THE BANARAS LAW JOURNAL

Vol. 4 January—December 1968 Nos. 1 & 2

ARTICLES

THE QUESTION OF EXTENDED PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER THE AUSPICES OF THE LEAGUE OF NATIONS — R. P. Dhokalia

DISARMAMENT-PROBLEMS AND PROSPECTS — Baleshwari P. Srivastava

INTELLECTUAL TRADITION IN RELATION TO LAW, SCIENCE AND POLICY IN SPACE AGE — S. Bhatt

THE OBJECTS CLAUSE OF A COMPANY AND THE RECENT LEGISLATIVE PRESCRIPTIONS — Surendra Nath

NOTES AND COMMENTS

Interpretation of Statutes—Central Sales Tax Act—Goods Intended for Use in Manufacture, Processing or Mining (Lachhaman Prasad Gupta); Reflexions on Indian Legal Education (C. Dallas Sands).

BOOK REVIEWS

J. D. M. Derrett, *Religion, Law and State in India* (B. N. Sampath);
J. D. M. Derrett, *An Introduction to Legal Systems* (B. N. Sampath).

(*Editor*)
SURYA P. SHARMA

BANARAS HINDU UNIVERSITY VARANASI-5

BANARAS HINDU UNIVERSITY

Visitor	The President of the Republic of India (Ex-officio)
Chancellor	H. H. Maharaja Dr. Vibhuti Narain Singh of Banaras
Vice-Chancellor	Dr. A. C. Joshi
Rector	Dr. H. P. Dwivedi
Finance Officer	Sri U. Ramachandra Rao
Registrar	Dr. K. N. Lal
Librarian	Sri P. N. Kaula
Dean, Faculty of Law	Dr. Anandjee

LAW SCHOOL

Dean	Dr. Anandjee	
Teaching Staff		
Anandjee	*B.Sc., LL.B. (Banaras), LL.M., J.S.D. (Yale)*	Professor
Banerjee, P. N.	*B.Sc., LL.M. (London)*	Lecturer
Bhardwaj, V. K.	*B.Sc., LL.M. (Banaras)*	Lecturer
Bijawat, M. C.	*M.A., LL.B. (Banaras), LL.M., J.S.D. (Yale)*	Reader
Chaturvedi, M. N.	*M.A., LL.M. (Banaras), LL.M. (Yale), S.J.D. (Nw.)*	Lecturer
Dharma Pratap	*M.Sc., LL.M. (Banaras), D.Phil. (Oxford)*	Reader
Dhokalia, R. P.	*M.A., LL.B. (Alld.), Ph.D. (Manchester)*	Reader
Durga Prasad	*B.Sc., LL.B. (Lucknow), LL.M. (Banaras)*	Lecturer
Gaur, K. D.	*B.Sc., LL.M. (Alld.)*	Lecturer
Jain, M. P.	*B.A. (Hons.), LL.M. (Delhi), J.S.D. (Yale)*	Professor
Krishna Bahadur	*M.A., LL.M. (Lucknow)*	Lecturer
Mehta, J. P.	*M.A., LL.B. (Banaras)*	Part-time Lecturer
Misra, R. K.	*M.A., LL.M. (Lucknow)*	Lecturer
Nayak, K. N.	*M.A., LL.M. (Banaras), LL.M., J.S.D. (Yale)*	Reader
Nigam, S. S.	*M.Sc., LL.M. (Lucknow), Advocate*	Professor
Pande, R. S.	*M.A., LL.M. (Banaras)*	Lecturer
Parasuraman, S.	*M.A., B.Com., LL.M. (Banaras)*	Lecturer
Raj Krishna	*M.A., LL.M. (Lucknow), Ph.D. (Canberra)*	Reader
Saharay, H.	*M.A., LL.B., Ph.D. (London), Bar-at-Law*	Lecturer
Sampath, B. N.	*B.Sc., B.L. (Mysore), LL.M. (Osmania)*	Lecturer
Sands, C. Dallas	*A.B., LL.B., LL.M., J.D. (Indiana)*	Visiting Professor
Saksena, S. N.	*B.A., LL.B. (Agra)*	Part-time-Lecturer
Singh, P. N.	*M.A., LL.B. (Lucknow), Advocate*	Part-time Lecturer
Singh, S. N.	*B.A., LL.M. (Banaras)*	Lecturer
Singh, V. N.	*M.A., LL.M. (Lucknow)*	Lecturer
Sarjoo Prasad	*M.A., LL.B. (Banaras)*	Part-time Lecturer
Sharma, Surya P.	*B.Com., LL.M. (Delhi), LL.M., J.S.D. (Yale)*	Reader
Srivastava, S. C.	*B.Sc., LL.M. (Banaras)*	Lecturer
Surendra Nath	*M.A., LL.B. (Banaras), LL.M. (Northwestern)*	Lecturer
Yogendra Singh	*B.A., LL.M. (Banaras)*	Lecturer
Research Assistants		
Bhatia, S. K.	*M.A., LL.B. (Banaras)*	
Sinha, S. P.	*M.A., LL.M. (Banaras)*	
Srivastava, D. K.	*M.A., LL.B. (Banaras)*	
Rao, R. J.	*B.A., LL.M. (Osmania)*	
Verma, N. N.	*Shastri, LL.M. (Banaras)*	
Verma, S. K.	*B.Com., LL.M. (Banaras)*	

THE BANARAS LAW JOURNAL

Cite This Volume

4 Ban. L. J. (1968)

THE BANARAS LAW JOURNAL

Vol. 4 January—December 1968 Nos. 1 & 2

CONTENTS

ARTICLES

THE QUESTION OF EXTENDED PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER THE AUSPICES OF THE LEAGUE OF NATIONS..*R. P. Dhokalia* 1

DISARMAMENT-PROBLEMS AND PROSPECTS.....*Baleshwari P. Srivastava* 33

INTELLECTUAL TRADITION IN RELATION TO LAW, SCIENCE AND POLICY IN SPACE AGE.....*S. Bhatt* 60

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).....*Surendra Nath* 71

NOTES AND COMMENTS

INTERPRETATION OF STATUTES-CENTRAL SALES TAX ACT-GOODS INTENDED FOR USE IN MANUFACTURE, PROCESSING OR MINING.....*Lachhaman Prasad Gupta* 105

REFLEXIONS ON INDIAN LEGAL EDUCATION.....*C. Dallas Sands* 112

BOOK REVIEWS

J. D. M. DERRETT, RELIGION, LAW AND STATE IN INDIA.....*B. N. Sampath* 124

J. D. M. DERRETT, AN INTRODUCTION TO LEGAL SYSTEMS.....*B. N. Sampath* 128

THE QUESTION OF EXTENDED PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER THE AUSPICES OF THE LEAGUE OF NATIONS

R. P. DHOKALIA*

I INTRODUCTION

Agreements between states or other international persons are legal bonds of contractual character as they are intended to create legal rights and obligations between the parties.[1] They are a necessary incident of international intercourse and they multiply in number and variety with the frequency of contact and intimacy of association between interntional persons. Since they seek to establish a legal relationship by means of which international persons acquire legal rights and undertake obligations, international treaties appear to be the major instrument for developing new norms directly by a common agreement.[2] Treaty obligations may be assumed in a variety of ways. The traditional methods of participation in a treaty are signature, ratification and accession, and more recent methods are : acceptance, concurrent action by way of exchange of notes, a unilateral action accepted by the other party or parties and, generally, any other procedure which the parties may find it necessary to employ.[3] It is true that, in principle, participation in treaties, in the generic sense is confined to the states participating in the negotiation and, if a treaty specifies the parties, the contractual relationship becomes fixed and the question of the admission of additional parties cannot be opened. The question of admittance of new states to participation in a treaty also becomes complex

---

* M.A., LL.B. (Alld.), Ph.D. (Manchester); Reader, Faculty of Law, Banaras Hindu University, Varanasi.

1 See Brandon, "Analysis of the terms 'Treaty' and 'International Agreement' under Article 102 of the Charter," 47 *Am. Jr. Int'l L.* 46-69 (1953).

2 McNair, "Functions and Differing Legal Character of Treaties," XI *Brit. Y.B. Int'l L.* 100-118 (1930); Harvard Research in International Law Treaties, 29 *Am. Jr. Int'l L.* 653-1226 (1935) supplement.

3 See Commentary on Art. 7, *Brierly's Report on the Law of Treaties*, (1950) *2 Y.B. Int'l L. Comm'n* 235-238, paras 67-83, (1950) U. N. Doc. A/CN. 4/23 ; See also *Lauterpacht's Report on the Law of Treaties*, (1953) *2 Y.B. Int'l L. Comm'n* 106-123, U.N. Doc. A/CN. 4/63 Pt. 11.

in the absence of an accession clause.[4] In fact, the whole problem in connection with participation in a treaty is that under international law there is no rule enjoining upon a state or group of states to accept another state as a party to a specific treaty, and so, it cannot be said that every state has an inherent right to become a party to a treaty.

It is necessary to distinguish between bilateral and multilateral treaties from the point of view of the problem of participation.[5] In the case of bilateral treaties or even plurilateral treaties, there is no problem since such treaties being negotiated between a restricted number or group of states, participation therein is necessarily limited in principle to the states immediately concerned, and other states cannot claim a right of participation, nor in fact can participate without the consent of these states. However, in case of general multilateral treaties or conventions, particularly those intended to create norms of general international law, several problems arise in regard to participation and the methods and procedures to be prescribed for admitting non-signatory or new states. Such treaties usually contain satisfactory accession clauses, and their coming into force creates obligations only for those states which at that date have taken the necessary steps, whether by signature, ratification, or accession, to indicate their participation in the instruments.[6] In case there is no accession clause,[7]

4 In the *Polish Upper Silesia Case*, the P.C.I.J. observed with reference to an armistice convention that when a treaty did not provide for any right of accession it was not possible to presume the existence of such a right. (1925) P.C.I.J. Ser. A, No. 6.

5 A bilateral treaty being a transaction between two states to promote interests peculiar to themselves raises no issues of international law as it in no way affects the interests of the international community. Similarly, plurilateral treaties are the ones negotiated for a specific purpose by a restricted number of states having some common interests affecting them only. Participation in a regional or plurilateral treaty by an outsider requires the consent of the parties. Multilateral treaties, on the other hand, are the those drawn up at an international conference or under the auspices of an international organization. They may be adopted by anything up to 100 states. They are characterized by a general or universal interest and do not involve direct benefits for any of the participating states. The benefits under them are of general character arising from participation in common cause for the general good. See for distinction between a general multilateral treaty and a multilateral treaty, U.N. Doc A/5209, Report of the ILC covering the work of its forteenth session. (1962) 2 *Y.B. Int'l L. Comm'n* 163, para 12 ; on the problem of differing rules, See Jenks, "The conflict of Law-Making treaties," *Brit. Y B. Int'l L.* 401-453 (1953).

6 *Fitzmaurice, (First) Report on the Law of Treaties (Article* 41, para 4), (1956) 2 Y.B. Int'l L. Comm'n 116, U.N. Doc. A/CN. 4/101 (1956).

7 For instance, the Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes contain no accession clauses since the agreements provided for in Articles

the problem of admitting new parties is subject to the consent of the parties if the treaty is in force, or of the signatories if it is not in force. Then there are multilateral treaties either drawn up at an international conference or under the auspices of an international organization, and, in both cases, the trend appears to be that the admission of additional states to participate in such treaties is to be affected by the same majority by which they have been adopted, or by the decision of the competent organ of the organization.[8] As far as the United Nations practice is concerned, states are offered the alternative of becoming parties either by signature followed by ratification, or by accession. This simplification of formalities offers to states the procedures most convenient to them.[9] For all practical purposes, it seems inconceivable that any convention concluded under the United Nations would lack a provision enabling non-participants to sign it or accede to it. A system even broader than that of the United Nations has been provided by article 139 of the Geneva Convention of August 12, 1949 relative to Treatment of Prisoners of War, which makes it open for accession on entry into force by any power in whose name the convention had not been signed.[10] This provision has emphasized the importance of universality of participation.

The participation of additional or new states in existing treaties is not a simple question. It raises several fundamental issues: whether or not every state has an automatic right to insist on becoming a party to a treaty, particularly, when the question of participation is related to multilateral treaties or conventions of general interest which create norms of general international law; if not, under what conditions a state may be

60 and 94, respectively, have not been concluded. See the Hague Conventions and Declarations of 1899 and 1907 (Scott. ed. 1918).

8 See Art. 13 and Commentary, *Waldock (First) Report on the Law of Treaties*, (1962) 2 Y. B. Int'l L. Comm'n 53-57, U.N. Doc. A/CN. 4/144 (1962).

9 See U. N. Doc. A/CN. 4/121. (1959). Practice of the United Nations Secretariat in relation to certain questions raised in connection with the articles of the law of treaties, Note by the Secretariat, (1959) 2 Y.B. Int'l L. Comm'n 83 (Section E) ; See also, for illlstration, Art. XI of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) according to which it may be signed by any Member of the United Nations and any non-Member state invited to sign by the General Assembly. This clause provided a procedure for the admission of new parties, and General Assembly resolution No. 368 (IV) requested the Secretary General to implement it.

Similar provision was included in all subsequent multilateral treaties, e.g., Art. 26 of the Convention on the Territorial Sea and the Contiguous Zone, See United Nations Conference on the Law of the Sea, Official Records, Vol. II Pl. mtg. Doc. A/CONF 13/L. 52 pp. 132-135. (U.N. Pub. Sales No. 58 V. 4 Vol. II).,

10 No. 972, 75 U.N.T.S. 240 (1960).

entitled to participate in a multilateral treaty; whether a group of states has the right to exclude all other states from participating in a treaty which deals with a problem of general or universal interest; whether the agreement of all the original signatory or negotiating states, as the case might be, is always necessary for admission of new signatories; whether in the case of treaties which contain no accession clause, or, if such a caluse exists but the time limit for accession has expired, is it possible for a country to participate in a treaty after signature? Whether the ratification or accession to a multilateral treaty imply recognition of an unrecognized state either by a state which ratified or by a state which subsequently acceded to it and, lastly, if the right of all states to participate in universal treaties is admitted, is it not implied that all states are bound by universal treaties, even by those in which they have not participated?

These fundamental questions relating to participation of all states, particularly in treaties of a universal character, are of added significance in our times when multilateral conventions are increasingly replacing custom as the principal source of international law in the present day fast-moving articulate and complex international society.[11] The International Law Commission, which had placed the 'Law of Treaties' amongst the topics as being suitable for codification in 1949[12] and since then had studied the subject very comprehensively,[13] discussed these questions, during its debates on Article 24[14] (Beginning and duration of the treaty obligation) at its eleventh session in 1959.[15] This Article was the occasion of discussion as to the existence or otherwise of any basic general right to participate in treaties. During the debate in the International Law Commission, it appeared that there arose two problems in connection with the participation

11 Hudson, pointing out the growing use of international treaty for the development of international law, agreed with Benjamin Moore's view that, of all the achievements of the past hundred years in the field of international relations, the most remarkable has been the improvement of international law by international legislation, i.e. by law-making international treaties. See Introduction to the series of volumes, International legislation, Vol. I, pp. xiii-xiv, (1931).

12 (1949) Y.B. Int'l L. Comm'n 7th Mtg. Doc. A/925 Supp. No. 10, paras 15 and 16.

13 The Commission submitted its final Draft on the Law of Treaties consisting of 75 draft articles; See Report of the 18th. Session U.N. Doc. A/CN 4/191, also in Supplement No. 9 (A/6309/Rev. 1). The United Nations Conference on the Law of Treaties, which met at Vienna in two phases—26 March to May 1968 and 9 April to 23 May 1969 has adopted the Vienna Convention on the Law of Treaties comprised of 85 articles in all. See U.N. Doc. A/CONF. A/39/27, dated 23 May 1969.

14 *Fitzmaurice. (Fourth) Report on the Law of Treaties,* (1959) 2 Y.B. Int'l L. Comm'n 47, U.N. Doc. A/CN. 4/120 (1959).

15 See (1959) 1 Y.B. Int'l L. Comm'n 102-115.

of states in general multilateral treaties:—(i) whether there was any abstract right of participation at all and (ii) what was to be done for participation of new states in the treaties concluded in the past the provisions of which limited the participation to specific categories of states or, in other words, which were no longer open for signature or accession. As to the first problem, the Commission deferred consideration of a general article about participation in view of the complexities of the matter and wide divergence of opinion amongst its members.[16] However, in view of the fact that general multilateral treaties regulate matters of universal interest, that they are concluded on behalf of and belong to the international community as a whole, and that the extension of participation of states in such treaties is an important factor in promoting international co-operation, particularly under the present-day conditions of peaceful co-existence of states with differeing economic, political and social systems, these treaties in the present writer's opinion should be open to accession on a universal basis.

It is with the question of extended participation in general multilateral treaties concluded in the past before the emergence of new states that the present paper is concerned. The following pages therefore attempt to study the problem of participation of new states in those multilateral agreements concluded under the auspices of the League of Nations in respect of which the Secretary General of the United Nations acts as depositary and which are not open to new states by virtue of their terms or of the demise of the League.

A working paper prepared by the Secretariat of the United Nations has given a list of such treaties numbering thirty-one in all. Of these twenty-six agreements have already entered into force,[17] and the remaining

16 See the debates (1959) 1 Y.B. Int'l L. Comm'n 102-15, 502-503 mtgs of the Comm'n. In the final Draft on the law of teaties the Commission by majority had adopted the text that, unless otherwise provided by the treaty or by a rule of an international organization, a general multilateral treaty should be open to participation by every state. See Int'l L. Comm'n Report, 17th Session, 84 (1966), U.N. Doc. A/CN 4/191.

17 These are: (1) International Convention concerning the use of Broadcasting in the cause of Peace, Geneva, September 23, 1936; (2) Declaration regarding the Teaching of History (Revision of School Text-books), Geneva, October 2, 1937; (3) Protocol relating to a certain case of Statelessness, the Hague, April 12, 1930; (4) Convention on certain Questions relating to the Conflict of Nationality Laws, The Hague, April 12, 1930; (5) Protocol relating to Military Obligation in certain cases of Double Nationality. The Hague, April 12, 1930; (6) International Convention for the Suppression of Counterfeiting Currency, and Protocol, April 20, 1929 (7) Optional Protocol regarding the Counterfeiting Currency, Geneva, April 20, 1929; (8) Convention and Statute on Freedom of Transit, Barcelona, April 20, 1921; (9) Convention and Statute

five agreements have remained still inoperative.[18]

II THE PROBLEM OF PARTICIPATION IN OLDER TREATIES

It is very unusual in modern times to find a multilateral treaty which does not regulate the participation of states nor contain a general accession clause. In fact, modern multilateral treaties normally contain satisfactory accession clauses so that the problem of accession of new sates is one which primarily relates to older multilateral treaties. The problem of participation in respect of older treaties arises because they are no longer open for signature and either they do not expressly provide for accession or, like the Hague

on the Regime of Navigable Waterways of International Concern, Barcelona, April 20, 1921; (10) Additional Protocol to the Convention on the Régime of Navigable Waterways of International Concern, Barcelona, April 20, 1921; (11) Convention regarding the Measurement of vessels employed in Inland Navigation and Protocol of Signature, Paris, November 27, 1925; (12) ConventionalStatute on the International Règime of Maritime Ports, and Protocol of Signature, Geneva, December 9, 1923; (13) Agreement concerning Maritime Signals, Lisbon, October 23, 1930; (14) Agreement concerning Manned Light Ships not on their Stations, Lisbon, October 23, 1930; (15) Conventional Statute on the International Régime of Railways and Protocol of Signature, Geneva, December 9, 1923; (16) Agreements between Customs Authorities in order to facilitate the Procedure in the case of undischarge or lost Triptych, Geneva, March 28, 1931; (17) Convention on the Taxation of Foreign Motor Vehicle with Protocol Annex, Geneva, March 30, 1931; (18) Agreement concerning the Preparation of a Transit Card for Emigrants, Geneva, June, 14, 1929; (19) Convention relating to the Transmission in Transit of Electric Power and Protocol of Signature, Geneva, December 9, 1923; (20) Convention relating to the Development of Hydraulic Power affecting more than one State, and Protocol of Signature, Geneva, December 9, 1923; (21) International Convention relating to the Simplification of Customs Formalities and Protocol, Geneva, November 3, 1923; (22) International Agreement relating to the Exportation of Bones, and Protocol, Geneva, July 11, 1928; (23) International Agreement relating to the Exportation of Hides and Skins, Geneva, July 11, 1928; (24) International Convention for the Compaign against Contagious Diseases of Animal and Declaration attached, Geneva, February 20 1935; (25) International Convention concerning the Transit of Animals, Meat and other Products of Animal Origin, with Annex, Geneva, February, 20, 1935; (26) International Convention concerning the Export and Import of Animal Products other than Meat, Meat Preparation, Fresh Animal Products, Milk, and Milk Products with Annex, Geneva, February 20, 1935 See 17 U.N. GAOR, Annexes, Agenda Item No. 76, U.N. Doc. A/C. 6/L. 498 (1962).

18 These are: (1) Convention for the Prevention and Punishment of Terrorism, Geneva, November 16, 1937; (2) Special Protocol Concerning Statelessness, The Hague, April 12, 1930; (3) Convention on the Registration of Inland Navigation Vessels, Rights in *Rem* over such Vessels and other cognate Questions with Protocol Annex, Geneva, December 9, 1930; (4) Convention on Administrative Measures for Attesting the Right of Inland Navigation Vessels to a Flag with Protocol Annex, Geneva, December 9, 1930; (5) Agreement for a Uniform System of Maritime Voyage and Rules annexed thereto, Geneva, May 13, 1936. See U.N. Doc. A/C. 6/L. 498, *op. cit.*

Conventions of 1899 and 1907 concerning the Pacific Settlement of Disputes, or the Barcelona Convention of 1921, contain an accession clause limiting the right of accession to certain states. This problem received attention of the International Law Commission (ILC) at its eleventh session in 1959, during its discussions on the Draft Articles on the Law of Treaties.[19] Since the purpose of these Draft Articles was to establish a general system for the future, it was thought desirable to examine the problem which arose from treaties concluded in the past, more particularly, with regard to those treaties concluded under the auspices of the League of Nations for the reason that they constituted an important part of the contemporary international law of treaties.[20]

Again in 1962, the Special Rapporteur, Sir Humphrey Waldock, in the first report on the Law of Treaties, commenting on Article 13 relating to "Participation in a Treaty by Accession," pointed out that even if his draft articles "were to contain a provision specifically creating a right to accede to such treaties and were to be adopted at an international conference as a convention on the conclusion of treaties, they might not be sufficient to achieve the object." He explained that a convention only bound the parties to it, and so, unless all the surviving parties to the older multilateral treaties in question became actual parties to the new convention on the conclusion of treaties, the effectiveness of the convention to create the right of accession for new states might be doubtful.[21] This procedure which required a convention, codifying the law governing the conclusion of treaties to be joined as parties by all the states adopting older multilateral treaties, was not considered to be an expeditious or effective solution for extending the participation of these treaties to new States.

Sir Humpherey Waldock, therefore, suggested a few expedients One of them was the possibility of administrative action to be taken through the depositaries of the individual treaties to obtain the necessary consent of the states concerned in each treaty.[22] In fact, in his opinion, it was

19 See (1959) 1 Y.B. Int'l L. Comm'n (502, 503, 504 mtgs.) 102-115.

20 See (1959) 2 Y.B. Int'l L. Comm'n 108-109 (para 10), Report of the Int'l L. Comm'n., 11th Session, U.N. Doc. A/4169.

21 See (1962) 2 Y.B. Int'l L. Comm'n 57 (para 16), U.N. Doc. A/CN. 144 (1962). The International Court of Justice in the Aerial Incident case afirmed the rule that the Statute of the Court annered to the Charter was "without legal force so far as non-signatory States were concerned"; See (1959) I.C.J. 138.

22 It is to be noted that to-day international agreements are concluded in a great variety of forms, and in multilateral treaties communications through the depositary are a normal means of obtaining the views of the interested states in matters touching the operation of the final clauses.

well-established that the requirement of the consent of the states, which were entitled to a voice in the matter of opening of a treaty to accession by additional states, did not necessitate negotiation of a fresh treaty amending or supplementing the earlier one. Another expedient was that the necessary consent of the states concerned might be obtained in the form of a resolution of the General Assembly of the United Nations by which each Member State agreed to make a specified list of multilateral treaties of universal character open to accession by any Member State of the United Nations or of a specialized agency, or Party to the Statute of the International Court of Justice. As regards the problem of obtaining the consent of a few non-member states, which would also be necessary, Sir Humphrey thought that it was not impossible to devise a means, of associating those states with the resolution, which was expected to command almost unanimous support. Also, it was pointed out that the General Assembly might draw up a list of the treaties to which accession by additional states was deemed desirable and further invite the states parties to them to open the listed treaties to accession by additional states and, more especially, new states.[23] The International Law Commission adopted these observations of the Special Rapporteur in the commentary on the Draft Article 9 of the Law of Treaties dealing with the "opening of a treaty to the participation of additional states."[24]

In the Sixth Committee of the General Assembly different views were expressed and proposals made on the suggestions made by the Commission on the question.[25] Certain delegations—Australia, Ghana and Israel—joined together in introducing a resolution[26] which in its final form referring to the Commission's recommendation proposed that the General Assembly should: (1) authorize certain measures so that the Secretary General could inquire, from the parties to the conventions listed in an annex to the resolution within a period of twelve months from the date of the inquiry, whether they objected to the opening of the conventions to which they were parties for acceptance by any Member State of the United Nations or member of any specialized agency; (2) authorize the Secretary General, if the majority of the states parties to those conventions had not objected within the prescribed period, to receive in deposit instruments of acceptance thereto

23 *Id.* at 58.

24 See (1962) 2 Y.B. Int'l L. Comm'n 169 (para 10). Int'l L. Comm'n Report, 14th Session, U.N. Doc. A/5209.

25 17 U.N. GAOR, Report of the Sixth Committee, Agenda Item No. 76.

26 2 U.N. GAOR, U.N. Doc. A/C. 6/L. 504/Rev. *Id.*

submitted by any Member State of the United Nations or member of any specialized agency; (3) recommend that all states parties to those conventions should recognize the legal effects of instruments of acceptance so deposited and communicate to the Secretary General as depositary their consent to the participation in the conventions of states so depositing instruments of acceptance; (4) request the Secretary General to inform Members about the communications received by him under the Resolution.

The above mentioned three-power proposal contemplated three stages: (1) an inquiry to the parties whether they objected to opening of the listed conventions; (2) an authorization to the Secretary General to receive new instruments of acceptance; and (3) a recommendation that the legal effect of new instruments deposited should be recognized. Whilst the former two stages were purely administrative in character and did not affect legal relationships, the third stage was only of recommendatory nature leaving each state free to determine the method of such recognition in the light of the requirements of its own internal law.

However, doubts were expressed regarding the proposed procedure during the debate in the Sixth Committee.[27] Various points raised by different representatives were as follows: (1) that what was really involved in the first stage was the agreement of the parties to change a rule on participation which had been laid down in the conventions and, for reasons of international and constitutional law, consent to such a change could not be given informally or tacitly by a mere failure to object;[28] (2) that, since some new states might have become bound by the League treaties through succession to parties, it was difficult to determine the list of the present-day parties to the treaties as would need to be done under the proposed scheme;[29] (3) that the determination of the states parties to the conventions as well as inviting new states to accede to the conventions in question involved a problem of succession of states, and this might prejudge the work of the International Law Commission on state succession; (4) that the provision in the draft resolution for a simple majority as sufficient to open the treaties to additional states appeared to be inconsistent with the requirement of a two-thirds majority in article 9 para 1 (*a*) of the draft articles on the Law of Treaties provisionally adopted by the Commission in 1962; and (5) that the course which was legally preferable in order to avoid uncertainty and constitutional difficulties was to prepare a protocol of amendment of the

27 U.N. Doc. A/5287, Report of the Sixth Committee, *op. cit.*

28 *Id.* para 35.

29 *Id.* para 37.

conventions as had been done in other cases by the General Assembly.[30] In the context of the debate, the General Assembly resolved that a more thorough study of the problem be made by the International Law Commission.[31]

In accordance with the General Assembly resolution what was required was : (*a*) a study of the League Treaties in question and (*b*) an examination of the procedure of amending protocol used by the United Nations in respect of those League treaties only which the United Nations was willing to maintain but which were rendered inoperative merely because of the disappearance of the League organs which were entrusted with certain functions of a depositary.

The International Law Commission did this at its fifteenth session in 1963.[32] It was facilitated in its task by a working paper submitted by the Secretariat which gave a list of multilateral treaties concluded under the auspices of the League of Nations in respect of which the Secretary General of the United Nations acts as depositary and which are not open to new states by virtue of their terms or the demise of the League.[33] It contained in Part A a list of 26 agreements which have entered into force, and in Part B, listed 5 agreements which have not yet done so.[34] The Commission confined its study to the agreements in Part A only because those in Part B had not received a necessary support to bring them into force despite the fact that over a quarter of century had elapsed since their conclusion.[35]

Examining the technical aspects of the question of extended participation in the League of Nations treaties with reference to those given in part A of the Secretariat's list, the Commission emphasized the need of their re-examination with a view to ascretaining whether, quite apart from their participation clauses, a number of them might require changes of substance in order to adopt them to contemporary conditions. It found that five

30 *Id.* para 34. also see infra at 11-13.

31 See G.A. Res. 1766 (XVII), November 20th, 1962. U.N. Doc. A/C. 6/L. 508/Rev. and Doc. A/5287, *op. cit.* para 39.

32 (1963) I T.B. Int'l L. Comm'n (712 th and 713th mtgs).

33 U.N. Doc. A/C. 6/L. 498, *op cit.* para 6, note 2. Other documents placed before it were : U.N. Doc. A/CN. 4/159 and Add 1—(Mimeographed) containing a summary of discussions in the Sixth Committee, and U.N. Doc. A/CN. 4/162, Report of the Special Rapporteur on the Law of Treaties entitled "Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (17 G.A. Res. 1766, XVIII incorporated in the Report of the Int'l L. Comm'n 15th Session 2 (1963) 2 Y.B. Int'l L. Comm'n 217-223 (Chap. III), U.N. Doc. A/5509.

34 See *Supra* notes 17 and 18.

35 See (1963) 2 Y.B. Int'l L. Comm'n 21 (para 218).

of the twenty-six treaties were designed to be closed treaties, their participation clauses being restricted to the states which had been represented at or invited to the conferences which drew up those treaties.[36] The remaining twenty-one of them were clearly intended as open ones, their participation clauses being so worded as to allow the participation to any state not represented at the conference to which a copy of the treaty might be communicated for that purpose by the Council of the League. These treaties turned into closed treaties only as a result of an event foreign to the wishes of the parties, namely, the dissolution of the League and its Council and the absence of any organ of the United Nations exercising the powers previously exercised by the Council under the treaties.

It may be pointed out here that the Secretariat's list had not included seven League of Nations treaties which were amended by the Protocols in pursuance of the General Assembly resolution 24 (i) of February 12, 1946.[37] This resolution was adopted as a result of an information given by certain Members of the United Nations which were Members of the League of Nations and which were parties to some of the treaties under which the League and its organs were entitled to exercise numerous functions or powers. The information was that they were moving a resolution in the League Assembly whereby its members would assent to the necessary steps for the transfer to the United Nations of the functions and powers previously entrusted to the League of Nations.[38] The General Assembly, for its part,

36 U.N. Doc. A/5509, *op. cit.*, para 23. One of these five treaties, the Convention Regarding the Measurement of Vessels Employed in Inland Navigation, Paris, 1925 (67 L.N.T.S. 63) was also open to states having a common frontier with one of the states invited to the Conference, *ibid*, note 95, remaining four agreements found to be closed ones were : Concerning Maritime Signals, Lisbon, October 23, 1930 ; Concerning Manned Light ships not on their stations, Lisbon, October, 23, 1930 between Customs Authorities in order to facilitate the Procedure in the case of Undischarge of Lost Triptychs, Geneva, March 28, 1931 ; Concerning the Preparation of a Transit Card For Emigrants, Geneva, June 14, 1929.

37 See for the recommendations on the basis of which this resolution was adopted, U. N. Doc. PC/20, Report of the Preparatory Commission of the United Nations, p. 116 ; U. N. Doc. A/18 and Add 1 and 2-the report of the Committee set up by the preparatory Commission to discuss and establish with the supervisory commission of the League of Nations a common plan for the transfer of the assets of the League of Nations ; U. N. Doc. A/28, Report of the League of Nations Committee to the General Assembly.

8 Such a resolution was adopted by the League Assembly on April 18, 1946 at its final session whereby it recommended that the members should facilitate in every way the assumption by the United Nations without interruption the functions and powers entrusted to the League under international agreements of a technical and non-political character which the United Nations was willing to maintain. See League of Nations, Off. J. Spec. Supp. 194, at 57.

declared its willingness in principle to assume the exercise of certain functions and powers previously entrusted to the League, and the members of the United Nations which were parties to the instruments in question placed on record their assent to the action contemplated in the resolution 24 (i) and to use their good offices to secure the cooperation of the other parties to those instruments.[39]

The General Assembly then adopted three decisions for the transfer of functions and powers belonging to the League under resolution 24 (i). According to the Decision (A), the General Assembly declared the willingness of the United Nations to "accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations."[40] It may be noted here that the League was invested with purely, secretarial functions as the depositary of the treaties for the parties to each treaty rather than for the League of Nations. This was done by making such provision in the final clauses of each treaty. Hence, the transfer of the depositary functions from the Secretariat of the League to that of the United Nations amounted to a modification of the final clauses of the treaties in question. Although the assent was given to this transfer by those members of the United Nations which were also parties to the particular treaties, the agreement of other parties to various treaties which were not members of the United Nations, was not sought. Since no objection had been raised by any party, the Secretary General had acted as the depositary for all those treaties ever since the passing of the resolution.[41] But, according to the terms of the resolution, the Secretary General had not considered within his powers to accept signatures, ratifications, or accessions from states not covered by the participation clauses of the treaties which rendered them as closed. By Decision (B) of the resolution 24 (i), the General Assembly expressed its willingness to take the necessary measures to ensure the continued exercise of the functions and powers which the instruments of a technical and non-political character conferred upon the organs of the League for their due execution. It also referred the matter to the ECOSOC to examine carefully which of the organs of the United Nations or its specialized agencies, which had been brought into relationship with the United Nations, should in future exercise the functions and powers in question.[42] Decision (C) covered the instruments having a political character with respect to which the General Assembly decided that it would either iself examine, or would submit to the appropriate organ of the United Nations any request from the parties to a treaty that the United Nations should assume the exercise of the functions or powers entrusted to the League.[43]

39 See U. N. Doc. A/CN. 4/154. Resolutions of the General Assembly concerning the Law of Treaties, Memorandum prepared by the Secretariat para 18, (1963) 2 Y. B. Int' 1 L. Comm'n.

40 U.N. Doc. A/CN. 4/154, para 18 (A). *Id.* at 6.

41 See U. N. Doc. ST/LEG/7, Summary of the practice of the Secretary General as Depositary of multilateral agreements, pp. 65-68.

The General Assembly in pursuance of the aforesaid decisions (B) and (C) approved seven protocols between 1946 and 1953 which amended earlier multilateral treaties and transferred the functions or powers formerly exercised by the League to the organs of the United Nations. These Protocols[44] not only made necessary amendments of substance but also replaced the participation clause of the earlier treaties opening them to accession for any Member of the United Nations as well as for any non-Member state to which the ECOSOC decided officially to communicate a copy of the amended treaty. Since these protocols made more extensive amendments than merely opening the old treaties to new parties, a formal procedure for consent was also necessary in the form of final clauses opening the protocols for signature or acceptance only to the parties of the old treaties and providing for the entry into force of the amendments when a majority or a specified number of those states had become parties to the protocols. It was this procedure of amending protocol which was favoured by several delegates in the Sixth Committee of the General Assembly at its seventeenth session in 1962, as legally preferable and in accordance with international practice and with domestic and constitutional practice of many states for opening the League treaties to new states.

