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BOOK REVIEW

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CONTENTS

THE EMERGING DIMENSIONS OF HUMAN RIGHT: PROTECTION AT THE INTERNATIONAL AND REGIONAL LEVELS THE COMMON STANDARD OF MANKIND

W. PAUL GORMLEY*

I. The Preeminence of the Universal Declaration To Evolving Human Rights

The legal and moral force of the *Universal Declaration of Human Rights*[1] continues to expand, as subsequent conventions, designed to protect human rights, are adopted by member states of the United Nations. Yet, it is not intended to imply that the controversy surrounding the legal force of the Universal Declaration has been resolved. As is true of the issue concerning the legal force of resolutions of the United Nations General Assembly, and similarly of multinational institutions, the definitive determination of ultimate binding quality of resolutions has yet to be reached.[2] Nonetheless, some tentative hypothesis that will remain valid during the decade of the 1980s can be cited as a basis for the utilization of those rights enunciated in the Universal Declaration.

As concerns the contemporary legal effect of General Assembly resolutions, and particularly of the Universal Declaration, Professor McDougal concludes that "The important point is that the people of the world now have an established institutional process through which they can freely and unambiguously express their expectations about policy, authority, and control in relation to all problems, including those of human rights."[3]

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1. International Declaration of Human Rights, *U. N. GAOR* 3rd Sess. (I), *U. N. Doc.* A/810, 1948 at 71 ; U. S. Dep't State, Pub. No. 3381 (1949) ; 43 *Am. J. Int'l L. Supp.*, 1949 at 127.
2. Discussed in M. Laches, The International Law of the Outer Space, 113 *Recu des cours*, 95-96, (1964).
3. M. McDougal, H. Lasswell & L. Chen, *Human Rights and World Public Order*. 1980 at 273.

The traditional interpretation, which can be traced to the practices of the League of Nations and the early standards of the United Nations, that resolutions are merely recommendations and do not bind governments is no longer respected. For the purpose of this study, the following conclusion of Professor McDougal is adopted.

The Universal Declaration is now widely acclaimed as a Magna Carta of the mankind, to be complied with by all actors in the world arena. What began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the United Nations Charter and as established customary law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights.[4]

The next stage in this line of reasoning is that the Universal Declaration, by means of the practice of states, the expectations of mankind, and consistent reiteration by subsequent resolutions is more than a common standard of achievement; rather it has become customary law. As such, the human rights contained in the Declaration are legally binding on all states as customary international law.

Lest the importance of the Universal Declaration be minimized, one further observation is worthy of note, because of its impact on the United Nations Charter. The Declaration, in reality a General Assembly resolution, "has now become the authentic interpretation of the human rights provisions of the Charter which neither catalogues nor defines the human rights to which it refers."[5]

The subsequent accomplishments of the United Nations rely on the U. N. Charter and the Universal Declaration. Moreover, the rights enunciated in the Declaration, stemming from conceptions of natural law, are receiving reinforcement and implementation from other multilateral declarations and regional conventions. As will be shown below, the Helsinki Final Act of the Conference on Security and Cooperation in Europe is similarly providing support for some of the rights contained in the Universal Declaration.

One of the most significant accomplishments of the General Assembly was the adoption of the United Nations Human Rights Covenants and the Optional Protocol in December of 1966, for the reason that with

4. Id. at 273-74 (footnotes omitted).
5. Humphrey, The Implementation of International Human Rights, 24 *N. Y. L. S. L. Rev.* 1978, 31, 33. See also Humphrey, The International Bill of Rights, 17 *Wm. & Mary L. Rev.* 1976, 527, 529.

their entry into force in 1977, states parties assumed binding treaty obligations. Yet, an additional legal issue has arisen, namely, at what point can the human rights set forth in the covenants be deemed to constitute customary international law or, alternatively, may certain enumerated rights (e. g., the right to life, freedom from torture, protection against forced labour, or the right to education) be held to constitute general principles of international law? Of course, such human rights receive additional support from the conventions of the International Labour Organization and UNESCO.[6]

Some of the rights contained in the Universal Declaration are expanding in scope beyond their original definition. An example would be the right to health.[7] Today's conception of the economic right to health (including such related phases as freedom from hunger and the right to an adequate nutrition[8]) is considerably different than the "right" originally set forth in 1948. In this regard, the majority (if not all) economic, social, and cultural guarantees have evolved since the end of World War II, and they continue to expand as human beings redefine the quality of life on their planet.

From the fundamental rights contained in the Universal Declaration, newer rights continue to emerge. To illustrate, the right to a pure and decent environment is not mentioned in the Universal Declaration or in the U. N. Covenants,[9] although it is related (and perhaps contained within) the right to health and to life. This right to environmental protection has been treated as a civil and political right[10] and also as a social and economic right.[11] It has also been characterized as an emerging human right, because of the fact that it is expanding in its appli-

6. S. Marks, UNESCO and Human Rights; The Implementation of Rights Relating to Education, Science, Culture, and Communication, 13 *Texas Int'l L. J.* 1977, 35 (and the sources cited therein).
7. See e. g., *The Right to Health as a Human Right* (R. Dupuy ed. 1979).
8. Dobbert, *The Right to Food in the Right to Health as a Human Right* id. at 184-213; and A. Eide, *Nuutition, Human Righis in the World Society* 1977, 28-30.
9. W. Gormley, *Human Rights and Environment: The Need For International Co-operation* (1976).
10. H. Steiger, *The Right to a Human Environment: Proposal for an Additional Protocol to the European Human Rights Convention* (1973).
11. W. Gormley, *supra* note 9; Uibopuu, The International Guaranteed Right of an Individual to a Clean Environment, 1 *Comp L. Y. B.* 1978, 101 and S. McCaffry & R. Lutz, *Environmental Protection and Individual Rights: An International Symposium* (1978).

cation and implementation to such areas as transfrontier pollution, ocean pollution, and the protection of the environment in outer space.[12]

The growth of human rights from the basic principles in the Universal Declaration is further stimulated by the attention being directed toward specific areas, such as the protection of women and a greater awareness of the legal rights of children.[13]

Obviously, an encyclopedia should be written concerning the evolution of those rights enumerated in the Universal Declaration in order to provide an indepth analysis of the status of human rights protection from the perspective of positive international law. The above cited examples were intended to demonstrate the evolving nature of those rights contained in the Universal Declaration.

II. New Human Rights and Supporting Remedies

Human rights have evolved beyond the two traditional classifications, i. e. civil and political, which are the traditional type of rights arising from natural law, as contrasted with economic, social, and cultural rights that arose following World War II. The later quarter of the twentieth century is witnessing a third generation of human rights, presently referred to as solidarity rights, such guarantees as the right to : (1) peace, (2) development, (3) environmental protection, and (4) the benefits stemming from the common heritage of mankind have been mentioned. Such rights are of a general nature and could, conceivably, be applied to groups, nations, peoples and the international community,[14] as well as to private indiviudals, being rights *erga omnes*. These solidarity rights stem from the Preamble, article 3, and indeed from the thirty articles in the Declaration.

A new approach to the evolution of human rights arises : states have duty to cooperate in order to protect their citizens. And, while all men of good will favour the adoption of such new solidarity rights,

12. Gormley, The Protection of the Earth-Space Environment : The Use of Remote Sensing Satellites to Protect Human Rights, to be published in 19 *Indian Y. B. Int'l Aff*. 1981.
13. See generally, Question of a Convention of the Rights of the Child. Report of the Secretary-General. 27 December 1978, and 1 February 1979. E/CN. 4/324/Add. 1; and *id*. Add. 2.
14. The concept of the International Community was the theme of Professor Rene Dupuy's General Course in Public International Law, to be published in—*Recueil des Cours*—(1979). Professor Dupuy reiterated his position in *The Right to Development at the International Level*, 1980, 443-45.

the problems facing implementation are difficult to resolve, in terms of existing codified rights. Notwithstanding the difficulties confronting the implementation of the third generation of human rights, the fact that such new solutions to pressing human needs are being proposed indicates the expansive nature of this phase of international law. For instance, such human rights as development and the benefits to be derived from the common heritage of mankind are at the foundation of the new international economic order and similarly, the "new international law"[15]. The potential for the growth of such new international law seems endless, at least in a philosophical sense.

Additional new human rights continue to be proposed; they are designed to deal with areas (and problems) not covered by traditional areas of law. Thus, Judge Lachs in his 1980 Hague Academy lectures proposed that a new right to protect mankind be adopted that would provide financial aid to victims of natural disasters[16]. This human right to compensation—resulting from floods, cyclones, volcanoes, earthquakes, etc.—would be brought about by an international convention. Relief would be granted by a United Nations Emergency Relief Programme, designed to protect mankind from grave dangers and catastrophies.

May this writer propose a further extension, possibly in regard to state liability arising from ultra-hazardous activities, such as ocean pollution, nuclear explosions, the dumping of chemicals and other hazardous wastes, or falling space objects ? Though resulting injuries are unintentional and due care had been exercised, the very nature of the activity imposes liability upon the state (and in appropriate cases its nationals and companies), as can be seen from the Convention on International Liability For Damage Caused By Space Objects[17]. Undoubtedly, many such injuries can best be dealt with by the state espousing the

15. E. G., C. Colliard, Cours general sur le droit international public, 153 *Recueil des Cours*—(1976 V). Contra, J. Watson, The "New" Approach, in A Realistic Jurisprudence of International Law, 34 *Y. B. World Aff*. 1980, 265, 275-77.
16. M. Lachs, Law and the International Community : General Course in Public International Law,—*Recueil des Cours*—(1980).
17. [1973] 24 U. S. T. 2389, T. I. A. S. No. 7762 (effective October 9, 1973), discussed in Diederiks-Verschoor & Gormley, The Future Legal Status of Nongovernmental Entities In Outer Space : Private Individuals and Companies as Subjects and Beneficiaries of International Space Law, 5 *J. Space L.* 1977, 125.

claims of its citizens by means of diplomatic protection of nationals,[18] in view of the fact that the law of ultra hazardous activity will prove adequate to resolve the majority of claims. But, owing to the catastropic nature of nuclear accidents, ocean pollution and descending space vehicles, additional safeguards to protect the existence of mankind (his right to life, health and a decent environment) may be desirable.

The most recent new human right has been proposed by Professor Alte Grahl-Madsen, who advocates the adoption of a Convention for the Prevention and Punishment of Tyranny, "which would make it an international crime to become a despot, and which would make the deposed tyrant an outlaw on the earth"[19].

The manner in which such a convention for the prevention and punishment of tyranny might be implemented will prove to be a challenge to the world community. But still it becomes essential not to minimize the eternal significance of the Universal Declaration and, simultaneously, focus on the implementation of the expanding corpus of international human rights law.

III. The Protection and Implementation of Human Rights

In considering the future implementation of the Universal Declaration during the 1980s, the writer proposes a double objective : 1) improvement of existing international machinery, thereby strengthening the Universal Declaration ; and 2) the adoption of human rights treaties by governments, particularly by the United States. Within this context, the writer will advance specific recommendations to accomplish these goals, such as the creation of a United Nations High Commissioner for Human Rights and a supporting Human Rights Council to receive petitions from injured private individuals, greater cooperation by all members of the United Nations with international authorities and also with regional institutions, the perfection of the implementation of the United Nations Human Rights Covenants and the Optional Protocol by all states, the future role of the International Court of Justice, and related topics, in order to give effect to the ideals set forth in the Universal Declaration. Within this scheme, the positive achievements of the U. N. should be

18. Gormley, The Employment of Diplomatic Protection As An Alternative Remedy To Individual Action, 18 *Indian Y. B. Int'l Aff.* 46 1980, 46 (and the sources cited therein).
19. Grahl-Madsen, International Law at the Crossroads, 24 *Scandinavian Studies in Law.* 1980, 177, 186.

recognized. Previously the writer has taken the position that generally the U. N. has failed to protect human,[20] political, and economic rights, primarily because of assertions of extreme sovereignty; however, some highly significant accomplishments have been achieved by the parent U. N. and its specialized agencies.[21] For example, Professor Myres S. McDougal recognized as early as 1949 that human rights programmes of the World Organization could only be evaluated "from a perspective of centuries."[22] From this approach, the steps taken by the U. N. have developed into at least an embryonic international law of human rights in the opinion of Professor John P. Humphrey.[23] Consequently, a dual purpose confronts the over one hundred and fifty member states. On the other hand, areas in which immediate improvement can be achieved (or at least begun, e. g. adoption of the U. N. Human Rights Covenants) must be selected for intensive programming, while on the other, longer range objectives, not capable of rapid solution (such as increasing the jurisdiction of the International Court of Justice) must be pursued at a slower pace. The World Body deserves credit for what has already been accomplished, namely the promulgation of the Universal Declaration,[24] the admittedly unsuccessful attempt to formulate a world bill of rights[25] and establishment of a supporting court of human rights,[26] the drafting (leading to final ratification) of the United Nations Human Rights Cove-

20. W. Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals*, 1966, 1-3.
21. Gormley, The Emerging Protection of Human Rights by the International Labour Organization, 30 *Albany L. Rev.* 1966, 13; and Gormley, The Growing Protection of Human Rights and Labour Standards By the International Labour Organization, 7 *Banaras L. J.* 1973, 1.
22. McDougal & Leighton, The Rights of Man in the World Community : Constitutional Illusions Versus Rational Action, 59 *Yale L. J.* 60 (1949). The proposals are carried forward in McDougal & Bebr, Human Rights in the United Nations, 58 *Am. J Int'l L.* 1964, 603.
23. J. Humphrey, The United Nations and Human Rights, 11 *How. L. J.* 1965, 373. Aecord, Schwelb, The United Nations and Human Rights, *id.* at 739.
24. McBride, *The Strengthening of International Machinery for the Protection oj Human Rights, in International Protection of Human Rights* : Seventh Nobel Symposium, 1968, 149-66.
25. B. V. Cohn, Human Rights Under the United Nations Charter, 14 *Law & Cotemp. Prob.* 1949, 413 (discusses the early American efforts, including the work of the American Law Institute, to draft an International Bill of Human Rights).
26. Australian Draft Proposals for an International Court of Human Rights, U. N. ECOSOC, *U. N. Doc.* E/CN. 4/AC. 1/27 (1948).

nants, and the entry into force of the Convention on the Elimination of All Forms of Racial Discrimination.[27] The writer maintains : prior success and even dramatic failures have laid the philosophical foundation upon which a fully developed United Nations Law of Human Rights is being built. At the foundation is the Declaration. Even more directly, the U. N., through its Economic and Social Council, and the Commission of Human Rights, has produced the greatest international human rights treaty ever devised by man, i. e. the Human Rights Covenants now in force. For the present, we can note affirmatively, the U. N. has far surpassed the League of Nations in the field of human rights protection.

