fact to be ascertained in each case and not a matter of legal presumption. Further, did the Supreme Court wish to lay down that merely because the employer who is taking action is the employer who is a party to the reference or is his heir, successor, assign or benamidar, he must be deemed to be acting from an improper motives unless the contrary is proved ? Or, conversely, if the employer taking action is not the one who is involved in the pending adjudication proceeding or is his heir, successor, assigns or benamidar, he will be deemed to be acting *bona fidely ?* In our opinion neither of the two propositions is sound. Indeed, in the very following sentence Mr. Justice Bhagwati conceded the possibility of the other non-identical employer acting *mala fide.*

(e) *Arguments Based on Lack of Identity of Employers*

The Supreme Court refused to accept the interpretation adopted by the High Court on the ground that it would, as in the instant case, result in restraining S.K. G. Sugars Ltd., who had nothing to do with Guararu Cane Development and Cane Marketing Union, Ltd., (i. e. the employer concerned with the industrial dispute pending adjudication), from taking action. It observed :

> if there is no connection at all between the employer A and the employer B...one fails to see how a mere identity...of the workmen could be enough to bring the employer within the purview of these sections.[17]

May we respectfully point out that both the definitions of "employer and workman" are purposely couched in words, not with reference to the relationship between them *inter se* but with reference to their relationship with the industry, to avoid difficulties which the Supreme Court Judgment has unwittingly created.

16 *S.K.G. Sugars Ltd.*, (1959) I L.L.J. 420 at 428 (S.C.).

17 *S.K.G. Sugars Ltd.*, (1959) I L.L.J. 420 at 427 (S.C.).

resort to any unfair practice or victimization in the matter of the proposed discharge or dismissal of the workmen.[12]

Thereafter he concluded :

> If this be the criterion for determining whether an employer was *entitled* to discharge or punish the workmen or alter their conditions of service *without* the permission in writing of the authority concerned *that employer cannot be any other than the one who is concerned in the industrial dispute* which is the subject matter of adjudication.[13] (emphasis added)

We have no hesitation in confessing our lack of comprehension of the court's reasoning. *Atherton West and Co. Ltd.*[14] delineated the scope of enquiry on an employer's application under a provision analogus to that of section 33 for permission to discharge or punish, whether by dismissal or otherwise, a workman concerned in the dispute pending adjudication. It held that the enquiry contemplated by the section was limited to establishment of a *prima-facie* case for the action proposed by the management; and that the establishment of a *prima-facie* case did not depend upon a positive finding that the proposed action was justified on merits but on a finding that the proposed action was not prompted by motives which are deemed to be improper in the law relating to Labour Management Relations. It was because of this limited nature of enquiry that the Supreme Court went on to hold that grant of permission did not preclude affected workmen from raising an industrial dispute and getting it adjudicated on merits. We do not read that judgement as an authority for the proposition that, in the absence of improper motives, an employer is entitled to take action against concerned workmen during the pendency of adjudication proceedings *without* the permission in writing of the authority concerned, nor, to the best of our knowledge, have other decision-makers understood that case in the manner suggested by Mr. Justice Bhagwati.

Even assuming that Mr. Justice Bhagwati was right in his evaluation of the decision in the *Atherton West and Co. Ltd.*,[15] it is not clear how the "*criterion*" for determining whether an employer was "entitled" to take prejudicial action "*without the permission*" of the authority concerned would lead to the suggested conclusion, namely, "that employer cannot be any

12 Id. at 324-325.
13 S.K.G. Sugars Ltd., (1959) I L.L.J. 420 at 428 (S.C.).
14 (1953) II L.L.J. 321
15 (1953) II L.L.J. 321 (S.C.).

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Even assuming without conceding that the identity of employers is essential for the operation of the ban imposed by section 33, we disagree with the Supreme Court that the requisite identity of employers had not been established in this case.

First : Mr. Justice Bhagwati emphasised : (1) that the reference was of an industrial dispute not between "*the company* and the workmen" but between "the management of the mills and their workmen;" (2) that the liquidator was not in the management of the factory; (3) that the only persons who were in management were the lessees for the time being to whom leases were granted by the liquidator with the sanction of the Court ; (4) that the lessees who were at the date of the reference in management of the factory were a party to the reference; and (5) that S. K. G. Sugars Ltd., came into management of the factory after the reference and could not, at the date of reference, be a party to the dispute. However, the emphasis on the disputes being between the "management of Gaya Sugar Mills Ltd. and their workmen" (Cf. between Gaya Sugar Mills Ltd. and workmen employed therein) is unrealistic. An "industrial diapute" is a dispute *inter-alia* between "employers and workmen", where, however, employer is a company, or other body corporate, or an association of persons whether incorporated or not, or government, or local authority, factually the dispute is between the persons in the position of management and the workmen. This reality of affairs is reflected generally, if not always, in the wordings of orders of reference which describe the industrial dispute as one "between the management of industrial establishment X and their workmen." But despite the description of the "management of the industrial establishment X" as a party, the true position in law is that it is the industrial establishment itself which, being the employer, is the real party to the dispute[18] and we know of no other decision-makers who have been misled in believing otherwise.[19]

18 Significantly Section 32 of the I.D. Act provides :

> Where a person committing an offence under this Act is a company, or other body corporate, or an association of persons (whether incorporated or not), every director, manager, secretary, agent or other officer or person concerned with the management thereof shall, unless he proves that the offence was committed without his knowledge or consent be deemed to be guilty of such offence.

19 It is interesting to note that despite the description of the dispute in the order of reference as one "between management of industrial establishment X and their workmen" all legal proceedings are instituted in the name of the employer without any objection of the decision-makers,

Further, in the instant case, there appears to be a factual error. According to the facts averred in the Supreme Court judgment, the lease granted to Guraru Cane Development and Cane Marketing Union, Ltd. came to an end in November 1954.[20] It follows that thereafter lessee's interest reverted to the lessor and obviously Gaya Sugar Mills Ltd. or, if one were to be more technical, Gaya Sugar Mills Ltd. (In liquidation), was the employer on the date of reference. The lease in favour of S. K. G. Sugars—Ltd., was granted after the date of reference. One, therefore, fails to understand why S. K. G. sugars Mills—Ltd. were not treated atleast as assigns of Gaya Sugars Ltd. (In Liquidation,), the original party to the reference. It may also be pointed out that in all cases of lease there will either be a lease *via* the lessor or sub-lease thereby establishing a privity of estate.

Second : the Supreme Court indicated that requisite identity of the employer at the commencement of the reference with the employer who intends to take action in respect of matter covered by section 33

> could in the event of change in the employers be established by showing that the latter employer was merely a nominee or benamidar of the former or that, on the analogy of the section 18 (3) (c) of the Industrial Disputes Act, he came within the description of his heirs, successors or assigns in respect of the establishment to which the dispute related[21].

It stressed that S. K. G. Sugars Ltd. was neither a heir, nor successor, nor assigns nor benamidar of the lessee, i.e. Guraru Cane Development and Cane Marketing Union Ltd., who was in management of the factory on the date of the reference and who was contemplated to be a party to the industiral dispute. Quite apart from the fact, as we have already stated, that on the date of reference Gaya Sugar Mills Ltd. (In liquidation) was in the position of the management and S. K. G. Sugars Ltd., having been granted lease after the date of the reference, was at least assigns of the real party to the dispute; in our opinion the Supreme Court took an unnecessarily rigid and restricted view of the situation. The expression "heirs" successors or assigns" occuring in section 18 (3) (c) should not be read as exhaustive of the persons whom a settlement or award is binding but only as illustrative of the fact that subsequent employers, no matter how they come to occupy

20 The Supreme Court, for instance, observed :

> The lease in favour of the old lessees....had apparently come to an end by efflux of time, the period of the lease presumably being up to the end of the crushing season which would end some time in the month of November 1954.

21 *S.K.G. Sugars Ltd.*, (1959) II L.L.J. 420 at 427 (S.C.).

that position in the industrial establishment, are bound. Unless we adopt this position, serious difficulties would arise, particularly in cases of imposition of an employer by an order of a Court or by operation of laws other than those governing inheritence and succession. For instance, receivers, liquidators, successive lessees *inter se*, persons who become employers by adverse possession, successive life-estate owners *inter se*, and, among others, reversionary interest holders *vis-a-vis* the limited owners cannot come within any one of the aforesaid statutory expressions. Nevertheless, it will frustrate the very object of proceedings under the Act if they are held to be beyond the reach of the law. The critical question must be : Is the person in the position of an employer in relation to workmen employed in the industrial establishment ? If yes, he should be deemed to be an employer for the purpose of proceedings under the Industrial Disputes Act. It is significant that the statute itself does not define the expression "employer" in exhaustive terms.

Third : The Supreme Court also laid emphasis on the fact that the tribunal did not serve notice on the S. K. G. Sugars Ltd. intimating it of the reference of the dispute by the appropriate Government. But whatever the impact of such lack of notice on the ex-parte adjudication proceedings in relation to the main industrial dispute,[22] the rules are clear,[23] and there are any number of decisions[24] establishing the proposition, that the ban imposed by section 33 becomes operative from the moment an order of reference is signed and the question whether concerned employer had, or had not, any notice of the signing of the order of reference is immaterial.[25]

22 The Court did not conclusively decide this question. It merely stated that the proceeding was ex-parte *qua* the Guraru Cane development and Cane Marketing Union, Ltd., the previous lease. See page 427.

23 See for instance Rule 22 of the Industrial Disputes (Central) Rules, 1957 :

If without sufficient cause being shown, any party to proceedings before a Board, Court, Labour Court Tribunal, National Tribunal or Arbitrator fails to attend or to be represented, the Board, Court, Labour Court, Tribunal, National Tribunal or arbitrator may proceed as if the party had duly attended or had been represented.

4 *Reliance Jute Mills Co. Ltd.*, (1958) II L.L.J. 67 (H.C.); *Andheri-Marol-Kurla Bus Services*, (1955) I L.L.J. 378 (H.C.); *Santacrug-Kalina-Malad Marve Bus Service*, (1954) II L.L.J. 436. (L.A.T.); *Spence Ltd.*, (1950) L.L.J. 337 (I.T.); *Tungabhadra Industries Ltd.*, (1955) II L.L.J. 343 (I.T.); *Navratna Pharmaceutical Laboratories* (1957), I L.L.J. 387 (I.T.)

25 *Tobacco Manufacturers Ltd.*, (1953) I L.L.J. 259 (L.A.T.); *Adoni Cotton Mills Ltd.*, (1955) I L.L.J. 447 (I.T.); *Surat Bus Co.*, (1952) I L.L.J. 431 (I.T.).

(f) *Conclusion* :

Gaya Sugar Mills Ltd. owned a factory in which the complainants were employed at the relevant time. Since 4 November 1951, however, Gaya Sugar Mills Ltd. was under liquidation. The liquidator granted lease of the right to manufacture sugar in the factory to various parties from time to time. The lease in favour of *Guraru Cane Development and Cane Marketing Union, Ltd.* expired in November *1954*. on *2* December *1954*, the Government of Bihar referred an industrial dispute, *inter-alia*, "between the management of Gaya Sugar Mills Ltd. and their workmen" for adjudication. Soon, thereafter, on *6* December *1954*, the liquidator granted another lease in favour of S. K. G. Sugars Ltd., who terminated the services of the complainants, and, thereby, committed an act prohibited by the provisions of section 33. However, since the ban imposed by that section affects only these employers who are parties to a pending, *inter-alia*, adjudication proceeding, it became necessary to decide whether S. K. G. Sugar Mill Ltd. was a party to any such pending proceeding.

Admittedly an adjudication proceeding concerning certain industrial disputes between the management of Gaya Sugar Mills Ltd. and their workmen was pending on the date on which S. K. G. Sugars Ltd. took the impugned action against the complainants. But, the critical question was whether S. K. G. Sugars Ltd., the lesees of Gaya Sugar Mills Ltd. (In liquidation), answered the description of "the management" in the pending adjudicating proceeding and was a party to it.

Gaya Sugar Mills Ltd. was under liquidation on the date of the reference. Further, it was an off-season period. The previous lease has expired, but a fresh lease had not been granted. Nevertheless, the order of reference, *inter-alia*, read :

> whereas the State Government is of the opinion that an industrial dispute exists or is apprehended between the management of the sugar factories as specified in appendix I and their workmen represented by the unions as specified in appendix II regarding the matters specified in annexure A...

The Gaya Sugar Mills Ltd. was the second item in appendix I.

If appendix I listed "sugar factories", obviously Gaya Sugar Mills Ltd. was not a factory : the company could, at best, be described as proprietor-management. On the other hand, if the list contained the names of "management of sugar factories", it is obvious that on the date of reference the liquidator, and not the Gaya Sugar Mills Ltd., answered the description

of management of the factory. Assuming the latter position to be true, was the omission to suffix the words "in liquidation" after "Gaya Sugar Mills Ltd." fatal to the order of reference ?

It may be relevant to observe that appendix II mentioned "Chini Mazdoor Sangh, Guraru", which was the union of the workmen employed in the Gaya Sugar Factory and which represented their workmen including the complainants. Further, the dispute was, *inter-alia*, concerning leave and holidays, a matter in which all workmen employed in the factory, irrespective of who filled the position of the management, were interested. Finally, the liquidator of Gaya Sugar Mills Ltd. was served with a notice intimating him of the reference and requesting him to submit a statement of the case.[26]

In *C. P. Sarathy*[27] case, the Supreme Court had to consider the validity of region-cum-industry wide general omnibus references. It observed that :

> the scope of adjudication by the tribunal under the Act is much wider... (than ordinary arbitration)... and it would involve no hardship if the reference is also made in wider terms provided, of course, the dispute is one of the kind described in the section 2 (k) and the parties between whom such dispute has actually arisen or is apprehended in the view of the Government are indicated either individually or collectively with reasonable clearness.[28]

If this be the true test, and we believe that it is, we are unable to say that the mention of Gaya Sugar Ltd. without the suffix "in liquidation" was such an omission, in the circumstances of the case, as to detract from "reasonable clearness" of the identity of the parties.

The next question is to determine the status of S. K. G. Sutgars Ltd. *vis-a-vis* the liquidator. The Supreme Court stressed that S. K. G. Sugars Ltd. were running the factory on lease for themselves and not for or on behalf of the liquidators. We regret our inability to appreciate the significance of this distinction. Assume that Gaya Sugar Mills Ltd., was running the factory on loss. Assume further that the liquidator wished to run the factory so as to keep up its market value, but, in view of the liquidation proceedings, could not afford to take the risk of losses. Under the circumstances, if the liquidator leased the business of running the factory on a stated rental, can it really be said that the lessee was running the factory *only* for and on behalf of himself ? An affirmative answer ignores the fact that the lessor-liquidator was getting the compensation for the running of the factory by the lessee.

26 See, S.K.G. Sugars Ltd., (1959) I L.L.J. 420 at 424 :

> The fact that the notice was given to the liquidator...might have been received late...

27 (1953) I L.L.J. 174 (S.C.).

28 *Id.* at 180.

It appears to us that the real question to decide in the instant case was whether the lease was of the business of manufacturing sugar in the factory or only of the premises known as Gaya Sugar Mills. In the former case, a person cannot escape responsibilities arising out of labour-management relation merely on the ground of his being a lessee. Assume that Gaya Sugar Mills Ltd. had continued to run the factory even after the order of reference. No body would have doubted the responsibility of Gaya Sugar Mills Ltd. to observe the terms of the award. Would it make a difference if after the order of reference, the business was run not by Gaya Sugar Mills Ltd. but by a liquidator appointed by the High Court, or by a purchaser, or by a mortgagee, or even by a lessee ? In all these situations, the liquidator, the purchaser, the mortgagee and the lessee remain primary participants in the labour-management relations of the factory concerning which an industrial dispute had arisen and which dispute could successfully be resolved by making them comply with the award of the adjudicator.

Incidentally, the *maxim ut lite pendente nihil innovestur* is designed to solve the precise situation which arose in this case.

If the forgoing analysis is correct, it is obvious that identity of employers is not needed. What is needed is *an* employer, *the* industrial establishment and *a* group of workmen employed therein whose disputes are under adjudication.

(3) *Ambika Talkies, Salem*[29] :

(a) *The Contentions* :

Earlier, in 1952, the Labour Appellate Tribunal had occasion to consider the converse of the problem posed in *S. K. G. Sugars Ltd.*[30] The relevant facts of Ambika Talkies were as follows :

	1947 :	Ambika Talkies was built by a partnership firm.
21 Feb.	1948 :	The partnership firm leased Ambika Talkies for a a period of 3 years.
	1950 :	Reference of an industrial dispute between the "Management, Ambika Talkies" and their workmen concerning wages and dearness allowance.

29 (1952) I L.L.J. 647 (L.A.T.)

30 (1959) I L.L.J. 420 (S.C.).

12 Jan. 1951 : Lessee issued notice to all his workmen intimating them that the lease was coming to an end on 21 Feb. 1951 and that their services were being terminated at the end of the lease period.

21 Feb. 1951 : (i) The lessee terminated the services of his work-men;

(ii) the workmen signed the following release in favour of the lessee :

"As your lease term comes to an end on 21st February 1951 and as per your previous notice dated 18th Jan. 1951, you have intimated to us that our services would terminate on 21st February 1951. We have received all our salaries upto 21st Feb. 1952. Our accounts have been settled as on 21st Feb. 1951. Hereafter there is no sort of salary or other liabilities between you and us. There is no litigation also between us."

(iii) The lease expires.

22 Feb. 1951 : (i) The lessor firm entered into possession and management of Ambika Talkies.

(ii) The lessor firm refused to continue in employment 14 workmen whom the lessee had employed until 21 Feb. 1951 and whose services had been terminated as aforesaid.

24 Feb. 1951 : (i) The 14 aggrieved workmen lodged complaints under section 33-A against the lessor firm.

(ii) The adjudication proceeding mentioned above was still pending.