Before we examine the main problem of the procedure of extending participation in the League treaties we may allude to its relation with the question of succession of new states to these treaties.[45]

42 See U.N. Doc. A/CN. 4/154 *op. cit.* 18 (B).

43 *Id.* para 18 (C).

44 They dealt with various treaties relating to (1) Narcotic Drugs [12 U.N.T.S. 179]; (2) Economic statistics 20 U.N.T.S. 229]; (3) Circulation of Obscene Publications (30 U.N.T.S. 3); (4) Suppression of the White Slave Traffic [30 U.N.T.S. 23]; (5) Suppression of the Circulation of, and Traffic in Obscene Publications [46 U.N.T.S. 160]; (6) Suppression of the Traffic in Women and Children [53 U.N.T.S. 13]; and (7) Slavery [182 U.N.T.S. 51].

45 See Jenks, "State Succession in Respect of Law-Making Treaties," Brit. Y.B. Int'l L. 104 (1952).

III THE QUESTION OF SUCCESSION OF NEW STATES TO LEAGUE TREATIES

The question of opening the League treaties to participation by additional states has certain relevance to succession of new states after independence. A memorandum, prepared by the Secretariat of the United Nations[46] gave a complete account of the practice both of the states and of the Secretary General pertaining to treaties concluded under the auspices of the United Nations as well as of the League of Nations. Chapter I of this document, surveying the practice with respect to the League treaties,[47] points out that, in case of the League treaties amended by the United Nations protocols, the practice of the Secretary General has been to enquire from each new state whether it considered itself bound by the amended League treaties when any of them had been made applicable to its territory by its predecessor state.[48] As regards the League treaties, not amended by the United Nations protocols, the document observes that no systematic attempt has been made by the Secretary General to ascertain what states are parties by succession to these treaties.[49] In fact such action is not required under the General Assembly resolution 24 (i) of 1946 under which the Secretary General has certain functions in respect of these treaties. Besides, it would involve two legal problems: firstly, it would be necessary to establish a list of the League treaties that are still in force and this would require an enquiry on the following points: whether each treaty has been denounced by the parties, whether the treaty can still be executed after the disappearance of the organs of the League, whether the treaty has been superseded among the parties by a new treaty, and whether the treaty has fallen into *desuetude*; secondly, it would be necessary to draw up a list for each treaty of the states which could have

46 (1962) II Y.B. Int'l L. Comm'n 106-131, U.N. Doc. A/CN. 4/150 (1962). Also U.N. Doc. ST/LEG/7 "Summary of the Practice of the Secretary General as Depositary of Multilateral Agreements" published in 1959. As to the practice of International Labour Organization See Jenks, *op. cit, supra*.. note 45 at 105.

47 See U.N. Doc. A/CN. 4/140 *op. cit.* paras 10-28.

48 Number of new states, such as Iraq, Lebanon, Syria, Phillipines, Jordon, Ceylon, Cambodia, Laos, Vietnam and Federation of Malaya replied in response to these enquiries that they considered themselves bound by the old treaties amended by the 1946 Protocol on Narcotics by virtue of succession. *Id.* paras 10-15. As to other treaties Burma, Ceylon, Labanon, Pakistan, Sierra Leone, Syria, Iraq, India, Guinea and Morocco recognized that they continued to be bound by virtue of succession to the specified old treaties and other United Nations amending protocols. India, which had not separately become a party to the old treaty, has become party to two conventions: (i) Agreements for the supression of the Circulation of Obscene Publications (Paris, May 4, 1910); (2) Agreement for the Supression of the white slave Traffic (Paris. May 18, 1904 and May 4, 1910), *id.* para 14.

49 *Id.* para 15.

succeeded to its rights and obligations, sometimes through several consecutive successions. However, according to the Memorandum, certain new states have, of their own accord, informed the Secretary General that they continued to be bound by various League treaties.[50]

It may be submitted here that, since in the absence of an international legislature multilateral conventions are among the most promising methods for the development of international law, the need of their continuance is all the greater in relation to technical treaties such as postal agreements. This is borne out by the tendency of continued application of multilateral conventions to the territories of newly-emerging nations, and by the procedures of international organizations encouraging continuity of treaties despite a change of state. For example, new states established by the United Nations are often made subject to treaties prescribed by that organization since they find little advantage in starting off with a "clean state." As example of devices for securing continuity by international organizations, perhaps reference may be made to the GATT agreements and, in particular, to the practice of the International Labour Organization suggesting to a new member on admission to make an additional declaration to continue to be bound by all ILO Conventions previously applied to its territory.[51]

The newly-emerging nations themselves do recognize as much as the older states the over-whelming need to maintain a minimum world public order, and so, they have shown keen interest in the continuity of multilateral treaties from the point of view of the world-community as such. But the important task, then, is to identify those multilateral treaties in which the world comunity has an interest in continuity.

When the Commission examined this question of relation between the problem of opening the League treaties to new states and the succession

50 For instance, Pakistan informed that by reason of article 4 of the Schedule to the Indian Independence (International Arrangement, Order, 1947, promulgated on 4 August. See 2 U.N. GAOR, 6th Committee Annexes 6 c. at 308-310, U.N. Doc. A/C 6/161); the rights and obligations under the following three agreements devolved upon Pakistan and that therefore Pakistan "considers itself a party to these agreements": (i) On certain questions relating to the conflict of Nationality Laws; (2) relating to a Certain case of statelessness, and (3) special Protocol concerning statelessness, all signed at the Hague on 12 April, 1930. It is to be noted that the third of these agreements, though ratified by India in 1932 has not yet entered into force. Other States, Laos, Indonesia, Federation of Malaya and Jordon also listed the treaties to which they considered themselves bound. *Id.* paras 16-22.

51 See "The Effect of Independence on treaties," International Law Association Report 340 (1965) (South Hackensack, N. J. 1965); O' Connell, "Independence and Problems of State Succession," in *The New Nation in International Law and Diplomacy* 7-41. (Brien ed. 1965).

of these states to old treaties, it held the view that, before it could be seen how far the problem was capable of being solved through principles of succession, a number of difficulties were required to be settled. For instance, many of the League treaties have not been ratified by a substantial proportion of the signatories and, therefore, the question arises as to the position of a new state whose predecessor in the territory was a signatory but not a party to the treaty. The Commission concluded that owing to some of such difficulties the principles governing the succession of states to treaty rights or obligations could scarcely be expected to provide either a speedy or a complete solution of the problem under consideration.[52]

IV THE PROCEDURE OF EXTENDING PARTICIPATION IN THE LEAGUE TREATIES

As to the procedure by which the problem of extending the right to participate in the closed League of Nations treaties may be solved, the only essential requirement is the consent of the parties in any form which they themselves may determine. The two procedures—the method of an amending protocol and the method of obtaining necessary consent by inquiries addressed by the Secretary General of the United Nations to the parties to the various treaties—seek to obtain the necessary consent and each of them has its own advantages as well as disadvantages. In the 1963 session, the International Law Commission had examined both the procedures.[53]

As regards the use of the procedure of amending portocol for providing a right to participate in the closed League treaties, the Commission drew attention to certain disadvantages involved in that method: Firstly, that procedure, as adopted in the seven protocols mentioned above,[54] is somewhat complicated. A protocol obligates the parties as between themselves to apply the amendments to the Leauge treaty which are set out in an annex to the protocol. It is open to signature or acceptance only by the states parties to the League treaty and is expressed to come into force when any two such states have become parties to the protocol. But, unless a majority of the parties to the League treaty become parties to the protocol, the amendments contained in the annex to the protocol do not come into force. The amendments make the League treaty open to accession by

52 See U.N. Doc. A/5509, Report of the I.L.O. fifteenth session (1963) II Y.B. Int.l L. Comm'n 221 (para 38).

53 See for the various views expressed in the Commission during the discussion, the summary Records of its 712 and 713th meetings, (1963) I Y.B. Int'l L. Commn'.

54 *Supra* at 21.

any member of the United Nations and by any non-member state to which a designated organ of the United Nations decides officially to communicate a copy of the amended treaty. The result is that there are different dates for the entry into force of the protocol itself and of the amendments to the League treaty. Besides, whilst the parties to the original treaty become parties to the amended treaty by subscribing to the protocol, other states become so by acceding to the amended treaty.[55]

Secondly, the procedure of an amending protocol does not provide a complete solution to the problem of extending participation to additional states in the League treaties because the protocol operates only *inter se* the parties to it, and accession to the amended treaty will not establish any treaty relation between the acceding state and parties to the original treaty which have failed to subscribe to the protocol. Moreover, the possibility of some delay remains for obtaining requisite number of signatures or acceptances in order to bring the required amending provisions into force.[56] For these reasons even if the use of a simplified form of an amending protocol were to be found possible, that procedure would still have certain drawbacks as mentioned above.

The other procedure, as suggested by the three-Power draft resolution,[57] sought to obtain the necessary consent by means of enquiries addressed to the parties to the various treaties by the Secretary General in his capacity as the depositary. The draft resolution contemplated the enquiries in the negative form i.e. the failure to reply within the period of twelve months was to be treated as equivalent to an absence of objection for the purpose of determining the authority of the Secretary General to receive deposit instruments of acceptance from members of the United Nations or of a specialized agency. Really speaking, such "tacit consent" of the majority would not suffice to give legal effect to the instruments of acceptance deposited with the Secretary General even *vis-a-vis* those treaties whose consent is thus presumed. The *tacit consent* would in fact operate only to establish the authority of the Secretary General to receive instruments in deposit but it would be open to each party to follow whatever procedure it wished for the purpose of recognizing the legal force and effect of the instruments deposited with the Secretary General. Furthermore, despite the fact that the procedure proposed in the draft resolution offered

55 See U.N. Doc. A/5509-Report of the Int'l L. Comm'a to the General Assembly covering the work of its 15th session. (1963) 2 Y.B. Int'l L. Comm'n 221, para 39.

56 *Id.* para. 40.

57 See *supra* at 13-14.

of these states to old treaties, it held the view that, before it could be seen how far the problem was capable of being solved through principles of succession, a number of difficulties were required to be settled. For instance, many of the League treaties have not been ratified by a substantial proportion of the signatories and, therefore, the question arises as to the position of a new state whose predecessor in the territory was a signatory but not a party to the treaty. The Commission concluded that owing to some of such difficulties the principles governing the succession of states to treaty rights or obligations could scarcely be expected to provide either a speedy or a complete solution of the problem under consideration.[52]

IV THE PROCEDURE OF EXTENDING PARTICIPATION IN THE LEAGUE TREATIES

As to the procedure by which the problem of extending the right to participate in the closed League of Nations treaties may be solved, the only essential requirement is the consent of the parties in any form which they themselves may determine. The two procedures—the method of an amending protocol and the method of obtaining necessary consent by inquiries addressed by the Secretary General of the United Nations to the parties to the various treaties—seek to obtain the necessary consent and each of them has its own advantages as well as disadvantages. In the 1963 session, the International Law Commission had examined both the procedures.[53]

As regards the use of the procedure of amending portocol for providing a right to participate in the closed League treaties, the Commission drew attention to certain disadvantages involved in that method: Firstly, that procedure, as adopted in the seven protocols mentioned above,[54] is somewhat complicated. A protocol obligates the parties as between themselves to apply the amendments to the Leauge treaty which are set out in an annex to the protocol. It is open to signature or acceptance only by the states parties to the League treaty and is expressed to come into force when any two such states have become parties to the protocol. But, unless a majority of the parties to the League treaty become parties to the protocol, the amendments contained in the annex to the protocol do not come into force. The amendments make the League treaty open to accession by

52 See U.N. Doc. A/5509, Report of the I.L.O. fifteenth session (1963) II Y.B. Int.l L. Comm'n 221 (para 38).

53 See for the various views expressed in the Commission during the discussion, the summary Records of its 712 and 713th meetings, (1963) I Y.B. Int'l L. Commn'.

54 *Supra* at 21.

any member of the United Nations and by any non-member state to which a designated organ of the United Nations decides officially to communicate a copy of the amended treaty. The result is that there are different dates for the entry into force of the protocol itself and of the amendments to the League treaty. Besides, whilst the parties to the original treaty become parties to the amended treaty by subscribing to the protocol, other states become so by acceding to the amended treaty.[55]

Secondly, the procedure of an amending protocol does not provide a complete solution to the problem of extending participation to additional states in the League treaties because the protocol operates only *inter se* the parties to it, and accession to the amended treaty will not establish any treaty relation between the acceding state and parties to the original treaty which have failed to subscribe to the protocol. Moreover, the possibility of some delay remains for obtaining requisite number of signatures or acceptances in order to bring the required amending provisions into force.[56] For these reasons even if the use of a simplified form of an amending protocol were to be found possible, that procedure would still have certain drawbacks as mentioned above.

The other procedure, as suggested by the three-Power draft resolution,[57] sought to obtain the necessary consent by means of enquiries addressed to the parties to the various treaties by the Secretary General in his capacity as the depositary. The draft resolution contemplated the enquiries in the negative form i.e. the failure to reply within the period of twelve months was to be treated as equivalent to an absence of objection for the purpose of determining the authority of the Secretary General to receive deposit instruments of acceptance from members of the United Nations or of a specialized agency. Really speaking, such "tacit consent" of the majority would not suffice to give legal effect to the instruments of acceptance deposited with the Secretary General even *vis-a-vis* those treaties whose consent is thus presumed. The *tacit consent* would in fact operate only to establish the authority of the Secretary General to receive instruments in deposit but it would be open to each party to follow whatever procedure it wished for the purpose of recognizing the legal force and effect of the instruments deposited with the Secretary General. Furthermore, despite the fact that the procedure proposed in the draft resolution offered

55 See U.N. Doc. A/5509-Report of the Int'l L. Comm'a to the General Assembly covering the work of its 15th session. (1963) 2 Y.B. Int'l L. Comm'n 221, para 39.

56 *Id.* para. 40.

57 See *supra* at 13-14.

the prospect of somewhat speedier action than obtainable through an amending protocol, it would not avoid some of other defects of the latter method. It is on the *tacit* consent of "a majority of the parties" that entry into effect of the instrument depends. Besides, the identification of the parties to the treaties would be necessary both for the purposes of the enquiry and for determining when the authrority of the Secretary General to receive instruments from additional states comes into force. As pointed by the International Law Commission, the later United Nations protocols have sought to minimize the difficulty arising from the need to identify the parties to the League treaties by making the entry into force of the amendments dependent upon the acceptances of a specified number rather than of a majority of the parties.[58] Indeed whilst the procedure of *tacit consent* may diminish the force of the constitutional objections by leaving each party free to follow any procedure for recognizing the legal force and effect of the instruments deposited, it also involves a certain risk of delaying the completion of the procedure and of obtaining only incomplete results.[59]

Both the procedures discussed above—the method of amending protocol and the method of obtaining consent by means of enquiries by the Secretary General-take account of the applicable rule of international law that the modification of the participation clauses requires the assent of the parties to the treaties. A participation clause, one of the final clauses of a treaty, is, in principle, on the same footing as a clause appointing a depositary save that the former affects the scope of the operation of the treaty and, therefore, creates substantive obligations for the parties. It is on the basis of the final clause that the consitutional processes of ratification, acceptance and approval by individual states take place. Underlining the significance of the relation between the participation clauses of the League treaties and the constitutional processes of the individual parties, the Commission pointed out that in twenty-one out of the twenty-six League treaties the participation clauses were so formulated as to make the treaties open to participation by any member of the League and by any additional states to which the Council of the League communicated a copy of the treaty for that purpose.[60] The implication is that not only the negotiating representatives drawing up the treaties could authorize the League Council to admit any further state to participation, but also, that each

58 U.N. Doc. A/5509 *op. cit.* at 222, para. 42.

59 *Id.* para. 46.

60 *Id.* para. 47.

party whilst giving its definitive consent to these treaties expressly could confer that authority upon the Council. In other words, in the case of twenty one League treaties, the states which have ratified, consented to, or approved them in order to become parties, have; in fact, expressly consented to the admission not only of any member of the League but of any further state at the decision of an external organ—the Council of the League. There fore, in the case of these treaties, any possible constitutional objection to the use of a less formal procedure for modifying the participation clause would seem to be of much less force.

The International Law Commission, whilst not expressing any preference for any of the above two procedures from the point of view of the constitutional issues under internal law, pointed out that the special form of participation clauses of the League treaties appeared to present no constitutional difficulties in obtaining the assent of the parties to the treaties to the modification of the participation clauses. Moreover, considering the special form of the participation clauses of the twenty-one treaties, it might be worth-examining the possibility of dealing the problem along the lines adopted in 1946 with regard to the transfer of the depositary functions of the League Secretariat to the Secretariat of the United Nations despite the difference that under those clauses the functions of the League Council were not purely administrative.[61] What this transfer essentiallly involved was an adaptation of the participation clauses of the League Treaties to the change-over from the League to the United Nations. This would entitle the General Assembly to designate through adoption of an appropriate resolution, an organ of the United Nations to assume and fulfil the powers which, under the participation clauses of the treaties in question, were formerly exercisable by the League Council. This procedure, as an alternative to the other two methods discussed above, provides a simplified and expeditious administrative action for achieving the object of extending the participation in general multilateral treaties concluded under the auspices of the League.[62] The Commission suggested that since a number of League treaties were of no interest for states today, they be further examined by the competent authorities and that the General Assembly should take necessary steps to examine them with a view to determining what action may be necessary to adapt them to contemporary conditions.[63]

61 U.N. Doc. A/5509, *op. cit.* para 48-49.

62 This administrative procedure was also suggested by the International Law Commission in 1962. See ILC's Report of its fourteenth session; U.N. Doc. A/5209, Y.B. Int'l L. Comm'n 169, commentary on Art. 9, para. 10.

63 See U.N. Doc. A/5509 *op. cit.* paras. 18-50 for the series of conclusions reached by the Commission at its 15th session.

V SOLUTION OF THE PROBLEM

At the eighteenth session of the General Assembly the Sixth Committee proposed a solution generally based on the recommendations of the International Law Commission.[64] This solution has received general approval for its ultimate aim, namely, the participation of new states in those multilateral treaties of a technical and non-political character concluded under the auspices of the League of Nations which have become closed as the result of the demise of the League. As to the force and interest of the treaties in the present circumstances, it is to be considered that whilst some of them are clearly in effect and are of real and current interest to states, others might have ceased to be in force or lost their value, or they might have been superseded by later treaties or need to be adapted to the contemporary conditions of the world community.[65] Perhaps the greatest amount of controversy relates to the issue concerning the states that should be invited to accede to the treaties under consideration. One view has been that all states are entitled to be invited for accession.[66] on the basis of the desirability and necessity of reaffirming the principle of universality with regard to participation in general multilateral treaties. According to this view the inherent right of all states to participate in such treaties, specially of a technical and non-political character, is derived from the principle of sovereign equality of all states. According to it any formulae discriminating against certain states is contrary to the true interest of the United Nations and so incompatible with the purposes and principles of the Charter and with the rules of general intenational law.[67] Another view holds that there is no well-established right of all states to participate in general multilateral treaties, that extension of invitation to all states

64 For A/C. 6/L532 a draft resolution moved by Australia, Ghana, Greece, Gautemala, Indonesia, Mali, Morocco, Nigeria and Pakistan, See 18 U.N. GAOR, 6th Committee Annexes, Agenda Item No. 70, U.N. Doc. A/5602, (1963); See also 18 U.N. GAOR, 6th Committee, 794th to 802 mtgs, held from 16th to 29th October, 1963.

65 *Id.* para. 17.

66 A/C. 6/L 533., and corr. 1 and 2, Ghana, Indonesia, Mali, Morocco and Nigeria's amendment to draft the solution A/C. 6/L 532. *Id.* para. 18. This was rejected by 42 votes to 38 with ten abstentions.

67 In support of this argument it was asserted that the principle in question had been recognized in the Moscow Treaty, banning nuclear weapons tests in the atmosphere, in outer space and under water, and signed on August 5, 1963; in several resolutions of the General Assembly concerning the restoration of law and order in the Republic of the Congo (Leopoldville), such as Resolution 1774 (ES IV); and in article 8 of the International Law Commission's Draft on the conclusion, entry into force and registration of treaties.

would make it impossible for some state-parties to the League treaties to agree, and that it would place the Secretary-General in a difficulty ashe cannot decide unless he has instructions from the General Assembly in that regard that which entities, not members of the United Nations or the specialized agencies, are states.[68] The 1961 Vienna Convention on Diplomatic Relations and the 1963 Convention on Consular Relations[69] provided a good solution with regard to participation in general multilateral treaties. These instruments are open for accession to any of the four categories: all states, members of the United Nations or the specialized agencies, or Parties to the Statute of the International Court of Justice, and any other state invited by the General Assembly of the United Nations. This formula found favour in the General Assembly resolution 1903 (XVIII) of November 18, 1963.[70] According to it the General Assembly decided that it was the appropriate organ of the United Nations to exercise the power conferred by the League treaties on the Council of the League of Nations to invite states to accede thereto. It also placed on record the assent to that decision by those members of the United Nations which were parties to the treaties concerned. Besides, in the operative paragraph 3 of the resolution the General Assembly requested the Secretary General:

(*a*) As depositary of the treaties, referred to above, to bring to the notice of any party which is not a member of the United Nations the terms of the present resolution;

(*b*) to transmit copies of the present resolution to states members of the United Nations which are parties to those treaties;

(*c*) to consult, where necessary, with the states referred to in subparagraphs (*a*) and (*b*) above and with the United Nations organs and the specialized agencies concerned as to whether any of the treaties in question have ceased to be in force, have otherwise ceased to be of interest for accession by additional states, or require action to adapt them to contemorary conditions....

Finally in the operative paragraph 4 of the resolution the Secretary General was requested to:

68 *Id.* paras. 19, 20, 21.

69 See U. N. Conference on Diplomatic Intercourse and Immunities, official Records, Vol. II, Annexes,(U.N. Pub. Sales No. 62. X 1)and U.N. Conference on Consular Relations, official Records, Vol. II Annexes (U.N. Pub. sales No. 63 x 2), see arts. 48, 50 of the Con-vention on Diplomatic Intercourse and Immunities.

70 See U.N. Doc. A/5602 *op. cit.*, para 24. (e) and 25.

Invite each state which is a member of the United Nations, or member of a Specialized agency, or a party to the Statute of the International Court of Justice, or has been designated for this purpose by the General Assembly, and which otherwise is not eligible to become a party to the treaties in question, to accede thereto by depositing an instrument of accession with the Secretary General of the United Nations.[71]

Pursuant to the operative paragraph 3 (c) of the above resolution the Secretary General brought the terms of the said resolution to the notice of fifty-four states which were parties to any of the twenty-one League treaties in question requesting their views on the matter i.e. whether any of those treaties had ceased to be in force, had been superseded by later treaties, had otherwise ceased to be of interest for accession by additional states, or required action to adapt them to contemporary conditions. Since the subject matter of some of the treaties might fall within the framework of various specialized agencies and that the question of their application might be of some interst to them, pertinent information was also sought from the executive heads of the five specialized agencies:—WHO, ILO, FAO, UNESCO, and IMCO. Also, considering that the Economic and Social Council appeared to be the competent organ of the United Nations to be consulted in the matter, that organ was requested under rule 13 of the Rules of Procedure of the Council to include the item in the provisional agenda of its thirty-seventh session. The regional economic commissions of the United Nations were also asked to supply any relevant information pertaining to studies that might have been made or action taken in some of the fields covered by the treaties in question. The results of these enquiries were reported to the General Assembly at its twentieth session.[72]

71 See Resolutions passed by the General Assembly at the Eighteenth Session, 1963, Resolution 1963 (XVIII) adopted on November 18, 1963 at 1259th plenary meeting.

72 See U.N. Doc. A/5759 and Add. 1 of 25th February and 7th October, 65, 20 U.N. GAOR, Annexes, Agenda Item No. 88(1965). The item entitled "General Multilateral treaties concluded under the auspices of the League of Nations" was not considered by the General Assembly at its 19th session, Part two of the Document; see the statement of the President of the Assembly to that effect 19 U.N. GAOR, Annexes (1964), U.N. Doc. A/5884 (para 6). Pt. II of the U.N. Doc. A/5759 contains the summary of the views and observation made by governments, the U.N. organs and Specialized Ageneies and the regional economic commissions. Pt. III contains the conclusions. Of the five Specialized Agencies, (1) the ILO found none of the League treaties within its framework; (2) the IMCO showed some interest in three treaties: Convention and Statute on the Regime of Navigable Waterways, (December 9, 1923); and International Convention relating to the Simplification of Customs Formatilies, (November 3, 1923) which was pointed out to be connected with the IMCO Draft Convention on Facilitation of International Maritime Traffic; (3) The UNESCO expressed direct interest in two agreements: International Convention concerning the use of Broadcasting in the cause of Peace (September 23, 1936) and Declaration regarding the Teaching of History (October 2, 1937); (4) The WHO expressed its interest in three conventions concluded at Geneva on February 20, 1935: International Convention for the Campaign against contagious Diseases of Animals; International Convention concerning the transit of Animals, Meat and other Products of Animal Origin; and International Convention concerning the Export and Import of Animal Products (other than Meat, Meat Preparations, Fresh Animal Products, Milk and Milk Products); (5) The FAO expressed some interest in two agreements of July 11, 1928: one relating to the exportation of bones and the other to the exportation of hides and skins and the three agreements referred to in (4). The Economic Commission for Latin America (ECLA), The Economic Commission for Asia and Far East (ECAFE), The Economic Commission for Africa (ECA) and the Economic Commission for Europe (ECE) referred to various studies and projects relating to the subject matter of certain of these treaties such as on Freedom of Transit on the Regime of Navigable waterways of International concern and the Additional Protocol, all done at Barcelona on April 20, 1921, also the Treaties relating to the International Regime of Maritime Ports, the Transmission in Transit of Electric Power, the Development of Hydraulic Power affecting more than one State all done at Geneva on December 91923, and the one relating the Simplification of Customs Formalities of December 9, 1923. *Id.* paras. 31-32. For conclusions of the Report see paras. 133-104.

It was unfortunote that a number of states, parties to the League treaties, did not respond to the communication of the Secretary General and very limited replies were received. However, the document of the Secretary General containing a general survey of the consultations, in spite of the scarcity of replies from the governments approached,[73] seem to give a fairly clear and consolidated picture of the twenty-one treaties of the League of Nations in question. Out of these treaties, on the basis of the replies and comments received, nineteen have been grouped into five main categories. In the first three categories are those treaties which are of current interest for additional accessions although they may or may not require some degree of adaptation to the contemporary conditions. In the first category are two treaties which are still in force, not yet superseded. They do not require adaptation to the contemporary conditions and are of interest for accession by additional states. These are: the Protocols relating to a certain

73 Out of the Fifty four states parties to the League treaties to which a communication was addressed by the Secretary General, only twelve states cared to reply. The following governments sent their views and the number in parentheses indicates as to how many of the twenty-one treaties each state is a party: Ireland (1); Japan (4); Netherlands; (13) Norway; (12) Poland; (11); Sweden (13) U.S.S.R. (5); U.K. and N. Ireland (16); U.S.A. (1); El Salvador (3); Iraq (7); and Switzerland (9); U.N. Doc. A/5759 and Add. 11, paras. 17 and 2 respectively.

case of Statelessness,[74] and the Protocol relating to Military obligations in certain cases of Double Nationality,[75] both concluded at the Hague on April 12, 1930. In the second category are four treaties which, although still in force, have not been superseded, and which are still of interest for accession by additional states and may require in the view of one party some adaptation to the contemporary conditions. These are : Convention and Statute on Freedom of transit,[76] Convention and Statute on the Regime of Navigable Waterways of International Concern[77], Additional Protocol to the Convention on the Regime of Navigable Waterways of International Concern,[78] all concluded at Barcelona on April 20, 1921 ; and Conventions and Statues on the Regime of Maritime Ports concluded at Geneva on December 9, 1923[79].

74 See No 4138, CLXXIX, L.N.T.S. (1937). This Protocol entered into force on 1 July, 1937 having obtained ten ratifications or accessions, the last on April 2, 1937. Twenty signatures were not perfected by ratification. After the transfer of the Protocol to the custody of the United Nations, one state recognized itself as a party to it by succession and one state acceded to it. *ibid* paras. 55-57. Of the twelve parties consulted, only four (Net erlands, Poland, U.K. and El Salvador) replied to the communication of the Secretary General.

75 See No. 4117, CLXXVIII, L.N.T.S. (1937). This Protocol came into force on May 25, 1937 and obtained twelve ratifications or accessions during the existence of the League of Nations. Fifteen signatures were not perfected by ratification. Since its transfer to the custody of the UNO, one signatory state has ratified it on July 28, 1958. U.N. Doc. A/5759, *op. cit.* paras. 65-68 ; of the thirteen parties consulted only five (the Netherlands, U.K., U.S.A. El Salvador and Sweden) replied.

76 See No. 171 VII, L.N.T.S. (1921-22). This convention came into force on October 31, 1922. It obtained thirty-three ratifications or accessions. Seven signatures and two accessions were not perfected by ratification. Under the U.N. custody, two states have recognized themselves as parties to it by succession on November 24, 1956 and February 10, 1965. See Doc. A/5759 *op. cit.* para. 82. Of twenty-nine parties consulted seven replied (Japan, the Netherlands, Norway, Sweden, U.K., Switzerland and Iraq.).

77 See No. 172 VII, L.N.T.S. (1921-22). The convention came into force on October 31, 1922. It obtained twenty ratifications or accessions. Eleven signatures and two accessions had not been perfected by ratification. Since its transfer to the UNO it has been denounced by one state on March 26, 1956. Doc. A/5759. *op. cit.* para. 85. Of the Nineteen parties consulted, three (Norway, Sweden and the U.K.) replied.

78 See No. 173, *id.* The Protocol entered into force on October 31, 1922. It obtained seventeen ratifications or accession. Two signatures and two accessions have not been perfected by ratification. It has been denounced by one state on March 26, 1956.

79 See No. 1392. LVIII, L.N.T.S. (1926-27). It came into force on July 26, 1926 and obtained twenty three ratifications or accessions. Seven signatures and one accession have not been perfected by ratification. One state recognized itself as a party to the convention by succession on November 9, 1964. Doc. A/5759, *op. cit.* para. 90. Of the twenty-two parties consulted, seven (Japan, The Netherlands, Norway, Sweden, U.K., Iraq, and Switzerland) replied.

The third category consists of three treaties which are still in force, have not been superseded, and are of interest for accession by additional states but, in the view of one or more parties, they clearly require adaptation to the contemporary conditions. These are : International Convention concerning the Use of Broadcasting in the Cause of Peace, Geneva, September 23, 1936 ;[80] Convention on certain questions relating to the Conflict of Nationality Laws, the Hague, April 12, 1930 ;[81] and International Convention relating to the Simplification of Customs Formalities and Protocol, Geneva, November 3, 1923.[82]

Since these nine treaties of the above three categories are of interest for additional accessions, invitations might be issued in respect of them and, with a view to adapting them to the contemporary conditions, the question of of their revision may be left either to a possibly expanded number of parties

80 See No. 4319, CLXXXVI, L.N.T.S. (1938). This convention entered into force on April 2, 1938. It obtained twenty one ratifications and accessions. Fifteen signatures have not been perfected by ratification.

The General Assembly adopted a resolution 841(IX) on December 17, 1954 at its 514 plenary meeting to give full effect to its provisions by preparing an amending protocol for the purpose of the transfer of custodial functions to the United Nations. The Secretary General, being authorized to prepare a draft protocol for such transfer and to circulate the draft to the states parties, did this on August 1, 1955. His draft besides amending formal clauses added two new articles binding parties to refrain from radio broadcasts meaning unfair attacks or slanders against other people and not to interfere with the reception within their territory, of foreign radio broadcasts. In the opinion of the Government of India the new articles should be treated as a revision of the existing convention which should be taken in due course under the procedure provided by art. 15 of the convention. Doc. A/5759, op. cit. paras. 40-50. No further action has been taken by the General Assembly on this convention.

Of the nineteen parties consulted, seven (Ireland, the Netherlands, Norway, Sweden, U.K., El Salvador, and Switzerland) replied. One state, the Netherlands, considered its adaptation to contemporary conditions necessary.

81 See No. 4137, Cl XXIX, L.N.T.S. (1937-38). Its entered into force on July 1, 1937. It obtained twelve ratifications or accessions. Twenty eight signatures have not been ratified. One state has recognized itself as a party to it by succession, on July 29, 1953. *Ibid.* para 64. Of the thirteen parties cousulted five (the Netherlands, Norway, Poland, Sweden, U.K.) replied. The U.K. considered its revision necesessary, as certain provisions of it were affected by convention on the Nationality of Married women (New York, February 2, 1957) and Convention on the Reduction of Statelessness (New York, August, 30, 1961). *Ibid.* para 59.

82 See No. 775 XXX, L.N.T.S. (1924-1925). It entered into force on November 27, 1924. It obtained thirty-two ratifications or accessions. Seven signatures have not been perfected by ratification. Under the U.N. custody one state ratified on July 29, 1952. Besides, three states have recognized themselves as parties by succession. U.N. Doc. A/5759. para. 118. Of the thirty-three parties consulted eight (Japan, the Netherlands, Norway, Poland, Sweden, U.K., Iraq and Switzerland) replied. Poland considered adaptation necessary and the U.K. thought probably it would be beneficial.

or to the international organizations within whose respective competence this subject matter falls.

The fourth category includes two treaties which are still in force, but which in view of one or more parties have ceased to be of interest for accession by additional states. These are : Declaration regarding the Teaching of History (Revision of School text-books done at Geneva on October 2, 1937)[83] and Convention and Statute on the International Regime of Railways, and Protocol of signature concluded at Geneva on December 9, 1923 ;[84] these are the treaties whose interest seems doubtful.

The fifth category includes eight treaties which have been replaced, or have otherwise ceased to be of interest for accession by additional states These are : Convention on the Taxation of Foreign Motor vehicles with Protocol—Annex, Geneva, March 30, 1931[85] ; Convention relating to the

83 See No. 4216, CLXXXII, L.N.T.S., (1937-1938). It entered into force on November 24, 1947. It obtained eighteen definitive signatures. Of the Seventeen parties consulted three (the Netherlands, Norway and Sweden) replied. One non-party, the U.K., also replied. Norway and the U.K. considered that the Declaration has ceased to be of interest, Doc. A/5759, para 48-54. The UNESCO expressed its direct interest in the declaration and mentioned action undertaken by it with a view to revising and improving history and geography text-books. It assured to take all necessary measures should the General Assembly pronounce itself in favour of the full application of the Declaration. *ibid.* paras. 51-53.

84 See No. 1129, XLVII, L.N.T.S. (1926) The Convention entered into force on March 23, 1926 and obtained twenty-six ratifications and accessions, of which eight, signatures and three accessions have not been perfected by ratification. Of the twenty two parties consulted five (Japan, The Netherlands, Norway, Sweden and the U.K.) replied. The Netherlands maintained that the Convention and Statute had ceased to be of interest for accession by additional states, and the U.K. considered that they might need adaptation. The ECE (Economic Commission for Europe) Stated that they were outdated in many respects. U.N. Doc. A/5859, paras. 91-95.

85 No. 3185 C XXVIII, L.N.T.S. (1933). This instrument entered into force on May 9, 1933. It obtained twenty-two artifications or accessions. During its custody of the United Nations three states have denounced it since it has been superseded by new convention. Three new conventions concluded within the framework of ECE have largely superseded the 1931 convention. These are : Convention on the Taxation of Road Vehicles for Private use in International Traffic, done at Geneva on May 18, 1956. (No. 4844, 388 U.N.T.S. 1959) ; Convention on the Taxation of Road Vehicles Engaged in International Goods Transport, and Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport, both done at Geneva on December 14, 1956, Nos. 6292, 6293, 436 U.N.T.S. (1962). See U.N. Doc. A/5759, paras. 97—101.

Of the eighteen parties consulted, seven states (The Netherlands, Poland, Sweden, U.S.S.R., U.K., Iraq and Switzerland) as well as ECE considered that the Convention has been superseded and would not be of interest for accession.

