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(*Editor*)
B. N. SAMPATH

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MENTALLY UNSOUND OFFENDERS IN INDIA AND THEIR TREATMENT

(A criminological view-point)

P. N. BANERJI*

I. Introduction

In India the criminal responsibility of mentally unsound offenders has been determined by the so-called M'Naghten's test[1] for over a century. Indeed, once a person has been found mentally unsound in accordance with the test, he is treated as a medical or psychiatric case rather than a criminal.[2] Exemption from criminal liability is based on the assumption that mentally unsound offenders cannot be deemed to have requisite *mens rea* for an offence. Again, if a person is mentally unsound at the time of the trial, he would be tried only if he is found capable of defending himself. Otherwise, the trial would be postponed till such time as he becomes capable of doing so.[3] What is, however, a matter of concern to criminologists as also to psychiatrists and medical men is that M'Naghten's test, as applied and interpreted in India, takes note only of two extremes. Either a person is a total mental wreck having lost his cognitive faculties altogether, or, he is mentally sound and therefore answerable for his criminal act. That in between the two extremes there can be various shades or categories of mental unsoundness has

*B.Sc., LL.B. (Lucknow), LL.M. (London), Lecturer, Law School, Banaras Hindu University.

1 M'Naghten's test in its original form consists of rules formulated by some judges in England in 1843 in answer to five questions put to them by the House of Lords with a view to ascertaining the law on criminal responsibility of offenders suffering from insane delusion (See Hansard's Debates, Vol. 67, pp. 288, 714). The material part of the answers were as follows :—

A person suffering from partial delusion only, and not in other respects insane, will nevertheless be punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to the law of the land.

The jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

2 Ss. 470, 471 of the Code of Criminal Procedure (1898).

3 Id. Ss. 464, 465, and 473.

been ignored, excepting for the fact that in exceptional cases, even after convicting a person, a court can recommend his case to the concerned government for relief.[4] Among categories of mental unsoundness, which would not entitle a person to exemption from punishment, there could be some having criminogenic propensity.[5] The extent of responsibility for a crime in such cases is difficult to ascertain. Possibly, what excuses our law for creating an artificial dichotomy between the concepts of legal and medical insanity and for being static for over a century is inadequacy of our knowledge of the precise role of mental unsoundness in the etiology of crime.

The present author feels that time has now come for a change. Any rational system of law, it is needless to say, is under an obligation to provide for safeguards to ensure that persons, who are in need of treatment—medical, psychiatric or psychological, but who have no articulate voice to make a demand, should not instead be subjected to harsh punishments. Perhaps, mentally unsound offenders have a priority of place in the matter of individualised teratment.[6]

4 Id. Ss. 401, 402, 402A. Under these provisions the concerned government has been given power to suspend or remit sentences partly or wholly.

5 See Howard Jones, Crime and the Penal System 41 (1956) where the author quoting D. K. Henderson and R. D. Gillespie, says : "Among the psychoses, schizophrenia has been known to give rise to a variety of criminal acts : murder, rape, arson, theft etc. The paranoid patient may attack those who, in his deluded state, he believes are plotting against him, as may the manic those who obstruct him in his ceaseless and feverish round of activity.

Similarly with neurosis. In the course of hysterical 'fugue' (a state of altered consciousness), the individual may commit many offences of which he has no recollection afterwards. The obsessional neurotic also may be forced by an irresistible inner compulsion to go on performing some act, which may well be an offence, such as stealing, sexual exhibitionism or wandering. Then there are various sex offences which are clearly the product of a disordered mind."

6 Along with 'reformation' as one of the basic objectives of criminal law, individualisation in the treatment of offenders has been regarded as its necessary complement. Specialised institutions like reformatories, approved or certified schools, borstals, psychotherapeutic centres, ideal prisons, industrial training centres and non-institutional treatment through, probation etc. are manifestations of this changed outlook.

Individualised treatment, not necessarily excluding punishment, is the organised reaction of a political society towards an offender by way of therapeutic measures. Such treatment is given to an offender keeping in view his individual peculiarities of temperament, emotionality, personality, age, sex, social background and experiences etc.

In the context of mentally unsound offenders, individualisation in their treatment should mean special therapeutic measures adopted to take care of the particular shade or category of mental unsoundness, besides other factors.

The principle of individualised treatment of offenders is not new to India. See Manu, verse 126 along with commentator's observations quoted by Sen, Penology Old and New, 4 Tagore Law Lectures 111 (1929).

The purpose of this paper is to make a brief review of our law on criminal responsibility of mentally unsound offenders, the mode of their treatment, and also to suggest any improvement that is practicable within our economic limitations.

II. Substantive Criminal Law on Mental Unsoundness

Section 84 of the Indian Penal Code, 1860 (hereinafter referred to as S. 84 I.P.C.) reads as follows :

> "Nothing is an offence which is committed by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law".

(i) *Loss of cognitive faculties :*

The above provision of law assumes that unsoundness of mind of such category as impairs the cognitive faculties of a person's mind thereby incapacitating him either (a) to know the nature of his act or (b) to know the wrongfulness of the act at the time of committing it, should be taken to negative *mens rea* for an offence.[7] But it is in fact this aspect of the test, namely, the loss of cognitive faculty of mind, which is by far the most controversial. Firstly, there are varieties of mental unsoundness which, as already stated, might have a causal connection with crime,[8] but it has not been established that all such illnesses necessarily deprive a person of his cognitive faculties whereby he judges the nature of his act or distinguishes between right and wrong.[9] Secondly, it has been said that the test has the unfortunate implication of regarding human mind as made up of different faculties or compartments independent of each other and that it would be more appropriate to think of psychic personality of an individual as an integrated whole where impairment of one faculty will have an inevitable impact on others.[10]

The judiciary in this country has adhered to the so-called legal test of insanity in S. 84 I.P.C. with utmost rigidity. The resultant decisions might not have been always fair to those mentally unsound offenders who could not qualify for exemption. Indeed there are reported cases causing considerable

7 *Geron Ali v. Emperor*, AIR. 1941 Cal. 129; *Hazara Singh v. The State*, A.I.R. 1958 Punj. 104; *Rustam Ali v. The State*, A.I.R. 1960 All. 330; *Etwa Oraon v. The State*, A.I.R. 1961 Pat. 345.

8 Supra note 5.

9 The Royal Commission On Capital Punishment 80 (Command 8932, 1949-'53).

10 Id. at 113. It says : ".....gravamen of the charge against M'Naghten rules is that they are not in harmony with modern medical science, which, as we have seen is reluctant to divide the mind into separate compartments—the intellect, the emotions and the will but looks at it as a whole and considers that insanity distorts and impairs the action of the mind as a whole."

discomfiture even to a lay man.[11] For instance in *Channabasappa v. The State*,[12] the appellant, who was aged 30 years and was subject to epileptic fits, had quarelled with an outsider and had been admonished by his father on that account. After a day or so of this incident he was discovered by his mother inflicting injuries on himself with a knife. The mother in fright rushed towards him and she was stabbed with the same knife. Upon arrival of his father he too was stabbed and also killed on the spot. After the incident the appellant threw his knife aside and stayed unmoved. He did not offer any explanation for his acts but only said that he was not conscious of what he had done. The Sessions Judge convicted him of the offence of murder and sentenced him to transportation for life, but he recommended the case to the State Government for relief on the ground that the convict was a man of weak intellect and was not actuated by any motive.[13] The High Court affirmed the sentence.

In *Rustam Ali v. The State*,[14] the appellant murdered a child of 4 years with a chopper, made a brutal attack on another person who came to the rescue of the child and then assaulted several other boys of the same locality. Thereafter, he returned home almost oblivious of what he had done. His acts were without any apparent motive. He pleaded insanity before the Sessions Judge. The Civil Surgeon who kept him under observation gave evidence in the court that the accused's power of understanding was poor; that he did not also remember the incident for which he was being prosecuted; that he did not also remember what was his monthly salary and where he was employed and that he did not even know why people are sent to jail. He was sentenced to death by the Sessions Judge and his conviction was upheld by the High Court of Allahabad. Their Lordships of the High Court observed that:

> In order to bring a person within the four corners of legal insanity, it must be shown that the cognitive faculties of the accused are, as a result of unsoundness of mind, so completely impaired as to render him incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law....."[15]

11 Such discomfiture is not unwarranted when one comes to think that even in a country like England where the Home Secretary is under a statutory duty to order special medical examination for those who, even though have been sentenced to death, are suspected to be insane, the sentence of death passed by the courts were set aside in 41 cases out of a total of 86 cases medically investigated between 1940-9. The total number of cases referred to him during that period were 262. See Howard Jones, Supra note 5 at 154.

12 A.I.R. 1957 Mys. 68.

13 Id. at 69.

14 A.I.R. 1960 All. 333.

15 Id. at 336.

Again in *Ambi v. The State*,[16] where the Superintendent of a mental hospital, who had treated the accused on two occasions before the incident, had emphatically stated before the court that the accused had been suffering from schizophrenia, the High Court of Kerala observed that the evidence of the doctor would at the most show that the accused was not a mentally normal person but this could not amount to legal insanity and therefore he was not exempt from punishment.[17]

In *K. A. Koya v. The State*,[18] Koya, a man of over sixty killed a young man by cutting his throat with a dagger-knife while the deceased was reading newspaper in a reclining position. There was no provocation whatsoever and apparently there was no motive for the crime. Evidence adduced by the defence showed that sometime before the event the accused had consulted an Assistant Professor of Calicut Medical College on three occasions and was found to have been suffering from schizophrenia. The accused had suffered from severe fear complex and he heard people abusing him, but the doctor who had examined him on those occasions for half an hour each could not say for certain that the man would not know the nature of his act or that he would not know what he was doing was wrong. Koya was sentenced to death by the Sessions Judge but the same was reduced to life imprisonment on appeal to the High Court of Kerala.

In *Kamla Singh v. The State*,[19] the appellant had displayed such symptoms of insanity as going naked in the village roads, easing indiscriminately at any place, tearing his own clothes and so on. He had been subjected to medical treatment for about a month or so and was often kept locked up and under chains in one of the cow-sheds of the house. He was convicted by the Sessions Judge for having committed the murder of his two brothers and sentenced to transportation for life. The Judge, while admitting that the accused was of unsound mind[20] appeared to have relied on a statement made by the accused before witnesses when he said immediately after murders: "I have killed two and I will kill you people too" as showing that the accused was knowing the nature of the act and that this was not disproved beyond doubt by the accused.[21] On appeal, the High Court of Patna had to come to the rescue of the appellant by holding that the appellant should be acquitted on the basis of the second test in S. 84 I.P.C., namely, the accused did not know what he was doing was wrong or contrary to law. However, for the purposes of security the High Court referred the case to the State government for such action as deemed necessary.

16 (1962) 2 Cr. L. J. 135.

17 Id. at 141.

18 A.I.R. 1967 Ker. 92.

19 A.I.R. 1955 Pat. 209.

20 Id. at 211.

21 Id. at 215.

Very similar in outcome was the case of *Kashiram v. The State*[22] where the appellant, who had been abnormal and violent for quite sometime, was acting under an insane delusion that his wife had done him incalculable injury by declaring him insane and by giving away household articles to others. He had been twice detained in a mental hospital for prolonged treatment. He was usually kept chained in a room but had succeeded in freeing himself. The children of the accused, who had been out to fetch water from a village-well, came back a little later and found the door bolted from inside. The accused opened the door on being asked to do so but did not make any attempt to escape. Upon being asked as to why he had killed his wife, he said: "what have you to do with it, she was my wife and I have killed her".[23] The Magistrate who conducted the inquiry found him of unsound mind and sent him to Civil Surgeon where he was put under medical treatment for about 4 months before being found capable of making his defence. On the other hand, the Sessions Judge, trying the case, relied on the statement of the accused when he acknowledged killing his wife and the fact that the door was found bolted from inside when the children came back from village as showing that the accused knew the nature of his act. The Judge had no hesitation, therefore, in convicting the accused. On appeal, the High Court of Madhya Bharat held that while accused might be knowing the nature of the act, he might not be knowing that what he was doing was wrong or contrary to law. The appellant was acquitted and his case was reported to the State Government.

One may have little to complain about the outcome of the last two cases. What is a matter of concern, however, is that the trial judges in these cases, even though far better placed to assess the evidence, had convicted and sentenced the accused after admitting that they were of unsound mind.

Again in *Hazara Singh v. The State*[24], the appellant, who had murdered his wife, had been a person of unsound mind for sometime. The Superintendent of mental hospital, who had examined him much before the incident, had no doubt that he was suffering from unsoundness of mind of the type of paranoia, and that he was a fit person to be admitted in a mental hospital for treatment. However, he thought that at the time of committing the act the appellant was sensible in every other respect but for the delusion that his wife was unfaithful to him.[25] With due respect to the learned psychiatrist, it is submitted that the scientific basis of such a statement is of doubtful validity since it is difficult to conceive of delusions independent of mental disease or disorder, which appear to have been admittedly present in this

22 A.I.R. 1957 M.B. 104.
23 Id. at 105.
24 AI.R. 1958 Punj. 104.
25 Id. at 107.

case. The Sessions Judge convicted and sentenced the accused to death under S. 302 of the Indian Penal Code. On appeal, the High Court of Punjab, while admitting that the accused was of unsound mind, did not consider him exempt from punishment. They reduced the sentence of death to one of life imprisonment. Their Lordships of the High Court insisted that "In order to earn immunity from criminal liability, the disease, disorder or disturbance of the mind, must be of a degree, which should obliterate perceptual or volitional capacity. A person may be a fit subject for confinement in a mental hospital, but that fact alone will not permit him to enjoy exemption from punishment.....".[26]

In *Lakshmi v. The State*,[27] the accused, who was incorrigibly addicted to intoxicating drugs like Ganja and Bhang, murdered his step brother. It was pleaded that the accused at the time of commission of the act was suffering from insane delusion. There was meagre evidence to prove insanity excepting that the accused had been violent on one or two earlier occasions. The Sessions Judge convicted the accused and this might appear to be *prima facie* justified. However, their Lordships of the High Court of Allahabad while upholding the conviction of the accused made the following observation which typifies their rather rigid approach to such cases:

> ".....what S.84 lays down is not that the accused claiming protection under it should not know an act to be right or wrong, but that the accused should be "incapable" of knowing whether the act done by him is right or wrong. The capacity to know a thing is quite different from what a person knows. The former is a potentiality, the latter is the result of it. If a person possesses the former, he cannot be protected in law, whatever might be the result of his potentiality. In other words, what is protected is an inherent or organic incapacity, and not a wrong or erroneous belief which might be the result of a perverted potentiality."

Further elaborating upon the point their Lordships observed:

> ".....what the law protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished. Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality. Our beliefs are primarily the offsprings of the faculty of intuition. On the other hand

26 Id. at 108.
27 A.I.R., 1959 All. 534.

the content of our knowledge and our realisation of its nature is born out of the faculties of cognition and reason."[28]

It is obvious that while the latter part of the observation represents the traditional conception of the mind as made up of faculties or compartments independent of each other, the former insists that what is protected by S.84 I.P.C. is impairment of the capacity to know and not actual knowledge. With due respect, it is submitted that even though there could be a theoretical distinction between 'capacity to know' and 'actual knowledge', it might become difficult to make such distinction in actual practice.

Their Lordships appear to have supported the idea that what is protected by S.84 I.P.C. is an inherent or organic incapacity and not a wrong or erroneous belief which may be the result of perverted potentiality. Here, one is tempted to ask : why should a man's potentiality to know a thing get perverted at all unless this happens due to unsoundness of mind ? The alternative possibility of a man developing an unhealthy super-ego unconnected with mental unsoundness, making him unaware of one of the very basic values of any society that none should be killed or injured without any reason or rhyme, appears to be remote in most cases. If a man's potentiality to know a thing has become totally perverted, this will be just another way of saying that he has lost his capacity to know.

(ii) *Incapacity to know what is wrong or contrary to law.*

In fact, the observations of their Lordships in *Lakshmi's* case were partly directed towards criticising the case of *Ashiruddin v. The King*[29] decided sometime ago by the High Court of Calcutta. In that case the accused had sacrificed his five year old son inside a mosque in supposed compliance with a command received by him from someone in paradise. He had made no attempt to conceal his act as was evidenced by the fact that he committed it in broad day light at a public place of worship and secondly, he also disclosed the story to a man after a little while presumably because he did not want this great sacrifice to go unnoticed. The High Court of Calcutta in this case interpreted S.84 I.P.C. by laying down that exemption from liability can be obtained, if it is established that :

(i) the nature of the act was not known to the accused, or
(ii) the act was not known to be contrary to law, or
(iii) the act was not known by him to be wrong.[30]

The implication of this interpretation of S.84 I.P.C. was to admit that a person may also be exempted from punishment provided that he did not

28 Id. at 536.
29 A.I.R. 1949 Cal. 182.
30 Id. at 183.

know that his act was morally wrong. This type of situation, it is submitted, can possibly be brought about under two circumstances firstly, inherent mental deficiency in an individual which might have come in the way of developing a healthy conscience or super-ego; secondly, insane delusions which make a person believe in things or facts which are detached from reality. Under both the circumstances punishment alone cannot serve the ends of individualised justice nor can it possibly serve as a deterrent to others who would not identify themsleves with a mentally unsound offender.

The implication of what their Lordships of Allahabad High Court said in *Lakshmi's* case is to greatly eliminate the possibility of exemption for those whose acts are outcome of delusions arising out of such unsoundness of mind as would not necessarily obliterate cognitive faculties of his mind altogether. Indeed, the fear expressed by some that, if the courts were to recognise insane delusion as a defence, this might encourage frivolous claims to exemption from punishment, is not entirely baseless.[31] But should it call for the extreme step of closing the door altogether to the plea of insane delusion in rare cases like that of Ashiruddin where a person kills one of his dearest relatives without any apparent motive and under circumstances which give credibility to his story besides creating a reasonable doubt as to the sanity of his mind ? The difficulty in ascertaining the truth of such claim to exemption is undoubtedly great, but such difficulty, it is submitted, always confronts judiciary whenever their duty requires them to probe into the mind of an accused.

That the High Court of Calcutta did not go too far out of the way in enunciating the third ground of exemption under S.84 I.P.C. hardly needs to be emphasized. In 1843, Lord Chief Justice Tindal, who answered questions on criminal responsibility of insane offenders put to him and other judges by the House of Lords, explained the word "wrong" as follows :—

> ".....If the question were to be put as to the knowledge of accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong and this course we think is correct, accompanied

31 See K.M. Sharma, *Defence of Insanity in Indian Criminal law*, J.I.L.I. 341 (1965).

with such observations and explanations as the circumstances of each particular case may require."[32]

In the above passage their Lordships do not appear to have ruled out the possibility of an insane person getting exemption from punishment when his mental unsoundness has obliterated his capacity to distinguish between what is morally right and wrong. On the other hand, they appear to have envisaged some difficulty if exemption were to depend entirely on whether or not a person knew about legal wrongfulness of his act. It is, however, true that their Lordships did not specifically advert to the other aspect of their proposition i.e. what will happen to those cases where a person having lost his capacity to appreciate the moral wrongfulness of his act, might vaguely understand that it was something for which he could be hauled up before the police. In fact they seem to have envisaged that all this should largely depend on the individual peculiarities and circumstances of each case.

In view of the above, it is also not surprising to find Sir James Stephen explaining in 1883 that if A kills B with knowledge of his act and its illegality, but under an insane delusion that the murder of B was directed by God and would result in the salvation of the human race, he should be entitled to exemption.[33] To the same effect were the observations made by Justice Cordozo in 1915 when reviewing the history of M'Naghten rules in *People v. Schmidt*, he concluded that the word 'wrong' in these rules means 'Moral wrong.'[34]

Unfortunately, the general approach of the judiciary in India is to interpret the phrase "wrong or contrary to law" in S.84 I.P.C. to mean something that is "wrongful or legally wrong".[35] The efforts of Calcutta High Court to broaden the test so as to extend the exemption to cases of insane delusions of a nature where cognitive faculties of a persons' mind might not have been wholly impaired, do not appear to have succeeded.[36]

(iii) *Insanity affecting emotions and volition.*

The principle, that impairment of cognitive faculties alone will exempt a person from punishment, has an element of arbitrariness in it. This was, however, a matter of legislative policy which common law jurisdiction in England were in a position to lay down while deciding M'Naghten's case. This policy has been repeatedly questioned since then in the country of its

32 Hansard's Debates vol. 67, 714 (1843).

33 James Stephen, *A History of the Criminal Law of England*, 149 (1883).

34 216 N.Y. 324 110 N. E. 945 (1915).

35 See *Geron Ali v. Emperor*, A.I.R. 1941 Cal. 129 ; *Hazara Singh v. The State*, A.I.R. Punj. 104 ; *Rustam Ali v. State*, A.I.R. 1960 All. 333.

36 See supra note 31.

origin and elsewhere. Summarising such criticisms, the Royal Commission on Capital Punishment said :—

> "Briefly, they have contended that the M'Naghten test is based on entirely obsolete and misleading concept of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong or forbidden by law, but yet commit it as a result of the mental disease.[37]

Even the judiciary in India while adhering to the letters of law has been keenly aware of the shortcomings of our law. In 1896 it was observed in *Queen Empress v, Kader Nasyer Shah*[38] that where the will and emotions are affected by the offender being subjected to insane impulses, it is difficult to say that his cognitive faculties are not affected. In extreme cases that might be true, but to take such a view as this would be to go against the plain language of S.84 I.P.C. and the received interpretation of that section.[39] Again in *Kalicharan v. Emperor*, their Lordships of Nagpur High Court adverting to M'Naghten rules observed :

> "There are no doubt thinkers who are in favour of extending the rule in (1843) 10 Cl. & Fin. 200 even to cases where the accused acts without any motive and under sudden and over-powering impulse. This is, however, the province of legislature. We, as judges, have, to administer the law as is contained in S. 84, Penal Code".[40]

There are similar pronouncements elsewhere.[41] However, the helplessness of the judges, it is submitted, is not so much due to any inherent inflexibility in M'Naghten rules but rather due to their interpretation that was adopted and established in this country through the years.

III. Procedural Law on Trial of Mentally unsound offenders

The procedural law relating to trial of insance offenders is contained in sections 464 to 475 of the Criminal Procedure Code, 1898 besides some other sections. These provisions broadly deal with pre-trial and after-trial disposition of a case.

(i) *Pre-trial disposition :*

Section 464 empowers a Magistrate holding an inquiry or a trial to

37 Supra note 9 at 80.

38 (1896) I.L.R. 23 Cal. 604.

39 Id. at 609.

40 A.I.R. 1947 Nag. 20 at 23.

41 *Lachman v. Emperor*, A.I.R. 1924 All. 413 ; *Abdul Rashid v. Emperor*, A.I.R. 1927 Lah. 567 ; *Lakshmi v. The State*, Supra note 27 ; *Channabsappa v. The State*, Supra note. 12 ; *In re Govindaswamy*, A.I.R. 1965 Mad. 283.

inquire into the fact of unsoundness of mind, if he is of the opinion that the accused is of unsound mind and therefore incapable of making his defence. However, before he holds such opinion he shall inquire into the fact of such unsoundness and shall get such person examined by a Civil Surgeon or a Medical Officer as the State Government directs. Under S. 465 the Court of Session or the High Court before whom a case comes for trial are under a duty to try the fact of unsoundness, if it appears to them that the person is of unsound mind and consequently he is incapable of making his defence. Section 466 provides that upon a finding that the accused is a man of unsound mind and incapable of making his defence, the Magistrate or the Court, as the case may be, have the power to release the accused if sufficient security is given for his appearance and for taking care to see that he does not do any injury to himself or to other persons. The power to release on security exists irrespective of whether the offence committed by the accused is bailable or not. The above section also provides that a Magistrate or the Court may not release the accused if they are of the opinion that bail should not be taken in the case or that sufficient security was not forthcoming and order the accused to be detained in safe custody in such place and manner as he or it may think fit and shall report the action taken to the State Government. As per S. 467 the Magistrate or the Court can at any time resume the inquiry or trial and order the accused to appear or be brought before them but before this is done, a medical officer is to be appointed by them with a view to finding out if the accused is capable of defending himself and the certificate given by such officer is then received in evidence.

When the accused is brought a second time before the Magistrate or the court, the inquiry or trial can proceed if he is considered capable of making his defence. If on the other hand the accused is still considered to be incapable of making his defence, the Magistrate or the Court, as the case may be, will have to repeat the same procedure once again as laid down in Ss. 464 to 466 of the Criminal Procedure Code.

(ii) *After-trial disposition :*

It is only when the case falls under the above sections, that is, when the accused is insane at the time of inquiry or trial, that the issue of insanity has to be tried before the trial is proceeded with. In other cases, i.e. where the accused is of sound mind at the time of trial but was alleged to be of unsound mind at the time of committing an offence, the Magistrate will have to proceed with the trial, if the case is one to be tried by him or if the case ought to be committed to the Court of Session, the Magistrate will have to send the accused for trial before such court. (S 469).

Upon acquittal on ground of mental unsoundness under the provisions of S. 84 I.P.C., the Magistrate or the Court, as the case may be, will specifically record in his findings whether the accused had committed the alleged act or not (S. 470). This requirement makes it obligatory on the court to go into the question of guilt of the accused for the offence irrespective of the plea of insanity. Upon acquittal the Magistrate or the court before whom the trial has been held shall order the accused person to be detained in safe custody in such place or manner as the Magistrate or the Court thinks fit or shall order such person to be delivered to any relative or friend of such person on his application upon giving adequate security (Ss. 471, 475). The action taken in the matter will have to be reported to the State government. Whenever an order is made for detention of the accused in a lunatic asylum this can be done only as per the provisions of Indian Lunacy Act, 1912.

Section 474 provides that in those cases where a person has been detained under the provision of Ss. 466 or 471, the Inspector General of Prisons in case he is detained in a jail or the Visitors, if he has been detained in a lunatic asylum, can certify that in his or their opinion he may be released without danger of his doing injury to himself or to any other person and thereupon the State government may order him to be released or detained in custody or to be transferred to a public lunatic asylum if he has not been already sent to such asylum. In those cases where the State Government orders the person to be detained in a public lunatic asylum, it may, before doing so, appoint a commisson consisting of a judicial officer and two medical officers to report to the State government about the mental condition of such person and the State government will take such report into account while ordering his release or detention.

It is obvious that our procedural law for inquiry into the case of a mentally unsound person and his trial has several safeguards included in it to see that he is not subjected to unnecessary suffering or harassment. Notwithstanding this, the procedure still seems to reflect a high degree of legalism. The emphasis on the need for a regular trial and the concept of guilt is rather excessive. Some persons genuinely insane at the time of commission of the act may as well suffer from total or partial amnesia[42] forgetting thereby the circumstances under which he committed an offence. In such cases, it would be too much for us to expect that he would be able to defend himself effectively in a subsequent trial which is characterised in this country by a legal battle between the defence and the prosecution.

42 See J.P. Modi, *A Text-book of Medical Jurisprudence and Toxicology*, 388, 399, 629 (1957).

The authors say that in post-epileptic insanity stupor following the epileptic fit is replaced by acts like theft, incendiarism, sexual assaults and brutal murders of which the patient has no recollection afterwards. They further say that somnambulism might give rise to such offences as theft or murder and there might be no recollection of such acts afterwards, and similarly in delirium tremens in the case of habitual drunkards a patient can commit offences and suffer from gradual loss of memory.

IV. Law of Evidence–proof of mental unsoundness in Criminal Cases

Section 105 of the Indian Evidence Act, 1872, contains the law relating to burden of proof in those cases where an accused claims exemption from punishment on any of the grounds laid down in the chapter on General Exceptions in our Penal Code.[43] This section was re-interpreted by the Supreme Court in relation to cases of mental unsoundess in a recent decision.[44] The Court laid down the following principles:

> "(1) The prosecution must prove beyond reasonable doubt that accused had committed the offence with requisite *mens rea*, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
>
> (2) There is a rebuttable presumption that the accused was not insane when he committed the crime, in the sense laid down by S. 84 of the Indian Penal Code. The accused may rebut it by placing before the court all the relevant evidence-oral, documentary, circumstantial, but the burden of proof upon him is no higher than that rests upon a party in civil proceedings.
>
> (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged"[45]

In the context of our rather rigid subatantive law, the above interpretation is undoubtedly a progressive step. According to the interpretation the prosecution has to prove beyond reasonable doubt that the accused had committed the act with requistite *mens rea* and the accused has only to create a reasonable doubt in the court as regards one or more of ingredients of the offence including *mens rea* in order to obtain acquittal. He will have

43 The Indian Penal Code, Ch. IV (1860).

44 *Dahyabhai Chhaganbhai Thakkar v. The State of Gujarat*, A.I.R. 1964 SC 1563: (1964) 7 S.C.R. 361.

The High Courts had conflicting views on the extent of the burden on the accused of proving insanity. Some of them held in effect that insanity ought to be proved beyond any reasonable doubt. See for instance, *Chandu Lal v. The Crown*, AIR 1924 All. 186; *Pancha v. Emperor*, AIR 1932 All. 233. There were High Court decisions which held that all that the accused had to do was to create a reasonable doubt in the mind of the court as to his mental soundness. See *State v Durga Charan*, AIR 1963 Or. 33; *Kamala Singh v. The State*. A.I.R. 1955 Pat. 209.

45 Id. at 1568.

the advantage of all the evidence adduced whether by himself or by the prosecution. The above law seems to be a close approximation to English law on the point where in a judge's summing up the jury is told that the burden of proof on the defence is lower than that on the prosecution, and it is sufficient if they prove insanity on the balance of probabilities and not beyond reasonable doubt.[46]. The same holds true of most jurisdictions in U.S.A.[47]. It is, however, submitted that inspite of the liberal interpretation of the law relating to the burden of proof, it is doubtful if much advantage of this could be derived by defence counsels. What goes to prove insanity at the time of commission of the act is the prior and subsequent conduct of the accused.[48] The prior conduct of the accused, barring immediately prior to the act, often remains shrouded in mystery. Economic conditions of the people in general as also superstitions associated with insanity do not encourage near relatives of a mentally unsound person to arrange for his medical or psychiatric treatment. The patient himself in most cases is extremely hostile to the very idea of treatment for mental unsoundness. It is natural therefore that the defence counsel has, in most cases, very few facts to rely upon to prove the conduct and mental condition of the accused prior to the commission of the act, which, if proved to the satisfaction of the court, could greatly weaken the presumption of mental soundness at the time of commission of the act.[49]

Expert evidence as such has limited significance in proving legal insanity. Besides this, our adversary system of criminal proceedings leaves the door wide open for conflicting expert evidence and consequent difficulties for the defence counsel. Even though no statistics is available on this aspect, it is common knowledge that such difficulty creates a diffidence on the part of the counsel to raise the plea of mental unsoundness even when he is very much doubtful about the sanity of his client.[50] Besides this, a plea of mental unsoundness has another implication. It is tantamount to an indirect

46 See Brakel and Rock, The Mentally Disabled and the Law, 399 (1971).

47 Ibid.

48 *The State v. Kartik Chandra*, A.I.R. 1951 Ass. 79; *The State v. Koli Jeram*, A.I.R. 1955 Sau. 105; *Kashiram. v. The State*. A.I.R. 1957 M.B. 104.

49 See *Emperor v. Somya Hirya* (1918) I.L.R. 43 Bom., 134; *Onkar Datt v. Emperor*, A.I.R. 1935 Oudh 143; *Kashiram v. State*, supra note 22.

50 This is so because the law has reserved to the courts the right to decide what kind of mental abnormality will entitle a person to exemption from punishment.

See Taylor's Principles and Practice of Medical Jurisprudence, XII ed., 431 (1965). Speaking of England, the learned authors say: ".....Despite far-reaching advances in British law....., some of the presumptions about mental activity upon which the law still relies are unquestionably obsolete and unsound; and it might be difficult or even impossible for a valid and complete psychiatric opinion to be expressed within the limitations imposed.

admission by the accused that he committed the alleged act. Again, the fact that mental unsoundness, if proved, may lead to prolonged incarceration in a public mental asylum which imposes almost the same restraint on a person as can be expected in a prison, affords no incentive to the counsels to plead mental unsoundness except where he feels that this might save the accused from capital punishment or a life-imprisonment. Perhaps, this explains why the reported cases in this country mostly relate to the plea of mental unsoundness in murder cases.

V. The Problem of formulating a Legal Test of Mental unsoundness based on Symptoms

The test formulated in S. 84 .I.P.C. stands out for its emphasis only on the manifestation of a symptom of mental unsoundness i.e. loss of cognitive faculties. This is regarded as conclusive in the matter of determining whether or not a person is exempt from punishment. Indeed, there is no other way of looking into the mental unsoundness or otherwise of a person than to look at the symptom or symptoms which are manifested by him and this is of equal significance to physicians, psychiatrists and lawyers. The question that is of vital importance, however, is on which particular symptom or symptoms shall we base our test for the purpose of deciding that a person needs more of medical or psychiatric treatment rather than punishment ? The problem becomes complicated because choosing a symptom or symptoms for the purpose of a test leads to ascription of blameworthiness to a conduct. This, in its turn, leads to a high degree of generality and as such cannot be expected to bring about individualised treatment or justice. The M'Naghten's test itself, it has been acknowledged, takes into account the knowledge of one's capacity to know which relates to the conscious part of the intellect of an individual not his sub-conscious mind or his emotional life or will power. The unconscious part of the mental life of an individual which has significant bearing on his conduct has been ignored.[51]

In this context, it might be worthwhile to examine some of the alternatives to M'Nghten's test.

VI. Alternatives to M'Naghten's Test

(i) *Irresistible impulse test and the German test :*

Irresistible impulse test was enunciated in certain jurisdictions in U.S.A. It is based on the assumption that mental disease or disturbance in a person may affect his will in such a way as to deprive him of any power to resist his impulses even when he knows the wrongfulness of his conduct. Consequently, this test has the merit of giving a wide discretion to the Court to take into

51 See Mannheim, *Group Problems in Crime and Punishment* 282 (1955).

account various kinds of mental illnesses and defects for the purpose of exemption from criminal responsibility or at least for differential treatment. S. 51 (1) of German Penal Code of 1933, reads as follows :

> "An act is not punishable when the actor, at the moment of his action, in consequence of mental disturbance, of mental disorder or imbecility is incapable of understanding the unlawfulness of his action or of acting in accordance with his understanding."

The first part of the above formulation, which speaks of incapacity of understanding the unlawfulness of one's action has a similarity with the second rule of S. 84 I.P.C. but when it speaks of capacity of acting in accordance with one's understanding, this is an acknowledgment of the principle of 'irresistible impulse' arising out of emotional imbalance, sub-conscious motivations or any other factor. It is needless to emphasize that taken independently emotion or passion cannot exclude or reduce criminal responsibility. They have to be the outcome of mental disturbance, mental disorder or imbecility.

The above test, it is obvious, does not give any clear-cut guidance to the court or the jury because in practice it is rather difficult even for an experienced psychiatrist to say that the impulse was irrestible or that it was simply unresisted.[52] It has also been alleged that there is an unfortunate implication in this test that when a crime is committed as a result of insanity, it must have been suddenly and impulsively committed after a sharp internal conflict.[53] The latter criticism, it is submitted, is not wholly justifiable. In fact the formula of 'irrestible impulse' was originally used as a collective phrase to include emotional element in the definition of insanity. The test was designed to exempt those of the accused, who because of diseased condition of their mind were incapable of wishing or trying to prevent themselves from committing the proscribed act irrespective of whether the act was the ultimate outcome of a prolonged mental suffering or it was sudden and impulsive.[54] In other words, the considerations which counteract criminal tendency in an individual might have existed, but it was not possible for the insane to carry them into effect.[55]

Indeed, the question whether an impulse was irresistible or not and that it was on account of mental disease or disorder is always a difficult one. But a difficulty similar to this is bound to arise in every trial of insane offender irrespective of the test applied. If a determination which is predominantly of physiological or psychological nature is difficult for medical men or psychia-

52 Hamlin Smith, *Psychology of the Criminal*, 179 (2nd ed.)

53 The report of the Royal Commission on Capital Punishment supra note 9 at 110.

54 See Mannheim Supra note 51 at 292, 298.

55 Id. at 285.

trists to make, how could it be regarded easier for the court or lay jury to make such determination ? Assuming that our knowledge of the science of psychiatry has not yet reached a degree of perfection where we could make such determination with relative ease, this does not mean that our ignorance should be the cause of suffering to those who are in special need of individualised treatment. With due attention to the security of the society, a more just approach would be to do our utmost to see that as far as possible a mentally unsound offender, depending on the class or category of his mental unsoundness, should not be given the same punishment as is given to normal offenders. Any punishment, if at all necessary, will have to be combined with adequate psychiatric therapy.

(*ii*) *The New Hampshire test and the Durham Test*

In 1871 the New Hamphsire Supreme Court in *State v. Jones*[56] held that the verdict should be 'not guilty by reason of insanity' if the killing was the offspring or product of mental disease in the defendant. Subsequently in *Durham v. State*[57] the U.S. Court of Appeal for the District of Columbia reiterated the same principle by laying down that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Since then there have been further elaboration upon the Durham rule by various decisions of U.S. Court of Appeals for the District of Columbia Circuit. In 1959, the Committee on Criminal Responsibility of the Bar Association of the District of Columbia stated the rule as follows :—

> "The accused is not responsible for a criminal act if such act was the product of a mental disease or mental defect. A mental disease is a diseased mental condition which may get better or get worse; a mental defect is a diseased mental condition which cannot get better and cannot get worse. The criminal act was the product of mental disease or mental defect if the act would not have occurred except for the disease or defect, and that is so whether the disease or defect was the only cause of the act, or the principal one of several causes or one of several causes."[58]

The word 'product' of mental disease or defect undoubtedly has an air of vagueness around it but the product test appears to leave the door wide open for judicial discretion and for the possible guidance the court can obtain from medical men and psychiatrists in order to arrive at the conclusion that the alleged criminal act was committed by an insane person who should not be held

56 50 N. H. 369, 398 ; 9 Am. R. 242, 264 (1871).

57 *Durham v. United States*, 214 F. 2d 862, 874. 75 (D.C. Cir. 1954).

58 Bar Association of the District of Columbia, Committee on Criminal Responsibility, Report, 26 J.B.A. D.C. 301, 304 (1959) quoted in the Mentally Disabled and the law supra note 46 at 381.

wholly responsible for the offence. It is not to be assumed, however, that in the application of these tests it is the psychiatrists who have to determine the criminal responsibility or otherwise of the accused. This determination is a legal one and is always made by the judge and the jury with the help of medical data, opinion and scientific facts.

(*iii*) *The Model Penal Code Test of the American law Institute.*

The principal test of the Model Penal Code drafted by the American Law Institute reads as follows :—

> "A person is not responsible for the criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of law."[59]

So far as this test speaks of the capacity to appreciate the criminality of his act or conduct, there appears to be little difference between this test and the first part of the test in S.84 I.P.C., but the alternative test of capacity or otherwise to conform one's conduct to such appreciation appears to recognise the 'irresistible impulse' test which adds to the discretion of the court to exempt those whose criminal acts can be ascribed to their emotional imbalance, subconscious motivation or any other source.

The underlying objective of the alternatives to M'Naghten's test discussed above is no doubt commendable, but any outright adoption of such tests in India may not be of advantage to us. Our judicial system faces problems unique to itself. Barring exceptions there is no jury in our trials. Experts like doctors and psychiatrists are no doubt summoned before the Courts for experts evidence but this is always a highly expensive affair and an accused of ordinary means can seldom be expected to have consulted an expert of high repute whose testimony could be of help to him later in his trial. Even if he is fortunate enough in having consulted such experts previously, the possibility of testimony produced by him getting neutralised by contradicting psychiatric testimony produced by the prosecution cannot be ruled out. Perhaps the significance of different tests discussed above lies in the fact that all of them tend to narrow the gulf between legal and medical insanity so as to see that those individuals who could be treated in a hospital or psychiatric centre should not be lodged in a jail in company with those with whom they have nothing in common. At the same time the weakness of these tests in the context of India, lies in the fact that they are putting too great a burden on an already over-worked judiciary. Much of this problem can be resolved if we assume that there is basically little difference between mental unsoundness or ailment and any other physical ailment, excepting for the

59 The Model Penal Code drafted by the American Law Institute, 4.01 (1962).

fact that since a mentally unsound person has committed an act forbidden by law, the judiciary has every right to look into the case so as to satisfy itself as to the guilt of the accused and also whether he should be treated like any other normal human being guilty of an offence or should he be treated differently because of his mental unsoundness or ailment. But once a court has come to the latter conclusion on reasonable grounds, though not necessarily conforming to M'Nagthen's test, there is hardly any point in asking them to go ahead with the case any further for the purpose of prescribing an appropriate treatment.

(iv) *The doctrine of diminished or partial responsibility.*

The doctrine of diminished responsibility was introduced in U.K. in 1867 by the decision of a Scottish court in Dingwal.[60] It has since been applied by some jurisdictions in the United States either generally or in murder cases alone.[61] It was given legislative recognition in England by the Homicide Act. of 1957, which provides that an accused "shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impairs his mental responsibility for his acts and omissions in doing or being a party to the killing".[62] It is obvious that in England the doctrine has been made applicable only to homicide cases coming within the category of murder. The position is different in Scotland where it applies to all types of cases.[63]

The doctrine of diminished responsibility is based on the assumption that "among those who are sane and legally responsible there are appreciable degrees of mental impairment, and it is unjust to ignore that and impose uniform sentences. Within the rule of law there can and should be a substantial measure of individualisation".[64]

Though it might appear to be unwarranted to apply the doctrine to the cases of voluntary intoxicated offenders, as has been done in certain jurisdictions in the United States,[65] it has the merit of directly recognising the doctrine of individualised treatment of offenders. It can neither be denied that an extensive application of the doctrine of diminished responsibility in India, unless accompanied by other suitable measures, will greatly enhance the work of an already over-burdened judiciary. It would involve scaling down of punishment and provision of various kinds of therapeutic measures depending

60 *H. M. Advocate v. Dingwall*, 5 Irvine 466 (1867).
61 Supra note 46 at 393, 394.
62 The Homicide Act§ 2 (1957).
63 Guttmacher, *The Role of Psychiatry in Law* 93 (1968).
64 Hall, *General Principles of Criminal Law*, 462-63 (2nd ed. (1960).
65 Supra note 46 at 22 quoting C.J.S. "Criminal Law"§ 68 (1961).

on the degree or extent of mental unsoundness, determination of which can only be made by an impartial body of psychiatrists and medical men. It would be more practicable therefore that while the courts are left with the problem of determining responsibility of the accused for an offence, they should better be content with passing an indeterminate sentence on the offender, if he is found to be mentally unsound. An impartial treatment-tribunal appointed by the government concerned can then prescribe the required treatment.