Under these circumstances, it was contended that the employment of the aggrieved workmen having been terminated by the lessee before the lessor-firm came into possession and management of Ambika Talkies, the lessor-firm was not the employer of the complainants. Further, the lessor-firm had not committed any breach of section 33 inasmuch as refusal to give employment to new hands was not the subject-matter of regulation in that section.

(b) *The Decision :*

The tribunal held that the aggrieved workmen were directly concerned in the industrial dispute pending adjudication and had been dismissed during

the pendency of that adjudication proceeding without the permission of the concerned authority. It further held that so long as the identity of the workmen concerned in the dispute remained unchanged, the fact that the management had changed hands did not matter. Accordingly, it directed the lessor-firm to reinstate the aggrieved workmen.

On appeal, the Labour Appellate Tribunal reversed the decision. It ruled :

> A workman is not competent to file a complaint under section 33-A for...contravention of section 33 unless the person who is guilty of the contravention is his employer.[31]

Since the aggrieved workmen in the instant case had been employed not by the lessor-firm but by the outgoing lessee and their services had been terminated not by the lessor but by the lessee, the Labour Appellate Tribunal held that the lessor-firm was not the employer who had violated the provisions of section 33 and, accordingly, complaints, against the lessor-firm were not maintainable.

(c) *A Demurrer :*

Assume for a moment that the lease had not expired and was continuing at all relevant times. Evidently the lessee could not have terminated the services of any of this workmen without obtaining the permission of the concerned authority. Further, if he did terminate the services without obtaining the permission of the authority, a complaint would have been maintainable against him. In the event of transfer of management during the pendency of proceedings under section 33-A, the proceedings would have been continued against the lessee's heirs, successors and assigns in respect of the concerned establishment even though such heirs, successors or assigns had neither appointed nor dismissed the aggrieved workmen. Likewise, if the transfer took place after the lessee had discharged workmen in disregard of the provisions of Section 33 but before a complaint in respect of it was lodged under Section 33-A, aggrieved employees would be entitled to lodge the complaint against the heirs, successors or assigns of the lessee even though such heirs, successors or assigns had neither appointed nor dismissed the aggrieved workmen. Did it really make a difference that the persons against whom the complaint was filed was not the heir, successor or assigns in the sense in which those words are understood in the law relating to property but was the holder of the reversionary estate, the lessor-firm ?

Assume further that, during the pendency of adjudication proceedings, an employer wishes to bring to knees those employees who were instrumental

31 (1952) I L.L.J. 647 at 648 (L.A.T.).

in raising the dispute. However, if he discharges them, tribunals would enquire into the motives prompting the action. He cannot also escape the provisions of section 33 by discharging all his workmen and subsequently re-employing only those whom he liked. Can he, then, grant a lease of the industry and with impunity terminate the services of those whom he did not like or even of all the workmen with an understanding that the lessor would re-employ only the "desirable" employees ? Will the law countenance such subterfuge ? Will it make any difference if it is the lessee who obliges the lessor at the time of termination of lease by discharging "undesirable" employees or even all employees thereby giving a free hand to the lessor to select and re-employ the "desirable" ones ?

Transfer of management from one employer to another does not always necessitate termination of the services of workmen employed by the transferor. Further, where the services are not specifically terminated, employees continue in employment even after the transfer. The termination of service where effected, serves to define liabilities of the transferor in terms of matter such as unpaid bonus, gratuity and retrenchment compensation. The termination of service, however, does not bar claims for employment under the transferee. Courts have also held that where the transferee agrees to retain in employment, or subsequently re-employs, only a section of the labour force employed by the transferor, the choice of the personnel does not depend upon the fancy of the transferee but is governed by the principles of industrial law. Lastly, questions relating to employment of erstwhile employees can always be the subject matter of industrial dispute.

The critical question, therefore, is whether such claims should be settled in an *independent reference* or should be adjudicated upon in an *ancillary proceeding* under section 33-A ? If the object of the imposition of the ban under section 33 is to prevent further exacerbation of the already strained relations between the disputants and promotion of harmonious labour management relations conducive to the settlement of the dispute, the answer can be only one. The lessor should be deemed to be an employer within the meaning of section 33-A.

An extended meaning of the expression "employer", occuring in sections 33 and 33-A, will not result in any hardship. Broadly speaking, claims under section 33-A are of two kinds : (i) those that relate to past obligations; and (ii) those that relate to maintenance of *status quo* including employment of discharged personnel. There are few deeds of transfer,

if any, which do not impose a liability on the transferee in respect of all obligations arising until the date of the transfer. Tribunals can always implead the transferor as a necessary party and, if circumstances demand, imposition of a liability, imposition on the transferor or the transferee, whoever might be found to be responsible for it under the deed of transfer. Situations will, therefore, not arise where a transferee will be saddled with obligations in violation of the terms of contract between him and the transferor. There should also be no objection on the part of the transferee to maintain *status quo* pending the adjudication or to re-employ men whose termination of service in a proceeding under section 33-A is held to be not only a technical violation of section 33 but also unjustified on merits, particularly because the transferee had no personal animus against the discharged workmen. On the other hand, non-extension of the meaning of the expression "employer" would result in abuse of rights, proliferation of proceedings, harassment of workers and continued disharmony.

E. Complainant Must be Aggrieved :

Of course, every complainant is, at least from his point of view, an aggrieved person. However, section 33-A does not provide a penacea for the redress of all grievances. As we have already seen, the complainant must be aggrieved by an action of his employer in violation of the provisions of section 33 during the pendency of adjudication proceedings.

The requirement of employer's action excludes matters which may understandably aggrieve a person but which are *dehors* the employer. For instance, labour may feel aggrieved by the decision of the Calcutta High Court declaring "gheraos" as illegal. However, the provisions of section 33-A cannot be utilised to air such grievances. Again devaluation may have resulted in soaring prices of consumer goods and diminishing real wages but these are not matters to be agitated under the provisions of section 33-A.

The requirement of grievances arising from the exercise of management prerogative in disregard of the provisions of section 33 serves, as we have already seen, to further limit the scope of complaints under section 33-A. For example, section 33 does not prohibit an employer to *bona fidely* close an industrial undertaking. Such action on the part of the employer, however, would necessarily throw complainants out of employment and cause understandable grievance. But, unemployment resulting from such closure cannot be agitated under the provisions of section 33-A. Again, workmen appointed on a contract basis for a specified period or work, can-

not complain of unemployment consequent on the expiry of the period or completion of the work even though such unemployment occurs during the pendency of proceedings.[32] It will also be recalled that section 33 regulates management action *vis-a-vis* workmen. Accordingly, if the action affects non-workmen, e.g., an independent contractor, a medical doctor, a manager or a director of the company, the action cannot be impugned in an application under section 33-A.

Even at the risk of repetition it may be emphasised that unless an employer commits the impugned act during the pendency of adgudication proceedings, section 33-A does not come into operation. It is, for instance, not meant to air grievances regarding such exercise of management prerogative in disregard of the provisions of section 33 as occured before the commencement of adjudication proceeding.

Before we close this part of the discussion we may note that the legal grievance arising out of employer's prejudicial action in violation of section 33, does not become any theless because the complainant is able to get employment elsewhere whether before or after lodging complaint under section 33-A. Employment may affect compensability but certainly does not affect culpability.[33]

F. Complainant Must be an Employee :

Section 33 regulates management action vis-a-vis "workmen." However, section 33-A grants relief only to an aggrieved "employee." The use of dissimilar expressions in statutory provisions prohibiting exercise of management prerogative and providing relief against an errant employer, whether an act of negligence[34] or foresight,[35] raises problems of interpre-

32 *Narayan vilasom Tile Factory*, (1953) II L.L.J. 153 (I.T.); *See also Rohtas Industries Ltd.*, (1956) II L.L.J. 444 (S.C.).

33 *Janardan Mills Ltd.*, (1953) I L.L.J. 344 (L.A.T.).

34 See foot note II at 9-10, *supra*, where it has been indicated that the provisions of section 33-A were bodily lifted from clause 920 of the Industrial Relations Bill, 1950 without any regard to the fact that whereas, the Bill had defined and throughout used the expression 'employee,' the Industrial Disputes Act, 1947, had defined and throughout used the term 'workman.'

35 Section 2 (s) of the Act defines "workman", *inter alia* to mean

> Any person....*employed* in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied... .

In *Dharangadhra Chemical Works Ltd.*, (1957) I L.L.J. 477, 480, the Supreme Court read the word "employee" as indicative of employer-employee relationship :

> The essential condition of a person being a workman within the terms of this definition is that he should be employed to do the work in that industry, that

tation, particularly, because all "employees" are not "workmen" and, perhaps, all "workmen" are not "employees."[36]

Reading section 33 and 33-A together it will appear that only those persons are competent to initiate proceedings under section 33-A who are both "*employees*" as well as "*workmen*". The fact that the complainant satisfies only *one out of the two capacities* of "employees' and "workmen," is not sufficient. Thus, the head of the personnel department in *Bata Shoe Co.*[37] who was an "employee" but was not a "workman" was held to be not entitled to claim relief under section 33-A. Again, the tribunal had no jurisdiction to grant relief to the medical doctor in *Bengal United Tea Co. Ltd.*[38] The decision in *Kirloskar Oil Engines*[39] is yet another illustration. complainants who are "workmen" but not "employees" cannot lodge complaint under section 33-A, e.g., dependent enstrepreneurs, (assuming that they are "workmen").[40]

Of course, if the complainant is neither an "employee" nor a "workman," the question of lodging complaint by such person under section

> there should be, in other words, an employment of his by the employer and that there should be the relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman.....

Professor Anandjee has severely criticised this restrictive interpretation. According to him the tort concept of independent contractor is inapplicable in labour management relations. He pleads for reading the word "employed" as a synonym of "engaged" and then interpreting the section. So interpreted employees will remain workmen. However, quite a large number of persons who are to-day , under the prevailing decision, categorised as "independent contractors" will fall within the definition of workman. He calls this group of persons "dependent entrepreneurs" to emphasise their economic dependence as well as to distinguish them from traditional "employees." If his interpretation correctly signifies the intention of the Legislature, the use of the word "employee" in section 33-A becomes extremely significant.

It might parentherically be noted while the Supreme Court still formally adheres to the observations made in *Dharangadhra Chemical Work Ltd.*, (1957) I L.L.J. 477, it has by judicious mainpulation of direction and control test included several persons within the category of workmen who can hardly be described as traditional "employees" and who are really what Professor Anandjee calls "dependent entrepreneurs". See for instance, *D. C. Dewan Mohideen Sahib & Sons*, (1964) II L.L.J. 663 ; *Bridhichand Sharma v. First Civil Judge, Nagpur*, (1961) II L.L.J. 86 (S.C.).

36 *New Jehangir Mills*, (1953) I L.L.J. 419 (I.T.); *Modern Tile and Clay works*, (1953) I. L.L.J. 730 (I.T.); *Bird & Co. Calcutta*, (1953) I L.L.J. 774 (I. T.) ; also Cf. *Kirloskar Oil Engines* (1963) I L.L.J. 126 (S.C.).

37 (1956) I L.L.J. 278 (H.C.).

38 (1962) II L.L.J. 376 (S.C.).

39 (1963) I L.L.J. 126 (S.C.).

40 See supra note 35.

33-A does not arise. For instance, "dependent enterepreneurs," under present decision[41] cannot take recourse to the special provisions of section 33-A.

Moreover, it is not enough that the complainant is an "employee-workman." He should, in addition, be the employee of the employer who contravenes the provisions of section 33 and who is a party to the pending adjudication proceeding. In *Modern Tile and Clay works,*[42] *Bird & Co., Calcutta,*[43] and *Britainnia Biscuit Co.,*[44] the complainants were "employee-workmen." However, they were "employees" of independent contractors who, though they had taken the impugned action, were not parties to the pending adjudication proceedings and, consequently, had not acted in violation of section 33. On the other hand, the principal employers, who were parties to the adjudication proceedings, had not acted in violation of the provisions of section 33 *vis-a-vis* the complainants. Accordingly, complaints lodged in these cases were rejected. The decision in *Kirloskar Oil Engines*[45] was partially also based on the absence of "employer-employee" relationship between the watchman provided by the police department and the Kirloskar Ltd.

But, once the requisite "employee-workman-employer" relationship has been established, the further categorisation of complainants into temporary,[46] casual,[47] and permanent employees is of no significance.

G. Collective Application :

(1) *General :*

Management action, which is in violation of the provisions of section 33, may affect an individual workman, or some but not all the workmen, or

41 We have already seen that by judicial manipulation of the concept of direction and control test the Supreme Court held the workers involved in *Bharangadhra Chemical Works Ltd.*, (1957) I L.L.J. 477, *Bridhichand Sharma, op. cit.* and *D. C. Dewan Mohideen Sahib and Sons, op. cit.*, However, the observations in those cases indicate that "dependent entrepreneurs" are not workmen. Further, if they are not workmen it is obvious that they can neither be parties to an industrial dispute nor management action in respect of them can violate the provisions of section 33. Even so there are quite a few cases where so called "dependent entreprenuer's workmen complained under Section 33 but their application were not maintained. See, for instance, *Modern Tile and clay works,* (1953) I L.L.J. 730 (I.T.) ; *Bird & Co.* (1953) I.L.L.J. 774 (I.T.) ; *Britannia Biscuit Co.* (1965) II L.L.J. 316 (I.T.).

42 (1953) I L.L.J. 730 (I.T.).

43 (1953) I L.L.J. 774 (I.T.).

44 (1955) II L.L.J. 316 (I.T.).

45 (1963) I L.L.J. 126 (S.C.).

46 *Narayan Vilasom Tile Factory,* (1953) II L.L.J. 153 (I.T.); *Trichinapaly Mills Ltd.,* II L.L.J. 807 (I.T.).

47 *Bhartiya Steel and Engineering Co.,* (1952) II L.L.J. 77 (I.T.); *Trichinopaly Mills Ltd.,* (1953) II L.L.J. 807 (I.T.),

all the workmen employed in the concerned industrial establishment. Likewise, a complainant under section 33-A may be lodged by some or all the aggrieved employees; and the non-aggrieved employees in the establishment may or may not join as complainants. There is also the theoretical possibility of only the non-aggrieved employees lodging the complaint. (The stress on the word "employee" in response to the legislative use of that expression should not obscure the fact that the complainant "employee" as indicated earlier, must also be "workman" within the meaning of the statute).

Fact situations requiring consideration may be tabulated as follows :

A. In violation of the provisions of section 33, employer-terminates the service of :

1. An individual workman
   - (a) Complaint by the aggrieved employee
   - (b) Complaint by the aggrieved employee together with some but not all the non-aggrieved employees
   - (c) Complaint by the aggrieved employee together with all non-aggrieved employees
   - (d) Complaint by only non-aggrieved employees
2. More than one but not all workmen
   - (a) Complaint by all the aggrieved employees
   - (b) Complaint by all the aggrieved employees together with some but not all the non-aggrieved employees
   - (c) Complaint by all the aggrieved employees together with all non-aggrieved employees
   - (d) Complaint by some but not all the aggrieved employees[48]
   - (e) Complaint by some but not all the aggrieved employees together with some but not all the non-aggrieved employees
   - (f) Complaint by some but not all the aggrieved employees together with all the non-aggrieved employees
   - (g) Complaint by only non-aggrieved employees
3. All workmen.
   - (a) Complaint by all the aggrieved employees
   - (b Complaint by only some of the aggrieved employees
   - (c) Complaint by only one aggrieved employee

48 *Bhartiya Steel and Engineering Co.,* (1952) II L.L.J. 77 (I.T.) ; *Bird and Co., Calcutta.* (1953) I L.L.J. 774 (I.T.).

B. In violation of the provisions of section 33, employer alters the conditions of service of :

1. An individual employee
   (a) Complaint by the aggrieved employee
   (b) Complaint by the aggrieved employee together with some but not all the non-aggrieved employees
   (c) Complaint by the aggrieved employee together with all non-aggrieved employees
   (d) Complaint by only non-aggrieved employees
2. More than one but not all workmen
   (a) Complaint by all the aggrieveved employees[49]
   (b) Complaint by all the aggrieved employees together with some but all the non-aggrieved employees
   (c) Complaint by all the aggrieved employees together with non-aggrieved employees
   (d) Complaint by some but not all the aggrieved employees[50]
   (e) Complaint by some but not all the aggrieved employees together with some but not all non-aggrieved employees
   (f) Complaint by some but not all the aggrieved employees together with all non-aggrieved employees
   (g) Complaint by only non-aggrieved employees
3. All workmen
   (a) Complaint by all the aggrieved employees
   (b) Complaint by only some of the aggrieved employees[51]
   (c) Complaint by only one aggrieved employee[52]

Are the aforesaid complaints maintainable under the provisions of the Industrial Disputes Act ?

(2) *An uncalled for Distinction :*

Observations in reported decisions have compelled us to make a distinction between applications under section 33-A which seek redress against management actions terminating service and those that seek redress against alterations in conditions of services in violation of the provisions of section 33. We, on our part, do not believe in the validity of this distinction.

49 *Singampatti Group of Estates*, (1954) II L.L.J. 725 (L.A.T.).
50 *Bird and Co. Clacutta*, (1953) I L.L.J. 774 (I.T.).
51 *Assam Oil Co.*, (1952) II L.L.J. 499.
52 *Firestone Tyre and Rubber Co.*, (1952) I L.L.J. 853 (I.T.); *Western India Match Factory*, (1954) I L.L.J. 111 (I.T.) ; *Janki Ram Mills Ltd.*, (1954) I L.L.J. 607 (I.T.).

During 1950-56, section 33 prohibited employers from discharging or punishing, whether by dismissal or otherwise, "*a workman*" concerned in the dispute and from prejudicially altering the condition of service of '*workmen*" concerned in the dispute. The use of singular and plural number in the aforesaid provisions led technical decision-makers to hold that management action directed to prejudicially change service conditions did not come within the mischief of section 33 unless it affected concerned *workmen collectively*. The requirement of collective complaint for redress of the grievance was the next logical step.