As a corellary, all lawyers gravely concerned with the establishment of human rights guarantees—plus inseparable topics such as the "world rule of law" and the establishment of world peace—must seek more limited though immediate results, while looking toward the future and the absolute protection of man's natural law rights,[28] plus those newer rights discussed above. As the leadership class, attorneys are the persons best able to carry forward the ideals enunciated in the Universal Declaration. Hence, the position of the writer—pursuant to articles 1 through 12 of the Declaration—is that every human being possesses certain inalienable rights, which cannot be legally infringed upon by any government; nevertheless, under present international law, they usually cannot be enforced against sovereign states who are absentee to the treaty commitment. It is, therefore, in the field of implementation of these natural law rights, as enunciated in the Declaration, that the U. N. and its specialized agencies (particularly the ILO, UNESCO, and WHO) are making their greatest contribution.

In terms of future attempts to protect existing human rights, the most realistic approach (aside possibly from the United States ratifying or adhering to the major international and regional human rights conventions) is to seek increased cooperation between states. Obviously, such cooperation, in the majority of cases, must take place between those states dedicated to the world rule of law. However, there are few striking instances in which there have been trade offs of political prisoners between

27. *G. A. Res.* 2106 (XX) Annex, adopted by the General Assembly, December 21, 1965. See the excellent discussion by Schwelb, The International Convention on the Elimination of All Forms of Racial Discrimination, 15 *Int'l & Comp. L. Q.* 1966, 996.

28. W. Gormley, *supra* note 20, at 10-16 for the transformation of natural law rights into positive law. Castberg, *Natural Law and Human Rights, in International Protection of Human Rights* : Seventh Nobel Symposium, 1968, 13-34.

the U. S. and the USSR, including the immigration of jews from the Soviet Union. In other words, some relief is obtained for a few Soviet dissidents by pragmatic negotiations. Despite the fact that the cause of global human rights is not advanced, some success is forthcoming at the phase of implementation.

IV. The Political Climate within the International Community : Affirmative and Negative Forces

The beginning of the decade of the 1980s is not an ideal period for the expansion of human rights programmes or the enactment of new rights by regional and international institutions. The violations of individual and group rights are very frequent Examples of tortured and degraded humanity can be seen in the labour camps of Eastern Europe, the systematic destruction of Amerindians,[29] the terrorist activities of Latin American governments, and the persecution of dissidents. Torture, imprisonment without a fair trial, inhumane treatment, the supression of speech and press, and the destruction of the cultural heritage, thought control, the supression of minorities and native populations are all too common.

Perhaps the most distressing "regression" is the failure of the Helsinki review conferences at Belgrade and Madrid to carry forward "basket three" of the Helsinki Declaration,[30] i. e. Principal VII: Respect for Human Rights and Fundamental Freedoms, including the Freedom of Thought, Conscience, Religion and Belief. Quite correctly, the United States takes the position that the original Final Act of the Helsinki conference has not been modified; however, it is tragic that greater recognition could not have been accorded to those specified rights. Admittedly, the moral force of the Helsinki Declaration has failed to be strengthened.

Aside from the "difficulties" facing the conferences on Security and Cooperation in Europe, the mounting financial difficulties facing the developing world, and even the European Communities. are diverting the attention of governments from humanitarian considerations. Conversely, within the Council of Europe and the Organization of American

29. Gorinsky, Cultures in Conflict : Amerindians in New Societies, 24 *Y. B. World Aff.*, 1971, 88. W. Gormley, The Destruction of Life : The Threat to Mankind, in *Human Rights and Environment*, *snpra* note 9, at 18.20.

30. Lord Tomson, From Helsinki to Belgrade : *Roport of the Helsinki Review Group*, 1977.

States significant progress is being made. The most dramatic contributions are being recorded by the Council of Europe, particularly by the European Commission of Human Rights[31] and the European Court of Human Rights[32]. The Inter-American Commission on Human Rights is now functional and dealing with individual complaints, notwithstanding a lack of support from non-ratifying governments, such as the United States.

Regardless of major problems confronting the United Nati ns (largely arising from the political climate within the world body, efforts continue that seek to promote, protect, and implement human rights. Within these broad objectives, a number of areas are particularly troublesome.

(1) The failure of states to effectively utilize the resources of the International Court of Justice is hampering not only human rights protection but also the development of international law. This hesitancy of states to seek redress from the court, as for example by states from the developing world, can be traced to the 1966 *South West Africa Cases*[33]. These events, resulting in the loss of confidence in the court, are well known[34].

On the other hand, the *Advisory Opinion on the Legal Consequences For States of the Continued Presence of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1960)*[35] has clarified the legal issues involved in the controversy and has stipulated the legal duties imposed on the Government of South Africa plus the obligations of both member and non-member states of the United Nations, namely, that since South Africa's continued presence in Namibia is illegal, it is under an obligation to withdraw from the territory. Moreover, states (member and non-members of the U. N.) are under an

31. J. Fawcett, *The Application oj the European Convention on Human Rights*, 1969.
32. F. Jacobs, *The Europeon Convention on Human Rights* (1975); Gormley, Book Review, 23 *Eur Y. B.* 1975, 864. F Castberg, *The European Convention on Human Rights*, 1974 ; Gormley, Book Review, 23 *Eur. Y. B.* 1975, 858.
33. South West Africa Cases *(Ethiopia* v. *South Africa, Liberia* v *South Africa)* (Second Phase), [1966] I. C. J. 6
34. Gormley, Elimination of the Interstate Complaint : South-West Africa Cases and Resulting Procedural Deficiencies in the International Court of Justice, 3 *Texas Int'l L. F.* 1967, 43. R. Taubenfeld & H. Taubenfeld, Race, Peace, Law and Southern Africa : Hammarskjold Forum (1968) ; Gormley, Book Review, 62 *Law Lib. J.* 1969, 106.
35. [1971] I. C. J. 16 [hereinafter cited as Namibia Advisory Opinion].

obligation not to lend support or assistance to South Africa. It is required that all states sever diplomatic and consular relations affecting the Namibian Territory. However, these states are also required to recognize the obligations owed by the World Community to the indigenous population of the former mandated territory[36].

The court has taken steps to improve its effectiveness by revising the rules of procedure,[37] in order to expedite its proceedings. Of special significance is the possibility for the use of chambers by the court to deal with specialized classes of disputes. Hence, for this purpose a number of judges (and former judges) may be selected by the parties to serve as an arbitral tribunal[38]. The advantages of permitting states a direct voice in determining the composition of an *ad hoc* tribunal are considerable, in terms of the confidence that the parties will have in the verdict. It is only necessary to draw an analogy to arbitral awards to appreciate what has been termed the juridical sanction of law. Precisely, the binding force of the judgment is related to the prestige of the court (and the judges) rendering the verdict.

Conversely, the judges are severely limited as to the extent of any action they may take. Only the General Assembly can modify the overly restrictive Statute of the Court, so as to prevent a recurrence of

36. One of the most comprehensive analysis of the problem of human rights protection is set forth by Judge Ammon (separate opinion), Namibia Advisory Opinion, *supra* note 46, at 67. See especially id. at 77.
37. Rules of Court, International Court of Justice, adopted 6 May 1946, No. 2 (1972). E. Jimenez de Arechaga, The Amendments to the Rules of Procedure of the International Court of Justice, 67 *Am. J. Int'l L.* 1973, 1.

    See generally, E. Jimenez de Arechaga, Ch. 6, Peaceful Settlement of Disputes and the International Court of Justice, in International Law in the Past Third of a Century, 159 *Recueil des Cours* 1, 1978, 143-69. See especially, Human Rights in the Charter, *id.* at 174-76.
38. Beagle Channel Arbitration (Argentina-Chile), Report and Decision of the Court, February 18, 1977 ; 17 ILM 634 (1977). (The judges were Dillard, Fitzmaurice, Gros, Onyeama, and Petren.) See Beagle Channel Affair, 71 *Am J. Int'l L.* 1977, 733.

    A more typical example of an *ad hoc* arbitral panel, but still utilizing some judges of the ICJ, is to be seen in the Arbitration on the Delimitation of the Continental Shelf (France v. United Kingdom) Decisions of June 30, 1977, and March 14, 1978 ; 18 I. L. M. 397 (1979). See D. Colson, The United Kingdom-France Continental Shelf Arbitration, 72 *Am. J. Int'l L.* 1978, 95.

the 1966 South West Africa judgment[39]. Of primary importance is the fact that the International Court in the advisory opinion on Namibia has declared that South Africa's imposition of apartheid violates that government's obligations, which were assumed under the League of Nations Mandate and the United Nations Charter[40]. Still, the basic problem remains : states are not utilizing the verdict, as can be seen from the attempts to create a law of the sea tribunal. Sad to say, the immediate future does not appear to offer encouragement for the use of the Hague Court to resolve human rights issues. Nonetheless, the availability of the court, with considerable resources at its disposal, offers the possibility for states to seek assistance in resolving disputes. It would, of course, be an oversight to omit the pending case between Tunisia and Libya concerning their continental shelf, which action has commenced under the terms of a *compromis*[41]. Here, then, two states—not accepting the ICJ's compulsory jurisdiction—have agreed to appear before the court for the purpose of resolving a vital legal issue.

(2) The issue that gave rise to the *South West Africa cases*, the brutally enforced regime of apartheid—as created by the Union of South Africa in violation of its obligations under the League of Nations mandate and after World War II imposed on the former mandated territory

39. Gormley, *supra* note 34. See especially, E. Cross, The South-West Africa Cases : An Appraisal, 21 *Int'l Org.* 1, 1967 ; and P. Rao, "Editorial Comment", South West Africa Cases : Inconsistent Judgment From the International Court of Justice, 8 *Indian J. Int'l L.*, 1966.

40. Namibia, Advisory Opinion, *supra* note 35, at 56-57. See also President Kahu (declaration) 59, at 61-66, citing the oral arguments originally advanced by the United States, *id.* at 64-65.

Security Council Res, 301, 20 October 1971 : 13-0-with 2 abstentions, calls on states to implement the Advisory Opinion on Namibia, supra note 4[illegible], at IP's 119-27. The Security Council : "declared that any further refusal of the South African Government to withdraw from Namibia could create conditions determental to the maintenance of peace and security in the region." *Id.* at 14 of ECOSOC, E/CN. 4/1076 (15 February 1972).

41. Compromise : Special Agreement (Republic of Tunisia and Libyan Arab Jamahiriya) Continental Shelf Between the Two Countries. I. C. J. 1 December 1978. Case Concerning the Continental Shelf : Order of 3 June 1980. I. C. J. Report 1980, p. 7. Application For Permission to Intervene by Government of Malta : Case Concerning the Continental Shelf, I. C. J. 30 January 1981.

Continued aid is being sought by United Nations organs, pursuant to the Court's advisory jurisdiction. E. g., Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, [1980] I.C.J. 3.

of South West Africa—is being attacked on all fronts within the United Nations, especially within the General Assembly[42]. The U. N. Human Rights Covenants now outlaw the practice;[43] Human Rights Year, and the Teheran Conference of 1968 saw the practice of apartheid condemned, and the General Assembly, by Resolution 2145, 27 October 1966 revoked the mandate, although South African control has yet to be removed. While the internal legislation of South Africa cannot be changed by international action, apartheid has also been declared illegal and a crime against humanity by the 1968 Teheran Conference. As shown by contemporary practice, the right of self-determination has become a principle of public international law in addition to a political norm as originally enunciated by President Wilson at the Paris Peace Conference. With the entry into force of the Human Rights Covenants, the right of self-determination has become a legally binding norm by means of an international treaty, as specified by article 38 of the Statute of the International Court of Justice. However, the evolution of the right of self-determination of peoples is far from finalized, for the reason that it is being contended, and quite properly, that self-determination has already emerged as customary international law. In fact, Judge Lachs in his 1980 Hague Academy General Course has taken the position that self-determination became a recognized principle of law prior to the entry into force of the covenants,[44] because of the recognition of self-determination in the United Nations Charter. Consistent with this approach is the fact that the right of self-determination is being applied to a greater degree as the number of sovereign states increases.

(3) The fundamental problem still facing the U. N. and regional organizations is the continued assertion of absolute sovereignty by all states.[45] Regrettably, extensions of national sovereignty continue, as can be seen from the extension of national jurisdiction over the formerly free areas of the high seas, pursuant to the negotiations at UNCLOS III and

42. Other U. N. organs have undertaken studies, designed to implement the 1971 advisory opinion. Report of the *ad hoc* Working Group of Experts Prepared in Accordance With Resolution 7 (XXVI) of the Commission on Human Rights, ECOSOC, 28th Sess. E/CN. 4/1076 (15 Februarv 1972) ; Resolution of 7 (XXVII) of March 8, 1971.

43. The first article in both U. N. Covenants create the new international right of self-determination. See *infra* notes 97-99.

44. M. Lachs, *supra* note 16.

45. For the basic comparison of the application of absolute and relative sovereignty see *Sovereignty Within the Law*, 1965. (A. Larson & C. Jenks eds. 1965).

attempts by equatorial states to assert national control over the geostationary orbit in outer space.[46] Similarly, the degredation of humanity by the dictatorships of the left and the right attest to the force of "absolute sovereignty," as memorialized in article 2 (7) of the United Nations Charter. This practice is particularly disruptive of attempts by the Western Powers to "enforce" the Helsinki principles, especially toward oppressed minorities and dissenters in Eastern Europe. The defense of domestic jurisdiction is frequently cited by totalitarian regimes ; they must necessarily depend on this classical doctrine. All governments have relied on article 2 (7), which provision provides : "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.." In dealing with this language, the writer seeks less employment of 2 (7) rather than its outright repeal. The hard facts of contemporary society preclude repeal or amendment of article 2 (7); nonetheless, adoption of the covenants have removed significant fields from "domestic jurisdiction" of states parties. A trend looking toward the "modification" of the strict concept of domestic jurisdiction has already begun because of General Assembly actions in the human rights field. As shown by Professor Ermacora, the doctrine of non-interference does not preclude study and debate by U. N. organs of violations of basic human rights.[47] His best insight is that the concept of domestic jurisdiction is being modified by the practices of U. N. organs, especially the General Assembly and its specialized committees.[48] Further expansions would be the Helsinki Accord, as influenced by the two review conferences.

Van Boven carries forward the distinction between the promotion, as contrasted with protection, one step further when he maintains, and quite correctly, that the United Nations must now implement existing human rights, namely those contained in the Universal Declaration and

46. See criticism in Gormley, Protection of the Earth-Space Environment, *supra* note 12. Accord, Christol, The Geostationary Orbital Position as a Natural Resource of the Space Environment, 26 *N. I. L. R.* 5 1979 ; and Gorove, The Geostationary Orbit : Issues of Law and Policy, 73 *Am. J. Int'l L.* 1979, 444.