Transmission in Transit of Electric Power and Protocol of signature and Convention relating to the Development of Hydraulic Power affecting more than one state, and Protocol of Signature both done at Geneva on December 9, 1923 ;[86] International Agreement relating to the exportation of Bones and Protocol[87], and International Agreement relating to the Exportation of Hides and Skins and Protocol,[88] both concluded at Geneva on July, 11, 1928 ; International Conventions for the Campaign against Contagious Diseases of Animals and Declaration attached, concerning the Transit of Animals, Meat and other Products of Animal origin with Annex, and concerning the Export and Import of Animal Products (other than Meat, Meat Preparations, Fresh Animal Products, Milk ond Milk Products) with Annex all done at Geneva on February 20, 1935.[89] These treaties do not seem to be of current interest for additional accessions, since they have ceased to reflect contemporary development.

86 The first of the two conventions entered into force on July, 26, 1923 and obtained eleven ratifications or accessions. Ten signature failed to be perfected by ratification. See No. 1380 LVIII, L.N.T.S. (1926—27).

The second convention entered into force on June 30, 1925 and obtained eleven ratifications or accessions. Nine signatures were not perfected by ratification. No. 905 XXXVI, L.N.T.S. (1926).

Out of the ten parties consulted only the U.K. replied stating that both conventions were still in force as not having been superseded and were of possible interest for accession by additional states although they might require adaptation to contemporary conditions. All four regional economic commissions ECA, RCAFE, ECLA and ECE considered the conventions of great interest to the countries in their respective regions though in the opinion of ECE the Conventions were no more suitable for additional accessions. See U.N. Doc. A/5759 paras. 103—111.

87 See No. 2185, XCL, L.N.T.S. (1929). It entered into force on October 1, 1929 and obtained eighteen ratifications. It was denounced by one state on March 2, 1936. Two signatures have not been perfected by ratification. Out of the sixteen parties consulted four (The Netherlands, Norway, Sweden, the U. K. and Switzerland) replied. For the Netherlands, the U.K., Norway and FAO the convention had ceased to be of interest for accession. Doc. A/5759, paras. 119—122.

88 See No. 2184 XCL, L.N.T.S. (1929). It entered into force on October 1, 1929 and obtained eighteen ratifications. Two signatures have not been ratified. Out of the seventeen parties consulted, five replied. The observations of these states and FAO were the same as above save that the U.K. held the view that additional states which exported hides and skins might be interested in accession. U.N. Doc. A/5759, paras. 3—125.

89 The first of the conventions (see No. 4310, CL XXXVI, L.N.T.S., 1938) entered into force on March 23, 1938 and obtained eight ratifications or accessions. Eight signatures and one accession were not ratified. Of the seven parties consulted, only the U.S.S.R. and Iraq replied.

The remaining two conventions (see *id.* vol. CXCIII, 1938—39, No. 4488 and 4487) entered into force on December 6, 1938. Each obtained six ratifications and nine

Apart from the above-mentioned nineteen League treaties, there was found to be sufficient evidence that the International Convention for the Suppression of Counterfeiting Currency, and the Optional Protocol thereto, both done at Geneva on April 20, 1929,[90] were still in force and were of interest for accession by additional states. The Secretary General pursuant to paragraph 4 of the General Assembly Resolution 1903 (XVIII)[91] invited states which had become eligible under the terms of the resolution, to accede to these treaties. He also informed the Governments of states, parties to the twenty-one League treaties, that no consultations seemed to be necessary in respect of these instruments and therefore, he was inviting the accession of the states referred to in paragraph 4 of the Resolution. In response to the invitations issued, six states had acceded until 1965 to both the Convention and the optional Protocol. Besides, the instrument of accession of one more state, having been made subject to a reservation, has been pending the acceptance of the reservation by the contracting parties in accordance with article 22 of the convention.[92]

The survey done by the Secretariat on the basis of replies and commentaries received from various governments reveals clearly that from among the nineteen treaties only nine treaties included in the first three categories mentioned above may be of interest for accession by additional states within the terms of General Assembly resolution 1903 (XVIII) notwithstanding the desirability of adapting some of these treaties to contemporary conditions.

VI CONCLUSION

We have seen that the two main problems involved in the question under consideration had been: (i) the determination of the appropriate

signatures and one accession, which have not been ratified. Of the parties consulted only the U.S.S.R. replied. The U.S.S.R. stated that it was party to all the three conventions. The non-party, the U.K. and also the FAO and WHO stated that the conventions were not of interest for accession. See Doc. A/5759 paras. 126—132.

90 See Nos. 2623 and 2624, CXII, L.N.T.S. (1931). The convention entered into force on February 22, 1931 and obtained twenty-nine ratiafications or accessions. Ten signatures were not perfected by ratification. Since its transfer to the U.N. custody three signatory states deposited their ratification on December 30, 1948, March 28, 1958 and July 28, 1959 and two states have acceded, one on July 15, 1957 and the other on June 6, 1963. See Doc. A/5857, para. 72.

The Optional Protocol entered into force on August 30, 1930 and obtained fifteen ratifications or accessions. One signature has not been ratified. *Id.* para. 73.

91 See *supra.* at 25.

92 See U.N. Doc. A/5759, paras, 13, 69—74.

organ to exercise the power which had once belonged to the Council of the League of Nations, and, (ii) in connection with inviting additional states to accede to the treaties in question, the determination of the question that what additional states should be invited. These problems were settled in 1963 by the General Assembly resolution 1903 (XVIII).[93] However, some dissatisfaction was expressed against the resolution so far as it provided for the issuing of invitations only to certain classes of states rather than to all states without exception and discrimination.[94] Considering the disirability of universal participation in general multilateral treaties intended to regulate matters of universal interests, there is certainly a need of improving the solution already adopted in the General Assembly Resolution 1903. The principle of universality has been recognized, for example in the Moscow treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water signed in 1963. Also, there should not be any difficulty for the Secretary General in implementing the all-states-formula, only if the General Assembly provided him with a complete list of the states covered by that formula so that he may not be burdened with the responsibility of deciding the legal status of political entities of disputed or doubtful existence.[95] Hence, in view of the universal interest in general multilateral instruments and the importance of promoting international cooperation by extension of universal participation of states in such treaties, the General Assembly should not be prevented from promoting universality and avoiding any discrimination against some states which raise further barriers to their accession. It appears that emphasis of several delegations in the General Assembly on the consensual or contractual character of international agreements led them to regard the idea of universality as being in contradiction with state sovereignty and the position of states as masters of their own destinies.[96] It is sub-

93 See *supra* at 33—34.

94 See 20 U.N. GAOR (1965) 6th Committee, ((853 to 857 mtgs.).

95 See the statement of the Secretary General, 18 U.N. GAOR (1963), Plenary meetings. 1258 Meeting, para. 101.

96 Note that, in the voting on the Draft resolution at the 856th mtg. of the Sixth Committee on October 20, 1965, the first preambular paragraph referrng to G.A. resolution 1903 (XVIII) of November 18, 1963 (which provided for issuance of invitations only to certain classes of states rather than to all states) was adopted by a roll-call vote of 67 votes to 10 with 11 abstentious. The countries favouring "all-states" formula and opposed to this part of the draft resolution were : Bulgaria, Byelorussian-Soviet Socialist Republic, Congo (Brazzaville), Cuba, Czechoslovakia, Hungary, Mongolia, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics. See Doc. A/6088, Report of the 6th Committee para. 22 (*a*) 20 U.N. GAOR, Annexes, Agenda, item No. 88, 1965 ; also supra note 3, at 34.

mitted that this old conception of a treaty as a compact, a bargain, a *vertrag* was predominant before the dawn of a new multilateral treaty had begun, and modern states must free themselves from this traditional notion if we are to develop new norms directly by common agreement.[97]

Two other problems requiring a solution were revealed by the report of the Secretary General (A/5759 and Add 1) discussed above. These were: (1) the need of specifying those League treaties which are in force and still of interest for accession by additional states and (2) the necessity of revising those League treaties which, though still in force and of interest for accession by additional states, may require adaptation to the contemporary conditions.

The General Assembly, at its twentieth session in 1965 adopted resolution 2021 (XX) on November 25,[98] which noted the action of the Secretary-General issuing invitations to additional states in respect of the International Convention for the Suppression of Counterfeiting currency and the Optional Protocol thereto (both done at Geneva, April 20, 1929), since, in respect of them there was sufficient evidence of their being still in force and of interest for accession by additional states.[99] Furthermore, this resolution, whilst noting the results of the Secretary General's consultations in regard to other nineteen treaties and also the opinions stating that some of these treaties may need to be adapted to the contemporary conditions, has recognized that nine treaties listed in the annex may be of interest for accession by additional states within the terms of the General Assembly Resolution 1903 (XVIII).[100] It has also drawn the attention of the parties

97 The necessity to be aware of this situation has been underlined by Mc Nair in "The Functions and Differing Legal Character of Treaties," 1930 Brit Y.B. *Int'l L.* 106, 118 and Jenks, in "State Succession in Respect of Law-Making treaties," (1952)*Brit. Y. B. Int'l L.* 105.

98 See 20 U.N. Plenary meetings, 1367th mtg. (1965).

99 This constituted the third preambular paragraph of the draft resolution (A/C6/L563/Rev. 2) which was adopted by 65 votes to 9, with 14 abstentions. Bulgaria, Byelo Russia Cuba, Czechoslovakia, Hungary, Mongolia, Poland, Ukrarinian S.S.R. and U.S.S.R. voted against this part of the resolution, and Afghanistan Burma, Congo (Brazzaville), Ethiopia, Ghana, Iraq, Kuwait, Liberia, Libya, Morocco, Pakistan, Romania, Syria, U.A.R. abstained, See U.N. Doc. A/6088, para. 22 (*b*) *op. cit.*

100 This part of the draft resolution with the words "within the terms of General Assembly resolution 1903 (XVIII)" was adopted by 52 votes to 17, with 17 abstentions. The states opposed were ; Algeria, Bulgaria, Burma, Byelorussian S.S.R., Cuba, Czechoslovakia, Hungary, India, Iraq, Mongolia, Poland, Romania, Syria, Ukrainian S.S.R., U.S.S.R., U.A.R., Yugoslavia, See U.N. Doc. A/6088, para. 22 (*c*) *op cit.*. The draft resolution as a whole was adopted by a vote of 69 votes to none with 17 abstentions.

"to the desirability of adapting some of these treaties to the contemporary conditions, particularly in the event new parties should so request." This specific mention of the possibility of the revision of the treaties in question at the request of newly-acceding parties has been made for two reasons: firstly, newly acceding parties are more likely to raise the question of adaptation to the contemporary conditions than the original parties; and secondly, the new parties should be preserved from any misunderstanding or imputation of bad faith if they acceded and then called for revision.

Nine treaties singled out as of possible interest for accession by additional states in the annex of the above resolution are: (1) International Convention concerning the use of Broadcasting in the cause of Peace, 1936; (2) Protocol relating to a certain case of Statelessness, 1930; (3) Convention on certain questions relating to the Conflict of Nationality Laws, 1930; (4) Protocol relating to Military Obligations in certain cases of Double Nationality, 1930; (5) Convention and Statute on Freedom of Transit, 1921; (6) Convention and Statute on the Regime of Navigable Waterways of International concern, 1921; (7) Additional Protocol to the Convention on the Regime of Navigable Waterways of International Concern, 1921; (8) Convention and Statute on the International Regime of Maritime Ports, and Protocol of signature, 1923; (9) International Convention relating to the Simplification of Customs Formalities, and Protocol, 1923.[101]

It is doubtful that any of the newly-established states would be reluctant to become a party to most, if not all, of the general multilateral conventions, particularly the ones for which the Secretary General of the United Nations is depositary. But the relevant problem is, that if these agreements are deemed to be automatically binding on new states under customary international law, the new states in effect will be presented with a list of treaties by which they become bound without consultation. On the other hand, if it is maintained that these treaties will not automatically bind additional states, but must be acceded to anew, the new states naturally not only begin examining the provisions of each agreement and show a disposition to be selective, but also suggest changes on the ground of altered conditions. In the present writer's opinion the latter course is better and far more desirable from the view point of newly-established states and the international community because a new state can closely examine the obligations under general multilateral conventions and accede cons-

101 These nine treaties are those which were listed in the first three categories in the Secretary General's Report, U.N. Doc. A/5759 and Add. 1 *op cit.*, see *supra* at 27—28.

ciously being fully aware of its commitments. Thus, a new state is saved from becoming a participant without its being aware of what it is becoming a party to. Besides, this course offers a reasonable accommodation between the necessity for change resulting from altered conditions and the advantages of continuity both to new and older states in respect of multilateral conventions. In the light of these observations the latest General Assembly resolution in regard to the League of Nations treaties should be welcome to the older as well as the newly emerging nations. Whilst new states wishing to participate in these pre-existing multilateral conventions of world-importance are allowed the option of accommodating their relations with other states and of judging the suitability of the agreements in question to the new conditions, the older states too are probably not left to the whims of the new nations as the former have the choice of accepting or rejecting the proposals of the new nations.

DISARMAMENT-PROBLEMS AND PROSPECTS

BALESHWARI P. SRIVASTAVA*

I INTRODUCTION

The intensity of the problem of disarmament[1] hardly needs any magnification.[2] The tremendous race for armaments is threatening the very existence of life upon this planet. A spectre of its extinction haunts humanity "which has had a remarkable history and whose disappearance none of us can desire."[3] But unfortunately man has not been able to remove such nightmares.

The efforts thus far made towards disarmament are well known. From the Hague Conference of 1899 to the present Sub-Committee on

* M.A. (Double), LL.M. (Banaras), LL.M. (Harvard), former member Faculty of Law, Banaras Hindu University, now a member of the Indian Revenue Service.

The author is aware of the complexities of a problem such as disarmament, and the endless discussions and materials piled up on the subject. For that matter, he does not claim any originality or innovation of ideas, and is not offering any practical solution to the problem. But he does feel that there stands a genuine need to explore the subject in a precise and analytical way, avoiding the maze of approaches, and taking into account the basic difficulties involved as well as the possible means to overcome them, so that the goal might be better achieved in accordance with the 'rule of law.'

The author wishes to express his thanks to Dr. Surya P. Sharma, Reader in Law, Banaras Hindu University, for his valuable help in this effort.

1 The word here is used in an alloyed sense to include any effort or agreement to eliminate or reduce armies or armaments, including nuclear armaments, to prohibit or limit their further production or development, and to govern the possession, development, and use of those that remains.

2 On January 21, 1964, President Johnson of the United States had told the American Lawyers that the Soviet Union and the United States already had produced "enough explosive force to equal ten ton of TNT for every man, woman and child of this earth," and since world's 1964 population was 3.2 billions, this means the equivalent of 32 billion tons of TNT. According to the guess, the Hiroshima bomb, one TNT, can cause about four deaths. See Granville Clark "Need for Total Disarmament Under Enforceable World Law," in *Current History* 96 (August 1964).

Speaking to the first Committee of the United Nations on October 21, 1966, the Indian delegate Mr. Trivedi echoed a similar voice when he said—"For many years now the super powers have possessed an unlimitable destruction capacity. Even their second strike capabilities are sufficient to destroy the entire world." (Comp. Mast. 316, Vol. VIII, No. 5).

3 Russel, '*Appeal To World*' (Pugwash Movement) in *Disarmament ; Its Politics and Economics* 18 (S. Melman ed. 1962).

Disarmament, which periodically meets in Geneva, man has aspired to attain this goal, but the record has been more or less disappointing as no substantial achievements have been made in the direction. It is pertinent therefore to analyse the difficulties that have come in its way and to consider some of the alternatives to achieve the goal.

There have been several difficulties in the way of disarmament. In spite of their desire for peace and co-operation, the different countries are arming themselves heavily, and are piling up as much efficient means of destruction as possible. There is mutual distrust, hostility and jealousy everywhere. Every state thinks that it is living in a state of absolute insecurity. Many states do not sincerely believe that world peace is really possible, as they are governed by the old ideas of history. The biggest obstacle is, of course, the insistence of states on the outmoded theory of state sovereignty which allows states to resist international supervision of arms, or their inspections. The practical problems of economic collapse and mass unemployment add to the existing difficulties.

It may be useful to consider these problems in greater details.

II DIFFICULTIES IN THE WAY OF DISARMAMENT

Mutual Distrust and Hostility and *Competitive Spirit for Armaments:*

Today the world, instead of uniting to fulfil the purposes of the United Nations, is seperated by an iron curtain of mutual distrust, jealousy and hostility. The different power blocs are seriously divided in certain spheres of their relationships.

The lack of faith in each other has mainly been due to their ideological differences. The western countries, as represented by the United States, have belief in *laissez faire*, individual liberty, and in the so called a free society. They believe that an individual should be left free to manage his own affairs without much interference. The Communist countries believe in the supremacy of the state, in the economic equality of man and in bettering the conditions of the working class by eliminating the exploiters. They believe in the dictatorship of the proletariat and of the communist party, and do not hesitate to advance their ideological goals even through the means of force, as in the case of Communist China. Others want to resist such ideological expansion by force, and this has led to certain serious conflicts such as in Korea, Laos, Indonesia, and presently in Vietnam. The mutual distrust is also responsible for the formation of the different

military alliances such as the NATO, the SEATO, the CENTO, and the Warsaw Pact, and also for the competitive spirit for armaments. Just as their differences widen, they require more arms for an alleged defence of their political systems.

The history of armament is a tale of growing ferocity. From the age of stone implements to that of nuclear warheads, science and technology have made tremendous progress, and along with it the dangers from weapons have also multiplied. Throughout the history, arms have been regarded as a symbol of power, and the rule that might is right has always dominated.[4] Some modern thinkers have held the same view when they argue that "the fundamental conceptions of international law can best be understood if it is assumed that they maintain and support the rule of force." It is thus difficult to conceive how nations can be persuaded to disarm. Each nation seems to prefer the familiar risks of arms race to the unfamiliar risks of disarmament, and the desire to solve the problems peacefully is overridden by the desire to demonstrate to its people its capacity to "stand up to its enemy."[5]

Difficulties of State Sovereignty and Domestic Jurisdiction:

Another serious difficulty that comes in the way of disarmament, is the undue insistence of states upon their sovereignty and traditional prerogatives which they imply the supreme authority in a state, empowering it to do anything within its territorial jurisdiction as well as in its external behaviour according to its self interests. They have been regarded as unlimited and illimitable.[6] If this be the conception, how can any restriction be imposed on the nation states, and in the absence of such restrictions how can disarmament be possible ? It is somewhat unfortunate that the Charter of the United Nations itself contains provisions to that effect,[7] and on their basis numerous objections have been raised during

4 Keeton and Schwarzenberger, quoted in *Legal and Political Problems of the World Order* 151 (Mendlovitz ed. 1962).

5 See International Conciliation 15 ff. (Sept. 1962).

6 See the theories of Hobbes, Bodin, and Pufendorf on the subject.

7 For example, Article 2(i) speaks that "The Organization is based on the sovereign equality of all its members," and Article 2(7) says that "Nothing contained in the present Charter shall authorise the United Nations to intervene in the matters which are essentially within the domestic jurisdiction of any state, or shall require the members to submit such matters to settlement under the present Charter" except the application of enforcement measures under chapter VII.

the disarmament negotations.[8] Any step towards disarmament will naturally require the states to lower down their traditional 'iron' and 'bamboo' curtains in order to allow international inspectors to inspect their countries, and to make sure that the promise for disarmament is not being violated. But such plans have been seriously opposed by a number of states on the ground that it threatens their national security.[9]

The Soviet Union has been taking a most rigid stand on the issue of national sovereignty and domestic jurisdiction.[10] At times when several states advocated a total control of armaments,[11] it seriously opposed the plan. Though she recognised the desirability of an international control organ to conduct inspection on a continuing basis, she did not want to allow them to interfere in her domestic affairs.[12] Mr. Zorin openly termed such plans as 'legalised systems of international espionage.'[13] Similar views have been expressed by the Soviet spokesmen on several other occasions.[14] Though there might be some truth in them, the fact remains that such attitudes have greatly hampered the progress towards disarmament. Further difficulties in the field may arise due to tremendous technological developments which have made it possible to produce nuclear devices in a button making factory,[15] thus causing further diffi-

8 The Atomic Energy Commission was fully alive to the impacts of its plans upon the traditional prerogative of national sovereignty, but in view of the difficulties faced by it, it saw "no alternative to the voluntary sharing by nations of their sovereignty in this field to the extent required by its proposals." U.N. AEC, 3rd Rep. 4-5 (17 May 1948).

9 See Wiesmer "Comprehensive Arms Limitation System," in Mendlovitz *op. cit.* note 4, at 607 ff. But in 1947, the General Assembly, by a majority, had pointed out that the development and use of atomic energy were not matters essentially within the domestic jurisdictions of each state, but had rather predominently international implications and repurcussions, hence the restrictions of Article 2(7) would not apply to questions arising from atomic control. Thus, the limitation of national sovereignty was the basis of any plan for the prohibition of atomic weapons." UN Gen. Ass. 3rd sess. Pt. I, 44 (Oct., 1948).

10 See, for example, U.N. AEC, O. Re. 2nd yr. No. 3, 45-46 (Sept. 10, 1947). Also U.N. SCOR 452 (Jan. 15, 1947).

11 Mr. Rusk (USA), ENDC/PV. 2, 22-23 (15 March 1962); Mr. Home (UK), *id.* 5, 10 (March 20, 1962). See also the communique issued by the Commonwealth Prime Ministers on March 13, 1961.

12 U.N. Doc. A/C 10698, 2-3 (Jan. 12, 1962).

13 ENDC/PV 26, 28 (April 24, 1962).

14 See Mr. Khruschev's speech at the World Congress for General Disarmament for Peace on July 10, 1962 (Bom. Sirur Printing Press, 1962), 19. See also Tsarapkin ENDC/PV 107, 33 (March 11, 1963), and Gromyoko id. 8, 22 (March 23, 1963).

15 This point was raised by Mr. Vyshinsky and Mr. W. Wadsworth answered it in the affirmative. See UN Gen. Ass. 9th sess. Ist. Comm. Ofl. Rec. 687th meet. 34 (Oct. 12, 1954).

culties of domestic jurisdiction. It has been argued that the acceptance of inspection system will mean an end of military secrets, and will be the greatest surrender of sovereignty[16] in the cause of disarmament, though it will no doubt end the nightmare fear of sudden and unprovoked attacks' 'and will gradually but profoundly' change the whole character of international relations between states.[17]

The Difficulty of Sanction :

Questions regarding sovereignty and domestic concern are related to the problem of sanction, that is an authority sufficiently strong to enforce and implement disarmament plans and procedures. Under the present rules of international law, all enforcement powers have been assigned to the Security Council of the United Nations.[18] But the veto power alloted to its permament members has made the exercise of these powers quite ineffective as it is very difficult to get the consensus of these powers on an important enforcement measure. The permanent Members of the Council will not hesitate to use their veto if anything goes against their interests in the disarmament process. Moreover, if any big nuclear power attempts to violate a disarmament agreement, it will be virtually impossible to apply any sanctions against it. It was with a view to remove such difficulties that the 'Majority Plan' was put forward by the United States in 1946 proposing to abolish the veto power so as to avoid a violation of a disarmament agreement.[19] But the proposal never materialised. The Soviet Union flatly refused to forego her veto power, and did not agree to accord much power to an international control organ.[20] The Soviet delegate openly charged the United States of procuring a 'me-

16 Phillip Noel-Baker, *The Arms Race* 61-62 (1958).

17 *Ibid.*

18 See chapter VII of the U.N. Charter (Articles 39 to 53). The chapter gives all enforcement powers to the Security Council. Article 39 empowers it to determine the existence of any breach of the peace, threat to the peace, or an act of aggression. Article 40 empowers it to call upon the parties concerned to comply with the necessary provisional matters. Article 41 empowers it to take enforcement measures by interrupting the economic relations of rail, air, postal, telegraphic, radio and other means of communications, and Article 42 empowers it to demonstrate, blockade and to take actions by air, sea and land forces of member states contemplated under Article 43. In these tasks, the Council is to be assisted by a Military Staff Committee.

19 See U.S. Deptt. of State Bull. *Growth of Policy* Pub. No. 2707, 142-163 (Aug. 6, 1945—Oct. 15, 1946).

20 U.N. S.C.O.R. 284 (Feb. 14, 1947).

a ble of developing testing or producing military weapons to ensure that no illegal activity exists. This will further include extensive and continuing inspection of records, verification of budgets and expenditure records of governments, as well as production and inventory records of industries and laboratories. Moreover, the measurements of the consumption of such items such as electric power and fuel might also reveal information concerning unusual manufacturing demands.[32] Above all, the aerial inspection specially through aerial photography may also be necessary to achieve the goals of effective control.[33] Over and above these, international inspectors will have to be given the right to question the management and personnel of any plant, and to use all the communication and transportation facilities available within each nation to the extent necessary for the effective exercise of their function. Such steps are bound to bring more inroads into the domestic jurisdictions of nation states.[34]

The most serious inspection problems are posed by the limitation of nuclear weapons and ballistic missiles, and by the need for surveillance of research and development. The nuclear weapons and missile control problems are interrelated. If one could be absolutely certain of the size of any controlled nuclear stockpile, the need to carry out careful control of missiles would have been reduced. But that is not the case. Similarly, it is very difficult to establish very good control over the missile aircrafts, and other carriers of nuclear weapons.[35]

The inspection and control of the outer space poses another serious problem in the way. With the present knowledge and technological development, it is not easy to exercise an efficient control over the outer space, to patrol it for acertaining that it is being used for peaceful purposes only, and not for espionage activities or for dropping a bomb or missile on some territory.

Another serious difficulty in this sphere arises out of the large stockpiles of nuclear materials, and the chronic problems of determining their actual stocks and matures. The uncertainties have been inferred to be between 50 to 500 large nuclear weapons if only physical means were em-

32 ENDC/PV 50, 9 (June 6, 1962) ; also U.S. Deptt. of State, *International Control of A Atomic Energy ; Growth of a Policy*, Pub. No. 2707, 53 (Aug. 1945-Oct. 1946).

33 See Levision, "Aerial Inspection," in *Inspection for Disarmament* 12 Melman ed., (New York, 1958) ; also President Eisonhower's *Open Sky Plan* 12 ff. (Bem. U.S.I.S. 1955).

34 See *Disarmament and Arms Control* 8, (Winter, 1963/64).

35 See Mendlovitz (ed.), *op. cit. supra* note 4, at 612.

ployed to determine them.[36] But it is to be reasonably feared that their number will be much more. The limitation on the production of nuclear materials may be still more difficult, as it is very well possible to produce such materials secretly for making a few bombs or using them in other destructive purposes, thus jeopardising the security of the nation states.

The problem of inspection has drawn the greatest attention of the world over, and has been subject to great deal of discussions from time to time. In one of their major proposals, which still forms the basis of discussions in the Sub-Committee with small changes, both the United States and the Soviet Union seem to propound their own ideas, but all the same they seem to struggle only with the shadows missing the real substance.

The United States 'Outline' professes to make the I.D.O. responsible for the verification of the disarmament process. It provides that the reductions of armaments and armed forces would be verified at 'agreed locations' and the limitation on production of other specified activities will be verified at "declared location." It states that nation states "would provide assurance" that agreed levels of armaments and armed forces were not exceeded and that activities subject to limitations or prohibition were not being conducted secretly. Such an assurance will be provided through arrangements which would relate the extent of inspection at any time to "the amount of disarmament being undertaken" and to the risks to the disarming states of possible violations.[37] This could be accomplished if arrangements were made under which states would divide themselves into a number of 'zones' through which inspection would be progressively made. Lastly it was stated that by the end of Stage III when disarmament has been completed, all parts of the territory of the states would have been inspected.

The 'Outline' has evidently left several points vague and unclear. The meaning of the words "agreed locations," "declared locations" are not clear. Further, any inspection system cannot be effective merely by the 'assurance' given by the states. Again, the proposition that inspection would be made to the extent of disarmament being undertaken, is also abstract. Lastly the hope that by the end of Stage III all parts of the state territory would have been inspected, without laying down any certain or realistic measures to that effect, is also illusory. Only the inspection of some zones, that too the exact location of which is not to be revealed before

36 *Id.* at 621.

37 *Id.* at 713.

a ble of developing testing or producing military weapons to ensure that no illegal activity exists. This will further include extensive and continuing inspection of records, verification of budgets and expenditure records of governments, as well as production and inventory records of industries and laboratories. Moreover, the measurements of the consumption of such items such as electric power and fuel might also reveal information concerning unusual manufacturing demands.[32] Above all, the aerial inspection specially through aerial photography may also be necessary to achieve the goals of effective control.[33] Over and above these, international inspectors will have to be given the right to question the management and personnel of any plant, and to use all the communication and transportation facilities available within each nation to the extent necessary for the effective exercise of their function. Such steps are bound to bring more inroads into the domestic jurisdictions of nation states.[34]

The most serious inspection problems are posed by the limitation of nuclear weapons and ballistic missiles, and by the need for surveillance of research and development. The nuclear weapons and missile control problems are interrelated. If one could be absolutely certain of the size of any controlled nuclear stockpile, the need to carry out careful control of missiles would have been reduced. But that is not the case. Similarly, it is very difficult to establish very good control over the missile aircrafts, and other carriers of nuclear weapons.[35]

The inspection and control of the outer space poses another serious problem in the way. With the present knowledge and technological development, it is not easy to exercise an efficient control over the outer space, to patrol it for acertaining that it is being used for peaceful purposes only, and not for espionage activities or for dropping a bomb or missile on some territory.

Another serious difficulty in this sphere arises out of the large stockpiles of nuclear materials, and the chronic problems of determining their actual stocks and matures. The uncertainties have been inferred to be between 50 to 500 large nuclear weapons if only physical means were em-

32 ENDC/PV 50, 9 (June 6, 1962) ; also U.S. Deptt. of State, *International Control of A Atomic Energy ; Growth of a Policy*, Pub. No. 2707, 53 (Aug. 1945-Oct. 1946).

33 See Levision, "Aerial Inspection," in *Inspection for Disarmament* 12 Melman ed., (New York, 1958) ; also President Eisonhower's *Open Sky Plan* 12 ff. (Bem. U.S.I.S. 1955).

34 See *Disarmament and Arms Control* 8, (Winter, 1963/64).

35 See Mendlovitz (ed.), *op. cit. supra* note 4, at 612.

ployed to determine them.[36] But it is to be reasonably feared that their number will be much more. The limitation on the production of nuclear materials may be still more difficult, as it is very well possible to produce such materials secretly for making a few bombs or using them in other destructive purposes, thus jeopardising the security of the nation states.

The problem of inspection has drawn the greatest attention of the world over, and has been subject to great deal of discussions from time to time. In one of their major proposals, which still forms the basis of discussions in the Sub-Committee with small changes, both the United States and the Soviet Union seem to propound their own ideas, but all the same they seem to struggle only with the shadows missing the real substance.

The United States 'Outline' professes to make the I.D.O. responsible for the verification of the disarmament process. It provides that the reductions of armaments and armed forces would be verified at 'agreed locations' and the limitation on production of other specified activities will be verified at "declared location." It states that nation states "would provide assurance" that agreed levels of armaments and armed forces were not exceeded and that activities subject to limitations or prohibition were not being conducted secretly. Such an assurance will be provided through arrangements which would relate the extent of inspection at any time to "the amount of disarmament being undertaken" and to the risks to the disarming states of possible violations.[37] This could be accomplished if arrangements were made under which states would divide themselves into a number of 'zones' through which inspection would be progressively made. Lastly it was stated that by the end of Stage III when disarmament has been completed, all parts of the territory of the states would have been inspected.

The 'Outline' has evidently left several points vague and unclear. The meaning of the words "agreed locations," "declared locations" are not clear. Further, any inspection system cannot be effective merely by the 'assurance' given by the states. Again, the proposition that inspection would be made to the extent of disarmament being undertaken, is also abstract. Lastly the hope that by the end of Stage III all parts of the state territory would have been inspected, without laying down any certain or realistic measures to that effect, is also illusory. Only the inspection of some zones, that too the exact location of which is not to be revealed before

36 *Id.* at 621.

37 *Id.* at 713.

it is selected for inspection,[38] will make the whole inspection process just a mockery.

The scheme of the Soviet Union on the point is also not satisfactory. It expects the state parties to the treaty to solemnly observe their obligations with respect to the whole process of disarmament under an international control given to the I.D.O. to whom the states must submit the necessary information with regard to their armaments and armed forces.[39] But she does not precisely define their powers and the extent to which inspections may take place. Further, due to the emphasis of the Soviet Union upon the veto or unanimity clause, such steps will be rendered considerably ineffective.

The question of non-proliferation of nuclear weapons and their inspection is thought to be another serious obstacle in the way, particularly due to the fact that the present treaty on the point is not being consented upon by a large number of non-nuclear powers. But the way in which the problem is being tackled does not justify such apprehensions. It can hardly be called a 'problem' as it is quite remote from the actual problem of disarmament. It matters little whether the non-nuclear powers do or do not possess nuclear capabilities, so long as the big nuclear powers retain and continue to augment their huge stockpiles of nuclear weapons.[40]

Problems Under the Municipal Laws :

General and complete disarmament will also create several difficulties with regard to the application of the disarmament agreement to the municipal laws. An attempt here will be made to reflect these difficulties by citing illustrations from the American[41] and Indian laws.

If a disarmament agreement seeks to limit or regulate the private scientists and private scientific research, one may face the claims of liberty under the 'due process clause' or under the first amendment of the Constitution as in the U.S.A., and under articles 20, 21 and 22 of the Indian Constitution. But such freedoms are subject to limitations under both

38 *Id.* at 703.

39 See Article 2(i) of the Soviet Draft in *id.* at 670.

40 For a detailed exposition of this facet of the problem, see an article of the author entitled "Nuclear Non-Proliferation ; Illusions and Realities" in *The Leader* (Magz. Sec. April 9, 1967, at 1.

41 For this aspect of the problem see '*Disarmament*' 38 (L.M. Tondel Jr. ed., Oceana Pub. 1964).

the laws.[42] In both the countries, there exists a precedence under Atomic Energy Act for the regulation of research, for requiring disclosures of the fruits of research, and for the appropriation of these fruits by the governments.[43]

A serious difficulty will arise when inspections and interrogations will hit the private citizens. The millowners and scientists, doctors and mine foremen may have information concerning arms and materials which might be the subject of disarmament agreement. And if the treaty is enforced by the criminal laws answers to some interrogations might be within the privilege against self-incrimination, even if the witness, in fact, be innocent of any crime.

The right against unreasonable search and seizure will give rise to further problems. This right is enjoyed by the corporation or companies, as well as by individuals both in the United States and India.[44] The question may arise whether disarmament inspection constitutes "search" ? If so, is it unreasonable or might it be unreasonable in some circumstance ? If the inspectors were required to obtain warrants from the municipal courts the constitutional question might disappear, because any state can validly issue warrants for the search and arrest of its citizens. But that is not the case in asmuch as the international inspectors may not be required to obtain warrants from the municipal courts. Moreover, effective inspection may require sudden and surprise checks for which it may be difficult to obtain a warrant. Again, the difficulties might be lessened if inspections were to be limited to "regulate industry" that is, the acknowledged manufacturers of weapons or materials which are inspected to enforce limitations on the account and kinds manufactured. But as noted earlier there will be more legal difficulties if the inspections were entitled to inspect a button factory to determine whether it is indeed a button factory and not a cover for something forbidden. It will be more difficult

42 See *Sweezy v. New Hampshire*, 354 US. 234 (1957) ; see also *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27.

43 *Op. cit. supra* note 40, at 38.

44 But this right is not absolute under both the laws. See *M. P. Sharma v. Satish Chandra*, AIR 1954 SC 300, and *State of Gujrat v. Shyamal*, AIR 1965 SC 1251 (Ind.), as well as *Frank v. Meryland* 359 US 360 (1959). In the latter case the U.S. Supreme Court had upheld the right of a Maryland Health Inspector to enter a dwelling without a warrant. Similarly, under sections 94 and 96 of the Code of Criminal Procedure of India, a search warrant can be issued against a person, and it will not be debarred by Article 20(3) of the Indian Constitution. See also *Kathi Kalu v. State of Maharastra*, AIR 1961 SC 1808.

if the inspectors would wish to inspect a farmer's silo to be sure that its bathroom is not in fact a small laboratory for the testing or manufacturing of cultures for germ warfare.[45] Such problems my even require appropiate amendments of the constitutions so as to alter the concept of liberties. Similarly, a disarmament treaty may require several other types of implementations under the municipal laws,[46] which might need due modifications. It may also raise the question of compensations to be paid to the private citizens for the destruction of their property, for damages caused by low overflights of aerial inspectors and for compromise of trade secrets.