A practical application of the doctrine of diminished responsibility would be to subject the accused to pre-trial psychiatric investigation with a view to diagnosing the mental illness or defect. The report of such examination can then be helpful to the court to decide upon the mode of treatment. Something of this nature has been tried upon in larger urban areas in the United States. For instance, the State of Massachusetts has established State-run court clinics and has made a psychiatric examination mandatory for all the capital offenders, repeating felons, or persons indicted for any crime more than twice.[66] A similar system of legal psychiatry exists in Sweden where, at the slightest suggestion of mental abnormality, an accused is sent over to a State-run psychiatric clinic either for a detailed or short examination and the courts take the help of clinical reports submitted by the clinics for the purpose of deciding upon any one of a variety of sanctions provided for in the Penal Code of Sweden.[67] The judicial disposition of mentally unsound offenders of the different categories include closed psychatric care, open psychiatric care and probation. There is also a disposition called 'surrender for special care' under which an offender may become the charge of one of the agencies under the general administration of the different social welfare agencies.[68]

While the system of pre-trial psychiatric examination is an ideal institution suited to a country like Sweden with the highest standard of living, the economic implications of such a system makes its adoption impracticable for a country like India atleast at the present juncture.

VII. CONCLUSION

Our criminal law on insanity requires a change but outright adoption of one of the alternative tests discussed in the foregoing pages or the advanced system of psychiatric services in some parts of U.S.A. or Sweden may not be workable in our present set-up. A more practicable solution would be to retain S.84 I.P.C. with an amendment in the Criminal Procedure Code to the following effect :

66 See Guttermacher, *Adult Court Psychiatric Clinics*, Am. J. of Psychiatry, 881, 890 (1950).
67 Strahl, *Introduciion to Criminal Code of Sweden* at 20.
68 See Mental Health Act (1967) of Sweden.

"Notwithstanding that a person is not exempt from liability under the provisions of S.84 Indian Penal Code and notwithstanding anything contained in any other law for the time-being in force, if on the basis of evidence adduced from whatever source and of other relevant circumstances a court entertains a reasonable doubt as to the mental soundness of a person found guilty of an offence, it shall not pass a fixed sentence on him and shall refer the case along with all the evidence on record to a treatment tribunal appointed by the concerned State Government or the Central Government. The decision of such treatment tribunal as to the specific mode of treatment to be prescribed for such person will be final subject to any variation or change recommended by the tribunal upon periodical review of the progress of such treatment."

The aforesaid treatment tribunal may, *inter aila* consist of one or more psychiatrists, a medical man and a lawyer of recognised competence besides a probation officer or a criminologist who could make an independent investition into the antecedents of the person so convicted.

The merit of this approach to the problem lies in this that in those cases where an accused of unsound mind is exempt from liability under the provisions of S.84 I.P.C., his case can be directly referred to the State Government for proper treatment as is being done at present.

The aforesaid treatment tribunal may be asked to prescribe adequate treatment in such cases as well. At the same time those of unsound mind, who are not being presently exempted from punishment under S.84 I.P.C. can still expect to be treated well as per the recommendation of the tribunal. On the other hand, the retention of the present S.84 I.P.C. including the adjective law on the point will still continue to lay the burden on the accused to prove that he was of unsound mind at the time of the commission of the act. This will discourage frivolous plea of insanity in most, if not all the cases. It is also hoped that the present diffidence on the part of defence counsels in pleading insanity even in genuine cases will be overcome to some extent.

THE COGENCY OF INTERNATIONAL LAW IN AFRICA

A. OYE CUKWURAH*

The Dilemma of African States

I

It is commonly said that the body of international law at any given time necessarily depends upon the prevailing international system.[1] The same belief is implied in the assertion that international law bases itself on realities and acknowledges only factual situations.[2] In other words, international law should adjust to salient changes outside itself as a means of ensuring that at any given historical period its two main functions[3] of maintaining order and administering justice in the society of nations are being fulfilled.

According to Clive Parry,[4] the extraordinary growth in the number of states as well as the corresponding profusion of international organisations today has had the greatest influence upon the international community and its law. It is a phenomenon which is partly responsible for making the traditional definition of international law obsolete.[5]

Many of the new States to which Clive Parry refers are the former colonial territories on the African continent. As newly independent States they have participated and a majority of them are still actively participating in the proceedings of the multifarious international organisations to which they belong. But within a good many of these states, the painful discovery of the alarming difference between the myth and the realities of the modern world

*Department of International Law & Jurisprudence, Faculty of Law, University of Nigeria, Enugu Campus, Nigeria.

1 See Rosalyn Higgins : *Conflict of Interests—International Law in a Divided World* (1965), published by The Bodley Head, London, at p. 11 ; See also Brierly ; *The Law of Nations*, 6 ed. (1963) p. 41 ; *Oppenheim's International Law*, Lauterpacht (ed.), Vol. 1, p. 48.

2 See Miodrag Sukijasovic : "*A Cause of the Present Crisis of International Law* " in Vol. 65 (1971). AJIL, p. 378.

3 See Quincy Wright : *The Role of International Law*, Manchester University Press (1961) at p. 1.

4 Clive Parry : *The Sources and Evidences of International Law*, Manchester University Press (1965) pp. 9. 14. See also Elias : "*The Expanding Frontiers of Public International Law*" in *International Law in a Changing World* (1963), OCEANA PUBL. INC., pp. 97-104.

5 Traditional definition of international law recognises states as the only subjects of international law. But in modern international society the interests to be protected and regulated can no longer be entrusted exclusively to states, hence the recognition to-day of new subjects of rights and duties in international law.

"Notwithstanding that a person is not exempt from liability under the provisions of S.84 Indian Penal Code and notwithstanding anything contained in any other law for the time-being in force, if on the basis of evidence adduced from whatever source and of other relevant circumstances a court entertains a reasonable doubt as to the mental soundness of a person found guilty of an offence, it shall not pass a fixed sentence on him and shall refer the case along with all the evidence on record to a treatment tribunal appointed by the concerned State Government or the Central Government. The decision of such treatment tribunal as to the specific mode of treatment to be prescribed for such person will be final subject to any variation or change recommended by the tribunal upon periodical review of the progress of such treatment."

The aforesaid treatment tribunal may, *inter aila* consist of one or more psychiatrists, a medical man and a lawyer of recognised competence besides a probation officer or a criminologist who could make an independent investition into the antecedents of the person so convicted.

The merit of this approach to the problem lies in this that in those cases where an accused of unsound mind is exempt from liability under the provisions of S.84 I.P.C., his case can be directly referred to the State Government for proper treatment as is being done at present.

The aforesaid treatment tribunal may be asked to prescribe adequate treatment in such cases as well. At the same time those of unsound mind, who are not being presently exempted from punishment under S.84 I.P.C. can still expect to be treated well as per the recommendation of the tribunal. On the other hand, the retention of the present S.84 I.P.C. including the adjective law on the point will still continue to lay the burden on the accused to prove that he was of unsound mind at the time of the commission of the act. This will discourage frivolous plea of insanity in most, if not all the cases. It is also hoped that the present diffidence on the part of defence counsels in pleading insanity even in genuine cases will be overcome to some extent.

THE COGENCY OF INTERNATIONAL LAW IN AFRICA

A. OYE CUKWURAH*

The Dilemma of African States

I

It is commonly said that the body of international law at any given time necessarily depends upon the prevailing international system.[1] The same belief is implied in the assertion that international law bases itself on realities and acknowledges only factual situations.[2] In other words, international law should adjust to salient changes outside itself as a means of ensuring that at any given historical period its two main functions[3] of maintaining order and administering justice in the society of nations are being fulfilled.

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has created a state of persistent doubt and agitation owing to unfulfilled expectations. They have found themselves, as it were, in a dilemma.

Owing to their present circumstances of want and under-development and political instability, the new African States do not and cannot, as is otherwise expected of them, influence changes in the law of nations in a way satisfactory to their legitimate interests. And, unlike the long-established states, especially the advanced ones, African States cannot flout existing rules of international law with impunity in order to accomplish certain national objectives.[6] Those of them that ever dared to do so invariably brought upon themselves the strong arm of the dominant powers. More and more of these new states therefore, are beginning to feel that international relations (are nowadays) governed mostly by the balance of power[7] and not by inter national law in the sense of what Starke describes as "that body of law whichis composed for its greater part of principles and rules of conduct which states feel themselves bound to observe and therefore do commonly observe in their relations with each other.[8] It is, of course, true that at present the law of nations operates increasingly through regional and international organisations admitting of an international society in all the diversity of its manifestations. All the same, the law is still constituted primarily on the basis of States, whose sovereign equality had traditionally been acknowledged without reference to the population, territorial size or economic strength of anyone of them. However, there may well be a departure from this traditional norm soon if the concept of "micro-states"[9] or "diminutive states"[10] which some writers are currently postulating finally prevails and attaches to many of the new states a lesser legal status then they would normally enjoy under traditional international law. It is not inconceivable that this growing notion of mini-states[11] is a convenient devise to minimise the discomfort which the older members of the community of nations feel about the extraordinary growth in the number and variety of independent States in recent years which phenomenon is regarded by some writers as a weakening development for international law.[12]

6 See Louis Henkin : *How Nations Behave—Law and Foreign Policy*, London (1968); J. Frankel : *Contemporary International Theory and the Behaviour of States*, OPUS (1973).

7 See Miodrag Sukijasovic, Op. Cit., p. 378;

8 See J.G. Starke: *Introduction to International Law*, 7 ed. Butterworths, London (1972), p. 1.

9 See Starke, Op. Cit., pp. 103-105 ; See Sir Leslie Glass : "*Micro States*" Proceedings of the N.S. of Int. Law 1971, p. 1-8.

10 See M. H. Mendelson : "*Diminutive States in the United Nations*" in Vol. 21, Part 4 (1972 I CLO, pp. 609-630.

11 See Stephen M. Schwebel : "*Mini-States and a More Effective United Nations*" in Vol. 67, No. 1 (1973) AJIL, pp. 108-116.

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The conception of international law as being purely the law of the Society of States had traditionally defined that law in relation to "*civilized*" nations. Thus, Briefly calls it "the body of rules and principles of action which are binding upon *civilized* states in their relations with one another."[13]

What is meant by the term "civilized" is, in our opinion, subjective. Some writers in discussing the development of international law use it to refer to Western Christian nations at the turn of the 19th Century and to those non-Christian States which had shown themselves worthy of being admitted to their limited family of nations.[14] But the irony of it all is that the Chinese, in their external relations during the 16th and 17th centuries, viewed the same Western Powers as "barbarians" and themselves as the defenders of an enlightened civilization.[15] Historically, therefore, most of the great civilisations of the world took this contemptuous posture in their relations with foreigners and this phenomenon understandably determined European attitude to colonial Africa, its varied culture and institutions. The new African States, indeed, are yet to outlive the colonial myth of a "dark continent", whose inhabitants as one European commentator put it, "have achieved in the past nothing worth the name of history; nothing that can be called civilization; nothing that can be recognized as technical progress."[16]

Under Article 38 of its Statute, the International Court of Justice (ICJ) at The Hague, is enjoined to apply, *inter alia*, "the general principles of law recognized by *civilized* nations." If this provision is given a restrictive interpretation, then, consideration of legal systems of the new African States in the Court's proceedings is certainly out of its purview. But it is inconceivable that the statute of a court to which these new states of Africa are expected to submit themselves would preclude it from applying relevant principles of their legal systems. What, then, is the point in retaining the word ? The true meaning of Article 38 (i) (c) of the Courts statute is dis-

13 See Brierly, Op. Cit., p. 1.

14 See Oppenheim's *International Law*, Vol. 1, Op. Cit., pp. 48-50.

15 See Rosalyn Higgins, Op. Cit., p. 12. In a critical reference to this unfortunate state of affairs Professor T.O. Elias (the present Chief Justice of Nigeria) had in one of his numerous juristic writings

> "recalled that throughout the 18th and 19th centuries, international society led by the Great Powers assumed that public international law did not really extend to nations that could not be described as "civilised.." This exclusive character of public international law resulted in a country like China, with probably a much longer historical tradition of culture and enlightenment than many of the States of Western Europe at that time, being excluded from the purview of international law"

See Elias : "*The Expanding Frontiers of International Law*, Op. Cit., at p. 99.

16 See WEST AFRICA, February, 28, 1959, p. 205. On the same theme see Elias :" "*The Expanding Frontiers of Public International Law*" in *International law in a Changing World*" OCEANA PUBL. INC. 1963, pp. 97-104 at p. 99.

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cernible from the fact that among the retired and present judges of the World Court are eminent African jurists like Mr. Justice Charles D. Onyeama of Nigeria, (Nigeria's Sir Louis Mbanefo having previously sat as *ad hoc* judge) Isaac Forster of Senegal, Louis Ignacio-Pinto and other Third World Jurists like Edardo Jimenez de Arechaga of Uruguay, Sir Mohammad Zafrulla Khan of Pakistan and Padilla Nervo of Mexico. Article 9 of the Court's Statute requires the electors of these judges at every election to bear in mind—

> "not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal, legal systems of the world should be assured."

Thus at least in theory, modern international law seems to recognize the urgency of accommodating African norms and legal systems in its machinery for ordering the international community.

It follows, therefore, that the restrictive meaning hitherto applied to the term "civilized nations" can no longer stand the test of our own times. It is in this context that Professor F. Parkinson in a reference to the provisions of Articles 38 of the Court's statute under consideration noted that—

> "It must, however, be remembered in this context that the term 'civilised nations' as employed in the Charter, has to be interpreted in the light of its historical background if it is to make any legal or sociological sense....."[17]

II

PRE-COLONIAL INTERNATIONAL LAW IN AFRICA

Rosalyn Higgins has observed that the various civilizations of the past tended to develop within themselves a community of political entities, governed by a system of international rules and practices, although regional in out-look.[18] She happens to be one of the few modern writers who admit, contrary to a widely held belief, that certain international norms were formulated and acknowledged by non-European States.

A major defect of traditional international law is that it had ignored these other non-European systems in its growth only to turn back to claim, as Brierly puts it,

17 F. Parkinson (Reader in Law, Uiversity College, London) : "*Pre-Colonial International Law*," a paper presented to a U.N. Regional Symposium on International law for Africa, organised by UNITAR in Accra, Ghana, from 14 to 28 Janury 1971, as part of U.N. Programme of assistance in the teaching, study, dissemination and wider appreciation of international law (Unpublished).

18 See Rosalyn Higgins, Op. Cit., at p. 13.

> "the allegiance of nations which had no part in building it up, and which either have never known, or no longer accept, the fundamental beliefs and sentiments on which it was originally founded."[19]

Outside western Europe, there were, then, many other rudimentary politico-legal systems including those of pre-colonial Africa, which could also have developed in their separate ways like those of feudal and medieval Europe to form the basis of a "regional" law of nations, if they had not been cut short as we show below by the intervention of "some cataclysmic sequence of events."[20]

If we accept the notion of law as any system of social control holding a society (primitive or not) together, then, we cannot deny the existence of such legal systems in pre-colonial African communities.[21] In fact, Saadia Touval alludes to this very phenomenon in his commentary on the role of Africans in the partition of the continent by former colonial Powers. According to Touval's argument :

> "African rulers were usually unacquainted with European political institutions and diplomatic practice, but this does not mean that they were politically innocent. African societies did not exist in a political vacuum, and their leaders usually had experience gained in dealing with neighbouring societies with superior or subordinate tribal authorities, and with rival groups or individuals. Thus when European emissaries came and offered inducement in return for treaties, their offers often fell upon politically sensitized ears".[22]

The weakness in Touval's reasoning here which attributes to Africans a positive contributary role in the carve-up of the continent is that it fails to underline at the same time the basic physical inequality of African Societies at their point of contact with West European culture and imperialism. To

19 See Brierly, Op. Cit., at p. 43.

20 See F. Parkinson : *Pre-Colonial International Law*, Op. Cit., See also Brierly, Op. Cit., pp. 3, 4. L.S.B. Leakey, the well known anthropologist, has once lamented that "critics of Africa forget that men of science today are, with few exceptions, satisfied that Africa was the birth place of man himself, and that for many hundreds of centuries thereafter Africa was in the forefront of all world progress," See L.B.S. Leakey : *The Progress and Evolution of Man in Africa* (1961) Oxford University Press, p. 1.

21 See Elias, T. O. : *The Nature of African Customary Law*, Manchester University Press (1956), Third Impression (1972) ; Elias : *African Law in Sovereignty within the law* (1965) OCEANA PUBL. INC. pp. 210-222. Fortes and Evans—Pritchard : *African Political Systems*, Oxford University Press (1940) ; Max Gluckman : *The Ideas in Barotse Jurisprudence* J.D. Imer-Cooper : *The Zulu Aftermath*, Ibadan History series (1966) where such systems are discussed ; See also Henri Labouret : *Africa before the Whiteman* (first published in France as *L'Afrique Proecoloniale*, 1946) Translation (1962), New York.

22 Saadia Touval : *The Boundary Politics of Independent Africa* (1972), Harvard University Press' Cambridge Massachusetts, at p. 6.

expect such weak nations to engage in equal combat with the rabid might of expansionist Europe at a time when even public opinion in the metropolis generally supported these overseas adventures and aggression seems illogical. Touval is equally well aware as his statement shows, that "often the Africans had no choice".[23] It is, therefore, inaccurate to condemn African societies in early colonial experience as "naive, rather than passive"[24] towards the arbitrary partition of the continent. However, in pointing out that African Societies did not exist in a political vacuum, he has rightly departed from the more stereotype presentation of African pre-colonial times that one often comes across. The political institutions he impliedly refers to presuppose the existence of some operative legal systems compulsorily adherred to by the precolonial communities. As Parkinson, in his eassay on "*Pre-Colonial International Law*" maintains in reference to the historical situation under consideration :

> ".....where a modicum of social cohesion and political order exist, law must be present to support them in one way or another even though that law may be structured in a way differing widely from that of civilised society".[25]

We may add here that the whole concept of *indirect rule* in British colonial administration acknowledges the existence within the colonised people of an articulate system of administration which could fit into the European programme of colonialism.[26]

No doubt, the intrusion of colonialism into Africa prevented the primitive inter-group laws (or the customs) of the victim communities from maturing as in Western Europe, into the so-called "civilised" international law. In our opinion, those writers who charge that African communities did not develop any pre-colonial international law do so either as a result of ignorance or mere prejudice. For in the new history of Africa it is now revealed to us that within the African continent there also existed the type of impulses which generated the growth of what juristic writers commonly refer to as *Jus gentium inter se*.

Omer-Cooper[27] refers to some of them as "internal forces which had been gathering strength over centuries" and which brought about 'far-reaching

23 Ibid, p. 5.

24 Ibid, p. 4.

25 F. Parkinson : "*Pre-Colonial International Law*," Op. Cit. As Quincy Wright noted : "There may be some law, some society, some concept, some awareness of mankind even though it is minimal in the contemporary world" See Columbia Law Review, Vol. 63, No. 3 (1963), pp. 435-458 at p. 440.

26 See Margery Perham : *The Colonial Reckoning*, The Reith Lectures (1961) The Fontana Library, pp. 40-42, 86-7. See also F.D. *Lugard : The Dual Mandate in British Territory* (1922); M. Perham : *Lugard : The Years of Adventure*, Vol. 1 (1956) and *The Years of Authority*, Vol. II 1960.

27 J. A. Omer-Cooper : *The Zulu Aftermath-A Nineteenth-Century Revolution in Bantu Africa*-Ibadan History Series, London (1966), p. 2.

changes over wide areas of the continent." He rightly observes, too, that :

> "These great movements were independent of European influence in origin though as they developed they interlocked with expanding European activity affecting and being affected by it. They brought about changes in African societies and African demography which are of no less significance for an understanding of modern African than those resulting from external influences".[28]

Among "these great movements", he identifies in particular the following.[29]

(*a*) the spread of Islamic reforming fervour in the Western Sudan, resulting in the series of *Jihads* which not only permanently transformed much of the Western Sudanic belt but also spread their effects deep into the forest, as in Yorbaland, where they combined with internal forces in the Oyo empire and European influences to produce the present pattern in Western Nigeria ;

(*b*) the long and mainly unrecorded process of expansion and colonisation which brought the Bantu from their original home, probably in West Africa, to occupy most of the continent south of the Sahara-which dispersion "seems to have coincided closely in time with the coming of the Iron Age of Africa South of the Sahara."[30]

(*c*) the Zulu movement (of southern Bantu in reverse) which began in South Africa and spread through Central Africa as far as the southern shores of Lake Victoria.

It is, therefore, against this historical background that he made the following observations :

> "In this period of transformation (i.e. the Scramble for Africa) which established the outlines of the modern physiognomy of the continent, Africa was not mere passive material moulded by external forces. The development of European activities themselves was a matter of reciprocal action and reaction with indigenous African societies. Their nature, direction and extent and their permanent significance for African history all depended on the African reaction to them".[31]

It is in this context of a disrupted indigenous African socio-political evolution that we can fully appreciate, for instance, the significance of the

28 Ibid. p. 2.

29 Ibid. p. 2 ; See also p. 10.

30 See Roland Oliver & J. D. Fage : *A Short History of Africa*. Penguin Africa Library (1962) pp. 30, 32, 33.

31 See Omer-Cooper, op. cit., p. 1.

Mfecane[32] in the history of Southern and Central Africa, especially in the way it affected later developments.

In his treatise on "*African Law*", Professor T. O. Elias had discussed several instances of international intercourse in pre-colonial Africa arising partly from those movements.[33]

III

IMPERIALISMS OF THE 19TH CENTURY IN AFRICA

The historic partition of Africa in the nineteenth century which was finally consummated by the Berlin Conference of 1884-5, left a lasting mark on the face of Africa. The whole phenomenon was part of the aftermath of the Industrial Revolution in Europe. It took place in an era when possession of overseas territories was widely acknowledged by Europeans as an asset in the world game of power politics; hence the intensification of European interest in the black continent.

It was, however, not openly admitted at first by these European operators that their main motivation was political, But eventually they turned to the acquisition of spheres of influence and colonies to provide raw materials and new markets for Europe's manufactured products, although the European colonisers had justified their overseas aggression and subjugation of indigenous African races on missionary and humanitarian grounds.

Either accidentally or by design the vast continent had been reasonably softened for these 19th century colonisers through the decimation of the African population and cultural base during the traffic in slavery by European traders. The Atlantic slave trade, the so-called 'Great Circuit' trade, involving about 40 million slaves was the largest forced transportation of human beings from one part of the globe to another in world history.[34] The fact of slavery therefore had profound impact on the subsequent attitudes of the white society toward the black man. The fact of slavery helped to fix the sense of superior group position over colonised peoples and other people of equivalent status.[35]

32 The term *Mfecane* is an Nguni word used for the wars and disturbances which accompanied the rise of the Zulu, See Ibid, p. 5.

33 See Elias: "*African Law*" in *Sovereignty within the law* (1975) op. cit. pp. 218-221.

34 See review of JACK GRATUS: *The Great White Lie*, Hutchinson, in WEST AFRICA, No. 2927 (9527?), 16th July 1973, p. 953; See also STEWART EASTON: *The Rise and Fall of Western Colonialism*, London (1964), p. 7, 53-5; J.D. Omer-Cooper: "*The Zulu Aftermath*. Ibadan History Series (1966) p. 1; Basil Davidson; *Guide to African History* (1963) pp. 67-72.

35 See Stokely Carmichael and Charles V. Hamilton: *BLACK POWER, The Politics of Liberation in America* (1967), Pelican Books, at p. 41; See also David Brion Davis: *The Problem of Slavery in Western Culture* (1970) Pelican Books. See also THE BRITISH EMPIRE No. 4 "*Black Ivory-Britains Infamous Slave Trade.*" BBC-TV TIME-LIFE Books (1972).

Basil Davidson gives a brief but illuminating in-sight into the standing of Europe and Africa before and after the slave trade. In his own words:

> "When this period began there was no very great difference in power between leading European and leading African States. The Europeans were technically more advanced, and were already entering the scientific age, but they still had to treat African States with a good deal of respect. The 'balance of power, was still a fairly equal one.
>
> "Yet, by the end of this period the 'balance of power, had moved right over into the European side of the scales. The armies and expeditions of Europe could now do pretty well whatever, they liked in Africa, and go more or less wherever they pleased. Backed by their wealth and increasing mastery of science, the European Kings and soldiers carried all before them. In doing so they found it easy-and convenient—to treat Africans either as savages or as helpless children".[36]

Enboldened by sustained prosperity at home, the European Powers began casting competitive eyes beyond the boundaries of their respective metropolis in search of raw materials and new outlets for their growing industries. Governments encouraged exports and gave protection to the great industrial syndicates and steamship companies. Their diplomacy, as De Fisscher points out, "assisted enterprising businessmen in capturing foreign markets and winning concessions for public works or mining in new countries".[37] These interventions and manifestations of mounting national competition outside Europe resulted in more or less fictitious occupations, recognition of spheres of influence, disguised protectorates and financial controls in the Americas, India, Asia and subsequently Africa. This was a natural sequence to their experience in Europe which had revealed that political control determined the disposition of other interests. Thus, outside Europe, the flag followed trade and in turn stimulated commercial expansion and more friction between the Powers anxious to preserve the balance of their acquisitions overseas.

The growth of European overseas empires invariably precipitated the suppression of the indigenous population in order to advance European national self-interest. It is, therefore, worth reminding those who claim with some air of finality that colonialism conferred material and social benefits on Africans, about the reverses caused by its exploitatory attributes and demoralising effects on enobling African ways of life. Experience has shown that little or no attempts were made by colonial powers to encourage the

36 Basil Davidson: *Guide To African History* (1963), p. 68.

37 Charles De Fisscher: *Theory and Reality in Public International Law* (1957), Translated from the French by P.E. Corbett, Princeton University Press, Princeton, New Jersey, U.S.A.

cultivation, development and preservation of basic African cultures which in any case were treated as either non-existent or too primitive to warrant civilised attention. Not only were the indigenous races kept tightly apart in artificial boundaries drawn without regard to the dictates of geography and ethnic alignments[38] but the land and the people were internationally maligned to give meaning and significance to European presence and aggression there. In order to sustain the continued dominance of each European power over its African territory, specialised works were promulgated aimed at proving the inferiority of the African by projecting the international image of the so-called "dark-continent," whose inhabitants as quoted above, "have achieved in the past nothing worth the name of history ; nothing that can be called civilization ; nothing that can be recognised as technical progress."[39] Thus, Hawkin wrote that the "Congo Conference at Berlin in 1885 formulated an International Law to promote Peace and Civilization in the Dark continent...."[40] We must however distinguish this so-called "dark continent," from the historical phase in the growth of Africa which Leakey refers to as "Africa's age of darkness." According to Leakey, climatic and geographic factors (e.g. the Sahara desert to the north and the Swamps known as the Sudd south of the Nile) cut off Africa practically from the rest of the world at a period when major developments were taking place in Egypt, Syria and Mesopotamia.[41] The net result of all these colonial manoeuvres was that African communities like all the other colonised communities and their institutions did not fit into the traditional definition of international law as "the body of rules and principles of action which are binding upon civilized states in their relations with one another."

The hitherto popular misconception of Africa, though it still lingers on, has ben considerably discredited by recent historical and archaeological works applying more objective standards of judgment to African questions. The trend towards a new African history became most evident in the late 1950's when it had become inevitably clear that most of the colonial territories would become independent sooner or later. Writing in the UNESCO journal, 'COURIER' of October, 1959, while discussing the defunct civilizations of the African Continent, Basil Davidson commented that—

> "It is increasingly realized that the cultural contributions of African peoples to the general history and progress of mankind were

38 See Norman J. G. Pounds : *Political Geography*, McGr w-Hill Book Company Inc., New York, 1963, p. 61.

39 WEST AFRICA, Feb. 28, 1959, p. 205. See also THE BRITISH EMPIRE No. 20; "*Into the Dark Continent*" BBC-TV, TIME-LIFE BOOKS (1972); Roland Oliver and J.D. Fage : *A short History of Africa*, Penguin African Library (1962) p. 13.

40 R. C. Hawkin : *The Belgian Proposal to Neutralise Central Africa During the European War*" in Vol. 1 (1916) *The Transactions of the Grotius Society*, pp. 67-90, at p. 67.

41 See Leakey, op. cit., pp. 11, 12, 13.

> not limited to interesting works of art, whether in wood or ivory or in bronze or gold, but comprehended a wide range of political and social achievements that were none the less important or remarkable because they were ignored or little known. It is, seen indeed, that these works of art that so many Asians and Americans and Europeans have now admired were not the more or less mysterious products of a social vacuum, but, on the contrary, the ornament and attribute of early African civilizations."[42]

He had the occasion to restate his conviction about African civilizations in his review of a recent work by archaeologist Peter S. Garlake of the Institute of African Studies, University of Ife, Nigeria.[43] Writing about the remarkable granite edifice built by ancestors of the Shona people of Great Zimbabwe, Davidson again commented :

> "When European hunters and explorers first saw these massive walls, about a hundred years ago and somewhat less, they refused to believe that Africans could have built them. They preferred to believe that Zimbabwe and other sites were the long-abandoned work of non-African inmigrants of long ago. To support this belief they invented a great many theories about who these non-African immigrants might have been ; the most popular of these myths was that Zimbabwe was the land of King Solomon's mines or the kingdom of the Queen of Sheba. Amateur archaeologists moved in and helped to complete the ransacking of ruins that gold-hungry adventurers had already begun ; and the consequence is that a vast amount of archaeological and artistic evidence has been lost for ever."[44]

Other eminent historians and Africanists have also made salient deductions which are particularly relevant to the subject of our present discussion. In their Penguin book's "*Short History of Africa.*" Roland Oliver and J. D. Fage observed that contrary to the general impression, Africa was far from the most backward of the continents at the beginning of the modern period of history. True, the northern third of the continent belonged to the urbanized civilization of Islam. But down south in the remaining two thirds of the continent, these writers have pointed out that most of the African peoples were organized into states and communities powerful enough to deter invaders and migrants from overseas until late in the nineteenth century. The Africans

42 Basil Davidson in UNESCO'S Oct. 1959, COURIER, p. 5

43 See Peter S. Garlake : *Great Zimbabwe*, Thames and Hudson. (1973).

44 WEST AFRICA, No. 2932, August 20, 1973, p. 1973, 1152. See also Basil Davidson : *The Lost Cities of Africa*, Revised Edition, Little, Brown and Co., Boston, USA (1970), esp. "'*The Builders of the South*" pp. 243-307, where he discussess the Great Zimbabwe.

were able to put up such resistance because of "the progress made by Africans in earlier centuries."[45]

European conquest of Africa by superior technology and fire-power totally halted any possible recovery from the set-back to its pre-colonial momentum of progress and consequently any further indigenous political advancement and inter-state co-existence which could have originally resulted from the embryonic relations that were developing within and between neighbouring communities either in the form of commercial and cultural contacts or as a result of military confrontations; such relations in Europe gave rise to early rules of conduct among states.[46]

Of course, international rules of conduct fashioned at the time by the European Powers themselves justified European appropriation of African peoples "as wards of civilization" and grounded their segmentation of the continent in law and in fact. Under the prevailing circumstances, African colonies were merely treated as objects of international law without an international personality of their own. Thus, no real states possessing the predetermined attributes of statehood were recognised as existing in pre-colonial Africa.[47] In view of this historical disability no positive contribution could be credited to Africans by the same forces responsible for their downfall; neither could African institutions and practices have any impact on European oriented international rules of conduct. It took the two world wars and especially the Second World War before Africans could initiate the political movements that gave them the breakthrough into international acceptance in the late 1950's. But as is well known, the breakthrough is yet to encompass those parts of the Continent with strong white settler population dominating a numerically predominant African population and vehemently resisting decolonisation.[48]

45 See Oliver and Fage: *A short History of Africa*, Penguin African Library (1962), pp. 13, 14. On the Contribution of Africa to human evolution, See LEAKEY: *The Progress and Evolution of Man in Africa*, OUP i(1961)).

46 On the colonial policies of the European Powers in Africa, See HAILEY: *African Survey* (1956), pp. 145-153. See Elias: "*African Law*," Op. Cit.

47 See Moore: *International Law Digest*, Vol. 1, 1906, pp. 14-17, esp. p. 16. The convenient principle was developed that "the territories of a nation includes its colonies." See Ibid. p. 18.

48 This includes South Africa, Rhodesia, Mozambique, Angola and Guinea Bissau (which declared its independence in 1973 while her struggle for total freedom continues), Namibia and the Comoro Islands. It took a lengthy bloody and costly war of liberation to wrest Algeria from the French. See Mushkat: "*The Process of African Decolonisation*," in Vol. 6 (1966) IND. J. INT. LAW, pp. 483, 508. See also T. Walter Wallbank: *Documents on Modern Africa*, an ANVIL ORIGINAL under the general editorship of Louis L. Snyder (1964), at pp. -77-80 "*Africa After World War I*" and pp. 81-86 "*Nationalism in Africa*."

IV. INTERNATIONAL LAW AND CHANGE

To-day, African States are caught in an uneasy choice. On the one hand, they are being pressured to accept all existing rules of international law because, as some writers argue,[49] these states are born into it under its instrument and their very existence is justified by only such rules of international Law. In the extreme, their possible alternative is to reject totally all traditional international law rules on the ground that the law is a by-product of Western culture and European institutions which have little cogency when the conduct of African States is concerned.[50] As to the first choice, O'Connell[51] emphatically insists that:

> "New States must thus accept the whole of international law or deny the basis of their own existence; they may later modify that law by contributing to changes of custom, but they may not repudiate it as a manifestation of an outmoded and alien order of things. If they do so, even in part, they challenge not only the system but also human-society itself."

49 See O'Connell: *International Law*, 1 ed. p. 5; See also STARKE: *Introduction to International Law*, 7 ed. pp. 27-8, 81 where Starke states: "It is well established that international law binds the new State without its consent, and such consent if expressed is merely declaratory of the true legal position." Brierly: *Law of Nations*, 6 ed. pp. 13, 52.

50 See Lissitzyn: *International Law Today and Tomorrow* (1965) pp. 1-2; See also O'Connell 1 ed. op. cit. p. 5; Brierly, Op. Cit. pp. 41, 43, 52: Clive Parry, Op. Cit. pp. 15, 17, 18. In his review of T.O. Elias's "*Africa and the Development of International Law*," Antony Steel makes the following salient observation:

"A major defect of traditional international law was that it originated in Europe where it was gradually developed with the framework of Christian principle. Naturally, such a system was not always suitable and acceptable to other parts of the world. What the world needed was an "inter-civilizational and multicultural" system which would reflect the needs of all man-kind." See WEST AFRICA, No. 2921, 4th June, 1973, p. 737; See also L. Oppenheim: "*The Science of International Law: Its Task and Methods*" in Vol. 2 (1908) AJIL, pp. 313-356, at p. 317, where he states that "a history of international law.....is only a branch of the history of Western civilization." Writing about "*The New International Law*" in Vol. xv (1929) Trans. Grot. Society, pp. 35-51 at p. 43, Professor Alejandro Alvarez noted that "The European publicists were the ones who developed International Law in the nineteenth centur , it is therefore the fruit of the nature, the doctrines and the needs of the old world." More recently Sir Muhammad Zafrulla Khan, the President of the International Court of Justice at the Hague was quoted as saying that many new States did not want to submit to the jurisdiction of the Court because they argued that its decisions were based on a body of law in which they had no share. He was adressing a special sitting of the Court to mark the fiftieth anniversary of the inauguration of the international judicial system. See The Times, London, 28 April, 1972, p. 4.

51 O'Connell op. cit., p. 6.

In a way, the attitude of African States towards international law is inspired by *Pan-Africanism*.[52] For this reason, critics of the African attitude maintain that although Pan-Africanism was motivated by considerations of national leadership, it however found valid justification for the demands it made on international conscience and the grounds of complaint on the violation of norms of humanity and international law. In effect, what these critics seem to say is that African States (or indeed the newly independent countries) cannot approbate and reprobate at the same time on the question of the universality of international law. It is, however, doubtful whether these critics have been reasonably fair in their extreme reaction to African dissent. Is there really no justification for the reservations which these new states have expressed concerning a law devoid of the impact of African customary law although as it is generally asserted[53] international law is traditionally customary law ?

Akehurst points out that newly independent states (in Africa, for example) adopt this distinctive attitude towards international law because of "certain facts which are true of the vast majority of newly independent countries." According to him, such facts are :

(i) tht newly independent countries value their independence-simply because they are newly independent ;

(ii) that newly independent countries were mostly under alien rule during the formative period of international law, and therefore played no part in shaping that law ;

(iii) that almost all newly independent countries are poor and anxious to develop their economies ;

(iv) that many newly independent countries have a feeling of resentment about past exploitation, real or imagined ;

(v) that consequent upon above reasons, newly independent countries often feel that international law sacrifices their interests to those of the other and richer states.

By and large, Akehurst's postulates which are closely similar to those earlier advanced by Lissitzyn[54] seem to represent the current feeling among African States. However, the core of the matter as far as newly independent countries are concerned is that they did not participate in laying the foundations of modern international law. There is no African cornerstone to

52 See Colin Legum : *Pan-Africanism* (1962)

53 See O'Connell Op. Cit. p. 4. It should be remembered that Oppenheim's thesis concerning "*universal infernational law*" "*particular international law*" and "*general international law*" is restricted to treaties alone. It does not resolve the controversy over the dominion of traditional international law. See Oppenheim's *International Law*, Vol. 1, 8 ed., p. 28.

54 See Lissitzyn, Op. Cit., at p. 72.

the foundations of the law of nations and all other arguments consequently derive from this central point. Perhaps, in appreciation of the relevance of this overriding argument Akehurst, like Lissitzyn,[55] further elaborates that :

> "Newly independent States have never dreamt of rejecting all rules of international law which were laid down before they became independent ; to do so would mean rejecting many rules which operate to the advantage of newly independent states. All the same, western lawyers would be well advised to be tactful in dealing with newly independent countries, and to stress the benefits which those countries receive from rules of international law, instead of relying mechanically on old authorities".[56]

Clive Parry, on his part, calls for some effort at re-appraisal of the sources of international law. More particularly, the long-established States are enjoined to strive collectively to enable the new members learn and grasp the pre-existing rules of international law because "many if not most of the new comers upon the scene are not only newcomers but have little in the way of inherited international legal tradition" and "are inevitably inexperienced".[57]

All these rationalisations apart, it is submitted that the advanced nations of the world oppose Third World's demands for changes in existing rules of the international community mainly on grounds of self-interest. As Charles De Visscher noted :

> "It is the mark of a consolidated legal system to combine for the better satisfaction of social needs, suppleness of adaptation with the firmness indispensable to legal ordering. This double requirement is very generally met in the national order by a legally recognised hierarchy of values sustained by appropriate mechanisms of change. There is nothing like this in the international order....This being so, the aspiration to change easily takes on the appearance of threat to the established order and to inviolable rights. Because change is not regarded and dealt with as a normal social need, the aspiration becomes charged with a political potential and results in inarticulate tensions or sharp fluctuations that escape the ordering of law."[58]

And so, within an international commuity replete with vested or established interests, De Visscher maintains, "the aspiration to change collides head—

55 Ibid, p. 73-74.

56 Akehurst, Op. Cit., at p. 33.

57 Clive Parry : *Sources and Evidences of International Law*, Op. Cit., pp. 14, 15, 17, 18.

58 Charles De Visscher : '*Theory and Reality in Public International Law*,' Translated from the French by P. E. Corbett; Princeton University Press, Princeton, New Jersey, U.S.A. (1957) p. 309.

on with the individualist distribution of power among nations."[59] This is understandable for as late Professor Quincy Wright of the University of Virginia, USA., has explained:

> "In all stages of international law we seem to have had these two principles—the principle of imperialism and the pirinciple of reciprocity. States that have the power are always inclined to take what they can get and to use international law to justify what they have done....Among equals, however, they sometimes acknowledge another principle of international law based on reciprocity."[60]

This proposition to some extent underlines the reactionary attitude of the former colonial powers and their associates to continuing African agitation for fundamental changes in established rules of power politics, the crystallization of nationalistic rumblings clearly anticipated by certain "prophetic" writers at the height of the First World War. In a passionate appeal to European Powers one R.C. Hawkin who warned against certain aspects of Europe's African policy stated:

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> The so-called treaties signed by unwary native chiefs ceding sovereignty, suzerainty, or land to traders in lexchange for heads or gin, will be examined and criticised according to African ideas and.... they will be declared invalid."[61]

Juristic writers are generally agreed that international law is "a primitive of law,"[62] a law in a process of formation, an "underdeveloped" legal order.[63] This is understood to refer to its dynamic attributes of constant development and advancement in the eternal search for the consolidation of world peace and the improvement of relations among the peoples of the world.

In another sense, the present opposition among African States to the traditionally held universal nature of international law rules is also part of a growing tendency, at different times active and at others dormant, the tendency of proclaiming the existence of international

59 Ibid. p. 309.

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> ".....*a priori* rules of general international law apply to Africa as well as to other parts of the world. But law is not stable, law is moving according to the development of new social and political conditions, and this is the place where Africa has an important role to play. Africa, as the newest continent which has entered into international community has the duty to enrich international law with its own experiences, its own values and ideas, in defence of its legitimate interest."

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66 Cited by OGUNDERE on p. 21 of Nigerian Society of International Law (NSIL) Proceedings 1969.

67 See Richard A. Falk : "*The New States and International Law*", in Hague Recuil (1966); S. Prakash Sinha : "*New Nations and the Law of Nations*", Leyden (1967) ; S. Prakash Sinha : "*Perspectives of the Newly Independent States on the Binding Quality of International Law*" in Vol. 14 (1965) 1 CLQ, pp. 121-131 ; M. Mushkat : "*The African Approach to Some Basic Problems of Modern International Law*" in Vol. 7 (1967), Indian J. Int. Law, pp. 339-368 ; V. Maya Krishnan : "*African State Practice relating to Certain Issues of International Law*" in Vol. xiv (1965) Indian Y.B. Int. Affairs, pp. 196-241 ; L. L. Kato : "*Recognition in International Law : Some Thoughts on Traditional Theory, Attitudes of and Practice of African States*" in Vol. 10 (1970) Indian J. International Law, pp. 299-323 ; P. K. Menon : *International Practice as to Succession of New States to Treaties of their Predecessors*" in Vol. 10 (1970) Indian J. International Law, pp. 459-478 ; J. D. Ogundere : "*Field Work in International Law—African Objectives*," in Proceedings of the First Annual Conference of the Nigerian Society of International Law, Lagos (1969) pp. 20-44 ; Okoye : *International Law and the New African States* (1972) Sweet and Maxwell ; Elias : *Africa and the Development of International Law*" (1972), OCEANA PUBL. INC.

statements and pronouncements at international conferences or from complex bilateral and multilateral treaties concluded by African States. One cannot say for certain or assess precisely the impact of African opinion on some of the major changes which have taken place lately in rules of international law. Nevertheless, African involvement in the proceedings leading to such changes or in the formulation of draft propositions awaiting implementation raises a strong presumption that African view point is no longer completely ignored as was the case in the past. Many avenues for participation in the development and advancement of international law as we show below are now open to the new States of Africa.

(*a*) *African Presence at the United Nations and its Institutions :*

Of the fifty odd States which took part in the San Francisco Conference (1946) and also became original members of the UN, only Egypt, Ethiopia and Liberia, out of the present forty-two African States members of the Organisation of African Unity (OAU), were at the Conference. However, from 1955 onwards, the weight of the African block in the deliberations of that world body began building up[68], reaching its maximum after 1960, in which year the greatest number of African States became independent as a result of intensified nationalist agitation and the anticipated UN Declaration on the Granting of Independence to Colonial Countries and Peoples[69] of 14 December 1960.