47. F. Ermacora, Human Rights and Domestic Jurisdiction (Article 2, & 7, of the Charter), 124 *Recueil des Cours* 1968 II, 396. See note 49 *infra*.

48. *Id* at 425-31. *Cf. id.* at 393-406. See also, J. Fawcett, Human Rights and Domestic Jurisdiction, in *The International Protection of Human Rights*, 1967, 288-303.

the U. N Covenants[49]. The problem, according to Van Boven, is that the U. N., because of the selfish political orientation of the member states, is unable to bridge the gaps between promotion, as contrasted with protection and particularly with the additional step of implementation.[49]

A similar observation must now be offered as regards the human rights programmes of the United States. Whereas the U. S. assumed a role of leadership under President Carter,[50] the Reagan Administration is shifting emphasis away from the global protection of human rights in favour of the supression of terrorism. The position taken is that the United States has no cause to interfere with another state's internal sovereignty—a stand reminiscent of article 2 (7) of the Charter. Tragically, the emphasis placed by President Carter in his Farewell Address[51] on the future need to safeguard human rights at the global level is currently (at least in the short and medium term) being reversed. As a result, the position of the Reagan Administration is fully consistent with the results of the Belgrade and Madrid review conferences of the Final Act of the Helsinki Conference on Cooperation in Europe.

49. T. Van Boven, United Nations and Human Rights : A Critical Appraisal, in UN Law/Fundamental Rights : *Two Topics In International Law* 1979, 21. But *cf.* his criticism of U. N. member states, *id.* at 127

50. M. Schneider, Human Rights Under the Carter Administration, 43 *L. & Contemp. Prob* 1979, 261.

51. Farewell Address by President Carter from the White House, Washington, D. C., January 14, 1981 ; reprinted 57 *Vital Speeches* 1981, 226

President Carter in his concluding statements on the future of human rights advocated, as a constructive force, the enhancement of individual human freedoms through the strengthening of democracy, and the fight against deprivation, torture, terrorism and the persecution of people throughout the world. The struggle for human rights overrides all differences of color, nation or language.

Those who hunger for freedom, who thirst for human dignity, and who suffer for the sake of justice—they are the patriots of this cause.

I believe with all my heart that America must always stand for these basic human rights—at home and abroad. That is both our history and our destiny.

America did not invent human rights. In a very real sense it is the other way round. Human Rights invented America.

Ours was the first nation in the history of the world to be founded explicity on such an idea. Our social and political progress has been based on one fundamental principle—the value and importance of the individual

The battle for human rights—at home and abroad—is far from over. We should never be surprised nor discouraged because the impact ofour efforts has had varied results.

It seems, therefore, valid to conclude that the U. S. will become an exponent of national sovereignty at the expense of global human rights efforts. Consequently, the problems discussed above, e. g. increased usage of the International Court of Justice, the supression of the regime of apartheid in South Africa, and the implementation of human rights covenants will receive a diminishing degree of attention from the United States government in the future.

V. Natural Law and Morality: Support for Human Rights Protection

Notwithstanding the fact that the U. N. has not been able to fulfill its two main functions: to preserve world peace; and secondly, to guarantee human rights, some very singificant accomplishments have been recorded. The U. N. and its agencies have created binding international law from the ideals set forth in the Universal Declaration and the Charter.[52] The moral force stemming from the following sources have all contributed to present efforts, such as the entry into force of the *Convention on the Elimination of All Forms of Racial Discrimination* and its implementation by means of supporting institutional structures, with the cooperation of states parties.

As will be shown below, legal action is being taken which is, first, helping to implement the convention; and second, to serve as precedent for the interpretation of the U. N. Convenants and also portions of the Universal Declaration. Consequently, the Convention on the Elimination of Discrimination is an important element in the moral force being exerted at the global level.

Other fundamental sources of this growing moral awareness that spring from the Universal Declaration include, *inter alia*, the early attempts to draft a binding treaty or World Bill of Rights, declarations

Id. at 227.

52. An optimistic viewpoint is advanced by O. Schachter, The Relation of Law, Politics and Action in the United Nations, 109 *Recueil des Cours*, 1963 II, 169. Schwelb, The Influence of the Universal Declaration of Human Rights on International and National Law, [1959] *Proc. A. S. I. L.* 217, 220. E. Schwelb, *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights*, 1948-1963, 1964. W. Gorwley, *supra* note 20, at 46-49. See also, H. Lauterpacht, The Charter of the United Nations and Human Rights, 3 *Osterreichische Zeitschrijt Fur Offentliches Recht*, 1950, 19, 20-21 and H. Lauterpacht, *Internaiional Law and Hnman Rights*, 1950, 374. See his discussion of the mora' force of the Universal Declaration of Human Rights, *id.* at 417.

of the General Assembly, peace keeping operations, relief efforts to preserve human life, attempts to achieve peaceful co-existence between competing power blocs and regional groupings, the adoption of the U. N. Covenants by the General Assembly and, primarily, their entry into force in 1977, plus other conventions, e. g. genocide, forced labour, rights of women, and the draft convention on the protection of children.

Pressures resulting from immediate crises tend to obsecure the positive contribution of moral force in the economic, political, and legal spheres. In fact, the emergence of the solidarity rights previously discussed, which stem from the right to life as expressed in the Universal Declaration, have their foundations in natural law, in the writer's submission.[53] Conversely it must be conceded, in terms of political organs—the General Assembly, Security Council, Commission of Human Rights—that moral force exerts a less decisive role in terms of the actions of the major powers, alignments of states, and special interests. Notwithstanding the politically charged atmosphere within United Nations organs, it would be incorrect to assume that moral force and concepts of natural law will play no part in future United Nations' deliberations. Just as principles of honour and responsibility must guide the observance of international law by states, the moral force of the Charter and Universal Declaration make it extremely difficult for any member"...to ignore the problems of legal responsibility when disputes are brought to the United Nations political organs and [that] the Charter principles are involved as a basis for decision.[54]

The more concrete accomplishments, namely General Assembly Resolutions and human rights conventions, stem directly from the moral force of United Nations law. Henceforth, this philosophical foundation based on the Declaration, will support continued attempts to create a

53. Gormley, The Status of the Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement, 10 *How. L. J.* 1964, 33, 36-38 S. Schwebel, *The Effectiveness of Interuational Decisions*, 1971.

Justice Donner, former President, European Court of Justice, EC, maintains: "Experience shows that the pressure of public opinion is a much more effective sanction and States—at least European States—must be supposed to submit to judicial rulings." The Court of Justice of the European Community, *Int'l & Comp. L. Q. Supp.* No. 1, 1961, 77.

54. Schachter, The Quasi—Judicial Role of the Security Council and the General Assembly, 58 *Am. J. Int'l L.* 1964, 960, 962.

world rule of law,[55] encompassing the protection of individual liberties. Stated more in terms of the basic premise set forth earlier in the study : all human beings, merely because of the fact that they have been born, become entitled to recognition and protection by the international community. Therefore, U. N agencies are charged by the Declaration and the U. N. Charter with giving legal affect to these rights at the practical level, since one of the primary duties of the Organization is to develop the required international structure and implementing machinery.

Though springing from natural law concepts, as set forth in the Declaration, the direct obligation to further human rights protection imposed on the U. N. is contained in Charter article 55 (c). The United Nations shall promote : "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". An even more direct command looking toward concrete action, not merely the recognition of an ideal, is set forth in article 56 : "All membes pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55". The above texts in connection with articles 13 (1) (b) and 62 (2), have placed an obligation—individually and collectively on U. N. members—to advance the cause of human rights.[56] But the U. N. has had to deal with narrower topics, rather than approaching the whole area of global protection, such as peace keeping operations, peaceful co-existence as a legal activity, elimination of racial discrimination, and protection of minorities. The important consideration is that all of these functions benefit private persons in addition to member governments; their collective force has

55. Cassin, Reflections on the Rule of Law, 2 *J. Int'l Comm'n of Jurists*, 1963, 224, 234-39. Cassin, How To Achieve A Better World : The Universal Declaration of Human Rights, 5 *U. N. Rev* 1958, 14, 15. See also Cassin, Reflection on the Rule of Law, 4 *J. Int'l Comm'n of Jurists*, 1963, 254. R. Cassin, Les droits de l'homme, 140 *Recueil des Cours*, 1974 IV, 321. K. Vasak, Le droit international des droits de l'homme, *id.* at 333.

56. Opsahl, Human Rights Today : International Obligations and National Implementation, in 23 *Scandinavian Studies In Law*, 1979, 149 79 Cf. the approach of Edward M Kennedy, International Humanitarian Assistance : Proposals For Action, 12 *Vir J. Int'l L.* 1972, 299. This obligation of U. N members (and indeed of non-members) to advance the cause of human rights has been set forth in Namibia Advisory Opinion, *supra* note 35, at 54-56, 58. Of even greater importance is Judge Amon's separate opinion, in which he reviews the human rights question. His discussion moves beyond the specific issue of South Africa's administration of Namibia, *id.* at 67.

rendered a contribution far beyond the accomplishments of the League of Nations. Moreover, the specialized agencies have in their own spheres of activity achieved considerable success, especially UNESCO and ILO. Each of the specialized agencies has made unique contributions, as for example WHO. ECOSOC and the Trusteeship Council have also furthered the aims of the United Nations.

Richard N. Gardner so accurately preceives : "Peace and security, economic and social development, and human rights are the three sides of the triangle of world order. In the absence of any one of them, the triangle is not complete."[57]

The fundamental norm of social justice underlying international law, United Nations law, and human rights protection has been stressed by the late C. Wilfred Jenks in his Hersch Lautherpacht Memorial Lectures when he observes : "The Law must protect the common peace, must promote the common welfare, and must provide an orderly discipline for the relentlessness of change."[58] In addition, Jenks continues : "The postulate that law must promote the common welfare implies that the law:—must protect human rights..."[58]

The norm of social justice therefore, can serve as the umbrella concept to include the expanding three classes of human rights, discussed above. In effect, the collective force of the numerous conventions, bilateral treaties, declarations and resolutions in the human rights area (and related fields) emerges into a positive law of human rights. Within this context, a parallel is drawn by Dr. Francis Wolf to the evolution of the International Labour Code from the conventions and recommendations of the International Labour Organization.[59].

Allied with the concept of social justice is a common standard for the protection of the international community, which supports the ideal of the Common Law of Mankind, of Dr. Jenks.

By the common law of mankind is meant the law of the organised world community, constituted on the basis of States but discharging its community functions increasingly through a

57. R. Gardner, Ch. 10, Human Rights : The Ultimate Foundation, In *Pursuit of World Order*, 1964, 246.

58. *Social Justice In the Law of Nations : The ILO Impact After Fifty Years*, 1970, pp 3-4.

59. F. Wolf, *The Protection of the Environment and International Law*, 1975, 452-56. Wolf, ILO Experience in the Implementation of Human Rights, 10 *J. Int'l L. and Econ.* 1975, 599.

> complex of international and regional institutions, guaranteeing rights to, and placing obligations upon, the individual citizen, and confronted with a wide range of economic, social, and technological problems calling for uniform regulations on an international basis which represents a growing proportion of the subject-matter of the law.[60]

This evolution of natural law (including the sacrosanct right to life, to include economic, social, cultural, and the soiidarity rights) now serves as a pillar of the human rights movement.

As a phase in the development of human rights protection at the regional and global levels, it is essential to recognize the contributions of the sociological jurists, the pragmatic school of jurisprudence, and of course the realists. Looking to society—primarily the expectations of mankind and the need of man to physically survive on this planet (in the face of pollution and nuclear contamination)—the need to respect and enforce basic human rights becomes the primary objective. To give one example of what has been termed a "modern law of nature,".[61] Professor Grahl-Madsen points out that,

> People are generally better off if those in positions of power have to respect the life, freedom, and physical integrity of individuals. Freedom of expression and freedom of assembly are preconditions for this. Also, there should be no discrimination without just cause At least from the point of view of a democratic society, it is a great advantage if as many states as possible have a government based on the active participation of those governed.

At the basis of this approach is a type of international consensus, or frequently a consensus between a group of closely aligned governments, can be seen from the experience in Western Europe. Under a realistic approach, it is desirable—indeed mandatory—to elect statesmen and leaders who are dedicated to the cause of world peace and human protection. In the employment of a realistic jurisprudence, interrelated fields, such as environmental protection and the peaceful uses of outer space, are also included within the orbit of protection.

60. C. Jenks, *The Common Law of Mankind*, 1958 at 8. *Orthodoxy ond Innovation in the Law of Nations*, 1971 ; and C Jenks, Economic and Social Change In the Law of Nations, 138 *Recueil des Cours*, 1973 I, 455.

61. Grahl-Madsen, International Law at the Crossroads, 24 *Scandinavian Studies In Law*, 1980, 185-86.

In the writers's opinion, natural law and morality are at the foundation of the emerging new international law.[62] Contributions, particularly in the realm of implementation, will be forthcoming from the pragmatic, sociological, and realist jurists.[63] Inherent is the primary importance of human rights norms to the new international law, because of the sanctity of the right to life.

VI. United Nations Efforts to Create Positive law and supporting Structures by means of Treaties

As recognized by the realist school of jurisprudence, grave crises face the human rights movement, which was given fresh impetus by the Helsinki Declaration, but not extended by the Belgrade and Madrid review conferences. As indicated above, tragic violations of human rights continue in all continents; international terrorism is on the increase; the position of the third and fourth worlds is deteriorating; open warfare in violation of the U. N. Charter continues; and freedom of thought, conscience and assembly are threatened. In spite of the political climate within the United Nations, a human rights law has evolved at the regional and international levels.[64] As shown in Section I, an emerging international law of human protection is being perfected. Indeed, it is only necessary to compare the present accomplishments of the U. N. and regional institutions with the situation that existed during the inter-war period. Without detracting from the experiments of the League of Nations in its regime for Upper Silesia, designed to protect minorities, the original goals of the mandates system and the subsequent attempts by the Permanent Mandates Commission to give legal affect to resulting obligations, the protection of stateless persons and the issuance of Nansen passports, and the programmes of the International Labour Origanization,[65] the United Nations has accomplished a great deal more than had its predecessor Consequently, contemporary violations of human rights must not obscure the progress that continues to be made as a greater number of states adhere to the covenants and other human rights conventions. Accordingly, we must not abandon our commitments to human rights, despite the restrictive policies of the United States govern-

62. A Colliard, *supra* note 15.

63. J. Watson, A Realistic Jurisprudence of International Law, 34 *Y. B. World Aff.* 1980, 265.

64. See *e.g.*, L. Sohn & T. Buergenthal, *International Protection of Human Rights*, 1975 ; Gormley, Book Review, 5 *Georgia J. Int'l & Comp. L.* 1975, 330. M. McDougal, *supra* note 3.

ment. The commissions and tribunals established pursuant to these conventions are perfecting their procedures for the enforcement of codified rights, with the support of United Nations organs. At present, the General Assembly and its committees are rendering the mast significant contributions; in the future the Security Council and the International Court of Justice may assume a more significant role. Similarly, the contributions of the specialized agencies must also be appreciated within the expanding corpus of legal rights.