The Economic Difficulties :

Disarmament would raise both the general problem of maintaining the overall level of economic activities, and specific problem of adopting military capabilities to the non-military needs. It is feared that disarmament will result in mass unemployment.[47] There seems to be a deep though a latent concern that disarmament will bring economic depressions. Fears and pressures that are stirred today whenever a defence contract is terminated suggests that such fears may not be easy to allay, although the studies by the economists have indicated that the problem is not very serious.[48] It has also been argued that inspection and administration of disarmament may cost substantially more than the savings on disarmament.[49] For many underdeveloped countries, the effects of disarmament upon the country's demands for primary products and thus upon the exports earnings of the primary products countries, would cause several difficulties. So also the methods of dealing with the liquidation of the strategic stockpiles.[50]

45 *Op. cit. supra.* note 40, at 39.

46 See for example, Article 253 of the Indian Constitution which empowers the Parliament to implement any treaty into the municipal laws. See Petersky, "Some Problems in a Disarmed World"' in, *Disarmament and Arms Control* 421 (1963-64).

47 The economic advisors of 180 factories of armaments in the U.S.A. opposed disarmament on the grounds of economic and industrial collapse and mass unemployment. British economic advisors have expressed a similar opinion.

48 See for example, *Economic Impacts of Disarmament*, a report of the Panel on the Economic Impacts of Disarmament submitted to the U.S. Arms Control and Disarmament Agency in January 1962; see also Benoit, "The Economic Aspects of Disarmament in the United States," in '*Disarmament; Its Politics and Economics*' (Melman ed. 1962).

49 See Schelling, "Arms Control will Not Cut Defence Costs", *Harv. Bus. Rev.* (March-April 1961).

50 See the *Economic and Social Consequences of Disarmament*, UN. E/2593/Rev. 1, 49.

Even with the successful maintenance of the total effective demands during a period of disarmament, significant problems of adjustment may remain in specific sectors and areas of economy. Shift between industries would necessitate acquisition of different types of skills by the working force. In the event of any rapid disarmament, some 6 or 7 percent, including the armed forces, of the total labour force on the U.S.A. and 3 to 4 percent in the United Kingdom will have to find civilian instead of military employment or change their employment from one industry group to another.[51] Consequently there will be problem with regard to reemployment and training of man power and reorientation of scientific research. While most members of the armed forces might have received training that would fit them easily for the civilian life, a special effort would have to be made to find out suitable employment for the rest.[52] There will be certain cases which would require special assistance to encourage the adoptation of skills to new jobs. The uneven geographical distribution of the activity based on military expenditure would give rise to a need for various forms of public and other assistance to facilitate readjustment.

The task of shifting scientific and technical personnel to non-military fields of research in some countries would be considerable.[53] Besides these, disarmament will effect the composition and direction of foreign trade and in turn might affect the pattern of the world trade relations. It may adversely affect the exports of some countries.

Difficulties of Maintaining the Peace in a disarmed world :

In a disarmed world the different countries might assume the posture of "big powers" and factors other than military powers may become more important determinant of international influence. If one were to accept such complete disarmament as a realistic possibility, one may still have to face the problem of peace. There may be possibility of nations fighting with the small weapons left with them or with their man power. There may still remain the dangers of insurrections, civil wars and revolutions, as in Vietnam, Laos and Indonesia.

General and complete disarmament down to a level sufficient only for internal police may bring about an unimaginable situation leading to serious instabilities,[54] may bring other peculiar difficulties of its own such as resulting in an invitation to aggression.[55]

51 *Ibid.*

52 *Ibid.*

53 See *op. cit. supra note* 4, at 737-38.

54 See H. Petersky, *op. cit. supra* note 46, at 2.

55 Such a thing happened after the first world war, when the majority states reduced their armies and armaments in the general hope of peace, but Germany and Italy went on arming themselves secretly, and inflicted the well known disaster.

Assuming that such a world might come about, some people might still think the situation not conducive to peace. It will raise the problem of establishing effective international police force to maintain international peace and stability.

Under 1962 proposals, both the United States and the Soviet Union have proposed some kind of police force. But there views are conflicting. The Soviet Union wants to build force similar to that postulated under Article 43 of the U.N. Charter. The United States wants to establish a United Nations Peace Force which will be more or less a permanent and exclusive body independent of the internal police force of the nation-states though the states will provide to it the agreed man power and armaments. The U.S. proposal in this respect is accompanied with proposal for strengthening the international machinery for the peaceful settlement of international disputes, but the Soviet proposal contains no precise provision in this respect. Further, under the Soviet proposal the command of such a force is contemplated to be given to a Troika, the combined command of socialist states, western states, and neutral states, but the United States proposal contains no such provisions. As a result of this difference, no agreement on the subject has been possible so far.

There may also emerge the difficult problem of making structural changes in the United Nations, and doubts have already been expressed upon the feasibility of such a plan.[56] It has been argued that the nations will never give up reliance on their own weapons and hand them over to such a supranational body. It may be difficult to establish an international body strong enough to maintain effective peace, but not too strong as to weaken the 'sovereignty' of nations. Likewise it may also be difficult to ensure command and control which may be reliable, and immune to subversions and seizures by hostile forces. Fundamentally it may be futile to take any practical steps toward the problem without first securing that comity of interests which alone can support law and government.

Beyond the development of the peace-keeping instititutions and machinery, the disarming world will also face the difficulty of strengthening the fabric of international law. New substantive rules will have to be developed, acceptable to mass of nations old and new. New procedures, and perhaps new institutions for settling disputes, may also have to be developed to ensure that the world without force will not be one where international wrongs remain unrectified and unpunished.[57]

56 See for example the Woods Hall Summer Study of 1962 called *Verification and Responses in Disarmament Agreements*, especially its summary report and the annex volumes.

57 See the Soviet and American proposals for general and complete disarmament presented

III ALTERNATIVE SUGGESTIONS FOR ATTAINING DISARMAMENT

Disarmament appears so fundamently at odds with the hard facts of a divided world that it has widely been regarded as an uptopian solution. But the question remains whether disarmament is a more uptopian means of 'deterrance' upon which nations have put so much reliance. The success of disarmament will require a basic change in the human outlook and their existing pattern of behaviour. While the goal of achieving peace through disarmament will demand willingness to look for security through means other than military power, peace through deterrance entails simple willingness to accept permanently a threatening status quo.[58] Historica support for the latter has been pessimistic, though also not very otpimisticl regarding disarmament since so little has been tried.[59] Deterrance by threat of violence—our historical legacy—has never prevented war.

It will be difficult to envisage much progress towards disarrmament until we stop treating it as a theoretical problem and recognise that it is a key to universal security.

In order to achieve the goal of general and complete disarmament it is desirable therefore that the following factors should be taken into consideration while entering into a treaty or treaties on the subject.

to the Sub-Committee in March-April 1962 (reproduced in Mendlovitz *op. cit.* note 4.), as well as the well known treatise of Messers Sohn and Clark, *World Peace Through World Law* (1962); see also V. A. Kirilin, "*The Road to General and* Complete Disarmament," in *Disarmament and Arms Control* 2 (1963-64.)

The Soviet and American proposals of 1962 both advocate disarmament according to three stage plan. The Soviet plan sought to reach the goal within 4 years. The United States advocated the abolition of 30% armaments in stage I, one half of the remaining armaments in stage II, and the final reduction to police level in stage III. Stage I and II are to take 3 years each, and stage III as promptly as possible within an agreed period of time. However, the inadequacies and insufficiencies of these proposals are an admitted fact.

58 Richard J. Barnett, "Preparations for Progress", in Mendlovitz *op. cit. supra* note 4, at 56.

59 For example, see the various treaties concluded on the point such as the HagueConventions of 1899 and 1907, the Geneva Convention of 1925, the treaties imposed upon the defeated nations after the first and the second world wars, the Test Ban Treaty of August 5, 1963, the Outer Space Treaty of January 27, 1967 and the N.P.T. of June 12, 1968. See also the provisions in the Covenant of the League of Nations and the efforts made by it for disarmament. See also the earlier efforts made by the United Nations, such as the creation of the Disarmament Commission and the Sub-Committee, etc.

Strong Publicity Machinery for Disarmament :[60]

Since public opinion very much affects the development of law, efforts should be made to create favourable circumstances through the help of a strong international publicity machinery acting under the United Nations. This body should make a global publicity of disarmament. Unless the people of the world are convinced of the importance, necessity and the benifits of disarmament, no practical steps can possibly be taken in this direction. A genuine need to educate the mind of the people on the subject is to be seriously felt by all. Such international publicity machinery should try to prohibit and antidote the criminal propaganda of those nations who try to create a war psychoses among their people by advocating war and militarism.

An International Information Service on Disarmament may be organised which should work under the United Nations. A director of International Information may be appointed to direct this service. This service should play dynamic role for a year or two before the process of disarmament actually begins.

United Nations Inspection Service :

During the time the international information machinery goes on with its work, the United Nations should set up, under its aegis, a United Nations Inspection Service[61] headed by an Inspector General to be appointed by the General Assembly, on the recommendation of the Security Council and the Secretary General, for a term of five years.

An United Nations Inspection Commission should be formed to direct and control the United Nations Inspection Service.[62] The Inspec-

60 Messers Sohn and Clark in their work *World Peace Through* World Law have laid down a thoughtful and well conceived plan for world disarmament. But the learned authors have not appreciated the importance of international public opinion, and an international publicity machinery, which should be the first step towards achieving the goal of a general and complete disarmament.

If brought about efficiently, it would remove several difficulties in the way of disarmament noted earliar, such as the competitive spirit for armaments, mutual distrust and hostility, and the insistence upon the theory of state sovereignty. It will also facilitate the process of inspection and verification, and will help in providing some sanctions against the violation of disarmament agreements, since it will be easier to detect such cases through the international publicity machinery.

61 In writing the present portion of the paper the author is grateful to Messers Sohn and Clark whose aforementioned treatise has been a great source of inspiration and basis of several ideas incorporated in this portion.

62 It is possible to set up these services within the framework of the U.N. Charter. Under Article 22, the General Assembly is empowered to establish such subsidiary organs

tion Commission should consist of ten persons, no two of whom should be nationals of the same state. The members of the Inspection Commission should be appointed by the Security Council subject to confirmation by the General Assembly.

The General Assembly should form an Action Committee consisting of not more than five members of the General Assembly from among themselves, for a period of five years. Through this Action Committee the Assembly should watch over the carrying out by the Inspection Commission and the Security Council of the responsibility for disarmament. The Action Committee should be entitled to obtain from the Commission and the Council all relevant information and should make such investigations as it deems necessary, or as the Assembly may request to make. If in the opinion of the Action Committee a situation exists which requires the convoking of a special session of the General Assembly, it should be entitled to request the Secretary General to convoke such special session.

The Inspector General should be the administrative head of the United Nations Inspection Service, subject to the direction and control of the United Nations Inspection Commission. During a reasonable time the Inspector General should complete, to the extent possible, the recruitment and training of the inspectors and other personnel of the United Nations Inspection Service, subject to the regulations regarding their qualifications, tenure, compensation, and other conditions of service, to be adopted by the General Assembly.

The regulations regarding the employment of such staff should include the following provisions :

(1) All members of the inspection service should be selected on the basis of their competence, integrity and the devotion to the purposes of the United Nations. They should solemnly declare to perform their duties impartially and conscientiously.

(2) They should not seek or receive any instructions from any

as it may deem necessary for the performance of its functions. Article 97 says that the Secretariat shall comprise the Secretary General and *such staff* as the Organisation may require. Article 101(2) speaks that appropriate staff shall be permanently assigned to the different organs of the United Nations.

For selecting the staff to these services, the United Nations can set up an International Service Commission which may provide and recommend the methods of selection, and may hold examinations for this purpose in the important cities of the world. Efforts should be made to make these services a most representative one, even though certain quotas may have to be reserved for certain areas.

one other than the United Nations. They should behave perfectly like international officers.

(3) They should receive adequate pay and allowances, as well as retirement pensions and should be free from taxations.

(4) They should be recruited on as wide a geographical basis as possible.[63]

The United Nations Inspection Service should have direct responsibility for, and direct supervision over, the fulfilment by all the nations and all individuals of their obligations with respect to the whole process of disarmament.[64]

The inspectors of the United Nations Inspection Service should have complete freedom of entry into, movement within, and egress from the territory of any nation. They should have a right to use all communications and transportation facilities available within each nation to the extent necessary for the effective exercise of their functions.[65] The passes issued to them by the United Nations should be accepted as valid travel documents by the authorities of all Nations.

Neither the United Nations nor its inspectors nor other personnel should use or disclose any confidential or private information which is acquired in the course of inspection and is related to the accomplishment and maintenance of disarmament.

During the whole process of disarmament and until and after the establishment of the licensing system, all the installations, plants, laboratories and other facilities and places of every description reported in an arms census should be completely open to inspection to the international inspectors in order to gear up the plan of disarmament. The international inspectors should also have authority to inspect the records of the govern-

63 These qualifications and conditions should also apply to the members of other international services.

64 Under Article 2 of the Soviet Draft Treaty of 1962, such an authority is proposed to be vested in an International Disarmament Organisation whose staff is to exercise control over the compliance by the states with their obligations to reduce or eliminate armaments and their manufactures, and to reduce or disband their armed forces. The U.S. Draft Treaty of the same year also proposes to empower the I.D.O., to look after the verification and other progress towards disarmament measures. See their proposals in Mendlovitz, supra.

65 Article 43 of the Soviet Draft Treaty contemplates that the I.D.O., its personnel and representatives shall enjoy in the territory of each state such privileges and immunities as are necessary for the exercise of independent and unrestricted control over the implementation of the present treaty. See Mendlovitz, *op .cit. supra*, at 868.

ments of the nations relating to their armaments, and licences for arms given for different purposes.

Census of the Armaments of the world :

After the United Nations Inspection Service is fully organised, a census of the armaments of the world should be taken. For this purpose the Inspection Commission should send a questonnaire to every nation of the world[66] requiring from it the following information. (1) The location and description of all its military installations including the man power strength, organisation, composition and disposition of its military and police forces. (2) The location, kind, and quantity of all finished and unfinished arms and weapons (including nuclear, biological, chemical and other weapons of mass destruction), ammunitions and military equipments possesed by, or at the disposal of these forces. (3) The information regarding all the facilities within its territory which are engaged in the production of arms, weapons, ammunitions, explosives or military equipment of any kind, or of tools of such nature. (4) The number, kind, location and stage of completion of all rockets satellites or spacecrafts within its territories or which are owned and operated by it or its nationals.

The questionnaire may require such other information as the Inspector General, with the apoproval of the Inspection Commission, should deem necessary or advisable in order to obtain from every nation complete information as to its armed forces and armaments.

Every nation should duly complete the questionnaire and return it to to the Inspector General within six months from the date of receiving such questionnaire. In case of any non-compliances in this connection, the matter should be immediately communicated to the Security Council for appropriate action.

Gradual Reduction of armaments :

During these periods of the process of disarmament, every nation

66 Article 2(5) of the Soviet Draft Treaty of 1962 provides that the state parties to the treaty shall in good time submit to the I.D.O. such information about their armaments and armed forces, military productions and military preparations, as are necessary to carry out the measures of the corresponding stage. The United States Draft Treaty proposes that those parties to the treaty, which are subject to reductions of armaments, would submit to the I.D.O. an appropriate declaration respecting inventories of their armaments existing at the agreed date. See Mendlovitz, for their texts. See also the French proposal for the collection and verification of information on the size of the existing armed forces and armaments. UN Doc. S/C. 3/40 (July 20, 1949).

Enlargement of the Powers of the International Atomic Energy Agency:[76]

In order to have an efficient control over the use of atomic energy, it is necessary to enlarge the powers of the existing International Atomic Energy Agency,[77] acting under the direction and control of the Security Council. It is desirable to give the following additional powers to this body:

1. To acquire adequate compensation and to take into its custody all specific nuclear materials in the world which are not needed for immediate use of research, industrial, commercial, and other non-military purposes.
2. To supervise the production of special nuclear materials and the distribution facilities for such production.
3. To establish its own research laboratories and the facilities for the utilisation of nuclear energy for non-military purposes, and to assist the private persons in such work.
4. To conduct survey and explorations with a view to discover new sources of raw materials of such nuclear energy.

The nation states should co-operate with the Agency in transferring the nuclear materials which they do not require for themselves on payment of due compensation.

Enlargement of the Powers of the Outer Space Committee:[78]

In order to tackle the complex problem of controling the use of outer

76 It was created on April 18, 1956. See IAEA/ 65/INF/Rev 2. The purpose of this Agency, as set forth in its statute, is to accelerate and enlarge the contribution of the atomic energy to peace, health and prosperity throughout the world, and to ensure that the assistance provided by it, or at its request, or under its supervision or control, be used in such a way as to further any military purpose. But so far the Agency has not been able to make the desired achievement.

77 Such an enlargement of the powers of the IAEA is intended to fulfil two purposes; (i) to supplement the work of the U.N. Inspection Service by supervising certain critical stages in the production and distribution of special nuclear materials, and (ii) to promote to the greatest possible extent the utilisation of nuclear energy for peaceful purposes.

Messers Sohn and Clark have advocated the creation of a United Nations Nuclear Energy Autohrity under a United Nations Nuclear Energy Commission for this purpose. But there seems no necessity to create a new organ when one is already functioning. The Soviet and United States proposals of 1962 are silent on the point, though indirectly they appear to give this power to the I.D.O.

78 Messers Sohn and Clark (*supra* note 57) have advocated the creation of an Outer Space Agency for this purpose. But in view of the existing Outer Space Committee, the goals can be achieved more conveniently and in a better way by enlarging the powers of the existing institutions, instead of creating a new one.

space so as to ensure its non-military and peaceful uses only, it is imperative to enlarge the powers of the present 'Committee' on outer space.[79] Instead of merely being a reporting agency, it should be made a continuous functioning body, and should be entrusted with the following additional powers:

79 It was created by an unanimous resolution of the General Assembly (Res. 1348, XIII, of Dec. 13, 1958). The Committee was asked to report on 1. the activities and resources of the U.N., its specialised agencies, and other international bodies relating to the peaceful uses of outer space. 2. The area of international co -operation in this field which could be appropriately undertaken under the U.N. auspices to the benefits of states irrespective of their economic and scientific development, 3. future organisational arragnements to facilitate international cooperation in the field within the framework of the U.N., and 4. nature of legal problems which might arise in carrying out programmes to explore the outer space.

This Committee has two subsidiary sub-commitees—the legal sub-committee, and the scientific and technical sub-committee. These committees were also asked to draw a similar report. See A/Res. 1721(XVI) 5026 (Dec. 20, 1961). During 1962 the discussions in the various U.N. organs on the legal problems involved in the exploration and use of outer space centered mostly on the following three questions: (1) the elaboration of basic legal principles governing the activities and co-operation between states in the exploration and use of outer space; (2) the developments and assistance to, and the return of, astronauts and space vehicles; and (3) liability for space vehicle accidents (U.N. Year Book 1962).

On December 13, 1963 the General Assembly unanimously adopted the following important principles governing the outer space—(1) the use of outer space should be for the benefit of all mankind; (2) no nation can appropriate the outer space which is quite free; (3) every state or individual is free to explore and use the outer space and celestial bodies according to international law and the U.N. Charter; (4) a state is liable to any harmful activity done in the outer space; (6) a state is bound to observe the corresponding interests of the other states in outer space; (6) a state or individual retains the ownership of any object launched in the outer space; (7) s state is liable under international law for any damage caused to any one by the objects launched in the outer space, and (8) a state is bound to render all possible assistance to, and return of astronauts in the event of accident, distress or emergency landings.

On December 23, 1963, the General Assembly again unanimously adopted a five part, resolution (1963 XVIII) on international co-operation in the peaceful uses of outer space.

The efforts of the 'Committee' bore substantial fruit when on January 27, 1967, the major nuclear powers signed a treaty on the peaceful uses of outer space, barring the orbiting of weapons in outer space, and laying down that the outer space and celestial bodies should be explored and made use of only in the interest of all countries. The treaty has also provided that states, making use of outer space, should bear international responsibility for their activities and should be under an obligation to render assistance to astronauts in case of accidents, distress or forcelanding.

The treaty, however, does not prohibit unmanned spy satellite or atomic tipped rockets e.g. inter-continental ballistic missiles which will go up into space for a brief period on their way back to earth as these were not considered weapons of mass destruction 'in orbit.'

one other than the United Nations. They should behave perfectly like international officers.

(3) They should receive adequate pay and allowances, as well as retirement pensions and should be free from taxations.

(4) They should be recruited on as wide a geographical basis as possible.[63]

The United Nations Inspection Service should have direct responsibility for, and direct supervision over, the fulfilment by all the nations and all individuals of their obligations with respect to the whole process of disarmament.[64]

The inspectors of the United Nations Inspection Service should have complete freedom of entry into, movement within, and egress from the territory of any nation. They should have a right to use all communications and transportation facilities available within each nation to the extent necessary for the effective exercise of their functions.[65] The passes issued to them by the United Nations should be accepted as valid travel documents by the authorities of all Nations.

Neither the United Nations nor its inspectors nor other personnel should use or disclose any confidential or private information which is acquired in the course of inspection and is related to the accomplishment and maintenance of disarmament.

During the whole process of disarmament and until and after the establishment of the licensing system, all the installations, plants, laboratories and other facilities and places of every description reported in an arms census should be completely open to inspection to the international inspectors in order to gear up the plan of disarmament. The international inspectors should also have authority to inspect the records of the govern-

63 These qualifications and conditions should also apply to the members of other international services.

64 Under Article 2 of the Soviet Draft Treaty of 1962, such an authority is proposed to be vested in an International Disarmament Organisation whose staff is to exercise control over the compliance by the states with their obligations to reduce or eliminate armaments and their manufactures, and to reduce or disband their armed forces. The U.S. Draft Treaty of the same year also proposes to empower the I.D.O., to look after the verification and other progress towards disarmament measures. See their proposals in Mendlovitz, supra.

65 Article 43 of the Soviet Draft Treaty contemplates that the I.D.O., its personnel and representatives shall enjoy in the territory of each state such privileges and immunities as are necessary for the exercise of independent and unrestricted control over the implementation of the present treaty. See Mendlovitz, *op .cit. supra*, at 868.

ments of the nations relating to their armaments, and licences for arms given for different purposes.

Census of the Armaments of the world :

After the United Nations Inspection Service is fully organised, a census of the armaments of the world should be taken. For this purpose the Inspection Commission should send a questonnaire to every nation of the world[66] requiring from it the following information. (1) The location and description of all its military installations including the man power strength, organisation, composition and disposition of its military and police forces. (2) The location, kind, and quantity of all finished and unfinished arms and weapons (including nuclear, biological, chemical and other weapons of mass destruction), ammunitions and military equipments possesed by, or at the disposal of these forces. (3) The information regarding all the facilities within its territory which are engaged in the production of arms, weapons, ammunitions, explosives or military equipment of any kind, or of tools of such nature. (4) The number, kind, location and stage of completion of all rockets satellites or spacecrafts within its territories or which are owned and operated by it or its nationals.

The questionnaire may require such other information as the Inspector General, with the apoproval of the Inspection Commission, should deem necessary or advisable in order to obtain from every nation complete information as to its armed forces and armaments.

Every nation should duly complete the questionnaire and return it to to the Inspector General within six months from the date of receiving such questionnaire. In case of any non-compliances in this connection, the matter should be immediately communicated to the Security Council for appropriate action.

Gradual Reduction of armaments :

During these periods of the process of disarmament, every nation

66 Article 2(5) of the Soviet Draft Treaty of 1962 provides that the state parties to the treaty shall in good time submit to the I.D.O. such information about their armaments and armed forces, military productions and military preparations, as are necessary to carry out the measures of the corresponding stage. The United States Draft Treaty proposes that those parties to the treaty, which are subject to reductions of armaments, would submit to the I.D.O. an appropriate declaration respecting inventories of their armaments existing at the agreed date. See Mendlovitz, for their texts. See also the French proposal for the collection and verification of information on the size of the existing armed forces and armaments. UN Doc. S/C. 3/40 (July 20, 1949).

1. To possess and operate its own rockets, satellites and space crafts, and to issue licences for their use by the states and even by individuals.
2. To conduct researches for the developments of new rockets, satellites and space crafts.
3. To supervise and control the use of outer space to ensure its peaceful uses only.
4. To take all necessary measures to prevent the military uses of the outer space, and to keep the United Nations informed about them, particularly about their violations, and to recommend the Security Council for an appropriate action.[80]

Though the rockets, satellites and space crafts at the disposal of the 'Committee' would primarily be used for peaceful purposes only, they might be permitted to equip themselves for policing the outer space, or even for other military uses in case of serious emergencies requiring the use of such weapons, e.g. if some delinquent and insincere state happens to spring a surprise on others by using such weapons all of a sudden.

Financial Suggestions :

The entire expenses of the whole disarmament process should normally be borne by the United Nations or by the state parties to the treaty as the case may be.[81] The General Assembly should determine the salaries and allowances of the various services mentioned above,[82] subject to the re-

80 It is quite possible to achieve these objects as the areas of international agreements in this respect have been increasing. See the provisions of the outer space treaty in the preceding note. The treaty fulfils many of the expectations of the nation states, such as those of Article 15 of the Soviet Draft Treaty of 1962 which contemplated that the launching of rockets and space devices should be carried out exclusively for peaceful purposes, though the expectation that the I.D.O. or for that purpose any international organisation should exercise the necessary control in this respect has not been realised. The U.S. 'Outline' of the same year had also desired that the placing of weapons of mass destruction in orbit should be prohibited in Stage I, though the desire of limitations to be imposed on the production, stockpiling, and testing of boosters for space vehicles has not been fulfilled. Her desire for increased co-operation in the peaceful uses of outer space has also been given a practical shape.

81 Article 44 of the Soviet Draft Treaty of 1962 says that all the expenses of the organisation shall be met by the state parties to the treaty, and the budget of the organisation shall be drawn up by the Council and approved by the Conference. The U.S. 'Outline' makes a similar provision, and adds that the General Conference would exercise borrowing powers on behalf of the I.D.O. It is not very difficult to realise these objects.

82 The creation of these services may considerably solve the economic problems mentioned earlier. It may remove the difficulties of mass unemployment and change over, as well as the structural problems of conversion in as much the U.N. will have its own plants and laboratories for certain purposes.

commendations by their respective commissions or committees. The annual budgets of these services should be prepared by their respective heads, and should be submitted to the General Assembly for action.

The United Nations should pay adequate compensations for all machines, appliances, tools, special nuclear materials, rockets, satellites and space crafts, acquired by it. The United Nations should also pay adequate rents for the laboratories and other facilities used by its services.

In order to meet these extra-expenses the United Nations should charge appropriate fees for the various services, including the issuance of the licences. It should also receive adequate compensation or rents for the special nuclear materials sold or leased to the nations, public or private organisations as well as the international institutions.

In the event of a dispute regarding the compensation paid or payable by the parties concerned, the decisions of regional courts if agreed to in the agreements, or in the absence of that, that of the International Court of Justice should be adhered to.

IV CONCLUSION

The implementation of these plans will require a better understanding among the competing and rival states. Though in the tension ridden world of today it is not easy to bring the different political blocs, with their different political, economic, social, and legal systems, very near to each other, we cannot lose sight of the fact that such areas of disagreement have been gradually declining. It is evident from the fact that the major blocs have agreed to take certain steps towards disarmament.[83] It is a

83 See U.N. Doc. A/4879 of Sept. 20, 1961, commonly known as Mc Cloy-Zorin statement This was their joint statement on the *Agreed Principles for Disarmament Negotiation*. The main features of these principles are as follows : (1) Disarmament should be general and complete, and war should be renounced. This is to be accompained by the establishment of reliable procedures for peaceful settlement of international disputes and effective arrangements for the maintenance of peace in accordance with the principles of the U.N. Charter. (2) States will have only limited and non-nuclear weapons for their internal police arrangements and they will help the U.N. Peace Force. (3) Any programme for disarmament shall contain necessary provsions with respect to the military establishment of every nation, e.g. for disbanding, stopping the production, elimination of armaments and armed forces etc. (4) Disarmament should be carried out stage by stage. (5) All measures of disarmament should be balanced so as not to give any military advantages to any state at any stage of disarmament process. (6) Disarmament measures should be implemented under an effective international control which should be honoured by all the parties. For this purpose the International Disarmament Organisation should be created whose inspectors should

hopeful event that the Soviet Union and the United States, together with other members of international community are co-operating in conducting researches in outer space, prohibiting their military uses. The Soviet Union seems to have refused to provide any help to Communist China in the field of nuclear weapons, and the United States has done the same to some countries including France. During the Cuban crisis of 1962, both the countries displayed their accord on a 'tacit agreement' not to enter a nuclear war by firing their missiles. The proposals for general and complete dissrmament presented by both the countries in 1962 reflected certain areas of identical approaches as with respect to the I.D.O. In 1963, they established a direct telephone link, the so called 'Hot Line' between Moscow and Washington (Kremlin and Whitehouse) in order to safeguard against accidental wars. The Test Ban Treaty of 1963 has brought a major rapproachment among the world community, though France and Communist China have not hailed it. In response to a resolution of the United Nations[84] calling for international co-operation in the peaceful uses of outer space, the major powers have signed a significant treaty on the point.[85] The N.P.T. of June 12, 1968, and the efforts to limit the stretegic arms by the major powers have brought further rapproachment. Much remains still to be done in order to bring about a greater understanding and harmony among the world community. It may be possible to bridge the gulf first by securing co-operation among the likeminded people and nations, and then to extend this consensus, even though in a limited and gradual way, to other peoples and nations. If the respective systems are able to bring about a clear understanding even among themselves, then such agreement can be gradually extended to other systems and nations, and thus an international harmony on the point may be realised.

There are apparent clevages among the respective blocs today. France has almost drifted away from the western bloc. China has already divorced the 'socialist' camp. Even among the non-aligned nations there is no common understanding and co-operation. They may be good or bad, but it will be possible, through the international publicity machinery, to cement

have adequate privileges and access to the needful places. (7) Disarmament process should be accompained by the establishment of the institution to settle international disputes and to maintain peace and security through an effective international police force. (8) Negotiating states should try to achieve maximum possible agreement at an early date.

84 U.N. Doc. A/Res/2130 (XX) Jan. 1966, 20th sess. Agenda item No. 31.

85 See *op. cit supra* note 79.

such breaches either among themselves or in relation to other groups, whereby it may be easier to persuade them to accept such an agreement on the subject.

The achievement of these goals may involve a complex process of negotiation, whether on the basis of trust or distrust in which reciprocal concessions will have to be made by the respective parties, but it is imperative to do so in order to safeguard and secure that common interests of mankind which transcend the ideological, social and economic differences, since "they involve fundamental human values to which highly developed societies tend to attach increasing importance as they mature."[86]

---

86 Jenks, *Law Freedom and Welfare* 69 (London, 1963).

INTELLECTUAL TRADITION IN RELATION TO LAW, SCIENCE AND POLICY IN SPACE AGE

S. BHATT*

I

NEED FOR INTER-DISCIPLINARY APPROACH

The study of contemporary international relations inevitably reveals the great role of modern science and technology. For the proper understanding of the vital issues of Space Age, it is realised that there is an urgent need for evolving an inter-disciplinary approach of law and science. Such an approach can be effectively utilized by scholars in evaluating problems and seeking their appropriate solutions. The perspective is aptly stated by Professor Harold D. Lasswell:

> As the years pass and scientific facilities, incentives and responsibilities become more international, we can continue working to the end that a community of scholars capable of achieving a homogeneous perspective on global affairs will succeed in perfecting a comprehensive institution of survey by the voluntary paralleling of effort on a global scale.[1]

It is proposed here to outline briefly the relationship between the intellectual tendencies of law and science which need to be combined for determining community policies of Space Age along with the role of intellectuals in shaping these public policies.

II

COMMON INTELLECTUAL TRADITION OF LAW AND SCIENCE

If creativity aims at human progress, it is of interest to understand the nature of creativity in law and science. We may ask ourselves what does research process indicate? Does it lead to definite policies and conclusions, or, are there any alternatives available? As a renowned science writer states:

> The good that comes of this disinterested intellectual pastime [meaning scientific research] and reaches nearly everyone is this:

* Research Scholar, Department of International Law, Indian School of International Studies, New Delhi.

1 See "The Scientific Study of International Relations," in *Year Book of World Affairs* 28 (1958).

> because science maintains that the source of truth is nothing and the method of reaching it everything, no conclusion is beyond doubt; questioning is an honourable occupation...."[2]

It is for this reason that an astrophysicist remarked that "it is almost easier to explain certain phenomena than to accept the explanations."[3]

In relation to legal research the element of doubt is explained by the remark of the revered jurist Lauterpacht on Brierly that search to him [Brierly] was more important than the results.[4] In the humanities of which law forms a part, there is greater involvement of the subjective element leading to greater irregularities. Hence all determinist derivations are, by simple logic, bound to suffer from inherent limitations that they may not necessarily represent the whole truth, or an idea.

However, one cannot fail to realise that the process of research by itself leads to the increase and dispersion of knowledge. This in turn leads to the widening of human perspectives in regard to the determination of solutions or policies relating to human problems. The study of community policies cannot, therefore, escape the role of creativity; it is therefore essential to realise the scope of creative effort. It is also conceivable, therefore, that international law[5] in general and law relating to earth-space arena in particular has to be "a process and not a condition"[6]: a process

2 See Barzun, "The Cult of Research and Creativity," in *Science : The Glorious Entertainment* 199 (1964).

3 *Id.* at 295.

4 See Brierly, *The Basis of Obligation in International Law and other Papers XXXV* (Lauterpacht & Waldock eds. 1958). Lauterpacht in his introduction says: "It would almost appear that what, weighed with him was not the result of research, but the research itself," at XXX; "What, however, is perhaps most impressive is his apparent inclusiveness, his disillusionment born of experience of a period of unprecedented retrogression, and his disapproval of easy solutions, there asserted itself a fervent and constructive hope."

5 *Cf.* the definition of international law by McDougal and Feliciano: "International law may be most realistically observed, and fruitfully conceived, as a process of authoritative decision transcending State lines by which the peoples of the world seek to clarify and implement their common interests in both minimum order, and in the sense of the prevention of unauthorized coercion, and optimum order, in the sense of the promotion of the greater production and wider distribution of all values." See McDougal and Feliciano, *Law and Minimum World Public Order* vii (New Haven and London, 1961).

See McDougal, "International Law, Power and Policy: A Contemporary Conception," I *Recueil Des Cours* 137 (1953) citing Roscoe Pound: "We shall not ask him ("the jurist of the immediate future") for a juristic romance built upon the cosmological romance of some closed meta-physical system. But we may demand of him a legal

of decision-making, which combines the knowledge of humanities, when this knowledge is considered of "conscious man and his acts," and the knowledge of physical sciences, when this knowledge is considered as "of things and processes."[7]

Moreover, we live in a period dominated by science and technology.[8] The creative processes of science have to be met by the creative processes of law so as to forge a working relationship between the two.[9] The need for this relationship is stressed in a cryptic remark by Bertrand Russell that "one of the troubles of our age is that habits of thought cannot change as quickly as techniques, with the result that, as skill increases, wisdom fades."[10] This relationship between law and science can be established, firstly, through identification of impact of science and technology upon international society, and secondly, by integrating policies of law and science for the evolution of major community policies.

III

IMPACT OF MODERN SCIENCE AND TECHNOLOGY ON CONTEMPORARY SOCIETY

The assessment of the importance of modern science and technology is largely related to their impact upon contemporary social life. By itself, the aggregate of technology (including space technology) has opened vast vistas in various fields of science of engineering, astro-

philosophy that shall take account of the social psychology, the economics, the sociology as well as the law and politics of today, that shall enable international law to take in what it requires from without, that shall give us a functional critique of international law in terms of social ends, not an analytical critique in terms of itself, and above all *that shall conceive of the legal order as a process and not* as a condition." (Italics supplied).