As new members of the UN, African States became *ipso facto* committed to that organisation's programme for the development of international legal rules and norms.

Under Article 13 of the UN Charter, the General Assembly was given the express function to "initiate studies and make recommendations for the purpose of..encouraging the progressive development of international law and its codification." In pursuance of the General Assembly's responsibility so defined, its Resolution 94 (1) of January 31, 1947, established the Committee, otherwise, known as Committee of 17, on the Progressive Development of International Law and its Codification. The work of that Committee resulted in the establishment of the *International Law Commission*[70] by the General Assembly Resolution 174(II) of November 31, 1947, as a body composed of individuals having recognised competence in international law, which would meet regularly and assist the Assembly in its task. The Commission was

68 See Membership in the United Nations, OPI/458—February 1972—30 M. See also *Africa and World Order* edited by Padelford and Emerson (1963).

69 See Ian Brownlie: *Basic Documents in International Law*, 2 ed. Oxford (1972), p. 187

70 See The Work of the International Law Commission, United Nations Public 67 v. 4.

mandated to prepare draft Conventions on subjects which have not yet been regulated by international law or in regard to which the law has not been sufficiently developed in the practice of states. It was also asked to codify rules of international law in fields where there already has been extensive state practice, precedent and doctrine.[71]

Draft articles prepared by the Commission were usually submitted to member States individually for their comments and to the Sixth Committee (Legal), and then revised in the light of the views expressed before the convening of a plenipotentiary conference to adopt a final convention.

Obviously, this procedure gives African States an opportunity to state their case on any subject under consideration. Whether the views they thus express ever carry the day is another matter. However, we must add that African Jurists from Algeria, Dahomey, Nigeria and the United Arab Republic (Egypt) who had participated in the works of the Commission since 1960 must have introduced some variety in the atmosphere of its proceedings and new dimensions to its draft propositions.[72]

In response to the need for the United Nations to play a more active role in removing or reducing legal obstacles to the flow of international trade the General Assembly established on 17th December 1966, the *United Nations Commission on International Trade Law* (UNCITRAL), to perform in relation to international trade law, a role similar to that played by the International Law Commission with respect to international law more generally.

UNCITRAL has as its object the progressive harmonization and unification of the law of international trade and therefore, coordinates the work of international organizations active in the field of international trade law, promotes wider participation in existing conventions and prepares new international conventions and other instruments relating to international trade law.

The composition of this Commission is also significant. It consists of twenty nine states representing the various geographic regions and the principal economic and legal systems of the world. It holds one regular session a year and during the year, working groups, designated by the Commission from among its members, meet to consider the preparation or the revision of various legal instruments. Reports of these working groups, as well as studies and reports by the Secretary-General of the United Nations and by governmental and non-governmental international organizations, are considered

71 On the Codification of International Law, See R. P. Dhokalia : *The Codification of Public International Law* (1970) Manchester University Press:

72 See Yearbooks of the International Law Commission and record of Codificatio conferences.

by the Commission at its annual sessions. The report of the Commission on the work of its annual session is submitted to the General Assembly.[73]

African States have also prominently participated in a series of UN Committees and working groups which examine particular legal questions on an *ad hoc* basis. For example, when a special committee of 27 members was set up under the UN General Assembly Resolution 1966 (xviii) of December 16, 1963, to study the "*Principles of International Law concerning Friendly Relations and Co-operation among States*,[74] the African States of the Cameroun, Dahomey, Ghana, Malagassy and Nigeria were included. Later on, four other States including Algeria and Kenya were co-opted into the special Committee by General Assembly Resolution 2103 (xx) of 20th December, 1965. The Declaration endorsing the work of this Committee on the subject[75] is contained in the Annex to Resolution 2625 (xxv) of the UN General Assembly and was adopted without vote on 24th October, 1970.

In December 1963, the UN General Assembly had authorised the Secretary General to take the necessary steps to establish the *United Nations Institute for Training and Research* (UNITAR) so as "to enhance the effectiveness of the United Nations in achieving the major objectives of the Organization, particularly with regard to the maintenance of peace and security and the promotion of economic and social development." *The United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law* provides fellowships and UN legal publications to persons and institutions in developing countries and ensures, through UNITAR, the holding of a regional seminar or training course in international law each year. Such seminars were held in Accra, Ghana, 1971 and in Lagos, Nigeria, 1972, in which year also the African States regional Seminar on the law of the Sea took place in Yaounde, Cameroun.[76]

73 See Basic Facts about the United Nations (1972), UN Publication No. E. 72.1.16, pp. 71-2. Priority is currently being given to the following fields : the international sale of goods; international payments; international commercial arbitration and international legislation on shipping. The UNCITRAL at its 5th Session held in April, 1973, on considering the agenda item "*Training and Assistance in the Field of International Trade Law*" decided to convene an international symposium on International Trade Law during its 8th session to be held in Geneva in April 1975, on the role of universities and research centres in the teaching, dissemination and wider appreciation of international trade law. It is proposed by the Nigerian Federal Ministry of Justice to convene an inter-university seminar on international trade law at the latter part of 1974 to discuss this matter.

74 UN Resolution 1815 (xvii) of December 18, 1962 stipulated seven principles of peaceful co-existence or friendly relations to be studied by the special Committee.

75 See Ian Brownlie : *Basic Documents in International Law*, Op. Cit., p. 32.

76 See International Legal Materials, Vol. xii, Number 1, January, 1973, pp. 210-213.

The final report of the Yaounde Seminar reveals a distinctive African attitude on the burning issue of the peaceful uses of the Sea-bed and ocean floor beyond the limits of national jurisdiction. It is obvious from the recommendations put forward that African States are generally in favour of further changes in the law of the sea as grounded by the 1958 Convention on the law of the sea[77] so as to secure particular African interests. Like the Latin American States which claim jurisdiction over extensive areas of the high seas adjacent to their coast, African States at Yaounde questioned the relevance of traditional principles which no longer command universal acceptance. We have to wait until the proposed Law of the Sea Conference in 1974 to see what impression the African protest will make on the advanced nations.

The United Nations is at present to establish a regional base in Africa for its work for human rights and it is hoped that African governments will lend their support and cooperation towards this development of international law on human rights. The creation of an *African Commission on Human Rights* was first proposed at the African Conference on the Rule of law organised by the International Commission of Jurists in Lagos, Nigeria, in 1961. That Conference adopted the "*Law of Lagos*" which aimed at giving full effect to the Universal Declaration of Human Rights of 1948 (later endorsed by the Charter of the Organisation of African Unity signed in 1963 at Addis Ababa, Ethiopia). The United Nations Commission on Human Rights at its Twenty-Third Session in March 1967, had adopted its Resolution 6 (xxiii) by which it decided to set up an Ad hoc Study Group to consider a proposal for setting up Regional Commissions on Human Rights in areas where they did not already exist. The proposal had been made with particular reference to Africa.

The Report of the Ad Hoc Study Group was corsidered by the UN Commission on Human Rights at its Twenty-Fourth Session in March 1968. But following the opposition of the Eastern bloc to the creation of Regional Human Rights Commissions, it was arranged to defer the matter to the UN Seminar in Cairo in September 1969 on the establishment of Regional Commission on Human Rights with particular reference to Africa.[78] The Seminar was attended by participants from twenty African countries out of a possible forty-one.[79] The general conclusons of the Seminar stated *inter alia* that the participants agreed unanimously on the desirability of establishing a Regional Commission on Human Rigss for Africa and requested the Secretary-General

77 See Ian Brownlie : *Basic Documents in International Law*, Op. Cit., pp. 77-115.

78 The Arab League had set up its own Commission on Human Rights in September 1968.

79 The countries were U.A.R., Libya, Tunisia, Morocco, Chad, Congo-Kinshasa (now Zaire), Dahomey, Guinea Mali Mauretania, Senegal, Ghana, Kenya, Liberia, Mauritius, Nigeria, Sierra Leone, Somalia, Tanzania, Zambia.

of the UN "to communicate the report of the Seminar to the Secretary-General of the Organisation of African Unity and the Governments of member States of the OAU so that the OAU my consider appropriate steps with a view to establishing a Regional Commission on Human Rights for Africa...."[80] The Seminar also appealed to all Governments of member States of the OAU, the Specialised Agencies of the UN as well as the inter-governmental Regional Orgnisations which have Commission on Human Rights (i.e., the Council of Europe, the League of Arab States and the Organisation of American States) to lend their support and cooperation for this purpose.

The type of Commissin which many of the participants had in mind was not one comparable to the European Commission, with its quasi-judical functions, but rather aCommissin for the promotion, of human rights, more on the lines of the UN Commission. This general attitude was re-affirmed at the *Addis Ababa Conference on African Legal Process and the Individual*,[81] convened in April 1971 by the UN Economic Comission for Africa (ECA) in order to get things moving after failing to obtain the co-operation of the OAU, although the Secretary-General of the UN had duly communicated the conclusions of the Cairo Seminar to the African Governments. An organ of the OAU which would have co-sponsored the Addis Ababa Conference was the Mediation, Conciliation and Arbitration Commission which as we show below has not been particularly effective. In place of the OAU, the ECA was assisted by the International Legal Center of New York, a private organisation, principally financed by the Ford Foundation, devoted to promoting the developed countries with particular reference to Africa.

No doubt, the United Nations offers the new States of Africa a potential forum within which they can participate in reforming the outmoded rules of international law. But in assessing their success one must bear in mind that for the moment they can only but exert moral pressure on the recalcitrant older and more industrialised members of the community of nations and then hope for the best.

(*b*) *Assian-African Legal Consultative Committee*:

Another functional machinery for determining the attitude of African States to vital areas of international law and its growth, is the Asian African Legal Consultative Committee[82] (which bore the name of the Asian Legal

80 See Mission Report of 18th September 1969, doc. H. (69) 12 by Director of Human Rights Commission, Council of Europe, Strasbourg.

81 See Mission Report of 19th May 1971. doc. H. (71) 13 by Director of Human Rights Commission, Council of Europe Strasbourg.

82 See Vol. 59 AJLL (1965), pp. 721-74; also at Robe Wilson in 61 AJL (1967), pp. 1011-1015.

Consultative Committee until 1958). It was established on November 15, 1959. Article three of its Statute sets out its purposes as follows:

(*a*) to examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before this Commission;

(*b*) to consider legal problems that may be referred to the Committee by any of the participating countries and to make such recommendations to governments as may be thought fit;

(*c*) to exchange views and information on legal matters of Common concern;

(*d*) to communicate with the consent of the governments of the participating countries, the points of view of the committee on international legal problems referred to it, to the UN, other institutions and international organisations.

The subjects with which the Committee has dealt or has on its agenda include Diplomatic Immunities, Extradition, Immunity of States in respect of Commercial Transactions, Status of Aliens, Arbitral Procedure, Legality of Nuclear Tests, Dual Nationality, Conflict of Laws in respect of International Sales, Avoidance of Double Taxation, Legal Aid, Recognition and Enforcement of Foreign Decrees in Matrimonial Matters, Diplomatic Protection of Nationals and State Responsibility, Consular Immunities and Privileges, Law of the Sea, Reciprocal Enforcement of Judgements, Law relating to Commerce and Industry, and Rights of Refugees.

(*c*) *The Organisation of African Unity*

The Organisation of African Unity (OAU)[83] was founded at Addis Ababa in May 1963. It has celebrated a decade of its existence as a regional international organisation dedicated to the promotion of the unity and solidarity of African States, the coordination and intensification of efforts to achieve a better life for the peoples of Africa; the defence of member states' sovereignty, territorial integrity and independence; the eradication of all forms of colonialism from Africa and the promotion of international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

The OAU Charter solemnly commits member states, under Article III(4) to "peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration". In furtherance of this commitment the Charter established a Commission of Mediation, Conciliation, and Arbitration leaving the modalities of this Commission to be worked out in a subsequent Protocol signed at Cairo in 1964 which formed an integral part of the OAU Charter. The Commis-

83 See Ian Brownlie; Basic Documents on African Affairs (1971), Oxford, p. 1.

sion is one of the four principal institutions through which the Organisation seeks to accomplish its purposes.[84]

It is through this machinery that the OAU, as a regional organisation, would have established itself as a continental organ for the development of international law in Africa. Unfortunately, not much contribution has been made in this direction because of the luke-warm attitude of member states who tend to shy away from using the services of the Commission.[85] In many cases parties to a particular dispute have shown complete lack of interest in OAU's machinery of justice and instead addressed their complaints to the United Nations or to some other sub-regional organisation to which they also belong in the hope of getting a more favourable hearing for their own side of the case.[86] Such reluctance to utilise the services of the Commission is also encouraged by the fact that the jurisdiction of the Commission is not compulsory. Even if it were compulsory there is no guarantee that this would have improved the attitude of member states to it. And so, the Commission continues its existence of a lame duck and, unless there is an immediate change of heart the impact of its proceedings on the jurisprudence of international law would be totally lost.

Since African States are pressing hard for reforms in rules of international law, perhaps they would better start some constructive changes by evolving new customary rules applicable on the continent for a start. Such rules may well persist for a long time and become eventually accepted by other members of the Community of nations.

The stand which African states have collectively taken over such questions as inherited international boundaries and secession in Africa is indicative of the way in which they can modify some traditional rules of international law. At the Cairo Heads of State Conference in 1964, the OAU resolved to maintain the *status quo* and respect boundaries existing on the achievement of national independence by members, on the ground that "the borders of African States on the day of their independence constitute" as the preamble to the resolution notes "a tangible reality".[87] The OAU seems also to have

84 The other three are the Assembly of Heads of State and Government, the Council of Ministers and the General Secretariat.

85 See M. A. Odesanya : "*Reflections on the Pacific Settlement of Inter-State Disputes in Africa*" in Papers of 3rd Annual Conference of Nigerian Society of International Law (1971), pp. 42-50.

86 See Cukwurah : "*The OAU and African Territorial and Boundary Problems 1962-1973*" (accepted for publication in 1973 issue of the Indian Journal of International Law).

87 See Ian Brownlie (Ed.) : *Basic Documents on African Affairs*, Op. Cit. pp. 360-1; See Cukwurah : *The Settlement of Boundary Disputes in International Law* (1967), Manchester University Press, pp. 112-116, 190-9.

taken a stand against secession[88] because it can disorganise inherited boundaries and lead to the balkanization of Africa, causing a violation of Article III of the OAU Charter concerning respect for the sovereignty and territorial integrity of member states.

Apparently, another problem retarding African efforts at reforming public international law is internal involvement with changes in the legal systems inherited from their respective colonial masters. Until these states have stabilised their domestic laws and given them an appreciable feature to commend the local laws as salient basis for analogy or comparison, in the conduct of continental affairs, the absence of a truly African outlook in the corpus of international law rules may well continue for longer than expected.

VI
CONCLUSION

It is sometimes questioned whether international law really exists, whether it is law at all.[89] It has been variously denounced and praised depending on the writer's notion of law.

Whether international law really exists is now an academic question. It is too late in the day to begin to doubt the existence of international law. If the argument is that it lacks the machinery of sanctions open to municipal or domestic law then this is understandable.[90] But some weakness in the enforcement of a law cannot ordinarily justify a total denial of the existence of that law.

Over the years the community of nations has succeeded in preventing international anarchy and in containing known cases of armed conflict and periodic inter-state disorders through the observance of certain widely recognised norms, principles and rules of conduct. It is only a system which possesses the basic attributes of law, however defined, that can assure such legal order within a community as diverse as the community of nations.

However, in a fast changing world many of these rules especially those of them grounded on customary rules tend to be outmoded and at times to work against the vital interests of certain sections of the world community.[91]

88 See the Resolution adopted at the Assembly of Heads of State and Government of the OAU at Kinshasa, Zaire, 11-14 September 1967, in Ian Brownlie, Op. Cit., p. 364.

89 See L. Oppenheim : "*The Science of International Law. Its Task and Method*", in Vol. 2 (1908) AJIL, pp. 313-356, at pp. 330-333; See also James Brown Scott : "*The Legal Nature of International Law*" in Vol. 1 (1907) AJIL, pp. 831-866; Kelsen : *General Theory of Law and State* (1945) p. 328.

90 See Elihu Root : "*The Sanctions of International Law*", in Vol. 2 (1908) AJIL, pp. 451-457.

91 For example, the customary rules and principles governing State succession.

This has been the experience of the new States of Africa and of other developing countries. In principle, African States recognise the primacy of international law although they also question some of the contents of that law. In this regard they find themselves in confrontation with the vested interests of older and more advanced countries of the world because these new states by their conduct seem to attack the law which for a very long time has justified those vested interests.

In reaffirming in the OAU Charter their adherence to the principles of the Charter of the UN and the Universal Declaration of Human Rights, as "a solid foundation for peaceful and positive cooperation among States,"[92] African States of the OAU in effect pledge themselves to coopearte with other members of the community of nations in fashioning out an international system of law which will ensure legal order and justice for all. They do not in any way imply an unreserved acceptance of the law as existing before their birth into the world community, for as we noted above many of these rules work against the vital interests of African States.

A law that works hardship on the people it is meant to serve is an unjust law. Therefore, international law cannot by default be allowed to impair the interests of developing countries who are struggling to catch up in a fast changing world. African States do not and indeed should not deny the cogency of international law in the continent. But in order to ensure a fair deal as well as purposeful commitment within the continent the content of some aspects of this law[93] must be reviewed so as to reflect the wishes of people of this part of the world. International law is at a cross-road characterised by a confrontation between advanced nations and the newly independent developing countries. As Dr. Elias had rightly emphasised :

> "The challenge of the times requires it to show itself capable of adaptation and expansion in order to enable it to fulfil its destiny....to foster the conversion of the present international society into a truly international community.[94]

Quincy Wright in his treatise on "*A Law for Mankind*" seems to refer obliquely to this issue where he states that universal law, whether public international law or universal private law, can formulate values acceptable to all mankind only if it is derived from sources accepted by universal public

92 See Preamble to OAU Charter, in Ian Brownlie's *Basic Documents in International Law*, 2nd ed. Oxford University Press (1972).

93 For example, the traditional rules on state succession, state responsibility for acts of nationalisation and expropritation, the law of the sea, etc. the concept of self-determination.

94 See T.O. Elias : *The Expanding Frontiers of Public International Law*, Cit. p. 104.

opinion[95] but, he adds, a national opinion will not support a law seeking to maintain a universal order of society that it opposes.[96] In another treatise, he explains why : Each nation has its own culture, its own values, its own procedures which its own people consider just. Each finds it difficult to envisage a universal justice except as an extension of its own conceptions.[97] This is the more reason why no system of value or culture should be omitted in the continuing search for a world community grounded on the rule of law.

95 Quincy Wright : "*Toward a Universal Law for Mankind*" in Columbia Law Review, Vol. 63, No. 3 (1963), pp. 435-458, at p. 442.

96 Ibid. p. 444.

97 Q. Wright *The Role of International Law* (1961), Op. Cit. p. 10.

SUICIDE : A REVIEW OF THE CURRENT SOCIAL, MEDICAL AND LEGAL ISSUES*

S. M. DAS GUPTA** A. R. TRIPATHI***

INTRODUCTION

Suicide or self-murder has been defined as the intentional 'taking of one's own life'. In scientific language the phenomenon of suicide has been described as the 'occasional final symptomatic act of a mental illness triggered often times by a passing event.'[1] However due to lack of general agreement on a precise definition the expression "suicidal act" has been used to denote the "self infliction of injury with varying degrees of lethal intent and awareness of the motive" the outcome depending not only on the relationship between the self-destructive and life-preserving tendencies of the individual but also on the immediate reactions of the environment.[2]

It has been estimated that an average of at least 1000 persons a day commit suicide in the world and the ratio of attempted suicide to suicide is about 8:1. Suicide has ranked amongst the first 5 to 10, as the cause of death in the industrialized countries of the west for many years. The figures of nearly half a million persons committing suicide and millions more attempting it every year in the world, is believed to represent only a fraction of the total number involved in suicide.[3]

A REVIEW OF SOCIAL AND LEGAL ATTITUDES TOWARDS SUICIDE

From the beginning of human history attitude towards suicide has varied from community to community ranging from condemnation by early Hebrews, to tolerance among the ancient Greeks and Romans, and to glorification by the Japanese. Consequently, both motives of suicide and frequency have varied from culture to culture.[4]

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*This article is based on the papers, presented by the authors at the All India Seminar on Abortion, Infanticide and Suicide held at Panaji, Goa in April, 1972.

**M.B.B.S., M.D. Professor, Department of Forensic Medicine, Institute of Medical Sciences, Banaras Hindu University.

***M.B.B.S. Demonstrator, Department of Forensic Medicine, Institute of Medical Sciences, Banaras Hindu University.

1 See for instance, Legal Medicine Annual (1969) Edited by C. H. Wecht, Appleton-Centry-Crofts, New York, pp. 165, 184.

2 Quoted by Med. Sc. Law (1970) 11, pp. 131-134 and W.H.O. (1968) Public Health Papers No. 35, Geneva, p. 38.

3 W.H.O. (1968) Public Health Papers, No. 35, Geneva, p. 9.

4 Comprehensive Text book of Psychiatry (1967) Ist Indian Edition, Scientific Book Agency, Calcutta, pp. 1170-1179.

Judeo-Christian ethos and the American legal code perceived suicide as the most negative of all modes of death, as murder committed on the self.[5] Suicide was regarded as self-murder, a double offence, one committed against the King and the other against God and hence a heinous crime, which called for retaliation from the society. The common law in England regarded suicide as a felony, a grave offence. Sir John Jervis wrote in 1829 "Self-murder is wisely and religiously considered by the English law as the most heinous description of feloneous homicide".[6]

The common Law in England confiscated the suicide's property in the name of crown. It was said that you could not commit suicide on pains of being regarded as a criminal if you failed and a lunatic if you succeeded. Other penalties for suicide were social banishment, religious excommunication and denial of the sacrament of last rites.[7] Early English law indeed provided for burial of suicides in the highway "with a stake driven through the body"[8] so that the spirit could not wander about.

The American states never accepted the harshness of English law towards suicide. Confiscation was not adopted and suicide became an ignored law in the books. No action was taken against the person or property of the suicide[9]. In New York, suicide was recognised as "a grave public wrong" but was not considered a crime. The Supreme Court of Illinois recognised that suicide was a felony at common law, but never considered the spirit of English Law as applicable to their institutions. In several other states suicide has been held to be a *malum in se* and a crime, although not punishable if self-murder is once accomplished.[10]

In fact, "the current law in the fifty states is in hopeless confusion with some states still 'punishing' suicide as a crime ; some punishing attempted suicide, with or without punishing the 'crime' itself; and some, with or without either of these, punishing a person who aids another in committing suicide. There is no pattern or purpose in the law which is discernible from a reading of the law and th e very few law review commentaries published in recent years". These comments made about the suicide law in America[11] may perhaps hold equally good for other countries of the world.

5 J. Forensic Sci. (1968) 13, pp. 33-45.
6 Jervis on Coroners (1829) Ist Edition, p. 110.
7 Hand book of Psychiatry (1969) Asian Edition, Kothari Book Depot, Bombay pp. 246-253.
8 J. Forensic Sci. (1968) 13, pp. 177-222.
9 Amer. J. Publ. Hlth. (1970) 60, pp. 163-164.
10 Washburn L. J. (1967) 6, pp. 395-401 Quoted by Curran (1970).
11 A. B. A. J. (1968) 54, p. 855. Quoted by Curran (1970).

THE INDIAN SCENE

The mediaeval India glorified suicide under certain situations. One such situation was "*Suttee*" denoting self-immolation of the Hindu widow on her husband's funeral pyre and the other was "Jauhar" or self-immolation by fire of Rajput women of the royal families to save themselves from falling into the hands of foreign invaders. The general sentiment of the Dharmasastra was, however, against suicide and suicide or attempt to commit suicide was deemed to be a great sin except where it was permitted on certain religious grounds.[12]

Such an attitude, together with strong family ties, providing security and shelter to the old and infirm inside the family, and a sense of resignation to one's own destiny or fate, when in trouble, appear to have been largely responsible for a relatively low suicide rate in India. As for the Muslims, their law forbids and the religion deprecates suicide, since liberty (or life), it is said, cannot be disposed off at one's own pleasure except that of God.[13] Whether this could be the cause for a low suicide rate among the Muslims in certain parts of India (or perhaps elsewhere too), reported in a few studies that are at present available,[14] needs verification.

An All India enquiry into the problem was started only as late as in 1963, by the Central Bureau of Investigation. Between 1964 and 1969 number of suicides in India increased from 29, 724 to 43, 633, a 46.8 per cent rise and the rate increased from 6.3 to 8.4 per 1,00,000 of population.[14a] Most of the western countries and Japan have higher suicide rates, but unlike those countries India has not taken any steps to tackle it as a social problem.

In 1969 as many as 43,633 persons committed suicide in India. Although Maharashtra recorded the highest number of suicides per 1,00,000 population, maximum number of cases were reported from U.P. (5,699 or 13.06 per cent) followed by West Bengal (5,613 or 12.86 per cent) and Tamil Nadu (4,967 or 11.38 per cent). Despair over dreadful diseases claim the highest toll of suicide deaths in India, 6169 (14.14 percent) cases, followed by domestic unhappiness resulting from quarrel with married partners and mothers

12 History of Dharmasastra (1953) Volume 4, Bhandarkar Oriental Research Institute, Poona, pp. 604-614.
13 The Legacy of Islam (1931) 1st Edition, Oxford University Press, London, p. 293.
14 Indian J. Social Work (1960) 21, pp. 167-175 ; J. Indian M. A. (1966) 46, pp. 18-22 ; In Press Bharat Med. J.
14(a) Yearwise incidence of the cases : 29, 724 in 1964 ; 27, 936 in 1965 ; 37, 848 in 1966 ; 39, 861 in 1968 and 43, 633 in 1969 or a total number of 1,79,002 suicides in 5 years. (C.B.I. quoted by. The Hindusthan Times, September 9, 1967 ; 2. The Statesman, December 30, 1971 ; and 3. The Illustrated Weekly of India, Volume XCIII, February 13, 1972, pp. 44-47).

-in-law : 3286 (7.53 per cent) and 3259 (7.47 percent) cases. Others in order of frequency are poverty 1825 (4.18 per cent), failure in examinations 1959 (3.65 per cent), and estrangement in love affairs 1428 (3.25 per cent).[15] Young married women are particulary vulnerable as many of them are forced to take their own lives due to continuous cruel treatment by their husbands or mothers-in-law and this evil appears to be particularly rampant in the Saurashtra area of the Gujarat State.[16] Worst of all, many of of the women reported to have died from suicide or accident by burning are suspected to be the victims of deliberate murders.

While men in India are found to commit suicide because of failure in examinations, diseases, poverty, or estrangment in love affair ; women more often kill themselves because of quarrel with their parents-in-law or married partners. The "modes" of committing suicide vary from state to state. However, taking poisons, drowning, hanging, burning (setting fire to the clothes after sprinkling with kerosene oil) and lying on the railway track are found to be the most typical methods. The various methods, it appears, are established by culture and tradition and on availability of the means employed. Of the two sexes men are found to be more liable and overall male-female ratio is about 6:4.[17] However in Saurashtra region twice as many women as men commit suicide.[18]

CHANGING CONCEPTS

With the progress in scientific, sociological and medical knowledge, there have been important changes in the society's attitude with regard to suicides. Society is tending to view suicide less, as a sin or crime and more as an unfortunate consequence of mental illness, personal failure, or of social isolation. Social and judicial attitudes regarding suicide have been gradually turning away from assessing guilt and enforcing punishment towards protecting suicidal persons when possible, and compensating the victims of suicide deaths.[19] The last of the penal statutes against suicide was repealed in England in 1961. France abolished the penal law as early as in 1870, while Scotland, England's closest neighbour never enacted, or felt the need for one.[20] Although only nine of the American States still consider suicide or attempt to commit suicide a crime, these laws are seldom enforced.[21]

15 The Statesman, Dec. 30, 1971.
16 Indian J. Soc. Work (1960) 21, pp. 167-175.
17 The Statesman, Dec. 30, 1971.
18 Indian J. Soc. Work (1960) 21, pp. 167-175.
19 Washburn L. J. (1967) 6, pp. 395-401. Quoted by Litman, R.E., (1966) J. Forensic Sci. 13, pp. 46-54.
20 J. Indian M. A. (1966) 46, pp. 18-23.
21 J. Forensic Sci. (1968) 1, pp. 46-54.

In fact, today there are many who would like to argue, that suicide should be a civil right of the individual, with which no one should have authority to interfere. Discussions on the subject is often associated with euthanesia. The prospective suicide is making a rational choice between, extended life and quick death. He does not like the quality of his life and therefore ends it.[22]

THE PROBLEM OF UNDER-REPORTING

Suicide is almost certainly under-reported everywhere and available figures do not fully reflect the real magnitude of the problem. Gross under-reporting is the rule, and actual rates are likely to be very much higher than those reported.[23] The figures also do not reflect the unconsciously motivated fatal accidents or many variety of self destructive behaviour that are psychologically related to suicide.[24]

Various kinds of apprehensions or fears are at the root of gross under-reporting of the suicide and attempted suicide cases all over the world. Socially suicide is still regarded as a stigma, involving loss of face, even in countries where suicide or attempt thereof are not regarded as crimes in law. Various degrees of persuasion and coercion and very unusual methods like tampering with the position or surroundings of the suicide dead (or attempted) and burning or burying the dead body in haste, are resorted to in a bid to influence the certifying (or reporting) authorities against a pronouncement of suicide "which still evidently is equivalent to a verdict of guilty" at least in a social and moral sense and a sign of moral cowardice.

Criteria of suicide for the guidance of the certifying authorities are not often clear and tend to differ from country to country. Moreover, a post-mortem examination is not mandatory everywhere ; and in India under Section 174(3) of the Criminal Procedure Code, it is left to the discretion of the Police officer ; once the case is found out by other evidences to be one of a suicide the matter may be closed without a post mortem examination. It is, therefore, not surprising that an autopsy examination was performed in only 16 or even less than 50 per cent of the 39 cases, studied by the present authors in Varanasi.[25] The situation is made all the more worse where there is a law in force making suicide or attempt thereof a punishable offence. It therefore sounds quite clear that as long as suicide or its attempt continues to be a punishable offence, true picture of their prevalence in a community, shall

22 Amer. J. Publ. Hlth. (1970) 60, pp. 163-164.
23 Quoted by W.H.O. (1968) Public Health Papers, No. 35, Geneva, p. 9.
24 Comprehensive Textbook of Psychiatry (1967) 1st Indian Edition, Scientific Book Agency, Calcutta, pp. 1170-1179.
25 In Press. Bharat Med. J.

probably never be known. This is a deplorable state of affairs, for, effectively tackling this problem requires a correct knowledge of its dimensions.[26]

OUTSTANDING ISSUE

Important social legal and public health issues must be resolved before the law can play its role in reducing the incidence of suicide cases effectively. What should be the correct attitude of a law with regard to suicides-dead or attempted ? Should there be legal sanction to investigate and interfere in the affairs of the person who attempts suicide ? Is it necessary to declare attempted suicide a crime ? If the attempted suicide is not a crime how can the person be restricted in his freedom and confined even temporarily tor treatment, which he may not himself consider necessary ?

If the attempted suicide is a crime in law, should it deter people from reporting an occurrence resulting in under-estimation of its prevalence in the community ? Should there be enactment for the statutory notification of a suicide or its attempt to the public health authorities ? Should there be legal provision to prosecute and punish one who by persistent acts of cruelty drives another person to commit suicide ? Should post-mortem examination be mandatory in all cases of deaths from suicide ? These and other outstanding questions must be answered correctly before the law can be of any real help to the medical and public health authorities in their efforts at suicide prevention.

PLEA FOR LAW REFORMS

The phenomenon of suicide is mysterious in the sense that it is extermely antagonistic to the natural urge for self-preservation that is so deeply rooted in each individual. The fear of death or loosing the life is universal and is the worst fear that haunts the minds of all living ereatures, men or animals. The very idea of inflicting further punishments on one who has already decided to suffer the "supreme punishment of death" by his own hands, therefore, sounds queer.

It may significantly be noticed that suicides are most often planned or committed in moments of utter despair, when the emotional balance of the individual is completely lost or thrown out or at the height of an impulse when one has not even thought of dying, or very superficially, if at all. Under such situations there is hardly scope for any serious thinking.

As such, the existence of a punitive law can only serve as an inducement to non-reporting or concealment of the cases of suicides, dead or attempted, resulting in under-estimation of their prevalence in the community; while a low-suicide rate may in fact conceal more human misery and frustration

..H26 WO. (1968)Public Health Papers, No. 35, Geneva, p. 32.

than is revealed by a high one. Viewing in this context the very idea of a punitive law, serving as a deterrent to suicide appears untenable. Suicide is a malady, and is the symptom of a mental illness, rather than a crime. and one who attempts it, needs treatment and not conviction for his mental condition.

The apparet spurt in the reported suicide cases, after the passing of Suicide Act of England of 1961, could thus be attributed at least partialy to the fact that more cases are now being reported and hence are coming to the light, since the crime clause has been excluded and fear of penalty no longer exists in the public mind.

However, the high rise in "self-poisoning" cases using the sleeping pills or the tranquilizers, may well have still other explanations in the form of easy availability and careless perscription of the drugs, broken homes, a materialistic approach to the problems of life resulting in a reduced tension or frustration resistence or a sheer love for experimentation or thrill, wherein any lethal intent or desire to die was virtually non-existent.

Whether or not a restriction on the sale or prescribing of the drugs could be of help in bringing about a reduction in the incidence of these self-poisoning cases, is altogether another issue, for as long as strong motivations and conditions for committing suicide exist within the society, the human ingenuity will invent newer methods.

Section 309 I.P.C. makes attempted suicide a punishable offence in India. The Law Commission in its 42nd report on the Indian Penal Code published recently has recommended that an attempt to commit suicide should cease to be an offence in India.[27] The Commission feels, and with it the present authors are in agreement, that "it is a monstrous procedure to inflict further suffering on an individual who has already found life so unbearable his chances of happiness so slender, that he has been willing to face pain and death in order to cease living." The Commission further recommends that a section should be inserted after Section 306 of the Code that "whoever by persistent acts of cruelty, drives a member of his family living with him to commit suicide, shall be punished with imprisonment which may extend to three years and shall also be liable to a fine." It is hoped that the parliament would enact the aforesaid provisions expeditiously to modify the law to suit the requirements of changing times.

MURDER FOLLOWED BY SUICIDE

A news about suicide, that struck the headlines recently,[28] was that of an unfortunate woman, a mother who on being thoroughly disgusted with life, jumped into a well along with her three daughters of tender ages. But

27 Northern India Patrika, Nov. 17, 1971.

28 Janavarta (Varanasi), March 6, 1972.

death eluded her, as she was taken out of the well alive by the neighbours acting in zealous pursuit of their neighbourly obligations, while the children were already dead. Police arrested the woman and registered a case of murder against her for killing her own children and one also of an attempt to commit suicide.

Being thus deprived of all her wishes to live, as also her chances to die, she is now spending her days in the prison only to face the mockery of justice, and receive further punishment on her already shattered existence.

Amongst all the persons committing suicide, the murder-suicide cases namely those who murder first and subsequently commit suicide, are undoubtedly the most important and interesting from a medico-legal point of view.

A statistical study of murders in England and Wales by Home office Research unit[29] revealed the following information :

Nearly one-third of the murderers in England and Wales committed suicide. Those in murder - suicide groups were often insane or at least definitely mentally ill, of them 30-40 per cent were women and they murdered usually members of their own families or close associates. In majority of these cases a parent killed his or her children, and the commonest method was gassing.

The murderers who did not commit suicide were as a group in several ways different ; they were younger, they were almost all men, and majority of those that they killed were not their relatives. Sixty per cent of these murderers had previous convictions for one offence or the other. Their motives and methods also differed.

The murder-suicide group does not, according to West,[30] seem to differ from ordinary murderers in the proportion for one-half, are considered insane or of diminished responsibility. But there is a substantial number of seriously mentally involved people in this group, particularly amongst the women. Very few of these people had previous convictions of any kind ; and the young thug whose aim is theft or robbery is not found amongst them.

FILICIDE FOLLOWED BY SUICIDE AND MURDERING MOTHERS

"Infanticide" is a general term used for child murder. "Filicide" refers to cases in which the murderer is a parent (father or mother) of the victim.[31]

29 Cited by Batchelor, I. R. C. (1969) in Henderson and Gillespies Textbook of Psychiatry. 10th Edition, Oxford University Press, London, p. 534.

30 Quoted by Batchelor, I.R.C. (1969) in Henderson and Gillespies Textbook of Psychiatry. 10th Edition, Oxford University Press, London, p. 535.

31 Amer. J. Psychiat. (1969) 126, pp. 325-334.

Resnick reviewed 131 cases of child murder by a parent from the world literature and suggested a new classification for filicide, based on the apparent motive[31a]. The largest number fell under his first or the "altruistic" group of the murders committed out of love : associated with suicide by the murdering parent; 64 or nearly one half of the cases (49 per cent). The suicide parents claimed that they could not abandon their children, when they killed themselves. Some mothers talked openly of suicide and even expressed concern about the future of their children. Of the 64 filicide-suicide parents, 49 (76.6 percent) were mothers and only 15 (23.4 per cent) were fathers.

Three-quarters of all the parents showed psychiatric symptoms prior to their filicide and 60 per cent were classified as psychotic (mothers 67 per cent and fathers 44 per cent). A depression was found in the mothers (71 per cent) more than twice as often as in the fathers (33 per cent). Barring the unknown dispositions (68 per cent) of the "altruistic" and "acutely psychotic" filicide parents altogether 92 cases were hospitalized.

In the 10 cases reported by Tuteor and Glotzer from Illinois U.S.A. it could be shown that mothers who murdered their children suffered emotional deprivation during early life and their marital life was stormy and poorly adjusted. Seven out of the 10 mothers made serious suicidal attempts after killing their children and one succeeded in taking her life. None was found sane while committing the act and none stood trial for it.[32] It therefore assumes significance that, there were 10,920 murders in the United States in 1966 and out of every 22 was a child killed by its own parent.[33]

The incident of a mother murdering her child is always of particular significance and interest to the forensic psychiatrist. Bender postulated that child murders by parents are suicidal acts as a result of identification with the the child, and not primarily an act of hatred against the child.[34] The motive of sparing the victim from the same fate as the parent is quite common. All these factors contribute in converting suicide to filicide.[35] Emotionally the general populace feels that a mother murdering a part of her very self must be mentally ill. It appears that the suicidal intent is primary in most mothers

31a Resnick (1969), has proposed a new classification for filicide based on the apparent motives :—

(1) The "altruistic" filicide ;
(2) The "acutely psychotic" filicide ;
(3) The "unwanted child" filicide ;
(4) The "accidental" filicide ; and
(5) The "spouse revenge" filicide.

32 Amer. J. Psychiat. (1959) 116, pp. 447-452 ; J. Forensic Sci. (1966) 11, 373-383.

33 Uniform Crime Reports (1966) U. S. Govt. Printing Press, Washington, D.C. Quoted by Resnik, P. J. (1969). Amer. J. Psychiat., 126, pp. 325-334.

34 J. Nerv. Ment. Dis. (1934) 80, pp. 32-47.

35 Amer. J. Psychiat. (1969) 126, pp. 325-334.

and murder of the child or children secondary. It is postulated that the mothers in such a situation desire to remove the "total-all", the actual and the extended self-the children—whom they see as parts of themselves, so that nothing of self remains. In other words, in such cases "murder is suicide."[36]

It is estimated that nearly 15 per cent of depressive patients may ultimately commit suicide.[37] Depressive psychoses are the cause not only of of the majority of the suicides but also of some murders. As a result of depressive delusions, convinced that he and his family are ruined or that he has been at the root of their sufferings, a man may murder his wife and children ; and a depressed woman, despairing in a similar way, may murder her children, within or without the puerperium. The murder is only the first step in these cases to suicide, but the suicide may not always be effected[38] and one may well be apprehended soon after the murder, but before he has succeeded in taking his own life. These cases, tragic as they are, also present some of the most difficult medico-legal problems, since the McNaghten Rules or the legal tests of insantity, based primarily on a disturbance of reason or knowledge, tend to apply very poorly, to these cases of pathological disturbances of emotions. In such a case it is clearly difficult for the honest expert medical witness to maintain either that the man (or woman) did not know what he was doing or that he did not know that it was wrong, But the balance of his mind was no less overthrown, and his sanity therefore no less impaired, because the disturbance was primarily emotional rather than rational.[39]

Precise figures of the murder-suicide cases, it appears, have nowhere been worked out for our country. However, a desperately indigent though affectionate father murdering his own dependents before committing suicide or a depressed and despairing mother destroying her own child and then killing herself, are by no means uncommon on Indian scene. Quite often a mother driven by the misery and plight of her tottering mental condition, jumps into the nearby well with her child still held firmly in embrace. If both the mother and child die in the desperate game, so far the better; but in case where the child is killed in the process, but the mother is saved through a timely intervention of the well meaning and dutiful neighbours, the iron hand of law comes heavily upon her and she has to face the grave charge of murdering her child and also stand trial for an attempt to commit suicide. Unlike the English law, law in India while dealing with such cases, does not make any allowance for the disturbed mental balance of the mother, who might

36 J. Forensic Sci. (1966) 11, pp. 373-383.

37 W.H.O. (1968) Public Health Papers No. 35, Geneva, p. 17.

38 Henderson and Gillespie's Textbook of Psychiatry (1969) 10th Edition, Oxford University Press, London, p. 528.

39 Taylor's Principles and Practice of Medical Jurisprudence (1965) 12th Edition, J. & A. Churchill, London, pp. 475-479.

still then be recovering from the effects of her child birth and lactation ; although judges by and large may have felt strongly about treating such mothers with utmost sympathy and compassion.

THE INTERRELATED LEGAL ISSUES

Until 1922, the killing of a new born child was murder in English law, no matter by whom it was done.[40] The Infanticide Acts of 1922 and 1938, provided for the consideration of the disturbed mental state of the mother due to the effect of child-birth and lactation, when a woman caused the death of her child under the age of 12 months. Homicide Act of 1957 and Mental Health Act of 1959 (of England) which defines a "psychopathic personality" introduced further advance by bringing in the concepts of diminished responsibility and irresistible impulse resulting from disease or defect of the mind in dealing with the mentally afflicted offenders.[41]

In India, infanticide even when committed by the mother on her own child, is regarded as murder, and is punishable under section 302 I.P.C. by death or transportation of life and also fine ; and so is treated at par with the adult murder. In punishing the offender, who might appear otherwise mormal under the same or a related section of the Penal Code, the law in India provides hardly any room for considering the accused's mental condition while committing the crime. While dealing with an insane criminal, under section 84 I.P.C. our law still seems to be hide-bound to the McNaghten Rules[42] and keeps its doors snugly shut to the advances of modern psychiatric teaching about the mental and criminal responsibility of an insane offender. The ideas of diminished responsibility, and impulsive and irresistable acts of the mentally diseased or retarded as mitigating circumstances have not yet been accepted in our law.

One has to consider, whether the plea for a compasionate treatment should be extended to mothers killing their own children—who are either monsters and hence incapable of life ; or are grossly deformed as by drugs like "thalidomide"; or to the unfortunate women, who became pregnant following rape or seduction. This is not to say or suggest that "euthanesia" be permitted, though there are strong grounds for even that in many of these cases. But the problem really involves diverse interlinked and interrelated issues.