These decision-makers were helped in their thinking process both by judicial decisions emphasising collective nature of an industrial dispute and by the fact that, in several cases, it was impossible to grant any relief to the complainant aggrieved employee without, at the same time, granting relief to non-complainant aggrieved employees.

We may first deal with the supporting arguments. The judicial requirement of an industrial dispute being a collective dispute, never a sound one,[53] has been more or less legislatively disapproved.[54] Further, the Supreme Court decisions emphasising collective nature of an industrial dispute conceded that 33-A contemplated, albeit through a fiction, an individual dispute.[55] Likewise, the incongruity of the proposition that a complainant should be denied remedy merely because grant of relief to him would also benefit others, needs only to be stated to be rejected. We know of no law which compels an aggrieved person in civil or analogous matter to institute proceedings for the redress of his grievance and we see no reason why complaints lodged by some of the aggrieved employees should

53 See, for instance Anandjee, *Community Regulation of Labour Management Relations in India 1947-1957*, a thesis submitted to the Yale Law School for the degree of Doctor of Laws (unpublished).
54 See, for instance, Sec. 2-A inserted by Act 35 of 1965.
> Where any employer discharges, dismisses, retrenches, or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer concerned with, or arising out of such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

55 *Shalimar Works Ltd.*, (1959) II L.L.J. 26 (S.C.); See also *Sri Ramvilas Service Ltd.*,(1956) I L.L.J. 498, where Mr. Justice Rajagopalan observed that :
Sec. 33-A introduces two fictions :
(2) the complaint of the workman with the limits prescribed by Section 33 of the Act is deemed to be industrial dispute, though the dispute is only between the complaining workman and the management.

be rejected merely because some of the other employees, who were equally entitled to lodge complaints, have preferred not to press for the redress of their grievances.

Let us now revert to the main proposition. In *Singampatti Group of Estates*,[56] the Labour Appellate Tribunal succinctly observed :

> It is true that in Cl. (*a*) of section 33 the word used is 'workmen' and not 'workman' but according to the General Clauses Act the plural includes the singular and vice-versa.

and concluded that there was no justification for the view that :

> alteration in the conditions of service cannot form the ground of individual worker's claim.

We agree. The 1950-Amendment of section 33 was not meant to be, and could not be construed as a charter of immunity or the employer to terminate the services of *all workmen* or to prejudicially alter service conditions of an *individual workman*. We might also add that the original section 33 in the 1947-Act and the presently re-amended clause (1) of section 33 consistently employ the expression "workmen" in plural.

There is thus no justification for maintaining the distinction between complainants in respect of termination of service and those in respect of prejudicial alteration of conditions of service. The effective categories of fact-situations are those mentioned in clauses 1, 2 and 3 including subdivisions thereof.

(3) *Basic Issues Relate to Joinder of Complainants :*

Section 33-A provides a personal remedy to an employee aggrieved by management action in violation of the provisions of section 33. Accordingly, the complaint in fact-situations I(*a*) is without any blemish whatsoever.

In fact-situations 2 (a), 3 (a) and all other cases where management action affects more than one workman, aggrieved employees may lodge individual complaints or a joint complaint. Objection cannot be taken to either of these procedures. Section 33-A specifically provides for individual complaints. Contrary suggestions in some of the reported decisions[57] are without any foundation and run counter to the views of the Supreme Court. On the other hand, even though the provisions of Rule I, Order I of the Code of Civil Procedure, namely :

56 (1954) II L.L.J. 725 at 729.

57 *Western India Match Factory*, (1954) I L.L.J. 111 (I.T.).

> All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transactions or series of acts or transaction, is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

do not apply to proceedings under the Industrial Disputes Act, it is difficult to visualise what harm will accrue if the principles contained therein were made applicable to complaints under section 33-A. An *Obiter Dictum* of the Supreme Court in *Shalimar Works Ltd.*[58] supports the view that indidual as well as joint applications can be filed :

> The remedy for such a breach is provided in section 33-A and it can be availed of by individual workman. If therefore it was felt by the workmen who were discharged on 6 April 1948 that there was breach of section 33 by the company, they should have applied *individually or collectively* to the tribunal under section 33-A.[59] (Emphasis added)

We agree.

In *Bird and Co.*,[60] 170 workmen were adversely affected by management action in violation of section 33. However, only 74 of them authorised the union of which they were members to represent them at the time of the hearing after the union had already lodged the complaint. The Industrial Tribunal apparently condoned late authorisation but indicated that the complaint, to the extent to which it purported to be on behalf of the remaining 96 aggrieved employees, may not be maintainable. In this connection we would like to draw attention to the provisions of Rule 8, Order I of the Code of Civil Procedure, which, *inter alia*, reads :

> (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue.....on behalf of or for the benefit of all persons so interested. But the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each may direct.

We would suggest that the general principles contained in the aforesaid provisions should be made applicable to complaints under section 33-A

58 (1959) II L.L.J. 26 (S.C.).

59 Id. at 31.

60 (1953) I L.L.J. 774.

particularly in view of the fact that they are already largely applicable to the main proceeding in relation to the industrial dispute under the Act.

Complaints in fact-situations 1(d) and 2(g) are, in fact, instituted in the name of wrong complainants : those in situations 1(b) and (c) as well as 2(b) and (c) contemplate misjoinder of parties; those in situations 2(d) and 3 (b) are defective, if at all, because of non-joinder of all the complainants, and those comprising categories 2 (d) and (f) suffer from non-joinder of parties as well as mis-joinder of parties. It will be appropriate here to refer to the provisions of Rules 9 and 10 of Order I of the Code of Civil Procedure which *inter alia* provide :

(9) No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

(10) (1) Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bonafide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Adoption of these general principles, it is suggested, will resolve the instant problems and lead to smooth functioning of tribunals.

H. UNION COMPLAINT :

(1) *Trend of Decisions :*

Is a trade union of which the aggrieved employee is a member, competent to lodge a complaint under section 33-A ? Judicial response is a peculiar mixture of strictness and compassion. On the one hand, it is emphasised that section 33-A grants a personal remedy to the aggrieved emplyee who alone,[61] and not the trade union[62] of which he is a member, is competent to lodge the complaint. On the other hand, doctrine of agency is invoked to assert that even though a trade union *as such* cannot lodge a complaint under section 33-A, it may, as the duly authorised[63] agent of the aggrieved employee, lodge complaint for and on behalf of him. Of course, since unions are merely juristic entities, these decisions, in fact, maintain the validity of complaints lodged by officials of the union, i. e. by agents of the agent. The decision in *Metal Box Co.*[64] does not question this position. It, however, suggests that section 36 is exhaustive of the circumstances under which an agent may be appointed and of the persons who may be appointed as agent.

There is a marked variation in the attitude of decision-makers towards the question as to what constitutes a valid authorisation. In *Pench Valley Coal co.*[65] the industrial tribunal read the concluding words[66] of Cl. (c) of sub-section (1) of section 36 as controlling the provisions of Clauses (a) and (b) of that subsection[67] and held that the authorisation must be in the "Form" prescribed by the Industrial Disputes (Central Rules).[68] Other

61 *National Power Supply Co.*, (1963) II L.L.J. 10 (H.C.);
Steel Brothers and Co., (1954) I L.L.J. 314 (L.A.T.);
M. M. Nagalinga Nadar and Sons, (1954) I L.L.J. 515 (L.A.T.);
Edison Continental Laboratories, (1952) II L.L.J. 359 (I.T.);
Metal Box Co. Of India, (1952) II L.L.J. 869 (I.T.);
Bird and Co., Calcutta, (1955) I L.L.J. 573 (I.T.).

62 *Sri Digvijaya Woollen Mills*, (1954) I L.L.J. 411 (I.T.):

63 "Authorized in such manner as may be pescribed", Section 36

64 (1952) II L.L.J. 869 (I.T.).

65 (1955) I L.L.J. 286 (C.I.T.); Here an employee of the Company with 10 years clear service record was dismissed during pendency. A complaint was signed and filed by the Union president on proper authority being given by the complaint.

66 See *infra*, for section 36

67 *Ibid.*

68 Form F

Before .....

.....Reference.....of.....

Workmen.....Versus.....

Employer

In the matter of.....I/we hereby authorise

Shri/Sarvashri to represent me/us in the above matter

Dated this.....day of.....19.....

Signature of person(s) nominating the representative(s) Address.

Accepted.

Signature of representative (s)

Address.

tirbunals have insisted on written authority,[69] irrespective of the fact whether such authority is in the prescribed form or not. Still others have deemed aggrieved employee's "affirmation"[70] of union complaint sufficient to uphold its maintainability. In *M.M. Nagalinga Nadar and Sons,*[71] however, where the secretary of the union, together with only one of the five aggrieved employees, lodged the complaint and the remaining four aggrieved employees neither authorised the union secretary nor joined in the complaint, though two of them examined themselves in support of the complaint, the Labour Appellate Tribunal held that the complaint in so far as it related to the aforesaid four aggrieved employees was not maintainable.

Authorisation is not a condition precedent for lodging of complaints by the union. There are instances where complaints were in fact filed without any authorisation from aggrieved employees, but on aggrieved employees authorising the union subsequently, *up to any time before the first hearing,* complaints were held to be maintainable.[72] Evidently, tribunals have not accepted any authorisation thereafter.[73]

It is submitted that decision-makers have misread the provisions of section 36 of the Industrial Disputes Act. They had not only failed to appreciate its true nature and scope but also to realistically approach the problem of representation.

(2) *Limitations on the Right to Act Through an Agent :*

Whenever law requires, entitles or suffers a particular action on the part of a person, the action may be performed, unless expressly or impliedly prohibited, through an agent. The right of audience before courts, tribunals and other quasi-judicial bodies, however, falls in the non-permissible category. It is generally recognised that, subject to such rules as may be made in this behalf, judicial and quasi-judicial authorities have the inherent power of regulating their procedure,[74] and that regulation of procedure

69 *M. M. Nagalinga Nadar and sons,* (1954) I L.L.J. 515 (L.A.T.) ; *Bharat Fire and General Insurance Ltd.,* (1954) II L.L.J. 620 (C.I.T.).

70 *Bird and Co. Ltd.,* (1955) I L.L.J. 573 (I.T.).

71 (1954) I L.L.J. 515 (L.A.T.).

72 *Bird and Co. Ltd.,* (1953) I L.L.J. 774 (I.T.); *Bird and Co. Ltd.,* (1955) I L.L.J. 573 (I.T.).

73 *M. M. Nagalinga Nadar and Sons Ltd.,* (1954) I L.L.J. 515 (L.A.T.).

74 See for instance, Section 11 (1) of the Industrial Disputes Act, 1947 :

> Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit.

includes determination of questions relating to the right of audience.[75] Unless, therefore, law grants the right of audience, judicial and quasi-judicial bodies are within their rights in refusing right of audience to agents.

This general position is fully reflected in the provisions of the Advocates Act, 1961. Section 30 insures the right of advocates to practice :

> Subject to the provisions of this act, every advocate whose name is entered in the common roll shall be entitled as of right to practise throughout the territoties to which this Act extends—
>
> (i) in all courts including the Supreme Court;
>
> (ii) before any tribunal or person legally authorised to take evidence; and
>
> (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

However, section 32 retains the authority of the Court to regulate right of audience :

> Notwithstanding anything contained in this chapter, any court, authority or person may permit any person not enrolled as an advocate under this Act, to appear before it or him in any particular case.

Section 33 declares :

> *Except as otherwise provided in this Act or in any other law for the time being in force, no person* shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act. (Emphasis added).

It is obvious that the concerned authority may exercise its jndicial discretion against granting audience to duly authorised agents. Significantly also Rule I of Order 3, of the Civil Procedure Code, which *inter alia* reads :

> Any appearance application or act in or to any court, required or authorised by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be on his behalf...

has been interpreted as not entitling a person to appoint an agent to plead his cause before courts.[76]

75 See, for instance, *A. S. Patel v. National Rayon Corporation Ltd.,* A.I.R. (1955) Bom. 262 ; *N. Satyanarayana v. Y. V. Subbiah,* A.I.R. (1957) Andhra Pradesh 172 ; *Samdukhan v. Madanlal,* A.I.R. (1959) Raj. 35.

76 *Re, Eastern Tavoy Minerals Corporation Ltd.,* A.I.R. (1934) Cal. 563 ; *Jivan Lal v. Ram Ratan,* A.I.R. (1936) Oudh 261; *Thayarammal v. Kuppuswami Naidu,* A.I.R. (1937) Mad. 937 (F.B.); *A.S. Patel v. National Rayon Corpn. Ltd.,* A.I.R. 1955 Bom. 262 ; *Samdukhan v. Madan Lal,* A.I.R. (1959) Raj. 35.

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72 *Bird and Co. Ltd.*, (1953) I L.L.J. 774 (I.T.); *Bird and Co. Ltd.*, (1955) I L.L.J. 573 (I.T.).

73 *M. M. Nagalinga Nadar and Sons Ltd.*, (1954) I L.L.J. 515 (L.A.T.).

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It is obvious that the concerned authority may exercise its jndicial discretion against granting audience to duly authorised agents. Significantly also Rule I of Order 3, of the Civil Procedure Code, which *inter alia* reads :

> Any appearance application or act in or to any court, required or authorised by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be on his behalf...

has been interpreted as not entitling a person to appoint an agent to plead his cause before courts.[76]

75 See, for instance, *A. S. Patel v. National Rayon Corporation Ltd.*, A.I.R. (1955) Bom. 262 ; *N. Satyanarayana v. Y. V. Subbiah*, A.I.R. (1957) Andhra Pradesh 172 ; *Samdukhan v. Madanlal*, A.I.R. (1959) Raj. 35.

76 *Re, Eastern Tavoy Minerals Corporation Ltd.*, A.I.R. (1934) Cal. 563 ; *Jivan Lal v. Ram Ratan*, A.I.R. (1936) Oudh 261; *Thayarammal v. Kuppuswami Naidu*, A.I.R. (1937) Mad. 937 (F.B.); *A.S. Patel v. National Rayon Corpn. Ltd.*, A.I.R. 1955 Bom. 262 ; *Samdukhan v. Madan Lal*, A.I.R. (1959) Raj. 35.

(3) *The True Significance of Section 36 :*

It, therefore, follows that officers of a trade union cannot, *as of right*, claim audience before labour tribunals to represent a member of the concerned trade union even when duly authorised by such member. This legal position, however, is not conducive to the interests of labour. Quite apart from denying trade unions a legitimate opportunity to play at least useful, if not actually constructive role, it has the effect of suffering either poor presentation by un-educated and ill-informed workmen against the orderly and well marshalled presentation of educated employers before a judicially trained adjudicator; or lawyer's invasion of the field of a adjudication and Labour-management relations. Parliament, accordingly, enacted section 36 to partially regulate[77] the judicial discretion and provided that :

(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by--
   (a) an officer of a registered trade union of which he is a member;
   (b) an officer of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;
   (c) where the worker is not a member of any trade union, by an officer of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorised in such manner as may be prescribed.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by--
   (a) an officer of an association of employers of which he is a member;
   (b) an officer of a federation of association of employers to which the association referred to in clause (a) is affiliated;
   (c) where the employer is not a member of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged and authorized in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court.

77 Section 36 exhausts the list of persons who can appear as agents as of right but does not exhaust the list of those who may appear as agents with the permission of the concerned authority. For instance, an incorporated company may be represented by one of its officers. See Rule 3 read with Form 'A' of the Industrial Disputes (Central) Rules, 1957. Cf. *Metal Box Co. of India*, (1952) II L.L.J. 869 (I.T.).

(4) In any proceeding before a Labour Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be.

If sub-section (1) and (2) foreclose the possibility of judicial discretion being exercised against granting audience to persons mentioned in clauses (a), (b), (c) of sub-sections (1) and (2), sub-sections (3) and (4) regulated the right of parties to authorise advocates to plead their cause and, thereby, without coming in conflict with the provisions of section 30 of the Advocates Act, sought to keep the arena of labour-management relations free from lawyers.

We are aware that our interpretation limits the scope of the word "representation" in section 36 of the Industrial disputes Act. However, this limited meaning is implicit in the expressions "a party appearing by a representative"[78] "in any proceeding under this Act."[79] Moreover, Rule 29 of the Industrial Disputes (Central) Rules, 1957 specifically defines the statutory powers of representatives to mean the right of audience before authorities :

> The representatives of the parties appearing before a Board, Court, Labour Court, Tribunal or National Tribunal or an arbitrator shall have the right of examination, cross-examination and of addressing the Board, Court, Labour Court, Tribunal or National Tribunal or arbitrator when an evidence has been called.

Under the circumstances, we do not think that section 36 has any bearing on the question as to whether an officer of a trade union can lodge a complaint under section 36 of the Act, whether *suo motu* or for and on behalf of an aggrieved employee. Rights conferred by sub-section (1) and (2) of section 36 spring into life only after a proceeding has been instituted and is pending before the authority.

There is another aspect of section 36 which needs to be emphasised. Decision-makers have assumed that, in the absence of due authorisation, officers of a trade union or of the federation of which the union is a member, cannot claim audience on behalf of the member of the union. We do not think this is the correct position. The section recognises the facts of industrial life and entitles a workman to be represented by the stated officers

78 Rule 37 of the Industrial Disputes (Central) Rules, 1957.

79 Rule 36 of the Industrial Disputes (Central) Rules, 1957 and Section 36 of the Industrial Disputes Act.

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   (b) an officer of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;
   (c) where the worker is not a member of any trade union, by an officer of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorised in such manner as may be prescribed.

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   (a) an officer of an association of employers of which he is a member;
   (b) an officer of a federation of association of employers to which the association referred to in clause (a) is affiliated;
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78 Rule 37 of the Industrial Disputes (Central) Rules, 1957.