In line with the moral force being exerted within both the political and legal spheres, the premise offered is that United Nations activity, plus related campaigns of regional organizations (such as the Organization of African Unity, the Western European groups, and the Organization of American States) add up to a developing line of jurisprudence, in spite of prior failures to adequately support those ideals set forth in the Universal Declaration and the U. N. Charter. Along with a collective moral drive, a positive United Nations law of human rights is being developed. This result is recognized by Professor John P. Humphrey, formerly, Director, Human Rights Division, United Nations.[66] At the very least, it must necessarily be conceded that under classical international law such phases of human protection were exclusively reserved to national authorities:[67] "The concept of a world organization affirming, promoting and envisaging steps to guarantee human rights on a universal basis was altogether revolutionary. We thus have a curious inversion in the international sphere of the order in which human rights have won recognition nationally.[68]

The U. N. was unable to achieve its original goal: the implementation of the Universal Declaration by means of a United Nations Bill of Rights, which document, first proposed in 1947, would have constituted

65. W. Gormley, The Implementation of the United Nations Human Rights Covenants, *supra* note 44. A. Grahl-Madsen, League of Nations Action for Refugees, in 1 *The Status of Refugees in International Law*, 1966, 12-14.

66. The United Nations and Human Rights, 11 *How. L. Rev.* 1956, 373. Schwelb, The International Protection of Human Rights: A Survey of Recent Literature, 24 *Int'l Org.* 1970, 74. See note 5 *supra*.

67. The converse situation is taking place. International rights are being implemented at the municipal level. See *e.g.*, *Human Rights and Foreign Policy*, 1979 (the application of those rights contained in the U. N. covenants and the European Convention on Human Rights). States parties are required to give internal effect to these rights, according to art. 13 of the European Convention of Human Rights and art. 26 of the Civil and Political Covenant.

68. *Law, Freedom and Welfare*, 1963, 78.

binding international law, was rejected by the major powers with the beginning of the cold war.

"Since 1948 there has resulted a new awareness on the part of the international community of the worth and dignity of man, and a realization that man has certain inalienable rights.[69] As to positive law created by the United Nations, we must first look to the U. N. Charter. Articles 55 and 56 should be cited as basic authority in support of the human rights activity by the General Assembly; still additional articles must not be slighted. As summarized so ably by the late Professor NacChesney,[70] several distinct references to human rights are contained in the Charter. Eight specific references are to be found in the Preamble and the articles of the Charter. The language contained in Preamble relates to all of the provisions in the body of the Charter; consequently, the protection of human rights becomes one of the objectives of the U. N. In terms of precise requirements placed on the U. N., article 1 (3) maintains that one of the essential purposes of the U. N. (considered in terms of its total jurisdiction) is to achieve, promote, and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion .." In almost identical language, article 13 (1) (b) imposes a similar obligation on the General Assembly to assist "... in the realization of human rights and fundamental freedoms..." Thus article 13, in connection with articles 55 and 56, gives the General Assembly the authority to promulgate human rights, whereas article 62 (2) authorizes the Economic and Social Council to "make recommendations for the propose of promoting respect for, and observance of human rights and fundamental freedoms for all." Of even grea er importance, ECOSOC "...may prepare draft conventions for submission to the General A ssmbly.." as was done with the Human Rights Covenants, pursuant to the authority granted by paragraph 3. Furthermore, a procedural grant of competence is evident in article 68: "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights." A similar type objective is set up i. Chapter XII, article 76 (c); its purpose is identical to th it of article

69. O. Lord, The Declaration of Human Rights, 13 *Va. L. Weekly Dicta Comp.* 1962, 6, 9 A similar position has been adopted by Judge Rene Cassin, How To Achieve a Better World: The Universal Declaration of Human Rights, 5 *U. N Rev.* 1958, 14, 15. See also Schwelb, *supra* note 52.

70. MacChesny, International Protection of Human Rights in the United Nations, 47 *Nw. U. L. Rev.* 1952, 198, 202-03.

13 (1) (b), but in this instance human rights are to be assured throughout the International Trusteeship System.

Tragically, these seven distinct articles within the body of the Charter, all seeking similar goals, are restricted in their application by article 2 (7), "Domestic Jurisdiction", as was shown above. However, article 2 (7), in turn, is restricted by the Preamble of the United Nations Charter.

As to a positive law of human rights, progress beyond the Universal Declaration and the Charter has had to proceed on a piece meal basis. By means of a series of declarations and conventions the World Organization has dealt with specific fields. While a full review of applicable declarations and conventions would require treatment far beyond the scope of this study, a few main items will be cited because of the precedent created. Special attention should be directed toward the *Declaration on the Granting of Independence to Colonial Countries and Peoples*,[71] since it represents the best example of newly established international protection. Significantly, not a single negative vote was cast in the General Assembly, with the result that customary international law has been created. The Assembly, is not a parliamentary body; it cannot legislate, as is true with the adoption of the Universal Declaration. At present, an increasing number of writers—while rejecting the notion of "international legislation" promulgated after World War One, by Manley O. Hudson—[72] believe that declarations passed without dissent constitute international law, though not having the force of treaties.[73] One of the leading exponents of this view is Judge Lachs who maintained in his 1964 Hague Academy lectures that new international law is created by declarations unanimously adopted by the General Assembly. On the other hand, the Universal Declaration was passed over thirty years ago without dissent; yet it was not deemed to constitute law. But why the difference in legal force, it may be asked? The most logical answer lies in the changed status of the world community, which in turn is developing a "new International law", particularly in the human rights area.

71 U. N. GAOR 15th Sess., Annexes Agenda Item No. 87. See the prior discussion leading to the final Declaration. U. N. GAOR 15th Sess., Annexes, Agenda Item 87, at 925-39, 944-47 (1960-61). U. N. GAOR, 18th Sess. Supp., at 8-9, No. 15, *U. N. Doc.* A/5515 (1963).

72. M. Hudson, *International Legislation*, 1919-1945 Vols 9, 1931-1950, 9 vols.

73. W. Gormley, *supra* note 20, at 15-16.

In addition to more informal declarations, the main law making power of the General Assembly lies in its ability to promulgate conventions, subsequently ratified by member governments. An early example in the human rights area is the *Convention on the Prevention and Punishment of the Crime of Genocide*.[74] Though the enforceability of substantive portions of the convention has been almost destroyed by a series of unfortunate reservations,[75] a serious beginning was made at the end of World War II to protect groups—and segments of groups—from destruction by morally reprehensible actions of governments. By a unanimous vote, the General Assembly codified man's most basic natual law right, i.e. the right to live, regardless of race, colour, or religion. Article 2 of the Genocide Convention prohibits "acts committed with intent to destroy, in whole or in part, a national, ethnical racial or religious group .." Unquestionably, now international law emerged. But implementing judicial structures could not be developed, because of the fact major powers refused to subject themselves, or their nationals, to international proceedings and possible penalties; therefore, "rights exist without remedies." Sad to say, the mass destruction of nations and peoples continues.

An additional phase of human rights protection, seeking to preserve groups, as distinct from single individuals, is receiving greater attention from the Council of Europe and the United Nations. The unique problem is that members of a group—especially racial and religious groups—become the target of discrimination simply because of their membership.[76] This special phase of discrimination must be dealt with by regional and international organizations, in order to give effect to the Universal Declaration, possibly in conjunction with the solidarity (or third generation)

74. G. A. Res. 260 (III) A, GAOR, 3d Sess. (I), at 174. U. N. Doc. A/810; U. S. Dep't of State Pub. No. 3416 (1949); 45 *Am. J. Int'l L.* Supp. 1951, 6. *Cf.* McDougal & Arens, Genocide Convention and the Constitution, 3 *Vand. L Rev.* 1950, 638. Lemkin, *Genocide As a Crime Under International Law*, 1947, 145. See especially, Schwelb, International Conventions on Human Rights, 9 *Int'l & Comp. L. Q.* 1960, 654, 657 n. 9 and the sources cited therein.

75. E. g., Reservations to the Convention on Genocide, [1951] I. C. J. 15; 45 *Am J. Int'l L.* 1951, 579. The Court provides an analysis of the object and purpose of the Genocide Convention.

76. J. Lador-Lederer, *International Group Protection*, 1968, 43, see also *id.* at 247. Gormley, Book Review, 43 *Brit Y. B Int'l L.* 1968-1969, 303, 305. See the special application of group protection and judicial compensation, in Schwerin, German Compensation For Vietims of Nazi Persecution, 67 *Nw. U. L. Rev.* 1972, 479.

rights. During the final decades of this century, greater recognition must be given to the rights of nations, peoples, and the international community.

In conclusion to this selective discussion of global conventions, which implement the rights set forth in the Declaration, it must be stressed that continuing attempts are producing additional guarantees. For instance, the *International Convention on the Elimination of all Forms of Racial Discrimination*,[77] brings into force the aims set forth in articles 1 and 2 of the Declaration. The most important consideration, however, is the fact that the convention entered into force on January 4, 1969. Implementing Committees have been established, and procedural techniques are being perfected.[78] Reports from governments have been received and are in the process of being examined. Similarly, reports originally sent to other agencies have been transmitted to this committee. Regrettably, the committee is operating *in camera*, and it is evident that the Committee on the Elimination of All Forms of Racial Discrimination will only declare admissible those communications received from states parties to the convention, which allege gross instances of racial prejudice.[79] Because of the committee's conservative attidude, states parties are accorded a maximum degree of protection in that the internal affairs of governments are beyond its reach.

The above discussion of selected declarations and conventions has advanced the thesis : significant implementation of the Universal Declaration has already been brought about on a fragmentary basis. In good lawyer-like fashion, U. N. agencies have attacked the most pressing areas in an attempt to develop new international law. With the failure of member states to perfect a U. N. Bill of Rights, the more sophisticated empirical approach could not be undertaken until the climate of international relations demonstrated at least some chance of improvement.

In the writer's submission, the success achieved by the Council of Europe has set the stage for further U. N. action. The body of case law

77. Note 27 *supra*.
78. Measures For the Speedy Implementation of the United Nations Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination, ECOSOC E/CN. 4/1C22, 26th Sess., Item 12, 28 January 1970, at 3. But see, Schachter, How Effective Are Measures Against Racial Discrimination, 4 *H. R. J.* 1971, 293. See especially, M. Tardu, Human Rights : *The Internationol Petition System*, 1979 & 1980.
79. Schwelb, *The Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination* 1972.

from the European Court of Human Rights[80] and the opinions from the European Commission of Human Rights[81] have created a massive jurisprudence on human rights, which can be employed to guide the implementation of the covenants. An in-depth examination of the implementation of the rights originally set forth in the Universal Declaration by European organs[82] would be the topic of a major study.

The writer's premise that regional accomplishments are implementing the Universal Declaration—and in fact contributing to the global human rights movement—can be seen from the Inter-American experience. The Inter-American Convention of Human Rights has entered into force;[83] the new Inter-American Commission of Human Rights is functional (as for instance by holding on-site inspections of potential violations, receiving communications from individual petitioners, and examining reports submitted by governments). The significant factor from the viewpoint of the Universal Declaration is that the Inter-American system is superior to both the Strasbourg and New York systems. By way of illustration, the right of individual petition set forth in article 44 of the Inter-American Convention is automatic. No additional ratification is required, with the result that the individual is emerging as a procedural subject of the legal

80. E. g., Gormley, The Development of International Law Through Cases From the European Court of Human Rights : Linguistic and Detention Disputes, 2 *Ottawa L. Rev.* 1968, 382. See also F. Castburg, *supra* note 32 and F. Jacobs *supra* note 32.

The scope of this study precludes a review of the case law of the court. Since its establishment in 1959, thirty-one cases have been submitted, which is the most significant number of human rights cases in the post World War II period. (Comparisons can be made with the Tribunal for Upper Silesia of the inter-war period.) See The European Court of Human Rights : its organization and working (Information doc. Registrar of the Court). Press Rel. B (80) 5, 23.1.80.

81. J. Fawcett, *supra* note 32. The enormous body of case law is contained in nineteen volumes of the *Yearbook of the European Convention on Human Rights*. 1958-1976.
82. E. g., Parliamentary Assembly (and its resolutions), the Committee of Ministers, and the Secretary-General of the Council of Europe. See e.g., A. Robertson, *Human Rights in Europe*, 1977.
83. The Inter-American Convention on Human Rights, Pact of San Jose, Costa Rica (opened for signature on 22 November 1969) (entered into force July 1978), O. A. S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 of January 7, 1970 ; 9 I. L. M. 673 (1970) (fifteen OAS member states have ratified). A. Robertson, *Human Rights In the World*, 1972. L LeBlance, *The OAS and the Protection of Human Rights*, 1977.

order.[84] Future steps that must be undertaken by states parties to the Inter-American Convention include the ratification of the Inter-American Court of Human Rights. (A similar shortcoming still exists with regard to the European Court of Human Rights, since several of the High Contracting Parties have yet to accept its complusory jurisdiction.)[85]

In view of the gross violations of human rights taking place in the Americas, it is a great accomplishment that the Inter-American Convention has entered into force and that steps are being taken to render the programme effective.

VII. Measures to Enforce human Rights Protection

The United Nations has not only set in motion a law-making force but it has, through a series of actions, directed the "world sense of shame" at totalitarian governments, to use the words of Dr. H. Saba, as Legal Advisor to UNESCO.[86] As indicated in connection with the moral force of international law, world public opinion is one of the most effective sanctions. The marshalling of global opinion to build and support new human rights machinery represents one of the primary advances that has taken place, since the end of World War II. This use of the "world sense of shame" was given added support by the Helsinki Declaration, as can be seen from the sharp reactions of Eastern European governments by their persecution of dissidents. Furthermore, the human rights campaign of President Carter has had a profound impact at least upon democratic states, in spite of the fact that the United States has failed to ratify the major human rights conventions.

By taking a broader perspective, it can be seen that the movement within the international community to protect basic civil, political, economic and social guarantees has continued at a slow but steady pace since 1945 (despite periods of temporary regression). Thus, the projec-

84. Prior to the entry into force of the Inter-American Convention, individuals could petition, pursuant to action taken by the predecessor Inter-American Commission of Human Rights, under the authority of the American Declaration of the Rights and Duties of Man.