40 Gradwohl's Legal Medicine (1968) 2nd Edition, John Wright & Sons., Bristol, pp. 441, 442.

41 Taylor's Principle and Practice of Medical Jurisprudence (1965) 12th Edition, J. & A. Churchill, London, pp. 475-479 ; Modi's Text book of Medical Jurisprudence and Toxicology (1969) 17th Edition, N. M. Tripathi, Bombay, pp. 427 ; Henderson and Gillespies Text book of Psychiatry (1969) 10th Edition, Oxford University Press, London, p. 549.

42 Gour's Penal Law of India (1968) 8th Edition, Law Publishers, Allahabad, Volume I, p. 478.

A mother who was in the need of an abortion some weeks ago, but could not get it for some reason or the other, may well go for an infanticide (or filicide) at a later stage, after the unwanted child is born ; and she may also attempt or commit suicide thereafter. Hence enacting law on one of them or abortion alone, is not going to solve the complex social problem automatically. Changes in the existing medieval and harsh laws dealing with the infanticide and suicide cases in India, are also equally important and urgently called for.

As for the "abortions", it is high time that law reforms should also be introduced to bring the law in India in line with other civilized nations on all such vital issues affecting the society. The question assumes significance and urgency, inasmuch as nearly one-half of all the offenders, including the murderers, today are considered either "frankly insane or definitely mentally ill" and they need hospitalization for their mental conditions in place of conviction.

CONCLUSION

It was the canonical injunction against self-slaughter that stopped Hamlet from taking his own life ; but with at least 1000 persons a day committing suicide in the world[43] and about ten times the number attempting it, inspite of all barriers legal, moral or religious, suicide has emerged to the forefront as a grave social malady and a burning public health issue of our time.

Suicide is uniquely a human problem since man alone of all the animals, being endowed with power of reasoning, ability for abstract thought, and capacity to examine his own feelings has developed this propensity which flies in the face of nature.[44] What makes life so unbearable and what drives people to desperation ? What should be done to make life more humane and tolerable for the millions who are forced to decide on ending their own lives, in a bid to end their sufferings ? These are the important issues both personal and social and have to be answered, at whatever cost or sacrifice it may be. One who contemplates or commits suicide is admittedly a weak person who has not the capacity or courage to face the painful realities of life. Nevertheless such person deserves sympathy and support and not condemnation from the society which in a true sense is an accomplice to his desperate act.

To conclude this rather morbid and complex chapter let us recite with the Mikado :

"My object all sublime
I shall achieve in time

43 W.H.O. (1968) Public Health Papers, No. 35, p. 9.
44 Med. Sc. Law (1971) 11, pp. 131-134.

To make the punishment fit the crime"
(The Mikado).[45]

May we hope that the dreams of the Mikado be fulfilled ?

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RECENT TRENDS IN ADMINISTRATIVE ADJUDICATION IN INDIA

N. V. PARANJAPE*

Before Independence India was by and large a Police State. The interests of the British rulers were confined to the strengthening of their own power and influence in this country. They were mostly busy with the law and order problems of the country or fighting out the nationalist movement. It would therefore be futile to expect from such 'law and order government' any initiative in the direction of socio-economic welfare of the people. As a consequence of the limited functions of the administration there was hardly any opportunity for the courts[1] to play a decisive role in gearing up the administrative machinery of the government.

The dawn of Independence opened a new chapter in the history of administrative law in India. The promulgation of the Constitution of India on 26th January 1950 provided sufficient safeguards[2] to the individual against the powers of the State. Part IV of the Constitution of India[3] enjoins a duty upon the State (Government) to translate certain directive principles into practice for the attainment of the socio-economic good of the people. Thus the philosophy of welfare state has expressly been incorporated in the Constitution of India. The socio-economic measures undertaken by the Government ushered an era of such administrative activity in the country that it would be no exaggeration to say that India has moved into 'Administrative Age'.

In order to fulfil its commitments towards the people as contemplated by the Constitution, it became inevitable to confer large regulatory powers on the excutive. However, this raises the problem of reconciling the vast regulatory power of the Government with the rights of the individual. The arduous task of balancing administrative discretion on the one hand and affording due protection to individual's rights on the other, has been left for the courts to perform. The courts in India, therefore, have played a vital

* M.A., LL.M., Ph.D., Asstt. Professor of Law, Government Hamidia Law College, Bhopal.

1 *Ryots of Garbundhs v. Zamindar of Parlkimedi*—70 I.A.129 is an illustration on this point.

2 Part III of the Constitution of India contains Fundamental Rights.

3 Arts. 36 to 51 of the Constitution of India (Arts. 36 to 38 contain general principles of social policy. Art. 39 contains the socio-economic rights of Indian citizens. The Principles of Administrative Policy are contained in Arts. 40 to 50 while the directive regarding International policy for the Nation is contained in Art. 51).

role in moulding the administrative norms by the process of judicial creativity. The court's activism in setting norms in various areas of administrative law can be analysed under the following heads :

I. The doctrine of delegated legislation :

After Independence the question of permissible limits of delegation of legislative power has been engaging the attention of the courts. The Supreme Court *In re Delhi Law's Act* (1912)[4] tried to settle the extent to which the well known doctrine of delegated legislation could be accepted in Indian administrative law. The main question before the Supreme Court was whether the power of legislation should be narrowly limited or should be given a greater freedom to resort to new techniques, and, if the choice fell for the latter, whether it should be on the American or the British pattern.

It may be noted that the Federal Court of India in *Jatindra Nath v. Province of Bihar*,[5] had taken a narrow view of the delegation of legislative power and observed that there could be no delegation of legislative power in India beyond conditional delegation.[6] This line of approach, naturally did not suit the changed conditions of Free India and was also inconsistent with the basic philosophy of the Constitution and the Supreme Court did not accept this decision as a precedent.[7]

As to the choice between American interpretation of the doctrine of delegated legislation or the British approach, it could be seen that the former started with the theory of strict non-delegation but in practice accepted the doctrine of excessive delegation. This is evident from the fact that after 1937 rarely one finds the Supreme Court of United States holding a Central law bad on the ground of excessive delegation. Thus there has been no veto by the Supreme Court of United States in the federal field and the delegation of legislative power has come to stay as a technique of modern legislation. The position in England in this regard is, however, quite different. The parliamentary supremacy in Britain renders the delegation of power by the British Parliament immune from challenge before a law-court. This in other words means that there is no constitutional impediment to parliament's authority to delegate power at its choice.

Of these two extreme positions, the Supreme Court of India preferred to adopt a middle course. While it accepted the view that delegation of legislative power was ancillary to legislation it also emphasised that the

4 A.I.R. 1951 S.C. 332.

5 A.I.R. 1949 F.C. 175.

6 Conditional legislation means where the Legislature makes the law but leaves it to the executive to bring the Act into operation when conditions demanding such operation are obtained.

7 *In re Delhi Law's Act of 1912*, A.I.R. 1951. S.C. 332.

Parliament cannot delegate the essential legislative power[8]. Explaining the meaning of the words 'essential legislative power' the Supreme Court in *Harishanker Bagla v. M. P. State*[9] observed that the legislature must declare the policy and principles of the law and also provide a standard to guide the Administration in executing such laws. The delegation of legislative power (to the Central Government) was also up-held by the Supreme Court in *Bhatnagars Company Ltd., v. Union of India.*[10] The Court further reiterated its view in *N.T.F. Mills Ltd. v. The 2 nd Punjab Tribunal.*[11] Thus while the English courts have only a limited role in the realm of delegated legislation, the Indian courts, play a more creative role in setting norms in this difficult field. It would be noticed that wherever the delegation of power appears to be absolute,[12] the Courts have not hesitated to control it with a view to maintain an equilibrium between the administrative control and social welfare.

II. Validity of rules having retrospective effect :

The Courts in India have more than once reiterated their firm stand that the Administration is, neither expressly nor by necessary implication, empowered to make a rule operative retrospectively. The latest pronouncement on this point came from the judgment of the Supreme Court in *Hukum Chand etc. v. Union of India & other.*[13] Allowing the petitioner's appeal for the allotment of land in dispute, the Court observed that Sec. 40 of the Displaced persons (Compensation & Rehabilitation) Act, 1954 does not empower the Central Government expressly or by implication to make a rule retrospectively.

The Court's reluctance to favour retrospective legislation is indeed a progressive trend in as much as it seeks to extend due protection to the rights and claims of the parties which might adversely be affected by such retrospective laws.

III. The Rules of Natural Justice :

An administrative action which is not legislative, may either be quasi-judicial or administrative. The Courts exercise judicial control over the executive actions of administrative bodies to ensure that these bodies do not go beyond the scope of the power conferred on them. The administrative body must exercise its discretion for the purpose for which it was intended,

8 *In re Delhi Laws case.*

9 A. I. R. 1954 S. C. 465 (468).

10 A. I. R. 1957 S. C. 415.

11 A. I. R. 1957 S. C. 329.

12 In India the legislatures have to act within the ambit of the power given to them by the Constitution. An Act delegating legislative power must not be inconsistent with any of the provisions of the Constitution.

13 A. I. R. 1972 S. C. 2427.

and such discretion must be in accordance with the procedure prescribed for the purpose. An action of a quasi-judicial body may be assailed on the ground that it lacks jurisdiction or has acted in excess of its jurisdiction or has acted in violation of the rules of natural justice. The concept of natural justice sets certain minimum norms for administrative authority acting judicially. The two postulates of the principle of natural justice are :

(i) No man shall be a judge in his own cause (*nemo judex in causa sua*); and

(ii) No man shall be condemned unheard (*audi alteram partem*).

After 1962 there has been a notable change in the attitude of courts towards the concept of quasi-judicial functions of the Administration and it has moved in the direction of narrowing down the distinction between quasi-judicial and administrative functions. The border line between the quasi-judicial functions and the administrative actions of the government is vanishing fast as illustrated by the Supreme Court's verdict in *A. K. Kraipak* v. *Union of India*[14] In this case the Court set aside the selection made by a Selection Board which had as one of its members, a person who was himself a candidate for the post for which the selection was held. The Supreme Court observed that "the concept of judicial power has been undergoing a radical change" and "what was considered as an administrative power some years back is now being considered as a quasi-judicial power."[15] While expanding the application of these principles to administrative function as well Hegde J. observed :

> "If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries."

His Lordship expressed the view that it was often difficult to draw the line that demarcates administrative enquiries from quasi-judicial enquiries.

Kraipak's case fairly established the principle that the rules of natural justice apply even to purely administrative functions.[16] This, indeed is a very healthy development in the administrative law of India. The judicial interpretation given by the courts to the principles of natural justice sufficiently illustrates that the courts are playing a crucial role in shaping the administrative norms in this country.

14 A. I. R. 1970 S. C. 150.

15 A. I. R. 1970 S. C. 150.

16 This trend is along the lines of Judicial thinking in *Ridge v. Baldwin* (1963) 2 W. L. R. 935.

IV. *Obligation of quasi-judicial bodies to give reasoned decisions :*

The legitimate demand of administrative justice that in actions affecting the rights of a private party reasons for such decision must be given, has been engaging the attention of the courts for quite some time. The earlier view that unless where a law expressly requires to give reasons, an administrative authority is not required to do so[17], is no longer considered to be good law. It was in *Express News Paper* v. *Union of India*[18] that the desirability of giving reasoned decision was specifically stressed by the Supreme Court. The subsequent decisions also reflect the same trend in asmuchas they require that administrative authority must give 'reasoned decision' while performing quasi-judicial functions.[19] In case where the quasi-judicial authority gives reasons for its decision and the appellate authority agrees with it, there is no need for the latter to give reasons for its decision. However, in case the decision of the lower body is reversed by the appellate authority, then the latter has to state the reasons for doing so. Going a step further the Supreme Court in *Travancore Rayons Ltd.* v. *Union of India*[20] observed that there might be cases where the appellate authority might not agree in full with the reasons of the lower authority but has reached the same conclusion for different reasons. In such cases it would be most proper that the appellate authority should state the reasons for its decision. Emphasising this point the Supreme Court observed[21] :

> "the condition to give reasons introduces clarity, excludes or at any rate minimises arbitrariness ; it gives satisfaction to the party against whom the order is made ; it also enables an appellate or supervisory court to keep the Tribunal within bounds. A reasoned order is a desirable condition of judicial review."

In this context, it must be added that the Supreme Court's verdict in *Bhagatram* v. *State of Punjab*[22] is rather disappointing. The case involved the removal of a member of Municipal Committee and the reasons for removal were not conveyed to the aggrieved party. But the whole file of the case was placed before the Supreme Court and the court was satisfied after looking into the file that the removal was perfectly justified. The Court, therefore, held that non-communication of reason to the petitioner was perfectly justified under the circumstances. It is respectfully submitted that it is for the satisfaction not only of the court but of the individual adversely

17 *Benichand v. District Magistrate, Banda*, A. I. R. 1953 All. 476.

18 A. I. R. 1958 S. C. 578.

19 See *Govind Rao v. State of M. P.*, A. I. R. 1965 S. C. 1222 also *M. P. Industries Ltd. v. Union of India* A. I. R. 1966 S. C. 671.

20 A. I. R. 1971 S. C. 862.

21 Ibid.

22 A. I. R. 1972 S. C. 1571.

affected thereby, that the decision should be supported by reason. In the instant case the aggrieved party had no access to the files and in the absence of reasons for his removal he was bound to think that there was some thing 'fishy' about his case.

The reasoned decisions from quasi-judicial bodies, therefore, seem to to be the best safeguard to preserve public confidence in the administration.

V. *The right of a person to be represented by a lawyer before quasi-judicial bodies :*

Another significant area of administrative law where the court's activism is clearly discernible relates to the right of a person to appear through a counsel or a lawyer before a quasi-judicial body. The Supreme Court's approach to this problem is reflected in a recent decision in *C. L. Subramanian* v. *Collector of Customs, Cochin.*[23] This was an appeal against the removal of the petitioner who was a Preventive Officer, Grade II, in the Customs Office, Cochin. The petitioner had challenged the enquiry proceedings on the ground that in his case the Government side was represented by a seasoned lawyer while he was refused permission by the Government to appear through a legal practitioner. The Supreme Court held that denial of an opportunity to the petitioner to appear through a lawyer when the Government (respondent) themselves were represented by a trained lawyer vitiated the enquiry and the removal of the petitioner was, therefore, set aside. It may be noted that English Courts had also taken a similar view in *Pett* v. *Greyhound Racing Association Ltd.*[24] where the Court of Appeal observed :

> "(W) hen a Man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth he has also a right to speak by Counsel or Solicitor."

Thus it is quite desirable that where the person, property or reputation of an individual is affected he must be given permission to appear before a quasi-judicial body through a counsel or a lawyer of his choice.

VI. *Control over the administrative discretion of non-quasi-judicial bodies :*

The Control over the administrative discretion of non-judicial bodies has, indeed, been a very controversial issue in the area of administrative adjudication. It is well established that the rules of natural justice provide procedural safeguard only against the arbitrary discretion of quasi-judicial bodies and have no application in case of administrative discretion of administrative bodies. Though the dividing line between a quasi-judical function and an administrative action is vanishing fast, yet so long as it exists, the courts have been seeking definite tests to adjudge the vires of an administrative discretion reached by the administrative bodies. The judicial trend in India

23 A. I. R. 1972 S. C. 2178.
24 (1968) 2 All E. R. 545.

is to invoke the doctrine of 'fair play' in deciding the vires of administrative discretion of non-judicial bodies. This is well illustrated by the Supreme Court's decision in *Rampur Distillery Co.* v. *Company Law Board.*[25] In that case the Company at a meeting resolved that Managing Agency of Govan Brothers be continued till Agust 14, 1970. When the name was sent to the Company Law Board for approval. the latter disapproved it on the ground that the past conduct of the proposed persons could not be ignored while considering them for a similar appointment in another Company. The Company challenged this administrative order of the Board on the ground that its order was a stigma on the professional integrity of the proposed Managing Agent as well as the Company. Dismissing the appeal the Supreme Court, however, observed :

> "(I) nvestigating power of Central Government under Sec. 326 of the Companies Act, 1958, carries a duty to act judicially i.e. to hold enquiry in a manner consistent with the rules of natural justice, to consider all relevant matter and ignore irrelevant matters and reach a conclusion without bias and without predilection and without prejudice."

The courts also exercise control over arbitrary discretion of the administrative bodies by insisting that while initiating action against an individual, the administrative authority must have *'reason to believe'* that there is some material or fact against the individual on which such belief is founded. The words 'reason to believe' suggest that belief must be of a honest and reasonable man based on material or facts available against the individual proceeded against. That is to say, the action should be founded on reasonable grounds and "not on mere suspicion, gossip or rumour." The Supreme Court in *Sheonath Singh* v. *The Appellate Assistant Commissioner of Income Tax (Central) Calcutta and others*[26] set aside the order of the Income Tax Commissioner on the ground that the Income Tax authority had no material before it constituting 'reason to believe' that the assessee had evaded any tax on his gains and profits. Allowing the appeal the Supreme Court observed that the Income Tax Department in this case had neither direct nor circumstantial evidence to proceed against the petitioner but had acted on mere suspicion and this vitiated the proceedings.

It would thus appear that by applying these tests for adjudging the vires of administrative action the Supreme Court seeks to provide adequate protection to the rights of private parties.

25 A. I. R. 1970 S. C. 1789.
26 A. I. R. 1971 S. C. 2451.

VII. *Issue of a Writ of Mandamus :*

The law as to the issuance of a writ of mandamus to certain statutory bodies has been in a state of confusion for all these years. It has been well settled that mandamus can be issued to government departments and also to local bodies such as municipalities[27] and others. The Supreme Court has been issuing mandamus to statutory bodies and there has been no controversy on this point. Thus in *Mafat Lal* v. *Divisional Controller of State Road Transport Corporation*[28] the Court issued mandamus to the State Road Transport for wrongful dismissal of an employee. Similarly the writ was issued to a Life Insurance Corporation[29], to a University[30] and to the Board of High School.[31]

In *Rajasthan Electricity Board* v. *Mohanlal*[32] the Supreme Court considered the question as to whether a writ of mandamus could be issued to a business house even if it was the creature of a statute. Answering the question in affirmative the court observed that a writ of mandamus can be issued to a government department or a government, semi-government or a statutory body on whom powers are conferred by law, and it does not matter if some of these powers may be for the purpose of carrying out commercial activities[33].

It is now an established law that mandamus lies to secure the performance of a duty of a public nature and not to resolve private disputes. But, of late, the question of issue of mandamus to private registered bodies discharging duties of public nature has gained importance. With the enactment of various industrial and other laws imposing multiple liabilities, duties and restrictions on them, the courts have leaned in favour of liberal application of this writ to private bodies or individuals as evident from the dicta in some of the High Court decisions.

The High Court of Bombay issued a writ of mandamus to a private company, a public utility concern, for failure to carry out its duties under the statute[34]. The High Court of Allahabad issued mandamus even to an ordinary joint stock company to restore the services of a Labour Welfare Officer whose service conditions were regulated by the Factories Act and the rules made thereunder[35]. Similarly the High Court of Madhya Pradesh issued

27 *Municipal Corporation of Delhi* v. *Kishan Dass*, A. I. R. 1969 S. C. 386.
28 A. I. R. 1966 S. C. 1364.
29 *Life Insurance Corporation* v. *Sunil Kumar*, A. I. R. 1964 S. C. 847.
30 *Akshaibar Lal* v. *Vice Chancellor, B.H.U.*, A. I. R. 1961 S. C. 619.
31 *Board of High School* v. *Ghanshyam*, A. I. R. 1962 S. C. 1110.
32 A. I. R. 1967 S. C. 1857.
33 Ibid.
34 *Corporation of Nagpur* v. *N.E.L. and P. Company*, A.I.R. 1958 Bom. 498.
35 *Synthetics and Chemicals Ltd.* v. *G. C. Kumar* (1967) II I.L.R. All. 325.

a writ of mandamus to a co-operative society quashing its order suspending an employee on the ground that the bye-laws conferred no such powers on it. In this case the Court treated the bye-laws as having statutory force[36].

The decision of the High Court of Delhi in *Amir Jamin* v. *Desharath Raj*[37] observed that Jamia Millia Islamia, a society registered under the Society Registration Act, 1860 and an educational institution declared to be a 'deemed' University under Sec. 3 of the U.G.C. Act, 1956 was a public authority to which a mandamus could be issued. The reason for this view being that a University cannot be a private institution and that a power to confer degree is a statutory power of governmental nature, hence it is a public authority.

As to the issuance of mandamus to government Companies the Supreme Court in *Praga Tools Corporation* v. *C. V. Imanual*[38] refused to issue a writ of mandamus to a government Company because it was neither a statutory body nor had any public duty or responsibilities imposed on it by a statute.

In a recent case[39] involving the question of issue of a writ of mandamus against a trading company, the High Court of Delhi observed that for the issue of this writ the requirement is that the Company must have failed to perform any duty imposed upon it by the statute by which it is created for the purpose of fulfilling public responsibilities. In this case the petitioner moved for a writ of mandamus against the respondent Company for it had withdrawn enhanced house-rent of the petitioner without complying with the provision of section 9 A of the Industrial Disputes Act, 1947. The Court observed that the respondent Company, had neither been created by a statute nor had any statutory duty. It could not, therefore, be said that alleged non-compliance of Sec. 9 of the Industrial Disputes Act, 1947 by it entitled the petitioner to claim that mandamus be issued to the Company. The petitioners appeal, was, therefore, dismissed.

An analysis of the case-law referred to above would reveal that the writ of mandamus, besides being available against the statutory bodies for the performance of a public duty, can also be issued to a non-statutory body if it is subject to a public or a statutory duty by a law or it is engaged in some activity of public utility nature.

VIII. *Conclusion :*

From the foregoing survey we can conclude that the administrative law in India, by and large, is an outcome of court's activism. The courts have evolved on case to case basis definite principles of law which furnish a guide

36 *Dukhoo Ram* v. *Co-operative Agricultural Association*, A.I.R. 1961 M.P. 289.
37 (1967) I. L. R. Delhi 202.
38 A. I. R. 1969 S. C. 1306.
39 *National Seeds Corporation Employees Union and others* v. *National Seeds Corporation*, A. I. R. 1972 Delhi, 292.

line for regulating administrative activities. It is, however, true that this active participation of courts in providing norms for administrative actions and their role as instruments of administrative justice is limited only to the cases and precedents coming before them for adjudication. The courts seldom have appellate power over the decisions of the administrative bodies. The judicial review of administrative action is strictly limited to matters of jurisdiction and conformity with rules of natural justice. They are, therefore, excluded from undertaking the examination of administrative decision on merits. Under the circumstances, there is an urgent need to establish certain special Administrative Tribunals or the like institutions as has been done by some of the commonwealth countries in recent times.

At present there is a wave of 'reformation' in the field of administrative law. In England,[40] Australia, New Zealand and United States commendable work has been done in this direction. The institution of Ombudsman was introduced in New Zealand in 1962 and was adopted by United Kingdom in 1967. With the enactment of Judicature Amendment Act, 1968 an Administrative Division of the Supreme Court[41] was established in New Zealand to deal with the administrative matters. Recently the Administrative Review Committee[42] in Australia has stressed on the need for a general system of Administrative law and also for the establishment of administrative institutions including those for review of administrative decisions affecting individual rights. In United States, besides there being a code of Administrative Procedure,[43] an Administrative Conference of the United States was established in 1968 to undertake research connected with the intricate problems of administrative law.

In India the enactment of Commission of Enquiries Act, 1952, the establishment of the Administrative Reforms Commission in 1965 and the proposal for the institution of Lokpal and Lokayuktas[44] are no doubt some of the concrete measures in the direction of reforming the administrative law.

40 In England the Frank Committee appointed in 1957 did a commendable job in the area of administrative law. It is on the suggestion of this committee- that the Tribunals and Inquiries Act, 1958 was enacted.

41 The proposal for creating an Administrative Division of High Court was, however, rejected by the Frank Committee in England in 1957.

42 The Committee was appointed in October 29, 1968 and finally submitted its report in April, 1971.

43 The Code is prescribed under the Administrative Procedure Act, 1946.

44 The Administrative Reform Commission in 1966 suggested the appointment of Ombudman in India to be called as Lokpal and Lokayuktas. Consequently a Bill to this effect was introduced in Lok Sabha in 1969. The States of Maharashtra and Rajasthan have already appointed Lokayuktas while the State of Gujarat proposes to adopt it soon. There are, however, no indications about the appointment of Lokpal for the present.

But much yet remains to be done. The needs of administrative justice demand that there should be complete overhauling of the Indian administrative law so that the rights of private parties are properly protected. The much delayed institution of Lokpal should be introduced forthwith to supervise and investigate actions of the administrative officials and the acts of quasi-judicial authorities. India today needs a comprehensive legislation on administrative law along the lines of administrative procedure in United States prescribing rules of conduct for administrative authorities and quasi-judicial bodies.

THE CONCEPT OF INDUSTRY UNDER INDUSTRIAL DISPUTES ACT, 1947 AND CHIEF JUSTICE P. B. GAJENDRAGADKAR*

YOGENDRA SINGH**

The two dimensional concept of industry under the *Laissez Faire* in which the employer and the employee were exclusively participants has given way to the three dimensional concept in which in addtion to these two the community is also equally interested.[1] The community's concern in the industrial peace is obvious : *First :* it is interested in the uninterrupted flow of production ; *Second :* the dignity of labour be maintained or at any rate not mutilated unduly. Despite this sociological change in the industrial process, some of the rickety norms of the nineteenth century still hold the ground. In the absence of precise legislative provisions to cope with the change, the judge will be placed in an unenviable situation : on the one hand, if he applies the old norms for the solution of the current industrial problems, it may further generate sociological reactions due to the anachronistic approach, on the other hand, if he discards those norms as obsolete in the present context and formulates new ones to suit the current needs, he will be accused of assuming the role of a legislator. Chief Justice Gajendragadkar in an attempt to determine the expanse of the term "industry"[2] under the Industrial Disputes Act[3] has failed to resolve this dilemma ; while he has evolved certain bold norms in some cases,[4] he has struck a discordant note in others.

In *State of Bombay* v. *Hospital Mazdoor Sabha,*[5] two ward servants in J. J. Group Hospitals, Bombay were retrenched from service and later,

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* Chief Justice P. B. Gajendragadkar has been intimately connected with judicial process for about twenty years. His period of judgeship has practically run parallel with the period of India's Independence and has been for him, as for every Indian, a period of "destiny and challenge" vide "The New Chief Justice" by Dr. G. S. Sharma, Hindustan Times, Ist Feb., 1964.

** B.A.,LL.M., Lecturer, Law School, Banaras Hindu University.

1 *D. N. Banerjee* v. *P. R. Mukherjee* (1953) IL.L.J. 195, 197-199.

2 Section 2(*j*) of the Industrial Disputes Act, 1947 runs as follows :

> "Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

3 Hereinafter referred to as "Act."

4 *Ram Nath and others* v. *University of Delhi,* (1963) 1 L.L.J. 335. *National Union of Commercial Employees* v. *Meher* (I.T.) (1962) IL.L.J. 241.

5 (1960) IL.L.J., 251.

two state servants who had been retrenched due to "the closure of the appellant's Civil Supplies Department" were appointed in their place. Consequently the aggrieved employees petitioned the High Court that since the management had not complied with the mandatory provisions of S. 25F and S. 25H of the Act in retrenching them, the order of termination was void. The management repelled this contention on the ground that the J.J. Group of the hospitals did not fall within the purview of the term "industry". So before examining the validity of the management action, the Court had to give its verdict on the exceedingly important point whether the term "industry" under the Act is wide enough to include the hospitals.

Mr. Gajendragadkar after careful analysis came to the conclusion that the concept of "industry" as envisaged under the Act was wide enough to include hospitals. Taking note of the modern trends of the industrial democracy, the learned judge observed :

> "Industrial adjudication has necessarily to be aware of the the current of socio-economic thought around ;"[6]

His Lordship laid down the postulate that the industrial adjudication should not adhere to the doctrinaire approach.[7] The learned Chief Justice proceeded to consider some of the attributes of the concept of "industry" as well as some of the well established principles of interpretation relevant in the context.

The contention of the appellant that the expression "undertaking" occurring in the defiition of "industry" under the Act should share the same meaning as "trade or business" under the doctrine of *noscuntur a sociis*[8] did not find favour with his Lordship. The learned judge declared that the doctrine :

> "*noscuntur a sociis* is merely a rule of construction and it can not prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with the words of narrower significance is doubtful or otherwise not clear, that the present rule of construction can be usefully applied."[9]

However, in view of the inclusive nature of the definition of "industry", the learned Chief Justice was alive to the danger of bringing all kinds of services,

6 (1960) IL.L.J., 251, 257.

7 *Ibid.*

8 "This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is the more general is restricted to a sense analogous to a less general." (1960) ILL.J. 251, 256.

9 (1960) IL.L.J., 251, 256.

whether personal or domestic, within that definition. Mr. Justice Gajendragadkar (as he then was), while rejecting the view that the two traditional features of industry namely the investment of capital and profit motive alone are elemental in determining the scope of the term "industry" in section 2 (j) of Act, laid stress on "the character of activity" which may elude any specific formula. According to his Lordship any activity systematically organized in the manner of a trade or business undertaking, requiring co-operation between the participants, resulting in conferment of benefits upon the community, may come within the purview of the concept of "industry".

The judicial awareness that adherence to the traditional approach in the industrial adjudication may generate a reaction is further reflected. In *Hari Nagar Cane Farm* v. *The State of Bihar*,[10] the expression "undertaking" in the definition clause "industry" was interpreted somewhat liberally to include the agricultural operations within the ambit of S. 2(j) of the Act. In the instant case, the appellant firm was purchased in March 1956, by Hari Nagar Sugar Mills, Ltd. and since then it formed part of the organization of the mills. An industrial dispute which arose between workmen of the firm and the appellants was referred by the Government to the tribunal. Mr. Setalvad for the appellants argued with vehemence referring to the relevant provisions of the Constitution[11] that agriculture and industry had always been viewed as distinct and separate. Further, the learned counsel, on the parity of S. 3 (19) of the Bombay Industrial Relations Act, 1946 asserted that in the absence of express provision to include agriculture within the purview of "industry", it could not be said that the expression "industry" howsoever liberally interpreted would include agricultural operation. On the other hand, on the strength of S. 2(g) of the Minimum Wages Act, 1948[12] read with the Part II of the Schedule, an attempt was made by the other party to show that it was not at all impossible to include agricultural operations within the term "industry". Further, S. 4 of the Australian Conciliation and Arbitration Act, 1904, was referred to emphasize that where the legislature wanted to include the agricultural operation, it did so expressly. Reliance was also placed on S. 25 A of the Act, 1947, to indicate that the expression "industrial establishment" is inclusive of plantation, Hence it is not at all dificult to bring in agriculture also (plantation being a form of agriculture) in the definition of "industry". Conceding the force of the argument of Mr. Setalvad, his Lordship formulated :

10 (1963) I L.L.J., 692.

11 The Constitution of India, Art. 43, schedule VII, Entry 14 and 18 of State List, and entry 22 of the Concurrent List.

12 Section 2 (*g*) of the Minimum Wages Act, 1948 runs as follows :
"Scheduled employment" means an employment specified in the schedule or any process or branch of work forming part of such employment."

"It is desirable that industrial adjudication should deal with problems as and when they arise and confine its decisions to the points which arise strictly on the pleadings of the parties. If in reaching any conclusion while dealing with the narrow aspect raised by the parties before it, industrial adjudication has to evolve some principle, it should and must, no doubt, attempt to do so but in evolving the principle, care should be taken not to lay down an unduly general and broad proposition which may affect facts and circumstances which are not before the industrial adjudication in the particular case with which it is concerned."[13]

The learned Judge refrained from laying down a "broad and unqualified proposition that agriculture of all kinds is included in S. 2(j)" of the Act; instead he relied on the traditional requirements viz. investment of capital and profit making motive, which were quite apparent on the facts of the case. Moreover, the manner in which the said agricultural operation was organized did resemble trade or business.

In view of the technological advancement of the present century which has made agro-industrial co-operation inevitable, there is a clamour for the extension of labour laws to the field of agriculture. The anxiety to preserve the *status quo* and avoid the initial convulsions should not deter the decision makers from interpreting the existing provisions in conformity with the felt needs of time. The learned Chief justice in this case has given the signal to the legislators to pursue the matter further and facilitate the emergence of a new pattern in this area.

THE DELHI UNIVERSITY CASE[14]—A TURNING POINT

The respondents in the above case were employed in the Delhi University as drivers of buses run for taking the girl students attending the college. As it resulted in loss, the University decided to wind up the bus service. With this end in view, the two drivers were retrenched. The respondents made applications under S. 33C(2) of the Act for realizing the retrenchment compensation. The tribunal overruled the preliminary objection of the appellants that the work carried on by them was not an industry under S. 2(j) of the Act, and on merits, directed the appellants to pay Rs. 1050- "to each one of the respondents as retrenchment compensation." Hence, the Delhi University appealed to the Supreme Court by special leave. Mr. Justice Gajendragadkar (as he then was) proceeded to consider the wider question whether the work carried on by an educational institution is an "industry" within the meaning of S. 2(j) of the Act, The appellants contended that the literal rule of construction should not be mechanically applied

13 (1963) I L.L.J. 692, 695.

14 *University of Delhi and another* v. *Ram Nath and others.* (1963) 2 L.L.J. 335.

as the policy of the Act is to keep the educational institutions beyond its purview. On the other hand, relying on the *Hospital Mazdoor Sabha* case,[15] the respondents argued that "S. 2(j) of the Act has defined the word "industry" deliberately in the words of widest amplitude and there is no justification for putting any artificial restraint on the meaning of the said word as defined."[16]

The learned judge attempted to ascertain whether capital-labour nexus could chime with the relationship between the definition of "employer"[17] "Workman"[18] and "industry"[19] and also expatiating on the object and philosophy of education,[20] the learned judge concluded that the policy of the Act could not have meant to include education within the ambit of the

15 (1960) 1 L.L.J. 251.

16 (1963) 2 L.L.J. 335, 337.

17 Industrial Disputes Act, 1947, section 2 (*g*) runs as follows :

"Employer means—

(i) in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in this behalf or where no authority is prescribed, the head of the department ;

(ii) in relation to an industry carried on by or on behalf of a local authority, the chief executive officer of that authority ;

18 Industrial Disputes Act, 1947 Section 2(*s*) runs as follows :

"Workman" means any person (including an apprentice) employed in any industry to do any skilled, manual, supervisory, technical or clercial work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceedings under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Army Act, XLVI of 1950, or the Air Force Act, XLV of 1950, or the Navy (Discipline) Act, XXXIV of 1934 ; or

(ii) who is employed in the police service or as an officer or other employee of a prison ; or

(iii) who is employed mainly in a managerial or administrative capacity ; or

(iv) who being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

19 See *supra* foot note 2.

20 "Education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development.....Under the sense of values recognized both by traditional and conservative as well as modern and progressive outlook, teaching and teachers, are, no doubt, assisgned a high place of honour and it is obviously necessary and desirable that teaching and teachers should receive the respect that is due to them. A proper sense of values would naturally hold teaching and teachers in high esteem, though power and wealth may not be associated with them." (1963) 2 L.L.J. 335, 338.

term "industry" for the benefit of the subordinate staff which might be insignificant in strength. Further, his Lordship held that in view of the principal activity of the University being education, the insignificant subordinate staff can not alter the character of the institution. Though he was alive to the proposition that the absence of profit motive would not take away the activity outside the limits of the relevant section of the Act, the learned judge rationalized that education is more on the side of a mission and vocation than that of a profession.

At the outset, it has to be considered whether it was necessary in the instant case to decide the larger issue whether an educational institution comes within the purview of S. 2(j) of the Act. The facts of the case reveal that the dispute between the drivers and authorities of the University was with regard to the retrenchment compensation and not in respect of "employment", "non-employment", "terms of employment" and "conditions of labour"[21] of any member of the academic staff. The limited question before the Supreme Court was whether in such a fact-situation, the industrial law as to the particular matter was applicable or not. In view of the accepted norm of judicial policy that the highest court should not lay down unduly broad principles of law except when the occasion demands, it was not at all necessary for the court to decide the larger question. Hence, the attempt of the Court to enter the wider field of education (which does not conform to the pragmatic approach) for reaching the conclusion seems to be off the track.

It is significant that the main issue in the case could have been isolated for the purpose of the decision. Though it is true that the main function of the University is to disseminate knowledge in various branches yet nothing could have prevented the Court from deciding whether the specific activity undertaken by the University came within the purview of the term "industry". The first querry in the aforesaid situation should be, whether the relevant activity could be isolated from the whole process ? If it could be, then, whether the activity could be carried out by the private individual ? Whether the function is the sovereign function ?

It is quite possible that an educational institution may be involved in many undertakings in diverse ways.[22] And, in such a situation, it would

21 The Industrial Disputes Act, 1947 section 2(*k*) defines industrial dispute as—

"industrial dispute" means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

22 Universities in the modern times do undertake many activities which may not come within the purview of educational process. For instance, Banaras Hindu University has its own big press, hospital, pharmacy, Agricultural farm and Dairy, Public Works Department with a large labour force; see also, *Lalit Auyrvedic Pharmacy* (1960) 1 L.L.J. 523 (S.C.)

amount to the evasion of the issue to say that the activity in question is only an insignificant and secondary function of the main body. The problem of distinguishing and separating the educational process from industrial process is not an impossible task so long as we are alive to the trappings of industry.[23] In the instant case itself, it would not have neen dificult to apply the pragmatic method employed by justice Subba Rao (as he then was) in *Corporation of City of Nagpur* case,[24] on the ground that the University being the creature of statute[25] is in a sense a corporation.

The policy that education should not fall within the purview of industry is echoing throughout the judgment. Indeed, the decision amply illustrates the judicial rationalization of preconceived notions of his Lordship. The learned judge was convinced that the atmosphere of industrialism should not pervade the sacred precincts of the University. The adoption of doctrinaire approach animated by the predisposition of the decision maker has been responsible for abandoning the functional approach. The result has been the displacement of principle of "character of activity" established in the *Hospital Mazdoor Sabha*[26] by the doctrine of "principal activity."[27]

23 *Budge Budge Municipality* case (1953) 1 L.L.J. 1951 (S.C.) ; *Hospital Mazdoor Sabha* 1 L.L.J. 251 (S.C.) *Corporation of City of Nagpur* v. *Its Employees* (1960) 1 L.L.J. (S.C.) ; *Workmen of Sri Ram Chandra Bhanj Medical College Hospital Cuttack* v. *Sri Ram Chandra Bhanj Medical College Hospital Cuttack and others* (1965) 1 L.L.J. 187, in which High Court of Orrissa has successfully applied the technique of distinguishing industrial process from the rest of the affairs.

24 (1960) 1 L.L.J. 523 (S.C.).

25 The Delhi University Act, 1922, Section 3 (2) States :

"The University shall have perpetual succession and a common seal and and shall sue and be sued by the name.

26 (1960) 1 L.L.J. 251.

27 The confusion that has been created by the *Delhi University* case would be illustrated by citing the decision of the Patna High Court in *Vishnu Sugar Mills, Ltd., Harkhua* v. *State of Bihar and others* (1966) 1 L.L.J. 777. In the instant case, the management mainly carried on an industrial undertaking. It also engaged some teachers for imparting education to the children of its employees. In considering the point as to the competency of teachers to raise the industrial dispute, the High Court relied on the *Delhi University* case (1963) 2 L.L.J. 335, and held that teachers were not workmen in the concern. It is difficult to understand as how their Lordships of the Patna High Court could arrive at this conclusion. As noticed earlier, the Supreme Court drew clear-cut distinction between the principal and incidental function of the concerned body. Since the principal function of the University was confined to the dissemination of the knowledge, the incidental function could not alter this character. So the adoption of the *Delhi University case* should have logically led their Lordships of the Patna High Court to a different conclusion as the principal function of the body was industrial in nature. Had their Lordships stuck to the decision in *Hospital Mazdoor Sabha*, the stand could be justified.

Non-adherence to the policy of judicial auto-limitation, the rejection of functional approach, and judicial rationalization of predispositions in the above case have narrowed down the application of labour law whereby fact-situations which are intrinsically industrial in character are excluded from the purview of the Act. Quite apart from frustrating the normal aspirations of personnel of such undertakings the decision hampers the growth of the trade union movement. The observations of Dean Anandjee are apposite here :

> "We are not in favour of curtailing the wide import of the words used in the definition of "industry". Assume, for a moment that the university of Delhi has not got a few buses but hundreds of them for their 2,700 students and there are, say, 500 bus drivers and conductors. Obviously, these employees have very little, if any, capacity to individually bargain with the University of Delhi. In order to effectively deal with the management, they have to resort to collective actions. Art. 19 (1)(c) of the Constitution guarantees the "right to form associations or unions." However, according to the Supreme Court decision in *All India Bank Employees* case, the consitutional guarantee is restricted merely to the formation of union, in particular it does not protect collective action. Under the circumstances, if the aforesaid employees resort to economic instruments of coercion, their action would invite the application of the provisions of Indian Penal Code relating to criminal conspiracy and abetment of offences, of Section 7 of Criminal Law Amendment Act 1932 and of the doctrine of civil conspiracy and restraint of trade. The provisions of Trade Unions Act, 1926, which seeks to protect union activity, it might be mentioned, would be inapplicable unless the concerned workmen are employed in an "industry". What is worst, the Government cannot, in the absence of their being employed in an "industry", intervene in their disputes under the Industrial Disputes Act, 1947. The result is that a limited interpretation of the expression "industry" leaves quite an appreciable number of working force at the mercy of those who have often been described as the exploitors of labour."[28]

Chief Justice Gajendragadkar's attitude of infusing his predispositions into the cases before him could well be seen in an earlier case, the *National Union of Commercial Employees* v. *Meher Industrial Tribunal, Bombay and others*[29] wherein his Lordship held that the attorney's firm is outside the ambit of the definition of "industry". The appellants made demands relating to the bonus

28 "The analysis of adjudication in India". The paper submitted by Prof. Anandjee at the Industrial Relations Seminar organized by the Shree Ram Centre, New Delhi.

29 (1962) 1 L.L.J. 241.

for the years 1955-56 and 1956-57 along with other matters. The conciliation failed to bring about the settlement, hence the reference under S. 12(5) of the Act was made. The firm advanced a preliminary objection that there was no valid reference of the dispute as the profession could not fall within the purview of the definition of "industry". The Tribunal conceded this argument and held that it had no jurisdiction over the dispute. The High Court upheld this view that the firm could not constitute an industry and, hence, there could not arise an industrial dispute which might form the subject matter of reference. Against the decision of the High Court, an appeal was preferred to the Supreme Court.

Mr. Chari, the counsel for the appellants argued that the nature of cooperation between the firm of solicitors and its employees which necessarily leads to the institutionalization puts the firm at a level different from that of the individual solicitor's work. However, this argument did not find favour with the Court as the test suggested by the Counsel would apply with equal force to the case of a individual solicitor employing a large number of employees

Mr. Justice Gajendragadkar (as he then was) struck an emphatic note that the co-operation between employer and employees is essential and must be direct having relevance to the production of goods or rendering of service. Though he proceeded to say with some qualms, that—

> "There is, no doubt, a kind of cooperation between the solicitor and his employees."[30]

the learned judge cut short to observe :

> "but that co operation has no direct and immediate relation to the professional service which the solicitor renders to his client."[31]

By declaring that the distinguishing feature of liberal profession is the intellectual and educational equipment, the learned judge concluded that the solicitor's firm was beyond the reach of the industrial law.