79 Rule 36 of the Industrial Disputes (Central) Rules, 1957 and Section 36 of the Industrial Disputes Act.

he is a member; (2) or, an officer of the federation of which his trade union is a member; (3), or, (where he is not a member of a trade union), an officer of any trade union concerned with the industry in which he is engaged, or any other workman/employer engaged therein. Further, under section 36, agents falling in the third of the aforesaid three categories, require principal's authorisation in the prescribed form to invest themselves with the right of audience for and on behalf of the principal. In sharp contrast to this position, officers of the trade union of which the principal is a member or of the federation of which his trade union is a member, have, by virtue of their office, necessary authority to put in audience for and on behalf of the members of their union until such authority is specifically revoked.

There is no provision in the Industrial Disputes Act which specifically authorises a workman or an employer to appoint an agent to act for, and on behalf of, him in matters other than those relating to audience before authorities. It is, however, submitted that an agent may be appointed by a workman or an employer to act for, and on behalf of, him within the limits prescribed by the general law of the land; and, further, that officers of their respective trade unions have implied authority to act for, and on behalf of, them until such authority is specifically revoked. There are several reasons for these assertions.

First, we should act, not on the principle that every procedure is to be taken as prohibited unless it is expressly provided for, but, on the principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. This is particularly true where the impugned procedure is in derogation of the general law of the land.

Second, the Indian Trade Union Act, 1926 provides for the registration of a trade union, i.e., "of any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workman and employer." Further, section 15 declares that the general funds of a registered trade union may, among other objects, be spent on :

(c) the prosecution or defence of any legal proceeding to which the trade union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any rights of the trade union as such or any rights arising out of the relations of any member with his employer...."

(d) the conduct of trade disputes (i.e. disputes, *inter alia*, between employers and workmen...which is connected with the employment or non-employment or the terms of employment or the conditions of labour of any person.....) on behalf of the trade union or any member thereof.

(e) the compensation of members for loss arising out of trade disputes.

Under the circumstances, the authority of a trade union to act for and on behalf of its members in relation to matters enumerated above, must be assumed. By the very act of becoming a member of a trade union, the member authorises the union to act for, and on behalf of, him.

Third, Section 36 of the Industrial Disputes Act has expressly accepted the right of a member of a trade union to be represented by an officer of his union without any specific authorisation. The fact that the scope of representation under section 36 is limited to audience before authorities, should not in any way obscure the source of authority to act as an agent.

Fourth, The Industrial disputes Act requires, entitles and suffers several acts of workmen. However, the Industrial Disputes (Central) Rules 1957 clearly indicates that several of these actions are done by the union. Thus, section 5 provides for the constitution of a Board of Conciliation consisting of an independent person as chairman and one or two nominees, respectively, of employers and workmen. However, rule 6 contemplates that the Government shall, in the case of workers who are members of a trade union send a notice to the president or secretary of the trade union to nominate within a reasonable time persons to represent them on the Board. Similarly, whereever law requires notice to be given by or to workmen, such notice is given by, or to, the President or Secretary of the union, if any, of which concerned workers are members.[83] Indeed, sec. 22[84] prohibits workmen from going on strike in a public utility concern without giving specified notice and section 31 imposes penal liability on recalcitrant workmen. Yet Rule 71 read with Form L indicates that the notice

83 Rule 71 of the Industrial Disputes (Central) Rules, 1957, *Inter alia*, reads :
The notice of strike to be given by workmen in a public utility service shall be in Form L. and Form L at the foot reads :
"..... Yours faithfully,
Secretary of the Union
(five representatives of the workmen.....)"

84 No person employed in a public utility service shall go on strike in breach of contract—
(a) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking; or
(b) within fourteen days of giving such notice; or
(c) .....

of strike is given by the Secretary of the Union. Again, Sec. 10 (2) provides that where parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, for the reference of the dispute to a Board, Court or an adjudicating authority, the appropriate Government, if satisfied that the persons applying represent the majority of each party, shall make the reference accordingly. However, rules 3 and 4 (b), read with Form A, clearly indicate that, in the case of workmen, the application is made by the President or Secretary of the trade union. Likewise, section 10A provides for voluntary reference of disputes to arbitration but rule 8 requires the arbitration agreement to be signed, in the case of workmen, by any officer of a trade union of the workmen. Similarly, settlements are signed by the officers of union.[85] It is also interesting to note that the description of parties, particularly when workmen are numerous, is with reference to their union, if any.[86] Among other things, statement of case and rejoinder, whether in conciliation[87] or adjudication proceeding[88] are filed on behalf of workmen by the union, if any, of which workmen are members.

Fifth, it is not possible to introduce in proceedings under the Industrial Disputes Act, the distinction that prevails between rule 14 of order VI and rule I of order III of the Civil Procedure Code.[89] As we have already seen, statement of case and rejoinder, which are in the nature of pleadings, are signed by union officers under the provisions of the Industrial Disputes Act.

Sixth, the Supreme Court has repeatedly emphasised that the object of imposing a ban on the exercise of management prerogative during

85 See, Rule 58 of the Industial Disputes (Central) Rules, 1957 read with Form H prescribed thereunder.

86 See, Rule 19 (1) of the Industrial Disputes (Central) Rules, 1957.

87 See, Rule 10A of the Industrial Disputes (Central) Rules, 1957.

88 See, Rule 10B (i) and (2) of the Industrial Disputes (Central) Rules, 1957.

89 Rule 14, Order VI of the Civil Procedure Code reads :

> Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Rule 1, Order III of the Civil Procedure code reads :

> Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf :
> Provided that any such appearance shall, if the Court so directs, be made by the party in person.

the pendency of proceeding is to prevent "further exacerbation of already strained relations." If follows that, where management disregards the provisions of section 33, the remedy provided under section 33-A is designed to arrest the resulting "exacerbation." Since "strained relations" existed in the establishment not only between the employer and the aggrieved employee but also between the employer and his workmen generally, it is only proper that unions should have the right to step in and arrest the growth of further "exacerbation."

We are accordingly of the opinion that a complaint under section 33-A can be validly lodged by the officers of the union. In any event, we are of the opinion that, even if complaints are to be lodged by the aggrieved employees personally, filing of complaints by union officers should be deemed to be analogous to filing of plaints by wrong plaintiffs[90] and treated as an irregularity which is capable of being rectified.[91]

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90 See, for instance, Order I Rule 10 of the Civil Procedure Code.

91 *Ibid.* See also *N. Satyanarayana v. Y. V. Subbiah*, (1957) A.I.R. Andhra Pradesh, 172 at 181 :

> The preponderance of judicial opinion establishes that failure to comply with the provisions regarding presentation of an applicant or execution is mere irregularity....In such a case the Court would have a discretion to have the irregularity cured and if the applicant had acted in good faith and without gross negligence the Court would allow it to be cured.

NOTES AND COMMENTS

REMARKS ON THE RESPECTIVE PREROGATIVES OF A LEGISLATIVE ASSEMBLY AND ITS PRESIDING OFFICER (OR SPEAKER)

One who is uninitiated in the subtleties of the informal power structure in a parliamentary system of government cannot diagnose and prescribe with confidence concerning malfunctions which develop from time to time in that as in other systems. A casual observer from another system may nevertheless hope to suggest fresh insights for the very reason that the vantage point from which he addresses the problems is different from that of the insider. During most of my brief visit in India, actions of the Speakers of the Legislative Assemblies of West Bengal and Punjab in declaring those Assemblies adjourned and refusing to reconvene them have been much in the news, along with much commentary on the legal, constitutional, and political issues raised by those actions. As an interested bystander, I have found it surprising that what I would have taken to be certain relevant aspects of the problem were going unattended. My purpose in this paper is not to diagnose and prescribe but to offer some viewpoints and ideas for consideration.

It is understood that in the special interaction of political and "legal" forces that characterizes a parliamentary system there may be a variety of informal as well as formal sanctions having more or less effect to restrain misuse of power and position. Although it is said that a member of the Assembly is supposed to withdraw from party politics when he becomes Speaker, in order to assure his impartiality in the conduct of his duties as Speaker, he cannot but remain a political creature, subject to the myriad influences that result from the multifarious interacting personal relationships which attend competition for advantage in a political society. That those restraints may not always be successful to prevent a Speaker from imposing his will on the Assembly in possible contravention of the wishes of a majority of its members, however, has been demonstrated by events in West Bengal and Punjab.

It is also recognized that there are constitutional measures which may afford some remedy against obstructionism on the part of a Speaker. Litigation is currently in progress in Punjab to determine whether the Governor has the right to prorogue and then again summon the Assembly, under

Article 174 of the Indian Constitution, as a means to get it back into session after it had been adjourned by order of the Speaker.[1] Even if these steps are held to be within the constitutional prerogatives of the Governor, as seems probable by reason of the fact that Article 174 omits any reference to conditions on which the Governor's authority to prorogue and summon should depend, this seems to be an illusory kind of solution to the problem.

1 The Constitutional crisis arose in Punjab on March 7, 1968, when the Speaker adjourned the House for two months after declaring unconstitutional the two no-confidence motions against himself which the House had granted leave to make.

On March 11 the Governor prorogued the House and issued an Ordinance on March 13 divesting the Speaker of all his powers to adjourn the House when financial business was pending before it. The Ordiance was in terms of Art. 209 of the Constitution.

On March 14 the Governor summoned the legislature to meet on March 18 and simultaneously sent a message to the House under Art. 175 of the constitution, asking them to consider the financial business pending before the House. The Assembly met on March 18, but on a point of order raised by the opposition leader Gurnam Singh, the Speaker ruled that the sitting of the House was not validly constituted because the Governor had summoned the House while it was still in prorogation. As such, the Ordinance was illegal. Then, the Speaker ruled that the House was still in adjournment as per his ruling of March 7, and left the House.

On a certificate by the Deputy Speaker that the bills were money bills, the Legislative Council later passed these messures and the Governor put his seal thereon.

The matter came up before the Punjab and Haryana High Court when two writ petitions were filed by Dr. Baldev Prakash and others, and Mr. Satya Pal Dang, challenging the constitutional validity of the two Appropriation Acts and the Ordinance.

A Special Bench of the High Court held, on May 10, 1968, unanimously that the Punjab Appropriation Act of 1968 and the Punjab Appropriation Act No. 2 (Punjab Budget 1968-69) were *ultar vires* of the Constitution and invalid. The Court also later refused to stay the operation of the judgment, but granted the application of the State for leave to appeal to the Supreme Court.

Defending the powers of the Speaker, the Chief Justice said "the ruling of Mr. Speaker given on March 18, 1968 cannot a be impugned in this court in these proceedings and it is final...." "The effect of the ruling of Mr. Speaker then is that he gave a declaration that the sitting of the Assembly (on the Governors order issued on March 14, 1968) was not according to the Constitution and law...."

(See *The Statesman*, May 11, 1968, p. 1.).

The Supreme Court by its order of May 13, 1968, permitted the Punjab Government to draw amount from the State Consolidated Fund and to collect taxes till May 21, 1968, when the Court was to further hear the State Government's stay petition. The Court order was in response to a petition filed by the State Government for staying the judgment of the High Court of Punjab and Haryana. On May 21, 1968, the five-member Bench of the Supreme Court extended the authority of the State Government to withdraw and utilize money out of the Consolidated Fund of Punjab. Pending the disposal of appeal, the Bench stayed the operation of the judgment of the State High Court. The appeal witll be taken up by the Bench "peremptorily" on July 15 when the Court reopens after summer vacation.

Since it appears, according to Article 178 of the Constitution, that a Speaker is elected at the beginning of an Assembly to hold office through different sessions for the duration of that Assembly or until his office is vacated in one of the ways specified in Article 179, the same Speaker who had previously adjourned the Assembly would still continue in office as Speaker in the session to be convened in response to the post-proroguation summons of the Governor. When conditions of impasse have already made such extraordinary measures necessary, it is hard to see what might prevent the Speaker from again adjourning the Assembly just as soon as it had reconvened in response to the Governor's summons, thereby bringing events full circle without moving nearer to a resolution of the impasse.

There has also been mention of the possibility of action by the President of India, in the exercise of emergency powers under Artieles 356 and 357 of the Constitution, to suspend the normal operations of the legislature and govern the State under the special provisions of those Articles. This is, however, only a makeshift arrangement at best, besides which the constitutional provisions which authorize it permit it to be used only for a temporary period.

It may also be suggested that the Governor's power to "dissolve" the Assembly, which Article 174 gives him in addition to the power to prorogue a House, is the way to deal with such a crisis situation as that which results when a Speaker, by adjournment, prevents the legislature from functioning. There are two reasons, however, why this is not a fully adequate answer. In the first place, if the Governor is identified with the same political party as that which controls the State Government, he would be under pressure not to turn that government out merely as a means to get around the obstacle of a Speaker who is obstructing operations either for personal reasons or for those in which only a minority are interested. In the second place, it could happen that a Speaker who is sympathetic to a governing party which had lost its majority in the Assembly due to defections would employ the device of adjournment to prevent a vote of no confidence. In that case, if the Governor is also sympathetic to the governing minority party, he might not be readily willing to dissolve the Assembly, particularly if he thought there might be some chance that further realignments of political allegiance might restore the governing party to its majority position in the Assembly. Furthermore, dissolution of the assembly is, by any standard, a drastic remedy for obstructionism by the Speaker in behalf of a minority of the members of the Assembly, which is by definition the

situation to which these remarks are addressed, i.e. where a majority of the members (whether belonging to the governing party or not) want the Assembly to function but the Speaker prevents it from doing so by declaring it adjourned and refusing to reconvene it.

The essential principle on which these remarks are premised is that a legislative (or other parliamentary) body is a self-determining entity which can run its own affairs as it thinks fit except only as it is limited by the constitutional frame of reference in which it operates, and that the presiding officer (Speaker) is the servant of the Assembly to register and implement its decisions and actions except only as the Constitution may devolve certain prerogatives on him to be exercised independently of the wishes of the Assembly. The Constitution of India delegates power specifically to the Speaker only on a few rather specialized points such as the determination of whether a bill is a money bill on which special procedures are to be followed (Article 199(3)). On all other matters including adjournment, as the name of his position implies, he is supposed to "speak" for the Assembly to register and announce its decisions and actions. Since none of the possible remedies which have been noticed above, all of which represent in some sense indirect approaches to the problem, appears to offer a fully adequate solution, the potential of a more direct approach will be examined in what follows. The search will be for ways in which a majority in the Assembly can be enabled to have their way on the question of adjournment, by either continuing in session after the Speaker has declared it adjourned or reconvening without his participation. This search will begin by analysis of the present legal framework of the problem.

The laws which govern the operations of legislative bodies may be found in constitutional provisions, statutes, or rules adopted by the particular legislative body itself to govern its own organization and procedure, as well as in custom and usage. A direct solution to the problem of the obstructionist Speaker may require changes to be made at one or more of these levels of law. In this connection, it should be kept in mind that in the hierarchy of legal norms which comprise a legal system, changes affecting lower levels can be made at a higher level, but not *vice versa*. Thus, a constitutional amendment could simultaneously not only change the Constitution itself but also modify the law established in prior statutes, by internal rules of organization and procedure, and by custom. It is accordingly necessary to examine the present state of the law, constitutional, statutory, internal, and customary, to determine what there is about the present law which may

be the cause of the difficulty and what changes may be necessary or desirable for the purpose of effecting a remedy.

Pertinent constitutional provisions governing organization and operations of state legislatures are found in Part VI, Chapter III, of the Constitution of India.

At first glance, Article 179 might be thought to provide an easy solution to the problem of the obstructionist Speaker without the necessity for any new legislation, by making it possible for him to obstruct for only two weeks, since it empowers a majority of the Assembly to remove the Speaker from office. On closer analysis, however, it becomes evident that the problem goes deeper than the matters to which Article 179 pertains. The obstructionist technique of adjourning the Assembly and refusing to reconvene it can not be dealt with by the power to remove the Speaker since that power can only be exercised while the Assembly is in session. A way must be found to get the Assembly reconvened before an obstructionist speaker could be removed from office.

Similar considerations apply with regard to the provision in Article 180 (2) authorizing others to "act as Speaker" during his absence "from any sitting of the Assembly." When he has adjourned the Assembly there is no "sitting" for him to be absent from, which is the condition that brings this Section into operation.

Article 189 (1), specifying that "all questions" in a House of a Legislature "shall be determined by a majority of votes of the members present and voting," suggests a possible approach to the solution of the problem of the obstructionist Speaker if machinery can be devised which would assure that the House would have an opportunity to exercise its right to have even the question of adjournment decided by a majority. In the light of this provision, it seems reasonable to conclude that the only basis on which rulings of the chair (Speaker) on any question, including the question of adjournment, can be allowed to stand without formal ratification by a majority vote is that they are merely *allowed* to stand by common consent, with the understanding that all such rulings are always appealable to a vote of the entire House if the members wish it. The problem again, however, is to establish the machinery, or operational methods, by which this can be brought about. This is especially difficult with respect to a ruling on the question of adjournment, since in that case the House is no longer in session to consider an appeal of the ruling from the moment such ruling takes effect.

The point made in the last paragraph—that, in general, rulings of the Speaker are not final except as they are implicitly ratified by common consent in absence of an appeal for a majority vote—is confirmed by the fact that the Constitution, in Article 199(3), expressly makes decisions by the Speaker final with respect to one special kind of question, i.e. whether a bill is a money bill for purposes for which it makes a difference with reference to constitutionally prescribed parliamentary procedures. By the *expressio-unius* principle of construction, the fact that the Constitution *states* that the Speaker's decision shall be final on one kind of question implies that it is not "final" on other kinds of questions.

Machinery, or operational methods, to enable the members of the Assembly to have the final voice on whether they shall be and remain adjourned have to do with legislative procedure. According to Article 208 (1), a House of the legislature may make its own rules to regulate "its procedure and the conduct of its business." This section appears to mean internal rules, passed by resolution of the House itself instead of being enacted with all the formality of statutes, since the next Article, Article 209, provides for procedure on finaicial matters to be regulated "by law." The normal implication of these two Articles would appear to be that procedures on financial matters can be regulated *only* by statute whereas procedures on all other matters can be regulated *only* by internal rules adopted by resolution, although there is no apparent reason why this should have to be so. It is hard to see, for example, why the members, in voting on an appeal from a ruling by the chair on a question of procedure, could not be guided by internal rules in a case involving financial matters and by statutory procedural regulations in a case involving non-financial matters, if they wished to do so. This conclusion is reinforced by the provision in Article 212 (1) which prohibits "the validity of any proceedings in the legislature" from being "called in question on the ground of any alleged irregularity of procedure."