See Annual Report of the Inter-American Commission on Human Rights 1979-1980. OAS : Inter-American Comm'n on Human Rights. OEA/Ser. L/V/II. 50. Doc. 13 rev. 1, 2 Oct. 1980. Sixth Report on the Situation of Political Prisoners In Cuba. OAS : Inter-American Comm'n on Human Rights. OEA/Ser. L/V/II 48. Doc. 7, 14 Dec. 1979.

85. Only Costa Rica has accepted the jurisdiction of the Inter-American Court.

86. H. Saba, L'activite quasi legislative des Institutions specialisees des Nations Unies, 111 *Recueil, des Courss,* 1964 I, 604.

tion of the practices of the International Labour Organization to the U. N. level enabled the World Organization to undertake the ambitious programme, which led up to the adoption by the U. N. General Assembly in 1966 of the Human Rights Covenants and the Optional Protocol. In this regard, one "side effect" of the present paper is the educative influence of the United Nations (and of international law). This well known doctrine—the pedigocial function of law—expounded by the sociological and pragmatic schools of jurisprudence, is especially applicable to the developing corpus of human rights law, in view of the moral force being exerted by the Universal Declaration and the Hel inki Declaration. Considerable support exists on behalf of the use of world-wide education in order to arouse public opinion, and Professor Louis Kutner in his classical *World Habeas Corpus*[87] actually foresaw the U. N.'s continuing campaign when he advocated the massing of public opinion to educate the world's peoples—a theoretical reversal of the normal function of law.

The practice of false imprisonment is increasing in intensity within all continents, as for example pursuant to the regime of apartheid, most of the states in Africa, the Latin American governments, and the labour camps in Eastern Europe—the Gulag Archipelago. Accordingly, an international consensus is required, during the final two decades of this century, to remedy the degradations to human dignity. In this regard, Professor Kutner feels, and rightly so, that public opinion must be employed to change the position of governments before the executive and legislative branches of states will be willing to further legal obligations.[88] He further maintained : "The best...way to create a favorable and enlightened public opinion..would, in fact, be the convocation of a World Conference assisted by the mass media of communication, which would carry the debate concerning the merits to the far corners of the globe".[88] The combining of public opinion and educative techniques to safeguard human rights in the latter portion of this century will, hopefully, produce a momentum that will result in universal ratification of the U. N. Human Rights Covenants.

Though the United Nations Conference at Teheran is now a matter of history yet, it did devote considerable attention to the regime of apartheid and slavery-like practices in Southern Africa.[89] Paragraph 7

87. (1962). J. Carey, Ch 3, Education : Long-Range Projection, in *U. N. Protection of Civil and Political Rights,* 1970.

88. Kutner, *supra* note 87, at 134.

of the Proclamation of Teheran condemned the regime of apartheid, whereas paragraph 8 condemned the more wide-spread practice of racial discrimination. Tragically these violations of human dignity still remain all too common. However, at Teheran insufficient attention was devoted to the actual realization of effective protection of individuals, groups, peoples and the international community. Of course, the necessity for ratification of human rights conventions by all states was emphasized. Yet the political reality in the 1960s and, equally, in the 1980s is that governments favour direct negotiations (all to often supported by sanctions of a political, economic, or even military nature) rather than arbitral or judicial settlement. As the late Professor Friedmann observed in his Hague Academy general course in 1969 : "The fact is that, in the contemporary world of block and international tensions, States seem less and less inclined to submit major disputes to judicial settlement. Consequently, the International Court of Justice—and other standing international tribunals—are underemployed".[90]

VIII. Additional Actions Required by the U. N. to Safeguard Human Rights

One additional recommendation is offered : the creation of the new office of United Nations High Commissioner for Human Rights.[91] Although suggested in the past, this proposal remainstimely because of its inherent merit, even though the U. N. Generai Assembly has avoided consideration of this alternative: nonetheless the basic problem of the

89. *International Protection of Human Rights,* 1968, 104-07. Gormley, Book Review, 43 *Brit. Y. B. Int'l L.* 1968-1969, 285. (apartheid is declared to constitute a crime against humanity) id. at 62.

90. W. Friedmann, The International Court As Law-Maker, in General Course in Public International I aw, 127 *Recueil des Cours* 1969 II, 40, 172.

See especially, T. S. R. Rao, Review of the Functioning of the International Court of Justice—Some Considerations Relating to the Amendment of Its Statute, 11 *Indian J. Int'l L.* 1971, 20 and Schwelb, The Process of Amending the Statute of the International Court of Justice, 64 *Am. J. Int'l L.* 1970, 880.

91. Etra, International Protection of Human Rights : The Proposal for a U. N. High Commissioner, 5 *Colum. J. Transnat'l L.* 1966, 150. See the earlier plans for a United Nations Attorney General for Human Rights, Hoffmann, Implementation of International Instruments on Human Rights, [1959] Proc. A. S. I. L. 235, 237-38. Some of the earlier proposals were noted approvingly in M. Moskowicz, *Human Rights and World Order*, 1958.

proliferation of human rights conventions requires that some coordination result remains.[92]

Along with the possible creation of a new U. N. high office there is also the possibility that existing organs may be revamped, so as to make them more receptive to human rights activities. The earlier suggestion of Fr fessor A. H. Robertson in *Human Rights in the World,*[93] can be used as a counterpart. He proposes that the present Trusteeship Council be reorganized to constitute a human rights council, in view of the fact that only two trust territories remain. It fact, it might be desirable to merge these two proposals, in order to produce a major organ, capable of promoting and protecting human rights. Recently, Professor Robertson again reiterated this proposal.[94] In 1976, the writer also advocated that the Trusteeship Council be given jurisdiction over environmental issues in addition to traditional human rights.[95] In this proposal, the Council—and similarly a United Nations High Commissioner for Human Rights—would have competence over the rights of individuals, groups, non-governmental entities, states and the international community. Within the orbit of, first, political and civil rights and secondly, as social and economic rights, the writer contends that significant phases of environmental protection can be effectively dealt with by a United Nations human rights organ. Included would be the protection of the environment in outer space.[96] Obviously, not all environmental problems could be included within the scope of human rights protection; however, a U. N. council would be the proper type of body to deal with the global aspects of environmental and ecological safeguards. It may be recalled

92. See the subsequent proposals by J. Fawcett, A UN High Commissioner of Human Rights, in *Human Rights In National and International Law*, 1968, 297-99.

See also the suggestion that a U. N. High Commissioner for Human Rights can aid the implementation of the U. N. Human Rights Covenants. S. Hoare, The UN Commission on Human Rights, in *The International Protection of Human Rights*, 1967, 66-70, 96-97. R. S. Clark, *A United Nations High Commissioner For Human Rights*, 1972.

93. Note 83 *supra.*

94. A. Robertson, The Helsinki Agreement and Human Rights, in *Human Rights and American Foreign Policy*, 1979, 143.

95. 2 M, Tardu, *Human Rights* : The International Petition System, The Trusteeship System, 1980, Pt 2, Sec. 3, at 5. See also D. Hall, *Mandates, Dependencies ond Trusteeship*, 1948. N. Macaulay, *Mandates : Reasons, Results, Remedies*, 1937.

96. W. Gormley, Protection of the Earth-Space Environment, *supra* note 12.

that earlier in the study it was mentioned that environmental protection was also included as one of the solidarity (or third generation) of human rights. As such, the global approach to the preservation of mankind on this planet could be taken by a newly reconstituted "trusteeship" council. for the reason that the rights of all men could be protected, under the legal concept of "trusteeship".

The ramifications of such a U. N. Human Rights Council seem endless. For instance, greater coordination and cooperation with the U. N. specialized agencies particularly the ILO would be possible. Beyond question, increased cooperation with regional organizations would be of tremendous benefit to the development of the international law of human protection.

In support of the above recommendations, all lawyers, scholars, and jurisconsults must work to create new positive international law, not merely idealistic pronouncements concerning human dignity, world peace, the rule of law, and other desirable goals. It is, therefore, necessary to move beyond the codification of ideals and create binding international legal obligations by means of a series of multilateral conventions. May it be suggested that there is a danger that the solidarity rights might become ineffective simply because of the inability to implement and enforce specific provisions. Of course, the alternative approach is favoured by the writer, namely, that this third generation of human rights will also develop functional remedies, possibly in a manner reminiscent of the implementation of those rights enunciated in the Universal Declaration. In terms of the evolution of a United Nations law of human rights, it was recognized in 1948 that a treaty (or bill of rights) was required to give affect to the Universal Declaration. Therefore, one theme running through this study has been the implementation of the U. N. Covenants, for the reason that the ideals in the Universal Declaration have been made effective. The writer submits : their adoption, even with reservations is the greatest advancement ever taken at the international level to protect human rights, fundamental freedoms, and human dignity. Specifically, to prove worthwhile, it must be possible to obtain relief in specific cases; controversies must be capable of resolution; and injured persons (or classes of human beings) must be accorded legal remedies in appropriate situations.

In the immediate future, steps must be taken to persuade all governments—primarily the United States—to ratify the two human rights covenants. Similarly, the USSR must ratify the optional protocol

and file the declaration required to bring the inter-state complaint procedure into affect, as specified in article 41 of the Civil and Political Covenant. Moreover a larger number of states must be encouraged to ratify the Optional Protocol to the Civil and Political Covenant. Consequently a greater degree of cooperation is required on the part of U. N. member states, in order to give affect to newly emerging human guarantees. It can be assumed that additional classifications of rights will be perfected during the closing decades of this century that evolve from the basic principles of the Universal Declaration.

IV. The U. N. Covenants and Their Indispensability to the Global Community

The difficulty of creating new law from the Universal Declaration and the U. N. Charter has been emphasized with an objective in mind, namely that the historical discussion of ideals can serve as a basis for the present examination of the Human Rights Covenants,which give effect to those rights recognized as inalienable. These great covenants, first, the *International Covenant on Economic, Social and Cultural Rights*[97] the counterpart second treaty, the *International Covenant on Civil and Political Rights,*[98] and the most far-reaching text, the *Optional Protocol to the*

97. International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, G. A. Res. 2200A, 21 U. N GAOR, Supp. (No. 16) 49, *U. N. Doc.* A/6316 (1966) (entered into force Jan. 3, 1976); 61 *Am. J. Int'l L.* 1967, 861.

See especially, Alston, The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights, 18 *Col. J. Transnat'l L.* 1979, 79 (the contributions of WHO, FAO, ILO, and UNESCO are examined). See also Internal Agency Agreements, *id.* at 110-12.

Vierdag, The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights, 9 *N. I. L. R.* 1978, 69. See especially, See 5, The Question of the Enforceability of Social Rights, id. at 83-94.

98. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G. A. Res. 2200A, 21 U. N. GAOR, Supp. (No. 16) 49, *U. N. Doc.* A/6316 (1966) (entered into force Mar. 23, 1976) ; 61 Am. J. Int'l L. at 870.

But cf. M. Lippman, Human Rights Revisited : The Protection of Human Rights Under the International Covenant on civil and Political Rights, 10 *Calif. Western Int'l L. J.* 1980, 450. He concludes : "The Covenant lacks procedures for effective fact-finding, for decisions on the merits of a complaint, and fails to provide for the authoritative sanctioning and public exposure of human rights violations. In addition, the Covenant's substantive provisions are imprecise and reflect a liberal-democratic bias." *Id.* at 513 (footnotes omitted).

H. Muhammad, Guarantees For Accused Persons Under the UN Human Rights Covenants, 20 *Indiau J. Int'l L.* 1980, 177.

International Covenant on Civil and Political Rights,[99] which grants the right of communication to private individuals but not groups, will assure the necessary implementation of human rights at the international level. Out of these three texts entered into force in 1977, to date, over sixty states have ratified the two covenants, and over twenty states have ratified the optional protocol.

Professor Ian Brownlie points out the most significant consideration : the purpose of the optional protocol is : "to supplement the covenants giving more specific context to rights protected and granting more sophisticated enforcement procedures..."[100] The same conclusion is made by Holcombe as concerns the future implementation of the Universal Declaration : "The Covenant on Human Rights is designed to form the second part of an International Bill of Rights, of which the first part is the Universal Declaration of Human Rights."[101] Admittedly, the scope of the New York system is far from achieving universal application, as was originally the aim of the Economic and Social Council, and its U. N. Commission of Human Rights. Considerable effort will be required before the one hundred and fifty members of the United Nations are bound by the covenants and the machinery established pursuant to the optional protocol. Nonetheless, a major advance in the protection of human rights has been made for the benefit of the world community.

As of the 1980s, the New York system is now operational. Reports are being submitted by governments ; as required by article 40 (1), states parties undertake to submit reports within one year of the entry into force of the covenant and thereafter whenever the Human Rights Committee so requests. It should be noted in passing that compliance with these reporting obligations has the affect of giving internal force to the obligations assumed under the covenants, according to articles 24 through 26 of the Civil and Political Covenant, in conjuction with article 3.[102]

99. Optional Protocol to the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G. A. Res. 2200A, 21 U. N. GAOR, Supp. (No. 16) 49, *U. N. Doc.* A/6316 (1966) (entered into force Mar, 23, 1976) ; 61 *Am. J. Int'l L.* at 887.

100. The Place of the Individual In International Law, 50 *Vir. L. Rev.* 1964, 435, 456.

101. Holcombe, The Covenant of Human Rights, 14 *Law & Contemp. Prob.* 1949, 413. C. Jenks, The United Nations Covenants on Human Rights Come to Life, in *En Hommage a Paul Guggenheim*, 1963, 805. E. Schwelb, Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants, in *Melanges Modinos*, 1968, 207-89. See also J. Humphrey, The U. N. Charter and the Universal Declaration of Human Rights, in *The International Protection of Human Rights* 1967, 39-58.

With the establishment of the Human Rights Committee, pursuant to the entry into force of the optional protocol, individual communications have been submitted to the committee under article 4. During the first two years of the committee's existence, fifty-three such individual petitions were submitted against Canada, Columbia, Denmark, Finland, Madagascar, Mauritius, Norway, Uruguay, and Zaie.[103]

In brief, the committee's function involves the screening of petitions in order to determine admissibility (in terms of exhaustion of domestic remedies and compatibility with the convention, according to articles 2 and 3) and, subsequently, to consider the merits of the case. Requests for information are then submitted to the state in question, prior to the committee's drawing up its final report, which in appropriate circumstances may be made public.