Though the decision safeguards the legal profession from the omnivorous expression "undertaking" occurring in the definition of industry, it can not escape strong criticism. *First*, the firm is clothed with semi-legal personality, it can sue and be sued.[32] Obviously, its rights and duties are different from the rights and duties of members who are engaged in liberal profession. It exists as a legal or semi-legal fact. There is some force in the argument of Mr. Chari that the process of institutionalization is productive of different bundles of rights and duties, a natural result of incorporation. In view of this criticism, his Lordship's argument that the test suggested by the counsel

30 (1962) 1 L.L.J. 241, 245.

31 *Ibid.*

32 Civil Procedure Code, Order XXX, Rule 1.

would equally apply to a case of individual solicitor engaging a large number of employees loses its force. *Second*, in the modern technical age, it is extremely difficult to distinguish between liberal and non-liberal callings since the borderline is too vague. *Third*, his Lordship's attempt to distinguish the solicitor's function from that of the medical doctor on the ground that the solicitor's function is essentially dependent upon the professional equipment, knowledge and efficiency" of the solicitor concerned has little substance in it. Does it suggest that the medical profession does not depend upon the professional equipment, knowledge and efficiency. ? For instance, a doctor practising independently having his own nursing home would answer the description of a liberal profession, because without his "intellectual and educational background", the subordinate staff would be helpless.

The decision leaves the impression that the learned judge (as he then was) was inclined to protect the liberal profession of law from the clutches of industrial law and this predisposition affected the decision making.

In one set of circumstances, the learned Chief Justice taking account the "current" and cross-currents of industrialism" gives a go-by to the traditional and doctrinaire approach on the expression "undertaking" occuring in the definition clause of industry. On the other hand, in another set of circumstances, his Lordship ignores the norms he has evolved in the earlier cases and under the sub-conscious pressure of "inarticulate premiss" gives effect to his predispositions and restricts the scope of the term "industry". Thus the attitude of the learned Chief justice goes upward through the *Hospital Mazdoor Sabha*[33] and *Hari Nagar cane, Farm*[34] but drops downward with the *solicitors firm*[35] and *Delhi University*[36] *cases* thereby reflecting a sort of judicial dualism.

33 (1960) 1 L.L.J. 251.
34 (1963) 1 L.L.J. 692.
35 (1962) 1 L.L.J. 241.
36 (1963) 2 L.L.J. 335

Notes and Comments

SOME SUGGESTED REFORMS TO THE INDIAN COMPANIES ACT 1956*

There are many provisions in the new Indian Companies Act 1956 which make it different from the English Act and give it an existence of its own. Many critics have focussed attention on its "inordinate length", the complexity of its structure, "lack of precision and concreteness", "the interposition of Governmental control even in apparently minor matters," and "the plethora of returns and forms required to be furnished by the management without any corresponding utility."[1] Some of these criticisms though not entirely unfounded are in most cases an exaggeration. Some of the provisions might prove to be unhelpful or impracticable in their application but most of them are necessary.

The new Act has made far-reaching impact on the corporate scene. There is a steady increase in the number of companies. The relationship between directors and shareholders has become healthier ; much of the malpractices which were found in managerial actions have disappeared. Directors have started concentrating on the managerial tasks for which they are primarily appointed. Now they are not considered 'paternal guardians' of shareholders. The suppliers of capital-shareholders-have started taking interest in the company's affairs. The Government is also fulfilling important functions well and ensuring that the country's wealth is utilised for the betterment of the people. Shareholders have been given various rights, and they are now well protected. The Cohen Committee's statement, which was approved by the Bhabha Committee in India that the "control theoretically exercised by shareholders" is "illusory" seems, however, to be an over-statement. The Act provides shareholders with powerful weapons ; however the difficulty is that in many cases they are unable to use them. It may be true that a small investor may not be able to organise requisite support which is required under the scheme of the present Act to force the majority and/or management to act in his favour. Even in England, the conditions have changed after the Act of 1948 and the Jenkins Committee[2] has disagreed with the Cohen Com-

* This paper was presented at the 4th All India Company Law Seminar, organised by the Association of Company Secretaries, Executives & Advisors, Calcutta in 1969. This is the revised version of the same.

1 See Report of the Companies Act Amendment Committee (known as Sastri Committee), Government of India, New Delhi, 1957, Para 5.

2 See *Report of the CompanyLaw Committee*, London, 1962 Comnd. 1749, para 106.

mittee's statement made 17 years before.[3] Despite these changes there are many areas where further reforms could be effectuated which while solving the problems of the Indian society would make the Act a model enactment for others. An attempt is made in this paper to highlight the shortcomings of the present Act in various areas and offer some suggestions for further reform in the existing statute.

I

OBJECTS CLAUSE OF THE MEMORANDUM OF ASSOCIATION[4]
(Section 13)

In 1965, section 13 (c) was amended with a view to make the objects clause of a company more realistic. Now the companies have to classify their objects into two groups; (i) main objects and incidental to main objects (ii) other objects of the company. The present amendment does not put an end to the evil of having multipurpose or lengthy objects clauses. Since no limit has been put on the number of objects, new companies will pack their memoranda with numerous main objects. It also does not purport to interfere with the *Cotman* v. *Brougham* rule of interpretation of memorandum.[5] What would be the legal nature of the objects mentioned in the amended section 13 (d)(ii) ? They are neither main objects nor incidental or ancillary to the main objects. Will not they be independent clauses completely unrelated to the main objects ? Will there be any limitation or restrictions imposed on such objects ? Further, what would be the rules of interpretation for such objects clause ?

What happens if a company having a number of main objects (which is most likely to happen) does not pursue a few of them ? Will the remedy of winding up under section 439 be granted on the ground that the main or paramount object of the company having failed, the substratum has gone and thus the company must be wound up ? Further, the amendment does not solve the problem of an existing company having a memorandum already registered. Would it not be unjust or unreasonable to allow them to enjoy the benefits and advantages derived by their own wrongful acts ?

3 *Report of the Committee on Company Law Amendment*, London : 1945, Comnd. 6659, para 7(e). The Bhabha Committee approved the recommendations of the Cohen Committee ; see Report of the Company Law Committee, New Delhi 1952, para 70.

4 For detailed discussion on the subject see Nath, S., "The Objects Clause of a Company and the Recent Legislative Prescriptions (A critical study of the Companies (Amendment) Act 1965 with a comparative study of English Law), 4 *Ban. L.J.* 71-104 (1968).

5 (1917) 1 Ch. 477 aff'd by House of Lords : (1918) A.C. 514 The House of Lords held that such a paragraph does make each paragraph of the objects clause of the memorandum a separate main object which might be pursued independently.

The following suggestions are advanced as a measure against framing excessively long objects most of which are stereotyped and vary little whatever may be the business which a company was really formed to carry on, and which are framed mainly for obviating the '*ultra vires*' rule.

Although the classification of objects into different categories puts a check on the activities of directors regarding diversification, the questions raised above in connection with objects clause remain unanswered. The Act should also state the rule of construction for such an objects clause in which a number of main and other objects are mentioned, and every object seems to be an independent one. While interpreting such objects clauses, strict rule of interpretation (the main object rule of interpretation may be the right rule) should be applied, and the interests of shareholders both prospective and existing should always be kept in mind. The rule of *Cotman* v. *Brougham*[6] should be abrogated. There should be some sort of check or limit on the number of main objects, a company may state in its objects clause ; (how many is a debatable question). No limit need be prescribed for other objects of a company. The Registrar of the Companies should be empowered to refuse the registration of such memoranda of association which set out the objects clause in a vague, general, wide or ambiguous form. The Comapny Law Board may prescribe certain guidelines for the Registrar, and the Board should be made approachable by the promoters in case a Registrar refuses the registration of any memorandum.. Some common and necessary powers should be granted to every company by the Act itself. Provisions adopted in the United States or Australian States may serve as model for this purpose.[7] A company may be granted all the powers which a natural person has, and the theory of general capacity should be accepted, but only in case of transactions with outsiders, namely, the third parties. For shareholders and the Board, it should be regulated by the doctrine of 'special capacity'. In other words, the doctrine of ultra vires should be declared operative only as between shareholders and directors, as has been done in a few commonwealth countries, the United States, and has been recommended by the Cohen Committee

6 (1918) A.C. 514.

7 See also Nath, S., "Sources of Borrowing Power of Companies in India and the United States", 9 *J.I.L.I.* 184-204 (1967) at 187-204 ; see sectiin 19 of the *Uniform Companies Act* (adopted by six Australian States), The Statutes of New South Wales Companies 1961. The statutes of all jurisdictions in the United States enumerate the general powers of corporations. For example see *Delaware*, s. 122 ; *California* ss. 801-2 ; *Illinois* s. 5 ; *N.Y. General Corporation Law* s. 14. In some statutes the powers of a corporation are divided into two parts : (i) General powers and (ii) special powers. Special powers are expressly limited to corporate purposes whereas others are not so limited. See statutes of *Pennsylvania* and *Nevada*.

and Jenkins Committee in England.[8] If in the memorandum any power is mentioned, it should be treated as if it were contained in the articles, and all the rules and regulations applicable to articles should be applied to them.

II

POWER TO PAY CERTAIN COMMISSIONS—(Section 76)

In England, by virtue of section 53 of English Companies Act, 1948, a company may pay a commission to any person in consideration of his (i) subscribing or agreeing to subscribe for any shares in the company, and (ii) his procuring or agreeing to procure subscriptions for any shares in the company. In India the satutory power of the company to pay commission has been enlarged and a company may also pay a commission to any person in consideration of his subscribing or agreeing to subscribe for any debentures of the company. Although there is no mention in section 53 regarding the issue of debentures at a commission, the English companies can do so and there are no limitations on the amount of commission. However, under Indian law, the maximum commission allowed in case of debentures is two and a half-per cent of the price. In England there are no restrictions on the amount of commission paid at the issue of debentures because debentures can also be issued at a discount. If the debentures can be issued at a discount, there is no sense in putting restriction on the payment of commission.

Indian law follows English law as far as the shares are concerned but differs as regards the debentures. Moreover, Indian law is not clear and consistent with regard to debentures. Following the English pattern, there is no prohibition under Indian law on the issue of debentures at a discount but, on the other hand, the Indian Companies Act 1956 regulates the commission paid on debentures and puts a limit upon the payment to a certain specified percentage. The change does not seem to be based on well-founded principles, because practically it does not serve any useful purpose. If a company is not allowed to pay more than 2.5% commission on debentures (as section 76 provides), it does not matter much, it may freely issue debentures at discount at a rate of more than 2.5%. If the Legislature really intended to check the danger of illegal discount paid by means of commission, it should also prohibit the issuance of debentures at a discount. Until such change is made, section 76 does not serve any useful purpose as regards debentures, and does not provide a strong safeguard against the danger of illegal or unwanted discounts.

8 See *Report of the Cohen Committee*, Comnd. 6659 para 12; *Report of the Jenkins Committee*, Comnd. 1947, para 42;

Many commonwealth countries like Ghana, Liberia, Nigeria, Tasmania, Australia, as well as the United States have already made statutory provisions in their statutes recognising this proposition.

III

TYPES OF SHARE CAPITAL: PREFERENCE SHARE CAPITAL: EQUITY SHARE CAPITAL: ISSUE OF SHARES WITH DISPROPORTIONATE RIGHTS[9]

Section 85 attaches two requirements to a preference share : (i) it should carry a preferential right to dividend, and also (ii) it should carry a preferential right in regard to the repayment of capital on a winding up. By virtue of section 85, the scope of the "equity share capital" is enlarged; shares which carry only a preferential right as to dividend or as to repayment of capital will not be considered as preference shares and they will be included in the equity share capital. However, the rights attached to such shares are retained. The problem arises when one applies section 88 which prohibits the issue of shares with disproportionate rights attached to the 'holders of other shares' (not being preference shares). The expression 'holders of other shares' need be clarified. Although the intention of the Legislature in enacting section 88 is clear, it cannot be fully implemented in practice. The Legislature wanted an absolute prohibition on the issue of equity shares carrying disproportionate voting rights or different rights as to dividend, capital and so on; it wanted to make the equity share capital uniform carrying uniform rights. The idea underlying such provision was the right of equality among equity shareholders who bear the risk equally. But the drafting of section 88 has made the implementation of the intention of the Legislature difficult. Although the holders of preference shares issued before the Act of 1956 and who have become equity shareholders by virtue of sections 85 (1) and 85 (2) can retain their preferential rights as to dividend and capital or otherwise (by virtue of section 90) it is quite obvious that fresh issue of equity shares, after the commencement of the Act, cannot be made on the same footing, and it is necessary to exclude these cases. This might be done either by adding the words "subject to section 90", or the words "without prejudice to the rights saved under section 90" in the beginning of section 88, or by adding an explanatory clause stating that the preference shares which are issued before the Act of 1956 and have been included in the equity share capital shall not form the basis in the case of the further issue of equity shares and in determining the rights attached to such shares. Law relating to the share issued prior to of 1956 carrying only one preferential right need be clarified because the holder of such shares enjoy the privileges enjoyed by the equity shareholders while retaining the special rights attached to such shares.

9 For detailed discussion, short-comings and the proposed amendments on this aspect, see, Nath, S., "The Best-Share Capital Available for Investment", 11 *Finance & Commerce* 909-916 (1968).

IV

REDEEMABLE PREFERENCE SHARES (Section 80)

As it appears from the statutory definition, the preference shares may be issued either redeemable by a specified date or at the option of the company. But the converse does not apply—the preference shares cannot be made redeemable at the option of the shareholders (whether acting individually or collectively as a class). The statutory provision favours the company rather than the shareholders. When such shares are issued to be redeemed by a specified date, what would happen if a company fails to redeem them ? Section 80 does not specify any remedy open to shareholders. A suitable provision should therefore be made on this point in the Act.

V

REDUCTION OF SHARE CAPITAL OF A LIMITED COMPANY (Section 100-104)

The provisions of the Act which deal with the reduction of share capital do not mention anything about the rights of dissentient shareholders or the rights of various classes of shareholders who are affected thereby. The test of "fairness among various classes of shareholders" in a reduction originated in common law and it is of a comparatively recent development. The authorities who plead for such test base their judgement on equitable principles. In other words, the right of shareholders to object against the reduction of capital is not statutory but one granted under common law. In such cases, even if there are very few chances of success, the shareholders can object to the reduction on the ground that it causes a variation of their rights or is a fraud on the minority. The conflicting opinions[10] must be reconciled and the law should be clarified in this regard. The better view, which is based on equitable grounds, seems to be that it should also be provided in section 102 that the court before confirming the reduction of share capital should also be satisfied that the reduction will not work any injustice among the shareholders. Reduction should be fair and equitable and it should be done for the benefit of the company as a whole. The majority should not be allowed to take any undue benefit or advantage at the cost of minority only due to the fact that the Act does not provide any remedy or right to the minority. The present requirements of special resolution and the Court's

10 *British and American Trustees and Finance Corporation* v. *Couper* (1894) A.C. 399; *Poole* v. *National Bank of China Ltd.* (1907) N.C. 299 and *Re Thomas de la Rue & Co.* (1911) 2 Ch. 361.

The contrary view is expressed in *Scottish Insurance Corporation* v. *Wilson & Clyde Coal Co.* (1949) A.C. 462 (H.L.) ; *Re Old Silkstone Collieries Ltd.* (1954) Ch. 169 (C.A.). The contrary view seems to get favour in India : See *In re Panruti Industrial Co. Ltd.* A.I.R. (1960) Mad. 537.

sanction are not sufficient to safeguard the interests of shareholders. The dissenting shareholders should be given a statutory right to put their cases before appropriate forum that the reduction would be unfair to them if it were confirmed. In England shareholders can appear and object, on their accord, on the hearing of the petition.[11] A similar provision may be made in the Indian Companies Act, 1956.[12]

VI

CANCELLATION OF UNISSUED SHARES AND TYPES OF SHARE CAPITAL WHICH COULD BE REDUCED UNDER SECTION 100

It may be interesting to note that from the wording of section 94(1)(*e*) of the Companies Act, 1956, one may get the impression that this provision deals with only that type of capital which is issued but not subscribed by the investors, namely, the unsubscribed capital and therefore one may conclude that the reduction of unsubscribed capital is excluded from the operation of section 100 and can be done by ordinary resolution. However, it is not correct to interpret as was held in a Madras case of 1960[13] that the wording of section 94(1)(*e*) excludes the reduction of unissued capital, because the unissued capital will always be unsubscribed. Hence, section 94(1)(*e*) should be redrafted as follows :

> "cancel shares which at the date of the passing of the resolution in that behalf, have not been *issued, or have been issued but not* taken or agreed to be taken by any person....."[14]

Here, we may depart from the English interpretation and enlarge the scope of section 94(1)(*e*) by including the unsubscribed capital too.

The expression "reduction of share capital" means only the reduction of issued and subscribed capital or reduction of unissued capital combined with the subscribed capital. In other words, section 100 is only applicable to those cases where there is a reduction of that part of nominal capital which has been subscribed. If the above interpretation is correct, then, why not, in place of the words "reduce its share capital" in section 100, the words

11 Rules of the Supreme Court, Order 102 Rule 5 (England).

12 For detailed discussion regarding shortcomings and the proposed amendments relating to the reduction of Share capital of a limited company see, S. Nath, "Reduction of Share Capital of a Limited Company-Comparative Study of Indian and English Law", *Journal of A.I.R.* 1969 pp. 1-7 and 12-24.

13 *In re Panruti Industrial Co. (Pvt.) Ltd.* A.I.R. (1960) Madras 537 (538) The view held by the Madras High Court is not correct on merits. For the types of share capital which can be reduced under section 100 and the critical comment on the above case, see, S. Nath, "Meaning of the expression 'share capital' involved in reduction of capital under section 100 of the Indian Companies Act, 1956", *Company Law Journal*, 1968, pp. 145-148.

14 Words in italics are added to clarify section 94(1)(e).

"reduce its nominal share capital which has been issued and subscribed" or "reduce its subscribed capital" substituted ? This change seems to be logical and sensible as it would define the scope of section 100 more clearly, and the ambiguity of the provision will be removed. Moreover, the Jenkins Committee in England also held a similar view.[15]

VII

ANNUAL GENERAL MEETING CALLED BY THE CENTRAL GOVERNMENT (Section 167)

If the meeting called by the Central Government is held in the year in which default is made, there does not arise any problem. However, what will happen if it is called in the next year at a date when the next annual general meeting is due ? Will it also be considered as the annual general meeting for the year in which it is being held ? To make it more clear, a provision similar to the English one (section 131 (3) of English Companies Act of 1948) should be made.

VIII

DIVIDENDS DECLARED AT THE ANNUAL GENERAL MEETING

At the annual general meeting usually the dividend is declared, though it is not necessary that dividend must be declared at such a meeting. However ,if it is declared at the annual general meeting it is considered to be an ordinary business ; otherwise, if it is declared at any other general meeting, it would be deemed as a special business. This is not so under English law. Recently in an Indian case[16] it has been held that the dividends cannot be declared at any general meeting except at the annual general meeting. The law on this point should be clarified.[17]

IX

EXTRAORDINARY GENERAL MEETING

The definition of extraordinary general meeting is unsatisfactory. One gets the impression from section 169 that the term extraordinary general meeting is confined only to the general meeting called on the requisition of shareholders. Article 47 of Table A dispels any such doubt but it is not a mandatory article. It would be proper that some provision in the Act is inserted to make it obligatory on companies to mention in all cases whether the meeting to be called is annual, extraordinary or statutory to avoid any confusion. The Companies Act should also expressly state that all general meetings other

15 *Report of the Company Law Committee* (London) 1962, Comnd. 1749, para 157.

16 Per Ramachandra Iyer, C.J., in *Barjore Hazhangzi Vakil* v. *Mettur Chemical and Industrial Corporation Ltd.*, A.I.R. (1964) Madras 83,.

17 Section 173 and Article 85 Table A should be amended.

than annual general meetings and the statutory meeting shall be called extraordinary general meetings and all references to the general meeting in the Act or elsewhere should be treated as extraordinary general meeting unless otherwise specified therein.

X

PRESENCE OF QUORUM THROUGHOUT THE MEETING

The Indian and English laws are silent on the question whether the quorum should be present only at the beginning of the meeting or it should remain present throughout the meeting. In the absence of an article based on Table A, quorum must be present throughout the meeting. In 1954, Justice Wynn parry held that the words "proceeds to business" could not be said to imply the continued presence of a quorum when a resolution is voted.[18] The balance of opinion in the United States is in favour of not requiring the continued presence of quorum throughout the meeting.[19] The application of the British ruling may, however, pose some difficulties ; for instance, in the case of an adjourned meeting or where at a meeting more than one business are to be transacted and the quorum is present at the first business but not at the remaining items of the agenda, or where there is no article similar to one of Table A. A clarification is therefore desirable on this point.

XI

PERSONAL PRESENCE TO CONSTITUTE QUORUM

Proxies appointed by members cannot be counted to constitute a quorum unless articles specifically provide for presence in person or by proxy.[20] A representative appointed by a corporation, by the President and by the Governors in the meeting of companies in which they are members, may be counted to constitute a quorum.[21] If articles do not provide that a proxy can be counted in quorum, the interest of foreign individual shareholder would be hampered. To attract foreign individual investors and to protect their interests, the Act should provide that where a member resides abroad, he can be represented by proxy and his presence by proxy would suffice to constitute a quorum.

XII

SPECIAL NOTICE (Section 190)

Under section 190, any person can give a notice of the intention to move certain motions and the company has to send the notice of such intention to

18 *Re Hartley Baired Ltd.*, (1954) 3 W.L.R. 964.

19 See, Ballantine, *Corporations* (Chicago) p. 393.

20 Section 174 (1).

21 Sections 187 and 187A.

its members after the notice of the meeting has gone out ; which means an extra expense for the company. As this section does not require any numerical requirement of members for submission of such motions, even a single member can move a motion. In the case of a public company there may be numerous resolutions of which notices have to be circulated among members of the company, thus imposing an additional cost upon the company. The numerical requirement in case of a requisition regarding circulation of members' resolutions and statements should also be applied in such a case.[22]

XIII

DEFAULT MADE IN COMPLIANCE WITH SECTION 190

Section 190 deals with resolutions requiring special notice and provides for certain procedure regarding their circulation. The Companies Act, however, does not state : what will happen if the company does not comply with the provisions of section 190 ? A special notice is required in mostly those cases where a director is proposed to be either removed or appointed. And it is quite likely that the proposed resolution may be against the present Board of Directors and the Board may intentionally avoid compliance with section 190. Therefore, it is recommended that a penal provision should be inserted in the Act to deal with the case of default.

XIV

MEMBERS' RIGHT TO CIRCULATE THEIR OWN RESOLUTIONS AND STATEMENTS

Section 188 deals with the circulation of members' resolutions. This provision was inserted in the Companies Act, 1956, for the first time and it empowered a specified number of shareholders to make use of the administrative machinery of a company to introduce resolutions on their own account at the general meeting and to inform other members of the purpose for which the resolutions were proposed to be introduced or the reasons for opposing any resolution submitted by the directors for consideration at the general meeting. However, this provision has certain shortcomings[23] and it should be redrafted on the lines suggested below. Section 188(1) should be redrafted as :

"Subject to the provisions of this section, a public company and a private company which is a subsidiary of a public company shall, on the requisition in writing of such number of members as specified in clause (2) of this section and a private company (which is not a subsidiary of a public company) shall, on the requisition in writing of any

22 See section 188 (2).

23 For shortcomings of section 188 and justification for the proposed amendments, see, S. Nath, "A Plea to Amend section 188 of the Indian Companies Act, 1956" 10 *J.I.L.I.* (1968) pp. 309-322.

member, at its own expense (in case the requisition is lodged with the company before the notice of the meeting is sent to members) and at the expense of the requisitionist (if the requisition is deposited after the dispatch of the notice of the meeting), unless the company otherwise resolves so :

(*a*) give the members of the company entitled to receive notice of the next general meeting (including an annual general meeting), notice of any resolution which may properly be moved and is intended to be moved at that meeting :

(*b*) circulate to members entitled to have notice of any general meeting sent to them, any statement of not more than five hundred words (if it is to be circulated at the expense of the company) and not more than 1000 words (if it is to be circulated at the expense of the requisitionists, unless the company otherwise resolves so) with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting."

In sub-section 2, a proviso should be added that :

"In the case of a private company which is not a subsidiary of a public company any member, entitled to have notice of the meeting, can submit the requisition."

The latter part of section 188 (3) should be redrafted as follows :

".....and notice of any such resolution shall be given to those members of a private company (not being a subsidiary of a public company) who have been debarred by the articles of the company from receiving notices of the general meetings of the company, by giving notice of the general effect of the resolution in any manner permitted for giving notice of meetings of the company to other members of the company."

An additional clause should also be added in order to protect further the interests of shareholders :

"Where such a requisition as mentioned in clause (1) is deposited and the company does not act on it according to the provisions of this section, no meeting can be validly held, and the proceedings of any meeting of the company (if held after the deposit of the requisition) shall be void."

XV

AMENDMENT IN SECTIONS 179(c) and 179(d)

As the voting right of a member is in proportion to his share of the paid-up equity share capital of the company, clause(*d*) of section 179 does not serve any useful purpose. There is practically no difference between clauses (*c*) and (*d*). Though in 1956 the law as regards voting was changed, the

Indian Legislature adopted the provisions of English Act, 1948, without making suitable changes. Clause (*d*) should therefore be deleted.

XVI

RIGHT OF A PROXY TO SPEAK (Section 176)

Section 176 has taken away from the proxy the right to speak in the meetings. This is a matter of great concern to foreign enterprises who rely heavily on proxy representation. There is indeed an urgent need for such right being conferred on a proxy to allay the fears of foreign investors.

Further, section 176(1)(*b*) which provides that "A member of a private company shall not be entitled to appoint more than one proxy to attend on he same occasion" need be clarified.

XVII

RIGHT OF PROXY TO VOTE ON A SHOW OF HANDS

(*a*) A proxy cannot vote on a show of hands although he can join in demand for a poll. There is no harm if the right to vote on a show of hands is given to a proxy. Moreover, in practice, it is impossible to enforce the present rule unless the members present in person and present by proxy are separated into two groups in the meeting hall.

(*b*) Article 61 of Table A which regulates the deposit of a proxy and matters related thereto should be adopted in the Companies Act. It should also be made applicable in the case of adjourned meetings of the company.

XVIII

REVOCATION OF PROXY

There is no provision either in the Act or the articles as to the revocation of proxies. A suitable provision should be made in the Act.

XIX

MINIMUM NUMBER OF DIRECTORS

In India every public company must have three directors and any other company must have atleast two directors. In England, in case of a private company, there must be at least one director. In a case where a private company has only two members, the insistence on having two directors will usually result in both members of the private company being its directors and indirectly the private company will become a partnership firm for all practical purposes. A proviso should be added in Section 252 stating that if a private company has only two members, the minimum number of directors will be one.

XX

THE DEFINITION OF A DIRECTOR

In many provisions of the Companies Act, it has been recognised that some times the ostensible directors are mere dummies of those people who remain behind the scene and direct the affairs of the company. However, no company will openly admit that it is being operated by concealed persons. Therefore, it should be better if the definition of a director were expanded to include that person (*a*) who not being duly appointed as a director of a company holds himself out or knowingly allows himself to be held out as a director of the company, or (*b*) on whose directions or instructions the duly appointed directors are accustomed to act. These persons should be subjected to the same duties and liabilities as if they were duly appointed directors of the company. The practice of holding out must be checked in the interest of public and the shareholders. In the absence of such a provision, the shareholders would not know who really manages their company.

XXI

ELECTION OF DIRECTORS BY PROPORTIONAL REPRESENTATION

The Companies Act, 1956, vide section 265, gives an option to a company by making provision in its articles to adopt the method of proportional representation for the appointment of its directors. The new system does protect the interests of minority shareholders in the matter of appointment of directors. However, there are two dangers inherent in the system of cumulative voting being optional under the statute. First, owing its existence to the articles of association, the system can be got rid of by amending the articles of association. Secondly, even where the system is retained, the shareholders may lose their power of electing a director if the total number of directors is reduced. In the latter case, it is necessary that the Companies Act should provide that when the company opts for the method of proportional representation for the appointment of its directors, shareholders should not be allowed to reduce the number of directors by a mere ordinary resolution.

XXII

NOMINEE DIRECTOR OF THE MINORITY

In India, in the case of a public company or a private company which is subsidiary of a public company, one third of the total number of directors may be appointed without consulting the wishes of all shareholders. The system of proportional representation might give to the minority the control over the company. This might happen in case of a company (specially in a foreign company giving technical, financial or any other aid) where the minority

have the right to nominate one-third of the total number of directors, and the remaining two-thirds are to be elected under the articles by the system of cumulative voting. In such a case, the foreign concern, which has a sufficiently large shareholdings (though less than 51%) might be able to control the affairs of the company by having a majority on the Board of directors. This aspect must not be overlooked and proper safeguards should be provided.

XXIII
MANAGING DIRECTORS

There is no statement in the Indian Companies Act, 1956, as to who may appoint a managing director. However, an inference regarding the appointment can be drawn from section 2 (26) which defines a managing director. The definition suggests that a managing director may hold the post as such either (i) by virtue of an agreement with the company; or (ii) by virtue of a company's memorandum or articles of association; or (iii) by virtue of a resolution passed by the company in general meeting; and (iv) by virtue of a resolution by its Board of Directors. A difficulty arises where a managing director is not appointed by virtue of an agreement with the company, and the memorandum and articles of association do not contain any provision regarding the appointment of a managing director, Although the Indian Companies Act, 1956, does not state the right course in such a situation, the definition of a managing director suggests that he can be appointed by a resolution passed either by the company in its general meeting or by the Board of Directors. A situation may arise when both organs of a company, i.e., the shareholders in general meeting and the Board of Directors, pass separate resolutions appointing different persons as managing directors. Whose decision will be valid and effective? To set at rest the problems regarding the appointment of a managing director,[24] a provision in the Indian Companies Act, 1956, should be made with regard to the appointment of managing directors. A model provision is suggested below:

APPOINTMENT OF MANAGING DIRECTORS

(1) Unless the Memorandum or articles of association of a company otherwise provide, a managing director may be appointed by company in its annual general meeting while appointing other directors.

(2) If the company does not appoint a managing director in its annual general meeting, the Board of Directors may, from time to time, appoint one or more of their body to the office of managing director on such terms as they think fit, subject to the provisions of this Act.

24 For the shortcomings and the justification for such a provision in the Companies Act, 1956, see, S. Nath, "A Plea to Amend the Law relating to Managing Directors (Comparative Study of Indian and English Law)", (1969) 1 *Comp. L.J.*, pp. 1-13 at 7-10.

(3) A managing director appointed under sub-clause (2) shall hold office only up to the date of the next annual general meeting of the company when it would be open to the company to scrutinise the appointment.

(4) The appointment made by the Board of Directors cannot be invalidated by the regulations made, or resolutions passed, subsequently by the company in general meeting, except as provided in section 284 of this Act.

(5) A managing director may also be appointed by virtue of an agreement with the company.

(6) The appointment made under sub-clause (5) may be revoked by the insertion of a provision in the memorandum or articles of association of a company, or by a resolution passed by the company in general meeting, or by the resolution passed by the Board of Directors. But in such a case the company would be liable to pay damages to a managing director for breach of contract.

(7) If the memorandum or articles of association of a company contain a provision as to the appointment of a managing director and a managing director is so appointed, such a provision shall constitute a contract between the company and its managing director for the purposes of determining the terms of his appointment.

(8) The terms of the appointment of a managing director may be varied by altering the articles or memorandum by a special resolution passed by the company in general meeting, but the company would be liable to pay damages to a managing director for breach of contract.

(9) This section shall not apply to a private company unless it is subsidiary of a public company.

Indian law with regard to the tenure of the office of a managing director is also not explicit. At one place the Act provides that a managing director can be appointed for a period of five years or more, at another place it makes provision that every director will retire by rotation. How can a person be appointed for a fixed period of five years or so under one statutory provision when he is liable to cease to be a director under another provision? This inconsistency is due to the absence of an article in Table A of the Companies Act, 1956, similar to article 107 of Table A of the English Companies Act, 1948. Though most of the articles relating to directors were incorporated in the Indian Companies Act, 1956, a provision in this regard was neither made in the Act, nor in Table A. On the lines of Articles 107 of Table A of the English Companies Act, 1948, a sub-clause should be added either to section

256 or Section 317 providing that "the managing director shall not be subject to retirement by rotation, and he shall not be taken into account in determining the rotation of retirement of directors."

XXIV

MANAGERS

Although the powers and functions of managers are in many respects similar to those of managing directors, due attention has not been given to them. The law regarding their appointment is defective. An inference may be drawn from article 82 of Table A, which provides that "a manager or secretary may be appointed by the Board for such term as it may think fit." Article 82 is a new provision and is being drafted on the lines of articles 110 of Table A of the English Companies Act, 1948. The framers have however ignored the fact that the Indian law is not similar to English law as regards secretary and manager. The position of a secretary under English law is quite different from the position of a manager under Indian law. But, under article 82, a manager is treated at par with a secretary, and provisions applicable to a secretary are applied to a manager. Under Indian law a manager has an executive status equivalent to a managing director or a managing agent and he is the in charge of the whole management of the company, whereas a secretary appointed under section 177 of the English Act has mainly an administative status and he performs ministerial and administrative duties. He may be employed by a company to carry out the instructions given by a manager or anyone else, managing the company. Therefore, although article 82 of Table A refers to the appointment of a manager, it would not be judicious to apply it to a manager as defined in section 2(24) who is in charge of the management of the company. This inconsistency in law should be removed and the word 'manager' should be deleted from Articles 82 and 83. A provision in the Companies Act, 1956, should also be added expressly laying down who can appoint managers.

XXV

DISQUALIFICATIONS OF A MANAGER

It is not necessary for managers that they should also be directors. Therefore, the qualifications and disqualifications of a director do not automatically apply to a manager. Sections 384 and 385 prescribe certain disqualifications for a person being appointed as manager. It is surprising to find that nowhere persons of unsound mind are prohibited from being appointed as managers. This omission is regrettable and must be rectified at the earliest opportunity. Otherwise, it may lead to deplorable consequences.

XXVI

TENURE OF APPOINTMENT OF A MANAGER

The Indian Companies Act, 1956, is silent on this point. According to the definition of a manager, he may or may not be under a contract of service. When he is appointed under a contract of service, the terms of the contract shall be applied. If there is no contract of service, his appointment will be at the mercy of the Board of directors for no rules have been prescribed either in the Act or in the articles of Table A. The English Companies Act, 1948, however is more explicit in this regard and Table A contains several provisions regarding managing directors who are similar to managers in India. In India though the manager's status has been raised from the status of a company's officer to a managerial personnel, the Indian Companies Act, 1956, still treats him as an officer of a company so far as appointment and removal are concerned. The law relating to managing directors and managers should be clarified because now only these two forms of managerial personnel would be available for looking after the day-to-day administration of a company's affairs after the abolition of the systems of managing agency and secretaries & treasurers.

XXVII

MINIMUM MANAGERIAL REMUNERATION

A private company has been treated differently in section 198 where in a ceiling is provided on the total managerial remuneration. However a doubt can be raised, whether a private company is also exempted from sub-clause (4) of section 198. The opening words of section 198 (4), "Notwithstanding anything contained in Sub-sections (1) to (3)" make section 198 (1) inapplicable in the case of a private company, In section 198 (4), the word 'company' has been used and from this it can be interpreted that the legislature intended to include the private company within the scope of this sub-section. The application of this provision in such a case would be logical as there are more chances of having no profit or inadequate profit in a small enterprise. Moreover, it is easier for directors to manipulate things in their favour in a private company as they would be enjoying much more controlling power in such a company. A clarification in this regard is necessary.

XXVIII

REMUNERATION OF A MANAGING DIRECTOR (Section 309)

According to section 309, sub-clause (3) "a managing director or a whole time director may be paid an amount of remuneration not exceeding 5% of the net profits. If there are more than one such director, then such remuneration should not exceed 10% for 'all of them together'. These words raise

a question as to whether a managing director can be paid more than 5% in the case where there are more than one such director and total remuneration paid to all of them is 10%, say 8% to one director and 2% to another. Further, it is also not clear, who will decide the amount of remuneration of managers. A clarification is therefore necessary in this regard.

XXIX

A COMPANY'S FIRST DIRECTORS (Sections 253 & 254)

Section 254 provides that 'in default of, and subject to, any regulations in the articles of a company, subscribers of the memorandum who are individuals shall be deemed to be the directors of the company, until the directors are duly appointed in accordance with section 255'. This provision is necessary because every company must have directors. Section 253 prohibits any body corporate, association, or firm from being appointed as a director. However, according to section 12, it is not necessary that only individuals should subscribe their names to a memoradnum of association for forming a company: it provides that any seven or more *persons* (which includes legal persons also) may form a company. Incase all the seven persons are bodies corporate and the articles of such company do not make any provision for the appointment of first directors, section 254 providing that subscribers of the memorandum will be deemed to be the first directors of the company provided they are individuals will not be applicable. Such a company may remain without directors until the directors are appointed in accordance with section 255, namely they are appointed by the company in general meeting which may be convened anytime within a period of eighteen months according to section 166. A suitable provision need be made for meeting such a situation in the Companies Act, 1956.

XXX

REGULATION OF MANAGERIAL REMUNERATION, APPOINTMENT, ETC. BY THE GOVT.

The managerial remuneration in the case of a public company and of a private company which is a subsidiary of public company has been totally regulated by the Companies Act and very little room for manoeuvring has been left to the shareholders of a company. Each and every detail has been dictated by the Act and any decision taken by the shareholders has been subjected to the Government's scrutiny and approval except in certain circumstances.

It is however felt that for effectively discharging its duty in this area some sort of guide-lines for the state Government in this regard should be provided in the Companies Act, 1956.

XXXI

PRE-EMPTIVE RIGHT OF SHAREHOLDERS—WHO CAN CLAIM (Section 81)

Prior to the enactment of section 81, new shares could have been offered to all shareholders irrespective of class. Section 81 has, however, changed the situation. It has been made clear by section 81 that only the existing equity shareholders of a company have the pre-emptive right to the issue of new shares. Does it really make any substantial change in the old position ?

According to present law, all types of share capital (except that type of share capital which has been defined by Section 85) is grouped under the equity share capital. In other words, the right of pre-emption has only been taken away from those shareholders who have preferential right as to dividend as well as a preferential right as to the repayment of capital on a winding up.

The other change is related to the words of the section which have been interpreted recently by the Calcutta High Court in *Kedarnath Agarwal* v. *Jay Engineering Works, Ltd.*[25] Previously where an increase of the capital was proposed by issue of further shares, such shares had first to be offered to the 'members.' Now the legislatuee prescribes that the furthers hares, envisaged by section 81, shall be first offered to the persons who at the date of the offer are 'holders' of the equity shares of the company, and, unless the articles otherwise provide the offer would be deemed to include a right exercisable by the person concerned to renounce any or all of the shares offered to him in favour of any other person. Thus a person whose name is on the register of members may have sold his shares, and as from that moment his ownership of the shares has passed to his purchaser, he ceases to be a 'holder' of those shares under section 81. Such a person is not entitled to accept offers of any shares or to exercise right of renunciation.

The decision has given rise to some controversy. According to the decision, the expression "holders" does not necessarily mean 'members' and, therefore, any person holding equity shares of the company, whether registered in his name or not, is entitled to an offer of the shares made under the aforementioned section. This, of course, is impossible to put into practice, since the company may not know who is holding its equity shares at a particular moment when the holder does not register shares in his name. The best way is that the word "holders" should be interpreted as the persons registered in the "register of members". This expression should, therefore, suitably be amended.

25 (1963) 66 Cal. W.N. 1049.

XXXII

POWER OF A COMPANY TO REFUSE PRE-EMPTIVE RIGHT

The pre-emptive right of a shareholder is subject to the over-riding condition that any direction to the contrary may be given by the company in general meeting by ordinary resolution (with the approval of the Central Government) or by a special resolution, and it is further subjected to another condition that it is applicable only to allotment made after a certain defined period[26]. There have been two conflicting judicial opinions on the question as to whether this right can be totally denied by the company in general meeting (which, of course, will be the decision of the majority shareholders) to the existing shareholders. This conflict arose due to the wording of section 81. The point was clarified by the 1960 Amending Act; now the amended provision clearly indicates that the existing shareholders can be totally denied pre-emptive right if the conditions mentioned in the provision are fulfilled. In this context, does the section which gives statutory right of pre-emption serve any practical purpose due to the new amended sub-clauses? This right can be denied, abused or circumvented. There is at least one example of such abuse[27].

Regarding the special resolution some persons are of the view that even where it has been passed, the exclusion of the minority shareholders should not be permitted unless the Government is satisfied that it is beneficial to the company as such[28]. The suggestion should be given due consideration as the Company Law Board has better machinery available to judge the position. Of course, in order to protect against abuses, a provision may be made for an appeal against the decision of the Company Law Board, in proper cases. It has also been suggested that the Central Government should take into consideration not only the representations made by the company but also those of the dissenting shareholders. If the Government's interference is not welcomed, the percentage of votes should be raised to more than that is required for a special resolution[29]. The last suggestion does not seem to be a practical one, as it goes directly against the well established principle of company jurisprudence—the majority rule. Moreover, it would be very difficult to get any such resolution passed as it would be impossible to get unanimous consent. On the other hand, some jurists have suggested that there should be judicial control[30]. The best way seems to be that

26 Section 81 (i), Indian Companies Act, 1956.

27 *S. P. Jain v Kalinga Tubes Ltd* (1965) 35 Comp. Cas. 35 : A.I.R. (1965) S.C. 1565.

28 Subrata Roy Chowdhry, "Freeze out Problems in Corporation Law," *Proceedings of the Seminar on Current Problems of Corporate Law, Management ond Practice* (Indian Law Institute : 1964), pp. 273-286, p. 276.

29 *Ibid.*

30 Bhagwati P. N. "Rights of Minority Shareholders", *Proceedings...Practice. op. cit.* note 28.

the shareholders who have been denied such right should be granted a statutory right to go to the court and apply for cancellation of the resolution. They should be allowed to put forward their case that it would cause great hardship if they are not allowed to participate in the further issue of shares. A provision can be made on the lines of section 107. The other solution may be that the shareholders should be allowed to file a petition before the Company Law Board in case where a special resolution is passed. In the United States, in addition to the remedy by action at law against the company for damages, the shareholders may obtain relief in equity, either in the form of an injunction against the issue, or a mandatory order to permit them to subscribe. Under some circumstances, cancellation of the shares issued in violation of the pre-emptive right can also be granted[31].

XXXIII

SECTION 81 (1-A)

Section 81 (1-A) seems to take notice of only one kind of possibility, namely, the directors seeking initially to offer the new shares to any persons instead of the existing shareholders. It does not take into account the other possibility namely, the shareholders not desiring the shares to be offered to them at the moment, but preferring the offer to be made even at the first instance to the outsiders so that the directors would not make use of the opportunity of alloting the shares not accepted by the existing shareholders to their friends and relatives on easy terms which will consequently enrich their voting strength.