7 *Op.* cit. *supra* note 2, at 191.

8 See generally Skolnikoff, *Science, Technology and Foreign Policy* (London, 1967). The author states, at 316 : "The need to understand the underlying and future significance of scientific and technological developments and their relation to basic patterns of international affairs warrants immediate attention."

9 Thus McDougal, Lasswell and Vlasic remark : "At the same time we recommend that the public order deliberately circumscribe the role of government for the purpose of encouraging creativity in society as a whole." See *Law And Public Order In Space* 1059 (New Haven and London, 1963), cf. following remark of Bertrand Russell on the role of creativity in any theory building ; "But a theory, if it is to have any value, must not emerge from careful collection and collation of individual observations. It must emerge, rather, as sudden imaginative insight, like that of a poet or composer." See preface to *Einstein on Peace* xvi (Nathan and Norden eds. 1960).

10 Russell, *Has Man a Future ?* 11 (London, 1961).

physics, biological sciences, and astronomy, to mention a few only.[11] Some of the sociological changes brought about by these sciences relate to the reduction of time factor when electronics are ushering in a process of automation in vast number of appliances ; to the fantastic improvements in world communications, including future prospects of space travel ; to the control of diseases and hence the resultant population explosion, especially in the underdeveloped countries ; to the spread of nuclear weapons resulting in precarious balance of human survival. Above all the "revolution of rising expectations" is slowly engulfing the larger part of the world resulting in unsatiated wants and desires among peoples—a revolution of hedonistic and utilitarian philosophy indeed.[12] If one were to narrow down and specify the two most important tendencies which law must mark out of modern science and technology, it is the tempo of events and the cultural impact on human being.[13] This perspective once again shows that the problem "is to consider political science [including all aspects of legal education] as a discipline and as a profession in relation to the impact of the physical and biological sciences and of engineering upon the life of man."[14] The problem calls for an inter-disciplinary approach in a contextual process, which is essentially a method of weaving together all relevant facts or derivations concerning a particular issue or a situation.[15] In this task it is reassuring to consider that "it is apparent that all comprehensive systems are formally equivalent (hence interchangeable) at corresponding levels of abstractions."[16] Therefore, the inference is, "as Professor Lasswell so eminently states, "that within a rich intellectual

11 See generally *Educational Programs of NASA*, Hearings before Committee on Aeronautical and Space Sciences, United States Senate, 88th Congress, Ist Sessioin, 21—22 November, 1963, esp. pp. 83—89 containing remarks by Frederick Seitz, President National Academy of Sciences, U.S.A.

12 For study of the impact of science and technology in human values, see Kahn and Wiener, *The Year 2000*, especially at 213 (1967), wherein the authors state : "Many Europeans...argue...that under the impact of a massconsumption, materialistic culture the humanistic values that have been so characteristic in Europe are rapidly eroding or disappearing."

13 Thus C. Wright Mills observes "It is a showdown on what kinds of human being and what kinds of culture are going to become the commanding models of human aspirations." See *The Causes of World War Three* 174 (London, 1959).

14 Lasswell, "The Political Science of Science," Presidential Address of American Political Science Association 1956, 50 *American Political Science Review* (Wisconsin) 961 (1956).

15 See generally McDougal, Lasswell and Reisman, "Theories About International Law ; Prologue to a Configurative Jurisprudence," 8 *Virginia Journal of International Law* 188—299 (1968).

16 *Op. cit. supra* note 4, at 965.

tradition the most significant task is to construct a continuing institutional activity by which central theory is related continuously to events as they unfold."[17]

IV

INTEGRATION OF LAW AND SCIENCE

In order to keep the "central theory" continuously related to events, it is essential that the institutional activity must aim at integration of law and science. For this two steps are essential. Firstly, lawyers and physical scientists must join together so that mutual ignorances are removed and the processes of law or of political theory reflect the true state of things. Secondly, law must ensure the "human ends of science." Elaborating the first point, it is interesting to compare Darwin's theory of the survival of fittest with the state of nature conceived by Hobbes or Morgenthau. Given the benefit of great knowledge of genetics, Darwin no doubt suggests, most scientifically, that there is a competition for living among species of the same category. But he ascribes to man a great moral sense born out of their power of reasoning, moral power which is even greater than their intellectual power, which leads men to attain greatest happiness of the greatest number.[18] And, hence, Hobbes, in a period of much lesser competition for survival than today, led himself to believe of the vicious nature of man, which, when considered in a historical perspective, seems indeed an anachronism. It will not be an exaggeration to say that

17 *Ibid.*

18 See the following in Charles Darwin, *The Origin of Species by means of Natural Selection, The Descent of Man* and *selection in relation to sex* (Chicago, 1952) :

(*a*) "A moral being is one who is capable of reflecting on his past actions and their motives—of approving of some and disapproving of others ; and the fact that man is the one being who certainly deserves this designation, is the greatest of distinctions between him and the lower animals." At 592.

(*b*) "The moral faculties are generally and justly esteemed as of higher value than the intellectual powers. But we should bear in mind that the activity of the mind in vividly recalling past impressions is one of the fundamental though secondary bases of conscience. This affords the strongest argument for educating and stimulating in all possible ways the intellectual faculties of every human being ." At 593.

(*c*) "The appreciation and the bestowl of praise and blame both rest on sympathy ; and this emotion, as we have seen, is one of the most important elements of the social instincts." At 592.

(*d*) "As all men desire their own happiness, praise or blame is bestowed on actions and motives, according as they lead to this end; and as happiness is an essential part of the general good, the greatest happiness principles indirectly serves as a nearly safe standard of right and wrong." At 592.

all postulates built upon Hobbesian state of nature belie hopes of human rationality and, therefore, man may have been living with this great historical mistake. In their recent discourse on the "configurative jurisprudence," McDougal, Lasswell and Reisman observe that even though Kautilya, Hobbes, Bodin, Hume and Morgenthau "share a conception of man as essentially evil and, hence, a skepticism about the possibility of effective law," yet, "the concise answer to the non-law school is social reality."[19] Social reality, according to these distinguished authorities, is represented by the global interaction and interdependence. The distorted picture presented by the non-law school spring, as these authorities point out, from "deficiency in enquiry" and from parochial observational angle. They, therefore, conclude that the "assumptions about the immutable nature of man have engendered distortions of focus. Without a model or frame for describing social process and the variety of inter-locking community processes of which the world community is composed a highly distorted picture has been presented."[20]

Apart from integration of fundamental postulates of science and law, a second part of the integration process should ensure the "human ends of science." This means, *inter alia*, that progress in science and technology should be devoted to the service of mankind and in the amelioration of the urgent needs of the international society.

The lack of devotion of the scientific effort to the pressing problems of the human society is illustrated by the despair of some of the leading scientists of the world. The Indian physicists and Noble-laurate, Dr. C. V. Raman, described the "walk in space" as the "prostitution of science," in view of the colossal costs involved in relation to the human benefit.[21] The opinion in this matter is most aptly illustrated by the celebrated Dr. Einstein, who, as doyen among the world's scientists said : "Let me begin with a confession of political faith : that the State is made for man, not man for the State. This is true of science as well...."[22] The moral that is available is this : Until science is used for human ends, its progress may not necessarily promote the stability and progress of human society and civilization. Indeed, it is interesting to recall here the anomaly in Plato's concept of the prosperous phase of a civilization. As Professor Toynbee points out : in *Laws*,

19 *Op. cit. supra* note 15, at 211—12.

20 *Id.* at 212.

21 See *Statesman* (Delhi), August 1, 1966.

22 The *New York Times*, November 22, 1931, cited in Nathan and Nordon, *op. cit. supra* note 9, at 150.

Plato is inclined to believe that the prosperous phase of a civilization consists in its growth. (This may relate to the present stage of world civilization). In *Politicus*, however, Plato believes that the static YIN—State of the primitive order (when everything is in abundance) may be the prosperous-phase of a civilization.[23] Hence, it resolves that for the achievement of genuine propserous civilization the society must seek the "human ends of science."

V

RATIONALE OF POLICY-MAKING AND ROLE OF INTELLECTUALS IN SPACE AGE

While continuing the dialogue for the creation of a common intellectual tradition among various disciplines and the effective exploitation of this tradition for a viable system of law and order of earth-space arena, we are called upon to examine the role of intellectuals and scholars. In this respect it is not assumed to identify intellectualism or scholarship with any particular class (like Plato's guardian-class in contrast to the soldier and labour classes) ; but intellectualism is associated more with a sense of creativity not confined to any particular profession or discipline. Indeedl as contemporary world events unfold, we already witness an intellectual revolution of all sorts not confined to any particular profession or discipline. In this study we associate ourselves with the common attributes of an intellectual, of the potential role that he can play in society in view of his attributes, and finally the need for the closer association of scholars and intellectuals in formulation and implementation of community policies.

1. *Attributes of Intellectuals*

The urge that takes an intellectual into deeper and higher learning also has a concomitant factor which instinctively relates his knowledge and learning to the social ends. Hence any study cannot be in vacuum but must bear direct relationship to the society. This in turn urges an inquirer to seek avenues of action where the benefits of the study can be translated into action. However, it is observed regretfully that :

23 4 Toynbee, *A Study of History* 585 (1948). Also compare the following. "Man is developing enormous power to change his own environment—not only the outside world, but also his own physiological and intrapsychic situation. The prevailing secular humanistic view is that this is the 'progress'—and we would agree—that it would be no more desirable than feasible to attempt to halt the process permanently, or to reverse it. Yet this very power over nature threatens to become a force of nature that is itself out of control. . . ."*Op. cit. supra* note 12, at 412.

> an effective marriage of knowledge and action is seriously inhibited in the modern world by an exaggerated emphasis on the virtues of the division of labour. Decision-making and the pursuit of systematic knowledge have come to be regarded as separable activities, and it is supposed to be inefficient for the researcher to concern himself with policy decisions or for the policy-maker to probe too deeply into research techniques.[24]

Nevertheless, if scholars connot fully combine knowledge and action, they fulfil an important task of "clarifying the common interests of all peoples of the earth-space community" and clarify common goals which are possible of attainment.[25]

A third attribute of an intellectual is his mental make-up which emboldens him to relate his own inner conflicts with those of the society and *vice versa*. By this process an intellectual stays in an enviable position and helps in keeping the events in society directed towards the desired community goals.[26]

Fourthly, the scholar is well disposed to understand the complex role of power in society. By this it is implied that the scholar can better appreciate the "conceptual framework within which inquiry into the political process may fruitfully proceed."[27] When political process is defined as "the study of the shaping and sharing of power,"[28] in a materialistic and power-ridden society, the role of an intellectual is that of an impartial observer of events, and, with a dispassionate study, he brings into play forces of reason leading to lessening of tensions.[29]

24 Millikan, "Inquiry And Policy : The Relation of Knowledge to Action," in *The Strategy of World Order* (vol. II) *International Law*, 103 (Falk and Mendlovitz, eds. 1966).

25 See McDougal, "The Prospects for a Regime in Outer Space," in *Law and Politics in Space*, 113 (Maxwell Cohen ed. 1964).

26 Compare, for example, the following tribute paid tc J.S. Mill : "He was capable of grasping that his inner unconscious conflict was closely connected with the development of his moral and political beliefs. He was also able to understand something of the nature of his conflict. In both respects he stood head and shoulders above his contemporaries." See Sampson, *The Psychology of Power* 70 (1966).

27 See generally Lasswell and Kaplan, *Power and Society* x (1952).

28 *Id.* at xiv.

29 *Cf.* the following remark of Mills in *op. cit. supra* note 13, at 132—133.

> "Western intellectuals should remember with humility even with shame, that the first significant crack in the cold-war front was not made by those who enjoy the formal freedom of the western democracies, but by men who run the risk of being shot, imprisoned, driven to become nervous carricatures of human beings.

A fifth attribute of an intellectual is that he can deliberate on the "philosophy of nature" or what is these days known as "science." Medieval and ancient philosophers like Copernicus, Galileo, Descartes and Newton carried with them a vision of the entire universe and therefore made use of sciences, essentially, in order to comprehend nature. This tradition, as Arthur Koestler points out, is lacking from contemporary history.[30] By neglecting the "philosophy of nature," and by making separate compartments of science and humanities, man has led himself to what Herman Kahn describes as "the Faust legend," and which "is a metaphor for a central predicament of modern man."[31] As a Kahn and Weiner elaborate in their recent treatise :

> Faust sells his soul to the devil in order to acquire knowledge, power, riches, and women-typical sensate goals. The object of pragmatic, emperical (sensate) knowledge is to control rather than comprehend nature to understand it instrumentally and manipulatively, rather than normatively or mythically. Such knowledge is a tool not for the philosopher but for *homo faber*, man the maker or doer, who gambles with fate (Fortune or chance is a woman) to seize those rare opportunities that might never recur. Faustian men or *homo faber*, is secular, profane, and sensate rather than theological, philosophical, or theoretical.[32]

Thus in ideal terms, a modern scholar is cast in the role of a philosopher whose influence "though intangible, permeates society and helps to shape the ideas of people entirely innocent of the original issues."[33] In this perspective, his interpretation of the "philosophy of nature" assumes significant importance for the society. An off-shoot of this attribute is the scholar's quest for the historical continuity, whose benefit, as Lasswell states, is "in the sense that by mobilizing knowledge about the past we are enabled to recognize the appearance of new patterns and the diffusion or restriction of the old."[34]

The first significant cracks in the intellectual cold war came in the Communist world, after the death of Stalin. They were made not only by politicians but by professors, not only by factory workers but by writers, not only by the established but by students."

30 See Koestler, *The Sleepwalkers : A History of Man's Changing Vision of the Universe* 13 (1964).

31 See Kahn and Weiner, *op. cit. supra* note 12, at 409.

32 *Id.* at 410.

33 *Op. cit. supra* note 26, at 194.

34 *Op. cit. supra* note 16, at 978.

Finally, the power of an intellectual lies in the power of his intellect. In the space age, it is his merit, his skill, that prevails over old conceptions of class or birth. For these qualities of an intellectual, C. Wright Mills observes : "This is a time, I am contending, when the power of the intellectual has become potentially very great indeed."[35] By utilizing his pattern of work, of which research being an essential condition, a scholar is best suited to perform social tasks. Indeed, in the *Design for Research in International Rule of Law*, the author, Arthur Larson, has complete faith in the method of research which he states in his introduction thus : "This effort is based upon the conviction that research and scholarship have a crucial part to play in building the peace."[36]

2 *What Intellectuals Can Do ?*

In the contemporary world society, intellectuals can fulfil some of the following tasks which have direct bearing on the success of community policies of Space Age. Firstly, intellectuals can maximise rationality. Rationality is born out of reasoning of mind which differentiates between what is and what ought to be. A Machiavelli, or Hobbes, it is submitted, devoted themselves only to the considerations that spring from evil in the man. They did not attempt to highlight what men can achieve as rational beings. This misconceived notion about man, as we are witnessing today, has led human destiny at crossroads from where we can steer clear only by rational means.[37] Secondly, intellectuals can find the rationale of power at all levels since "the fact of power even at the personal level is...a very pervasive element in the common experience of daily life."[38] The intellectuals are called upon to constantly identify the meaning and scope of power for a stable order of earth-space arena. Thirdly, the intellectual can help in solving the eternal puzzle of how men can live with inequality : at least, he can set the problem in proper perspective. This problem of inequality assumes great significance in the light of technological innovations of Space Age. This problem needs further probing whether the "revolution of rising expectations" is a sound phenomenon for the health of international society, since the nature of expectations need evaluation in the context of social

35 *Op. cit. supra* note 13, at 133.

36 *World Rule of Law Book Series* No. 2, Rule of Law Centre 11 (Duke University, U.S., February 1961).

37 See especially, *op. cit. supra* note 26, at 153 ff.

38 *Id.*, at 140. On the wider implication of power the author states : "Indeed, it is truism that political philosophy has traditionally concerned itself with the search for some kind of moral justification for the power and coercion of governments."

problems raised by modern technology. A rational approach to the understanding of inequality should be deeper so that the essential values of human society are not submerged by the technological revolution. Finally, the intellectuals can lead the way towards creativity. Creativity in the fields of law,[39] science,[40] or any other discipline provides the ultimate hope for peace and progress of the international society.

3 *Intellectuals and Policy-Making*

The foregoing discussions on the attributes and potentialities of intellectuals and scholars point inevitably to the following conclusion. Seen in the perspective of an integrated intellectual tradition of law and science of Space Age, the intellectuals should be assigned greater roles in the policy-making. The instability and upsurge in parts of the world are pointers to show the neglect of intellectuals in national and international policy-making. Of the future consequences of present policies, Herman Kahn and Anthony J. Wiener warn thus :

> If we are as intellectually unprepared for ev ents at the beginning of the twenty-first century, and lack as muc h understanding of the issues as we did in 1929, 1941, and 1947, we are not only likely to be subjected to some very unpleasant surprises, but unnecessarily to exacerbate and prolong their negative consequences—perhaps to the extent that desirable institutions and values will be irrevocably overwhelmed.[41]

And, before the claims of intellectuals can finally be admitted, the following advice by Lasswell needs careful attention :

> From your perspective or mine the creative opportunity is to achieve a self-system larger than the primary ego ; larger than the ego components of family, friends, profession, or nation ; and inclusive of mankind.[42]

39 "What international law needs most today is faith and creative vision ; these alone will certainly not suffice to make the law an effective instrument of peace and justice, freedom and welfare ; but without these nothing else will. Jenks, *Law, Freedom and Welfare* ix (1968).

40 *Cf.* following observation by Albert Einstein : "I believe the most important mission of the state is to protect the individual and make it possible for him to develop into a creative personality." See Nathan and Norden, *op. cit. supra* note 9, at 150.

41 See Kahn and Wiener in *op cit. supra* note 12, at 357.

42 See Introduction to the *Law And Minimum World Public Order*. McDougal and Feliciano, *op. cit. supra* note 6, at xxiv.

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)**

SURENDRA NATH***

No company can be incorporated either in India or in England without registering its memorandum with the Registrar of Companies. According to section 12, any seven or more persons, and in case of a private company,[1] any two or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of the Companies Act in respect of registration,[2]

* The writer is grateful to Professor Robert R. Pennington, Faculty of Law, Birmingham University, England, and Professor S.S. Nigam, Law School, Banaras Hindu University, for the valuable suggestions made in the formative stages of this paper.

** This is the revised and expanded version of the seminar paper presented at Current Law Forum, Law School, B. H. U. on December 28, 1968.

*** Lecturer, Law School, Banaras Hindu University, Varanasi—5 (U.P.).

1 A 'private company' has been defined by section 3 (i) (iii) of the (*Indian*) *Companies Act*, 1956, as follows :

> "Private company" means a company which, by its articles,—
> (*a*) restricts the right to transfer its shares, if any ;
> (*b*) limits the number of its members to fifty not including—
> (i) persons who are in the employment of the company, and
> (ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased ; and
> (c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company ;
> Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition, be treated as a single member.

The corresponding English provision is section 28 of the *Companies Act*, 1948, II & 12 Geo. 6 Ch. 38.

A 'public company' has been defined as a company which is not a private company. (Section 3 (1) (iv), (*Indian*) *Companies Act*, 1956.

According to section 43 of the (*Indian*) *Companies Act*, 1956, where default is made in complying with any of those provisions mentioned in section 3 (1) (iii), the company shall cease to be entitled to the privileges and exemptions conferred on the private company by or under the Act and this Act shall apply as if it were not a private company. The section corresponds to section 29 of the (*English*) *Companies Act*, 1948.

2 See (*Indian*) *Companies Act*, 1956, sections 33 and 34 : (*English*) *Companies Act*, 1948, Sections 12 and 13.

form a company with or without limited liability.[3] Such a company may be either a company having the liability of its members limited by its memorandum to the amount, if any, unpaid on the shares respectively held by them,[4] or a company having the liability of its members limited by memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up,[5] or a company not having any limit on the liability of its members.[6] The memorandum of association, therefore, becomes the most important document due to its contents. Although there is no restriction in law either in India or in England as regards the clauses which a memorandum of association of a company may contain,[7] section 13 prescribes some obligatory clauses which the memorandum of every company, incorporated under the Act, *must* contain.[8] Out of these six obligatory clauses, the most important and controversial one is the "objects clause," due to the purpose intended to be served by it.[9] In this

3 Regarding modes of forming an incorporated company in England, see section 1 of the (*English*) *Companies Act* of 1948, which is almost identical to section 12 of the (*Indian*) *Companies Act*, 1956.

4 (*Indian*) *Companies Act*, 1956, s. 12 (2) (*a*) : (*English*) *Companies Act*, 1948, s. 1 (2) (*a*).

5 (*Indian*) *Companies Act*, 1956, s. 12 (2) (*b*) : (*English*) *Companies Act*, 1948, s. 1 (2) (*b*).

The difference between the companies limited by shares and the companies limited by guarantee is that in the former the liability of members may have to be implemented at any time during the existence of the company as well as during the winding up; whereas, in the latter, the liability need only be implemented after the commencement of winding up of the company.

6 (*Indian*) *Companies Act*, 1956, s. 12 (2) (*c*) : (*English*) *Companies Act*, 1948, s. 1 (2) (*c*).

7 Owing to this reason, the draftsmen of memoranda have taken the liberty of framing memoranda as lengthy as they can—including every possible matter—thus frustrating the whole purpose of having them. Further, the conditions mentioned in the memoranda are not easily alterable, and thus cause difficulty at the time of alteration.

8 (*Indian*) *Companies Act*, 1956, s. 13 : (*English*) *Companies Act*, 1948, s. 2.

These clauses are generally termed as :

(i) the name clause; (ii) registered office clause ; (iii) the objects clause ; (iv) the liability clause ; (v) the capital clause, and (vi) the association clause.

9 Prior to 1844, in England as well as in India, the common type of joint stock company was merely an enlarged partnership. The doctrine of 'ultra vires' had no application because, although the partnerships were allowed to be incorporated the existing form of constitution, the deed of settlement, was accepted and remained unchanged, and the liabilities of members remained unlimited. Investors were fully protected by the partnership rule, 'that any fundamental change must be agreed to by all the members,' and there was no need of protecting creditors because the liability of members was unlimited. However, the position of the joint stock company changed radically when limited liability concept was introduced in 1855, in England. Then arose a widespread need for the strict application of the rule of 'ultra vires,' in the interest of creditors. In 1855, Lord Cranworth too declared that a company incorporated by Act of Parliament

paper we shall discuss the legal problems relating to this clause and see how far the real purpose contemplated by the judiciary as well as the legislature is served, under Indian and English law, by the objects clause of the memoranda of association of the present companies. The legislature in India recently attempted to make the objects clause of a company a real one ; our attempt in this paper shall also be to examine how far the legislature has succeeded in its endeavour.

The Importance of the Objects Clause

The memorandum of association of every company *must* state the objects of the company.[10] The statement of the objects is not a mere record of what is contemplated by the subscribers without operative effect. While stating the importance of the objects clause in the memorandum of association, in a recent Indian case, Capoor, J., emphasised that the prospective investors must know clearly the objects of the company in which they have been invited to invest their money His observations were thus :

> The statement of the objects in its memorandum is not a mere legal technicality but is a necessity of great practical import because the public who are called upon to subscribe to the capital of the company by purchase of its shares *must know clearly what are the objects for which they are paying and which they want to encourage.*[11]

The similar observations have also been made by English Courts. As Lord Cairns puts it in *Ashbury Railway Carriage and Iron Co.* v. *Riche*,[12] the objects clause in a company's memorandum, "states affirmatively the ambit and extent of vitality and powers which by law are given to the corporation, and it states, if it is necessary to state, negatively that nothing

could not devote any parts of its funds to objects unauthorised by the terms of its incorporation. (*Eastern Counties Railways* v. *Hawkes*, (1855) H.L.C. 331, 346). The application of the rule was facilitated by the Act of 1856, (In India the Act 9 of 1857) which required a company to file two documents-memorandum and articles. In the memorandum, the objects of the company had to be stated, and no provision was made for its alteration. The idea behind the statement of objects was that directors should not embark on such activities which were not authorised by the objects clause of the company, and thus make shareholders liable. The result was that in *Ashbury Railway Carriage Co.* v. *Riche*, (1875) L.R. 7 H.L. 653, the House of Lords unanimously held that ratification was legally impossible (even if agreed to by all the shareholders) if the contract was beyond the scope of the memorandum ; the purpose of this rule was the protection of both, investors and creditors.

10 (*Indian*) *Companies Act*, 1956, s. 13 (1) (*c*) : (*English*) *Companies Act*, 1948, s. 2 (*c*).

11 *In the matter of Bhutoria Brothers (Pvt.) Ltd.*, AIR 1957 Cal. 593.

12 (1875) L.R. 7 H.L. 653, 678.

shall be done beyond the ambit and that no attempt shall be made to use the corporate life for any purpose other than that which is so specified." In another case,[13] it has been stated that the purposes of stating the objects in the memorandum are (i) that the intending corporators may know in what field the money they are going to invest is to be put to the risk, and (ii) to facilitate anyone dealing with the company to know whether the contractual relation he is entering into relates to a matter within its corporate objects.[14]

Hence the Act empowers the subscribers (who become shareholders afterwards) with two main rights. First, the Act furnishes them with the means to initiate the creation of a statutory corporation,[15] and secondly, by making it obligatory to state the objects, the Act gives to subscribers the right to endow the corporate body with powers to carry on such objects as they think fit, provided that those objects are not illegal. At this point, it becomes necessary to examine how much freedom the subscribers have in choosing the objects.

The subscribers to the memorandum may choose any object or objects for the purpose of their company. The subscribers may be associated for *any lawful purpose.*[16] Any purpose not prohibited by law is a lawful purpose under this section.[17] There are two restrictions, however, on the selection of 'objects' for a company: (1) the objects should not include anything which is illegal or contrary to law or public policy, e.g., floating a company for dealing in lotteries,[18] or for trading with alien enemies, etc.,[19] and (2) the objects should not also contemplate doing anything which

13 *Cotman* v. *Brougham*, (1913) App. Cas. 514 (522).

14 This clause is mainly related to the creditors. They are not within the scope of the present study.

15 A company is incorporated on the registration of memorandum of the company and the issuance of certificate of incorporation by Registrar vide section 34 (1) of the (*Indian*) *Companies Act*, 1956 ; Section 13 of the (*English*) *Companies Act*, 1948.

16 (*Indian*) *Companies Act*, 1956, s. 12 (1) ; (*English*) *Companies Act*, 1948, s. 1 (1).

17 *In re Indian Iron Steel Co.* AIR 1957 Cal. 234 (237).

18 *Ex parte More*, (1931) 2 K.B. 197.

19 *Daimler & Co.* v. *Continental Tyre Co.*, (1916) 2 A.C. 307.

Objects which are in restraint of trade (*Mac Ellis* v. *Ballymacalligot, etc., Co.*, (1919) A.C. 548), or which are blasphemous (but not denying christianity) are also held to be bad. (*Bowman* v. *Secular Society*, (1917) A.C. 406). But in both the countries, India and England, it has been held that contributions to political funds or objects providing such contributions can be validly included as one of the objects of a company. See *In re Indian Iron Steel Co. op. cit.*, note 17. It will be noticed that, in India, section 294—A (added by the Amending Act of 1960), authorised the companies to contribute to political funds subject to certain limits. Before this amendment, the power of the company in this behalf was a disputed question. Recently, the present

is prohibited by the Companies Act, e.g. buying the company's own shares.[20] A limited company cannot legally issue shares at a discount (except in certain circumstances)[21] and, therefore, it is not permissible to make the issuing of its shares at a discount as one of the objects of such a company.[22] Apart from these two restrictions,[23] the objects of a company may be anything that the proposed company desires to achieve.[24] It is for the subscribers to the memorandum of association to decide whether the objects shall be wide or narrow, reasonable or unreasonable, diffuse or rambling, cautious or speculative, concise or elliptical, single or various, concurrent or independent.

How far the Present Objects Clause serves its Contemplated Purpose ?

The question is, whether the objects clause of the memoranda of association of present companies serve the real purpose contemplated by the judiciary as well as the legislature. The Act[25] provides that the memorandum and the articles shall be "in accordance with the forms set out in the Tables or as near thereto as circumstances admit." However, this requirement has never been followed strictly, and is interpreted with some latitude; provided that basic form of the statutory model is preserved, the widest variations of contents are permitted.[26] One of the most troublesome features in this regard is the confusion between the objects or purposes of the company on the one hand and the powers a company may have to carry them out on the other hand. Very frequently, there is an extended multi-paragraph purpose clause which in fact does not distinguish at all between purposes and powers.[27] Further, as will be seen later on, such multi-purpose objects clause helps the company in the diversification of its activities with totally unconnected lines of its business. The consequence is that the present type of 'objects clause' is unlikely to give either any clear picture of a company's field of activity, or any protection to investors.

Government has put a total ban on political contributions, which will come into effect on 27—5—1969.

20 (*Indian*) *Companies Act*, 1956, s. 77 : (*English*) *Companies Act*, 1948, s. 54.

21 (*Indian*) *Companies Act*, 1956, s. 79 : (*English*) *Companies Act*, 1948, s. 57.

22 *Ooregum, etc., Co.*, v. *Roper*, (1892) A.C. 125.

23 In England, the objects clause must not include any object which would render the company a trade union, for to register a trade union under the Companies Act, 1948, is illegal—*Trade Unions Act*, 1871, s. 459(9) (6) of Act of 1948.

24 See *Lal Gopal Dutt* v. *Khororiah Mego Zilla Zamindari Co.*, 16 C.W.N. 297.

25 (*Indian*) *Companies Act*, 1956, s. 14; (*English*) *Companies Act*, 1948, s. 11.

26 Gower, *Modern Company Law*, (2nd Ed., 1947), 246.

27 See *infra* notes 51 and 52.

Purposes Versus Powers

In India, as well as in England, there is a strong argument against the inclusion of powers in the objects clause of the memorandum of association. In *Cotman* v. *Brougham*,[28] Lord Wrenbury observed that 'powers are not required to be and ought not to be specified in the memorandum. The Act intended that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the powers of the company to do in carrying on the trade. It must be borne in mind that the purpose of the memorandum is to enable the shareholders, creditors, and those dealing with the company, to know what is its permitted range of enterprise and for this information, they are entitled to rely on the constituent documents of the company. The practice has arrived now at a point, at which the fact is that the function of the memorandum is taken to be *not to specify, not to disclose but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be so found included somewhere within its terms*.'[29] The powers generally mentioned in the objects clause of the memorandum of association may be interpreted as objects although, in fact, at the time when the company was incorporated, those powers were only expected to be ancillary to the main objects. The mixed statement of the objects and powers in the memorandum often creates confusion and does not give a clear picture of the company's objects, and thus frustrates the whole purpose[30] of having such a clause in the memorandum.

The distinction between objects and powers is also underlined in a recent decision of the Supreme Court of India, *Dr. A. Lakshmanaswami Mudaliar* v. *Life Insurance Corporation of India*.[31] The company, in that case, was formed to carry on life insurance business in all its branches. By another clause in the memorandum the company was authorised to invest and deal with funds and assets of the company upon such securities or investments and in such manner as may, from time to time, be fixed by the articles of association of the company. The Supreme Court held that the latter clause was, in truth, not an object clause: it was a clause authorising investments of funds. The trust in the above case had numerous

28 1918 A. C. 514 (523).

29 Emphasis added.

30 See *supra* pages 80 and 81. The purpose is to protect the interests of shareholders and creditors. The importance should be given to the protection of shareholders, as creditors are already protected by many equitable remedies.

31 (1963) *Comp. L. J.* 255; AIR 1963 SC 1185.

objects one of which was to promote science, and industrial knowledge (including knowledge in insurance), etc. The Supreme Court held that the ultimate benefit which may result to the company from the availability of personnel trained in insurance if the trust utilises the fund for promoting education, insurance practice and business (the company had transferred moneys to a trust set up for this purpose, in the above case) was too indirect to be regarded as incidental or naturally conducive to the objects of the company. The trustees were directed to personally repay the amount received by them to the L.I.C. This case can be contrasted with *Evans* v. *Brunner*,[32] where a company spent money on scientific research although the main object of the company was the business of chemical manufacturers. Such expenditure was held to be a legitimate expenditure.

The protest made by Lord Wrenbury, however, has been unheeded, and the memoranda of the companies in India and England are still drawn in as 'confused' and vague a manner as ever before.[33] This is the field where a reform is needed in both the countries. The Jenkins Committee which recently went into the question of company law reform in the United Kingdom also bestowed some thoughts on this question. Many of the witnesses who submitted their evidence before the Jenkins Committee were of the view that certain general powers should be granted by the statute of incorporation (i.e. the Companies Act). In its memorandum, the Council of Law Society of Scotland submitted that the Companies Act should, for the sake of convenience, set out the common form of powers which are necessary to carry out the objects of the companies.[34] The necessity of simplifying the objects clause was also emphasised by another witness when he pleaded for the adoption of the provisions of the Newzealand's Companies Act, 1955; he was of the view that the prospective and the existing investors must clearly know the main objects of the company.[35]

32 *Evans* v. *Brunner, Mond. & Co.*, (1921) 1 Ch. 359.

33 For United States see—Ballantine, *Corporations* s. 15 *et seq.* (1946).

34 *Minutes of Evidence.* (vols. 16 & 17) pp. 1305-1308.

Many of the incidental powers which the company needs are generally set out as separate objects in the memorandum of association. It is probable that these powers would be implied as being necessary to enable the company to carry out its main objects, but businessmen prefer to see the powers set out in detail. It should be convenient if the Companies Act sets out the common form powers which are deemed to have these powers.

35 Memorandum by Guest Keen & Nettlefolds Ltd., *Minutes of Evidence*, (vol. 2), 30-9-1960.

Furthermore, we are in favour of simplification of the memorandum *so that members can see clearly what the main objects are*, and we think that it would be helpful if the

The representative of the Chartered Institute of Secretaries was more precise when he suggested that in the interests of simplification and efficiency, on the lines of the companies Act, 1959 of Tasmania, a Schedule should be added providing incidental and ancillary objects and powers.[36]

The Jenkins Committee supported the point-of-view of the witnesses and agreed that the practice of mentioning powers in the objects clause was partly responsible for the "inordinate length" of many objects clauses.[37] Therefore, the Committee also recommended for providing every company certain common form of specified powers which are necessary for any company in order to pursue its objects.[38]

There would be an advantage in enacting specifically certain powers which a company enjoys in carrying out its business; such a provision will partly remove any doubt that there might be, and partly due to such a provision the memoranda of association, in future, would be drafted in less prolix terms by the omission of many common form powers. The objects clause would be mainly confined to the objects of the company and, therefore, would serve the real purpose of having such a clause in the memorandum.

objects clause of the memorandum were restricted to the real main objects. The general clauses included in an object clause at present really represent powers to be exercised for the carrying out of the main objects of the company, and should be separately designated as such. Consideration might be given to the procedure used in the Newzealand Companies Act of 1955, where the ancillary and incidental objects and powers are set out in Schedule II of the Act, and deemed to be included in every memorandum. (Emphasis added).

36 Memorandum by the Chartered Institute of Secretaries, *Minutes of Evidence*, (vol. II), pp. 810-811.

. . .in the interests of simplification and efficiency, a new measure should contain a schedule, perhaps on the lines of the third Schedule to the Companies Act, 1959 of Tasmania, setting out incidental and ancillary objects and powers which would be statutorily implied....

37 *Report of the Company Law Committee* (1962) Comnd. 1749 para 43.

In the case of many companies the bulk of the provisions contained in the objects clause set out what appear to be powers, such as the power to borrow money or to give guarantees, rather than objects. Many witnesses have criticised this practice, which is partly responsible for the inordinate length of many modern objects clauses....

38 The Committee recommended that:

. . .the Companies Act should be amended to provide that every company should have certain specified powers, except to the extent that they are excluded, expressly or by implication, by its memorandum; such powers being those which any company should normally need in order to pursue its objects.

Report of the Company Law Committee, op.cit. note 37, para 43.