An interesting legal development—somewhat reminiscent of the determinations that had to be made by the League of Nations Permanent Mandates Commission and the Trusteeship Council[104]—had to be resolved by the committee (pursuant to article 40 (1) (h) of the covenant). Could the committee actually criticize a state in a type of judicial holding, thereby placing the accused state in the position of a defendant ? Alternatively, should the committee merely reach an opinion as to the factual data, perhaps in the manner of the European Commission of Human Rights ? It can be noted, by way of comparison that the Trusteeship Council, notwithstanding severe criticism from some administering powers, would direct strongly worded resolutions against offending states. While adopting what is deemed to be a middle (or compromise) approach, the committee is rendering holdings that have the affect of condemning violations of those human rights that have been codified in the covenant. Specifically, the two first distinct cases (involving five petitions) that have been handed down clearly demonstrate that the committee will serve as a viable organ that will direct the force of public opinion and where appro-

102. Reporting provisions are contained in the Covenant on Economic, Social, and Cultural Rights in Part IV, arts 16-22. Discussed in W. Gormley, Implementation of the Human Rights Covenants, *supra* note 44.

103. Commuuications From Individuals, Human Rights Committee, 23 *Rev. Int'l Comm'n Jurists*, 1979, 26.

104. See e.g., the discussion of the procedural innovations perfected by the Trusteeship Council, W. Gormley, *supra* note 44, and note 124 supra.

priate the "world sense of shame" against defaulting governments. As a phase of this process, the committee has developed standards that serve as a sanction agaist states committing gross violations of human rights. In the case against Uruguay, four communications alleged violations of torture and a fifth concerned the denial of a passport.[105] In regard to the allegations of torture, the committee held that a general reply that did not attempt to refute precise allegations was insufficient. Precisely the committee "... based its views on the ... facts which have either been essentially confirmed by the State Party or are uncontested except for denials of a general character offering no particular information or explanations."[106]

In the fifth petition transmitted against Uruguay, a passport had been arbitrarily denied to a political exile, but following the finding of admissibility of his complaint steps were taken by the governments to remedy the situation, primarily by issuing the required documents.[107] Without dwelling upon the original violation, the committee noted with approval that progress had been forthcoming. Perhaps, the committee was looking toward the practices of the European Commission of Human Rights, in which an essential part of its procedure is to attempt to arrive at a friendly settlement between the parties.

An additional development, which will prove to be of special significance to the implementation of the Political and Civil Covenant, and similarly of the Universal Declaration, is the cooperation between the Human Rights Committee and specialized agencies of the United Nations. Precedent for such cooperation can be seen from the aid provided by the International Labour Organization's help to the Council of Europe in the examination of reports submitted in connection with the European Social Charter and also its examination of reports submitted pursnant to articles 6 through 9 of the Covenant on Economic, Social, and

105. Human Rights Committee on the International Covenant on Civil and Political Rights: Decision With Regard to Communication of Valentini de Bazzano. Views of the Human Rights Committee Under Article 5 (4) of the Optional Protocol.... Communication No. R 1/5, 15 February 1977. Annex to Report of Human Rights Committee. *U. N, Doc.* A/34/40; 19 I. L. M. 133 (1980). See also, *id.* Communication No. 2/9, 20 February 1977.

106. Communication No, 2/9, *supra* note 136, IP 10, at 3.

107. Cited in Important Decisions Under the Optional Protocol, 25 *Rev. Int'l* Comm'n *Jurists*, 1980, 35.

Cultural Rights.[108] Precisely, the Human Rights Committee forwards the reports that it has received to the ILO, which in turn passes them on to its Committee of Experts on the Application of Conventions and Recommendations; the Committee of Experts then conducts a full examination and reaches final conclusions, and these conclusions are returned to the Human Rights Committee. At present, then, information and portions of relevant reports are being transmitted to UNESCO and the ILO. As a phase of the implementation process of U. N. organs, ILO is prepared to provide information and assistance within its fields of special competence.

An additional phase of the committee's work is of special importance to the implementation of human rights, namely the examination of reports submitted by governments through the office of the Secretary-General of the United Nations. As indicated above, states parties are required to submit their first report within one year of the entry into force of the Political and Civil Covenant. Despite the fact that a number of states have been tardy in fullfiling this obligation, the majority of states—including Eastern European States—have submitted their reports. Although in an embryonic stage of development, the committee has become functional. Operating under its Provisional Rules of Procedure, a system of supervision (as envisaged by Part IV of the Political and Civil Covenant, particularly articles 39 and 40) has been perfected, which reflects the practices of the ILO.

It should also be noted in this connection that the Covenant on Economic, Social, and Cultural Rights relies entirely on a reporting system patterned on ILO precedent. Articles 16 through 23, Parl IV of the covenant set forth the machinery by which reports from states parties are considered by ECOSOC and possibly by the U. N. Commission of Human Rights. This elaborate system of reporting, which has the possibility of cooperation with other U. N. agencies, is similarly creating valuable precedent for the implementation of economic and social guarantees.

The perfection of its procedural standards—and indeed its competence within the scope of its jurisdiction as set forth by the Civil and

108. This practice of transfering reports submitted under other international and regional conventions is discussed in W. Gormley, Elimination of Child Labour, *snpra* note 13. The writer proposes that reports from states parties to an international convention, dealing with child labour, be examined by the ILO, owing to its special competence in the labour field.

Political Covenant—provides considerable insight into the methods of arriving at some degree of cooperation between the Eastern and Western blocs. In fact, the single instance in which the Eastern and Western states collaborate in the implementation of human rights takes place within the Human Rights Committee, though without the participation of the United States.

No comparable level of cooperation has resulted from the Helsinki Declaration ; neither the Belgrade nor the Madrid review conferences were able to increase (or for that fact maintain) the original impetus of the Helsinki Final Act. Therefore the success achieved by the Human Rights Committee stands in sharp contrast to the "usual standoff" between democratic and socialist blocs.

At the insistence of the Eastern European powers, the committee operates on the basis of a consensus. No formal votes have been taken, although any member is entitled to call for such a vote, pursuant to Rule 51 (a) of the Provisional Rules of Procedure. Even though the members of the committee serve in their personal capacity and are not responsible to their states, the political tension within U. N. organs cannot be overlooked.

The functioning of the committee is worthy of serious study, preferably from a comparative approach, with the opinions rendered by the European Commission of Human Rights and the Inter-American Commission of Human Rights. Although the jurisprudence (or "case law") of the U. N. commission is far less extensive than that of its European counterpart, it might well be possible to discern future trends that will give affect to those human rights enunciated in the Universal Declaration and the evolving solidarity rights. Such a detailed analysis must remain within the realm of future research. Nonetheless, it is necessary to remain aware of the potential for additional growth and accomplishment by the Human Rights Committee.

X. The Continuing Role of the Universal Declaration : the Future Thrust of Human Rights Protection

With the entry into force of the covenants and the optional protocol, the United Nations moved beyond the promotion and protection of human rights and became directly involved with their implementation. Although in its infancy, the New York system has become operational; implementing machinery has been created under the authority of existing

international conventions; and procedural techniques are being perfected.[109]

The significant consideration is that practical effect is being given to those human guarantees enunciated within the Universal Declaration. Hopefully, the third generation of human rights that stem from the right to life and are applicable to the international community, *erga omnes*, will become enforceable. At least as a longer range objective, the implementation of this new group of rights is worthy of the continuing global campaign.

It must not be assumed that shortcomings do not exist within the several major systems, yet the accomplishments achieved are tremendous in terms of the relatively modest steps taken by the League of Nations, during the inter-war period. From this perspective, when evaluating the potential of any human rights experiment, the perspective of centuries should be appreciated.

In terms of the contemporary scene, it may well be asked : Is the glass half full or half empty ? Increasing violations of human dignity are occurring in every continent and in most countries, including such practices as torture, slavery, child labour, and starvation on a mass scale. Regrettably, the majority of states have yet to ratify the convenants and other relevant human rights conventions. Included is the United States. Inded, the failure of the U. S. to ratify the covenants has retarded the global human rights movement and tended to undercut former President Carter's human rights campaign. Therefore, the reality of the existing political climate within the international community must not be minimized when extensions of human rights are proposed. Conversely, longer-range objectives must continue to be explored, because of the continuing violations of human dignity that threaten the very existence of mankind. That is to say, men of good will must not lose sight of the ultimate objective—universal protection of human rights and resulting world peace. But in order to support this longer-range goal, specific (indeed often modest) steps must first be attempted. Within this context, the writer proposes that states make greater use of the tremendous resources at the disposal of the International Court of Justice, in order to resolve human rights issues. The difficulty is that states are

109. A. Cassese, Progressive Transnational Promotion of Human Rights, in *Human Rights: Thirty Years After the Universal Declaration*, 1979, 249-62. (The U. N. has done all it can to promote human rights. He also favors the activity of transnational groups, which activity does not oppose U. N. actions.)

reluctant to submit their disputes to international tribunals or to arbitration.

But states must accept the compulsory jurisdiction of the three existing courts : (1) the International Court of Justice, (2) the European Court of Human Rights, and (3) the Inter-American Court of Human Rights. Perhaps with the establishment of a law of the sea tribunal the desire to employ judicial and arbitral settlement will improve.

With the proliferation of human rights conventions, supported by declarations and resolutions of parliamentary assemblies, jurists and scholars must not lose sight of the significance of the Universal Declaration of Rights, for it not only serves as the foundation for additional classes of rights, but it simultaneously increases in stature. The Declaration consitutes customary international law. Consequently the Declaration, as implemented by regional and international conventions, will also function as the basis for cooperation between states in the area of human rights, and hopefully between the developing and the industrialized worlds (i. e. the first, second, and third worlds, in terms of the North-South dialogue).

The enforcement of human rights raises the subsequent phase now partially dealt with by the Human Rights Covenants and regional conventions. Collectively, practical effect is being given to the concept of social justice, through the common law of mankind. Within their respective spheres of jurisdiction, relief is being given to injured individuals. More than the recognition of natural law rights is involved : the individual has legal recourse against sovereign governments (at least to some degree), because of the fact that international and regional institutions have moved beyond the promotion of human rights and are protecting and implementing human guarantees. Looking toward the coming century, therefore, it is not unrealistic to anticipate that additional human rights will be codified and become binding on states but also that new schemes for the granting of relief and compensation will be adopted. As a corollary, existing rights such as environmental protection, the right to health, the protection of children and freedom from hunger will be enlarged in their application. Hopefully the solidarity rights will be of relevance, povided of course that they become capable of enforcement in addition to constituting formulations of ideals. Realistically, the process of implementation will be extremely prolonged, particularly from the viewpoint of oppressed individuals, minorities, and peoples. But the reality

of international life is that international and regional organizations cannot move faster than permitted by their participating governments.

With the adoption of the Universal Declaration in 1948, the first step was taken toward the protection of human rights throughout the international community. The continuing significance of these rights *erga omnes*—based on a common standard for mankind and conceptions of natural law—will serve as the foundation for future experiments in the coming century. These efforts must emphasize those newer procedural techniques that are required to afford relief to injured individuals and indeed, to all of mankind.

HINDU LAW OF MAINTENANCE AND THE PRIVY COUNCIL : A REVIEW

K. I. VIBHUTE.*

I

Colonial Jurisdiction of the Privy Council

The jurisdiction of the Privy Council to hear appeals from the Dominion and crown colonies is a very old jurisdiction.[1]

It is since 1726, a right to appeal to the Privy Council was granted from the Mayor's Court, the first crown court in India. Later on, the Regulating Act, 1773, by which a Supreme Court was established at Fort William, provided for an appeal to the Privy Council. Subsequently, under the Act of Settlement, 1781 appeals could go to the Privy Council from provincial Sadar Adalats. After the reconstitution of the Privy Council by the Judicial Committee Act, 1833, a legion of appeals were heard from India till the right of appeal was abolished by the Abolition of Privy Council Jurisdiction Act, 1949.

Though the jurisdiction of the Privy Council over India is terminated and legalistically, the Privy Council, is only a 'foreign court' for India in view of the fact that it has ceased to be the final court of appeal as it was for more than two hundred years, its influence however in the decision making in this country is quite considerable. Hence, the decisions of the Privy Council, even including those pronounced before the commencement of the Constitution of India, are, technically, the opinions of a foreign court, which, in the absence of any contrary provision, may or may not have any value in Indian legal system. But this is not true regarding opinions of the Judicial Committee of the Privy Council as the Constitution—supreme law of the land—has recongnised its value and attached some importance to the decisions of the Privy Council in the present Indian legal system. Under Article 372 of the Constitution all

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1. We have to go back to the twelfth century to the splitting of the 'curia regis' if we have to search how King's appellate jurisdiction over colonies began. It was part of the exercise of recovering King's powers around fourteenth century, an endeavour by Tudors to salvage royal authority till then not passed over to others.

the laws in force immediately before the coming into force of the Constitution shall continue in force until altered or repealed or amended by a competent legislature or other competent authority. Similarly, under Article 225 the law administered in any existing High Court shall be the same as immediately before the commencement of the Constitution. The phrases "law in force" (Article 372) and "law administered in any High Court" (Article 225), it is submitted, are wide enough to include judge-made law. The law laid down in the decisions of the Privy Council before the commencement of the Constitution, therefore, will be binding on all High Courts in India until it is altered, amended, or repealed by a competent legislative authority or contrary declaration of law by the Supreme Court of India[2] (under Article 141). Even assuming otherwise, Privy Council decisions are entitled to the highest respect,[3] in the Supreme Court.

Thus, by virtue of Articles 225 and 372 of the Constitution the decisions of the Privy Council, having binding force on the high courts and persuasive value in Supreme Court, have still great value in the Indian legal system. Therefore, their evaluation in the different fields is a worthwhite exercise. An attempt is made here to evaluate it's contribution in the area of Hindu law of maintenance.

II

Concept of Maintenance

The text of Manu, provides that, a mother and a father in their old age, a virtuous wife and an infant son must be maintained even by doing a hundreds of misdeeds.[4] The obligation to maintain, arising out of the existence of a particular relationship, in each of these cases, is personal to the man and is independent of his possession of any property.[5] But some times the liability depends upon the possession of

2. Article 141 of the Constitution *Gujrat* v. *Vora Fiddalli*, A. I. R. 1964 S. C. 1043 at p 1094.
3. *The Chief Revenue Controlling authority* v. *Mahereshtra Sugar Mills*, A. I. R. 1950 S. C. 218 at p. 221. Also see, *Srinivas Krishnarao Kongo* v. *Narayan Devji Kango*, A. I. R. 1954 S. C. 379 at p. 387.
4. वृद्धौच माता पितरो साध्वी भार्या सुतः शिशु ।
अप्याकार्य-शत कृत्वा मर्त्तव्या मनुरब्रवेत ॥ मनुः ॥
cf. D, N. Mitter, *The position of women in Hindu law* (1913), p. 177.
5. See, Mayne, *Hindu law* (11th ed., 1953) p. 818; Raghavachariar, *Hindu law* (1953), pp. 137-139.

property.[6] For exampie, a manager of a joint Mitakshara family is under obliga tion to maintain all members of the family, their wives and children. On the death of any one of the male members he is bound to maintain his widow and children.[7] Similarly, an heir is legally bound to provide, out of the estate which descends to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The logical justification behind this it seems, is that the estate is inherited subject to the obligation to provide for such maintenance,[8] which was even extended to a government when it takes the estate by escheat or by forefeiture.[9]

The origin of law of maintenance, it seems, lies in the humanitarian considerations and social security arrangement by providing safeguard to the physically helpless persons.[10]

At present the liability of a person to maintain his wife, children and parents, if they are unable to maintain themselves, is converted into a legal duty, and these relatives can claim maintenance as a matter of "right", if he neglects or refuses to maintain them.[11]

III

Persons entitled to maintenance

As stated above a Hindu is under obligation to maintain his wife, aged parents, legitimate and illegitimate sons, unmarried daughters and others. This obligation is personal and is independent of possession of property by him.