The Bhabha Committee recommended in para 52 of its report that "the additional capital should be offered to the holders of equity share capital unless the company in general meeting sanctioning the issue decides to the contrary." However, the draftsmen have ignored the words, "sanctioning the issue". Although the section was amended in 1960, the problem raised above has remained unresolved. The amendment has not made it clear whether the Board, on its own accord, has necessarily to take the initiative to call for a general meeting, not for sanctioning the issue, but to ascertain the wishes of the shareholders as regards the manner of distribution of the new shares, or the shareholders have to call for a requisitioned meeting under section 169 to advise the manner of the distribution of new shares. The latter course does not serve any useful purpose. A suitable amendment should be made, and the Board should be asked to ascertain the wishes of the shareholders before raising the capital by further allotment of shares.

31 Baker and Cary, Cases and Materials on Corporations (3rd Edn. Brooklyn : 1959) p. 900

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XXXIV

WHEN DOES THE PRE-EMPTIVE RIGHT ARISE ?

(A) Section 81 is only applicable to such cases where, at any time after the expiry of two years from the formation of a company, or at any time after the expiry of one year from the allotment of shares for the first time after the formation of that company, it is proposed to increase the subscribed capital by allotment of further shares. The word 'formation' in this provision has not been properly used, as the time when a company can be said to have been formed depends upon facts and circumstances of each case. Though it may be understood that the word has been used in the sense of "incorporation", an amendment to this section is required in order to remove the ambiguity in the section.

(B) Although companies generally fix an early date for closing the subscription lists, there may be a gap between the issued and subscribed capital. So although the capital is issued it may not be subscribed. Owing to such doubts raised by the critics, the Sastri Committee recommended that instead of the words "subscribed capital of the company by the issue of new shares", the words "subscribed capital of the company by the issue or allotment of further shares" should be inserted in section 81 (1). The intention of the Committee was to cover all possible cases of further issue of shares within the authorised limit, and which was also the reason behind the enactment of section 81. But, unfortunately, present section amended in 1960, contains the words "the subscribed capital of the company by allotment of further shares." By the amendment, section 81 has been made more difficult to interpret.

Under section 105-C of the Act of 1913, the directors were authorised to increase the issued capital provided the pre-emptive rights were given to shareholders. It was doubted whether it applied in the case of increase of authorised capital. This doubt was clarified by section 81 by confining the application of the section to the cases where it was proposed to increase the "subscribed capital.' However, the section applied to the case of unissued capital to be subscribed by fresh issue. The words used "increase the subscribed capital by issue of further shares" created a doubt regarding the applicability of the section in the cases where the company decided to increase the subscribed capital by further allotment of shares. Although it could be argued that the words "issue of shares" are wide enough to cover "allotment of shares", it was certainly a lacuna in the section. In 1960 an amendment was made and the words "increase the subscribed capital by allotment of further shares" were inserted and it has changed the whole situation.

Now the present section 81 as amended is only applicable to those cases where the applicability of the statutory provision was doubted under the old sections of 105-C and 81. The cases where section 105-C and section 81 were applicable (i.e. where the capital was not issued and the company wanted to increase subscribed capital-within authorised limit by further issue of shares) have been excluded. Was it the real intention of the Legislature while enacting sections 105-C and 81 (as amended in 1960) ?

Under this section the directors can raise the part of share capital, without giving pre-emptive right to the existing shareholders, which is within the authorised capital but is not issued. Section 81 does not come into picture as there is no increase in the subscribed capital by the allotment of further shares ; the increase is due to the issue of further shares. And it is quite certain that the word "allotment" is not wide enough to include "issue", whereas the reverse might be true.

Though the amendment in 1960 was made on the recommendation of the Sastri Committee (which recommended the addition of the words "allotment of further shares" and not the omission of "issue of shares" in the sentence "subscribed capital of the company by issue of new shares" the section was amended at variance with the recommendation. The intention of the legislature while granting the pre-emptive right to the shareholders is to give this right in each and evey possible case where there is an increase in the subscribed capital, within the limits of the authorised or nominal capital. The fact as to whether this increase is by the means of further issue of shares (if it is unissued) or by allotment of further shares (in the case where it is issued but not subscribed), is immaterial. The amendment of 1960 has created a very serious defect in section 81 and it should be rectified at an earlier date. It is recommended that section 81 of the Companies Act, 1956 should be amended to cover all those cases where there is a proposal to increase the subscribed capital-*not* only by allotment of further shares *but also* where it is proposed to increase the subscribed capital by issue of further shares.

XXXV

APPOINTMENT OF A SECRETARY AND RESTRICTIONS ON THE APPOINTMENT OF FORMER MANAGING AGENTS, SECRETARIES AND TREASURERS AS CONSULTANTS, ADVISORS AND SO ON

English Companies Act, 1948 makes it obligatory upon every company to have a secretary and provides that a sole director shall not also be secretary.[32] In India also, a suitable provision should be made

32 (English) Companies Act, 1948, section 177 and section 178.

in this regard applicable to a public company or a private company subsidiary to a public company having paid up capital of more than 5 lacs rupees. It has also been noticed that after the abolition of systems of managing agency and secretaries and treasurers, many companies have started appointing former managing agents and secretaries and treasurers as consultants or on other advisory positions. This tendency is not a healthy one and is against the spirit of the abolition of managing agency. A suitable provision should be made in the Act of 1956 prohibiting the appointment of former managing agents or secretaries and treasurers in any place of profit carrying a salary of more than 500 rupees per month including any post of advisory position and directorship. In order to avoid hardship in genuine cases, it may be provided that in genuine cases, such persons may be appointed by the special resolution of the company and with the prior approval of the Central Government. Further, the terms and tenure of the appointment of such persons will be decided by the Central Government taking into consideration the past records of these persons.

XXXVI

RIGHTS OF SHAREHOLDERS AS TO THE DECLARATION OF DIVIDENDS

It is not necessary that in case a company has earned profits, it would distribute the same amongst shareholders as dividends. There is no contractual obligation on the company that it must declare dividends in each or particular year. Neither in India nor in England, does the Act provide who shall declare dividend. Even the right to declare dividend is not given by the Act to the general meeting. The Act is completely silent on this point ; a provision in this regard is only made in the articles of association. But it is also possible that the directors may be the only persons entitled to declare dividends.

The Companies Act does not make any provision as to what portion of the company's distributable profits is to be allocated to the shareholders as dividend. Usually in most of the companies, the directors owe their position to certain individuals who are all in all in the company ; they may be the promoters of the company, financiers, managing agents, or the managing directors or any one else. It is possible that the directors may not be the real representatives of shareholders in general. Shareholders who subscribe risk capital should be protected by the State when the directors decide to retain the profits and not to distribute them among shareholders. In theory the shareholders can of course assert themselves but it is illusory to believe that the amorphous mass of shareholders can organise itself to elect the directors to replace the "low distributors." If the profit is high why should not the shareholders be equally entitled to participate in the company's prosperity ? As the law stands now, it can be argued that the more conscientious a director is, the more he thinks of his paramount duty to the company, the smaller will be the amount of dividend. It is difficult to reconcile the recommendation of payment of dividend by directors in legal principles with the requirement that they must act bonafide in what they consider are the interests of the Company. The Board which decides a zero dividend in a year of rising profits will not be offending any statutory provision. The discretionary dividend power of the Board of directors to declare dividend is enshrined in the companies Acts of both Countries, India and England. Even if the recommendations of the Jenkins Committee are accepted in England, the new Companies Act in England will not alter the present dividend procedures.

Even in the United States, the shareholders are helpless. Although half a century has passed, there is only one suit brought by a shareholder for the payment of dividends[33]. The judgment which went against Ford Motor Company was quite mild. It merely formulated that minimum dividend has to be paid. It is possible to tie the directors to a pre-determined dividend policy by making suitable provisions in the memorandum or articles of association, but in the absence of such provisions in the company's constitution and backed by the principle of separate entity of the company having a life of its own which should exist without reference to the wishes of those who subscribed the capital, the directors who form the dividend policy are on safe grounds when they decide not to pay dividend or decide to pay a very small amount of dividend out of large profits. The general rule in the Western World as well as many countries in the East, of which India is not an exception in any sense, is that shareholders must grit their teeth in silence when the directors choose to declare no dividend or give away a small amount of dividends. In other words it may be concluded that though the shareholders are the owners of the company and they have invested their money in the hope of getting reward from it, in practice, they are helpless and they have to depend upon the directors of the company who may, or may not, represent their wishes. Some kind of provision should be made in the Companies Act whereby all public companies are obliged to distribute a minimum specified percentage of the available profits to the shareholders as dividends.

SURENDRA NATH*

33 See *Dodge* V. *Ford Moter Co.*, 204 Mich. 499 : See also Baker and Cary, *Corporations*, 3rd ed., pp. 1389-1395.

* M. A., LL. B. (Banaras), LL. M. (Northwestern), Lecturer, Law School, Banaras Hindu University.

THE DISCRETION OF THE SUPREME COURT UNDER ARTICLE 136*

I

The end of law is justice, and law is the way to effect it. But law often times fails and leads to injustice. The Constitution, built on the bedrock of justice, created the Supreme Court at the apex of our integrated judicial system. It has been armed with vast powers to do justice and prevent injustices. It is not only the guardian of the fundamental rights, interpreter of the Constitution the final appellate Court in civil, criminal and certain other proceedings emanating from the decisions of High Courts but, under the provisions of Article 136[1], wields enormous powers to prevent injustice being perpetuated by any judicial pronouncement, legislative rigidity[2] or administrative excesses[3].

Besides, the Supreme Court having been made the highest Court of the country, the Constitution-makers thought that it should have jurisdiction to sit in judgment over decisions of any Court or tribunal, exercising judicial or quasi-judicial functions[4].

* This paper forms part of the author's dissertation for LL.M. degree of the Banaras Hindu University. The author wishes to express his deep debt to Dr. Anandjee, under whose supervision the dissertation was prepared.

1 Article 136 of the Constitution reads :

Special leave to appeal by the Supreme Court :

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

2 In *D.C. Cotton Mills* v. *Commissioner of Income-tax*, Justice Mahajan observed :

"It is, however, plain that when the Court reaches the conclusion that a person has been dealt with arbitrarily or that a Court or tribunal within the territory of India has not given a fair deal to a litigant, then no technical hurdle of any kind like the finality of findings of facts or otherwise can stand in the way of the exercise of this power because the whole intent and purpose of this Article is that it is the duty of this Court to see that injustice is not perpetuated or perpetrated by the decisions of any court or tribunals....." A.I.R. 1955 S.C. 65, 69.

3 See C.A.D. vol. VII 638, 639.

4 Justice Bhagawati appositely remarked :

"The great purpose of Article 136 is the recognition of the basic principle that one Court having supreme judicial power in the Republic will have appellate power over all courts and adjudicating authorities vested with the judicial powers of the State throughout the territory of India barring those constituted by or under any law relating to the Armed Forces." (A.C. Companies v. P. N. Shrma, A.I.R. 1965 S.C. 1955, 1608).

See also *Engineering Mazdoor Sabha* v. *Hind Cycle*, A.I.R. 1963 S.C. 874, 877.

The exercise of the special appellate power, subject to the constitutional limitations, depends solely upon the will of the Supreme Court and it cannot be cribbed, cabined or caged by any set of rules or principles. The power being discretionary, it would be improper, nay futile, to mark out the groove on which the discretion is to run[5].

This paper attempts to : (i) explore the main principles on which the Supreme Court exercises its 'plenary appellate jurisdiction', under Article 136 (ii) to examine how far the Supreme Court has from time to time deviated from the principles it laid down for the exercise of its discretion and (iii) to evaluate whether the extent to which the Supreme Court uses its powers under Article 136 is warranted by the constitutional provisions. The study on hand, however, is confined to the principles relating to civil, criminal and labour matters only.

II

Broadly speaking the Supreme Court has evolved the following four principles :

First, Special power under Article 136 is exercisable only in special cases[6].

Second, The Supreme Court should exercise its 'discretion' notwithstanding statutory provision of any kind. In doing so it may disregard finality clauses of the statutes if it is satisfied that the litigant before it had been dealt with arbitrarily or had not been given a fair deal[7].

5 Supreme Court appreciated this point and expressed its inability :

".....to define with any precision the limitations on the exercise of the discretionary jurisdiction vested.....by the constitutional provisions made in Article 136."

Justice Mahajan, speaking for the court, continued :

"The limitations, whatever may be, are implicit to the nature and character of power itself.....All that can be said is that the Constitution having trusted the wisdom and good sense of the judges of this court in this matter, that itself is a sufficient safeguard that powers will only be used to advance the cause of justice....."

D.C. Mills v. *Commr. of Income-tax*, A.I.R. 1955 S.C. 65, at p. 69. See also *Bengal Chemicals* v. *Their Employees*, A.I.R. (1959) S.C. 633 ; *Clerks of Calcutta Tramways* v. *Calcutta Tramways Co. Ltd.*, A.I.R. 1957 S.C. 78 ; *Sanwat Singh* v. *State of Rajasthan*, A.I.R. 1961 S.C. 100.

6 In *Pritam Singh* v. *The State*, the Supreme Court held :

"the wide discretionary power with which this Court is invested under it (Article 136) is to be exercised *sparingly* and *in exceptional* cases only, and so far as possible a more or less uniform standard should be adopted in granting special leave.....The only uniform standard which in our opinion can be laid in the circumstances is that Court should grant special leave to appeal only in those cases where special circumstances are shown to exist." A.I.R. 1950 S.C. 169 at p. 171.

7 See *D.C. Mills* v. *Commr. of Income -tax* A.I.R. (1955) S.C. 65 ; *Muir Mills Co. Ltd.* v. *Suti Mills Mazdoor Union*, A.I.R. 1955 S.C. 170.

Third, Even where special leave has been granted in the exercise of 'discretion' the same should never carry unrestricted right to canvass any point subsequently at the final hearing. In the opinion of the Supreme Court only those points should be allowed at the final hearing which are fit to be urged at the preliminary stage when the leave is asked for[8].

Fourth, There should not be the exercise of 'discretion' for granting special leave in matters which are stale[9].

CIVIL MATTERS

Appeal to the Supreme Court in a civil matter may be preferred, depending upon the issues involved, by an aggrieved party, as a matter of course, under articles 132[10] or/and article 133[11] or under article

8 *Pritam Singh* v. *The State*, A.I.R. 1950 S.C. 169; *Sadhu Singh* v. *State of Pepsu*, A.I.R. (1954) S.C. 271; *Hem Raj* v. *State of Ajmer* A.I.R. 1954 S.C. 462; *Bengal Chemicals* v. *Their Workmen*, A.I.R. 1954 S.C. 633; *Baldeota Bros.* v. *Libro Mining Works*, A.I.R. 1961 S.C. 100.

9 *Chief Commr.* v. *Radhey Shyam* A.I.R. 1957 304.

10 Article 132 provides:

"Appellate jurisdiction of Supreme Court in appeals from High Court in certain cases:

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

11 Article 133 reads:

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters—

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(*a*) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by a law; or

(*b*) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(*c*) that the case is a fit one for appeal to the Supreme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case

135[12]. These articles prescribe certain conditions on the fulfilment of which alone an appeal can be preferred from the decision of a High Court. Article 136, on the other hand empowers Supreme Court to grant in its discretion special leave to appeal in any cause or matter.

Judicial decisions reveal that the Supreme Court has granted special leave in civil matter if the judgments appealed against involved some substantial question of law[13] or was founded upon an error of law on a material issue[14]. In special and exceptional case it has also expressed its willingness to interfere with findings of fact[15], if such findings have resulted in manifest error of law, and has sometimes, even reviewed the entire evidence[16].

On the aforesaid grounds, Supreme Court has heard special appeals in civil matters against the judgments of High Courts even though the monetary test laid down in Article 133 had not been satisfied[17] and even where the certificate of fitness[18] has not been obtained. Further, it has granted special appeals

referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anyting in Article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything, in this article, no appeal shall, unless Parliament, by law otherwise provides lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

12 Article 135 enacts:

Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court:

Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions Article 133 or Article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

13 See for example, *Sant Lal* v. *Kamla*, (1952) S.C.R. 116; *Kidar Lall* v. *Hari Lall* (1952) S.C.R. 179; *Lalchand* v. *Mallappa*, A.I.R. 1960 S.C. 85: *Bal Krishna* v. *Ramaswami*, A.I.R. 1965 S.C. 195.

14 See for example *Radha Krishna* v. *Shridhar*, A.I.R. 1960 S.C. 1368; *Ranganathan* v. *Periskaruppam*, A.I.R. 1957 S.C. 815; *Murlidhar* v. *Harichandra*, A.I.R. 1962 S.C. 366; *Satyadhan* v. *Deoraju*, A.I.R. 1960 S.C. 941.

15 See for example, *Gondumogula* v. *Penumatcha* (1962) 3 S.C.R. 324.

16 *Purnima* v. *Khagendra*, A.I.R. 1962 S. C. 267.

17 *Kamala* v. *Bachulal*, A.I.R. 1957 S.C. 434; *Chilukuri* v. *Chilukuri* (1954) S.C.R. 424; *Aruna-chala* v. *Muruganatha* (1954) S.C.R. 243; *P. H. Patil* v. *Patil* (1957) S.C. 363; *Rajesh* v. *Santi*, A.I.R. 1957 S.C. 255, 257; *Ramanna* v. *Mallaparaju* (1956) S.C.. 76; *Lakshmi Reddy* v. *Lakshmi Reddy*, 1957 S.C. 314; *Gurunath* v. *Kamalabai*, A.I.R. 1965 S.C. 296; *Sant Lal* v. *Kamala*, A.I.R. 1952 S.C. 116; *Kieddrlal* v. *Hari Lall* (1952) S.C.R. 179; *Lilachand* v. *Mallappa*, 1960 S.C. 85; *Union of India* v. *HiraDevi*, (1952) S.C.R. 765; *Ganga Saran* v. *Ram Chavan*, (1962) S.C.R. 36; *Abdulla* v. *Animendra*, (1951) S.C.R. 230; *Nemi Chand* v. *Edward Mills*. (1953) S.C.R. 197.

18 See, *supra* pp. 34-35.

Third, Even where special leave has been granted in the exercise of 'discretion' the same should never carry unrestricted right to canvass any point subsequently at the final hearing. In the opinion of the Supreme Court only those points should be allowed at the final hearing which are fit to be urged at the preliminary stage when the leave is asked for[8].

Fourth, There should not be the exercise of 'discretion' for granting special leave in matters which are stale[9].

CIVIL MATTERS

Appeal to the Supreme Court in a civil matter may be preferred, depending upon the issues involved, by an aggrieved party, as a matter of course, under articles 132[10] or/and article 133[11] or under article

8 *Pritam Singh* v. *The State*, A.I.R. 1950 S.C. 169; *Sadhu Singh* v. *State of Pepsu*, A.I.R. (1954) S.C. 271; *Hem Raj* v. *State of Ajmer* A.I.R. 1954 S.C. 462; *Bengal Chemicals* v. *Their Workmen*, A.I.R. 1954 S.C. 633; *Baldeota Bros.* v. *Libro Mining Works*, A.I.R. 1961 S.C. 100.

9 *Chief Commr.* v. *Radhey Shyam* A.I.R. 1957 304.

10 Article 132 provides:

"Appellate jurisdiction of Supreme Court in appeals from High Court in certain cases:

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

11 Article 133 reads:

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters—

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(*a*) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by a law; or

(*b*) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(*c*) that the case is a fit one for appeal to the Supreme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case

135[12]. These articles prescribe certain conditions on the fulfilment of which alone an appeal can be preferred from the decision of a High Court. Article 136, on the other hand empowers Supreme Court to grant in its discretion special leave to appeal in any cause or matter.

Judicial decisions reveal that the Supreme Court has granted special leave in civil matter if the judgments appealed against involved some substantial question of law[13] or was founded upon an error of law on a material issue[14]. In special and exceptional case it has also expressed its willingness to interfere with findings of fact[15], if such findings have resulted in manifest error of law, and has sometimes, even reviewed the entire evidence[16].

On the aforesaid grounds, Supreme Court has heard special appeals in civil matters against the judgments of High Courts even though the monetary test laid down in Article 133 had not been satisfied[17] and even where the certificate of fitness[18] has not been obtained. Further, it has granted special appeals

referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anyting in Article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything, in this article, no appeal shall, unless Parliament, by law otherwise provides lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

12 Article 135 enacts:

Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court:

Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions Article 133 or Article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

13 See for example, *Sant Lal* v. *Kamla*, (1952) S.C.R. 116; *Kidar Lall* v. *Hari Lall* (1952) S.C.R. 179; *Lalchand* v. *Mallappa*, A.I.R. 1960 S.C. 85: *Bal Krishna* v. *Ramaswami*, A.I.R. 1965 S.C. 195.

14 See for example *Radha Krishna* v. *Shridhar*, A.I.R. 1960 S.C. 1368; *Ranganathan* v. *Periskaruppam*, A.I.R. 1957 S.C. 815; *Murlidhar* v. *Harichandra*, A.I.R. 1962 S.C. 366; *Satyadhan* v. *Deoraju*, A.I.R. 1960 S.C. 941.

15 See for example, *Gondumogula* v. *Penumatcha* (1962) 3 S.C.R. 324.

16 *Purnima* v. *Khagendra*, A.I.R. 1962 S. C. 267.

17 *Kamala* v. *Bachulal*, A.I.R. 1957 S.C. 434; *Chilukuri* v. *Chilukuri* (1954) S.C.R. 424; *Aruna-chala* v. *Muruganatha* (1954) S.C.R. 243; *P. H. Patil* v. *Patil* (1957) S.C. 363; *Rajesh* v. *Santi*, A.I.R. 1957 S.C. 255, 257; *Ramanna* v. *Mallaparaju* (1956) S.C.. 76; *Lakshmi Reddy* v. *Lakshmi Reddy*, 1957 S.C. 314; *Gurunath* v. *Kamalabai*, A.I.R. 1965 S.C. 296; *Sant Lal* v. *Kamala*, A.I.R. 1952 S.C. 116; *Kieddrlal* v. *Hari Lall* (1952) S.C.R. 179; *Lilachand* v. *Mallappa*, 1960 S.C. 85; *Union of India* v. *HiraDevi*, (1952) S.C.R. 765; *Ganga Saran* v. *Ram Chavan*, (1962) S.C.R. 36; *Abdulla* v. *Animendra*, (1951) S.C.R. 230; *Nemi Chand* v. *Edward Mills*. (1953) S.C.R. 197.

18 See, *supra* pp. 34-35.

from the decisions of High Courts, (confirming judgments of courts immediately below). It will, thus, be noticed that the exercise of special appellate jurisdiction in civil matters has practically rendered article 133 otiose.

The critical question in this context is whether Articles 132, 133 and 135 occupy the entire field and prescribe conditions on the fulfilment of which alone an appeal can be preferred from the decision of High Court to the Supreme Court in respect of matters enumerated thereunder or whether they merely enumerate the circumstances under which the aggrieved party may, as a matter of course, file an appeal but leave intact the power of the Supreme Court to grant "judicial grace" and hear special appeals in appropriate cases. The provisions of Article 135,[19] tend to support the theory of occupation of the entire field. It will be observed that they do not confer a right of appeal on the aggrieved party but merely extend the jurisdiction of the Supreme Court in relation to, among other things, matters specified but not made appealable under Article 133.[20] Obviously, such extension of the jurisdiction of the Supreme Court was unnecessary if the Supreme Court could exercise jurisdiction, under Article 136, over "matters" specified but not covered by Article 133. Indeed, the very existence of Article 135 suggests that matters enumerated thereunder could not, but for that Article, have come within the jurisdiction of the Supreme Court and, the only reason why they would not have been within the jurisdiction of the Supreme Court, appears to be the theory of occupation of the entire field. By necessary implication, therefore, Article 135 indicates that the jurisdiction of the Supreme Court to hear appeals in Civil matters from the decisions of High Court is limited only to the situations enumerated in Article 133 as enlarged by Article 135 itself.

Sub-clause (2)[21] of Article 132 is also highly suggestive. If the Supreme Court could exercise "additional jurisdiction" under Article 136 in a civil matter involving a substantial question of Law as to the interpretation of the Constitution, the insertion of clause (2) in Article 132 was unnecessary and uncalled for.

19 "Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law."

20 *Garikapati* v. *Sapnaib Choudhury*, A.I.R. 1957 S.C. 540; *Ramaswami* v. *Ramanatham* A.I.R. 1951 Mad. 251.

21 Clause (2) of Article 132 reads:

"Where the High Court has refused to give such a certificate, *the Supreme Court may*, if it is satisfie l that the case involves a substantial question of law as to the interpretation of this Constitution, *grant special leave to appeal* from such judgment, decree or final order." (Emphasis added)

Likewise, the powers of the Parliament to enlarge the jurisdiction of the Supreme Court under Article 133 (a) and (3) (a),[22] are hardly in harmony with the concept of 'additional jurisdiction' of the Supreme Court under Article 136.[23]

It is possible to argue that Article 133 confers on the aggrieved litigant constitutional right to appeal to the Supreme Court and the Parliamentary power is aimed at enlarging the ambit of that right. But this line of argument loses its force when we read article 134 (2),

> "*Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals* from any judgment, final order or sentence in a *criminal proceeding* of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law. (Emphasis added)

Unless the Constitution thoughtlessly uses different expressions and words, it will be noted that the Parliament is empowered not to enlarge the ambit of area where an appeal shall lie to the Supreme Court, but is entitled to extend the jurisdiction "to entertain and hear appeals." Palpably, the power to extend the jurisdiction and its exercise will be meaningless if the Supreme Court has 'additional jurisdiction." Finally, the provisions of articles 138,[24] 139 and 140 are in sharp contrast with the provisions of article 32.

CRIMINAL MATTERS

Article 134 deals with the ordinary criminal jurisdiction of the Supreme Court. Under this Article appeals in criminal matters are available only against a death sentence of a High Court, passed by reversing an order of acquittal or made in a case which it had recalled for trial before itself, and on a certificate granted by the High Court that "the case is a fit one for appeal to the Supreme Court." Under Article 136 the Supreme Court does not function as a regular court of criminal appeal. In the beginning of its career, the Supreme Court

22 Article 133 (a) and (3) reads:

(*a*) "that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or *such other sum as may be specified in that behalf by Parliament by law.* (Emphasis added)

and under article 133 (3)

"Notwithstanding anything in this article, no appeal shall, *unless Parliament by law otherwise provides* lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court" (Emphasis added).

23 Our view is further strengthened by the fact that both these clauses did not find place in the original draft constitution but were added afterwards, ostensibly to circumscribe the scope of civil appeals to the Supreme Court; (see VIII C.A.D. 617 (1949).

24 *The Supreme Court shall have such further jurisdiction and powers* with respect to any of the matters in the Union List *as Parliament* may by law confer." (Emphasis added).

enunciated very rigid principles for interference in criminal matters. In *Pritam Singh* v. *State*,[25] Fazl Ali J., in the course of the judgment observed:

> "Generally speaking, this Court will not grant leave, unless it is shown that exceptional circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decisions appealed against.[26]

The observation of Justice Fazl Ali postulates that unless the three conditions, namely, "exceptional circumstances", "substantial and grave injustice" and "features of sufficient gravity", co-exist, exercise of jurisdiction under Article 136 would not be justified. These principles have been followed and re-iterated in a number of subsequent decisions.[27] But, in some cases, the Supreme Court has, while accepting that the guidelines laid down by *Pritam Singh's* case to determine the scope of criminal appeals by special leave, considerably liberalised the rigidity of these principles by shifting the emphasis from "*and*" to "*or*".[28]

In *State Govt.* v. *P. V. Ramakrishna*,[29] Justice Mahajan held:

> .....the exercise of this extra-ordinary jurisdiction is not justifiable in criminal cases unless exceptional *or* special circumstances are shown to exist, *or* that substantial and grave injustice has been done." (Emphasis added)[30]

Again in *Mohinder Singh* v. *The State*[31] Supreme Court stressed:

> This court, as was pointed out in *Pritam Singh* v. *The State*..... will not entertain criminal appeals except in special and exceptional cases where it is manifest that by a disregard of forms of legal process *or* by a violation of the principles of natural justice *or* otherwise substantial and grave injustice has been done"[32]

Liberality in the matter of the principles enunciated for the grant of special leave has resulted in the exercise of jurisdiction under Article 136 in practically all types of cases.

25 A.I.R. 1950 S.C. 169.
26 *Ibid.*
27 *Mohender Singh* v. *The State*, A.I.R. 1953. S.C. 415. See for example S.C. 415, 419; *State of Madras* v. *Vaidyanath Iyer*, A.I.R. 1958 S.C. 61.
28 See for example, *State Government* v. *P. N. Ramakrishna*, A.I.R. 1954 S.C. 20; *Mohinder* v. *The State*, A.I.R. 1963 S.C. 514; *Balwan Singh* v. *Lakshmi Narain*, A.I.R. 1960 S.C. 770, 775; *Sanwat Singh* v. *State of Rajasthan*, A.I.R. 1961 S.C. 715.
29 A.I.R. 1954 S.C. 80.
30 A.I.R. 1953 S.C. 415.
31 A.I.R. 1950 S.C. 169.
32 A.I.R. 1953 S.C. 415 at 418.

Unhesitatingly, it can be said that the court has granted special appeals from judgments of High Courts confirming death sentences[33], life sentences[34] or orders of acquittal[35] or from judgments awarding sentences of various types, either sentence of imprisonment or fine or both[36] and from orders of acquittal.[37] The Supreme Court has even heard special appeals from the decisions of a High Court confirming that of the Additional Sessions Judges, convicting the appellant and sentencing him to imprisonment till the rising of the court and to fines of Rs. 250/- [38] and directed release of the appellant on bail[39].

Further, Supreme Court, while hearing appeals under Article 136, has delved into factual questions[40], reviewed evidence[41] and has even interfered with quantum of punishment.[42]

Though grant of special leave depends not on the quantum of punishment imposed but on the nature of injustice caused, yet not infrequent exercise of its jurisdiction by the Supreme Court under Article 136 in criminal matters appears to have some significance: *First*, it has considerably minimised the importance of High Courts as final Courts of Criminal appeals in matters not covered by Article 134. One judge of a High Court observed:

> The finality which formerly used to attach to the decisions of High Court has practically disappeared and this has to some extent

33 See for example *Pritam Singh* v. *State*, A.I.R. 1950 S.C. 169. *Mohinder Singh* v. *The State*, A.I.R. 1953 S.C. 415, 419; *Ram Chandra* v. *U.P. State*, A.I.R. 1957 S.C. 381; *Ratan Gond* v. *State of Bihar*, A.I.R. 1959 S.C. 18; *Raghav Prapanna* v. *State of U.P.*, A.I.R. 1963 S.C.. 74; *Aghnoo Nagesia* v. *State of Bihar*, A.I.R. 1960 S.C. 119; *Brij Bhushan* v. *State of Uttar Pradesh*, A.I.R. 1957 S.C.. 474; *Khushal Rao* v. *State of Bombay*, A.I.R. 1958 S.C. 22; *Bhupendra Singh* v. *State of Punjab*, A.I.R. 1968 S.C. 1438.
34 See for example, *Sadhu Singh* v. *The State of Pepsu*, A.I.R. 1954 S.C. 271; *Dharman* v. *State of Punjab*, A.I.R. 1957 S.C. 324; *Brij Bhushan* v. *State of Uttar Pradesh*, A.I.R. 1957 S.C. 474; *Nanavati* v. *State of Bombay*. A.I.R. 1961 S.C. 112.
35 See for example, *State of Bombay* v. *Bhandhan Ram*, A.I.R. 1961 S.C. 186; *State of U.P.* v. *Ramagya*, A.I.R. 1966 S.C. 78.
36 See for example, *Ramjanam Singh* v. *Bihar State*, A.I.R. 1956 S.C. 643; *Srinivas* v. *State of M.P.*, A.I.R. 1954 S.C. 23; *H. Singh* v. *State of Punjab*, A.I.R. 1966 S.C. 97.
37 See for example, *State of Madras* v. *Vidyanathan Iyer*, A.I.R. 1958 S.C. 61; *State of Bihar*, v. *Basawan*, A.I.R. 1958 S.C. 500; *M.G. Agarwal* v. *State of Maharashtra*, A.I.R. 1962 S.C. 200.
38 See for example, *G. S. Bansal* v. *Delhi Administration*, A.I.R. 1963 S.C. 1577, 1578.
39 *Ratilal Bhanji* v. *Asstt. Collector of Customs*, A.I.R. 1967 S.C. 1639, 1643.
40 See for example, *Kunhahammad* v. *State of Madras*, A.I.R.1960 S.C. 661, 663; *Sarwan Singh* v. *State of Punjab* (1957) S.C.R. 953, 969; *E.J. White* v. *Mrs. K. O. White*, A.I.R. 1958 S.C. 441; *Hanumant* v. *The State*, A.I.R. 1953 S.C. 343, 345.
41 See for example, *Sadhu Singh* v. *The State*, A.I.R. 1952 S.C. 271; *Barsay* v. *State of Bombay*, A.I.R. 1961 S.C. 1762.
42 See for example, *Munna Lal* v. *State of U..P.*, A.I.R. 1963 S.C. 21; *Bhupendra Singh* v. *State of Punjab*, A.I.R. 1968 S.C. 1438.

unfavourably affected the prestige of the High Court judiciary..... the present tendency of the Supreme Court seems to be to convert itself into a revising court of appeal and almost every case decided by the High Court is taken up to the Supreme Court. The cost also is not prohibitive and even if the High Court refused to grant leave the Supreme Court has been granting special appeals under Article 136 of the Constitution very liberally. The prestige of the High Court has been reduced to that of a court of a District and Sessions Judge during the pre-independence days."[43].

The remarks appear to be apposite. Really, Supreme Court has converted itself into a third court of appeal. Second, to some extent Article 134 (i) has been made superfluous. Even a Supreme Court judge, in his dissenting remarks while expressing his inability to deal with factual questions, underlined that Article 134 confers power on the Supreme Court to hear appeals both on questions of fact and law and "If the scope of an appeal under Article 136 is to be extended likewise to questions of fact, Article 134 (1) would become superfluous. It is obvious that the intention of the Constitution in providing for an appeal on facts under Article 134 (1) (*a*) and (*b*) was to exclude it under Article 136." This view is also fortified by the conclusions reached in *Pritam Singh* v. *The State.*[44] Third, it has dispensed with the necessity of conferment of further powers under Article 134 to enlarge the area of ordinary criminal appellate jurisdiction[45] of the Supreme Court. *Lastly*, in criminal matters, too, special appellate jurisdiction has been exercised by the Supreme Court so as to render Article 134 meaningless. Whether the extent to which the Supreme Court used its powers is justified or not will depend upon the interpretation of the other relevant provisions of Chapter III of the Constitution. If our reading of those provisions is correct and the Supreme Court should not have very wide powers in Civil matters[46] it is submitted, on the same reasonings, that the Supreme Court should not exercise its jurisdiction under Article 136 in criminal matters in such a way as to make Articles 132, 134 and 135 redundant.

LABOUR MATTERS

In labour matters, the Supreme Court does not consider itself an Ordinary Court of appeal under Article 136 from the decisions of the tribunals[47],

43 See Law Commission of India, 14th Report Vol. I, p. 47.
44 A.I.R. 1950 S.C. 169.
45 See clause (2) of Article 134.
46 See *supra* II Bohose.
47 *Rohtas Industries Ltd.* v. *Brijnandan Pandey*, A.I.R. 1957 S.C. 1; *Indian Iron and Steel Co.* v. *Their Workmen*, A.I.R. 1958 S.C. 130.

and has expressed its unwillingness to interfere with their decisions unless exceptional or special circumstances exist.[48]

In *Bharat Bank* v. *Employees of Bharat Bank*[49], Justice Mukherjee laid down three alternative conditions for Supreme Court's interference with awards of Industrial Tribunals. Observed his Lordship:

> "Where it (Supreme Court) chooses to interfere in the exercise of these extraordinary powers, it does so because the tribunal has either *exceeded its jurisdiction* or has *approached the question* referred to it in a manner which is *likely to result in injustice* or had *adopted a procedure which runs counter to the well* established rules of natural justice.[50] (Emphasis added)

The observation suggests that the role of the Supreme Court under Article 136 would be limited only to correction of jurisdictional illegalities and procedural errors. The view of Justice Mukherjee has been followed in later decisions of the Supreme Court. In *J. K. Iron and Steel Co.* v. *Mazdoor Union*[51], Justice Bose observed that Supreme Court should exercise its "overriding power only in those cases where grave injustice has been caused or the procedure adopted is against all the notions of legal procedure."

Bengal Chemical and P. Ltd. v. *Their employees*,[52] however, has considerably enlarged the scope of special appeals in industrial matters. The judgment of the court in the aforesaid case indicates that Article 136 will be available to a litigant not only in cases where the award of industrial tribunal is made "in violation of the principles of natural justice" exceptional or special circumstances exist", but also where it raises "an important question of law requiring elucidation and final decision".

Further, Supreme Court has expressed its willingness to interfere where the tribunal erroneously applied established principles of jurisprudence,[53] or did not apply its mind to the real question,[54] or approached the problems wrongly,[55] or ignored a material document.[56]

48 *Indian Iron and Steel Co. Ltd.* v. *Their Workmen* (1956) I LL.J. 260; *Rohtas Industries Ltd.* v. *Brijnandan Pandey*, A.I.R. 1957 S.C. 1; *Bengal Chemicals* v. *Their Workmen*, A.I.R. 1959 S.C. 633.
49 A.I.R. 1950 S.C. 188.
50 *Id.*, at p. 200.
51 A.I.R. 1957 S.C. 78, 81. See also *Clerks of Calcutta Tramways Co. Ltd.* v. *Calcutta Tramways Co. Ltd.*, A.I.R. 1959 S.C. 633.
52 A.I.R. 1959 S.C. 633.
53 *Clerks of Calcutta Tramways Co. Ltd.*, v. *Calcutta Tramways Co. Ltd.* A.I.R. 1957 S.C. 78, 81.
54 *Rohtas Industries* v. *Brijnandan Pandey*, A.I.R. 1957 S.C. 1.
55 *Takla Experiment Stations* v. *Its Workmen* (1961) 11 L.L.J. 694; *Mill Manager, Model Mills* v. *Dharam Das*, A.I.R. 1958 S.C. 311.
56 *Mahalakshmi Sugar Mills* v. *Their Workmen* (1961) 11 L.L.J. 822 (S.C.).

It will appear from these and other decisions that the Supreme Court has considerably enlarged the scope of special appeals in industrial matters in exercise of its 'discretions'. The flexibility of the principles has considerably increased labour litigations in the Supreme Court. One authority quotes that one-sixth of all litigations pending before the Supreme Court relates to industrial matters.[57] Solomon R. E. Rohnson observed that labour tribunals have been made "members of the judicial hierarchy" for Article 136 purposes and the "Supreme Court has become the Supreme rulemaker of substantive industrial law."[58]

In frequently granting special appeals in industrial matters Supreme Court has overlooked its own caution :

> "A free and liberal exercise by the Supreme Court of the power under Article 136 may materially affect the fundamental basis of the decisions of the Tribunals under the Act, namely, quick solutions of industrial disputes to achieve industrial peace."[59]

Law Commission also regretted :

> "Grave are the delays caused by these large number of appeals in the disposal of industrial matters which essentially need speedy disposals."[60]

Further, Supreme Court is institutionally ill-suited to dispose of labour matters.[61]

III

The large number of special appeals granted by Supreme Court in exercise of its 'discretion' under Article 136 confirm the belief that, as we have political *swarajya*, we have judicial *swarajya*,[62] too, to raise" any cause or matter" under Article 136. The ever increasing horizon of "Supreme Court's plenary appellate 'jurisidction' makes it as "omnipotent as far as a human court could be.[63]

57 See Rustamji : *The Law of Industrial Disputes in India*, 2nd Ed. 1964 p. 1.
58 Supreme Court and Section 33 of the Industrial Disputes Act, 3 J.I.L.I., pp. 161-204, 183.
59 A.I.R. 1959 S.C. 633.
60 See Law Commission's 14th Report, Vol. 1 p. 51.
61 The Law Commission's observation in respect of labour appeals may be quoted :

> "Moreover, appellate litigation appears to be ill-suited for compensating the Court for its lack of a body experience germane to the problem of industrial conflict.....labour matters are being thrust upon a court which has not the means and material for adequately informing itself about the different aspects of the questions which arise in these appeals, and, therefore, finds it difficult to do adequate justice." (14th Report, Vol. 1, pp. 50-51.)

62 See Law Commission's 14th Report, p. 47.
63 See C.A.D. Vol. VIII, p. 638.

On account of liberal use of its 'discretion' under Article 136 by the Supreme Court, it is arguable that it would be a mere superfluity for the parliament to legislate for "the enlargement of its jurisdiction[64] or invest it with powers to issue certain writs[65] and deal with some ancillary matters.[66]

D. K. SRIVASTAVA*

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64 See Article 138.
65 See Article 139.
66 See Article 140.

* M.A., LL.M. (Banaras) ; Senior Teaching Fellow, Faculty of Law Monash University (Australia).

INTELLECTUAL AND INDUSTRIAL PROPERTY

An attempt is made in the following pages to project the judicial response in 1971 in the area of Copyright and Trade Mark.**

COPYRIGHT

One of the main problems in the area of Copyright is the extent to which a person can claim authorship in his work without adversely affecting the right of another author. A person is entitled to get protection under the law of Copyright in his original, literary, dramatic, musical and artistic work.[1] The two significant words 'original' and 'literary' have been the subject of controversy both judicial and otherwise. The word 'original' is not used in the sense of novelty or newness alone. It merely means that the work has originated from the author and that it has not been copied from a protected work.[2] However, it is possible for authors to take extracts from matters of public domain or from works not protected and such a work will be deemed to be original for the purposes of Copyright Act. Further, the work 'literary' has been defined to include tables and compilations.[3] This inclusive definition adds to the domain of literary works, something more, which ordinarily, would not have been included in it. Normally, literary work would mean the written works having excellence of form or expression, which deal with any particular aspect of literature in prose or poerty. But, in the Copyright Act, it has not been used in that sense. The use of the word 'tables' in the definition substantiates our thinking. In *University of London Press Ltd.* v. *University Tutorial Press Ltd.*[4] while deciding whether examination papers fall under the category of literary work under the Copyright Act, Peterson, J., observed :

** The study relates to the cases reported in 1971 in the All India Reporter in the area of Copyright and Trade Marks. *Bishwanath* v. *P. & D. Controller* is the only case decided by the Calcutta High Court in the area of Patents. As the decision did not involve any question of substantive law of the Patents, hence is not discussed in this article.

1 See, Sec. 13 (1) (*a*) of the Copyright Act, 1957.

2 *In University of London Press Ltd.* v. *University Tutorial Press Ltd.* (1916) 2 Ch. D. 601/608 Peterson, J. Said :

"The word 'original' does not ..... mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of literary work with the expression of thought in print or writing. The originality which is required is ..... that the work must not be copied from another work..... that it should originate from the author."