The provision in Article 194 declaring that members of a House have rights and powers as defined "by law" should also be noted, as possibly having to do with the form in which remedial measures should be cast, since it could be argued that "law" means only provisions validated by a regular legislative act, excluding internal rules adopted by resolution of a single House. This is a problem if Speaker's obstructionism is counteracted by measures which increase the "rights" or "powers" of Assembly members. It is submitted, however, that for the reasons noted in the preceding paragraph, the term "law" as used in Article 194 should be understood to include

whatever form of adoption may be indicated elsewhere in the Constitution for the particular purpose at hand. In this case, since the "rights" or "powers" in question have to do with legislative "procedure" and "the conduct of its (the legislature's) business," internal rules adopted under Article 208 (1) by a resolution of the House should be legally effective.

Article 212 (1) is a significant provision in relation to this aspect of the problem. Because of the non-reviewability of legislative procedure, for which this Article provides, the problem is mainly the one of establishing procedures which would provide orderly methods for either appealing a Speaker's ruling to adjourn or for reconvening without his participation. When the Assembly is in session, after either overruling an adjournment order or reconvening on its own initiative subsequent thereto, its actions would not be reviewable on grounds of procedural irregularity. It might be suggested that the ground of objection to actions of the Assembly in such a case would be that it was not validly organized rather than that it used irregular procedures. But in view of the fact that according to Article 180 (2) the Assembly has power to designate anyone to act as Speaker when it is "sitting", the "organizational" objection would itself turn on procedural rather than structural considerations. If regularly established procedures are followed to bring the Assembly into session again following a Speaker's unacceptable adjournment order, its actions thereafter, taken under the direction of whomsoever the Assembly may have installed to act as Speaker in the absence of either the regular Speaker or his Deputy, Article 212 (1) would save its actions from attack.

Although I have not found any statutes or customs which affect the problem of the obstructionist Speaker, pertinent provisions are to be found in internal rules. It is not uncommon for such rules to contain explicit authorization for the Speaker to adjourn the House. On the face of it this might be taken to suggest that our problem could be solved simply by changing the rules to take away this authorization or to specifically direct that adjournment can be ordered only after a vote of the Assembly has approved a motion therefor by a majority vote. The trouble with this solution, however, is that the Speaker is the one who directs the proceedings. Because of the non-reviewability of legislative procedure as provided in Article 212 (1), already mentioned, nothing could be done about it if the Speaker were to issue a wholly unauthorized adjournment order, not supported by a majority vote.

As suggested by the examination of pertinent constitutional provisions, the problem is to find ways to establish orderly procedures to guide the

processes of either (1) appealing and overruling a Speaker's adjournment order, or (2) reconvening the Assembly following such an order, without the participation of the Speaker. The latter would be more complicated than the former.

In order to undo the effects of an adjournment order, so as to avoid the necessity for reconvening, it would have to be possible to act quickly, before the members have dispersed. If organisation can be maintained, there is no reason why this cannot be done even though the Speaker's gavel may have fallen to signify finality of the adjournment ruling, and even-though he may thereafter already have left the chair and the chamber, since "reconsideration" of previously decided questions is not an unusual thing in parliamentary practice. There is no reason why organization can not be maintained by the simple expedient of authorizing any member, on his own initiative, to take the Speaker's stand and call for order after the Speaker has ordered adjournment and absented himself. Whether this would be effective in any case would depend simply on whether the member who underakes to do so can be successful in establishing order and proceeding with business, the first item of which would be to appeal and revoke the adjournment order. But the chances for success in that regard would surely be aided by the existence of a rule of procedure authorizing members to take such action.

If the Speaker's adjournment order is factually successful in getting the members to disperse, the problem then would be to find a way to reconvene without the participation of the Speaker. Since the Assembly would not then be in session even in a *de facto* sense, the validating authority of a statute would probably be desirable, arguably even necessary, to enable someone to assume leadership and carry the initiative to call them together again. And the legal machinery for this purpose would have to be somewhat more elaborate than for appealing an adjournment order. It probably would be desirable, for example, to require a petition in order to demonstrate substantial support for the movement to reconvene without the Speaker. If that is done, it would also be necessary to designate some official, such as the Governor, to judge as to the sufficiency of the petition and to issue the call for the Assembly to reconvene.

Since the solutions described above relate to different situations, both of them are needed in order to provide for whichever situation may arise.

A rule permitting members of the Assembly to assume the function of a presiding officer to continue a session following an adjournment order could be adopted by a simple resolution of the House itself. Such a rule

the Supreme Court should not reverse the decision of the High Court under Article 136 of the Constitution in furtherance of the ends of justice, was also turned down on the ground that the impugned orders passed by the High Court were without jurisdiction.

And fiinally, his Lordship held that the High Court had no jurisdiction to interfere with the decision of the Appellate Tribunal by issuing the writ of *certiorari* on the ground that finding of fact reached by the Appellate Tribunal was supported by some evidence.

Subba Rao, J., dissenting from the majority view laid down the following proposition of law :

> If a tribunal ignores or fails to investigate a material circumstance put forward by a claimant and gives a finding against him, the said finding can certainly be said to be vitiated by an error of law apparent on the face of the record.[8]

On the following grounds his Lordship disagreed with the majority view : first, the documents namely the two reports and one letter were not expressly relied upon by the Tribunal for holding that the respondent had no workshop at Chidambaram; second, the above mentioned docuemnts, which were favourable to the case of the appellant, were not relied upon by him before the High Court, whereas the Appellate Tribunal gave a finding in favour of the appellant on the basis of the said material; and third, the content of the letter of the respondent also did not support the contention advanced by the counsel for the appellant. The two reports[9] also did not say that the first respondent had no workshop at Chidambaram. The Officers who made the reports did not make any enquiry as regards the facts. And fiinally his Lordship held :

> This is, therefore, a clear case of finding made by the Tribunal without any evidence to support it and by ignoring a specific claim made before it. I am, therefore, of opinion that the High Court rightly set aside the order of the Appellate Tribunal.[10]

The said view taken by Subba Rao, J., is in consonance with the view taken by him in an earlier case.[11] Implied departure of the majority

8 A.I.R. 1964 S.C. 417 at 484.

9 See *Supra*.

10 A.I.R. 1964 S.C. 477, at 485-86.

11 *K. M. Shanmugam v. S.R.V.S. (Pvt.) Ltd.*, A.I.R. 1963 S.C. 1626 : It was a unanimous decision delivered by Subba Rao, J., for the court, wherein it was held that the State Transport Appellate Tribunal committed error of law apparent on the face of the record, namely, that a company could not have branch office on the route in question if it hsa

view in the instant case from the view unanimously taken by the Supreme Court[12] deserves some comment :

First, the Appellate Tribunal in granting the permit in favour of the appellant had exercised its jurisdiction unjudiciously. Despite the fact that the respondent scored highest marks, the State Transport Authority as well as the Appellate Tribunal did not issue the permit in his favour on the ground that he had no workshop at Chidambaram. Further, the respondent had also asserted his claim on the basis of the two letters. However, Gajendragadkar, J., was of the opinion that his said claim was not in conformity with the two reports on record and his claim was also refuted by one of the applicants. But, strangely, if those reports were favourable to the appellant, why did he fail to rely on them before the Appellate Tribunal as well as before the High Court. These documents were relied upon for the first time before the Supreme Court. Further, it was contended that in the letter dated January 11, 1957, the respondent did not mention that he had a workshop at Chidambaram. But as Subba Rao, J., has observed that on perusal of that letter his claim was found to be expressed there. We may, therefore, conclude that the material evidence was entirely excluded from judicial consideration.

Second, the finding of the Appellate Tribunal contravenes the fundamental right of the respondent to carry on any trade or business guaranteed under Article 19 (1) (g) of the Constitution. By virtue of Article 19 (6) the State may impose reasonable restrictions on that right. The reasonableness of the restriction imposed by the State should be satisfied from substantive as well as from procedural point of view.[13] In our opinion, procedural reasonableness is not satisfied. When the respondent asserted his claim by sending a letter to the State Transport Authority and that claim was also not refuted by the appellant, the State Transport Authority ought to have made further enquiry into the fact and for that purpose it ought to have given opportunity of hearing to the respondent to prove his claim. Consequently, the finding of the State Transport Appellate Tribunal fails to satisfy the requirement of procedural reasonableness,

another branch elsewhere. The reasoning was that the Appellate Tribunal refused to take into consideration the relevant fact that whether the respondent had an office on the said route. And the High Court's order by which the finding of the Appellate Tribunal was quashed was upheld.

12 *Ibid.*

13 *N. B. Khare*, v. *State of Delhi* A. I. R. 1950 S. C. 211 at 217 ; *The State of Madras* v. *V. G. Row* A. I. R. 1952 S. C. 196 at 199.

before the Supreme Court) preferred appeals to the State Transport Appellate Tribunal (hereinafter called the Appellate Tribunal). Ignoring the highest total of marks[3] secured by the first respondent, the Appellate Tribunal rejected his claim on the ground that he had his workshop and place of business at Cuddalore and not at either of the terminii of the route. Excluding the first respondent, the Appellate Tribunal preferred the appellant in a competition between him and another appellant before the Tribunal. The main ground for preference was that the appellant had got his workshop in the headquarters at Madras. Accordingly, the second permit was granted in favour of the appellant. Being aggrieved by the order of the Appellate Tribunal, the respondent filed a writ petition before the Madras High Court. Srinivasa, J., quashed the order of the Tribunal mainly on two grounds : first, the Appellate Tribunal had overlooked the material considerations; second, the Tribunal had allowed irrelevant considerations which vitiated its order. On appeal to the Division Bench of the High Court, their Lordships affiirmed the decision of Srinivasa, J., on the first ground alone and further directed the Appellate Tribunal to call for further evidence regarding the claim of the first respondent that he had a workshop at Chidambaram, because this was the main issue before the Court. Then the appeal by special leave was made to the Supreme Court under Article 136 of the Constitution.

Before dealing with the contention of the parties, Mr. Justice Gajendragadkar (who delivered the majority judgment) laid down the grounds for the issue of the writ of *certiorari* and stated the proposition of law that a finding of fact reached by a tribunal could not be interfered with if it was supported by *any* evidence. According to his Lordship, only the error of law apparent on the face of the record, not the errors of fact, were amenable to the writ of *certiorari*. However, he was of the opinion that in any of the following circumstances even the finding of facts are liable to be vitiated on the ground of error of law apparent on the face of the record :

(i) If it was based on no evidence;

(ii) where the tribunal had erroneously refused to admit admissible and material evidence, and

(iii) where it had erroneously admitted inadmissible evidence affecting the impugned finding of facts.

3 The respondent No. 1 secured highest total marks, viz., 7½, under columns 1 to 5 under the Scheme of marking sanctioned by the State Government. The appellant got only 4½ marks.

Explaining the validity of finding of facts not supported by any evidence, his Lordship observed :

> A finding of fact reached by the tribunal cannot be challenged in a proceeding for a writ of certiorari on the ground that relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding.[4]

To fortify the aforesaid propositions of law his Lordship relied on the previous decisions of the Supreme Court.[5]

His Lordship then proceeded to deal with the contentions of the parties and to express views of the court in regard to them. The main contention of the counsel for the respondent, that the Appellate Tribunal overlooked the material evidence, i.e., the content of the letter sent by the respondent to the Transport Authority, did not find favour with Mr. Justice Gajendragadkar. According to his Lordship, when no reasoning was given by the Tribunal, how could it be averred that material evidence adduced by the respondent was not taken into consideration.

Regarding the next contention, that the substantive claim made by the respondent was not refuted or assailed by the appellant in any proceedings, his Lordship held that this contention also had no force, for the claim made by him in his letter was controverted by one of the applicants and further the reports on record were also against his claim.

The next point urged before his Lordship was that the errors committed by the Appellate Tribunal contravened the provisions of section 47 (i) (a)[6] of the Motor Vehicles Act, 1939, and in support of this contention reliance was placed upon the decision of the Supreme Court in *K. M. Sanmugam, v. S.R.V.S. Pvt. Ltd.*,[7] However, this argument was also repelled on the ground that when the Appellate Tribunal had reached the conclusion that the respondent had no workshop at either terminii the question of the applicability of the aforesaid section did not arise.

The last contention of the respondent that even assuming that the High Court had no jurisdiction to issue writ in the present proceedings,

4 A.I.R. 1964 S.C. 477, at 479-80.

5 *Hari Vishnu Kamath v. Ahmad Ishaque*, A.I.R. 1955. S.C. 233; *Nagendra Nath v. Commissioner of Hills Divisions*, A.I.R. 1958 S.C. 398; *Kaushilya Devi v. Bachittar Singh*, A.I.R. 1960 S.C. 1168.

6 Section 47 envisages : "(i) A regional Transport Authority shall, in considering an application for a stage carriage, have regard to the following matters, namely : The interest of public generally.

7 A.I.R. 1963 S.C. 1626.

could provide simply that if the Speaker declares the Assembly adjourned without giving members an opportunity to appeal from his ruling to a vote of the Assembly, any member has the right to take the Speaker's stand and call for order for the purpose of conducting the business of the Assembly. It would probably also help to clarify the situation if the rule were also to provide that the first item of business after order is restored following adjournment by the Speaker must be to reconsider the ruling for adjournment, and that no further business can be transacted unles and until a majority of a quorum votes to rescind the adjournment order.

Since arrangements to reconvene after the Assembly has dispersed requires official action by persons outside a meeting of the duly constituted Assembly, a legislative Act would appear to be called for in order to establish the authority for such action. A suitable provision to this effect might run somewhat as follows:

> Upon receipt of a petition signed by (an appropriate number, such as one third) of the members of the Assembly reciting that it was adjourned contrary to the wishes of a majority of its members and requesting that it be reconvened, the Governor shall issue an order, which shall be delivered to each member of the Assembly, calling for them to reconvene on a specified date which shall be within ten days after the petition was received by him. When the Assembly reconvenes pursuant to a call from the Governor, any member may take the Speaker's stand for the purpose of calling the session to order and designating someone to act as the Speaker.

An act of this nature would evidently have to be enacted at the Centre. Since the subject of state legislative organization and operations does not appear in any of the lists in the Seventh Schedule of the Constitution by which law-making powers are allocated, this is evidently a subject which comes within the residuary powers of Parliament under item 97 in the Union List.

It may be objected that remedies of the kind suggested here would be illusory, at least in circumstances where adjournment might have been necessary in order to resolve a tumultous session at which the conduct of business was obstructed by a disorderly minority. But if members of a state legislature are so undisciplined that they are willing to employ such irresponsible methods to prevent any expression of the law-making power of the majority, there is no relief to be found in procedural or legal arrangements.

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PROBLEM OF ADMINISTRATIVE JUSTICE AND SCOPE OF WRIT OF CERTIORARI†

The Supreme Court decision in *Syed Yakoob v. Radha Krishnan*[1] raises the significant problem pertaining to administrative justice. While considering the extent of the jurisdiction of the High Court to interfere with the decision of the State Transport Appellate Tribunal under Article 226 of the Constitution, the Court had to face two main problems : first, whether the finding of facts reached by the Tribunal having support of *any* evidence, howsoever meagre it may be, is amenable to the writ of *certiorari*; and second, whether the determination by the tribunal, devoid of reasoning, can be interfered with by the High Court through a writ of *certiorari* ? The aforesaid questions have been answered in the negative by the majority decision. This comment makes an attempt to prove that the majority view in the instant case may give rise to abuse of discretion exercised by administrative authorities in deciding the cases.

The facts of the case are as follows : The State Transport Authority, Madras, invited applications by issuing Notification under section 57 (2)[2] of the Motor Vehicles Act, 1939, for granting two stage carriage permits to run an express service on the route from Madras to Chidambaram. In all 107 applications were received in response to the said Notification. The respondent sent two letters to the State Transport Authority wherein it was mentioned that he had a workshop at Chidambaram as one of the terminii of the route. Two reports were also on record (one was sent by the Regional Transport Authority to the State Transport Authority, and the other was sent by the State Transport Authority to the State Transport Appellate Tribunal) wherein it was stated that the respondent had a workshop en route at Cuddalore. One of the permits was granted in favour of Provincial Transport (Pvt.) Ltd., as the Transport Authority found it most suitable amongst the applicants. There was no dispute regarding the grant of first permit. As regards the second permit, the concerned authority held that none of the applicants were fit and suitable and, therefore, decided to call for fresh applications.

Dissatisfied by the order of the said Authority, 18 applicants (including the appellant Syed Yakoob and respondent No. 1 K.S. Radha Krishnan

† *Syed Yakoob v. K. S. Radhakrishnan*, A.I.R. 1964 S.C. 477 : Majority judgment of the Supreme Court in the instant case was delivered by Gajendragadkar, J. (as he then was), and the judgment was four to one.

1 *Ibid.*

2 Section 57 lays down the procedure in applying for and granting permits.

because the report itself upon which the Appellate Tribunal relied suffers from the vice of violation of the principle of natural justice.

Third, the High Court, having quashed the decision of the Appellate Tribunal, gave direction to it to call for further evidence regarding the claim asserted by the respondent and then to reach certain conclusion. In our opinion entertainment of appeal under Article 136 was not a proper course, especially when the main issue was whether the respondent had a workshop at Chidambaram or not. When the Supreme Court itself has admitted that the Appellate Tribunal has not given any reason for its finding thet the aforesaid direction of the High Court was an appropriate one, because the Appellate Tribunal may again ascertain the true fact by inviting fresh evidence and by subscribing reasons.