The opinions of the Privy Council, on the issue of maintenance may Conveniently be discussed under the following heads :

(a) Wife
(b) Widow

6. *Rama Rao* v. *Raja of Pittapur* [(1918) 4 Mad. 778 P. C.]
7. *Bhagwan Singh* v. *Mst. Kewal Kaur*, 101 I. C, 201.
8. *Mst. Rupa* v. *Mst. Sriyabati*, A. I. R.1955 Ori. 28.
9. *Mst. Golab Koonwar* v. *Collector Benaras* (1847) 4 M. I. A. 246.
10. Dr. (Mrs.) R. K. Agrawala, *Law of Support of the Hindu wife* (unpublished) p. 3.
11. Section 125 Criminal Procedure Code, 1973. This Section, which is limited in character both as regards the ground and extent of claim, is generally applicable to all communities including Hindus. Chapter III of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as the Act of 1956) exclusively deals with the law relating to maintenance among Hindus. For critical comment and case law on it, see Dr. Rajkumari Agrawala, *Matrimonial remedies under Hindu law* (Tripathi, Bombay, 1974), p. 97.

(c) Widowed daughter-in-law
(d) Concubine
(e) Illegitimate children

(a) *Wife*—The husband and wife are 'one' under the *Sastra* and, therefore, the husband is under a personal obligation to maintain her even by doing hundred misdeeds. However, Hindu wife, is supposed to reside with her husband wherever he may choose to reside. And her first duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection. The duty imposed is not merely a moral duty but is a rule of customary Hindu law. Logically she can not claim maintenance if she refuses to live with him without any adequate reason. The reasons why the Court disentitles her from claiming maintenance is that by living seperately without a justifying cause, she commits a breach of duty.[12] The Judicial Committee of the Privy Council set aside the decree of the Madras High Court and disallowed recovery of arrears of maintenance by a voluntarily separated wife on the ground that her separate residence was not justified[13] even though the charges of immorality and cruelty were levelled against the husband but could not be proved by the wife. In *Nagganna's* case,[14] the Privy Council held that the wife living seperately leads an immoral life nnd persists with it, forefeits her right to maintenance.[15] However, if she gives up her immoral course of life she is entitled to "a bare or starving maintenance' i. e. to food and raiment just sufficient to support her life. But the Privy Council had no occasion to elaborate the idea of 'justifiable reason'.[16]

(b) *Maintenance of Widow* :—According to both the leading schools of Hindu Law namely Mitakshera and Daya Bhaga the right of a wife to claim maintenance subsists even after the death of her husband. The general rule of Hindu law is that the widow of a deceased coparcener is entitled to maintenance out of the coparcnery property devolving on the

12. However, prior to the Act of 1956, a Hindu wife's right to separate residence and maintenance was regulated by the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.
13. *Negganna Nayudu Bahadur* v. *Rajya Laxmi Devi*, A. I. R. 1928 P. C. 187. Also see *Shurno Moyee Dassee* v. *Gopilal*, A. I. R. 1926 P. C. 96.
14. *Paromi* v. *Mahadevi*, 5 I. C. 960.
15. This is also recognised by the Act of 1956 (Sec. 16 (3)).
16. At present, Section 18 (2) of the Act of 1956 enumerates the grounds on which a Hindu wife can live separately without forfeiting her claim to maintenance.

surviving coporceners.[17] The conditions precedent to claim maintenance are that she has not obtained any share from the estate of the deceased husband and the persons, against whom maintenance is to be claimed, must have inherited the property of her late husband. The right which accrues to her as a member of the joint family is therefore, available only against the surviving coparceners of the joint family 'quoad' the share of her deceased husband which they take by the rule of survivorship.[18] Thus the primary liability is against the coparcener who has in his hands the share of her deceased husband's estate.[19] If, however, the income from the share of her husband in the hands of the surviving coparcener(s) is inadequate to maintain her and something more is needed to meet her (reasonable) wants it may be made into a charge on a specific portion of the joint family property not exceeding her husband's share.[20] It does not form a charge on the whole property of the joint family but if before partition she gets a decree declaring, her right and creating a charge on the whole estate for maintenance, her right remains unaffected by subsequent partition unless the decree is modified as validly suspended.[21]

However, there is an exception to the rule that maintenance of a widow does not form a charge on the whole of the joint family property namely when there are more widows in the family. In such a situation maintenance of widows is a charge on whole estate. But after partition among the sons each widow can have a charge against the share allotted to her own son and not on the share of other sons.[22] It was contended

17. Since the coparcenery has not yet been totally abrogated by any enactment the right to claim maintenance exists notwithstanding the fact that the Act of 1956 doesn't contain any provision in this regard. Sections 21 and 22 of the Act of 1956 are not intended to affect this general rule of Hindu law. However, under the Act, "widow" is also a "dependent" (Section 21) and entitled to claim maintenance from the persons who inherited the estate of the deceased (Section 22), if she has not obtained any share from the estate of the deceased.
18. *I. T. Commissioner* v. *Bhagwati*, A. I. R. 1947 P. C. 143, 145.
19. However, there is no unanimity amongst the Indian High Courts regarding widow's right against joint family property. See, *Ramawati* v. *Manjhon*, [(1905) 4 Cd. L. U. 74] ; *Lingayya* v. *Kanakamma*, A. I. R. 1916 Mad. 444 ; *Varahalu* v. *Sithamma*, A. I. R. 1961 A. P. 272.
20. *Supra* note 17. Recently the Andhra Pradesh High Court summerising the position regarding widow's right to maintenance out of coporenery property, has held that the deficiency to meet the wants of the widow, should be contributed by all sons (*Satyanarayanamurthy* v. *Rama Subhamma*, A. I. R. 1964 A. P. 105).
21. *Supra* note 17. Also see Section 27 of the Act of 1956.
22. *Srimati Hemangini Dasi* v. *Kedar Nath Kundu Chowdhary* (1888-89) 16 A. I. 115.

before the Privy Council that the maintenance was a charge on the whole estate and like debt it must be provided for prior to partition. Rejecting the contention on the ground that right of a widow to maintenance is based on the relationship Sir Richard Couch has, rightly observed : "...where there are several groups of sons the maintenance of their mother(s) must so long as the estate remains joint be a charge upon the whole estate but when a partition is made the a law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her."[23] However, if a widow is residing in a residence given by the will of her husband, no heir is entitled to any interest in the house during the life time of the widow.[24]

A Hindu wife, as stated earlier, can not leave her husband's house and claim her right to be maintained by him unless this separate residence is justifiable, but the case of a widow is different. She is not bound to reside with her husband's family and she does not forfeit her right to maintenance merely by such non-residence.[25] She can even claim arrears of maintenance (from date of change of residence) which she can not claim while living in husband's residence unless she was kept under extreme penury and oppression.[26] At the same times it is important to note that she is not entitled for separate residence and maintenance, if she leaves her husband's residence being 'unchaste' or for 'other improper purposes'.[27] In other words, her right to maintenance is dependent upon her leading a chaste life even as a widow and if she deviates from it, the right is not available to her,[28] no matter whether it has been

23. *Ibid.*, cf. p. 124.
24. *Ananda Prasad Das* v. *Ambika Prasad Das*, A. I. R. 1926 P. C. 96 at p. 97-53 L. A. 201.
25. *Rajah Pirthee Singh* v. *Ranee Raj Kower* [(1873) I. A. Sup. Vol. 203 (at pp. 206, 211)]; *Md. Ekradeswari Bahuasin Saheba* v. *Homeswar Singh*, A. I. R. 1929 P. C. 128 (at pp. 131-132)]. But if the husband by his Will makes it a condition that she should reside in the family house, she is not entitled to separate maintenance if she resides elsewhere without just cause. (*Ekradeswari*).
26. Mf. *Ekradeswari supra* note 24.
27. *Supra* notes 24 and 25. Also see *Narayan Rao* v. *Ramabai*, (1878-79), 6 I. A. 114=3 Bom. 415 P. C.
28. *Rajah Pirthee Singh* v. *Runee Raj Kowar supra* ; *Maniram* v. *Kolitami*, 5 Cal. 776 P. C ; *Lakshmi Chand* v. *Mf. Anandi*, A. I. R. 1935 P. C. 180. It should be noted that where unchastity of a widow after her husband's death is relied upon as an answer to her claim for maintenance it must be specifically put in issue. *Saboo Sidick* v. *Ayeshabej*, 30 I. A. 115=27 Bom. 485 P. C. and the burden of proof lies on the opposite party (*Lakshmichand* v. *Anandi, supra*).

secured by a decree ; an agreement[29] or otherwise, If, however, she repents and reforms her life by reverting back to a chaste life before the date of her suit, she is entitled to 'bare or starving maintenance', that is food and raiments just sufficient to support her life.[30]

(c) *Widowed daughter-in-law :*—[31] Prior to the Act of 1956, a Hindu widow, when there was no separate property left by her deceased husband or when his share, if any, in the coparcenery at the time of his death was not sufficient for her maintenance, had no legal claim for maintenance against her father, her father-in-law deceased husband's relatives. However, the father-in-law was under a moral obligation, to maintain his widowed daughter-in-law if he had separate property of his own. However, on the death of the father-in-law, the heirs of the deceased were bound to maintain her for the moral obligation got transformed into legal obligation and the liability was fastened to the property inherited by them.[32]

Now under the Hindu Adoption and Maintenanee Act there are similar provisions,[33] with slight modification regarding the maintenance of widowed daughter-in-law endorsing the stand of the Privy Council taken as early as 1935.

(d) *Concubine*:—It is interesting to note that though the maintenance of a concubine was well established under Sastraic law, the Act of 1956 does not provide for her.

The Privy Council had an occasion to express it's opinion on the legality of the claim of maintenance by a concubine. Reversing the judgement of the Bombay High Court, which held that a concubine could claim maintenance only if she was an '*Avarudha stree*' (i. e. a continuousely kept concubine with whom the connection of the deceased was perfectly open and recognised and who was kept practically as the member of the family). Lord Darling held that her residence in the family house is not necessary if the concubinage was

29. *Moniram* v. *Kolitami supra.*
30. *Saboo Sidick* v. *Ayeshabai, supra.*
31. The right to maintenance of a Hindu widow daughter-in-law has changed materially under the codified Hindu law, particularly after passing of the Hindu Succession Act, 1956. The right of a widowed daugher-in-law, therefore, must now be considered in the context of the provisions of that Act. See Sections 19 ; 21 (vii) and 22 of the Act of 1956.
32. *Rajani Kanta Pal* v. *Sajani Sundan Dassoyya*, A. I. R. 1934 P. C. 29.
33. Section 19 read with Sections 21 and 22.

permanent and she was in the exclusive keeping of the deceased. According to his Lordship, the incident of residence in the family house is not a prerequisite for granting maintenance but rather a factor for ensuring the chastity of the mistress.[34] The concubine is entitled to maintenance from the property, whether ancestral or self-acquired, of the deceased.

(e) *Illegitimate children* :—An illegitimate son of a Hindu, prior to the codification was entitled to maintenance from his putative father only.[35]

Illegitimate sons of a Hindu, according to the status of his mother in the society, may be divided into following four classes,[36] namely :

(1) Illegitimate sons of a Hindu belonging to one of the three higher classes by a *dasi* (i. e. a Hindu concubine in the continuous and exclusive keeping of the putative father.)

(2) Illegitimate sons of a Hindu by a non-Hindu woman who is not a '*dasi*'.

(3) Illegitimate sons of a *Sudra* by a '*dasi*', and

(4) Illegitimate sons of a Hindu by a non-Hindu woman.

(1) The illegitimate son of a Hindu belonging to one of the three higher classes by a '*dasi*' is entitled only to maintenance out of the father's estate[37] during his father's life time. But after the father's death where he has left no separate property and was joint with his collaterals, the illegitimate son is entitled to maintenance out of that property but disentitled, even in the absence of a legitimate son, to demand a partion of the joint family property in the hands of the colloterals.[38]

(2) In *Muttuswamy Jagavera* v. *Venchalasware*[39] an issue before the Judicial Committee of the Privy Council was : nature and extent of maintenance of an illegitimate son born to a dancing girl kept in a 'Zanana' (who was not a permanent concubine) as a result of casual

34. *Bai Nagubai Manglorkar* v *Bai Manglibai*, A. I. R. 1926 P. C. 73 at p. 76—53 I. A. 153.
35. Section 20 (2) of the Act of 1956 gives statutory form to this legal obligation. It goes further than the old Hindu law by putting a female Hindu under a legal obligation to maintain her illegitimate children.
36. D. F. Mulla, *Principles of Hindu Law* (1952) p. 635.
37. *Chouturya Run Murdun Syn* v. *Sahub Purhulad Syn* [(1857) 7 M. I. A. 18] ; *Raoji* v. *Kunjelal, Supra.*
38. *Vellaiyappa Chetty* v. *Natrajan*, A. I. R. 1931 P. C. 294—58 IA 402.
39. (1868) 12 M. I. A. 203.

intereourse. The Committee opined that the son was entitled to maintenance even though he was the result of a casual or adulterous intercourse. He was entitled to maintenance out of the estate of his putative father and if the father had left no separate property he was entitled to maintenance out of the joint family property of which the father was a member.[40] However, their Lordships without deciding its legality in Hindu law, had expressed the view that an assignment of ancestral immoveable property by a father to his illegitimate son for the purpose of maintenance before the birth of a legitimate son and heir was valid,[41] though he could not succeed to his putative father under Hindu law of inheritance.