3 See, Sec. 2 (*o*) of the Copyright Act, 1957.

4 (1916) 2 Ch. D. 601, 608.

> "It may be difficult to define 'literary work' as used in the Act, but it seems to me plain that it is not confined to 'literary work' in the sense in which that phrase is applied, for instance, Meredith's novels and the writings of Robert Louis Stevenson. In speaking of such writings one thinks of the quality, the style and the literary finish which they exhibit ....In my view *the words 'literary work' cover work which is expressed in print or writing irrespective of the question whether the quality or style is high*" (Emphasis added)

The Indian judiciary has not departed from the above. Hence, anything in writing, provided it is not otherwise prohibited, can be deemed to be a "literary work" for claiming protection under the Copyright Act. Two cases[5] reported in the current year throw some light in the area of original literary work.

In *N. T. Raghunathan* v. *All India Reporter*,[6] the respondent (plaintiff) had started publishing "Notes of the unreported cases" in their journal, which contained only notes and headnotes without the original judgments. The respondents claimed that they had a copyright in them, because the preparation of notes and headnotes involved considerable amount of expense and skill. They alleged that the appellant (defendant), publishers of Madras Weekly notes, published an All India Digest, 1951-1955, criminal and revenue, in which they had copied the notes and headnotes from the respondent's "notes of unreported cases" and thus had infringed the respondent's copyright and hence, prayed for an injunction and damages.

The appellant's contention was that the respondent's work was not an original literary work, because they were merely abridgements of the original judgments of the courts of law in which no Copyright subsisted under the Act. The District Judge granted a temporary injunction prayed for by the respondent against which this appeal was preferred to the High Court.

Raghunathan's case[7] raises an important issue, namely, whether there can be any copyright available in the notes and headnotes of the reported cases (as found in the various periodicals reporting the judgments of the cases) : (i) where the notes and headnotes are the expressions of the author in his own words in a concise form ; and (2) where the notes and headnotes are verbatim extracts of the passages from the main judgment ? The Bombay High Court

5 *N. T. Raghunathan* v. *All India Reporter*, A. I. R. 1971, Bom. 48 ; and *Shyam Lal* v. *Gaya Prasad*, A. I. R. 1971 Alld. 192. The only other case decided under the Copyright Act, 1957 is the case of *M. Swain* v. *B. P. Art Press*, A.I.R. 1971 Cal. 455 which decided the issue that the City Civil Court of Calcutta could be treated as a 'district Court' having jurisdiction to entertain the infringement suit under Sec. 62, of the Copyright Act, 1957, is not discussed in this survey.

6 A.I.R. 1971 Bom. 48.

7 *Ibid.*

After comparing the works of the appellant and the respondent, Katju, J., was of the view that both the books have some similar and some dissimilar contents. There might be a strong presumption with regard to the contents which are similar that the respondent had copied it from the appellant's work. However, this could be rebutted by establishing the fact that both the appellant and the respondent arrived at the figures given in their respective works by individual labour and calculations. Further, it was also not necessary that the respondent should not have seen the work of the appellant before he commenced his work. The Court has even gone to the extent of observing that "the mere fact....that the defendant had the plaintiff's book with him will not by itself lead to an irresistable inference that he had copied the calculations from the plaintiff's book."[16] But, the mistakes found in the respondent's book were the same as found in the appellant's book. The learned judge observed that

> "....it will be a strange coincidence that the defendant when calculating himself *would commit the same mistakes with regard to the same figures* as those made by the plaintiff in his book."[17]

Hence it gives rise to a strong presumption that the respondent had copied those portions from the appellant's book. Further, the omission of the pie in the calculations by the respondent with respect to those calculations which were similar to those of the appellant and the inclusion of pie in other calculations of the respondent lead to the irresistable conclusion that the respondent had copied the materials from the appellant's work. Hence the Allahabad High Court was justified in observing that:

> "the defendent has infringed the plaintiff's Copyright."[18]

Therefore, it is difficult to say in all circumstances where two works are similar that one is the infringement of the other. As noted earlier both the works can be original, provided they have been taken independently from the public domain or both the authors have worked out the details independently in situations similar to *Shyam Lal's* case.[19]

Remedies for infringement of copyright:

Normally, the owner of a Copyright shall be entitled to have one or more of the following remedies, depending upon the circumstancs of each case; namely, (i) injunction: (*a*) partial or (*b*) full; (ii) damages (iii) accounts of profits; and (iv) the seizure of the copies of the infringing work.[20]

16 *Id.*, at 199.
17 *Id.*, at 199.
18 *Id.*, at 200.
19 Supra, note 11.
20 See, Sec. 55 of Copyright Act., 1957.

In *Raghunathan* v. *All India Reporter*[21], the Bombay High Court granted full injunction by which the appellant was restrained from printing, publishing and selling the copies of the infringing work. The appellant contended that the exercise of such a discretionary power by the court was too wide and was causing great hardship and loss to him. Therefore, he prayed that the demand of the accounts of the sale of copies at the time of assessment of damages would meet the ends of justice. Rejecting the contention, Mr. Justice Kotwal observed:

> "..... it is the plaintiff who would be more inconvenienced if the injunction does not issue (sic). Even if the convenience or inconvenience were equal, the defendants who have been prima facie proved to have offended must suffer the inconvenience."[22]

and held that any other kind of injunction would have made the assessment of the damage more difficult.

II Trade Mark

Competetion is the life breath of commercial enterprise. The difference in quality of goods obviously creates a demand for better quality of goods in the market. The manufacturers would therefore like to make their goods known to the public by giving a particular name, so that it may be possible for the purchasers to identify their goods. It is in this context that the law of Trade and Merchandise Marks plays its role by giving the right to a person over a mark with respect to a particular class of goods in which he deals either as a manufacturer or a trader-salesman. The Common law of misrepresentation as applied in the field of trade mark enunciated the principle that "no body has any right to represent his goods as the goods of somebody else". Trading must be fair and honest.[23] Even an unintentional act may be injurious and hence not permitted to be continued to exist. In the words of Lord Morris,

> "In the interests of fair trading and in the interests of all who may wish to buy or sell goods the law recognises that certain limitations upon freedom of action are necessary and desirable. In some situations the law has had to resolve what might at first appear to be conflicts between competing rights. In solving the problems which have arisen there has been no need to resort to any abstruse principles but rather ....to the straight forward principle that trading must not only be honest but must not even unintentionally be unfair."[24]

Therefore, "it is an actionable wrong for the defendant to represent, for trading purposes, that his goods are those or that his business is that of the plaintiff,

21 A.I.R. 1971 Bom. 48.
22 *Id.*, at 51.
23 Per Halsbury i.e. Reddaway v. Banham (1896) A.C. 199, 204.
24 See, *Parkerknoll Ltd.* v. *Knoll International Ltd.*, 1962, RPC 265/278.

and it makes no difference whether the representation is affected by direct statements, or by using some of the badges by which the goods of the plaintiff are known to be his, or any badges colourably resembling these, in connection with goods of the same kind, not being the goods of the plaintiff, in such a manner as to be calculated to cause the goods to be taken by ordinary purchasers for the goods of the plaintiff,"[25]

Before the introduction of the statutory protection to trade marks, both in England[26] and in India[27] the aggrieved traders could bring an action against an unfair competitor by bringing an action for passing off. The basis of a passing off action being a false representation by the defendant, it had to be proved in each case as a matter of fact that false representation was made and the mark of the defendant was so deceptively similar to the mark of the plaintiff that it caused confusion in the minds of persons of average intelligence and imperfect recollection. Moreover, "it is of the essence of an action for passing off to show, first, that there has been an invasion by the defendant of a proprietory right of the plaintiff (in respect of which the plaintiff is entitled to protection), and, secondly, that such invasion has resulted in damage or that it creates a real and tangible risk that damage will arise"[28]. However, the enacting of a statutory law has enabled persons to get their trade marks registered, if they wished to avail of a speedier remedy. The Trade Merchandise Marks Act, 1958, while giving relief to the traders against the infringement of their registered trade marks, did not take away the right available under an action for passing off.[29] Apart from the speedier remedy, one of the advantages of the registration of a trade mark is to enable a trader to know whether a particular mark proposed to be selected and used by him in the course of the trade is already registered and used by another person or not. This facility is not available with respect to unregistered trade marks. Hence, the possibility of the unintentional use of similar marks by rival traders is increased.

In *E.E.H. Mills* v. *A.T. Mills*[30] the plaintiffs manufacturer of ganjees vests and using the word "MOTI" as the trade mark, brought an action for passing off against the defendants, dealers in ganjees who were using "SACHA-MOTI" as their trade marks, praying that the defendants be restrained from using the word "SACHA MOTI" as it was causing a deception to the purchasers.

25 See, Kerly's Law of Trade Marks, 10th Edition (1972), p. 362.

26 In England the acquiring of the trade mark by registration was first regulated by Trade Marks Registration Act, 1875.

27 In India, though the Trade Mark Act was passed in 1940, relief to the aggrieved was granted under section 54 of the specific Relief Act, 1877, which governed the grant of injunctions in trade mark cases.

28 Wynn-Parry, J, in *McCulloh* v. *Lewis A May Ltd.* (1948) 65 RPC 58/64.

29 See Section 27 of the Trade & Merchandise Marks Act, 1958.

30 AIR 1971 Cal. 3.

The defendants resisted the claim and, *inter alia*, pleaded that (i) "MOTI" was not a registered Trade Mark and (ii) that they had taken the name from the name of one Moti Ram gupta, father of one of the partners of the firm and a well known merchant of Hosiery goods. Ghose J., observed :[31]

> "In an action for passing off or preventive use of trade name, the plaintiff must prove the following fact :
>
> (i) A disputed name or mark or sound or get up has become *distinctive* of the plaintiff's goods so that the use of the said name of (sic) mark etc., in relation to goods are regarded by a substantial number of members of public or in the trade as coming from the same source ;
>
> (ii) The defendant's use of the name or mark was likely or calculated to deceive or cause confusion and injury, actual or probable to the goodwill of the plaintiff's business."

However, in the instant case plaintiff's mark "MOTI" had acquired distinctiveness on account of its continuous use for ten years prior to the use of the mark 'SACHA-MOTI" by the defendant. Moreover, the word "SACHA" was written in small letters above the word "MOTI" written in bold letters, which was indicative of the fraudulent intention of the defendant. His Lordship opined that :

> "Resemblance in the respective get up of the two marks and the phonetic similarity of "MOTI" and "SACHA-MOTI" seems....to be likely to mislead purchasers in our country by whom the said goods would normally be bought."[32]

Further, regarding to the right to use the word forming part of one's own name the Court laid down that :

> "....the right to trade in one's own name does not entitle a man to use his name in connection with goods or business if the result will be to deceive the public into believing that they are the goods or the business of another."[33]

31 See also 38 Hslsbury Laws of England, 597 article 998.

32 A.I.R. 1971 Cal. 3/7.

33 *Id.* at page 7 : The Calcutta High Court took help of the observation of the Court of Appeal in *Wright, Layman Umney Ltd.* v. *Wright*, (1949) 66 R.P.C. 149, where Lord Greene M. R. observed :

> "the defendant was not allowed to trade under a name which was similar to that of the plaintiff, *without clearly distinguishing his businss from that of the plaintiff*" See also, *Electromobile Co. Ltd.*, v. *British Electromobile Co. Ltd.* (1908) 25 R.P.C. 149/154 where it was stated "if in point of user a particular thing had become so identified with the proper name of a person who carried on business under his own name that he could establish, as a matter of fact, that the name had become associated with the particular manufacture, ... another person who set up in business under that name, although it might be that person's own proper names might be restrained from carrying on that business under that name. But these are all questions of fact."

However, the decision does not satisfactorily meet the following situations :

(i) where both the plaintiff and the defendant commence same type of business on the same date ;[34]

(ii) Where both the plaintiff and the defendant have a common name and they use the same as a trade mark ;[35]

(iii) Where both the plaintiff and the defendant do not register their trade marks ; and

(iv) Where both the plaintiff's and the defendant's marks (as mentioned in (ii) above) have gained reputation in the market.

National Bell Co. v. *Metal Goods Manufacturing Co.*[36] raised the issue whether the respondents' use of the mark '50' in numerals and 'Fifty' in words in cycle bells possessed the characteristics of 'distinctiveness' as required by the Trade & Merchandise Marks Act, 1958,[37] to enable them to get those marks registered and thus to restrain others from using the same marks in respect of the cycle bells. Prior to the respondent's use of the words numeral '50' and words 'Fifty' certain foreign Companies (viz. Lucas) were using this mark in cycle bells, which were sold in the Indian market. The facts as reported reveal that these foreign companies were using the mark as "type marks" and not as "trade marks". In 1952, the Government of India prohibited the import of the foreign cycle bells, on account of which the foreign

34 The querry becomes relevant, because the preference of the longer user of a mark might be a weightier evidence to give a right to use the mark by that person ; However, in *Wright, Layman and Umney Ltd.* v. *Wright* (1949) 66 R.P.C. 149/151, 152 Lord Greene, M. R. stated that—

"A man may sell goods under his own name as his own goods. If he does so he is doing no more than telling the truth. If there happens to be already on the market another trader of that name, with a goodwill in a name known exclusively as referring to his goods, that is just his misfortune if somebody else having the right to trade in his own name cuts into his business. That is one of the cases where, so to speak, two conflicting rights have to coexist together if justice is to be done ; and it has to be laid down as clearly as can be that, provided that a man keeps within the limit of using his own name and does so honestly, and does not go beyond that, no body can stop him, even if the result of his doing so leads to confusion."

35 See, *Burgess* v. *Burgess* (1853) 2 Dc. G.M. & G 896, where it was stated that a person has a prima facie right to use his personal name for trading purposes, even though it is the same as that of his better known rival (quoted from S. Venkateswaran's Trade and Merchandise Marks (1963) page 490).

36 A.I.R. 1971 S.C. 898.

37 Section 9 of the T.M. Act, 1958 requires that a mark shall not be registered unless it is a distinctive mark. Sub-Section (3) of Section reads :

"For the purpose of this Act, the expression 'distinctive' in relation to the goods in respect of which a trade mark is proposed to be registered, means adapted to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade....."

companies lost their interest in the cycle-bell trade and did not protest against the use of the mark numeral '50' and words 'Fifty' in cycle bells by the Indian manufacturers. However, in 1952 the respondents got the mark '50'in numerals and 'fifty' in words for cycle bells, registered in their name,[38] without any opposition. In 1959, the respondents brought an action against the appellants for the infringement of their registered trade marks. The appellants moved an application demanding time for filing rectification proceedings in the High Court, which was granted in 1961.

Thereupon, the appellants raised the following objections :

(i) The numeral '50' and the word 'Fifty' were common to trade at the time of the registration by the respondents ;

(ii) Many manufacturers were using the numeral '50' and word 'Fifty' on or in relation to cycle-bells and so the "distinctiveness" had been lost ; and

(iii) The respondents had no bonafide intention to use the said marks in relation to their goods at the time of registration ;

and prayed that the registration of the mark in favour of the respondents be invalidated on the grounds :

(*a*) that the original registration was obtained by fraud ;

(*b*) that the trade mark was registered in contravention of the provisions of section 11 of the Act ; and

(*c*) that the trade mark was not "distinctive" of the goods of the respondent.[39]

The High Court of Punjab (both single judge and Division Bench) was of the view that though the idea of using the marks numeral '50' and word 'Fifty' was not original of the respondents, there was nothing wrong in converting the use of the "type marks" by the foreign concerns into the registered trade marks by the respondents. Moreover, on the basis of the evidence, their Lordships were of the view that some concerns, finding the use of the marks numeral '50' and words 'Fifty' by the respondents highly successful, had sought to take advantage of the popularity by imitating their marks, and hence rejected the contentions of the appellants. The appellants, thereafter appealed to the Supreme Court.

38 The respondent company, though not the first user of the words '50' in words and 'Fifty' in numerals, was also not committing an infringement of the mark as it was not registered in the name of any other company.

See, Section 32 of the T.M. Act, 1958 ; The appellant had to proceed under Section 32, because, "the original registration of the trade mark shall, after the expiration of seven years from the date of registration, be taken to be valid in all respects and in this cse the case was brought after 7 years. See, also *R. A. Sharma* v. *C. S.Sharma*, A.I.R. 1971 Alld., where, again, the case was brought after 7 years from the date of registration of the Trade mark and the Allahabad High Court was not prepared to interfere except on the grounds mentioned in Section 24 of T.M. Act, 1940 which was similar to Section 32 of the T.M. Act of 1958 with minor differences.

The issues considered by the Supreme Court were:

(i) whether the respondent's registration of the mark ought to have been refused on the basis that the mark was likely to deceive or cause confusion in the minds of the public on the date of the registration, and thus offended section 11(*a*) of the Act; and

(ii) whether the respondent's registration of the mark ought to have been refused on the basis that the same was disentitled to protection as it was not distinctive of the goods, and thus offended section 11 (*e*) read with Section 9 (*c*) of the Act.

Regarding the *first*, the Court was of the view that though there were similar marks in the market, the demand of the goods was made, not on the basis of numeral "50" or words "Fifty" only but on the basis of the name of the manufacturers, viz., "Lucas", Asia or Gupta. However, Shelat, J. observed:

> "..... there was no..... evidence ..... from which any likelihood of confusion or deception could be deduced."[40]

and so clause (*a*) Section 11 of the Act was not attracted. Regarding the *second*: repelling the contention of the appellant, the Court felt that section 11 of the Act was not subject to the provisions of Section 9 of the Act in the sense that if a mark fulfilled the requirements of Section 9, it automatically fulfilled the requirement of Section 11 or vice-versa. The reading of both the Sections 9 and 11 would reveal that even if a mark may comply with the requisites of section 9 but still it may not be fulfilling the requirements of Section 11 or vice-versa. Therefore, for entitling a mark to be eligible for registration it must fulfill the requirements of both the sections independently. Moreover, the endeavour of the appellant to bring the case under section 32 (*b*) of the Act, for which he had to establish that the registration of the mark offended Section 11 of the Act was a far fetched attempt. Further, the phrase "disentitled to protection in a court" occuring in caluse (*e*) of Section 11 of the Act laid emphasis on the illegal aspect of a situation on the basis of which the mark may not be registered. However, it does not relate to clause (*e*) of Section 9. Emphasising the importance and utility of the mark being and remaining distinctive of the goods, Shelat, J., observed:

> "..... the property in the trade mark exists so long as it continues to be distinctive of the goods of the registered proprietor in the eyes of the public.....If the proprietor is not in a position to distinguish his goods from those of others or.....the mark has become so common in the market that it has ceased to connect him with his goods, there would hardly be any justification in retaining it on the register"[41]

40 A.I.R. 1971 S.C. 898, 905.

41 *Id.*, at 907.

However, in the instant case,

> "the progressive increase in the sales of "Asia Fifty" and 'Asia 50' .....together with the evidence of witness examined.....shows that the said trade mark distinguished the goods of the respondent company from those of other manufacturers in the field."[42]

We agree. However, we hasten to add that it was not the use of the "numeral 50" and words "Fifty" that identified the goods of the respondents but, it was 'Asia Fifty' and 'Asia 50' which were held to be distinctive of the respondent's goods. Unfortunately, the question, whether the use of the numerals alone would entitle the respondents to claim the right to get the mark "numeral 50" registered in their names was left unanswered by the Supreme Court. Normally, numerals standing alone are *prima-facie* not considered as a distinctive Trade Mark.[43] But, the inclusion of the word "numeral" in the definition of the Mark[44] is indicative of the fact that there is no prohibition of the use of the numerals alone or with any combination as a trade mark provided it acquires the *quality of distinctiveness*. Therefore, a common word which ordinarily is not entitled to be registered as a trade mark can be registered if it is established that it has become distinctive.[45]

Further, a descriptive word which ordinarily is not entitled to be registered as a trade mark can be registered on the basis of the word becoming distinctive of the person claiming the same.

In *R. A. Sharma* v. *C. S. Sharma*[46] the appellants filed an application in the High Court praying that the words "Himkalyan Tail" (in Devnagri Script) and the words Him Kalyan (in English) registered in the name of the respondents be expunged. The contention of the appellant, *inter-alia*, was that the words "Him" and "Kalyan" were words widely used in Ayurved for purposes of hair oil and could not be said to be an invented word for the purpose of registration.[47] The learned judge held that the respondent had the exclusive right to use the word 'Him Kalyan Tail' which was distinctively recognised and observed:

42 *Id.*, at 907.

43 "Numerals are considered to be prima-facie indistinctive and only registrable upon proof of very extensive use", Kerly's Law of Trade Marks, (10th Edn.) 1972, page 23.

44 Section 2 (*j*) of the Trade and Merchandise Marks Act, 1958, defines a "mark" to include a device, brand, heading, label, ticket, name, signature, word, letter or *numeral* or any combination thereof.

45 For instance, marks "50"; "777"; "O" used in soaps are distinctive; so also "555" "999" on Cigarettes were distinctive.

46 A.I.R. 1971 Alld. 157 (D.B.).

47 The other contentions of the appellant viz., that the registration was obtained by fraud and that the mark was the joint family property of the respondent and hence they should be expunged, are not discussed in this article. However, both were negatived.

".....although the two words "Him" and 'Kalyan' have become *public juris* the combination "Himkalyan" has not become *"public juris"*.[48]

Further, the continuous use of the word "Himkalyan" by the respondent for a very long time (since 1909) and the non-use of the word by any rival trader went to establish that the word had acquired distinctiveness, and the respondent had the exclusive right to use the word as his trade mark. On further appeal, negativing the contention of the appellant that the word "Himkalyan" had a direct reference to the character and quality of the hair oil, Parekh, J., speaking for the Court observed:

"The word "Himkalyan" when split up may be *public-juris* but the combination of the two-words 'Him' and 'Kalyan' had acquired a distinctiveness in the trade of the respondent"[49].

Moreover this compound word was not used by any rival trader in the trade. Therefore,

"the compound word distinguishes the goods of (respondent) and it had acquired distinctiveness much prior to the date of application for registration of the trade mark, and was not *public juris*."[50]

We agree.

REGISTRATION OF TRADE MARK:

A person desirous of getting a trade mark registered has to apply to the appropriate office of the Trade Mark Registry in Form TM-1. The Registrar, apart from causing a search amongst the registered trade marks and amongst pending applications, whether there is any mark identical with or deceptively similar to he mark applied for, advertises the mark in the Trade Marks Journal (a Government of India bi-monthly published by the Registrar of Trade Marks from Bombay) for inviting any opposition by any person. If an opposition is made, the Registrar shall give an opportunity for hearing the parties and decide the claim.[51]

In *Madan Mohan* v. *Brij Mohan*[52], during the pendency of the registration application of a trade mark "Shanker" by a partnership firm the firm was dissolved and the right to use the trade mark "Shanker" by the partners[53] after dissolution was disputed. The respondents moved for an amendment in the original application on the basis of the partnership dissolution deed. The appellant, when he came to know of the amendment application, informed the Registrar and requested him not to proceed with the original application. The Registrar, however, without hearing the appellant allowed the amendment moved by the respondents. On appeal to the High Court upholding the contention of the appellant, Misra, J., observed:

"Before interpreting this document (the deed of dissolution) it was the duty of the Registrar to give an opportunity to the appellant so that he could submit his contentions and interpretations of the relevent portions of this deed."[54]

and in the instant case, the circumstances show that—

".....no opportunity of being heard was granted to the appellant before the decision was taken (by the Registrar).[55]

Under these circumstances the case was remanded with the direction that an adequate opportunity of hearing was to be given to the appellant. It was surprising that when the attention of the Registrar of Trade Mark was drawn by one of the parties (as a partner) of the original application as also to the deed of the dissolution not to proceed with the original application, he should have ignored the request and proceeded to uphold the amendment as desired by the respondent without hearing the appellant. Even in situations, where an opposition is made by any party during the process of the registration of a Trade Mark the statute[56] requires that the Registrar should give an opportunity to the parties to be heard. In *Madan Mohan's* case, the giving of the opportunity to the appellant was all the more necessary because he was one of the partners of the firm (which was dissolved) and he had a right to claim the use of the mark 'Shanker' for his trade unless he agreed otherwise with other partners, which does not appear from the facts of the case.

S. P. RAMAN*

48 A.I.R. 1971 Alld. 157, 159.
49 *Id.*, at 160.
50 *Id.*, at 160.
51 See, Section 21 (4) of the Trade and Merchandise Marks Act, 1958.
52 A.I.R. 1971 Delhi 313.
53 The appellants and respondents were the sons of Mr. Shanker Lal Garg and, the word 'Shanker' was selected to be used as a trade mark for the business of the firm.

54 A.I.R. 1971 Delhi 313, 316.
55 *Id.*, at 316.
56 See, sub-section (4) of Section 21 of Trade & Merchandise Mark Act., 1958.

* Lecturer, Law School, Banaras Hindu University.

THE CONTROLLER OF ESTATE DUTY U.P. V. ANARI DEVI HALWASIYA

A Case for overruling

The Controller of Estate Duty U.P. v. *Anari Devi Halwasiya*[1] spotlights the difficulties the courts are encountering in interpreting the provisions of the Hindu Succession Act in the light of those traditional provisions which remain unabrogated. The ruling in this case exemplifying the interaction between the traditional provisions and the statutory regime has unfortunately affected the property rights of Hindu Women in the most populous state of India. The matter came up before the Allahabad High Court by way of reference made under Section 64(1) of the Estate Duty Act, 1953 for ascertaining the interest of a Hindu widow in the undivided family property. The facts in brief are that one D.P. Halwasiya died in 1957 leaving behind his two wives Anari Devi and Tribeni Devi, a son and three daughters. Some time later Tribeni Devi also passed away. Consequent to her death the question of assessing the duty payable with respect to the estate of Tribeni Devi came up before the tax authorities. After a good deal of confusion[2] regarding the ascertainment of the interest of the deceased Tribeni Devi the matter was ultimately referred to the High Court.

The main question involved in this case was to find out the exact share of the joint family property which devolved on Tribeni Devi after the demise of her husband Halwasiya and which was therefore liable for the estate duty. Section 6 of the Hindu Succession Act, 1956 which regulates the devolution of the coparcenary interest of a Hindu male lays down :

"When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by tes-

1 A.I.R. 1972 All. 179.

2 It is difficult to account for the various fractional shares arrived at by the tax authorities. See *Anari Devi's* case ps. 179, 180. See also *Shiram bai* v. *Kalgonda*, A.I.R. 1964 Bom. 263 regarding the ascertainment of the wife's interest.

tamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1 :—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. ....."

Explanation 2 :—.....

Since the deceased Halwasiya died leaving behind female heirs of the class I of the Schedule, namely, the wives and the daughters, the operation of survivorship under para 1 of the section will be displaced by succession taking place according to the provisions[3] of the Hindu Succession Act. The first stage in the process of intestate succession will be to ascertain the interest of the deceased coparcener. In view of the fact that the interest of a Mitakshara coparcener in the joint family property is fluctuating and uncertain, section 6 has laid down in explanation 1 the mode by which the interest of the deceased could be ascertained. Explanation 1 contemplates a notional partition taking place just before the death of the coparcener and whatever share he receives at such a partition would devolve on his heirs by succession.

It is in this context that we have to turn our attention to the traditional law relating to partition which has been left untouched[4] by the provisions of the Hindu Succession Act, 1956. Under the traditional Hindu law apart from the coparceners who can enforce partition and receive their respective shares, certain females[5] are also given shares in the joint family propery although such females cannot ask for partition.

3 Sections 8-13 of the Act lay down the rules relating to intestate succession.

4 It is true that some restrictions have been imposed under section 23 of the Hindu Succession Act regarding the right of female heirs in demanding partition of dwelling houses. However that section does not in any way affect the traditional law relating to partition.

5 At a partition between father and sons, father's wife is entitled to receive a share equal to that of a son. Where the father is having two or more wives each one of them is entitled to receive a share equal to that of a son. Also at a partition between the brothers, the widowed mother is entitled to receive a share. See Mayne's Hindu Law (1953) p. 529 J. D. M. Derrett, Introduction to Modern Hindu Law (1963) p. 323-29.

The remark of Pathak, J., in Anari Devi's case (p. 181) that these females have no interest in the joint family property is also disputable. They have undoubtedly some kind of interest in the joint family property although its nature and quality may differ from that of a coparcener's interest. An interest need not give rise to a present and immediate right in the property. The fact that these females cannot enforce partition like coparceners does not obliterate even the existence of their interest. Their interest blosoms into a right when other coparceners effectuate a partition.

The Allahabad High Court while rightly stating the law relating to female sharers under the traditional Hindu law correctly computed the share of the deceased Halwasiya as one fourth of the coparcenery property by taking into account the two coparceners, namely, Halwasiya and his son and the two wives Anari Devi and Tribeni Devi. Applying section 10[6] of the Hindu Succession Act the High Court held that Tribeni Devi received one fortieth share in the joint family property. However the court erred when it came to the crucial question as to what was the share of Triveni Devi which she would receive in her capacity *not as the heir of Halwasiya but as Halwasiya's wife* at a partition between Halwasiya and his son. At this point the learned judge resiled from the logical course whic he should have taken and held that :

> "under the Hindu law, it is only if a partition takes place between the sons that the widowed mother becomes entitled to a share. Her share is then equal to that of a son in the coparecnary property.... In the present case in the absence of any partition the widowed mothers could not be said to have any interest in the balance of the coparcenary property remaining joint. Accordingly we must hold that Tribeni Devi had no interest in the three fourth part of the coparcenary property which remained joint upon the death of D.P. Halwasiya."[7]

At the outset it may be pointed out that Tribeni Devi's claim for one fourth share in the joint family property is not in her capacity as a widowed mother but as father's wife. Further, though the court did not specify as to what would happen to the three fourths share of the property (in which Tribeni Devi was denied her share) it was implied that it would devolve on the only son by survivorship which conclusion would create conceptual difficulties. It is also significant that the attention of the court was not drawn to some of the relevant rulings of other High Courts on the same point.

The same question had been raised before the Bombay High Court more than once.[8] In *Shiram bai's*[9] case Patel J. agreeing with the submission of the counsel that :

> "the rule of mitakshara law that on a partition the mother is entitled to a share (a limited estate) and that daughter's maintenanec and marriage expenses should be provided is for the reason that they do not have any share in the family property as such nor are they entitled to succeed to the husband and father respectively. But now that they are entitled

6 While under Rule 1 of section 10 the two widows together take one share, under Rule 2 the son and the three daughters will take one share each.

7 A.I.R. 1972 All 179, 181.

8 *Shirambai* v. *Kalgonda* A.I.R. 1964 Bom. 263; *Rangu bai* v. *Laxman*, A.I.R. 1966 Bom. 169.

9 A.I.R. 1964 Bom. 263.

> to succeed to a share on the death of the husband and father, under section 4 that rule of partition must be deemed to have been abrogated."[10]

held that the widow was not entitled to a share as father's wife at the time of notional partition. However, when the same question was taken up in *Rangubai's*[11] case significantly Patel J. who was a party to the earlier decision was again a member of the bench. The learned Judge after a thorough examination of the law on the point had no hesitation, while decla ing that the matter had not been fully discussed in *Shirambai's*[12] case, in departing[13] from the earlier decision. His lordship held that the widow was entitled to her share as father's wife at the time of no'ional partition.

The bone of contention in the aforesaid cases relates to the interpretation of the Explanation 1 of Section 6 of the Hidu Succession Act. Mulla puts a strict construction on the terms used in the explanation that the deemed partition is only for the purpose of carving out the share of the deceased coparcener for devolution and nothing more.[14] Such a rigid literal interpretation ignores the disquieting implications of such a stand on the property rights of others and its illogicality further leads to conceptual confusion.

The only other alternative is to take notice of all the implications of the notional partition and work it out to its logical conclusion. As Patel, J., put it :

> 'The Explanation enacts in effect that there shall be deemed to have been a partition before his death and such property as would have come to his share would be divisible amongst his heirs. It introduces a legal fiction of a partition before his death since without such fictional partition his share cannot be possibly determined."[15]

When such a fiction has to be given effect, should we stop half way as the learned judge did in *Anari Devi's case ?* The illogicality will be patent if we say that for the purpose of computing the share of the deceased we will take the two wives into account (that is how the Allahabad High Court arrived at the fractional share of one fourth), however when the wives claim their respective shares we will tell them that they are not entitled to claim those shares. In the words of Patel, J :

> "(C) an it then be said that though the Legislature intended that there shall be deemed to be partition of the property and the share of the

10 A.I.R. 1964 Bom. 263.

11 A.I.R. 1966 Bom. 169.

12 Note 10.

13 It was not a case of technical overruling for both the cases were decided by division benches. However the learned judge rightly declared that he was not bound by the earlier decision. A.I.R. 1966 Bom. 169, 174.

14 Mulla's Hindu Law Ed. S. T. Desai (1974) 850-852.

15 A.I.R. 1966 Bom. 169, 173.

deceased coparcener shall be deemed to have been separated the share to which the wife would be entitled should fall into vacuum and no relief could be granted to her ? Should such a share be allowed to be enjoyed by the son or sons ?[16]

Regarding the assumption that has to be made while giving effect to the fiction the learned judge quotes the remarks of the Supreme Court in *Commissioner of Income Tax Delhi* v. *Teja Singh*[17] *that :*

"It is a rule of interpretation well settled in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate.[18]

Further,

"If you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine certain state of affairs ; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."[19]

The implication of the ruling in *Anari Devi's*[20] case leads to the conclusion that the shares of the father's wives (namely, that of Anari Devi and Tribeni Devi) would devolve on the only son by survivorship. Such a conclusion is conceptually untenable. It is clear from the terminology of section 6 that either survivorship will operate or succession will take place according to the provisions of this Act. The idea of a portion of the property devolving by succession and another portion devolving by survivorship, to say the least, is unheard of under the Hindu law of inheritance.

It is interesting to notice that *Pratapmull* v, *Dhanbati*,[21] a case of doubtful validity, has influenced Pathak, J.'s conclusion. Though *Pratapmull's*[22] case held that the father's wife is not entitled to a share until the actual division, the Supreme Court[23] has questioned its correctness on different

16 Id. 173.
17 A.I.R. 1959 S.C. 352.
18 *Ibid.*
19 *Lord Asquith of* Bishopstone in *East End Dwellings Co. Ltd.* v. *Finsbury Council* (1952) A.C. 109, 132-133. Also referred by Aiyar, J. in *Teja Singh's* case p. 355.
20 A.I.R. 1972 All 179.
21 A.I.R. 1936 P.C.
21 A.I.R. 1936 P.C.
21 A.I.R 1936 P.C.
22 *Ibid.*
23 *Munnalal* v. *Rajkumar*, A.I.R. 1962 S.C. 1493, 1499, 1500.

grounds and has held that it is no longer good law in the light of the provisions of the Hindu Succession Act. It may be observed that even if Pratapmull's case stood as an authority the fiction could comprehend the partition by metes and bounds as Professor Derrett has suggested.[24]

In the light of the above discussion, it is submitted with great respect that the ruling in *Anari Devi's* case needs reconsideration for it is going to affect the property rights of a large section of Hindu Women in the State of Uttar Pradesh.

B. N. SAMPATH*

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24 The Ascertainment of a Deceased Coparcener's Share, 66 Bom. L.R. (1964) p. 169, 170.

*Reader, Law School, Banaras Hindu University, Varanasi-5.

JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION

The vast expansion of social legislation that has taken place in many countries of the world including India within the last hundred years has led to unprecedented growth of administrative process. Instead of confining itself to defence, public order, the criminal law, and a few other general matters, the modern state has undertaken elaborate regulation of the activities of the individual in the society. To meet the various requirements of the welfare schemes planned and introduced by the Government, administration has to be armed with new powers. To-day the welfare state primarily endeavours to invest the administrator with almost unlimited *discretion* to fulfil social needs through the accomplishment of legislative policies. The central theme of administrative justice, however, is the reconciliation of discretion of officials with the liberty of the individual.

The present note makes an attempt to evaluate the impact of judicial decisions in regulating the exercise of administrative discretion in Indias pecially after the establishment of the Republican Constitution of 1950.

THE NATURE OF ADMINISTRATIVE DISCRETION

An administrative discretion may be defined as a statutory power conferred on a public authority to make a choice, out of available alternatives, on considerations which are either not feasible or not possible to be declared before hand, the element governing a non-personal exercise of that choice being the statutory purpose.[1] For example, a statute may not make any classification of the persons or things for the purpose of applying its provisions, but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. However, discretionary powers must be exercised reasonably not arbitrarily. Lord Halsbury observed on the general discretionary power:

> ".....'discretion' means when it is said that something is to be done within the discretion of the authorities and that some things to be done according to the rules of reason and justice, not according to private opinion..... (but) according to law, and not humour. It is to be, not arbitrary, vague, and fanciful but legal and regular".[2]

1 A.T. Markose, Judicial Control of Administrative Action in India, (1956) p. 406.
2 *Sharp* v. *Wakefield* (1891) A.C. 173 at 179.

The crucial question, however, is: In what circumstances and to what extent will the courts review the merits of the exercise of a stautory discretion which is neither made subject to appeal nor limited by the express provisions of the Act? The courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confided. The scope of review may be conditioned by a variety of factors: the wording of the statute, the subject-matter to which it is related, the character of the authority to which it is entrusted, the purpose for which it is conferred, and last but not the least the court's view that judicial intervention would be in the public interest.

PRINCIPLES GOVERNING THE EXERCISE OF DISCRETIONARY POWERS:

An administrative authority possessing discretionary powers must act according to law. The authority does not do so if it exercises its power for a purpose different from the one for which the power was conferred or for an improper purpose, or acts in bad faith, or takes into account irrelevant considerations or leaves out relevant considerations, or acts unreasonably. These factors can be grouped under two main categories; abuse of discretionary power and failure to exercise discretion.

ABUSE OF DISCRETIONARY POWER:

It is a very well established principle of law that even the widest discretion conferred by law is subject to judicial control on grounds of abuse of power, that is, malafides, improper purpose, extraneous considerations, leaving out relevant considerations and so on, irrespective of the fact whether the function is quasi-judicial or administrative.[3] However, the role of the courts in interfering with the discretionary powers of the Government is limited. Their duty is to ensure that the discretion has been exercised according to law. The Supreme Court has emphasised that:

> ".....the court is not an appellate forum where the correctness of an order of Government would be canvassed, and, indeed, it has no jurisdiction to substitute its own view for entirety of power, jurisdiction and discretion..... is vested by law in the Government. The only question which could be considered by the court is whether the authority vested with the power has paid attention to or taken into account circumstances, events or matters wholly extraneous to the purpose for which the power was vested, or whether proceedings have been initiated malafide for satisfying a private or personal grudge of the authority."[4]

3 S.N. Jain, New Trends in Judicial Control of Administrative Discretion (1969) 4 JILI 544 at 552.
4 *Pratap Singh* v. *State of Punjab*, A.I.R. 1964 S.C. 72 at 83.

The direction of the Court will be to hear and determine according to law, though in some cases where the application has been rejected on account of irrelevent considerations, the court may direct the authority, to grant the application.[5] This may happen when the range of discretion has been cut down to such an extent that only one decision is possible.

An arbitrary exercise of power is an abuse of power. Ameer Ali C. J., has summed it up effectively in an epigram that if a new and sharp axe presented by Father Washington (the Legislature) to Young George (the statutory authority) to cut timber from father's compound is tried on the father's favourite apple tree an abuse of power is clearly committed.[6] There is an interesting decision of the Calcutta High Court in *Ghrita Mohan v. Additional District Magistrate*,[7] in which an authority empowered to decide appeals disposed of about 1700 appeals together, and it appeared that the discretion was exercised mechanically. Mandamus was issued directing him to deal with the matter according to law.

Thus an important ground on which the exercise of administrative discretion can validly be challenged is that of abuse of power. Abuse of discretionary power can be found in many guises. For instance, there may be abuse of discretion where repository of the discretion has sub-delegated the power of decision to another body, acted under the dictation of another body, purported to determine the matter by reference to a pre-determined rule of policy without reference to the particular merits of the case in hand, or postponed or adjourned consideration of the matter in a manner that was tantamount to a refusal to decide.

Sub-Delegation of Powers :

One way in which a discretionary power can be abused is where the function is delegated to some one not entitled to exercise it or an administrative authority uses its power for purposes other than those that the delegating authority had in mind.[8] A discretionary power, in general, be exercised by the auhtority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person, he must exercise that power personally unless he has been expressly empowered to

5 See for instance—*Ahmedabad Manufacturing and Calico Ptg. Ltd.* v. *Municipal Corporation, Ahmedabad*, A.I.R. 1956 Bom. 117.

6 Judicial Control of Administrative Action in India, supra note 1 at 417.

7 A.I.R. 1954 Cal. 97. See also *Hindustan Steels Ltd.* v. *A. K. Roy*, A.I.R. 1970 S.C. 1401.

8 Schwartz, *French Administrative Law*, p. 216.

delegate it to another.[9] This principle is expressed in the maxim *delegatus non-potest delegare* (or *delegari*).[10]

In an English case a whole series of suspensions and dismissals proved to be invalid because the initial suspensions had been made by the Port Manager, when in fact they should have been made by the Dock Labour Board.[11] The essence of the rule, therefore, is that only the authority indicated in the statute should perform the function otherwise the aforesaid common law maxim makes sub-delegation, unauthorised unless the person on whom the power is conferred is permitted to delegate, expressly or by necessary intendment.[12]

Acting under Dictation :

An authority entrusted with a discretion must not act at the dictation of some other person. In *Simms Motor Units Ltd.* v. *Minister of Labour and National Service*,[13] under war time labour regulations, a national service officer had power, after considering the report of an appeal board, to direct reinstatement of industrial workers dismissed for misconduct, it was held that a re-instatement order was invalid because he made it automatically in obedience to the instructions from the Ministry that re-instatement should be ordered in all cases where the recommendation of the appeal borard was unanimous. In *R* v. *Stepney Corporation*,[14] where a local authority made certain deductions from the compensation it had awarded because it thought itself obliged to do so having regard to the practice followed by the Treasury (to which an appeal lay from its decisions) writ of mandamus was issued to it to determine the claim according to law.

In *Rajagopalan Naidu* v. *State Transport Appellate Tribunal*[15], where the Government of Madras issued directions laying down the principles for the issue of stage carriage permits under the Motor Vehicles Act by the Regional Transport Authority the Supreme Court held that no directions could be issued to these bodies in the discharge of their functions because it

9 S. A. De Smith, *Judicial Review of Administrative Action* (1959) p. 173.

10 This maxim "owes its origin to mediaeval commentators on the Digest and the Decretals, and its vogue in the common law to the carelessness of a sixteenth century printer". Duff and Whiteside, "Delegta potestas non potest delegari: a Maxim of American Constitutional Law" (1929) 14 Cornell L. Q. 168 at 173.

11 *Barnard* v. *National Dock Labour Board* (1953) 2 Q.B. 18; see also *Vine* v. *National Dock Labour Board* (1957) A.C. 488.

12 *Veerayya* v. *State* A.I.R. 1967 A.P. 265; *Mangoolal Chunnilal* v. *Manilal*, A.I.R. 1968 S.C. 822.

13 (1946) 2 All. E.R. 201.

14 (1902) 1 K.B. 317 : See also *Buttle* v. *Buttle* (1953) 1 W.L.R. 1217.