Further, the Appellate Tribunal is a quasi-judicial body and it is expected that the decisions given by such bodies should be accompained by some reasons, so that they may be tested or corrected under Article 226 or under Article 136. The majority view of the Supreme Court to the effect that since the decision of the Appellate Tribunal is devoid of reasoning, the writ of *certiorari* can not be issued is, in our opinion, not in consonance with the changing needs of time. The growing complexity of the society synchronised with the era of social welfare, has resulted in concentration of powers in the hands of administrative authorities. In order to prevent them from functioning capriciously, there should be some effective control through judicial review.

It is, therefore, suggested that as a matter of practice the Supreme Court should lay down specifically that Administrative Tribunals as well as Appellate Tribunals should subscribe some reasons for their findings, so that their decisions may be amenable to review under Article 226 or Article 136, and consequently, effective judicial control may be excercised to a possible extent. Even then, if an administrative tribunal or Appellate Tribunal fails to give reasonings for its finding, writ of *certiorari* should be issued on the ground that it did not adequately discharge its duty to act judicially by not giving reasoning which is one of the concomitant of judicial act. As Professor Schwartz has aptly pointed out : "The right to know the reasons for a decision which adversely affects one's person or property is a basic right of every litigant."[14] Similarly, in England the Tribunals and Enquiries Act, 1958, has also imposed a Statutory duty on tribunals and Ministers to give reasons for their decisions.

14 Schwartz, *An Introduction to American Administrative Law* 164 (Second Edn. 1962),

Regarding the majority view to the effect that finding of facts having support of *any* evidence cannot be interfered by writ of *certiorari*, it is submitted that it would tend to encourage the administrative authorities which would result in gross abuse of their discretion. It is hoped that as and when an occasion arises, the Supreme Court would review its decision in the instant case to remedy the situation.

S. N. SINGH*

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pending dispute and matter and misconduct not connected with such a dispute. Moreover, the Cheif Justice referred to S. 33[4] (as it existed immediately before the 1956-Amendment) and the Objects and Reasons[5] for the Amendment pointing out that the intention of the legislature could never have been to lay an additional burden on the employer but to mitigate the rigour of law in case of misconduct not connected with a pending dispute.

While accepting the grounds of enquiry as laid down by the Industrial Tribunal as well-established, the Chief Justice proceeded to enquire :

> The question which we have to determine is not what is industrial law on the subject but what is the extent or limit of powers given to the authority referred to in S. 33 when according its approval to the action of dismissal or discharge for misconduct taken by the employer.[6]

4 S. 33 as it existed prior to the 1956 Act ran as under :

> During the pendency of any conciliation proceeding before a Tribunal in respect of any industrial dispute, no employer shall—
>
> (a) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings, or
>
> (b) discharge or punish whether by dismissal or otherwise any workman concerned in such dispute, save with express permission in writing of the Conciliation Officer, Board or Tribunal, as the case may be.

5 The objects and Reasons are as follows :

> The existing provisions of S. 33 of the Act prohibit during the pendency of any conciliation proceeding or proceedings before a tribunal a change being made in the conditions or service of, or any action being taken against, the workmen concerned in the dispute except with the express written permission of the authority concerned. The number of applications for such permission is frequently large and their disposal takes time. Employers have complained that they are therefore prevented from taking action even in obvious cases of misconduct and indiscipline unconnected with the dispute till long after the offence has been committed. It is proposed to alter the existing provisions so as to provide that, where, during the pendency of proceedings an employer finds it necessary to proceed against any workman in regard to any matter unconnected with the dispute, he may do so in accordance with the standing order applicable to the workmen, but where the action taken involved discharge or dismissal, he will have to pay the workman one month's wages and simultaneously file an application before the authority, before which the proceeding is pending, for its approval of the action taken. Protection on the lines of existing provisions will continue to be available to all workmen in regard to any matter or misconduct connected with the dispute. A limited number of representatives of workers will, however, be given protection in all matters whether connected with the dispute or otherwise. (See Gazette of India, Extraordinary 1955, Part II Sec. 2).

6 (1963) 2 L.L.J. 527, 536.

Pointing out the deliberate departure made in 1956, the Chief Justice indicated that the matter or misconduct falling under S. 33 (2) did not affect the pending proceedings as they were not connected with the pending industrial dispute. Distinguishing the importnat case of *Punjab National Bank, Ltd. v. Their workmen,*[7] he relied on some of the observations made by Mr. Justice Gajendragadkar in *Lord Krishna Textile Mills v. Its workmen*[8] so as to conclude :

> Having regard to the law as there laid down, it cannot be said that a tribunal when acting under S. 33 (2) (b) is called upon to consider whether there has been unfair labour practice or victimization.[9]

It is apparent that the grounds of unfair labour practice and victimization have been excluded from the powers of enquiry possessed by the Tribunal while approving the action taken by the employer under S. 33 (2) (b) of the Act.[10] But there are more than one objection which can be levelled against this view.

First, the phrase "*prima facie* wider" occurring in the relevant paragraph of the judgment in *Lord Krishna Textiles Mills v. Its Workmen*[11] can not be the conclusive answer to the problem of the scope of enquiry under

7 (1959) 2 L.L.J. 666.

8 (1961) 1 L.L.J. 211. The relevant observations (at 215-216) run as under :

> The requirement that he must obtain approval as distinguished from the requirement that he must obtain previous permission indicates that the ban imposed by S. 33 (2) is not as rigid or rigorous as that imposed by S. 33 (1). The jurisdiction to give or withhold permission is *prima facie* wider than the jurisdiction to give or withhold approval In dealing with cases falling under S. 33 (2) the industrial authority will be entitled to enquire whether the proposed action is in accordance with the standing orders, whether the employee concerned had been paid wages for one month, and whether an application has been made for approval as prescribed by the said sub-section. It is obvious that in cases of alteration of conditions of service falling under S. 33 (2) (a) no such approval is required and right of the employer remains unaffected by any ban. Therefore putting it negatively, the jurisdiction of the appropriate industrial authority in holding an enquiry under S. 33 (2) (b) can not be wider and is, if at all, more limited, then that permitted under S. 33 (1) and in exrcrsing its powers under S. 33 (2) the appropriate authorty must bear in mind the departure deliberetely made by the legislature in separating the two classes of cases falling under the two subsections, and in providing for express permission in one case and only approval in the other. It is true that it would be competent to the authority in a proper case to refuse to give approval, for S. 33 (5) expressly empowers the authority to pass such order in relation to the application made before it under the proviso to S. 33 (2) (b) as it may deem fit; it can, however, impose no conditions and pass no conditional order.

9 (1963) 2 L.L.J. 527, 537.

10 *Supra.*

11 (1961) 1 L.L.J. 211; *Supra* note 8.

S. 33 (2) (b) of the Act. Under the relevant paragraph when the deliberate legislative departure in having "two classes of cases falling under two sub-sections" is kept in view, it is not at all intended to exclude one of the important principles of industrial jurisprudence from the ambit of the enquiry possessed by the tribunal. It is only indicated that "the ban imposed by S. 33 (2) is not as rigid or rigorous as that imposed by S. 33 (1)." Thus, it is emphasised that the authority while approving the application under S. 33 (2) (b) should observe a sort of auto-limitation not to apply the well-settled principles of industrial jurisprudence with the same "razor-blade sharpness" which they apply under S. 33 (1). It is submitted that the limitation flowing from the relevant observations in *Lord Krishna Textiles Mills v. Its Workmen*[12] is not quantitative but qualitative. Besides, the perusal not only of the relevant paragraph but of the whole judgment, reveals no such sentence which may definitely indicate that the jurisdiction of the tribunal under both the sub-sections of S. 33 cannot be identical.

Second, the relevant paragraph[13] in *Lord Krishna Textiles Mills v. Its Workmen*[14] reveals that the proposed action of the employer must be—

(i) in accordance with the standing orders,

(ii) one month's wages has been paid to the concerned employee and,

(iii) an application for approval has been made. Then, it is observed that the employer is free to alter the conditions of service under S. 33 (2) (a) irrespective of the compliance with the provision to S. 33 (2) (b). Thereafter, it is stated :

> Therefore, putting it negatively, the jurisdiction of the appropriate industrial authority in holding an enquiry under S. 33 (2) (b) cannot be wider and is, if at all, more limited.[15]

Obviously, the aforesaid observation leaves the impression that the jurisdiction under S. 33 (2) (b) is not wider for the statutory fact that the alterations in the conditions of service brought about by the employer under S. 33 (2) (a) is not subject to scrutiny of the authority concerned. Consequently, the jurisdiction under S. 33 (2) (b) is or cannot be wider than that of the section 33 (1).

12 *Ibid.*
13 *Supra* note 8
14 (1961) 1 L.L.J. 211.
15 *Id.* at 216

Third : the Chief Justice has further relied on another paragraph in *Lord Krishna Textiles Mills v. Its Workmen*[16], particularly on the expression "all that the authority can do" occurring therein. He observed :

> Its decision on the subject is binding on all courts and tribunals. It has, whilst so laying down the law and whilst so trying to give light, expressed itself in terms which cannot be regarded as equivocal. It has laid down "all that the authority can do", when the case comes up before it under the provisions of S. 33 (2) (b).[17]

While laying emphasis on the expression "all that the authority can do", the Chief Justice ignored the fact that the relevant paragraph in which that expression finds place begins as follows :

> In view of the limited nature and extent of the enquiry permissible under S. 33 (2) (b) all that the authority can do in dealing with an application is to consider whether a *prima facie* case for according approval is made out by him or not.[18]

What is apparent from the above is that the authority is to see "a prima facie case" which concept has been defined by the Supreme Court in a number of cases.[19] Under the circumstances, the Supreme Court ought not to be understood to have intended that the limited scope of enquiry should be

16 The relevant paragraph in *Lord Krishna Textiles Mills v. Its Workmen,* (1961) 1 L.L.J. 211, 218 runs as follows :
In view of the limited nature and extent of the enquiry permissible under S. 33 (2) (b) *all that the authority can do* in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions pescribed by S. 33 (2) (b) and the proviso are satisfied or not. Do the standing orders justify the order of dismissal ? Has an enquiry been held as provided by the Standing Order ? Have the wages for the month been paid as required by the proviso ? And, has an application been made as prescribed by the proviso ?

17 (1963) 2 L.L.J. 527, 536.

18 (1961) 1 L.L.J. 211, See, also *supra.*

19 *Atherton West and Company, Ltd. v. Suti Mill Mazdoor Union and others* (1953) 2 L.L.J. 321; *Automobile Products of India v. Rukmaji Bala and others,* (1955) 1 L.L.J. 346; *Lakshmi Devi Sugar Mills, Ltd. v. Ram Sarup and others* (1957) 1 L.L.J. 17; *G. McKenzie & Col. Ltd. v. Its workmen and others* (1959) 1 L.L.J. 285; *Swatantra Bharat Mills, New Delhi v. Ratan Lal* (1961) 1 L.L.J. 558; *Banglore Woollen Cotton & Silk Mlils Ltd. v. D.B. Printing Labour Union*) (1960) 2 L L. J. 39. In *Martin Burn Ltd. v. Banerjee* (1958) 1 L.L.J. 247, the Supreme Court observed :

further limited. Further, the Supreme Court in the same notable paragraph continued to state :

> If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of said enquiry,.....

A significant question arises : whether the concept of domestic enquiry in the Labour-Management Relations includes or excludes the important norm of "unfair labour practice and victimization ?" In view of the Supreme Court decisions[21] bearing on the domestic enquiry, it is difficult to say that the grounds of unfair labour practice or victimization have been excluded from the purview of enquiry possessed by the tribunal under S. 33 (2) (b) of the Act.

Fourth, the view of Mr. Chief Justice that

> ...it would still be open to a Union of Workmen to raise an industrial dispute in connection with such dismissal or discharge and an industrial tribunal dealing with the matter would have jurisdiction to consider whether the action taken was not a bonafide action or amounted to unfair labour practice or victimization

does not square with reality. Indeed, there is a remote possibility of reference[23] of the matter on the disputes by the Government under the Industrial Disputes Act, which has already been the subject matter of scrutiny by the authority under S. 33 of the Act.[24]

Fifth, there is definite pointer in the Supreme Court decision in *Lord Krishna Textiles Mills v. Its Workmen*[25] relied upon by the High Court of Gujarat that unfair labour practice and victimization is itself the

A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case has been made, the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived on that evidence.

20 (1961) 1 L.L.J. 211, 218. See, also *supra* note 8.

21 *Ritz Theatre Ltd. v. Its workmen*, (1962) 2 L.L.J. 500; *Bangalore Woollen Cotton & Silk Co. v. Dasappa (B) (Binny Mills Labour Union)* (1960), 2 L.L.J. 39.

22 (1963) 2 L.L.J. 527, 535.

23 *The Employees of the Kusum Hosiery Mills, Calcutta v. The Kusum Hosiery Mills Calcutta*, (1951) 1 L.L.J. 233.

24 See, *B. Nath, Regulation of Management Prerogative During Pendency of Procoedings* pp. 17-21 (1961). Thesis submitted for the partial fulfilment of the requirements of the Degree of Master of Laws. Faculty of Law, University of Lucknow. (unpublished.)

25 (1961) 1 L.L.J. 211.

part and parcelof the enquiry conducted by the Tribunal under s. 33 (2) (b) of the Act. In the instant case, Mr. Justice Gajendragadkar considered the case of Mr. Harprasad, one of employees, whose case was found to be be one of victimization. It was stated;

> The tribunal has observed that this workman has not been named by any witness as having taken part in any assault, and it was therefore inclined to take the view that his dismissal amounted to victimization. We have carefully considered this workman's case, and we are satisfied that the tribunal was not justified in refusing to accord approval even to his dismissal.[26]

It is evident that the Supreme Court did consider the case of Mr. Harprasad on the sole ground of victimization. The attempt of the High Court to show that the case of this workman was considered separately from the rest of the case cannot be pressed in service as the High Court has done, to settle the position of law on the subject under consideration. It should not be overlooked that the case of Mr. Harprasad is interwoven in the texture of the whole case and he is in picture from the very start of the statement of facts of the case. Hence, if the judgment is considered as a whole, it is difficult to agree with the High Court that the Supreme Court, has in *Lord Krishna Textiles Mills, v. Its Workmen*,[27] excluded the ground of unfair labour practice and victimization from the ambit of enquiry possessed by the tribunal under S. 33 (2) (b) of the Act.

Sixth, even decisions of the Supreme Court reveal that the scope of enquiry under S. 33 (2) (b) is not more limited than that of S. 33 (1) of the Act. *State Bank of Bikaner v. Balai Chander Sen*[28] is in point. The following observations are apposite :

> ...all that the authority has to see when dealing with an application under S. 33 (2) (b) is whether the employer has conducted the enquiry properly and whether the action taken or proposed to be taken was bonafide and not due to victimization or unfair labour practice.[29]

Moreover, few relevant cases were not adverted by the High Court in *Dhrangdhara Chemical Works Ltd. v. Industrial Tribunal*[30] while interpreting the relevant observations[31] of the Supreme Court in *Lord Krishna Textiles Mills*

26 (1961) 1 L.L.J. 211, 219.

27 *Ibid.*

28 (1963) 2 L.L.J. 657.

29 *Id.* at 660.

30 (1963) 2 L.L.J. 527.

31 *Supra* notes 8 and 16.

v. Its Workmen.[32] The case of *Rohtas Industries Ltd. Dalmianagar v. Ali Hasan and others*[33] is in point. Mr. Justice Gajendragadkar while reversing the decision of the Tribunal observed :

> It is not found by the Tribunal that the finding of the enquiry is perverse or that the proposed dismissal of Kailash Singh amounts to act of victimization.[34]

Strangely enough, the High Court seems to have lost sight of *Kalyani (P.H.) v. Air France, Calcutta*[35] where the emphasis on "unfair labour practice and victimization" is no less significant. Justice Wanchoo stated :

> Thereafter, on coming to the conclusion that the employer had bonafide come to the conclusion that the employee was guilty, i.e., there was no unfair labour practice and no victimization, the labour court would grant the approval which would relate back to the date from which the employer had ordered the dismissal.[36]

Thus, it is apparent that the decisions of the Supreme Court do not support the view of the High Court of Gujarat in *Dhrangdhara Chemical Works v. Industrial Tribunal.*[37]

It is submitted that the reliance placed and interpretation given by the High Court of Gujarat on some of the observations of the Supreme Court in *Lord Krishna Textiles Mills, v. Its Workmen*[38] is not accurate and the view that unfair labour practice and victimization are no longer grounds of enquiry under S. 33 (2) (b) of the Industrial Disputes Act, 1947, is not correct.

YOGENDRA SINGH*

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32 (1961) 1 L.L.J. 211.
33 (1963) 1 L.L.J. 253.
34 *Id.* at 255.
35 (1963) 1 L.L.J. 679.
36 *Ibid* at 683.
37 (1963) 2 L.L.J. 527.
38 (1961) 1 L.L.J. 211.

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BOOK REVIEWS

INDIA'S POLICY OF RECOGNITION OF STATES AND GOVERNMENTS. By K. P. Misra. Bombay, Allied Publishers, 1966 Pp. X+214 Index. Rs. 16.

Until the Second World War, the European States forming the nucleus of the family of nations not only allocated to themselves the right to recognize, but also claimed to be their own judges on whether or not to recognize new entities or governments. The discretionary and political character of recognition and the consequent discrepancies in the practice of recognition in the diplomatic history provide evidence of its perennial use in the system of power politics as an instrument of diplomatic approbation and pressure.