The present trend in many countries is to grant to companies the powers similar to those of a natural person, thus accepting the theory of "general capacities."[39] Section 19 of the *Uniform Companies Act* (adopted by six Australian States)[40] lays down that the powers of a company shall include the power to make patriotic or charitable donations, to aid the Commonwealth in any War in which it is engaged, and all the powers as set out in the Third Schedule (unless they are expressly excluded or modified by the memorandum or articles).[41] The doctrine of *ultra-vires*[42] and the rule of "special capacities" have been abolished in many Commonwealth and European countries,[43] as well as in the United

39 There are two doctrines: General Capacity and Special Capacity. Under the former, it is said that a company can do all acts like a natural person, while according to the latter, companies are allowed to do only those acts which are expressly or impliedly sanctioned by the Act of incorporation. Law regulates the rights and obligations of persons, and divides them into two classes: (1) Natural persons, (2) Artificial persons. Natural persons are human beings of different degrees of capacity. The doctrine of general capacity is applicable to natural persons. On the other hand, the artificial persons are created and devised by the human beings for the purposes of society and government, and they are called companies or corporations (the word used in the United States). These artificial persons are regulated by the doctrine of special capacity. For detailed discussion of the two doctrines, see Pollock, *Law of Contracts*, (Ch. 2) 90-114 (1950). See generally, S. Nath, "Sources of Borrowing Power of Companies in India and the United States," 9 *J.I.L.I.* 184-204, at 185, (1967).

40 *The Statutes of New South Wales Companies*, 1961.

41 The third schedule lists the following powers: To carry on any other business which may conveniently be carried on; to acquire and undertake similar business; to acquire patent copyrights, etc.; to amalgamate with another similar company; to invest in other companies; to enter into agreements with Government, Municipal, etc.; authorities; to establish funds benefitting employees etc.; to promote another company to take over the company; to purchase real and personal property; or construct buildings, work, etc.; to deal with moneys not immediately required; to lend guarantee, loans etc.; to borrow money; to renumerate persons for services rendered; to draw, make, endorse, etc., bills, cheques, etc.; to sell or dispose of the undertakings of the company; to advertise the company and its products; to apply for charters, licenses, etc.; to obtain any statement etc.; to procure registration of the company outside the State; to sell, improve, manage lease, etc., the property of the company; to allot fully or partly paid up shares in payment of real or personal property; to distribute the property of the company among members; to do all such other things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the company.

42 Propounded by Lord Cairns in *Ashbury Railway Carriage Co.* v. *Riche*, (1875) L. R. 7 H. L. 653. See discussion *infra* pp. 90-93.

43 See, Final Report of the Commission of Enquiry into the Workings and Administration of the Present Company Law of Ghana, Appendix 1, (1961); *Draft Companies Code Bill* section 24 states:

Except to the extent that the company's Regulations otherwise provide, every company registered after the commencement of this Code, and every existing company

States,[44] by the statute of incorporations. The doctrine applies only as between the company and its members; outsiders dealing with the company are not affected by it.

In the United States, the issue that the powers should not be mentioned in the objects/purpose clause has been settled in almost all the States. Statutes of all the States[45] grant to corporations certain general powers which usually need to be spelled out in the Articles of Incorporation.[46] Where the statutes grant broad powers, there is no requirement that they should be restated in the Articles of Incorporation. The Model Business

which, pursuant to Section 19 of the Code, adopts Regulations in lieu of its memorandum and articles of association shall have, for the furtherance of its objects and of any business carried on by it and authorised in its regulations, all the powers *of a natural person of full capacity.* (Emphasis added).

Ghana Companies Code, 1963, s. 24.

See, *New Zealand Companies Act*, section 16; *Tasmania Companies Act*, (1959), Third Schedule; See also N.C. Chaterjee, "*Commonwealth Company Law.*" *Comp. L. J.* 61-89 (1965).

44 See, *Model Business Corporation Act Annotated* s. 6, (1960), which abolishes the doctrine of *ultra vires* partially and restricts its application to only between the company and its members. The Model Act, and the proposed New York Corporation law recently introduced, provide that no act of a corporation which is otherwise lawful shall be invalid by reason of the fact that the corporation was without corporate powers. Nevertheless, the validity of that act can be attacked in three different ways; a shareholder may bring an action against the corporation to enjoin the doing of the Act; an action may be brought against an officer or a director for loss or damage due to the performance of the illegal act; and in a special proceeding the Attorney General can bring an action to annul the corporation, if it performs such acts for which it is not authorised to perform. The law of *ultra vires* is not of as much importance as once it was. See also *Ghana Companies Code*, 1963; see *Report of Cohen Committee* (1945), (Comd. 6659), para 12, which recommended that a company should have as regards third parties the same powers as an individual but that an objects clause should continue to operate as a contract between the company and its members as to the powers exercisable by the directors. The recommendation was not accepted in the U.K. It was made easier for companies to change their objects which made the protection of shareholders still more illusory. On the other hand it does nothing to protect third parties from pitfalls as recent case has strikingly revealed: *Re John Beauforte Ltd.* (1957) Ch. 131. See discussion *infra*, at 90 *et seq.*

45 The statutes of all jurisdictions 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; (1) General powers, and (2) SpecialPowers. Special powers are expressly limited to corporate purposes whereas the other is not so limited. See Statutes of *Pennsylvania* and *Navada*.

46 The memorandum of association is called as "articles of incorporation" in the United States.

Corporation Act has also made one provision stating the general powers of each corporation.[47]

It is, therefore, submitted that the recommendation of the Jenkins Committee should be accepted in England. In India, as well, the Companies Act of 1956 should be amended accordingly.

Multipurpose or All-purpose Objects Clause

The tendency to draft the "multipurpose" or "all-purpose" objects clause in the memorandum of association has nullified the use of such a clause in the memorandum of a company. As pointed above, one of the reasons for having an objects clause in the memorandum is that the intending corporators (and when the company has been incorporated the shareholders) may know the field in which they are going to invest the money.[48] The intention of the legislature was that a company's objects should be mentioned in only one or two paragraphs. This has been made clear by the objects clause of the model forms of memorandum in Tables B, C, D and E,[49] which have remained unchanged.

It is a matter of discussion for practitioners in India and England, as well as in the United States, as to how long the objects clause should be. It is the contention of certain experts in corporate draftsmanship[50] that the best type of objects clause consists of one short general statement—a brief, but elementary clause. They believe that the expression of additional specific statements of objects limits the generality of the general statements of objects.[51] But there are other experts in draftsmanship who lean

47 *Model Business Corporation Act Annotated*, s. 4 (1960): General Powers. Alaska, Colorado, Illinois, Iowa, Missouri, North Dakota, Oregon, Pennsylvania, Texas, Virginia, Utah, Wyoming and Mississippi, Nebraska and South Carolina, with minor changes, have enacted the provision of the Model Act.

48 *Ashbury Railway Carriage Co.*, v. *Riche*, (1875) L. R. 7 H. L. 653.

49 (*Indian*) *Companies Act*, 1956, Sehedule I.

50 See, Pantzer and O'Neal, *The Drafting of Corporate Charters and By Law*, American Law Institute, 29, (1951).

51 They observed: "Thus, in the case of a department store, they would consider it sufficient to state the purpose as follows:....'To engage in a general manufacturing and mercantile business.' These Draftsmen also believe it is unnecessary to report in the charters any of the powers authorised by the Act. It is intersting, therefore, to note that although the charter of Marshall Field & Company...originally contained the Single Purpose Clause, "to manufacture and deal in merchandise and other property of every nature and description" the clause had to be amended in 1945 in order to cover the rendition of services, the transfer of real property, and the execution of improvements thereon....Pantzer and O'Neal, *op. cit.* note 50, at 29.

habitually towards the multiple purpose/objects clause.[52] Today, memoranda contain statements of some twenty, thirty, or perhaps more (as there is no limit on it by the statute), objects and ancillary objects, thus covering every conceivable business, as well as the incidental powers which might be needed to accomplish them.

A question may well be asked: then what is the function served by such objects clause of the modern corporate memoranda? It is true that such clauses may be good for the benefits of the third parties, as the likelihood of the contracts entered into between the company and the third parties being *ultra-vires*—and thus void—is remote.[53] But, on the other hand, it is also certain that such clauses afford very little protection to investors.[54] The basic principle that a company incorporated under the Companies Act cannot effectively do any thing beyond the powers expressly or impliedly conferred upon it by its memorandum was adopted for the protection of investors and creditors. The universality of a modern objects clause, nonetheless, effectively goes against the spirits and intentions of the foregoing principles. The practical difficulties that a modern 'objects clause' creates are that (*a*) it is very difficult to get any clear picture of a company's true field of activity by the perusal of its memorandum; (*b*) time and thought may have to be devoted to the relatively unproductive task of deciding whether some newly contemplated activity on the part of the company is within its objects clause, or if not, whether and how the objects clause should be altered; (*c*) the interests of the third parties may be prejudiced and the company may be placed in serious difficulty if the objects clause is transgressed; (*d*) practically every type of business can be contemplated under the present 'objects clause,' and (*e*) the investors are helpless when they find their capital being invested in some other unconnected

52 "....Still other experts in draftsmanship lean habitually towards the Multiple Purpose Clause. To them it makes no difference that the corporation is being formed for the purpose of conducting a merchandising establishment. At its very inception, such practitioners contemplate that the corporation may desire at some time in the distant future to engage in the air plane manufacturing business; to buy and sell securities as a trade;...and many other completely unallied activities. Consequently they chart the Shareholders' Contract, in so far as it affects Purposes, with very broad strokes," Pantzer and O'Neal, *op. cit.* note 50, at 29.
See also Worthy, Filing Corporation Papers in Illinois, 37 *Ill. Bar Journal* 412 (1949), Ballantine, *Corporations*, 222-224.

53 See Hornstein, "Legal Controls for Intracorporate Abuse" 41 *Columbia Law Review*, 405, 409; *Report of the Company Law Committee*, (Comd. 1749), (1962), para 43.

54 The greater need is to protect investors. Creditors have many other remedies under common law. See *infra* note 55.

business; they have no check or control over the management in the case of the diversification of objects.

There is a greater need for protecting the interests of shareholders than those of third parties (i.e. creditors, etc.), as the latter have many other equitable remedies in the case of an *ultra vires* transaction.[55] However, the present type of "universal" objects clause gives no protection to investors under modern conditions, and far from protecting may even damage the interests of creditors and shareholders. The protection of the shareholders is largely—to use the words of the Cohen Committee—"an illusory"[56] one.

Doctrine of Ultra Vires

It would not be out of place to examine briefly why the draftsmen of memoranda have adopted the practice of having a multi-purpose clause or such a lengthy objects clause in the memorandum of association. One of the reasons was the existence of the doctrine of *ultra vires*, propounded by Lord Cairns in the celebrated case of *Ashbury Railway Carriage Co.* v. *Riche*.[57] Although at common law a company has the same legal capacity

55 The courts in India and England have allowed the lender to recover on the basis of the equitable principle "benefit had and received" *Re Cine Industries & Recording Co.*, 44 Bom. L. R. 34; *T. R. Pratt (Bombay) Ltd.* v. *E. D. Sassoon & Co.*, AIR 1936 Bom. 62; *Balasarswathi Ltd.* v. *Parmeshwar Aiyar*, (1956) Com. Cas. 298; *Calcutta National Bank Ltd.* v. *Sonapur Tea Co.* (1957) Com. Cas. 289; *Pratt (Bombay) Ltd.* v. *N. C. Ltd.* (1940) Bom. L. R. 1109 (P. C.); *Equity Insurance Co.* v. *Dinshaw & Co.* AIR 1940 Oudh 202; *Laxmi Rattan Cotton Mills Co. Ltd.* v. *J. K. Jute Mills Co. Ltd.*, AIR 1957 All. 311; *Reid* v. *Rigley & Co.* (1894) 2 Q.B. 40; Halsbury, *Laws of England* (3rd Ed.) Vol. 6, s. 603. The other remedies are given on the doctrines of "Subrogation," "Implied" or "Quasi" contract. Many times remedy of recovery is awarded on the contract itself, for instance where the shareholders ratify transactions, or where the objects clause has been altered, or where the shareholders are estopped on some other grounds, such as indoor management, apparent authority, inherent agency power, laches, etc. There are very few cases where the creditors have to lose their money, unless they have not acted in good faith.

56 *Report of the Committee on Company Law Amendment.* Cmd. 6659, Para 12, (1945) provides:

Had memoranda of association closely followed the forms in the First Schedule to the Act, this protection might have been real, but, partly with a view to obviating the necessity of applying to the Court for confirmation of an alteration of objects, a practice has grown up of drafting memoranda of association very widely and at great length so as to enable the company to engage in any form of activity in which it might conceivably at some later date wish to engage and so as to confer on it all ancillary powers which it might conceivably require in connection with such activities. In consequence the doctrine of *Ultra vires* is an illusory protection for the shareholders....

57 (1875) L. R. 7 H. L. 653.

as a human being,[58] since a registered company is an artificial being incorporated for the stated objects, it has only powers to carry out such objects (together with anything ancillary thereto)[59] which are mentioned in its charter.[60]

The view of their Lordships in the *Ashbury's case*[61] was that the company registered under the Act of 1862 (now of 1948) was not to be regarded as a common law corporation endowed with full powers, but it should be regarded as a statutory corporation endowed with only limited powers. Lord Chancellor Cairns held that the subscribers 'are to state the objects for which the proposed company is to be established and the existence of the company is for those objects only.'[62] The result is that any act done, or any contract made by the company, which goes beyond the memorandum or which is not explicitly or implicitly warranted by it, is *ultra vires* (beyond the powers) not only of the directors but of the company itself.[63] The consequence is that such an act or contract is wholly void and inoperative in law, and will not, therefore, be binding on the company.

The Supreme Court of India in *Dr. A. Lakshamanswami Mudaliar* v. *Life Insurance Corporation of India*,[64] which appears to be its first decision

58 *Case of Sutton's Hospital*, (1612) 10 Co. Rep. 1a, 23a.

59 *Attorney General* v. *G. E. Rly.*, (1880) 5 App. Cas. 473.

60 A company which owes its incorporation to a statutory authority, cannot effectively do anything beyond the powers expressly or impliedly conferred upon it by its statute or memorandum of association. Any purported activity beyond the authorisation will be void even if agreed to by all the members. Per Cairns L. C. in *Ashbury Railway Carriage Co.* v. *Riche* (1875) L. R. 7 H. L. 653 (667). Sometimes this is called the theory of "special Capacity." See *supra* note 39.

In many countries, for instance, Ghana, New Zealand, Liberia, Tasmania, France, Australia and the United States, doctrine of "general capacity" is applied to companies. In England, too, the Cohen Committee recommended for the adoption of the doctrine of "general capacity."

61 (1875) L. R. 7 H. L. 653.

62 (1875) L. R. 7 H. L. 653, 669-670.

63 The present tendency is to restrict the application of the doctrine only between the company and its members. The acts are only considered as beyond the powers of the directors. Although the Cohen Committee recommended for such restriction—"We think that every company, whether incorporated before or after the passing of a new Companies Act, should notwithstanding any thing omitted from its memorandum of association, have as regards third parties the same powers as an individual. Existing provisions in memoranda as regards the powers of companies and any like provisions in memoranda in future should operate solely as a contract between a company and its shareholders as to the powers exercisable by the directors"—the recommendation was not accepted by the then Government in the United Kingdom (Cmnd. 6659).

64 A.I.R. 1963 S. C. 1185.

on the question of *ultra vires* acts of companies, affirmed the well known principles, and thereby lent greater authority upon them. The principles which the Supreme Court upheld were:

> A company was competent to carry out its objects specified in the Memorandum of Association but could not travel beyond those objects.[65] Where a company did an act which was outside those objects, such an act was ultra vires and no legal relationship or effect flowed therefrom. Such an act was absolutely void and could not be ratified even by *all* the shareholders.[66] The power to carry out an object undoubtedly included the power to carry out what was incidental or conducive to the attainment of that object because such extension merely permitted something to be done which was helpful in the attainment of that object.[67] But this extended power must have a reasonably proximate connection with that object, and some indirect or remote benefit which the company might obtain by doing an act not otherwise within the objects clause would not be permitted by this extension.[68] The articles of association might only explain the memorandum but could not extend its scope.[69]

The above quoted paragraph of the judgment is a good summary of the rules regarding the doctrine of *ultra vires*.[70] As pointed out in the above case, the court applied the principle of ultra vires liberally, i.e., it held that a company is not only competent to carry out its object specified in its memorandum, but also to carry out what was incidental or conducive to the attainment of that object.[71] In England also, the principle laid down in *Ashbury* v. *Riche*[72] was given a greater elasticity by the rule laid

65 *Id.* at 1190.

66 *Id.* at 1192.

67 *Id.* at 1190.

68 *Id.* at 1191.

69 *Ibid.* (para 14).

70 See *Jahangir Rustamji Modi* v. *Shamji Ladhar*, (1866-67) 4 Bom. H.C.R. 185 decided by Sargent J.; *The Port Canning Co. Case*, (1871) & Bengal Law Report (P.C.) 583, decided by Pheer J.; *Kathiawar Trading Co.* v. *Vir Chand Dipchand*, (1894) 18 Bom. 119; *The Imperial Bank of India* v. *Bengal National Bank*, AIR 1930 Calcutta 536, decided by Costello J.; *Ahmed Sait* v. *The Bank of Mysore*, (1930) 59 M.L.J.R. 28; *Re Madras Native Permanent Fund Ltd.*, (1931) 60 M.L.J.R. 270; *Wamanlal Chhotalal Parekh* v. *Scindia Steal Navigation Co. Ltd.*, AIR 1944 Bombay 131; S. R. Das, *The Law of Ultra Vires in British India, Tagore Law Lectures*, 1904; P. S. Sangal, "Ultra Vires and Companies; The Indian Experience." 12 *Int. & Comp. L. Q.* 967-988 (1963).

71 *Dr. A. Lakshmanaswami Mudaliar* v. *L.I.C. of India*, A.I.R. 1963 S. C. 1185-1190.

72 (1875) L.R. 7 H.L. 653.

down by Lord Selbourne, L.C.,[73] and the other law Lords, to the effect that the doctrine of *ultra vires* has to be reasonably, and not unreasonably, applied. Whatever is fairly incidental to, or consequential upon, that which is authorised by the memorandum will (unless expressly prohibited) be held to be *intra vires*.[74]

Although the rule of *ultra vires* was applied liberally by the courts in both the countries, India and England, the promoters, persons dealing with the companies and businessmen were reluctant to leave matters as little as possible to interpretation. They preferred to set out in the memorandum the ancillary powers which they thought they would need at a later stage. They did not confine the objects clause to only that business which the company was initially intended to follow, but preferred also to have all the other business which they might start in future. The result is the lengthy, unspecified, uncertain and unlimited objects clause.

Efforts of Judiciary to Check the Practice: The Main Object Rule of Interpretation

The courts, with a view to stop the abuse, sought some standard of interpretation by which the companies could be prevented from having power to do anything by virtue of a lengthy objects clause conferring a universal range of powers on companies. First, they applied the "Main

73 *Attorney-General* v. *Great Eastern Rly. Co.* (1880) 5 App. Cas. 473.

74 *Id.* at 478. The doctrine of *ultra vires* "ought to be reasonably and not unreasonably, understood and applied, and ... whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

For example, a company formed "to buy, sell and deal in coal" may for the purpose of carrying out the stated objects, employ labour, open shops, buy and hire lorries, purchase supplies, borrow and give security, have a banking account, employ agents and pay bonuses and pensions to employees. Palmer, *Company Law*, 80 (20th ed.). Lastly, in *London County Council* v. *Att. Gen.*, (1902) AC 165, Lord Halsbury referring *Ashbury's case* and *Att. Gen.* v. *G. E. Rly. Co.*, *op. cit.* note 73, said :

> I think now it cannot be doubted that these two cases do constitute the law upon the subject. It is impossible to go behind these two cases ; they are now part of the law of this country, and we must acquiesce in them, whether we like them or not.

As a result there is now a considerable body of case law deciding what powers will be implied in the case of a particular type of enterprise. For summary of these cases see Palmer's, *Company Precedents*, 17th ed. Pt. 1, pp. 270 *e iseq.*

See also Sangal, "March on Company Law," *Company Law Journal* 221-28 (1965). S. Nath, *op. cit.* note 39, at 188-196.

Purpose or Object" rule[75] to the construction of the objects clause. According to *Re Haven Gold Mining Co.*,[76] and *Re German Date Coffee Co.*[77] and others,[78] where the objects of a company are expressed in a series of paragraphs, the true rule of construction of the objects clause is to seek for the paragraphs (generally the first) which appear to embody the main or dominant object of the company. The other paragraphs should be treated as merely ancillary to this main object and as limited and controlled thereby. The above rule has been explained by Salmon, J., in a recent case,[79] and has also been opproved in an Indian case, *In Re Akola Electric Supply Corporation (Pvt.) Ltd.*[80] Salmon, J., observed thus :

> Where a memorandum of association expresses the objects of a company in a series of paragraphs, and one paragraph, or the first two or three paragraphs, appear to embody the "main object" of the company, all the other paragraphs are treated as merely ancillary to the "main object" and as limited or controlled thereby. The *principal purpose of this rule is for the protection of shareholders so that they may know how the money they invest is to be used.*[81]

The question arises whether the above method of construction adopted by the courts–for the protection of shareholders–is in fact adequate and practical. It will be interesting to examine how the draftsmen of memoranda have successfully tried to evade this restrictive interpretation of the objects clause.

75 Section 17(1)(b) of the (*Indian*) *Companies Act*, 1956 ; s. 5(1)(b) of the (*English*) *Companies Act*, 1948; enables a company by special resolution to alter the provision of the memorandum with reference to the objects of the company to attain its "main purpose" by new or improved means. The "main purpose" rule is sometimes spoken of, especially in English law, as the "main object" rule.

The "main object" is defined in *North England Zoo* v. *Chester*, (1959) 2 All. E.R. 116, thus :

> To ascertain which of the numerous matters set out in the memorandum comprises its main objects, one has to look at the memorandum and then get evidence as to what in fact have been the main objects : and if there is any doubt, also have reference to what has actually been done.

76 (1882) 20 Ch. D. 151.

77 (1882) 20 Ch. D. 169.

78 This rule was subsequently recognised in *Re Crown Bank*, (1890) 44 Ch. D. 634 ; *Re Amalgamated Syndicates*, (1897) 2 Ch. 600 ; *Re Coolgardia Consol Coal Mines*, (1897) 76 L. T. 269 ; *Stephens v. Mysore Reefs etc.* Co., (1902) 1 Ch. 745.

79 *Anglo-Overseas Ltd.* v. *Green & Others*, (1961) 1 Q. B. 1 (8).

80 (1962) 32 Com. Cas. 215.

81 Emphasis added.

Evasion of such Interpretation

First of all, this rule of construction only applies to such a case where it is possible to find out the main object, and it is also possible to treat the other paragraphs or other objects as ancillary to the main object. This rule may also be excluded or modified by the contents of the document itself. For example, every rule of construction contains by implication the saving clause : "unless a contrary intention appears by the document."[82]

There are also other modes which are occasionally adopted for excluding the artificial rule in discussion. For example, several objects are stated to be independent objects. In some cases, the first few objects are expressed in very wide general terms, and then latter objects are set out after the preamble "without prejudice to the generality of the preceding objects."[83] The other device adopted by the draftsmen for getting rid of this inconvenient and strict rule of construction is to state that each and every object is independent. Usually, the concluding paragraph is in the following form :

> The objects set out in any paragraph of this clause shall not be in any way limited by reference to or inference from the terms of any other paragraph, or by the name of the company. None of such paragraphs or the objects therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary to the main objects mentioned in the paragraph, and each paragraph shall be deemed to contain a separate main object of the company.[84]

In *Stephens v. Mysore Reefs Mining Co.*,[85] for the first time, the learned justice disregarded the presence of such a clause. The ground given was that inasmuch as when applied to one particular paragraph such a concluding paragraph would be nonsense and it could not be held to apply to the other paragraphs. But later on, this decision was overruled in *Cotman v. Brougham.*[86] 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. Although such a paragraph did not stand high in judicial favour and the habit of setting out a profusion of objects as well the declaration itself was severely

82 *Earl of Jersey* v. *Gaurdians of Poor of Neath*, (1889) 22 Q.B.D. 555.

83 Palmer, *Company Prececdents*, (17th ed. Pt. 1), 276.

84 Pennington, *Company Law* 11 (1959).

85 (1902) 1 Ch. 745.

86 (1917) 1 Ch. 477, aff'd by House of Lords, (1918) A.C. 514. See also *Re E. K. Cole Ltd.* (1945) 1 All E.R. 521.

criticised,[87] the device adopted by draftsmen of stating every object clause as an independent clause was held to be effective : the battle was won by the clever and intelligent draftsmen. The whole situation was well summarised in *Cotman v. Brougham*[88] by Lord Parker.[89]

Diversification of Objects

The multipurpose clause also helps the company's management in diversifying its objects. This is a topic which is of anxious interest to company management. In India, the present Government[90] is also intere-

87 *Re John Brown & Co. Ltd.*, (1914) 84 L. J. Ch. 245. In this case the courts refused to approve the alteration of an objects clause by inserting such a paragraph.

88 (1918) App. Cas. 514.

89 To quote the words of Lord Parker :—

> The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company, and who can infer from it the extent of the company's powers. *The narrower the objects expressed in the memorandum the less is the subscriber's risk, but the wider such objects, the greater is the security of those who transact business with the company.* Moreover, experience soon showed that persons who transact business with companies do not like having to depend on inference when the validity of a proposed transaction is in question .... *Thus arose the practice of specifying powers as objects*, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be specified. But, even then, a person proposing to deal with a company could not be absolutely safe, for *powers specified as objects might be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object*, and on this construction no one could be quite certain whether the Court would not hold any proposed transaction to be ultra vires. At any rate, all the surrounding circumstances would require investigation. *Fresh clauses were framed to meet this difficulty, and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects and its clauses designed to prevent any specified object being read as ancillary to some other object.* (Emphasis added). *Cotman* v. *Brougham*, (1918) A.C. 514, 520, 521.

90 See *Sastri Committee Report* (1957) and *Vivian Bose Commission Report*, 1962. That Government were aware of the practice of many companies in this country of starting or carrying on business unconnected with their main business, was pointed out by the then Minister for Revenue and Civil Expenditure, Shri M. C. Shah, who said that the question had several other aspects which should be considered before deciding the issue involved. He said :

> Mr. Asoka Mehta has pointed out a new development in company practice, namely, the establishment of departments or branches of activity by some companies unconnected with their principal business. Governments are fully aware of these developments and they have indeed given some thought to this subject for sometime past. All the considerations which Mr. Asoka Mehta has mentioned have been very much in the mind of the Government; but there are

sted in seeing that a company formed to work in gold mines does not fritter away its energies in running a fried fish shop–to use the felicitous language employed by Professor Gower.[91] The idea is that the activities of companies should be canalised through fruitful channels and they should not become dried up in arid sands of remote objects.

Diversification is advantageous only if the management to whom the opportunity is given is able to turn such diversification to good account. And, conceivably, uncertain management may do more harm fumbling with the affairs of a varied group which it does not understand than trying to cope with a single business on which it can concentrate all its efforts. A management which decides to manufacture textile goods, presumably, knows what it is about, but there is no such guarantee when it noses its

other aspects of the question which also have to be carefully considered by the Governments before they can take any action in the matter. While the Governments are anxious that no company should be empowered to indulge in activities unconnected with its main business only with a view to make more money, they are also anxious to ensure that no action of theirs impedes the expansion of legitimate investments: (*Lok Sabha Debates* of 25-8-1955, Vol. VI, No. 24 Col. 11222).

Shri Asoka Mehta pointed out that by keeping the objects clause too wide, the companies could expand their activities in widely different and diverse lines. For example, a textile mill could also set up a soda ash or a jute mill, might start a cement factory. Such a development besides giving rise to bad accounting practices would lead to concentration of industries in a few hands. Shri Mehta explained his views on the 'objects clause' in the following words:

It has been pointed out by the Stock Exchange, Bombay, in its memorandum to the Bhabha Committee that the objects clause is generally so wide as to cover every thing under the sun. We are all aware that that is the normal practice. In order that the company later on may have no difficulty in developing any kind of activity, the object clause is as wide or as prolix as possible, as the Cohen Committee has pointed out. In England, the Cohen Committee wanted that kind of flexibility should even be increased than what it is today and therefore that committee suggested that the provision of *ultra vires* should be deleted, which was not agreed to by the Parliament.

We do not want that a small group or a little group or a chain circle should have a kind of oligarchic control over our industrial life. But if you permit the objectives to remain as prolix as they are today, then what you are seeking to achieve through other clauses may be defeated by this clause.

I find that there is a certain amount of basic contradiction between the poolixity of objectives that is permitted, the composite units that are growing up in the country, and the basic desire of all of us to see that concentration of wealth and control is increasingly reduced and some approximation to equality of opportunities is made in our industrial life.

(Lok Sabha, 25-8-1955, Vide *Debates*, Vol. VI, No. 24 Cols. 11201-05).

91 Gower, *op. cit. supra* note 26, at 84 (2nd ed.).

way into shoes business. 'One can of course say that Guinness did a shrewd deal when it bought itself into confectionery,' but he can only say it because Guinness had proved itself fully equal to the management problem. Unfortunately, there is no way of gauging that capacity in advance.[92]

The reasons for the diversification were outlined thus: First, the anxiety of the promoters and directors to hedge against fluctuations should the business aimed at first subsequently become impossible. Second, the availability of managerial talent or funds which the company's management cannot, or does not wish to, employ in its main business but which it is unwilling to return to the shareholders. Third, the desire of the management to avoid the restrictions placed by the companies on the number of directorships and managing agency which can be held by them. Fourth, the desire to enjoy the benefits of development rebate and the depreciation allowances as well as the exemptions available under the law of Income tax. Fifth, it is also customary to make the objects and purposes of a company's memorandum as wide as possible in order to obviate applications to the court when some new venture is contemplated.[93]

Thus, diversification can lead to misuse of the company's resources into hazards not intended or realised by shareholders when they first invested their money. Moreover, where the objects clause is very widely worded, a company can legally hop from one business to another mentioned in it, and the shareholders will be helpless spectators even if such seeking of new fields and pastures is not beneficial to them. Where the memorandum is somewhat rigid, the company cannot embark on some new business without altering its memorandum and getting the court's confirmation to such alteration (only in India).[94] In a recent case, the

92 As pointed out in Investors Chronicle, 10th September, 1960, there ought to be two strings attached to diversification—approval of shareholders before hand, and a separate account of stewardship afterwards. Without these, one is bound to look warily at claims made on behalf of the mystery of management. It will be observed that in India, the requirement of shareholder's consent has been accepted and a provision has been made by the latest Companies Amendment Act, 1965; discussed *infra* notes 125 & 126, at 100-101. See also Rao, "Diversification of Objects," *6 Company Law Journal* 37-42 (1965).

93 *II Company News and Notes No. 7, at* 43.

94 For Alteration of Objects clause and Diversification, S. 17 of (*Indian*) *Companies Act*, 1956; and *In re Standard General Assurance Co. Ltd.*, AIR 1965 Cal. 16; *In re Ambala Electric Supply Co., Ltd.* (1958) 28 Com. Cas. 122; *Modi Spinning & Weaving Mills, Ltd.* (1963) 33 Com. Cas. 901; *In re New Asiatic Insurance Co., Ltd.* (1965) 2 Comp. L. J. 24; *In re Dalmia Cement (Bharat) Ltd.*, (1964) 2 Comp. L. J. 63 and *Re Parent Tyre Co. Ltd.* (1923) 2 Ch. 222.

Bombay High Court considered the discretion of a court exercised while confirming the alteration, and the views expressed in the judgment are apposite.[95]

The Company Law Committee[96] (on whose recommendations the present Indian Companies Act, 1956, is mainly based) realised the widespread practice of diversifying the objects and on this point it also made certain valuable comments. In its report, it was stated that:

> Several witnesses complained to us that companies incorporated ostensibly for the purpose of manufacturing cotton textiles were engaged in the making of acids, chemicals, sugar, vegetable ghee, etc., while companies formed for the manufacture of sugar were manufacturing industrial solvents, photographic chemicals, etc., and argued that it was highly improper that the resources of the companies should be thus invested in undertakings which had so little to do with the principal business for which they had been formed. Merely because many objects form part of a memorandum, there is no reason why the shareholders should be regarded as having acquiesced in authorising the directors to undertake activities which are completely removed from the main object of the company.[97]

Proper Way of Stating Objects

Although the Bhabha Committee made observations regarding lengthy and multipurpose objects clause in the memorandum of a company, the Committee did not make any straight forward recommendation for the

95 *In re Indo-Pharma Pharmaceutical Works Pvt., Ltd.*, (1968) 38 Comp. Cas. 313. Confirmation of the alteration of the objects specified in the memorandum is a discretionary order, as Chagla, C.J., has observed in the said decision....(*Jayantilal Ranchoodas Koticha* v. *Tata Iron and Steel Co. Ltd.*, (1957) 27 Comp. Cas. 604), even if the conditions laid down in section 17. . .are satisfied. That discretion is, no doubt, a judicial discretion, but it has to be exercised on the facts of each case, and the exercise of it is not a matter that can be governed by judicial decisions. Though it is primarily for the company to decide what is for its good and whether the alteration sought to be effected will enable it to carry on its business more efficiently within the terms of section 17(1) (*a*), the court may, in exercising its discretion have regard to considerations of business morality or national interests. In my opinion, however, those considerations should not prevent me from sanctioning the alteration of the objects in the present case, which is a case of a private company in the nature of a small family concern or a quasi partnership. (at 313-314).

96 The Committee was constituted by the Government of India in 1950 to consider the necessary amendment in the (Indian) Companies Act, 1913, as amended by Act XXII of 1936. It submitted its report on 29th February, 1952.

97 *Bhabha Committee Report* (India) para. 33 p. 28 (1952).

solution of the problem. The proper way of stating objects seems to be that the statement of objects should be clear, so that persons dealing with the company may know the real object of the company. In the words of Capoor, J., the statement of objects "must not be too vague, too general, and too wide for, in that case, it will defeat its very purpose and object."[98] In order to avoid generality, uncertainty and ambiguity, it is not permissible in law to have one solitary clause, "the company will carry on all kinds of business," without stating what the kinds of business are.[99]

This limitation, however, does not mean, as pointed out by the learned justice in the *Calcutta Case*,[100] that the memorandum has to be without any flexibility. He was of the opinion that the great liberty of language and aspiration can be accorded to memorandum of association in stating its objects so long as they give reasonable information and indication of the business the company intends to carry on.[101] The next consideration is that the objects stated should be those which the company intends to carry out in the near and foreseeable future. They should not be too remote to be carried out in a remote future, mere possibilities in some distant and uncertain time. All this is in the best interest of the company and, ultimately, for the protection of shareholders. The interests of shareholders can thus be protected against the directors who embark upon spurious and doubtful business and squander the company's trading funds under the cover of vague and ambiguous objects clauses in the memorandum, and whom the shareholders might otherwise find difficult to control, or manage, by reason of the operation of the whip of majority[102] which directors will normally be expected to enjoy by way of obtaining proxies supporting their own views.

Steps Taken by Various Committees in India

In this connection, it was suggested to the Company Law Committee (India) that in the memorandum of association the principal as well as the incidental and ancillary objects should be distinctly mentioned. Although at that time[103] the Committee did not accept the suggestion, its observations on the matter are significant:

98 *In the matter of Bhutoria Brothers (Pvt.) Ltd.*, A.I.R. 1957, Cal. 593, 597.

99 "To carry on any business that the company might think profitable" will not be accepted: *Re Crown Bank* (1890) 44 Ch. D. 634.

100 *In the matter of Bhutoria Brothers (Pvt.) Ltd.*, *op. cit. supra* note 98.

101 *Id.* at 597.

102 Rule in *Foss* v. *Harbottle* (1843) 2 Hare. 461.

103 The Company Law Committee submitted its report in 1952, and the present Companies Act was enacted in 1956. Thus, we do not find in the Act of 1956, any such provision.