15 A.I.R. 1964 S.C. 1573.

was against the fundamental principle of judicial process. An administrative body cannot be asked to exercise its discretion in accordance with the instructions given by some other body. Similarly in *Mahadayal Prem Chandra* v. *Commercial* Tax Officer[16], the Assistant Commissioner had delegated his power of assessment to the commercial Tax Officer. When the appellants' assessment came before the latter, he, instead of exercising his own judgment, referred to the former for opinion and decided it in accordance with that opinion. The Supreme Court quashed the action on the ground that the commercial Tax Officer had not exercised the power himself but exercised it on the directions of Assistant Commissioner.

EXTRANEOUS CONSIDERATION:

If the exercise of discretionary power has been influenced by extraneous considerations the courts are likely to hold that the power has not been validly exercised.[17] In *Sukhanandan* v. *State of Bihar,*[18] where the state Government had taken into account extraneous considerations in retrenching the staff of a department, it was held that the exercise of discretion on extraneous considerations was not an exercise of discretion at all. The order was quashed and mandamus issued to hear and determine according to law. Similarly in *Hazi Sattar* v. *Joint Chief Controller of Imports*[19], where an administrative authority took into account extraneous considerations in refusing to grant an import licence under the Import and Export (Control) Act, 1947, the court held the action as illegal.

IMPROPER PURPOSE:

If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. A good illustration of it is afforded by a recent Australian case. A Wages Board that was empowered to fix overtime rates for shop-workers fixed rates at a level so high as to impose what was in effect a penalty upon employers for keeping their shops open at an hour not permitted by law. The High Court held that the Board had exercised its powers invalidly by using them for the purpose of bringing about the closing of shops at an hour other than that required by the legislature[20]. Thus a larger group where abuse of power occurs is where the available powers are used by the statutory authority for a collateral purpose. For example in *Rustom* v. *Kennedy*[21] the power to license eating houses was

16 A.I.R. 1958 S.C. 667.
17 *C. S. Rowjee* v. *State of A. P.*, A.I.R. 1964 S.C. 962; *State of Punjab* v. *H. K. Sharma*, A.I.R. 1966 S.C. 1081.
18 A.I.R. 1957 Pat. 617.
19 A.I.R. 1963 Cal. 691.
20 *Brownells Ltd.* v. *Ironmongers' Wages Board* (1950) 81 C.L.R. 108.
21 3 Bom. L.R. 653.

so used as to please European residents of the locality. In this case the Commissioner of Police refused the licence simply because some of the European residents protested that it would be a nuisance if the eating house was located at the place where the applicant wanted it. This fact having been proved the High Court issued mandamus to the Police Commissioner to issue the licence in accordance with the provisions of the Bombay Act.[22] Similarly in *Ahmedabad Manufacturing and Calico Printing Co.* v. *Municipal Corporation, Ahmedabad*[23], the Court found that the power to refuse permit for the constructions of a new building was used to bring indirect pressure on the owners to construct drainage to their already existing building which the Municipal Corporation had no legal authority to order directly and issued a writ of mandamus directing the corporation to grant the permission sought. Again in *Ahmed Hussain* v. *State of M.P.*[24] where the Madhya Pradesh Government weilded its drastic power of requisition with ulterior purpose of dislodging a particular tenant, it was prevented by the writ of mandamus. However, in all such cases motives are to be specifically alleged and proved.[25]

IRRELEVANT CONSIDERATIONS:

If the exercise of discretionary power is based on irrelevant considerations, the Court will hold that the power has not been validly exercised, unless the jurisdiction of the courts to interfere has been excluded.[26] In *R* v. *Vestry of State Pancras*[27] Lord Esher, M. R. observed:

> "If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."[28]

MALAFIDES:

Malafides or bad faith means dishonest intention or corrupt motive. Malafides would include here those cases where the motive force behind an administrative action is personal enemity, personal benefit to the authority himself or his relations or friends. In *Pratap Singh* v. *State of Punjab,*[29] where disciplinary proceedings were initiated against the appellant on account of personal Vendetta the court quashed the proceedings on the ground of malafides.

22 XLVIII of 1860.
23 A.I.R. 1956 Bom. 117.
24 A.I.R. 1951 Nag. 138 at 142.
25 *Kamlakar Singh* v. *S. K. Gupta*, A.I.R. 1947 Cal. 147.
26 *Ram Manohar Lohia* v. *State*, A.I.R. 1966 S.C. 740.
27 (1890) 24 Q.B.D. 371.
28 *Ibid.* at 375-376.
29 A.I.R. 1964 S.C. 72.

FAILURE TO EXERCISE A DISCRETION:

If a tribunal or administrative authority wrongfully refuses to determine a question that it is obliged to determine, then it will be compelled by the Court to hear and determine the matter. Thus if public officials or public bodies or Government fail or neglect to exercise any discretionary duty with which they have been charged, then the Court will issue a writ of mandamus to compel them to carry it out[30]. However, where one who suffers injury by reason of the failure of a public authority to perform a statutory duty may have a right to sue for damages; no action, in general, for damages will lie for failure to exercise a discretionary power. But the administrative authority can be compelled to exercise its discretion where it failed to do so. In *A. S. V. Vardachariar* v. *Commissioner of Police, Egmore, Madras*[31] the petitioner prayed for the issue of a writ of mandamus directing the Commissioner of Police to secure to him peaceful and quiet enjoyment of his property by removing the persons who were unlawfully remaining on his property. The Commissioner of Police raised the plea that whether police action is necessary in this regard or what action is to be taken is within the discretion of the police and that a mandamus sought for by the petitioner cannot be issued. It was held that it is the duty of the Commissioner of Police to determine whether the continued presence of the hut dwellers amounted to trespass. If he comes to that conclusion, it is clearly his duty to evict the trespasser and give protection to the petitioner. The plea of the Commissioner that it is within his discretion to take action or not has no basis in law and this plea should never have been advanced. It is indeed his duty to enforce the law of the land[32].

From the above discussion it is clear that an administrative discretion may be abused in many ways and where the exercise of discretion is capricious, arbitrary or malafide, the court will interfere. It will enquire into the facts and compel the administrative authority to act according to law. In *Vimla Bai Despandey* v. *The Emperor*[33] the Nagpur High Court has aptly summed up the position relating to abuse of the power:

> "If a person exercises the power conferred on him in bad faith or for collateral purpose, it is an abuse of the power and a fraud upon the statute and is not really an exercise of the power at all and a court can interfere with such colourable exercise of the power, and when the issue is raised that any particular order has been made in bad faith or for collateral purpose and, therefore, not made in exercise of the power, the court is bound to enquire into the facts."

30 *The Market Committee, Karnal* v. *State of Haryana*, (1970) Punj. L.J. 207.

31 (1969) 2 M.L.J. 1.

32 See also *Mysore Manufacturers Ltd.* v. *State of Mysore*, A.I.R. 1969 Mys. 51 *R. Andemma* v. *P. Narasimhan*, A.I.R. 1971 A.P. 53.

33 A.I.R. 1945 Nag. 8; See alo *Bangshridhar Shewbhagwan & Co.* v. *Deputy Commissioner, Lakhimpur*, A.I.R. 1969 Assam 7; *I.T.O. Meerut* v. *M/s Seth Brother & other* (1970) 1 S.C.J. 212.

CONCLUSION:

Though under the principle of rule of law power is to be exercised by the administration according to law, it is a fact of life that in several cases the administrative organ can act and execute a policy without a statutory power or even where such power exists in excess of such power.

The judicial control of discretionary power is exercised at two levels: (i) Determination of the constitutional validity of legislation conferring discretionary authority on the executive; and (ii) determination of the validity of the exercise of discretionary power by the executive. An exercise of discretionary authority may be assailed on the ground of improper motivation on the part of administrative authority. However, the Courts cannot interfere with the exercise of discretion in the absence of a well-founded allegation of malafide or abuse of power. The courts interfere in cases of abuse of discretion holding that where a discretion is abused it is not exercised at all. But at the same time it is not the function of the court to probe the mental processes of the administrative authority. The integrity of the administrative process must be respected. In short, how do we ensure administrative responsibility without subjecting the administrator to an unseemly probing of his mental processes and the indignity is the question in the modern times to be satisfactorily answered by the courts while reviewing the administrative discretions.

V. S. CHAUHAN*

* Lecturer, Law School, Banaras Hindu University, Varanasi.

BOOK REVIEWS

POLISH LAW THROUGHOUT THE AGES BY WENCESLAS J. WAGNER*, EDITOR, HOOVER INSTITUTION PRESS; Stanford University (1970). 476+xii pp. $14.00.

Professor Wagner has filled a gap in existing comparative law literature by critically reviewing "One thousand years of legal thought in Poland"—the subtitle of the book. No other publication has dealt with this unique legal system for the benefit of an English language audience. The general purpose of the volume is to render a contribution, by Polish lawyers and scholars residing in North America (many of whom are refugees from Communism), to the celebration of one thousand years of Christianity in the Polish nation. Although various forms of effective political organization existed in what are now the regions of modern Poland, Lithuania, and the Ukraine, well before the conversion of the region to Christianity, the year 966 is chosen as the beginning of what is now held to be the Polish State. Specifically, in 966 her ruler Mieczyslaw I was converted to Christianity. He accepted the Christian faith not only for himself but on behalf of the entire nation; thus Christianity became the official religion. In addition to personally destroying some statutes of Slavic gods, Mieczyslaw invited foreign missionaries into his domain[1]. From this starting point, one of the recurring themes of the book is the effect of the Catholic faith on the moulding of Polish and Lithuanian institutions. The other force—indeed the force competing against both religion and law (including human rights)—is the Communist and Marxist ideology. The conflict between the two forces is repeatedly stressed throughout the series of essays.

The way in which the authors of the various essays have brought their highly technical subjects (and their scholarly presentations) to life is highly impressive.

Polish Law has been influenced by religion and now communism. In the intervening centuries the nation has been subject to foreign rule by the Russians, Prussians (later Germans), and Austrians. These various factors and their impact on the evolving legal system have been dealt with in the numerous essays. The book under examination represents a prime example of effective legal writing that carries a message.

* Professor of Law, University of Detroit. LL.M. Warsaw, Poland; Dr. en Droit; Paris, J.D., LL.M., J.D.S. Northwestern. Author of International Air Transportation as Affected by State Sovereignty (1970); Gormley, Book Review, 15 St. Louis U.L.J. 337 (1971).

1 Wagner, *Polish Law throughout the Ages*, 1 (1970) (Hereinafter cited as Polish Law)

We need only look to the present result of Communist domination: a greater observance of Poland's millennium took place outside of the country. As part of the global observance this book is the contribution by legal scholars in North America, yet we may ask: how can fourteen authors clarify a unique legal system for the benefit of lawyers? Obviously the task was enormous, but similar-type challenges have been resolved by a single writer[2], or a group of specialists, contributing to a single volume[3].

In seeking an answer to the above question, it is essential to note the unique experience of the Polish Nation which influenced its legal evolution. The most fundamental element—Christianity—has already been observed but a factor that might not otherwise be appreciated is that the Polish Legal system is not based entirely on Roman Law. Roman Law did undoubtedly exert considerable influence and Poland produced several able Roman Law Scholars[4]; nontheless, local custom emerged as a primary source of law. Accordingly, much of the book is devoted to the development of local laws, which include written constitutions as well as decrees from sovereign rulers.

Notwithstanding the predominance of Western Christianity, it would be wrong to assume that other religions were persecuted. The Eastern Orthodox Church, the Moslems, and the Jews not only held the absolute right to worship freely, but these sects were given local autonomy in religious and many legal matters. Persons belonging to these minorities attained the highest positions in society, including the government. During the fourteenth century Jewish immigration was encouraged at a time when other states persecuted this group,[5] and Casimir the Great".....granted them special privileges and guaranteed freedom of worship at a time when they were terribly persecuted in other countries[6]...." No one could be prosecuted for his religious beliefs.

One of the themes running through the book is the recognition of group rights and the protection of minorities, during periods of independence. Conversely, under foreign domination the situation was brutally reversed; for racial and religious persecution by the Austro—Hungarian Empire, Imperial Russia prior to World War One, the Nazi occupation, and the present Communist regime have practiced discrimination against groups and minorities.

2 E. g., Castel, *The Civil Law System of the Province of Quebec* (1962); Gormley, Book Review, 13 Am. J. Comp. L. 100 (1964).

3 The Finnish Legal System (Uotila ed. 1966); Gormley, Book Review, 15 Am. J. Comp. L. 376 (1967).

4 See. e.g.'s in concluding essay, Polish Law, supra note 1, at 417, 428.

5 Lador-Lederer, supra note 4; some of the problems confronting minorities in Poland are treated in the forthcoming study; Gormley, The Implementation of the United Nations Human Covenants. Special attention is devoted to Upper Silesia, See infra notes 52-53.

6 Polish Law, supra note 1, at 4.

The tolerance reflected in the polish legal thought is perhaps the happy reaction t. the fact that the Polish-Lithuaniun Union was in a constant state of warfare against non-Christian armies.[7]

Poland, though fighting for her very existence in what were largely religious wars, protected freedom of religion for her own nationals and aliens residing in her teritory. While holding the title of "Bulwark of Christianity", some modern notions of human rights protection prevailed. Indeed, this reviewer detected considerable material throughout the book that today is classified as "civil rights" and "human rights". This reviewer may venture to observe that much of the enlightenment found during the periods of Polish "golden freedom",[8] is being sought by Western democracies working through such international and regional organizations as the United Nations and the Council of Europe.

Another example may be taken from Professor Wagner's Introduction to illustrate this point. Obviously legal and political institutions of the fourteenth century cannot be compared with those existing in our period; nonetheless a few selective analogies become particularly revealing. Equally obvious is the fact that not all persons were able to enjoy constitutional freedoms which were reserved to the Nobility (as was true several centuries later in England). During the "golden freedom" only a minority of the population were "subjects of the law", as this concept is conceived in contemporary international law and some municipal legal orders. However, the Polish Nobility constituted ten to fourteen per cent of the entire population, whereas the corresponding figure for France was one-tenth of one per cent. English electors formed less than two per cent of the population.[9] The corresponding legal and social position of the peasants is also significant. They were in a better position than their counterparts in Germany, "and the scope of their liberties was broader than in England".[10]

A message—applicable today—emerges from the partitioning of Poland at the end of the eighteenth century: the State was subjugated because it was unable to defend its existence against three powerful and aggressive neighbours, Germany, Austria and Russia. The weakness lay in the inability of its institutions to react with sufficient speed to new challenges. Specifically, under the constitutional principle of *Liberum veto*, the Parliament could only

7 Id. at 5.

8 This term can best be defined as those periods of peace and prosperity in which the Nobility created democratic institutions, e.g. thirteenth to fifteenth centuries. The term is also used to apply to other periods of enlightenment, such as the seventeenth and eighteenth centuries.

9 Polish Law, supra note 1, at 5.

10 Id.

act on the basis of unanimity. At the time, the country was still in the period of its "Golden Age". It had become a cultural leader in Europe. Indeed the Poles consider the sixteenth century to have been the period of greatest enlightenment. Professor Wagner argues that the rule of unanimity and the resulting over-protection of minorities eventually led to the disintegration of the State.

One of the recurrent themes picked up by several of the authors is the survival of a nation under foreign tyranny, after the state had ceased to exist. Not only the nation (and her peoples and territory) survived but also her religion, language, literature and culture. Phases of Polish culture include recognition of minority groups (particularly jewry until destroyed by the Germans and Russians in 1939) and her legal institutions. The survival of Polish jurisprudence and legal institutions for a thousand years is one of the conclusions emerging from this study, particularly in view of the fact that the Poles are still held in the grip of foreign domination to the extent that the Government is considered to be a satellite of Moscow, though not to the extent of other Eastern States. Hence, the Polish people and statesmen cannot be held responsible for certain actions, such as the non-observance of the millennium of Christianity. Yet the legal system shows a line of continuity, despite the pressure from Communist ideology. From the foregoing discussion the unique quality of Polish law and jurisprudence begins to emerge. As shown above, Poland was a Latinized state, but Roman legal institutions were not merely copied. Christianity and eclesiastical law played a part in its legal development. Local customary law and even pre-Christian laws were of some significance; but particularly vital—even as regressive forces—is the imposition of foreign legal systems. Not only was the entire country subverted, but it was divided among several legal systems. That is to say, the region under Austrian domination was subjected to a different body of law than that controlled by Russia. Upon gaining independence, and during the inter-war period, it was necessary to harmonize at least three different legal orders. But the important consideration, from the approach taken in the book under review, is that all of these systems (even the Communist) have left their mark.

Much more could be written about the several distinct concepts emerging from Professor Wagner's excellent Introduction and the following fourteen specialized studies, but one further contribution should be noted in passing: the reader is given a short course in Polish history and its main institutions, i.e. the context in which Law functioned. Furthermore the comparative method is utilized to demonstrate the significance of legal innovations in relation to those in neighbouring Civil Law States and even Common Law countries.

Although fourteen independent writers of especially distinguished qualifications combined their efforts, the book's content follows a logical progression and moves towards the same objectives, i.e. a workable integration of legal content. The total product can be divided into several distinct time periods, although a number of authors cut across the one thousand year span: first the era beginning in 966, particularly the period of the Polish constitutional monarchy, prior to the partitioning of Poland at the end of the eighteenth century; second, the legal developments that took place in the three occupied zones up to the end of the First World War; third, the inter-war period; and fourth, the Communist domination since 1945.

Professor Wagner, in one sense reiterates a point in the back of the mind of most informed persons; yet in one other sense there is a tendency to forget the first Communist subversion of Eastern Europe, even prior to the uprising in East Berlin, the Soviet intervention in Hungary, and the Warsaw Pact invasion of Czechoslovakia. Professor Wagner maintains:

> "A short period of independence between the two world wars was followed by the delivery of Poland to her eastern neighbour, who imposed on her a communist system of government against the desires of the vast majority of the population. Poland, the first nation among the allies to succumb to invasion, by Germany and Soviet Russia, gained at the beginning of World War II the nickname of the "Inspiration of Nations", but was abandoned by her opportunist friends. The constitutional and legal rules enacted under the new regime are contrary to Polish traditions and beliefs and will be discarded at the first opportunity".[11]

The first essay in the volume is certainly one of the most informative. Under the title, "Historical Studies of Polish Law" a valuable survey of Polish legal literature is presented, along with some appropriate history of academic development, e.g., the establishment of learned societies.[12] However, this section deals with more than bibliography; an insight into the development of the legal system is the underlying theme. The impact of legal education (and its curriculum) on the *preservation of a legal order* is stressed, and the significance of this discussion is that the special importance of the study of legal history becomes evident. Whereas most of the positivistic law was replaced by conquering powers, legal scholars kept the Polish spirit alive through the study of history. Not only Polish legal history but

11 Id. at 7.

12 Written by Dr. Waclaw W. Soroka, Professor of History, Wisconsin State University. His excellent chapter is very detailed. The major Polish legal materials are listed with translations of the Polish titles. This chapter is intended primarily for legal scholars; it constitutes a contribution to legal literature.

also foreign legal history had an important place in the curriculum. In particular, the universities located in the Austrian sector were freer from external control than those in the Russian and German areas, with the result that the most significant contributions were made by the Law Faculties at Cracow and Lwow. Professors were under fewer restraints as to the viewpoints advanced in their lectures. Thus, such phases as History of Roman Law, Polish Law, European Law (especially German Law), and Church Law constituted a considerable portion of legal studies.[13] Various designations were given to the courses, but such content as Polish private law, Old Polish Judicial Law (including criminal law and procedure), land law, the history of state institutions, family law, all phases of property law, and especially Polish Constitutional Law (including Lithuanian Law) preserved the Polish legal system during a period when foreign laws were being administered by the courts, which were presided over by an imposed foreign judiciary.

One point of methodology needs to be emphasized: legal scholars employed the comparative method in their teaching, largely as a result of the German influence. The majority of Polish legal historians studied and conducted research under the outstanding German historians of the eighteenth and nineteenth centuries.

In this regard, the final chapter in the book, "Prominent Polish Legal Scholars of the Last One Hundred Years"[14] can be noted here. These two chapters are complimentary in that the reader is given an insight into the nature of the "law giver". As is true of all civil law systems, case reports contain minimal information. The judgments are unsigned; judges do not leave a permanent record as do their Common Law counterparts. The result is that no Polish judge can be found who can be compared with Marshall, Holmes, or Frankfurter.[15] Thus the emphasis shifts to the academics, all of whom are now dead. The reason for omitting living legal scholars is that their full contributions cannot be evaluated; moreover legal scholarship has been drastically affected by Communist ideology, as will be shown below. All of the Polish professors dealt with were born in the second half of hte nineteenth century, when the Polish State did not exist and no truly native law was in force[16]. Alternatively, they made careers in Polish Legal History and Roman Law, though devoting much of their lives to the study and teaching of alien legal systems. Furthermore, most Polish legal scholars served a period of time in German Universities, notably Jena and Berlin. The significance of their efforts was noted by Professor Wagner in his Introduction:

13 Polish Law, supra note 1, at 5.

14 By Jurij Fedynskyj, Associate Professor Law, Indiana University, id. 417-76.

15 Id at 417.

16 Id. at 418.

the unique Polish legal system was preserved so that it survived until independence was gained in 1919. Tragically, it seems unlikely that a similar situation can be repeated under the present Communist Government. In the first place, law has been reduced to the status of "professional training", with a corresponding de-emphasis on scholarship.[17] An even greater retrograde force is the "ideological concept of Marxist interpretation".[18] Without going into the full ramifications of Marxist doctrine on legal practice as do several of the authors,[19] it is sufficient to note "..... that lawyers must submit to the uniform socialistic concepts of state and law, as well as to the all-embracing Marxist outlook on law".[20] Not only positivistic law has been replaced, but independent thought has been suppressed. In the coming decades it will be more difficult to maintain the continuity of the Polish legal ideals.

The next series of chapters come to grips with Polish legal history. Beginning with the essay, "Origins of the Polish Law, Tenth to Fifteenth Centuries", by Dr. Wasiutynski,[21] six chapters review the history of Polish legal evolution. Each of the authors tends to deal with a certain period of history and simultaneoulsy to cover his area of specialization. The chapter mentioned above deals largely with public law and legal institutions, and considerable emphasis is placed on the relationship between the rulers, nobility, and commoners. In addition, what might be termed "external relations" or federation are dealt with. The reviewer found this third chapter, along with the one immediately following—"The Law of Nations in Poland from the Middle Ages to Modern Times" by Professor Wackaw Szyszkowski[22]—to be extremely useful, because of the discussion relating to the rights and protection of the citizen.[23]

Necessarily, in a book comprising fifteen distinct sections, some material will prove to be of more immediacy to an individual reader. This reviewer is impressed with those portions devoted to public law and jurisprudence. For example, the essay by Georges S. Langrod[24] and Michalina Vaughan[25] on "the Polish Psychological Theory of Law" was fascinating,

17 Id at 12. See especially, id. n. 6.

18 Id. at 13.

19 See infra notes 21, 25, and 28.

20 Id. at 12.

21 Dr. Wasiutynski. Noted Polish author and reviewer residing in the United States. Deputy Chief of the Polish Desk for Radio Free Europe.

22 Dean of the Faculty and Professor of Constitutional Law at Copernicus University, Torun, Poland.

23 Polish Law, supra note 1, at 63-72. This point was originally raised by Professor Wagner id, at 4-5.

24 Professor Emeritus, Faculty of Law, University of Saarbruchen, Germany.

25 Lecturer in Sociology, London School of Economics.

because of its insight into Polish legal philosophy as it was shaped by German realism and idealism. However, the influence of the school of jurisprudence of Natural Law and the trends in Polish constitutional law are assessed prior to the analysis of Professor Petrazycki's concept of the Psychological Theory of Law[26].

This essay deserves a full critical examination, but considerations of space preclude an extensive analysis of any single contribution. Still it needs to be mentioned that all of the major schools of jurisprudence had adherents in Poland, but of greater importance,

> "Polish authors did not lack originality. Several of them provided creative and wholly original contributions: even when assessing contemporary world thought or doctrines, their works retained a truly personal character and contained new ideas geared to reform or inspired by constructive criticism."[27]

Sadly most of these philosophers never became well known to Western audiences, largely because of the fact they wrote in the Polish language, unlike their contemporary counterparts who rely heavily on French and English (and to some extent German and Russian).

The observation made earlier in this review can now be completed: approximately one-third of the book is devoted to private law, but not all of these subjects can be dealt with here. Of special interest are the chapters dealing with contracts[28], land law[29], and those portions discussing criminal law[30]. As mentioned earlier in the review, the book tends to move from the more general areas toward specific legal topics. Indeed, traditional subject matter areas are found from the middle of the book and in the latter chapters, e.g., those devoted to "Polish Administrative Law". Professor Jaroslaw A. Piekalkiewicz[31], and "Polish Constitutional Law", by Professor Kos-Rabcewicz-Zubkowski[32]. This latter author begins by surveying the major

26 Considered to be an "original genius", he was held to be the greatest legal philosopher in Russia and Poland. He wrote previously in the German and Russian languages. He was born in 1867 into the Polish nobility and was Professor of Law, at St. Petersburg from 1898. He was one of the select group of Polish scholars who received recognition in Western Europe. See id. at 304, 306 ff.

27 Id. at 300.

28 Wagner, General Features of Polish Contract Law, id. at 389-416. He shows the the unique influences of Socialist doctrines, and its application to "good-faith", "principles of community life", and morality, Id. at 403.

29 Id. at 119.

30 E.g., id. at 177.

31 Associate Professor of Political Science and Soviet Area Studies, University of Kansas.

32 Professoer of Comparative Criminal Law, University of Ottawa, Canada. Former Simon Senior Research Fellow, Manchester University, England.

periods, comprising the one-thousand years of Polish legal history. Special emphasis is given to the status (what we would term civil liberties), of the several classes within society. A well organized essay, dealing with the structure of society, explains the legal position of freedman, serfs, and nobility. Also the position of peasants and colonizing Germans is dealt with. Aside from persons, such as officials and rulers, the special position of semi-autonomous cities, the Roman Catholic Church, (and of other religions), are covered. This penetrating essay attempts to deal with the most important aspect of Constitutional Law; consequently, the jurisdiction of law courts to grant redress for injuries becomes significant. Interestingly, situations existed in which a ruling prince acted as a chancellor and rendered a judgment; however, in Little Poland a separate judicial office first appears in the fourteenth century. Simultaneously the ecclesiastical courts had almost exclusive jurisdiction over the clergy. From the fifteenth century onward, judicial tribunals began to take a specific form[33]. German Courts applying German Law, also perfected their structure, including appelate procedures. Dr. Kos also includes a great deal of information as to topics more commonly thought of as military law, legal and political institutions, and federal state relationships (e.g., relations between Poland and Lithuania, Poznan, the Free City of Cracow, Gialicia, the Grand Duchy of Warsaw, and Prussia). Interestingly, the specific topics listed above (plus others not indicated in this short review) are treated in relationship to the periods of Polish History set out at the beginning of the chapter.

But the main contribution of Dr. Kos is his explanation of the legal and social position of the various classes of individuals and groups. For example, the rights of members of the clans and the legal institutions, which protected and restricted the freedom of the individual, provided the basis of the tightly knit political organization. The next stage in the early evolution of what is now deemed to constitute the Polish legal system was the holding of public trials and the creation of judges, who were to a high degree independent of ruling princes and the Church, although religious and royal personages continued to exercise some judicial functions. The most important lesson to be learned from Polish Constitutional Law is the limitation placed on the power of the monarch. This restriction of the power of the sovereign took the form of exemptions from taxation for the nobility and the creation of councils holding limited legislative power; moreover, the king, acting alone could not enact new measures, change the common law, or reduce public freedom. "The consent of the king's council (senate) and of the deputies in the *sejm* became indispensable for the promulgation of new laws. The parliamentary system was well established."[34]

33 "Courts" Polish Law", id. at 235-37.
34 Id. at 271.

Freedom from imprisonment, except by order of a competent court, represented a major step forward in the move toward the creation of modern democratic institutions: the Constitution of May 3, 1791, the culmination of the national cultural, and the legal renaissance of the eighteenth century.[35]

The situation existing under the Communist dominated government is completely contrary: "administrative law" is used by the State to control its citizens. Accordingly, the essay immediately following not only serves as a counterpart, but it contains some of the most "desperate" information to be found in the book. Professor Szawlowski in discussing "State Control' in Poland in the Nineteenth and Twentieth Centuries"[36] shows how the normal progression of law can be subverted. Under our Common Law, and within some of the democratic systems adhering to the Western European tradition (stemming from the Greco-Roman-Christian tradition), Law and Government reflect the will of the people. Law protects private individuals and groups, including religious and social minorities. Conversely, state control results in the use of the courts and administrative tribunals to suppress a nation. Therefore, during periods of foreign domination, and particularly at the present time, law has been concerned primarily with the perpetuation of a particular regime. On the other hand, the experience of the past one hundred and sixty years demonstrates the positive aspects of "state control" as a technique aiding the Parliament and the Executive Branch. In the case of Poland, its system was far in advance of other European states, although not equal to that of the United States.

> "Even in most of those Western Countries where a similar system exists, such intensive daily cooperation between the legislative and the supreme public finance audit institutions is not to be found. Apart from the United States, the Polish system, under which the "state control" furnishes to the parliament, on a large scale, reliable and up-to-date information concerning the functioning of the state apparatus at any time, is indeed hardly to be found anywhere in the world"[37].

Even at the danger of over-emphasizing the obvious, this reviewer believes that a brief return to the Chapter on Administrative Law is desirable by way of comparison, for the reason that a highly developed system of administrative control necessarily results in numerous judicial functions being taken over by administrative tribunals. Thus, criminal-administrative colleges (dealing with "minor offences" outside the normal court structure) have disposed of over half a million cases[38]. However, Professor Piekajkiewicz main-

35 Id. at 272.
36 Id. at 273.
37 Id. at 298.
38 Id. at 386 See also, id. at 182.

tains that many individual freedoms guaranteed by the Constitution are nullified, "....because they stem from the assumption that the citizens and the state are one."[39] This reviewer feels that the position of the individual citizen in terms of the regime of state control is well summarized, as follows:

> "The traditional defenders of civil rights—the independent courts—are deprived of their role by the theoretical denial of the division between the judiciary, legislature, and administration. The courts are only an appendage to the state administration, and the role of the law, and especially of administrative law, is to ensure that the state and Party politics are enforced. The protection of the individual occupies a secondary role."[40]

This situation is intensified by a confused hierarchial structure of statutes, regulations, and administrative orders.

> "Practice shows that in many instances the administration with the best intentions cannot decide which law to apply and is forced to take short cuts—unfortunately not always legal. Here, the Communist Party, the master of legal simplification, plays its role by instructing the administration in the right procedure."[41]

Professor Piekakiewicz concludes his excellent essay by highlighting the role of the Communist Party within the judicial and administrative hierarchies:

> "In many cases the Party's intervention is necessary to cut through the jungle of legal and administrative confusion. "Socialist legality" is an unwritten law of political expediency as pronouned by the leadership of the Communist Party. It is as if in Poland, there were two sets of state law—one on the books and yet another, superior to the first, in the Party's program of the day."[42]

It is, indeed, tragic that at the millennium of Christianity in Poland it must be concluded that a totalitarian regime has subverted the "golden freedoms", which evolved during so many centuries. The book brings out very forcefully the inescapable fact that Communist subversion is having a much more destructive influence and will be longer lasting. Accordingly, Marxist ideology will be more difficult to remove.

In conclusion, this reviewer is of the opinion that *Polish Law throughout the Ages* has rendered a major contribution to the study of comparative law. As the first book dealing with the Polish legal system, a major gap in the literature has been filled by the various authors. Hence the authors have

33 Id. at 387.
34 Ibid.
35 Id. at 387-88.
36 Id. at 388.

tried, with considerable success, to cover the entire realm of Polish Law and jurisprudence.

One observation, however, may be helpful. Whereas the Communist subversion is realistically handled, it seems that there is some tendency to be a bit too pro-Polish. For example, to speak of the regime existing between 1919 and 1939 as democratic is a bit unrealistic. In particular, the military rule of Marshal Pisudski (from 1926 to the time of the German-Russian invasion) can hardly be deemed to constitute a democracy. Of course, any evaluation of the type attempted in this book must necessarily employ the comparative method, with the result that the "golden freedom", periods of enlightenment, constitutional reform, and protection of individuals can only be appreciated if they are compared with similar developments in other Western countries (and indeed non-western countries, especially Imperial Russia). At times, however, it seemed as if too positive a picture was being presented. There is a danger that the general reader will be misled, to some degree. For example, no mention was made of the persecutions of minorities in violation of obligations to the League of Nations. German speaking minorities in Upper Silecia—despite the requirements of the 1919 German-Polish bilateral treaty and the Convention of 1922—were the objects of discrimination.[43] On several occasions, the League of Nations intervened, not only on behalf of German speaking minorities, but also on behalf of Ukrainians and Lithuanians[44]. Resolutions from the Council of the League attest to such persecution[45] By way of comparison, it must be recognized that serious violations of minority rights took place in practically all Eastern European States, including those in the Baltic and Balkan regions; moreover, Germany, not Poland was frequently guilty of violating Post World War One commitments. Yet the important consideration, when evaluating a book of this type, is to be especially conscious of the accuracy of the viewpoints presented. The Post World War One period was one of unrest and turmoil. Consequently a military takeover occurred, and the regime of Marshall Pisudski was concerned with legalizing its capture of the State and the retention of its power. For

43 Kaechkeabeck, *The International Experiment of Upper Silesia : A study in the working of the Upper Silesian Settlement* (1942). J. Stone, *Regional Gurantees of Minority Rights : A Study of Minority Procedures in Upper Silesia* (1933). J. Stone, *International Gurantees of Minority Rights: Procedure of the Council of the League in Theory and Practice* (1932).

44 Bagley, *General Principles and Problems in the International Protection of Minorities* (1950).

45 E.g., Case of the Ukrainian Minority in Poland, 12 League of Nations Off. J. 2264 (1931). This action was one of the cases approved by the Committee of Three for submission to the Council of the League. Though the only case against Poland, it was one of ten so approved between 1929 and 1939 to the Council for further consideration. See Bagley, supra note 52, at 89 and n. 3.

example, in 1934 a concentration camp was set up; subsequently five hundred people were imprisoned. Although there was no open terror, the rightist Government sought to achieve a democratic appearance by staging rigged elections.

It may be suggested, therefore, that the inter-war period should have been examined by at least one of the writers, particularly from the standpoint of human rights and the obligations assumed by Poland under the Peace Treaties and the Treaty of Versailles.

Part of the difficulty arises from the fact that because such a vast area was encompassed in a relatively small book, much of the details and supporting data had to be reduced. It is simply amazing how much content has been incorporated into this volume. All of the authors have demonstrated an excellent use of a concise style of writing.

One major shortcoming is the lack of a Subject-Matter Index. In view of the fact that this volume is intended to serve as a reference work, such an Index is desperately needed.

By way of a final suggestion, several of the chapters should be expanded into full-length books, since there is a need to delve further into some of these topics. In this regard, the chapters dealing with constitutional law, jurisprudence, administrative law, legal history, legal education and documentation, and related topics could serve as a foundation for additional books. Likewise Professor Wagner has demonstrated considerable skill as a historian and a biographer. It can only be hoped that he will produce more of the type of material presenfed in this book.

W. PAUL GORMLEY*

*Simon Research Fellow, Faculty of Law, University of Manchester, England, Member of the District of Columbia and United States Supreme Court bars. A. B. San Jose State; M.A. University of Southern California; Ph.D. University of Denver; J. D. (Honours), L L.M. George Washington University; New York University; The Hayue Academy of International Law.

CRIME: INTERNATIONAL AGENDA BY BENEDICT S. ALPER AND JERRY F. BOREN, 1972, LEXINGTON BOOKS, D. C. HEALTH AND COMPANY, Lexington, Massachusetts. Pp 220.

The acceptance of reformative trends in penal administration is now a universal phenomenon. This has been possible largely due to the cumulative influence of those who pioneered research on the various aspects of crime and also those who were busy in organising international co-operation in understanding the phenomenon of crime, treatment of criminals as also the methods of control and prevention of crime. Co-operation in international sphere has been possible only through meetings and congresses organised by official and non-official organizations of regional or universal nature. The resolutions adopted or principles declared in such conferences along with details of proceedings are usually sent over to various states for their acceptance. Compliance with such recommendations depends on the sovereign will of a state but in practice an increasing number of recommendations have been accepted through national legislation in various countries.

The book is a valuable perspective of all that has been achieved between 1846-1970 in various international meetings and congresses. It consists of ten chapters besides seven exhibits, containing questions discussed, proposals adopted or declarations made at scores of congresses. A carefully compiled bibliography at the end, and a foreword in the beginning by no less a criminologist than William Clifford, Director of the U.N. Committee on Crime Prevention and Control, further add to the value of the book.

Chapters 1 and 2, (containing seventeen pages) are by way of a prelude. They include a summary of the problems discussed in various international congresses between 1846-1970 as also a brief description of efforts made even before 1846[1]. The questions discussed in these congresses have been listed by the authors[2]. Amongst these are such perennial and vitally important ones as juvenile delinquency, treatment of prisoners, parole and indeterminate sentence, probation and alternatives to imprisonment, after-care agencies and programmes, individualisation of sentence and treatment, treatment of recidivists and administration of prisons and prison labour. The need for concerted action in respect of almost all the questions discussed has been felt widely but so long as the economic levels of different peoples vary to the extent as they do now, it is difficult to achieve any uniformity in their approach towards resolving the problems. It is natural therefore that even

1 B. S. Alper and J. F. Boren, Crime: International Agenda, 3-5 (1972).
2 Id. at 5.

though developing countries have been made aware of possible solutions to their problems, the legislative measures adopted by them appear to be mere lip-service to a cause. The perfunctory working of the enactments dealing with probation of offenders in India is an illustration on the point. What is important is adequate financial resources and this is where William Clifford has drawn our attention when he says:

> "When one looks at the subjects discussed in 1872 and in 1970 it might appear that there has been little headway made, and these people might be described as plodding the kind of futile, endless treadmill that had been abolished in the prisons even before their organizations were founded. In some respects this is true. Impressive conferences are no substitute for the allocation of adquate resources for action. It cannot be claimed that nations have yet taken crime prevention seriously....."[3].

However, the problem of financial resources is not the concern of the authors of this book. To them goes the credit of giving a faithful historical account of the efforts so far made by various organizations.

Chapters 3—9 deal with international and regional organizations operating in the field and the congresses organised by them. In Chapter 3, the authors record the minutes, proceedings and transactions of regular quinquennial congresses called by the International Prison Commission in the year 1872 at London and thereafter, till 1910. The above was the first international congress on the prevention and repression of crime and was held in London from 3—13th June, 1872[4]. According to the authors, the tangible results of this conference arising out of wide publicity given to it by books, articles and pamphlets were reform in national penal codes, the easing of prison discipline and increased attention to discharged prisoners later reported in almost every country which had participated in that conference[5]. One should have thought that authors could have considerably enhanced the interest of the readers by throwing more light on the relatively concrete results of international congresses in various countries.

In Chapter 4, the authors bring to light the efforts of the International Society of Criminal Anthropology whose area of interests were very similar to that of International Prison Commission. It is interesting to note that this Society had worked actively for several years and it held no less than seven congresses between 1885 and 1911[6]. There was a period of hibernation and thereafter when the society was revived under the name of Die Kriminal-

3 Id. see Foreword of W. Clifford at xv.
4 Id. at 23.
5 Id. at 27.
6 Id. 47-51

biologische Gesselschaft it organised another five congresses between 1927-1938. But for the painstaking work of the authors, many of us could not have learnt much of this society whose proceedings are mainly in German language.

In Chapters 5 & 6, the authors summarise the co-ordinating efforts of the League of Nations in the field of prevention of crime and child welfare as also the further work of the International Prison Commission which later came to be known as International Penal and Penitentiary Commission or IPPC. All this is a historical account of the work done by the international organizations in between the two world wars.

The work of the United Nations and more particularly that of the Economic and Social Council (ECOSOC) has been adquately discussed in Chapter 7. Brief reference has been made to the four United Nations Crime Congresses held in Geneva 1956, London 1960, Stockholm 1965 and Kyoto 1970. The authors have also discussed the work of the various specialized Agencies of the U.N. like the World Health Organization (WHO), United Nations Educational Scientific and Cultural Organization (UNESCO), United Nations Asia and Far East Institute (UNAFEI), United Nations Social Defence Research Institute (UNSDRI). Here as well the authors have been mainly content with narrating the organizational aspects and programme of the United Nations and its Specialized Agencies. No efforts have been made to pin-point the impact created at the national level.

In Chapter 8, the authors discuss, though briefly, the operational framework of other international organizations concerned with criminological work. Prominent among such organizations are Howard League for Penal Reform, London; International Centre for Comparative Criminology, Montreal; International Criminal Police Organization (INTERPOL), Paris; Berne; International Society of Criminology, Paris etc.

Chapter 9 deals exclusively with Regional Organizations like Benelux Penitentiary Commission; the European Committee on Crime Problems (ECCP) established by the Council of Europe, Strasburg; Pan-Arab Organization for Social Defence; Nordic Association of Criminalists and Scandinavian Research Council of Criminology.

In their concluding chapter 10, the authors, in their usual literary style, have attempted to draw an analogy between prisoners of war and ordinary civil prisoners and have gone a little out of the way to argue that the fact that prisoners of war have been treated in an inhuman manner in the past, shows that civil prisoners as well are not being spared. While there can be some truth in this statement, the analogy appears to be misplaced. War between nations as also a civil war within a state arouse hatred and contempt for the enemy to a level which is inconceivable in other spheres. However,

there is a justifiable doubt in the mind of the authors that not enough has yet been done by national governments in the matter of prevention of crime and scientific treatment of criminals[7].

Taking the London Congress of 1872, as the starting point, the authors have attempted to analyse some of the tangible results of various congresses. As regards prison population, the authors seem to think that a consensus has been arrived at in favour of smaller prisons and smaller prison population and that the principle of classification of prisoners has been universally accepted[8]. Again the authors point out that corporal punishment, even though it might still be practised on some juveniles and adults, is being growingly discarded[9]. So is the case with transportation[10].

The authors further point out that the question of desirability of professional training for correctional personnel is no longer argued and then again prison labour today is accepted as a means of training the prisoners[11]. By far the most difficult problem is that of financial compensation for the work done by the prisoners. That they should be well compensated for their work and that they should get some sort of unemployment compensation till such time as they are properly rehabilitated with gainful employment are some of the questions which will remain unresolved due to their financial implication for the poorer countries. The authors rightly lament that the question of standardising, gathering and compiling international criminal statistics has not advanced much.

If in their concluding Chapter the authors intended to assess and analyse the outcome of the deliberations in different congresses at the national level, their effort does not appear to have been very successful. However, in all fairness to the authors it can perhaps be said that "Crime: International Agenda" is one of the very few works which attempt to reveal the efforts of international organizations concerned with different aspects of crime and criminals.

P. N. BANERJI*

7 Id. at 157.
8 Id. at 160.
9 Id. at 160.
10 Id. at 160.
11 Id. at 161.

*B.Sc,. LL.B., (Lucknow), LL.M. (London), Lecturer n Law, Law School, Banaras Hindu University, Varanasi.

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