Since the end of the World War II, with the emancipation of the peoples of Asia and Africa, and their joining the family of nations in 'sovereign equality', as the Charter of the United Nations expresses it, the sociological structure of the expanding international community has been in the process of metamorphosis. The emergence of 'new' nations of non-European and non-Christian civilizations and the rise of the nations committed to the Communist system have led to the rapid expansion of the family of nations from a close homogeneous club of Europecentric orientation to the present-day heterogeneous international community organized on a world-basis. This development calls for a new approach to the question of recognition of new states and governments on an objective basis. But the formation of 'new' states in the course of national liberation struggle, or in consequence of partition, secession, or merger of old states, *de'etat* or socialist revolutions, leading to the replacement of one social system by another, have produced, in recent times, a most complicated jurisprudence because of the tendency on the part of the powerful states to grant or refuse recognition for political and ideological considerations. Moreover, the profound disagreement that persists in the United Nations on the admission of new members, reflects the political tension in international relations caused by the rival blocs to fortify their political positions in the Organization by recruiting new supporters.

In this context, it is interesting for the student of international law and world affairs to have a study of India's policy of Recognition of States and Governments with a view to evaluating India's contribution, if any, to prepare the way for clearing off the perplexities and misunderstandings existing around international law of recognition.

The volume under review does not claim to provide answers for all the problems and difficulties of the law of recognition. Whilst briefly discussing the two primary theories - the constitutive and the declaratory - and proceed-

ing to give the *rationale* of recognition, the author examines India's application of the general rules of international law of recognition to some concrete and controversial cases, which include Peoples Republic of China, Israel, Vietnam, German Democratic Republic, the Congo, Algeria, Syria, and Mauritania. It is indeed regrettable that this study was handicapped for the reason that the Indian Government "has been prone to keep even such information confidential which in other countries is usually thrown open to public."[1] Many a studies in this country have suffered owing to the intransigent attitude of the Government vis-a-vis research investigations connected with the documents in governmental control. However, as is evident from the references of the original sources, the work under review has largely depended upon the newspaper reports and the Lok Sabha debates which do not necessarily throw full light on the factors, motives and considerations working behind the policy statements of the government.

The author, on the basis of his survey, concludes that the Indian Government, without feeling bound by tradition, subscribes to the principle of effectivity as the criterion for recognition, since it has generally followed the policy of considering itself justified in recognizing new states or governments when the authorities constituting thereof seem sufficiently consolidated with a reasonable promise of maintaining themselves in power. Although he admits occasional inconsistencies, whenever India found it difficult to apply the criterion of effectivity in respect of new states or governments since recognition in these cases was likely to go against her national policy, on the whole, the author finds that the *de facto* theory has largely worked. This he does succinctly by analysing the difficult cases in order to scrutinize India's policy of recognition. As to the non-recognition of divided states, like Vietnam and Korea which have been territorially dismembered by the big powers, and have by this time come to stay for practical purposes as divided states, it is explained that owing to India's own tragic experience of partition, she has been unable to look upon with favour to territorial dismemberment of countries. Yet, inconsistency in India's policy becomes marked and inexplicable in case of its recognition of the Federal Republic of Germany in contrast to non-recognition of the German Democratic Republic. The author is justified in commenting in this regard that, at a time when in matters of recognition "new committed nations are treated more harshly by the opposing blocs, "a non-aligned country, like India, should not have widened" the incogruity between

1 Mishra, *India's Policy of Recognition of States and Governments* xii (1966).

the practice and the principles of international law" by her present policy of not recognizing the facts of life in politics.[2]

Another paradox in India's policy has been that, whilst with its admission to the United Nations, India's inexplicable and belated recognition of Israel and Mauritania, both having been admitted to the United Nations earlier, has caused much confusion and misunderstanding. These cases show that, like other countires, India has also looked to its own interests. Perhaps, with a view to providing a rational solution of the problems of recognition in general, India could have made a valuable contribution if it consistently urged other countries by its own example the need to ensure the continuity of international relations by preventing a prolonged vacuum and the need of not excluding from its international life any human collectivity that fulfilled the qualities, required for admission to the advantages of independent political relations with foreign states. The author's conclusion that, indirectly, India's policy "should be dicidedly conducive to strengthening international law"[3] seems to contradict his earlier observation pointing out incogruity between the practice and the principles of international law. Also, it is not clearly established, what pattern India's policy of recognition sets to realise the aspirations of the 'new' countries for the revision and progressive rewriting of old international law docrtrine to meet the revolutionary changes in the world community ? The last chapter of the book, containing author's conclusions, is particularly thought-provoking, although in the reviewer's opinion the generalizations appear to be too facile and lack expiscation. The book also suffers from recurrent repetitions and lack of sustained coherence because, as the author explains, "most of the chapters were originally prepared as separate case studies." Amongst its minor errors, typographical mistakes e.g. in the serialization of the footnotes in chapter 10, may be mentioned.

On the whole Dr. Misra's work is a provocative and constructive study of India's approach to a vexed and perplexing problem of international law which the International Law Commission decided to take up for codification in 1949 but has not yet found time to do so. The author sheds much illuminating comment and his critical evaluations reflect a searching analysis of the available relevant information. This work can be unhesitatingly recommended to the students and teachers of international law and international affairs.

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2 *Id.* at 93.
3. *Id.* at 202.
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OUTLINES OF INDIAN LEGAL HISTORY By M. P. Jain. Bombay, N. M. Tripathi Private Ltd., (Second edition) 1966. Pp. 742. Rs. 30.

Since its first publication in 1952, Dr. Jain's book has been a valuable guide to the study of Indian Law setting forth its historical background in a straightforward and comprehensible yet sufficiently detailed manner. The existence of this book in itself, as the author points out in his preface, corresponds to a growing readiness within India to take note of the historical dimension in its relevance for legal education. For such awareness there is particular need in the case of India's legal system the present shape of which so distinctly bears the marks of its formation during the gradual establishment of British institutions in the country. Many of its peculiarities will indeed hardly be understood without at least some orientation in its genesis. At the same time it remains pertinent what Savigny said 150 years ago with respect to the Roman-German law system, viz. "historical sense is the only protection against the self-deception of taking our peculiarities for the common nature of mankind."[1] It is not the common nature of mankind which shaped the characteristics of India's present legal culture, but English Common Law and English institutions introduced in a complicated and protracted reception process which deeply transformed even the indigenous branches of law and which in magnitude may justly be compared with the reception of Roman Law in medieval Europe. Such formative influence of English traditions gives a natural stimulus for Indian research at a moment when India has begun to take its fate into its own hands. In this context, I think the author has rightly confined his presentation to the British period as the period of practical relevance for an appraisal of the present situation.

For the second edition the book has been thoroughly revised and enlarged. It has thereby considerably grown in stature. The author's claim that he has practically rewritten the whole book does not seem exaggerated and a comparison with the first edition will reveal to the reader the extent to which the material and even single sentences have been rearranged, straightened in their logical sequence and more amply explained and documented. Between the two editions the author seems to have done a good deal of research work which the reader is now enabled to follow more closely since the first edition's summary bibliography has been replaced by detailed references worked into the text by way of footnotes.

1 On the Vocation of Our Time for Legislation 115 (1814)

Alterations in the text are too many to be discussed here in any degree of completeness. The general tendency has been to put into clearer relief historical situations by giving more extensive account of prevailing conditions (see, e.g., the more substantiated description of the State of Bengal before Hasting's judicial reforms p. 81 ff., of the initial uncertainties about the jurisdiction of the Supreme Court at Calcutta p. 118 ff., and the more acute analysis of the Act of Settlement, 1781), at the same time better explaining the policies discussed and adopted (e.g. contemporary discussion on the merits of codification p. 605 ff.). In many respects basic structures of legal development, e.g., the peculiar division of of law between presidency towns and mofussil or the question of personal also compared to territorial law (cf. treatment of the first Law Commission's Lex Loci Report) have been brought out in clearer perspective. The information given thus is not only comprehensive but permits real insight into the extraordinary morphology of India's legal development. The most remarkable line of revision perhaps is the much more intensive treatment received by questions of substantive law ; thus a certain disequilibrium in the first edition is being redressed. In many places discussion of illustrative case law has been amplified, yet the most distinct advance is seen in the chapters dealing with codification and the growth of different bodies of substantive law. Sections on customary law and the codification of Hindu law have been added as well as a chapter on law reporting. With all this shift in emphasis the book in its general plan maintains, at least to a Continental European reader's eyes, a curious preoccupation with questions of judicial administration, organization of courts etc. as compared with the growth of particular legal concepts. This in a way is not the author's fault or caprice but is in itself rooted within the English tradition and its tendency to perceive law primarily as the functioning of law courts. In India, as the author points out, this tendeny was carried to the extreme of trying for a long time to establish court systems without developing a body of law. The arrangement of materials in the book - progressing from a narrative of institutional reforms to a sketch of the transformation of substantive law - thus reflects the historical order of events. Nevertheless it is of the utmost consequence that this should be so, and perhaps the time has come to inquire what this order of events has done to the common man's notions of justice in India. One striking example of the traces which the jurisdictional approach has left in Dr. Jain's book-as by the way, incomparable books on the subject like Rankin's "Background to Indian Law"—is the total neglect of the branches of substantive law developed under the aegis of the Revenue Department.

Land tenures, tenancy legislation and even the codificatory work contained in the post-independence agrarian reform legislation are not discussed. One reason doubtless is the fact that these matters do not form a substantial part of court litigation proper, they are mainly handled by the collector's court and reach the superior courts but by way of supervisory jurisdiction. Still viewed from the substantive angle, the law of land tenures has most consequentially affected the life of that major part of India which today still is predominantly rural, and British tenancy legislation which so deeply predetermined today's agrarian reforms is no less a contribution to Indian legal history than, e.g., the Indian Evidence Act. At some places the lacunae are even felt in the discussion of purely judicial matters : many details of Lord Cornwallis's judicial reforms as well as their true scope will only be properly understood in the context of the Permanent Settlement and its wholesale expropriation of the tenantry.

It is fully realized that the integration of all substantive legal aspects with the development of law courts requires a formidable amount of further research. Yet it is submitted that to draw such an integrated picture of the substantive reality of law in India is an urgent task. It is true, as Maine has said, that the very institution of English type law courts in India has meant a legal revolution. But as every true revolution produces further revolutionary growth the new court system has led to the development of new substantive law in the continuous endeavour to make law certain. The modern legal techniques have not been confined to the courts and as a consequence the great competition between administrative and judicial tools to achieve substantive justice has developed also in India. It is in the analysis of this situation and the further clarification of the substantive law involved that Indian legal research may well come to play a much more ambitious role than it has done hitherto. Dr. Jain's book augurs well as a beginning in such legal research on an ambitious level. That it makes thrilling reading in itself points to the magnitude of the underlying phenomena.

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INDIAN AND AMERICAN LABOUR LEGISLATION AND PRACTICES—COMPARATIVE STUDY. By Arjun P. Aggarwal Asia Publishing House, 1966. Pp. 329 Index & Bibliography.

From the preface of the book it is manifest that it is a "modest" attempt in the direction of providing a "systematic study of the forces responsible for the birth and growth of Indian Labour Legislation" and also to assess the "influence that American laws, practices, conventions and court decisions have exercised on Indian Industrial jurisprudence." The objective of the author is indeed laudable. Nevertheless, nowhere in a book of this type does the author discuss conditions responsible for the evolution of the labour laws in either of the countries. Nor does he deal with inter-actions or inter-relationships between the present prevailing conditions and current labour laws of the two countries. Had the author tried to project a spectrum of labour problems in the context of socio-politico-economic conditions of both the countries through the prism of legal provisions it would have been more valuable both to the decision makers in the field of labour relations as well as to the academicians. The book is open to other objections as well. It appears that because of the vastness of the area covered by the book the author has not delved deep into the subject though the book gives sufficient indications of the availability of the materials to readers.

Moreover, there are certain statements in the book which do not appear to represent the correct proposition of law. Though the author, in general, has supported the statements of law by the appropriate authorities of statutes, judicial decisions and decisions of industrial tribunals or boards, some of his inferences are not supported by any authority. For example, on page 119 he has written that "In the United States the arbitrator can modify the punishment : *In India the tribunal has no such power.*" He has not cited any authority for it. Such general remarks are apt to misguide the readers. No doubt in the United States the arbitrator can modify the punishment but the same is true of Industrial Tribunals in India too. There are ample authorities in support of it. The Labour Appellate Tribunal in *Buckingham & Carnatic Mills Ltd. v. Their Workers*[1] has clearly observed that the "management with the knowledge and experience of the problems which confront it in the day to day work of the concern, ordinarily ought to have the right to decide what the appropriate punishment should be, *but its decision is liable to be revised if the Tribunal is of opinion that the punishment is so unjust that remedy is called for in the interest of justice.*"[2]

1 (1951) II L.L.J. 314 (L.A.T.) (F.B.).

2 *Id.* at 318 (emphasis added).

The same view has been taken by some of the High Courts[3] also. To mention only one, in *Hendricks & Sons v. Industrial Tribunal*[4] the Andhra Pradesh High Court has taken the view that where the action of the management in disciplinary step taken by them and the imposition of the punishment is either contrary to law or lacks good faith, or is baseless or perverse, or it is done by way of victimization or unfair labour practice and not for imposing a just punishment, the industrial tribunal can interfere with the action taken by the management.

Further, the view is reinforced by the Supreme Court's observation in *Andhra Scientific Company Ltd.v. Sheshagiri Rao and another*[5] wherein Das Gupta, J., held that even if all the charges alleged against the workman were proved "the labour court had to consider for itself what punishment, if any, should be imposed." According to His Lordship "when the acts in respect of which the workman is ultimately found guilty do not amount to misconduct at all under the Standing Orders of the employer *the tribunal not only can but should consider the question what punishment should be inflicted on the altered finding of guilt.*" And in other cases, particularly "where the conclusion reached by the management as regards the guilt of the accused of the misconduct urged against him remains undisturbed" the industrial tribunals should not ordinarily interfere with the punishment. But this does not mean that in such cases the tribunal can not interfere at all. The Supreme Court has merely cautioned the industrial tribunals that in such cases they should interfere only in extraordinary circumstances when grave injustice has been done to workmen.

Similarly, the statement in the book on page 144 that "Reference of a dispute to an industrial tribunal can be made jointly by the parties concerned or by the government" appears only partially correct. It is evident by Section 10 of the Industrial Dispute Act that the reference of a dispute to an industrial tribunal cannot be made by the parties directly. However, under certain circumstances and on the fulfilment of certain conditions mentioned in sub-section (2) of section 10, the government may, on an application being made by the parties jointly or separately, refer the dispute to the industrial tribunal.

Despite the above shortcomings, it is beyond doubt that the book is immensely informative. It represents a bold and extensive attempt to give a comparative picture of the Indian and American Labour Laws.

3 See (1960) II L.L.J. 484 (A.P.) and (1964) II L.L.J. 31 (Bom).

4 (1960) II L.L.J. 484, 486 (A.P.).

5 (1961) II L.L.J. 117, 120 (S.C.), (emphasis added).

The author has tried to compress a lot of materials into a short space. For example, chapter one itself comprises side by side the development of industrial jurisprudence in the United States and in India, constitutionality of the Wagner Act and the Industrial Disputes Act, restrictions on employer's prerogatives in the United States and in India and the problem of federal and state jurisdictions in both the countries. Chapter two, which deals with strikes, has been so arranged as to include, *inter alia*, right to strike, protected strikes, unprotected strikes, justified and unjustified strikes, unlawful strikes, sit-down strikes and right to discharge strikers. Discharge for union membership, covering topics like cause or just cause for discharge, dischargeable offence and procedure for discharge for just cause has been discussed in chapter three, while dispute settlement machinery, including topics like the national labour relations board, prevention of unfair labour practices, the federal mediation and conciliation service, national emergency disputes, works committee, conciliation officer, board of conciliation, court of inquiry, industrial tribunal, labour court, national tribunal, reference of dispute, submission and publication of the award, judicial review of the award and arbitration, has been discussed in chapter four. In all these chapters the author has tried at suitable places to compare and contrast the American and Indian provisions. But in addition to that in chapter five of the book he has discussed the application of American Law in Indian cases. Here the author has tried to show that though "the influence of English Law on India's legal system is most persuasive", yet "in the field of industrial jurisprudence American influence has become paramount." Even so, he feels that this influence is haphazard and unsystematic because, *inter alia*, the "Indian Tribunals have used American decisions as a shield rather than as a torch" and moreover, "the Indian lawyers on the whole are not conversant with the latest American decisions."

Indeed every country has its own problems and they should be tackled according to their own setup. Problems of two countries may appear to be similar, but the circumstances which give rise to those problems and the remedies for those problems may not be the same. The judicial decisions of foreign countries may not be aptly applied to apparently similar fact situations in India, because, the Indian set up is quite different from the foreign.

The author rightly remarks (on page 161) that it is "dangerous to uncritically employ American precedents in Indian cases." Hence, the decision-makers in India should try to interpret the law in the context of the existing conditions and needs of the country, as most of the American lawyers and

decision makers have done there. It is in this sense that the American decisions can be looked upon as a torch. In the end a word of suggestion may not be out of place with reference to the form of the citation of the Labour Law Journal. The form adopted by the Journal is L.L.J. and not LL.J. which has been continuously followed in the book. It is hoped that the author will adopt in the next edition the correct form.

DURGA PRASAD*
S. P. RAMAN**

MINES AND FACTORIES JOURNAL. Volume I (February 1967), Edited and Published By Shri M. K. Varma M.A., B.L., Kankarbagh Road, Patna-16, Printed By Shri Mohan Lal Bishnoi, B.A. at Mohan Press, Langertoli, Patna-4, Pp. 302. Annual subscription Rs. 30.00, single copy to subscribers : Rs. 3.00, to others : Rs. 5.00.

Since independence the Industrial Tribunals and Federal Court of India on an all India basis and later the Labour Appellate Tribunal, High Courts and the Supreme Court and after the abolition of the Labour Appellate Tribunal and since the introduction of three tier system, the Labour Court, Tribunal and National Industrial Tribunal, along with the High Courts and the Supreme Court of India, have been increasingly concerned with law relating to labour management relations. They have handed down a large number of decisions in the field of labour management relations, social security and minimum standard statutes etc.