While there was general agreement among us that it was neither in the interest of shareholders nor of creditors that companies should take all conceivable powers in their memorandum to transact this or that business, we found it difficult to devise a working formula under which restrictions could be imposed on their powers to do so, without introducing an element of rigidity into their constitution that might, on occasions, seriously prejudice their interests or impede their efficient working and the growth of industries. In this connection we considered the practicability of distinguishing between the principal and the incidental and ancillary business of a company on the lines of Ss. 7 and 14 of the Canadian Companies Act, 1934. While we fully appreciated in theory that a reasonably tenable case could be made out for this distinction, and in many cases it might provide a useful safeguard against the illegitimate extension of a company's activities, we were unable to find any practicable method by which this distinction could be generally enforced.[104]

While considering the difficulties and disadvantages of such classification of the objects mentioned in the objects clause, the Committee further observed :

Even if some practical method could be devised, we doubt very much whether it should be followed in the existing circumstances. The difficulty arises from the fact that, while in some cases it may be possible to distinguish between the principal and ancillary business of a company with sufficient precision to enable effective legal provisons to be made on the basis of this distinction, it is extremely difficult, if not impossible, to do so in all cases. Besides, even if it were possible to draw a sharp line between these two types of businesses, it may well be that in many cases, the seemingly incidental or ancillary objects of a company are as important as its principal objects, and in that case there would be hardly any justification for treating the two objects differently.[105]

Although in its report, the Committee agreed that there was a necessity for some type of amendment, it confessed that it was very difficult to devise any working formula. The Committee seemed to be reluctant to make any recommendation in this regard. On the lines of the report of the Cohen

104 *Op. cit. supra* note 97 para 33, at 28-29 (1952).
105 *Ibid.*

Committee[106] and Section 5 of the English Companies Act, 1948,[107] some relaxation in the existing provisions of the Indian Act was also suggested, but the Committee did not think that such a relaxation was either necessary or desirable. It also said that it did not favour any intervention in the matter either by the Central Government or by the proposed Central Authority.[108] The Committee left the whole matter to the responsible judgment of the management and the periodical vigilance of shareholders. The Committee hoped that the general result of other recommendations, made by it, might be to instil a greater sense of responsibility in directors and managing agents and to create a greater degree of alertness on the part of the shareholders.[109]

106 *Report of the Committee on Company Law Amendment* (*London*), (Cmd. 6659) paras 11 and 12. (1945).

107 *Companies Act*, 1948 (11 & 12 Geo. 6 Ch. 38) S. 5. Alteration of the objects clause is allowed without court's prior confirmation.

108 *Op. cit. supra*. note 97, at 29.

109 There was also heated debate in the Lok Sabha (The Lower House of the Parliament) on this subject. Many members were in favour of the classification of objects to safeguard the interests of shareholders from the activities of management.
The classification of objects into principal business and auxiliary business was stressed by Mr. M. S. GURUPADASWAMY in the following words :

Regarding the point about the principal and auxiliary purposes for which a company has been incorporated, I may point out that it is very necessary to keep this distinction very clear. Now-a-days, many companies include all sorts of things, from A to Z, in their memorandum of association...It is quite legitimate on their part to include all those things. But the present difficulty has arisen in this way, that we have not been able, in certain cases, to distinguish what is a principal business and what is a subordinate or subsidiary business of a company. Sometimes the subsidiary or auxiliary business takes the form of the principal business, and the principal type of business will be subordinate to the auxiliary business. So this has led to a lot of confusion. I would suggest that with a view to have proper clarity, it would be desirable to bring about a distinction between the principal type of business and the subsidiary type of business. The Bhabha Committee has, of course, dealt with this question, but it has not been able to come to any conclusion. It has not suggested any solution for this. It has simply made an observation that in certain cases, some companies have extended their activities. It felt that it would be very difficult to find a practical solution. But I feel *it would be better*, when we are amending the company law comprehensively, *to find some solution, and we must incorporate a clause to bring about a distinction between the two, to safeguard the interests of shareholders from the activities of the management* who, normally, are always tempted to extend the activities of the company to cover various things. *So from the point of view of shareholders, it is highly imperative and desirable that we should incorporate a clause preventing the management, the board of directors or managing agents, whoever they*

Nevertheless, the Committee was not very optimistic when it left the whole matter to the responsible judgment of the management. It also foresaw the possibility that the present situation might continue to exist without any change or modification. Therefore, it also suggested that the Government might later on take precautionary measures to check the evil. It stated:

> If, however, our expectations in this regard are belied and the managements of companies continue to indulge in activities only very remotely connected with their principal business, we recommend that Government should take stock of the situation and introduce such legislation as may be necessary to check the evil. For the present, we do not think that the evil is either so serious or widespread as to call for immediate action.[110]

It seems that the Committee underestimated the evils. In spite of the sincere appeal made by the Company Law Committee, the businessmen continued with their usual practices of having a multi-purpose objects clause, diversification of objects, etc. The hopes expressed by the Committee never became a reality.

The complaint that the objects clause of the memorandum very often includes several activities wholly unrelated to the main business for which a company is promoted still exists. Recently, the Research Bureau of the Economic Times conducted a survey by examining the prospectus of a number of companies floated recently to find out how often vague and ambiguous objects were included in the objects clause and how often activities totally unrelated to the main objects were included in it. The results of the study should not be overlooked and should be given proper consideration.[111] From this survey it seems that the practice of framing vague and ambiguous objects clause is so serious and widespread[112] that it is almost incurable without any interference by the legislature.

are, from extending the scope of the company's activities to an illegitimate extent without the knowledge of the shareholders. (Emphasis added).

(Lok Sabha *Debates of* 25-8-1955 Vol. VI, No. 24, Cols. 11198-99).

But neither any provision in the Act was made, nor any improvment in the usual practice was seen as was anticipated by the Bhabha Committee. Therefore, as will be seen below, the present Government was compelled to interfere and recently an amendment was made in this regard.

110 *Op. cit. supra* note 97, at 29-30.

111 "Objects Clauses of Companies—A Critical Examination," *Economic Times*, (India), 20-11-1964, at 5.

112 Contrary to the expectations of the Bhabha Committee, see *supra* p. 95.

Legislative 'Prescriptions' provided by the Companies (Amendment) Act, 1965

At last, the attention of the legislature was drawn to the wide-spread disease and to the existing inconsistency in the law. Recently, a Commission[113] was set up to enquire into the affairs and activities of a certain group of companies, and it made valuable recommendations which were long-awaited.[114]

A public company, under investigation by the Commission, was incorporated primarily for the purposes of carrying on an Airline business, although it was found later on that there was never any serious intention to do such business. The reason for floating the company in that form was that "at the particular time, airline business was very much in the public eye and there was a big demand for shares in such companies." This object was given dominance in the object clause, but the actual business of the company which it intended to pursue, namely "business in all types of surplus motor vehicles and spare parts left by the American fighting forces in India," was mentioned in one of the objects in a subsidiary omnibus clause. "No-one could have imagined by a simple statement in the memorandum that the main business was that of dealing in motor vehicles and spare parts involving an outlay of almost Rupees Six Crores (approximately £ 5,00,000), and the principal business was merely to be a small sideshow with an investment of about Rupees 22 lakh only (approximately 4%)." In order that the innocent investors should not be misled in this way, and often financially ruined, the Commission (on a balanced consideration) made the following recommendations which were based on the provisions of company law of Canada:

(i) The Act should be suitably amended to provide that every company shall clearly state its purpose under two separate categories, viz.,

(*a*) the principal and ancillary objects which the company intends at the time of its incorporation to pursue, and

113 The Commission was appointed on 11-12-56. Its report was submitted on 15-6-62 and its recommendations on 31-10-62. It was placed before the two Houses of Parliament on 23-1-63. The publication of the Report has made a history as never before in India such a detailed and thorough study in the affairs of a group of companies was made. The significance of the Report is all the more greater, for as *Commerce* has stated in its issue of March 16th, 1963, "It is going to leave a permanent imprint upon the Company Law of our country."

114 *Report of the Vivian Bose Commission (India)* (1962).

(*b*) all other objects which are separate from those mentioned in (*a*) above.

(ii) A provision should be made in the Act to the effect that a company shall not engage itself in any activities coming within the scope of clause (*b*) unless such activities are sanctioned by a special resolution of the company in general meeting.[115]

On the basis of the foregoing recommendations, section 13 (1) (*c*)[116] was amended in 1965 and the new clause stated:

(*c*) in the case of a company in existence immediately before the commencement of the Companies (Amendment), Act, 1965, the objects of the company;

(*d*) in the case of a company formed after such commencement,

(i) the main objects of the company to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects;

(ii) other objects of the company not included in sub-clause (i); and

(*e*) in the case of companies (other than trading corporations), with object not confined to one State, the States to whose territories the objects extend.

It should be noticed that according to the amended section companies are divided into two classes: (i) Companies in existence immediately before the commencement of the Amendment Act, and (ii) companies formed after such commencement. The recommendations of the Commission regarding the division of the objects clause was only accepted for the companies which would be formed after the commencement of the Act. The companies which were already in existence at that time were not affected by this amendment.[117]

115 This provision was made with a view to exercise a check on companies which seek to diversify their activities into wholly unconnected lines of business, and to give a say to the shareholders before the company can start such business. Many persons in England, too, have advocated for such shareholders' approval. See *Investors Chronical*, 10th Sept. 1960; Memorandum of the Association of *Investors Trusts, Minutes of Evidence*—Jenkins Committee, Vol. 10, 6-1-1961, p. 727; Memorandum by Clore, *Minutes of Evidence*, Vol. 8, (dated 25-11-60), p. 548

116 The section 13(1) (*c*) of the Act 1956, (before the amendment), ran as follows:
(*c*) the objects of the company, and except in the case of trading corporations, the State or States to whose territories the objects extend.

117 The reasons given by the Joint Committee for such exclusion were as follows:
It was represented to the Committee that if the existing companies were also to be required to re-draft their object clauses, then that would require the passing

THE FOLLOWING CONSIDERATIONS ARE MATERIAL IN THIS CONNECTION

(i) Since no limit is proposed to be put, how many objects a company can have?

The only result of the above new provision will be that new companies will pack their memoranda with numerous "main" objects. The amendment does not solve the problem of having a lengthy and multipurpose objects clause.[118] It also does not purport to interfere with the *Cotman* v. *Brougham*[119] rule of interpretation of memorandum discussed earlier.[120]

(ii) What would be the legal nature of the objects mentioned in the amended section 13 (*d*) (ii)?[121] They are neither main objects, nor they are incidental or ancillary to the main objects. Will not they be independent clauses completely unrelated to the main objects? Will there be any limitations or restrictions imposed on such objects? Does the amendment not indirectly grant the legislative recognition to the device invented by the draftsmen to evade the strict rule of interpretation as has been observed earlier?[122] The answer seems to be in the affirmative. It does not seem that the evil of having multipurpose or lengthy object clauses would be cured or stopped by the proposed amendment. The only visible change will be that the objects would be mentioned clearly in a proper and better form divided into two categories, no matter how many objects in number there are.

Further, what would be rules of construction for such an objects clause?

(iii) It appears that only those objects should be stated as main objects of the company which are to be pursued by the company on its

of special resolution under the Act, which would involve tremendous time and effort not commensurate with the results intended. The Committee, therefore, feel that this clause should be amended to provide that the provisions of existing clause (*c*) of section 13 of the Act should continue to apply to Companies (Amendment) Act, 1965 and the provisions of the proposed new clause requiring the division of objects, into (i) main objects and objects ancillary thereto, and (ii) other objects should apply only to new companies.

Published in the *Gazette of India* (Extra-ordinary), Part II Section 2 (dated 21st September, 1964).

118 The practice which has frustrated the whole purpose of having objects clause in the memorandum of association—See discussion *supra*, Multipurpose or All-purpose Clause, pp. 81 to 83.

119 (1918) A. C. 514.

120 See *supra* discussion "Evasion of Such Interpretation," pp. 88-89.

121 "Other objects of the company not included in sub-clause (i)." For full text of the provision, see *supra*, p. 98

122 See *supra*. The practice of stating in the end that 'evry sub-clause is an independent clause.'—*Cotman* v. *Brougham*, (1918) A. C. 514.

incorporation. If that is the true interpretation of the clause, then what happens if a company having a number of main objects (which is most likely to happen as there is no limit) does not pursue a few of them ? Will the remedy of winding up under section 433 of the Companies Act, 1956,[123] be granted on the ground that, having failed the main or paramount object of the company, the substratum has gone and thus the company must be wound up ?

(iv) Further, the amendment does not solve the problem of an existing company having a memorandum already registered. Would it not be a discrimination between two classes of companies ?[124] Would it not be unjust or unreasonable to allow the old companies to enjoy the benefits and advantages derived by their own wrongful acts ?

The changes, which purport to exercise a check on companies which seek to diversify their activities into totally unconnected lines of business without prior approval of shareholders, are quite satisfactory and thus appreciated. In this regard, the amended provision of Section 149 provides that if an existing company commences any new business which is not germane to its existing business which it was carrying on at the commencement of the Companies Amendment Act, 1965, it can do so only with the sanction of a special resolution or an ordinary resolution plus the approval of the Company Law Board.[125] The above provision also applies to a company, formed after such commencement, if it commences any business in relation to any of the objects stated in its memorandum in pursuance of clause (*d*) of sub-section (1) of Section 13. In both cases a duly verified declaration by a director or secretary regarding compliance with the condition of shareholders' approval has to be filed with the Registrar. The amended provision also imposes a penal liability over every person who is responsible for the contravention of such requirements.[126]

123 (*Indian*) *Companies Act*, 1956, Ss. 433, 439 : (*English*) *Companies Act*, 1948, Ss. 222, 224.

124 Can the new companies challange the present amendment as *ultra vires* the Constitution of India as it discriminates between two classes of companies under Article 14 ? The answer seems to be no, as the Supreme Court of India has decided that the company is not a "citizen" and thus cannot claim for fundamental rights protected under the Constitution of India. *Tata Engineering & Locomotive Co.* v. *State of Bihar*, AIR 1965 SC 40. Moreover, this would be treated as 'resonable' classification.

125 This amendment was inserted in section 149 of the Companies Act, 1956. The provision regarding the approval of the Company Law Board was added by the Joint Committee.

126 The following new provisions have been added by the Companies (Amendment) Act, 1965, after Section 149 (2):

SUGGESTIONS

The following suggestions are put forward to cure the defects of framing an excessively lengthy objects clause, most of the paragraphs of which are in a stereotyped form and vary little whatever may be the business which the company was really formed to carry on, and which are framed mainly to shorn most of the terrors of *ultra vires* rules.

(i) Although the classification of objects into different categories puts a check on the activities of directors regarding diversification,

(2-A) Without prejudice to the provisions of sub-section (1) and sub-section (2), a company having a share capital, whether or not it has issued a prospectus inviting the public to subscribe for its shares, shall not at any time commence any business—

(*a*) If such company is a company in existence immediately before the commencement of the Companies (Amendment) Act, 1965, in relation to any of the objects stated in its memorandum in pursuance of clause (*c*) of sub-section (1) of section 13 ;

(*b*) If such company is a company formed after such commencement, in relation to any of the objects stated in its memorandum in pursuance of sub-clause (ii) of clause (*d*) of sub-section (1) of the said section, unless—

(i) the company has approved of the commencement of any such business by a special resolution passed in that behalf by it in general meeting ; and

(ii) there has been filed with the Registrar a duly verified declaration by one of the directors or the secretary, in the prescribed form that clause (i) or as the case may be, sub-section (2B) has been complied with ;

and if the company commences any such business in contravention of this sub-section, every person who is responsible for the contravention shall, without prejudice to any other liability, be punishable with fine which may extend to five hundred rupees for every day during which the contravention continues.

Explanation—A company shall be deemed to commence any business within the meaning of clause (*a*) if and only if it commences any new business which is not germane to the business which it is carrying on at the commencement of the Companies (Amendment) Act, 1965, in relation to any of the objects referred to in the said clause.

(2-B) Notwithstanding anything contained in sub-clause (2-A) where no such special resolution as is referred to in that sub-section is passed but the votes cast (whether on a show of hands, or as the case may be, on a poll) in favour of the proposal to commence any business contained in the resolution moved in that general meeting (including the casting vote, if any, of the chairman) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, exceed the votes, if any, cast against the proposal by members so entitled and voting, the Company Law Board may on an application made to it by the Board of directors in this behalf allow the company to commence such business as if the proposal had been passed by a special resolution by the company in general meeting.

This section, (2-B) gives very wide discretionary power to the Company Law Board. There should be some guiding principles for the Board to act in this matter.

all problems[127] connected with the present type of objects clause are not solved. The problems raised by such an amendment, as pointed out above, should also be clarified and solved.

(ii) The Act should also state the rule of construction for such an objects clause in which a number of main and number of other objects are mentioned, and every object seems to be an independent main object of the company.

(iii) While interpreting such an objects clause, strict rules of interpretation (the main object rule of interpretation may be the right one) should be applied, and the interests of the prospective investors and the shareholders should always be kept in mind. The rule, enunciated in *Cotman v. Brougham*,[128] of interpreting every sub-clause as an independent one, should be abrogated.

(iv) There should be some sort of check or limit on the number of main objects which 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.

(v) 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 Company Law Board may prescribe certain guide-lines for the Registrar, and the Board should be made approachable by the promoters in case a Registrar refuses the registration of any memorandum.[129]

127 See *supra* pp. 99-100.

128 (1918) A. C. 514; see *supra* pp. 88-89.

129 One of the witnesses who submitted his evidence before the Jenkins Committee advocated for such power. He said:

> ...the company's objects should be specifically stated and the doctrine which permits each sub-clause of the memorandum of association to be separately construed should be abrogated. The Registrar of Companies could refuse to register any company's memorandum whose objects clauses are not specific or which are too wide. It could then be made statutory that any change in the objects must first be approved by a special resolution of the company and the amended objects still be acceptable to the Registrar of Companies as if they were part of the memorandum of association as originally lodged. This would prevent the business of a company being radically changed without the knowledge and consent of the shareholders.

(Memorandum by Mr. Charles Clore—a practitioner in Company Law Minutes of Evidence, Vol. 8, 25-11-1960, (Jenkins Committee) p. 548.

The Council of Association of Stock Exchange suggested in its memorandum (submitted to the Company Law Committee in England) thus:

(vi) Some common and necessary powers should be granted to every company by the Act itself. Provisions adopted in the Australian States or the United States may serve as model for this purpose.[130]

(vii) A company may be granted all the powers which a natural person has, and the theory of general capacity should be accepted. However, the company should be governed by the theory of general capacity only in cases of transactions with outsiders, i.e., third parties. For shareholders and the Board of directors, a company 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 common-wealth countries, the United States, and has been recommended by the Cohen and Jenkins Committees in England.[131]

(viii) 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 the articles should be applied to them.

If all the above-mentioned suggestions are written into law, only then the true purpose of having an objects clause in the memorandum of association of a company, as mentioned by the judiciary and contemplated

> From the Stock Exchange point of view, it is important that the nature of the company's business should be known to investors....We believe that the investor should know the nature of the business in which his money is invested and that the best safeguard for this principle would be a more strict insistence of conformity to the principal objects clause of the company's memorandum of association...we recommend an increase in, or a more vigorous use of, the powers of the Board of Trade to enforce compliance with the principal objects clause and prevention of the power to endow the companies with a plethora of unrelated objects all stated as principal objects. It is possible that one way to achieve this would be to magnify the significance of the principal objects by relating all the remainder to a statutory table similar to Table A for articles of associations.

(Memorandum by the Council of Association of Stock Exchanges, *Minutes of Evidence*, Jenkins Committee, Vol. 8, 25-11-1960).

130 See *supra*. pp. 78 & 79 and notes 40, 41 & 45.

131 As suggested by the Cohen Committee and the Jenkins Committee in England: *Report of the Cohen Committee*, Cmnd. 6659, para 12, *Report of the Jenkins Committee*, Cmnd. 1749, 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: See *supra* note 63.

by the legislature, will be served. Although the Amending Act of 1965 has given some prescriptions in order to cure the 'disease,' it seems that the Act was enacted hurriedly, probably under some pressure, without considering all relevant possible implications and problems. The position is almost same as it was before the amendment. A reform in the law is, therefore, needed, and further legislation on the lines suggested above is called for.

NOTES AND COMMENTS

INTERPRETATION OF STATUTES—CENTRAL SALES TAX ACT—GOODS INTENDED FOR USE IN MANUFACTURE, PROCESSING OR MINING*

Multiple levy of the same commodity was a common feature in the different State's sales tax legislations prior to 1956 which has always been treated as a hindrance in the national industrial & economic growth. This levy, as we find, was of two types—in one case, as the goods change as many hands as a result of sales it was taxed till its consumption & in another case, when a particular commodity was purchased for use in the manufacture of another commodity it was first taxed in the shape of raw materials, processing materials, & secondly in the shape of finished product (when sold...). Keeping this in view and at the recommendations of the Taxation Enquiry Commission, the Central Sales Tax Act, 1956, has been enacted by the Parliament. Section 8 of the Act,[1] which provides for the rates of tax on

---

* This paper is a part of the author's Research Methodology in LL.M. VI Term (Under Ordinance 7A) of the Law School, Banaras Hindu University. The author wishes to express his deep debt to Professor C. D. Sands (the Visiting Professor in Law 1967—68) whose valuable suggestions encouraged the preparation of this paper.

1 Relevant portions of Section 8, Central Sales Tax Act, 1956, read as under :

Rates of tax on sales in the course of inter-State trade or commerce—

(1) Every dealer, who in the course of inter-State trade or commerce—

(a) sells to the Government any goods ; or

(b) sells to a registered dealer other than the Government goods of the description referred to in sub-section (3), shall be liable to pay tax under this Act, which shall be (three per cent) of his turnover.

(2) The tax payable by any dealer on his turnover in so far as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade or commerce not falling within sub-section (1)—

(a) in the case of declared goods, shall be calculated at the rate applicable to the sale or purchase of such goods inside the appropriate State ; and

(b) in the case of goods other than declared goods, shall be calculated at the rate of (ten per cent) or at the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever is higher ;

and for the purpose of making any such calculation any such dealer shall be deemed to be a dealer liable to pay tax under the sales tax law of the approrpriate State, notwithstanding that he, in fact, may not be so liable under that law.

(3) The goods referred to in clause (b) of sub-section (1)—

* * *

sales in the course of inter-State trade or commerce, treats certain commodities concessionally and has classified them under rule 13, Central Sales Tax (Registration & Turnover) Rules, 1957,[2] as far as possible.

For providing this benefit of concessional treatment of tax in respect of sales effected in the course of inter-State trade or commerce to a dealer, the Act, under Section 7[3] read with rr. 3 to 8 of the Central Sales Tax (Regi-

(b) . . . are goods of the class or classes specified in the certificate of registration of registered dealer purchasing the goods as being intended for re-sale by him or subject to any rules made by the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power ;

2 *Infra* noted.

3 Registration of dealers—

(1) Every dealer liable to pay tax under this Act shall, within such time as may be prescribed for the purpose, make an application for registration under this Act to such authority in the appropriate State as the Central Government may, by general or special order, specify, and every such application shall contain such particulars as may be prescribed.

(2) Any dealer liable to pay tax under the sales tax law of the appropriate State, or where there is no such law in force in the appropriate State or any part thereof, any dealer having a place of business in that State or part, as the case may be, may, notwithstanding that he is not liable to pay tax under this Act, apply for registration under this Act to the authority referred to in sub-section (1), and every such application shall contain such particulars as may be prescribed. Explanation—For the purposes of this sub-section, a dealer shall be deemed to be liable to pay tax under the sales tax law of the appropriate State notwithstanding that under such law a sale or purchase made by him is exempt from tax or a refund or rebate of tax is admissible in respect thereof.

(3) If the authority to whom an application under sub-section (1) or sub-section (2) is made is satisfied that the application is in conformity with the provisions of this Act and the rules made thereunder, he shall register the applicant and grant to him a certificate of registration in the prescribed form which shall specify the classes of goods for the purposes of sub-section (1) of section 8.

(4) A certificate of registration granted under this section may—

(a) either on the application of the dealer to whom it has been granted, or, where no such application has been made, after due notice to the dealer, be amended by the authority granting it if he is satisfied that by reason of the registered dealer having changed the name, place or nature of his business or the class or classes of goods in which he carries on business or for any other reason the certificate of registration granted to him requires to be amended; or

(b) be cancelled by the authority granting it where he is satisfied that the dealer to whom it has been granted has ceased to carry on business or has ceased to exist, or in the case of a dealer registered under sub—section (2), has ceased to be liable to pay tax under the sales-tax law of the appropriate State or for any other sufficient reason.

stration & Turnover) Rules, 1957,[4] has prescribed the procedure of registration of the dealer under the Act. Unless a dealer is registered under this Act, describing the nature of the business, he can't avail the benefit of concessional treatment in respect of purchases made by him,[5] and further this benefit of concessional treatment is awarded only in respect of those items of goods which have already been included in the certificate of Registration of the purchasing dealer.[6] The reason for requiring such inclusion under the certificate of registration is to enable the sellers to judge whether the purchaser's claim to the reduced tax rates are valid. In the administration of the Act, the Sales Tax Officer has authority to approve or disapprove items on the list of goods to be purchased for business use, which a dealer submits for registration. And the phrase "goods as being intended for use... in the manufacture or procession of goods for sale or in mining...." used in section 8(3)(*b*) of the Act has been interpreted by the judiciary in such a way as creating a confusion in the minds of the dealers as to what are those intended goods to be used in a particular manufacturing or mining process as indicated by the Legislature. Such type of controversy arose in one of the cases decided by the Supreme Court of India, namely, *Indra Singh & Sons (Pvt.) Ltd. v. S.T.O. ; Rajgarh.*[7] In this case the appellant company, carrying on the business of mining coal and trading in coal & coke, filed an application for a registration certificate for the business of "wholly mining & wholesale distributors of coal mainly" and listed a number of items which it proposed to purchase for business use. As finally amended, the list included, *inter-alia*, motor-trucks, spare parts for motor trucks

(5) A registered dealer may apply in the prescribed manner not later than six months before the end of a year to the authority which granted his certificate of registration for the cancellation of such registration, and the authority shall, unless the dealer is liable to pay tax under this Act, cancel the registration accordingly, and where he does so, the cancellation shall take effect from the end of the year.

4 See R. V. Patel, *The Central Sales-Tax Act*, Second ed., Part III pp. 1—3.

5 Sub-section (4) of section 8 of the Central Sales Tax Act, 1956, provides as under :

The provisions of sub-section (1) shall not apply to any sale in the course of inter-State trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner—

(a) a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority ; or

(b) if the goods are sold to the Government, not being a registered dealer, a certificate in the prescribed form duly filled and signed by a duly authorised officer of the Government.

6 See Cls. (*b*) (*c*) & (*d*) of sub-section (3) of S. 8 of the Act.

7 (1966) 17 S.T.C. 510 (S.C.).

including tyres and tubes, sanitary fittings, and medicines. The Sales Tax Officer refused to approve those items on the list and the Commissioner of Sales Tax upheld the order of the Sales Tax Officer. On appeal the appellant contended that they should have been included because they were necessary for the conduct of the business. With respect to motor-trucks and spare-parts for motor trucks including tyres and tubes it was contended that they were required for transporting coal to the nearest railway loading point. With regard to sanitary fittings and medical supplies the basis of the appellant's claim was that they were required by government regulations. The Supreme Court of India dismissed the appeal, thereby upholding the order of the Sales Tax Officer, and held that only those goods should be included under the registration certificate which would be "used in mining" as distinguished from those which would facilitate, or be necessary for the conduct of the mining business.

The Act extends eligibility for the reduced tax rate to purchases by a registered dealer of goods that are "intended for resale by him or subject to any rules made by the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power."[8] A rule[9] under the Act provides further that the reduced rate shall apply to "goods intended for use by a dealer as raw materials, processing materials, machinery, plant, equipment, tools, stores. spare parts, accessories, fuel or lubricants in the manufacture or processing of goods for sale, or in mining or in the generation or distribution of electricity or any other form of power."

The appellant company in the instant case was registered only for the business of mining and wholesale distribution of coal. Thus there is no question in this case about the scope of the concessional tax rate for goods to be used in manufacturing or the generation or distribution of electrical or other power, and the only way a claim could be based on the language extending the concessional rate to goods purchased for use in "processing of goods for sale" would be to claim that wholesale distribution is a form of processing. Although a warrantably assertable argument could be made that distribution is a form of processing in an economic sense, no serious claim to this effect appears to have been advanced either in this case or elsewhere. The only remaining issue in *Indra Singh's case*,[10] therefore, is whether the items

8 S. 8 (3) (*b*), Central Sales Tax Act, 1956.

9 Rule 13, Central Sales Tax (Registration & Turnover) Rules, 1957.

10 *Supra op. cit.* note 7.

in question were used "in mining," as those words are used in the Act and in the Central Sales Tax Rule.

There is authority to support different views as to the meaning of the statutory conception of using goods "in" mining, manufacture, processing for sale, or generation or distribution of power. According to one view, a thing must be either consumed or employed directly in the process of transforming raw materials into finished products before it can be said that they are used "in" the process. The other view permits the preposition "in" to be read as "for" and extends the concessional rate to items which are essential for carrying on the business, or without which the economic production in question would not be possible. This view was supported by *Commissioner of Sales Tax v. Ajay Printing Pvt. Ltd.*[11] and *J. K. Cotton Spinning and Weaving Co. Ltd.* v. *Sales Tax Officer, Kanpur.*[12] The narrower view has been thought to find support in contract interpretation, as where the expression "for use in the execution of the contract" was interpreted to mean that the use should be such that would bodily go into the construction work itself. This was supported by *Kalinga Construction Co.* v. Collector *of Sales Tax*[13] and *J. K. Cotton Spinning and Weaving Co.* v. *Sales Tax Officer*[14]

Something in the nature of an intermediate position between the alternate views which have been described above was taken by the Supreme Court of India in a case where it approved the reduced tax rate for vehicles and accessories used to transport ore from a mine to a place of storage which was maintained in connection with a factory which was owned and operated by the same company, which was registered as being engaged in both the mining and manufacturing businesses. But that same case also refused to approve the lower tax rate for hospital equipment even though the mine could not be operated without it because such equipment was required by law, whereas laboratory equipment used for analysis of ore samples was approved for the lower rate. *Indian Copper Corporation* v. *Commissioner of Commercial Tax, Bihar.*[15]

In one case, the Supreme Court noted that a thing did not have to "be an ingredient of the finished goods" in order to qualify for the lower tax rate, and gave as the example electrical equipment, as for lighting and to

11 (1964) Gujrat, (unreported).

12 (1965) 16 S.T.C. 563, 570 (S.C.).

13 (1962) 13 S.T.C. 225 (Orissa).

14 (1964) 15 S.T.C. 711 (U.P.) overruled by the S.C. at (1965) 16 S.T.C. 563=A.I.R. 1965 S.C. 1310.

15 (1965) 16 S.T.C. 259. (S.C.).

operate fans and dehumidifiers without which, "...having regard to normal conditions prevalent in the industry, production of the finished goods would be difficult..."[16]

It is submitted that these cases demonstrate that the attempt to distinguish between goods which are used "in" mining or processing and those which are essential for the successful conduct of such businesses are unrealistic. They illustrate the unwisdom of trying to deal with economic considerations by means of terminology which connotes essentially physical considerations or characteristics. In the principal case the Court indicated that equipment which transports coal from the mine to a warehouse would be used "in" the mining operation, whereas equipment which transports the coal to a siding at a railway station would not. Perhaps the distinction rested on an implicit assumption that the warehouse would be situated as close as practical to the mine but this was not stated, and if that is to be regarded as essential for claiming the reduced tax rate, application of the rule requires courts to review delicate business judgments about what is the closest practical location for a warehouse. Unless that is done, however, the distinction provides a simple basis for gaining the benefit of the reduced rate in a case like the principal one, i.e. by establishing a warehouse adjacent to the rail siding.

The evident purpose underlying the provision for a reduced sales tax rate on goods purchased for use in certain kinds of businesses is to encourage investment and stimulate activity in those businesses, as well as perhaps to reduce costs so that prices of those products will be less to consumers. Although the extent to which that policy can be pursued depends on how it is balanced against the need of the State for revenues, there is no rhyme nor reason to striking that balance at the line which differentiates between things that are used "in" the business and those which are essential to it. Indeed, making eligibility for the reduced tax rate depend on physical considerations is so irrational that one suspects the statutory language which makes the reduced rate depend on whether a thing is purchased for use "in" a business operation was chosen without foreseeing the kind of problem that is illustrated by the principal case and without any purpose to establish the distinction which this case embraces.

If the policy of encouraging and stimulating business activity by tax concessions on purchases of things for business use is a valid one, there

16 *Snpra op. cit.* note 12, at 570.

is no logical reason to differentiate between *kinds* of business uses. If revenues would be too greatly impaired by giving the reduction from 10% to 3% on *all* purchases for business use, a more sensible way to balance the competing policies of procuring revenue and encouraging business, instead of restricting the tax saving to purchases for the *kind* of business use which can be said to be "in" the business, would be to reduce the amount of tax saving by raising the tax rate on such purchases from 3% to 4% or 5%, for example, while at the same time allowing *all* business purchases to share in the benefits.

Since the ineptness of the statutory way of defining what purchases are entitled to the favorable tax rate has thus come to light, it would be a good thing if the Sales Tax Act were amended by inserting the words "ways that are reasonably essential for the effective conduct of" between the words "in" and "the manufacture processing or mining." Without such an amendment, however, the Supreme Court could resolve the problem by construing the words "use in the manufacture..." as embodying an conomic conception instead of a physical one.

LACHHAMAN PRASAD GUPTA*

---

* Student of LL.M. Class.

operate fans and dehumidifiers without which, "...having regard to normal conditions prevalent in the industry, production of the finished goods would be difficult..."[16]

It is submitted that these cases demonstrate that the attempt to distinguish between goods which are used "in" mining or processing and those which are essential for the successful conduct of such businesses are unrealistic. They illustrate the unwisdom of trying to deal with economic considerations by means of terminology which connotes essentially physical considerations or characteristics. In the principal case the Court indicated that equipment which transports coal from the mine to a warehouse would be used "in" the mining operation, whereas equipment which transports the coal to a siding at a railway station would not. Perhaps the distinction rested on an implicit assumption that the warehouse would be situated as close as practical to the mine but this was not stated, and if that is to be regarded as essential for claiming the reduced tax rate, application of the rule requires courts to review delicate business judgments about what is the closest practical location for a warehouse. Unless that is done, however, the distinction provides a simple basis for gaining the benefit of the reduced rate in a case like the principal one, i.e. by establishing a warehouse adjacent to the rail siding.

The evident purpose underlying the provision for a reduced sales tax rate on goods purchased for use in certain kinds of businesses is to encourage investment and stimulate activity in those businesses, as well as perhaps to reduce costs so that prices of those products will be less to consumers. Although the extent to which that policy can be pursued depends on how it is balanced against the need of the State for revenues, there is no rhyme nor reason to striking that balance at the line which differentiates between things that are used "in" the business and those which are essential to it. Indeed, making eligibility for the reduced tax rate depend on physical considerations is so irrational that one suspects the statutory language which makes the reduced rate depend on whether a thing is purchased for use "in" a business operation was chosen without foreseeing the kind of problem that is illustrated by the principal case and without any purpose to establish the distinction which this case embraces.

If the policy of encouraging and stimulating business activity by tax concessions on purchases of things for business use is a valid one, there

16 *Snpra op. cit.* note 12, at 570.

is no logical reason to differentiate between *kinds* of business uses. If revenues would be too greatly impaired by giving the reduction from 10% to 3% on *all* purchases for business use, a more sensible way to balance the competing policies of procuring revenue and encouraging business, instead of restricting the tax saving to purchases for the *kind* of business use which can be said to be "in" the business, would be to reduce the amount of tax saving by raising the tax rate on such purchases from 3% to 4% or 5%, for example, while at the same time allowing *all* business purchases to share in the benefits.

Since the ineptness of the statutory way of defining what purchases are entitled to the favorable tax rate has thus come to light, it would be a good thing if the Sales Tax Act were amended by inserting the words "ways that are reasonably essential for the effective conduct of" between the words "in" and "the manufacture processing or mining." Without such an amendment, however, the Supreme Court could resolve the problem by construing the words "use in the manufacture..." as embodying an conomic conception instead of a physical one.

LACHHAMAN PRASAD GUPTA*

---

* Student of LL.M. Class.

REFLEXIONS ON INDIAN LEGAL EDUCATION

It has been my valued privilege to spend the past year as a visiting professor in the College of Law, Banaras Hindu University, assisting in a development program which it has undertaken for the declared purpose of improving legal education in India. Besides teaching three courses, I have conducted programmed discussions of problems of legal education with the Banaras teaching staff. I have also visited during the year at a number of other law schools and had many conversations about legal education with law teachers and interested persons around India. My observations and reflexions from a year of attention to the subject of Indian legal education are shared here, not with any presumption that I have been able to discover truths which have remained hidden from others but for whatever of value Indian law teachers and law school administrators may find in knowing how their operations look to one outsider.

Most of the full-time, career law teachers whom I have met in India are quite impressive for their scholarly sophistication. My relationships with them have been professionally rewarding as well as personally gratifying. Although I have heard the charge from Indian sources that mostly it is only second or third rate law graduates who become law teachers, I am inclined to discount this heavily as the kind of self-serving generalization which comes easy from persons outside legal education, based on the assumption that since financial rewards may be greater in law practice nobody would become a teaher if he thought he could succeed in practice. My own observations convince me, however, that here as in my country other motivational factors besides prospects of economic rewards figure significantly in the choice of law teaching as a full-time career. I do not believe legal education in India suffers for want of talent among its full-time law teachers, although it would be a good thing if there were more full-time teachers instead of the high proportion of part-time teachers presently being used in Indian law schools.

The thing which I have noticed most about Indian law teachers is what appears to me to be a difference in the predominant conception concerning the role of a teacher from that to which I have been accustomed. I believe the main characteristic of the self-image held by many law teachers here is simply that of a scholar, which is a term that is regarded as more or less synonymous with teacher. Consistent with that image, the teacher's role

is conceived to be that of learning as much as possible about his subject, after which students are expected to come and sit at his feet, much as disciples at the feet of a guru, to hear him tell them what he knows. Without meaning to disparage scholarship and knowledge, I submit that there is more to the role and responsibility of a teacher than merely that of a combination scholar and reporter.

I suggest that a more useful and effective way to think of a teacher's job is as a learner's helper. Certainly of course, knowledge of his subject is an essential element in the equipage needed in order to be most helpful to students who want to learn about it. But there are other things a teacher can do to get students to learn than to recite for them what they should know. With some students or under some circumstances other things which the teacher might do may be a more effective way to bring about the desired result. For example, students may learn more under some circumstances or on some subjects if they can be inspired, induced, seduced, or goaded into searching out information from original sources for themselves, by observing pertinent phenomena as in a laboratory exercise or demonstration, or by examining reports or recorded views of others, than by being told what findings and conclusions the scholar-teacher has arrived at by those methods. There is often special merit in this method of learning with respect to law because, being concerned with human relationships, legal knowledge is less susceptible to reduction by the scholar to demonstrably "right" information than is perhaps the case in what are known as exact sciences.

It is a mistake to emphasize the process of transmitting information, among the functions of the teacher, to the disregard or neglect of such important functions as the cultivation of insights, understanding, perception, reasoning ability, forensic skill, and so on. This is not of course a necessary consequence of the "scholar" conception of the role of a teacher, since received and recited knowledge can pertain to intellectual insights, abilities, and skills. But I believe teachers who think of themselves primarily as scholars do in fact concern themselves mostly with information about substantive doctrine. Perhaps this is because insights, abilities, and skills do not lend themselves to being "taught" and learned so well by recited precept as by observation and practice.

In other words, the main point of the difference between the "scholar" and the "learner's helper" conceptions of the role of a law teacher is that the former is less while the latter is more conducive to rationalizing aims and methods for the educational enterprise. The "scholar" type is apt

to take for granted that the only significant end to be served in legal education is that of transmitting information about what the "law" is, or about received doctrine. On the face of it, at least, a most obvious and natutal way to serve that end is by telling students the legal rules and precepts. The "learner's-helper" type, on the other hand, is more apt to recognize a wide variety of other things which need to be learned besides substantive doctrine. Because insights, abilities, and skills are not so easily learned by listening to descriptions and instructions, the teacher who is consciously concerned with them is more apt to think about alternative methods for pursuing those objectives.

Equally as noticeable to an outsider as the predominant conception of the role of a teacher, although related to it, are differences in the predominant conception of law. I believe most law teachers as well as practising lawyers and laymen here think of law primarily as a system of doctrine embodying the rules and precepts which govern the affairs and relationships of people. The idea of law as a process for validating acceptable answers to legal problems does not appear to be prominent among legal educators in India. The implications of the difference between conceptions of law as doctrine and law as process, in legal education, are that if law is thought of as doctrine the educational system will tend to concern itself mostly with transfer of information about doctrine and is less likely to give substantial attention to other considerations and factors which are involved in the processes of translating values in to rules and norms and of applying them to resolve conflicts of interest.

Thinking of law mainly as doctrine also not infrequently leads to a great deal of abstract verbalism in legal commentary, whether oral or written, and tends to cause questions concerning operational meanings and consequences to be neglected. Much of the discussion which I have witnessed on the part of both law teachers and law students in India has been of the former sort, dwelling on verbalistic niceties and distinctions, and leaving out of account practical questions of what difference the verbal distinctions make in the affairs of people.

Preoccupation with verbalism is also found in the jurisprudence of the courts, inasmuch as judges are themselves products of the system of legal education of which we are speaking. A good example of this approach in legal analysis is furnished by an opinion of the Supreme Court of India in case which involved a question as to whether a businessman was entitled to the benefit of a special reduced sales tax rate on a certain kind of purchase

for business use.* The governing statute provided for less than the usual rate on sales for use "in mining" and in certain other kinds of businesses. The taxpayer, who was engaged in the mining business, claimed the benefit of the more favorable tax rate on trucks, spare parts, and tires purchased for use to transport coal out of the mine and deliver it to a railhead, from where it would be carried to the market by rail. The court denied the taxpayer's claim and held that the regular tax rate applied. This decision was explained on the ground that what trucks do is move goods from one place to another, and that does not fall within the definition of mining. The court's opinion gives no indication that it considered whether an economic approach to the determination of what activities should be included within the definition of mining for the statutory purpose in question, instead of making that determination in terms of description of physical activities, might produce results more compatible with the statutory purpose and policy of encouraging business activity and avoiding multiple taxation.

By contrast, concern about verbalization of doctrine is generally not as great in American legal education. There it is regarded as only one among various objects of knowledge which make up the intellectual competence of a lawyer and are, for that reason, objects of study in law school. The definition of law which is perhaps the most germane to legal education in the United States is one which was provided by American Supreme Court's Justice Oliver Wandell Holmes when he called it a prediction of how a court would actually decide a case. Use of that conception of law directs attention to the fact that other considerations besides verbalizations of doctrine influence decisions, thus de-emphasizing legal doctrine and emphasizing legal process as the object of law study. In some sense the substance of the contrast can be summarized with the observation that in relation to the conception of law as a body of doctrine, India has "law" schools and America has "lawyer" schools.

I believe the prevailing emphasis in Indian law schools on transfer of information about legal rules and doctrines, along with the conception of a teacher as one who expounds his learning to be received by his students, has a direct influence on student's conceptions about the role of authority in law and in education. American law teachers work to disestablish the idea that what is read on the printed page is necessarily true or valid merely because it is given permanence by being enshrined in print. I remind my own students, time and again, that they should not believe anything they

*Indra Singh & Sons (Pvt) Ltd. v. Sales Tax officer, Rajgarh, 17 S.T.C. 510 (S.C.)

see or hear merely on the authority of its source, even if that should be the most prestigeous Supreme Court Justice or jurist,—and especially when I, their teacher, am the source. I make a standing offer to my students that I will give special bonus marks to any student who will show me that I am in error or persuade me to change my views on a point of law or legal process. And I have had gratifying occasions to pay off on that offer.

It has been called to my attention that the historic medium for transfer of knowledge in India is spoken communication, instead of written communication as in the West. The system doubtless has its advantages as well as its disadvantages. I think I have seen evidence, for example, that Indian students are better listeners than are American students. However, I expect that there is something about the inter-personal relationship between teacher and student which inhibits critical student's attitudes towards what is told them on their teacher's authority even more than the psychological influence of the printed page in the West. Teachers in my country often remark how difficult it is to keep students from taking what they find in print uncritically, as ultimate truth, just because of the seeming authority of the printed page. I suspect, however, that spoken transfer of knowledge may be more authoritarian and less conducive to critical and evaluative reception than written transfer, because of inhibitions which attend the personal relationship between teacher and student, and possibly also because in the case of spoken communication the student may be exposed to fewer sources and viewpoints and therefore less possibility for divergence and contradiction. The net effect of the system in India, I believe, is to cultivate and perpetuate an attitude of uncritical acceptance of what has been handed down on authority.

The kind of examination questions to which students are subjected is generally a good index or reflector of the aims and objectives of the educational program in which they are used. Most of the examinations which I have seen in India have appeared to be testing primarily for information about legal rules and doctrine, with marks determined on the basis of how accurately the students are able to recall and recite pertinent rules. American law school examinations, on the other hand, are more often designed more to measure student's understanding as to what factors and considerations are relevant to the process of decision on a point. The most frequently used type of examination question in American law schools is one in which students are given a statement of facts, actual or hypothetical, concerning events and circumstances involved in a legal controversy. The

examinees may be asked one or more kinds of questions concerning the controversy in question. A common form of questions calls for them to assume the role of a judge to decide the controversy and write a legal opinion explaining why they decide it the way they do. Sometimes they may be asked to assume the role of counsel for either the complainant or the defendant and write a memorandum explaining what they would say on behalf of their client in the effort to win his case for him. Or they may be required to comment on a point or a problem as juridical analysts. Multiple answers may even be called for with reference to the same fact situation, written from the standpoint of different successive roles.

In marking answers for questions of this nature, judgment would not be related to an authoritatively "correct" answer. This is in recognition that, however much there *may* be discoverable absolute truths in other disciplines (itself a debatable question) it seems not to be so in a descipline like law where human judgment is such a dominant consideration. It would be of course be possible to evaluate answers in terms of the degree of their conformity to the last official pronouncement of the legal system on the point in issue. Sometimes, however, this would not produce an answer that would come very close to what Holmes called law, i.e. a prediction of how a court would decide the question. In view of the susceptibility of law to change by judicial overruling of prior decisions, applicable as much in the realm of rulings on construction of statutes as where no statute is involved, it is unrealistic to glorify the last official statement of position on a legal point with uncritical acceptance as truth to the entire disregard of other views and positions. When a legal position established in an earlier decision is reversed in a later one, it would be strange, if that problem were posed on an examination, to give credit to a student whose answer conformed to the later ruling and deny credit to a student whose answer conformed to the earlier one, when the earlier court may have been the more prestigeous one and another court in the future might revert to the earlier position.

It is for reasons of this nature that American examiners test not so much for knowledge of currently authoritative rules as for the ability to make a persuasive presentation, based on relevant considerations, in support of a warrantably assertable (instead of "right") solution of a problem. In that way of marking answers, it happens not so infrequently that two students whose answers give diametrically opposite solutions to the legal problem posed in a question may get equal credit for their answers, simply because they both give equally persuasive reasoning based on equally pertinent considerations.

The difference in educational objectives which these examining techniques reflect is perhaps best summarized in what on the face of it appears at first to be a not very meaningful expression, to the effect that American law schools try to teach their students "to think like lawyers." Of course, there is nothing so very different about the way lawyers think from the kind of orderly thinking which others do, except that perhaps the legal profession would like to claim that its member's thinking is always orderly. The process is that of identifying considerations which are pertinent to the solution of a problem, interpreting them, evaluating their significance, relating them to each other, and drawing conclusions from them. The ability or capacity to do these things, along with certain skills with which to communicate effectively the results of thinking, are the main pedagogical objectives, broadly stated, of American legal education.

With respect to the matter of pedagogical methods, I am impressed that Indian law teachers are quite familiar with at least the theoretical literature concerning the wide range of possible methods that can be employed, including lectures, discussions, seminars, tutorials, case method, problem method, and so on. With all of their theoretical awareness, however, it appears to me that in practice most of what goes on in Indian law classes is lecturing in which the teacher tells the students "what the law is," which sometimes amounts to little more than reporting to them what a standard textbook has to say on the subject.

I have found what appears to me to be a considerable amount of misunderstanding about the "case method," which has been so popular in American legal education. Some of this is doubtless the result of confusing terminology. American literature sometimes calls it a "teaching" method. In fact, it is more meaningful to regard it as a method of studying rather than as a method of teaching. The idea is that students should study original sources, or cases, and draw their own conclusions, aided, to be sure, by guidance provided by the teacher in the course of discussion concerning the materials in question after they have been studied by the students. The method is thus essentially a scientific method of eliciting a systematic body of knowledge from the process of observing pertinent phenomena. This is obscured somewhat by the tendency in law to use the word "case" as an ambivalent referent for several different things. Lawyers sometimes use it to refer to a lawsuit, as distinguished from documentary matter relating to a lawsuit, which is all that would ordinarily be capable of being read and studied by students. What students study who are pursuing the case method, on the other hand, are, for the most part, opinions

written by judges to explain why they decide lawsuits as they do. The judge's written opinions, as reflections of their thought processes, are studied much as what goes on in a test tube would be studied by a chemist as a "case in point" with regard to a problem concerning the behaviour of chemical elements. The "case method" of law study is best understood if the word "case" is understood to refer to any "legal phenomenon" (or congeries of phenomena) which may be the object of scientific observation and examination. Although legislative enactments, expressions of jurists, and so on, may be cases in point in this sense, judicial opinions embodying accounts of the working of the legal process in particular instances is a most fruitful source of understanding about a legal system in which explanations of decisions are preserved. Although the decisional component or source of law may not be quite as prominent in India as in the United States, here as there it is an especially convenient source to study if for no other reason than that concrete applications of law in the affairs of men are much more interesting than abstractions and generalizations, which give the law its reputation for being a "dry" subject.

It is a monumental waste of student's time and effort to ask them to study cases for the purpose, as so often seems to be the impression, merely to discover felicitous judicial verbalizations of rules and doctrines. That way of doing only compels students to do the hard way what could be done very much easier by having teachers extract the kernels from the chaff and present them to the students in concentrated and neatly arranged form, in either lectures or textbooks, for convenient memorization. The point of having student's study cases is to enable them to learn additional things, including skills of observation and analysis, beyond simply what the opinion says, in order to understand what goes on in the process of making legal decisions, by analyzing the best evidence available with respect to selected examples of its exercise, i.e., judicial statements which aim to explain and justify their decisions.

Although either conception of law, as doctrine or as process, can be taught by any teaching method, it seems evident that lectures are more conducive to an authoritarian and doctrinaire conception than is true of the discussion method. Lectures can of course take the form of demonstrations of the process of analyzing and synthesizing legal phenomena such as judicial decisions and opinions, and some of this doubtless is done in lectures. But I believe it is an observable fact that lectures about law tend most often to dwell on abstractions. Likewise, a discussion can be

devoted to articulation, arrangement, and projection of doctrine. But, as previously noted, it is generally easier to maintain interest of participants in a discussion which is concerned with concrete problems in the affairs of men (the subject of law) than when it deals with abstractions of principle and doctrine.

My point is simply that, for the reasons noted, the lecture method of teaching has a tendency to direct the thinking of its participants along abstract and theoretical lines and is conducive to preoccupation about doctrine and about its internal consistency as a logical system. The other side of the point, equally significant, is that teaching by the discussion method, particularly when discussion relates to concrete legal controversies and problems, is conducive to recognition and awareness of the relevance of many other considerations besides doctrine in the legal process.

A related point is that what is learned has richer meaning if it comes as a product of independent though on the part of the learner. This is a major presupposition of the adaptation of scientific method to the kind of quasi laboratory exercise which we call the case method of law study, to which the discussion method of using contact time between teacher and students is associated. When knowledge has been distilled from original data by someone else and organized and presented in neatly packaged form, whether orally or in writing, the recipient is apt to "learn" little else besides the verbalization, without much understanding of its operational meanings in relation to practical problems. This refers to the tendency of students, which is so often deplored, to learn by rote, so that they can recite answers "parrot" fashion, without finding out what the sounds and symbols they have learned mean. The idea of spending class time on discussion of cases which have been studied, or "examined," by both the teacher and the students is that for most people discussion is the best mechanism to stimulate thinking and provides the best assurance that the most pertinent aspects of the matter under study will be thought about, since two or more heads are generally better than one.

There are reasons why India should be naturally receptive to the case method of law study and the discussion, or "Socratic," method of teaching, since I am told that important examples in India's epic literature, which is so widely studied and shared, take the form of "cases" wherein opposing or competing attitudes and values are the subject of dialogue and debate between contending hero figures. With a popular tradition of learning about life and about good and evil through the study of classic

examples of life's problems, it should not seem strange to study law by examining and discussing examples.

It seems evident that the opposing conceptions of law as doctrine and law as process, which are so largely the functions of opposing approaches and methods in teaching law, produce different professional attitudes and behavior on the part of lawyers. Where doctrine is emphasized, lawyers are apt to think of their role primarily as that of maintaining the unchanging purity of received doctrine through changing times and circumstances. As conservators of learned doctrine, they can be expected to exert a conservative influence in the affairs of society. Where process is emphasized, on the other hand, they are more apt to conceive their role to be that of using legal processes to validate decisions and actions in light of all pertinent knowledge including newly discovered insights as well as old wisdom preserved in established doctrine. This corresponds, in turn,to a difference in how the role of law in society is conceived. The difference is between law which determines, by applying received precepts, what needs of people and soceity will be served and that which operates as a validating process to serve soceity's needs. These are the differences, in short, which are often spoken of in terms of a contrast between a dynamic and a static legal system. It seems superfluous to point out which kind of a legal system is most needed to serve the urgent ends of rapid national development. The educational methods of examination, reflection, and discourse which have been commended here are precisely the methods of "liberal" education, in that they cultivate skills of original thinking and problem solving in lieu of the precise transfer of a "strict" body of received knowledge.

I have the opinion that curriculum content in Indian law schools is sometimes not very relevant to India's problems and needs, perhaps because of insufficient selectivity and adaptivity in borrowing from the instructional programs of English and American law schools. I would nevertheless not by any means assume to prescribe what exactly should be taught or by what specific methods they should be taught in Indian law schools. What I do propose is the urgent importance of greatly increased attention by Indian law teachers to questions concerning (1) what to teach, including what kinds of capabilities are needed for most effective participation in legal processes, as well as areas of substantive and adjective doctrine, (2) what methods would be most effective to get the students to learn the various kinds of things which they should know in order to be effective lawyers, and (3) what conditions and facilities are needed for the enterprise.

In other words I am recommending that instead of assuming that restatement of knowledge is all that is involved in the educational process, Indian law teachers should devote a great deal of attention and effort to rationalizing the aims and methods of legal education *for India.*

Although I have evangelized about the virtues of American methods of legal education, I would not close without remarking that I am certain Indian law teachers should not emulate American methods in exact detail, and that Indian solutions would normally represent adaptations of American methods and methods from other countries as well as those which are indigenous. Differences in these respects are indicated, for example, by the greater prominence of statutes in the Indian legal system and by the fact that Indians make less of the distinction between "legal" imperatives and those which are derived from religion or morals than do most western people. Until it becomes feasible, moreover, for Indian law students to be supplied with materials which they can read prior to class meetings, other ways must be relied upon to furnish students information to think and talk about if meaningful class discussions are to be possible. Pending solutions for larger problems, an immediate step which might be worth while is for teachers to rethink and replan the content and format of their lectures to facilitate more discussion. It is not my purpose here to suggest specific solutions or teaching methods. What I advance most strenuously, however, is simply the urgent necessity for conscious attention to these matters and for a great deal if innovation and experimentation in search of aims and methods which are right for India.

This is the kind of thing which the teaching staff of the Law College at Banaras Hindu University has been working on in the programmed deliberations of a Faculty Seminar on Legal Education which met once each week over most of the past academic year. The plan of the Seminar has been to consider individually various courses or papers in the curriculum, from the standpoint of what particular knowledge or legal capacities should be learned in them and what pedagogical methods should be best suited to those *particular* pedagogical objectives. I think the results of these discussions have been fruitful at Banaras, and I commend them for use at other law schools. I think it would also be a good thing if efforts to rationalize aims and methods of legal education could be carried out on a multi-school or all-India basis. Much has been done along these lines in America over the past half century under the auspices of the Association

of American Law Schools. It may be that we have overdone it, since Americans are known to be fascinated with the subject of pedagogical methodology. I nevertheless would submit that if we may have overdone it, India has not done enough of it, at least in the field of legal education which I have been watching. I suggest that this would be a useful role for the All-India Law Teacher's Association.

C. DALLAS SANDS*

---

*Visiting Professor and Consultant on Legal Education, Banaras Hindu University, 1967-68; Professor of Law, University of Alabama, U.S.A.

BOOK REVIEWS

RELIGION, LAW AND STATE IN INDIA By J. D. M. Derrett, Faber and Faber, London, 1968, 615 Pages, 90 sh.

The great and pioneering contribution of European scholars in the field of Indological studies, especially in Hindu law, is well known and each one of the jurists from Jones to Jolly has left his imprint in the field. By their writings and translations of Sanskrit works, they made known to scholars in west the richness and variety of Hindu literature. However, despite their academic sincerity and the great efforts they had put into their research, most of these scholars were handicapped by factors which were special to themselves or to the period in which they worked. Their lack of mastery over Sanskrit prevented them from evaluating the original works in the right perspective. Many of these scholars had an entirely different jurisprudential background and it was therefore natural for them to examine the Indian materials within their framework of European training, which consequently led to the misunderstanding of many Hindu concepts. Further, not all the leading Sanskrit works had seen the light of the day when they did their work and therefore many of their conclusions were inaccurate.[1] It is a matter of great satisfaction that the contribution of Professor Derrett is free from all these deficiencies. His thorough mastery over Sanskrit, his direct introduction into Hindu Jurisprudential framework,[2] and the advantage of working at a time when almost all the Sanskrit works are available, have enabled him to project the Hindu system in the correct perspective.

The book under review is a collection of papers of Professor Derrett, who by his prolific writings since 1950s has enriched the study of Hindu law. With a rare intuition Prof. Derrett is able to perceive accurately the ethos of the Indian people. His remark that "academic approach to the topic neglected the psychology of the Indian people with which any legal proposition must accord if they are to mean anything at all" (p. 20) rightly emphasises the futility of sterile scholarship which ignores the psychological and sentimental background of the people whose study is undertaken.

1 For instance, the reader may assume how it would be like to evaluate the role of positive law in the Hindu system without any reference to Kautilya's Arthasastra.

2 Professor Derrett started his career as a student of Indian History and took to the study of Hindu law later on. This was an asset to the learned author for his study of Hindu law is unhampered by the pre-conceived western notions which a usual student of law acquires during his law studies.

The reader perceives four strands of thought, namely (i) aspects of Hindu juridical ideas, (ii) European influence and Indian legal history, (iii) codification its birth pangs and working, and (iv) the movement towards a Uniform Civil Code. The study of Hindu legal system poses numerous difficulties that are peculiar to this branch. The main obstacle to a proper understanding of the Hindu system is the conceptual confusion arising out of the use of terminologies that have acquired specific meanings in the western jurisprudence and which are inadequate to convey the ideas of the Hindu system. For instance, t rms like law, religion, morals, ethics, custom, etc., that occur in the exposition of western jurisprudence have acquired defined meanings in the western frame work and have no exact equivalents in the Hindu system. Nor some of the terminologies used in the Hindu system have their counterparts in the western systems. For instance, *Dharma*, *Vyavahara* or *Charitra* cannot exactly be rendered into any of the European languages. Dharma indeed conveys the ideas of law, religion, morals and ethics in the appropriate context but conveys much more than each one of these ideas. The inexactness which arises in the proper choice of the terms is not entirely due to the basic shortcoming of the art of translation, but due to the absence of ideas in one system which are known to the other. Professor Derrett is one of the few western Indologists, who is able to expound the Hindu concepts in the oriental frame of reference and to connect them, wherever possible, to their western counterparts.

Religion is one of the most misunderstood and misused concepts of the human society. A proper understanding of the term in all its varied nuances is a necessary prerequisite for examining the Hindu system. The author's apt remark that "the definition (of religion) must relate to the kind of thing, not its appeal, its rationality, its history or its capacity of attracting another person's sympathy" (p. 36) marks the objectivity of his approach which puts the student of the Hindu system on an even keel. A beginner in Hindu law stumbles on the initial hurdle, what this personal law means and how it has come to being in its present form. Immediately he tries to look for the 'dogmas' and 'tenets' of Hinduism. When he fails to perceive the 'dogmas' and 'tenets,' he will be perplexed and his bewilderment naturally leads him to an erroneous conclusion without ever realizing the fallacy of his assumption. The learned author's observation that "one is free to have any and every belief or no beliefs at all without forfeiting one's religious denomination or affiliation....Religion is thus a social phenomenon and the character of the religious observance... depends upon factual membership of a social group" (p. 57) is a right pointer to the novice and

dissuades him from using the yardstick of Christianity or Islam to ascertain what Hindusim is.

Professor Derrett has ably exploded the myth that "law and religion are intricately wound up in the Hindu system" and are not easily separable. It is unfortunate that the above remark of Their Lordships of the Privy Council, which was the result of Their Lordships' non-acquaintance with the Mimamsa science of interpretation, was repeated by generations of Hindu law scholars as if it were an axiom. The misunderstanding was an obvious outcome of the anachronistic approach of examining ancient materials within the modern conceptual frame work.

The jurisprudential essays, "Expediency vs Authority : the right to earn in ancient India," "Custom and law in ancient India," "Law and social order before Muhammadan conquests," display a masterly treatment and the first of these achieves the difficult objective of rationalising all the ideas and texts clustering round the right to property in ancient India. The essays, "the British as patrons of the Sastra" and "the Administration of Hindu Law by the British" are of great value to the legal historians for the leading books on Indian legal history do not supply the materials furnished by these chapters.

Professor Derrett's comments on the process of codification, the structure and the working of the Hindu code are irrefutable. It is unfortunate that a thorough comparative study of the family laws was not undertaken (as was done in the case of the Constitution) before codification and certain provisions were borrowed without examining their historical background. For instance the relief of judicial separation which merely keeps the matrimonial nexus in a state of suspended animation and which, as a concept, is an outcome of the Christian attitude towards marriage need not have found place in the Hindu Marriage Act.

Professor Derret's remarks on secularism should be an eye opener to those who wax eloquent on secularism without comprehending its exact meaning. One is amused at the Indian academic approach towards this concept when he says that "it is assumed that India having adopted the word 'secular' for its present condition, ought to study what secular means or ought to mean, and then put into practice." (p. 31) In a telling way he reminds us that the spirit of secularism runs in the veins of this nation "what is often forgotten is that, whatever the citizen accepts or thinks he accepts, nothing will actually emerge in fact which is inconsistent with the ancient and traditional values, and these are consistent with secularism in a wholly unique, Indian sense." (p. 31).

In 'The Future of Muhammadan Law in India,' Professor Derrett has examined with uncommon candour the legal, religious and psychological factors involved in the enacting of a Uniform Civil Code and in bringing Muslims within its purview. The constitutional platitude of a Uniform Civil Code cannot remain so indefinitely. The political overtones in any discussion on such a code, though undesirable in the present situation of the Indian society, is inevitable and would sober down in course of time giving way to serious academic thinking on the subject. It has to be remembered that in a traditional society, law has to necessarily lead the social change, which when attempted would obviously convulse a few that are overzealous and religious. In the context of enhancing the wider interests of the Indian nation the traumatic experience of a small number of over sentimental people cannot be helped. The learned author's analysis of the contemporary legal provisions of Muhammadan law with a view to show the Muslim objector of codification that what the Code intends to displace is not very much in conformity with his religion, is extermely useful. But it is doubtful whether the two-tier regime suggested by the author in the direction of achieving uniformity is ever practicable.

A word has to be said about the style of the learned author. The reviewer has come across some of the Indian law teachers and lawyers who have complained against the author's sarcastic comments regarding certain Indian situations. But it is indeed the unique style of the author and no body can doubt his sincerety when he says that "the gentle tone of mockery which he occasionally adopts is intended only to portend the objectivity which must sooner or later emerge in which all students of India, whatever their provenance will be at one." (p. 25).

The book is indeed a rare contribution in modern times covering the field of Jurisprudence, Legal History and Indology.

B. N. SAMPATH*

*Lecturer, Law School, Banaras Hindu University.

AN INTRODUCTION TO LEGAL SYSTEMS By Professor J. D. M. Derrett 1968 Sweet and Maxwell, London, Page 203, price Sh. 37/6.

Comparative law, while being fascinating and enlightening, is an exacting discipline too. The arduous character of the study and the peculiar complexities it involves have always deterred legal scholars from undertaking a meaningful research in that field. Henry Sumner Maine, despite his limitations, did pioneering work and John Henry Wigmore, the American jurist attempted to stimulate research in this field in a slightly different way.[1] Both these jurists did their work at a time when it was, indeed, presumed that perspective in the field of comparative law was possible only when a jurist ascertained the development of various concepts in a number of systems by delving into them with the help of selected materials. But without undermining the contribution of these great savants and others, it has to be conceded that a study in comparative law which requires an individual jurist to undertake comprehensive research in every system which he intends to take up is hardly possible nor advisable in the present state of legal development in the world. Pooling of scholarship could alone provide authentic data in the respective systems to enable the individual scholar to compare notes on any concept. Professor J.D.M. Derrett, must be congratulated for bringing out this book, with the above objective, introducing seven mature legal systems to the English speaking world. Even though it is a book meant for a student of law for evoking his interest and broadening his perspective in the field of comparative law, the book may be recommended even to a lay reader. The learned editor has included in the book introductions to Roman, Jewish, Islamic, Hindu, Chinese, African and English laws, written by researchers of standing in the respective systems. The book is of special significance to the Indian law student for it includes some systems, namely, Chinese, Jewish and African which are unknown in India. While Hindu and Muslim laws are the law of the land, English law, with its intimate involvement in every branch of Indian law, is of equal acquaintance to every student of law. Further, Roman law had until recently been a compulsory subject in the LL.B. curriculum. But the Jewish law, despite its recognition as a personal law of the country and with its numerous similarities to the Hindu system has unfortunately been completely ignored.[2] Professor

1 See, for instance, J. H. Wigmore, *A Panorama of the World's Legal Systems*, in three volumes, 1928, West Publishing Company, St. Paul.

2 The reviewer strongly favours the inclusion of Jewish law in the Indian legal curriculum. In furtherance of this objective Jewish law has been introduced in the field of Family law at the Banaras Law School.

Zeev W Falk's introduction to Jewish law is, therefore, of special interest to those who intend to pursue research in that field. The study in Chinese law while throwing light upon an ancient and contiguous civilization exhibits a close similarity to the concepts developed in the Hindu system. Some interesting analogues are revealing. For instance, the recognition of a son of a brother as a son to the other brother who is sonless (p. 113) is close to '*Dvayamushyayana*' under the Hindu law. The reluctance as also the repugnance of the people to settle their disputes before the state tribunals (p. 115) are not unknown to the Hindu society even though they may not be so acute as under the Chinese system. The restrictive right of a father to dispose off the property (p. 117) and the requirement of consent of the sons to alienations, are remarkably close to the father and sons relationship under the Mitakshara coparcenary. The practice of arranged marriages (p. 118) is universal in the Hindu society even to this day. The abhorrence with regard to marriages of persons bearing the same surname (pages 120, 121, 122) is present to the same degree in the prohibition of Sagotra marriages in the Hindu system. Many more interesting and useful comparisons may be made with other systems.

A minor error that needs to be pointed out is that N. J. Coulson has referred (p. 72) to the age limits prescribed under the Child Marriage Restraint Act, 1929, as 14 for the girls and 16 for the boys. These age limits stand further amended to 15 and 18 years.

Professor Kirafly has stated "During the recent short war between India and Pakistan, the monarch was technically at war with herself." (p. 190) It is doubtful whether the constitutional law pandits all over the Commonwealth would ever accept the tenability of the proposition that the Queen as the head of the Commonwealth could be deemed to be the 'monarch,' of the republics of India and Pakistan.

Special mention may be made of the brilliant presentation of the respective systems by Professor Derrett, Professor Coulson and Professor Zeev W Falk. The teachers in the field of comparative law should be grateful to Professor Derrett for the stimulus his book gives in the direction of making the subject more attractive and inviting the attention of the legal scholars to undertake further purposeful research in the field.

B. N. SAMPATH*

*Lecturer, Law School, Banaras Hindu University.

RESEARCH WORK

Approved LL.M. Dissertations :

1.	DURGA PRASAD	Community Regulation of Management Prerogative to Terminate the Services of Workmen
2.	RAJNI KANT	Community Prescriptions for the Settlement of Bonus Disputes
3.	SURESH CHANDRA JOSHI	The Constitution is What the Judges Say It Is.
4.	MAHESHWAR NATH CHATURVEDI	Judicial Delineation of the Word "Civil Post" under Article 31I (2) of the Indian Constitution
5.	SURESH CHANDRA SRIVASTAVA	Community Regulation of Managements' Economic Instruments of Coercion
6.	N. N. VERMA	Law Relating to Strikes
7.	S. PARASURAMAN	Law Relating to Retrenchment
8.	M. KAMARAJU	Government Intervention under Industrial Disputes Act, 1947
9.	B. P. SRIVASTAVA	Disarmament in International Law
10.	S. P. SINGH	Bankruptcy in Private International Law
11.	S. K. VERMA	Development Rebate (A technique of tax incentive to attract investment)
12.	K. P. PANDEY	Compensable Harm Under the Indian Workmen's Compensation Act, 1923
13.	S. N. JHA	Enforcement of Statutory Provisions Regulating Exercise of Management Prerogative During Pendency of Proceedings
14.	R. L. LYNGDOH	Claims Adjustment Decisions Under the Industrial Disputes Act, 1947
15.	S. P. SINHA	A Study of the Industries (Development and Regulation) Act, 1951 : An Aspect of Public Control of Private Enterprise
16.	V. V. SOMARAJU	Beneficiary's Right of Action Under the Indian Contract Act (Act No. IX of 1872)
17.	RAJ BAHADUR SRIVASTAVA	Protection of Minority Shareholders in Case of 'Oppression' under the 'Indian' Companies Act
18.	O. P. SINGH	Continental Shelf : Legal Claims, Policies and Trends in Decision

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

FORM IV

1. Place of Publication	LAW COLLEGE, BANARAS HINDU UNIVERSITY, VARANASI-5.
2. Periodicity of its publication	SIX MONTHLY
3. Printer's Name	R. K. BERRY
Nationality	INDIAN
Address	MANAGER, BANARAS HINDU UNIVERSITY, VARANASI-5.
4. Publisher's Name	SURYA P. SHARMA
Nationality	INDIAN
Address	READER IN LAW, LAW COLLEGE, BANARAS HINDU UNIVERSITY, VARANASI-5.
5. Editor's Name	SURYA P. SHARMA
Nationality	INDIAN
Address	READER IN LAW, LAW COLLEGE, BANARAS HINDU UNIVERSITY, VARANASI-5.
6. Name and addresses of individuals who own the news papers and partners or shareholders holding more than one per-cent of the total capital.	LAW COLLEGE, BANARAS HINDU UNIVERSITY, VARANASI-5.

I, Sharma, Surya P. hereby declare that particulars given above are true to the best of my knowledge and belief.

SHARMA, SURYA P.

EDITED AND PUBLISHED BY SHARMA, SURYA P. FOR LAW COLLEGE
BANARAS HINDU UNIVERSITY
AND
PRINTED BY R. K. BERRY
AT THE BANARAS HINDU UNIVERSITY PRESS, VARANASI-5