There are very few journals reporting the industrial awards and decisions. At the same time, no attempt has been made to publish, at least, important awards and decisions of Tribunals and Courts, particularly of Labour Courts and National Industrial Tribunals of various parts of the country. One who wishes to get himself acquainted with awards and decisions of the land on any particular subject of labour law has to struggle much for consulting the same from various Provincial and Central Gazette. There is a need for a Journal which publishes important decided cases of Labour Court, Tribunals and National Industrial Tribunal. Further, there is a need for prompt publication of industrial awards and decisions. It has rightly been said that "Law that is not latest is not living."

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The work under review is one which makes some attempt to report cases along with other relevant material on these lines. The Journal is divided into five parts. Part I contains the editorial section, book reviews and notes of foreign cases. Part II contains notes on cases and decisions of the Supreme Court and High Courts. Part III contains notes on cases and awards and decisions of quasi-judicial authorities. Part IV contains Acts, Ordinances, Regulations, Rules, Orders, Notifications and Report etc. Part V contains information supplement, statistics, notes and orders and labour forum. The journal contains both the "nominal" and subject index.

The editor's note has been published on "framing of service rules not within the competence of an appropriate government under Section 10 of of the Industrial Disputes Act." Here the Editor has critically examined the problems arising out of Industrial Tribunal taking upon itself the task of Certifying Officer under Section 5 of the Industrial Employment (Standing Orders,) Act, 1946. He is critical of appropriate governments referring the industrial dispute relating to "framing service rules" for the workmen to the Industrial Tribunal for adjudication. Thereafter, he has pointed out certain disadvantages which will be prejudicial to both the employer and the workman if the service rules will be framed by Industrial Tribunal. He therefore, pleaded for the certification of Standing Orders under the Industrial Employment (Standing Orders) Act, 1946 and in case of any dispute arising out of it which the parties failed to settle amongst themselves to form the subject matter of reference to adjudication. The points suggested by the author are pertinent.

The Journal contains only one article on "Limitation of collective bargaining" by Dr. Ram S. Tarneja. Here the author has pointed out some of the obstacles in the growth of collective bargaining . He has criticised the role of government on the problems of labour management relationship. One of the factors hampering the growth of collective bargaining suggested by the author is the impact of increasing labour legislations in India. Although this general remark has been made, no Act has been referred to in the Journal and no statutory provisions have been quoted in particular to support the author's thesis. Further, no case law has been cited to fortify the author's proposition. Nevertheless, the article is comprehensive and brings to light some of the factors affecting the scope of collective bargaining. The readers will be benefitted more if the journal will also include some articles on some aspects of the law relating to labour management relations.

Besides this article, there are three book reviews. It might be mentioned that the book review will be more beneficial and meaningful if the books were reviewed by specialists.

The Journal lacks critical note on any case law. To make the Journal more useful, it is necessary to include comments on recent important cases.

The journal is very informative. The editor's note on pages 174 and 175 is commendable. The information in the Journal is also praiseworthy.

The scheme of arrangement adopted in the Journal and the division of the Journal into different parts will undoubtedly economize the time and labour of a reader in finding out various information on industrial matters. Moreover, the classification of the decision both subject wise and under the heading of Court adopted in the Journal is likely to render easier the task of locating the cases in the volume. However, the name of the Tribunals and Courts for the convenience of readers may be written within brackets in the subject index. This will further facilitate the readers in finding out the name of the Courts or Tribunals on any subject. Further, the inclusion of notable case law will add to the quality of the journal. A list of cases overruled, reversed and dissented from in the volume may also be incorporated. Again, in the "cases referred" given in head note no mention appears to have been made about the name of Tribunals or Courts who decided the cases. Moreover, it would be welcome if the cases are arranged alphabetically in the "nominal" index.

A perusal of the Journal further reveals that despite the attempt made by the learned Editor to report most of the cases of Tribunals and Courts, no award of the Industrial Tribunal, Lucknow, (U.P.) has somehow or the other been included either in the section of reported cases or in the notes on cases.

There are a few printing mistakes which can be avoided in subsequent issues. For instance, on page (v) of part II the printing reads as *Hindustan Automobiles v. the workmen.* In fact the name of the case is "*Hindustan Antibiotics Ltd. v. the workmen.* Further, in the notes of cases on pp. V, VI, VII, VIII of part I no mention of "cases referred" to have been made. On the other hand, in the Labour Law Journal in the *Hindustan Antibiotics Ltd.* (1967) I L.L.J. 114, a number of cases have been referred to. For instance, in this case references were made of *Bengal Chemical and Pharmaceutical Works Ltd.*, (1959) I L.L.J. 413, *Crown Alluminium Works*, (1958) I L.L.J. I, *Express Newspapers (Pvt.) Ltd.*, (1961) I L.L.J. 339, *French Motor Car Company*, (1962) 2 L.L.J. 744, *Hindustan Times Ltd.*, (1963), I L.L.J. 108, *Indian Hume Pipe Co. Ltd.* (1959) 2 L.L.J. 830, and *Talang (C.M.) v. Shaw Wallace & Co. Ltd.*, (1964) 2 L.L.J. 644. Moreover, it has wrongly been mentioned in Part III in the list of awards on the cover page that the Journal includes the award of Industrial Tribunal, (Central) Lucknow, whereas no such case appears on page 21 of the Journal.

We hope that this Journal will no doubt serve a useful purpose for labour law lawyer, researcher, management, labour union, those who have to administer labour law and all those who are interested in labour laws. The printing and get-up of the Journal is impressive. We wish the Journal and its sponsors all success.

SURESH CHANDRA SRIVASTAVA*

ARMS, AIMS AND ASPECTS. By J. N. Choudhari. Manktals, Bombay, 1966.

A significant development in the contemporary international politics is its virtual domination by military affairs. The last decade saw vast literature on the various aspects of this subject. 'Arms, Aims and Aspects' is another valuable contribution to that. Its author, General J. N. Chaudhari, presently High Commissioner in Canada, was one of the soldiers of fortune of the Indian Army.

These forty seven articles written between 1951 and 1965 and now presented under one cover originally appeared as casual articles in 'The Statesman'. They cover a wide range of military topics with particular emphasis on the Indian defence strategy and planning. A brief review like this may not possibly do justice to a collection of articles so varied in nature. However, some important articles have been well attended to.

A defence force in the process of change from an imperial army to a national army experiences, peculiar difficulties, recent developments in India very well illustrate this. After the Chinese invasion and recent Indo-Pakistan Conflict, there has been a great clamour for the expansion and strengthening of Indian defence forces. To stand on its own an army requires an indigenous armament industry above all. The author suggests that innumerable defence industries must and can stand much more research

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and development efforts.[1] Among them, the defence electronic industry can be developed to such an extent that all the requirements of this country cannot only be fully met, but much equipment can be exported to other developing countries. He repeatedly mentions, while this development is necessary, the time has come to leave the old colonial flavour and make the Indian army more 'Indianised.'

In another interesting article 'Tactics and Strategy in the nuclear age,' the author opines that self-sufficiency in conventional weapons will still prove decisive in the nuclear age. He does not make any committal statement about India's urgency for nuclear weapons but at the same time expresses his concern about the Chinese nuclear threat. His apprehensions are on account of the deteriorating conditions of Indian economy which may not permit her to embark an expansinve nuclear programme. Hence, it may seem desirable that India should concentrate more on the development of the conventional strategy and tactics.[2]

On "The Role of Guerrilla Forces", the author dwells on the importance of guerrilla force in modern warfare. He feels that guerrilla movements in Nagaland can be dealt with effectively, by establishing a sound administration, a well integrated programme and an unobstrusive intelligence.[3]

The experiences in the United Nations peace-keeping operations seem sufficient to illustrate the difficulties of securing any workable agreement upon the mounting of peace-keeping operations. For this reason the author goes rather pessimist about the United Nations Police Force coming into being in foreseeable future. However, in his article, 'An International Force Faces Complex Problems', he stresses the need, for an advanced planning agency within the United Nations to deal with the problem of co-operation, training and intergration of multi-national forces.[4]

Mention has to be made about the most illuminating article 'Shortcomings of Military Governments,' in which he very reasonably surveys the aftermath of military take overs in many Asian and African countries. His inference is that military Governments themselves work for their own disintegration. He concludes that nothing can be farther from truth than the illusion dearly nourished by many that military changeover is the panacea for all evils.

1 Chaudhari, *Arms, Aims and Aspects* (1966) Article 31.

2 *Id.* at 257.

3 *Id.* at 229.

4 *Id.* Article 43

Running through the pages of this book one tends to feel that the topical arrangement of the articles is rather uneasy. The articles are strung loosely and do not maintain continuity of thinking . The reader would also find occassional overlapping and repetitions. This may be improved in future editions.

The book is exhaustive for both the professional and general reader and gives near complete study of Indian defence system. The country of war classics like "Mahabharat" has been seriously missing a good many accounts of its military activities for years. This book partially fills the gap. To end, "old soldiers never die; they only fade away; but in that fading process many have a tendency to produce a volument of memories." General Chaudhari has done this.

P. K. JHA*

JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES.

Edited By Subhas C. Kashyap Published quarterly on behalf of the Institute of Constitutional and Parliamentary studies. Annual subscription Rs. 15/- or ($ 5.5 or £ 2 for overseas customers).

The Institute of Constitutional and Parliamentary Studies is a unique institution in India. It was formally inaugurated by Dr. S. Radhakrishnan, ex-President of India, on 10th December, 1965. This institution has been set up with the primary aim of promoting parliamentary studies in the world with particular reference to India and facilitating research in the field of constitutional law and other related subjects. It has also embarked on publishing research papers, books and a journal. It has already brought out a number of books on current problems written by authorities of world wide recognition. Besides, it arranged seminars and talks given by personalities like Professor Robert A. Scalapino, Professor of Political Science at the University of California, Dr. Alexander Erkstein, Professor of Economics at Michigan University, Mr. Andre de Blonay, Secretary-General of the Inter-Parliamentary Union, Dr. Arnold Smith, Secretary-General of the Commonwealth Secretariat, Mr. Justice Potter Steward, Associate Judge of the Supreme Court of the U.S.A., Professor Max Beloff, Gladstone, Professor of Government and Public Administration at the University of Oxford, Dr. K. M. Munshi, a former Union Minister and Governor, on various issues relating to constitutional law.

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Publication of the Journal of Constitutional and Parliamentary studies within a year and a quarter after its inception represents an added determination of the Institute to give effect to its basic objective. The first issue of the Journal was brought out as an issue of January-March, 1967. This newly born Journal received messages from persons who are at the helm of Indian affairs, such as Dr. Zakir Husain, President of India, Dr. Radhakrishnan, former President of India, Mrs. Indira Gandhi, Prime Minister of India, Hukum Singh, former Speaker of the Lok-Sabha and the like.

The editorial board of the Journal consists of Messrs L. M. Singhvi (Chairman), S. L. Shakdher, M. C. Setalvad, B. N. Banerjee, V. K. Menon, R. C. S. Sarkar, N. C. Chatterjee, M. N. Kaul. The editor is Dr. Subhash C. Kashyap.

There cannot be any shadow of doubt that a journal on Constitutional and Parliamentary duties is a pressing need of the day. Particularly in a country like India where Parliamentary democracy is in a nascent stage, a journal of this kind is a great boon to the people who have shown much interest to preserve democratic ideologies despite the country is surrounded on all sides (except Ceylon) by different forms of governments. Even a country run by a dictatorial government speaks of following democratic principles. So, naturally people are bound to be bewildered in the midst of propaganda machinery, one speaking quite opposite to the other. Under such circumstances, a Journal of Constitutional and Parliamentary Studies with no political bias as the one under review will undoubtedly throw new light and broaden the horizon of thinking people in India. The Institute has until now published two issues of the Journal of Constitutional and Parliamentary Studies.

The first issue (Vol. 1, No. 1) consists of six articles, two notes on Constitutional and Parliamentary developments in India, commentaries on two decided cases, book reviews and other features. Similar pattern has been followed in the second issue (Vol. 1, No. 2). The notes and case-comments in both the issues are mainly related to Indian Constitutional questions. Since one of the objectives of the Journal is to impart knowledge on comparative governments, it is expected that in future issues the Journal would include discussions on some leading questions relating to other democratic governments.

The contributors of the articles in both the issues are eminent persons like A. C. Guha, B. V. Baliga, S. L. Shakhder, R. C. S. Sarkar, N. N. Mallya, K. R. Bombwall, Francesco Cosentino, Jesse M. Urruh, M. V. Pylee, M. Abel, P. Parmeshwara Rao, and S. S. Bhalerao. The articles cover different aspects of constitutional issues in India A general topic like The Inter-Parliamentary Union was discussed by Sri S. L. Shakdher, the Secretary of the Lok Sabha (lower house of Indian Parliament) in the first issue. The second issue is more broad based. It includes two illuminating articles by foreign authors. Dr. Francesco Cosentino, the Secretary-General of the Chamber of Deputies, Italian Parliament, has written on Parliamentary Committees in the Italian Political System. The California Ombudsman Mr. Jerse M. Uruh, the Speaker of the California Assembly has in clear terms expressed the necessity of Ombudsman in a democratic set-up where an ordinary citizen seldom finds any remedy for mischief done to him while dealing with administrative agencies of the government. It is to be noted in this connection that a Bill relating to the introduction of Ombudsman in India is under consideration of Indian Parliament. Two articles have been contributed on emergency under the Indian Constitution. One by Dr. M. V. Pylee, Professor of Business Management and Director of the School of Management Studies, University of Kerala, on "The States under Constitutional Emergency", and the other by Sri Parmeshwara Rao, Lecturer in Law at the University of Delhi on "The Role of Parliament during the Emergency." In both the articles no historical background of emergency power in India has been referred. The articles could be of much interest if incidentally some references could have been made to the Indian Councils Act, 1861 for inception of this power and particularly to sections 45, 93 and 102 of the Government of India Act, 1935, as the predecessors to the emergency measures under the present Constitution. The two authors could not see eye to eye as to the effect of such provisions on democratic government in India. Dr. Pylee expresses satisfaction with the wisdom of the Government for not suspending the Fundamental Rights in any State during the existence of emergency proclamation. But is there any guarantee that it will be taken as a precedent in future, when the Constitution has provided otherwise ? We agree with the observation of Sri P. P. Rao. To dispense justice and safeguard individual rights and liberties, Articles 352, 358 and 359 require necessary amendments so as to limit the powers of the President to proclaim emergency when there exists no such state of affairs in the country. To determine the existence of emergency in fact, the matter should be subjected to judicial review. The exercise of such power by the executive has been the subject of judicial review in England (Ex Parte Budd (1942) 2 K. B. 14).

Notes and case-comments have been contributed in the two issues by Sri B. K. Mukherjee, Deputy Secretary, Lok Sabha, Dr. B. B. Jena, Reader

in Political Science, Government College, Baripada, Orissa, Shri D. C. Jain, Research Officer at the Institute. In the field of Constitutional and Parliamentary Development, Sri Mukherjee has made a brief survey of the party position in the Lok Sabha and the State Legislatures as on April 30, 1967. This note is very informative. Such an attempt in future issues will be much appreciated by politically conscious people.

It is clear from the depth and quality of the articles in the first two issues of the Journal that the readers will find them immensely beneficial from it; each feature of the Journal is refreshing, readable and full of information on constitutional and parliamentary aspects.

H. SAHARAY*

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RESEARCH WORK

A. Approved LL.M. Dissertations:

1.	DURGA PRASAD	Community Regulation of Management Prerogative to Terminate the Services of Workmen
2.	RAJNI KANT	Community Prescriptions for the Settlement of Bonus Disputes
3.	SURESH CHANDRA JOSHI	The Constitution is What the Judges Say It Is.
4.	MAHESHWAR NATH CHATURVEDI	Judicial Delineation of the Word "Civil Post" under Article 311(2) of the Indian Constitution
5.	SURESH CHANDRA SRIVASTAVA	Community Regulation of Managements' Economic Instruments of Coercion
6.	N. N. VERMA	Law Relating to Strikes
7.	S. PARASURAMAN	Law Relating to Retrenchment
8.	M. KAMARAJU	Government Intervention under Industrial Disputes Act, 1947
9.	B. P. SRIVASTAVA	Disarmament in International Law
10.	S. P. SINGH	Bankruptcy in Private International Law
11.	S. K. VERMA	Development Rebate (A technique of tax incentive to attract investment)
12.	K. P. PANDEY	Compensable Harm Under the Indian Workmen's Compensation Act, 1923

B. Current Ph.D. Work

1.	YOGENDRA SINGH	Supreme Court and Labour Law
2.	DURGA PRASAD	Termination of Service
3.	SURESH CHANDRA JOSHI	Remedies in Contract
4.	SHYAM NARAIN SINGH	Labour Appellate Tribunal: An Apprisal
5.	SURESH CHANDRA SRIVASTAVA	Law Relating to Instruments of Economic Coercion.

C. Current LL.M. Work

1.	S. N. JHA	Enforcement of Statutory Provisions Regulating Exercise of Managment Prerogative During Pendency of Proceedings
2.	R. L. LYNGDOH	Claims Adjustment Decisions Under the Industrial Disputes Act, 1947
3.	S. P. SINHA	A Study of the Industries (Development and Regulation) Act, 1951: An Aspect of Public Control of Private Enterprise
4.	V. V. SOMARAJU	Beneficiary's Right of Action Under the Indian Contract Act (Act No. IX of 1872)
5.	RAJ BAHADUR SRIVASTAVA	Protection of Minority Shareholders in Case of 'Oppression' under the 'Indian' Companies Act
6.	O. P. SINGH	Continental Shelf: Legal Claims, Policies and Trends in Decision
7.	D. K. SRIVASTAVA	Public Control of Private Enterprise: Control of Sugar Industry
8.	N. S. NAHAR	Government Control of Companies Under the Indian Companies Act
9.	DHIRENDRA KUMAR SRIVASTAVA	Plenary-Appellate Jurisdiction of the Supreme Court

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