The right of the illegitimate son to be maintained by his putative father is only personal to him and it does not descend on his death to his offspring. This means that the offspring of a illegitimate son are not entitled to claim maintenance out of the property of his grandfather, or his collaterals.[42]

(3) However, a liberal view was taken by the Privy Council regarding maintenance of illegitimate son of a *sudra* by a *dasi*. He was not only entitled to maintenance from his putative father but he was entitled to a share in the separate property of his putative father after his death. However, he was not entitled to demand a partition of the joint family property in the hands of the collaterals of his deceased putative father. The court may however award not only future but also past maintenance and may direct the same to be secured by a charge on the joint family property. Such maintenance is payable to the illegitimate son for life.[43]

(4) The illegitimate son of a Hindu by a non-Hindu woman is not entitled to maintenance under the Hindu law but he may claim maintenance from his putative father under Section 488 of the Criminal Procedure Code, 1898 (Now Section 125 Cr. P. C., 1973). Similarly, an illegitimate da ghter is not entitled to maintenance but she can claim it from the putative father under the same Section of the Criminal Procedure Code.[44]

40. *Ibid*, at p. 220.
41. *Rajah Parichot* v. *Zalim Singh* [(1877) 4 L. A. 159].
42. *Roshon Singh* v. *Balwant Singh* [(1899) 27 I. A. 51] ; Also see *Chouturya Ram* v. *Purhulad, Supra.*
43. *Vellaiyappa Chetty* v. *Natrajan, Supra.* Also see *Jogendra* v. *Nityanund* (18 Cal. 151 P. C.) ; *Inderun* v. *Ramaswamy* 13 M. I. A. 141.
44. *Ibid.*

Finally, it should be noted that, the illegitimate sons of junior members have no right of maintenance out of the ancestral impartible estate in the hands of the eldest member.[45] It is submitted that the opinion is not based on any authority of Hindu law and no convincing reasons given for such opinion.

It is interesting to note that there was no provision for maintenance of illegitimate daughters except the one under the Criminal Procedure Code.

The aforesaid narration significantly reveals that whereas disputes regarding the obligation of a person or his property to maintain his unchaste wife, widow, concubine, illegitimate sons were taken to the Privy Council hardly any appeals involving the maintenance of aged parents, virtuous wife, legitimate sons went to the Privy Council. Obviously we may conclude that the Hindus were bound to maintain aged parents, legitimate sons and virtuous wife irrespective of possession of any property.

IV

Quantum of Maintenance

Fixation of the quantum of maintenance was in the discretion of the courts.[46] In a leading case[47] on the subject of fixation of maintenance the Privy Council, rightly, pointed out that maintenance depended upon various facts of the situation, the value of the estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, regard being of course had to the scale and mode of living and the age, habits and wants and class of life of the parties. Though the Privy Council was reluctant to interfere with the discretion exercised by the Indian courts in fixing of the amount of maintenance unless there was 'strong ground' for such interference[48]

45. *Krishna Yachendra* v *Rajeswarre*, A. I. R. 1942 P. C. 3.
46. *Katchekaleyana Rungupp a* v. *Kachivijaya Rungappa*, 12 M. I. A. 49.
47. *Ekradeshwari* v. *Homeshwar, supra,*
48. *The Collector of Madras* v. *Mootto Ramlinge*, 12 A. L. A. 397 ; *Braja Sundar* v. *Swarna Manjori Devi*, A. I. R. 1917 P. C. 187. Also see, *Ekradeshwari* v. *Homeshwar, supra, Srermatty Nithokissoree Dossee* v. *Togendso Nutto Muttiele*, [(1878) I. A. 55] ; *Radarani Dassya* v. *Brindrani Dassya*, A. I. R. 1939 P. C. 27 ; *Katchekoleyana Rungappa* v. *Kachivijaya Rungappa, supra.*

it laid down important guidelines which are still considered as useful by the Indian courts.[49]

In fixing the quantum of maintenance of wife, widow, widowed daughter-in-law, concubine and illegitimate sons, variety of relevant factors have to be considered by the court. However, it is proposed to enumerate a few general considerations emphasized by the Privy Council, whenever it got an opportunity to do so.

Maintenance to be awarded to a Hindu widow should be such an amount which would enable her to live with the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life time,[50] and neither on too penurious or miserly nor on too extravagant a scale.[51] Important factors considered by the Privy Council in fixing the maintenance of a widow were : extent of property;[52] value of estate; position and status of the deceased husband and the wife; her station in life; ordinary expenses of living including reasonable expenditure for religious and other duties;[53] chastity of widow;[54] residence or non-residence with the husband's family;[55] extent of share of the deceased hus-band in the coparcenary,[56] etc.

The principles upon which maintenance is allowed to widow were applied *mutatis mutandis* in determination of the quantum of maintenance to be awarded to other females under old Hindu law.[57]

The criteria considered in fixing the quantum of maintenance of an illegitimate son were : income of the estate of the putative father, status of the putative father and the mode of life to which the son was accusto-

49. For example, the Supreme Court of India recently in *Kulbhushan* v. *Raj Kumari*, A. I. R. 1971 S. C. 234, expressed its entire agreement with the above quoted observations of the Judicial Committee of the Privy Council in *Ekradeshwari* v. *Homeshwar, supra.*
50. *Ekradeshwari* v. *Homeshwar, supra.*
51. *Rajani Kanta Pal* v. *Sajani Sundari Dassaya*, A. I. R. 1934 P. C. 20.
52. *Jatindramohan Tagore* v. *Ganendramohan Tagore* (1872) I. A. Supp. 47. But it is not conclusive criteria as other circumstances may reduce the maintenance.
53. *Shreemuthy Nittokishoree Dossee* v. *Togendso Nutto Mullick, supra.*
54. A widow leading unchaste life after her husband's death is entitled only for 'bare or starving maintenance'. (*Rajah Pirthee Singh* v. *Roni Raj Kowar*).
55. A widow residing out of the house of the husband's family for improper purposes is not entitled for maintenance. (*Ekradeshwar* v. *Homeshwar Singh*).
56. *Ramawati* v. *Munjhori, supra.* Also see *I. T. Commissioner* v. *Bhagwati, supra.*
57. *Jatindramohan Tagore.* v. *Ganendramohan Tagore, supra.*

med during his father's life time.[58] It is important to note that the all these criteria considered as important and relevant by their Lordships of the Judicial Committee of the Privy Council were not conclusive or exhaustive but were merely guidelines in the determination of the amount of maintenance in the appropriate cases.

The main consideration emphasized by the Privy Council, was that the determined amount of maintenance must bear a close relation with the cost of living, income of the estate, reasonable necessities and wants of the claimant, necessary reasonable expenditure, etc. These concepts vary from case to case depending upon its circumstances and facts. Therefore, the Privy Council, rightly, opined that the allowance of maintenance once determined many years ago forms no precedent either in fact or in law under changed circumstances of the estate.[59] This naturally implies that the amount of maintenance is liable to be increased; decreased or even discontinued according to the material changes in the circumstances and facts of each case. But the reduction in the value of the estate should not be by any default of the holder but by the act of God or owing to the circumstances beyond his control; otherwise he can not raise a case for lowering down of the maintenance.[60] The maintenance may even be suspended if a widow has sufficient means of her own to maintain herself.[61]

It is important to note that the relevance of all these criteria in fixing of the quantum of maintenance and issues related there to have been recognised by the Parliament of India by incorporating them in the Act of 1956.[62]

V

Conclusion

It is interesting to note that that though the obligation to maintain certain persons according to Manu, was based on religious, grounds[63] the

58. *Krishna Yachendra* v. *Rajeshwara, supra.*
59. *Ekradeshwari* v. *Homeshwer, supra.*
60. *Greeschund* v. *Sumbhoo*, 5 W. R. 98 P. C.
61. *Narayau Rao* v. *Ramabai*, 3 Bom. 415 P. C.
62. Chapter III in general and see Sections 23, 24 and 25 in particular.
63. भरण पोथवर्णस्य प्रशस्त स्वर्गसाधन ।
नरक पोडने चास्य तस्माद यत्नेन तू भरेत ॥ मनु ॥
(Meaning thereby the support of the group of persons who should be maintained is the approved means of attaining heaven but hell is the man's portion, if they suffer, therefore, he should carefully maintain them, cf. R. N. Sarkar, *A treatise on Hindu Law*, 1927, p. 1726.

Privy Council while transforming it into a legal one, liberally interpreted it on humaitarian considerations. For example, the text of Manu which says only chaste wife and widow should be maintained by a Hindu, was diluted by the Privy Council which provided for 'bare or starving maintenance' to an unchaste wife[64] and to a repented and reverted widow.[65] It seems that this approach adapted by it was based on humaitarian considerations that though a wife (and widow) be unchaste, she should not die for want of food and other fundamental necessities of life. At the same time it declined to provide separate residence and maintenance to a wife and widow when they left husband's place for improper purposes which is now iterated under Section 18 (3) of the Act of 1956. The old Hindu law imposed a duty upon a Hindu wife and widow to reside with her husband and her husband's relatives respectively, but the Privy Council has taken a view that a Hindu wife and a widow can claim separate residence and maintenance if there are adequate and justified reasons for such non-residence which again has been approved under the Act of 1956 [Section 18 (2)].

According to old Hindu law a concubine was not entitled to maintenance but the Privy Council opined that she was, entitled to maintenance if she was a permanent concubine even if she does not reside in the house of the paramour. It is submitted that this is still the existing law on the subject by virtue of Article 372 read with Article 225 of the Constitution as it is not altered by the competent authority.

We may note that the majority of the opinions expressed by the Privy Council regarding class of persons entitled for maintenance, extent and nature of their right, criteria to determine the quantum of maintenance, are embodied by the Parliament in the Hindu Adoption and Maintenance Act of 1956.[66]

On the whole it may be submitted that the decisions of the Privy Council in the present area still have great value in contemporary Hindu Law in interpreting the various provisions of the Act of 1956.

64. *Rama Rao* v. *Raja of Pittapur*, *supra*.
65. *Saboo Sidick* v. *Ayeshabai*, *supra*.
66. See Sections, 18, 19, 20, 22, 23, 25 of the Act of 1956.

PROMISSORY ESTOPPEL—A NOTE ON JIT RAM SHIV KUMAR V. STATE (A. I. R. 1980 S. C. 1285)

PAWAN KUMAR CHAURASIA*

Justice in a welfare state, lies in the protection of common man from all kinds of oppression, harrassment, mischief and negligence on the part of the government. Courts must do justice. But the law, as an instrument of justice, sometimes fails, and therefore, judiciary developed certain concepts like the concept of justness and fairness, principles of natural justice and other equitable doctrines in Administrative law. One of the equitable doctrines developed by courts is the doctrine of promissory estoppel.

In the course of its dealings—sovereign or commercial—the government comes in contact with the common man, officers make representations, give promises etc. Now the relevant question is that if the common man acts on the basis of these promises, advices etc., and later on if promises are not kept by the Government or if the advice given by officer was against the law, how to provide justice to innocent common man. Here courts found that by applying purely legalistic approach, justice cannot be done to the innocent individual, so they developed a new kind of estoppel, namely, promissory estoppel.[1] But due to certain considerations, the judiciary itself could not succeed in deciding the true scope of the application of this equitable doctrine in Administrative law. Some of these considerations are namely, the government must be kept free in changing its policies; the government cannot be held as bound by the advice given by its officers or by any such undertaking which is against the law, estoppel cannot apply against the government in the exercise of sovereign functions etc. In these situations it may not be desirable to apply promissory estoppel against the government, but the question remains unanswered from the point of view of the innocent common man who acted on such undertaking and altered his position. Here comes the problem of deciding the extent upto which the government should

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1. *See*, The opinion of P. N. Bhagwati J. in *M. P. Sugar Mills* v. *State of U. P.* A. I. R. 1979 S. C. 621 at 629.

be free to administer, to formulate and change the policy and beyond which it must be bound by its undertakings, representations or promises.

In India, the judiciary has been trying to solve this problem since the very begining of the present century,[2] and the recent effort in this regard has been made by the Supreme Court in *Jit Ram Shiv Kumar* v. *State* of Haryana,[3] when it analysed all important previous decisions and laid down certain standards for the application of the doctrine of promissory estoppel in Administrative law. The facts involved in this case were as follows :

With a view to improve trade in the area, the Municipal Committee of Bahadurgarh established Mandi Fateh, in Bahadurgarh town. To attract businessmen to purchase plots in the Mandi, the Municipal Committee by its resolution dated November 20, 1916 proclaimed that Fateh Mandi would remain exempted from the payment of octroi duty. By its resolution dated May 20, 1917, this exemption was granted forever. The Commissioner of Ambala in his letter dated June 26, 1917 pointed out that the above resolution was ultra vires the Municipal Committee. Subsequently, when the President of the Committee insisted that without such exemption, no purchaser would buy a plot in the Mandi and the whole scheme will collapse, the Commissioner withdrew the objection. Later on, when the examiner of local funds pointed out that the committee was under obligation to charge the octroi duty a notification was issued on September 4, 1953 bringing the Mandi within local limits, but on March 2, 1954 another resolution was passed by the Committee granting the exemption. On July 21, 1955, when the State of Haryana came into existence, the Committee requested the State government to approve the imposition of octroi duty and to cancel the resolution of March 2, 1954. The State government did so, and the octroi duty was imposed. The writ petition was filed against this imposition.

The Supreme Court, speaking through Kailasam J. held that the Committee could not be estopped as its resolution regarding exemption was ultra vires. Further, he said that levying of octroi duty was a Statutory duty and it was done for public purposes, and therefore the plea of estoppel was not available. Kailasam J. made an attempt to

2. *See Municipal Corporation of the City of Bombay* v. *Secretary of State* (1905) 29 I. L. R. Bomb. 580.
3. A. I. R. 1980 S. C. 1285.

summarise the law relating to the application of the doctrine of promissory estoppel against the government in the following way :—

"(1) The plea of estoppel is not available against the exercise of the legislative functions of the state.

(2) The doctrine cannot be invoked for preventing the government from discharging its functions under the law.

(3) When the officer of the government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the government cannot be held bound by the unauthorised acts of its officers.

(4) When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the court is entitled to require the officer to act according to the scheme and the agreement or the representation. The officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.

(5) The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matter which have a bearing on general interest of the State [4]"

So far as the first point is concerned the opinion of Kailasam J. has sound basis and the law is well established as judiciary has never applied the promissory estoppel against the legislative functions of the State. In *State of Kerala* v. *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*[5], the same problem was involved and Palekar J. in the Supreme Court refused to apply the doctrine. In this case the respondent company was established in Kerala on the understanding that the Government would be responsible for the supply of raw materials. Subsequently, when the government was unable to supply the same, it asked the company to purchase private forest lands for the supply of raw materials and also gave a guarantee that it would not pass any legislation to acquire such private forests for a

4. *Id* at 1302.
5. (1974) 1 S. C. R. 671.

period of sixty years. Relying upon this assurance, the company spent Rs. 75 lakhs, and purchased thirty thousands acres of private forests, but later on the government changed its mind, and passed an Act entitled the Kerala Private Forests (Vesting and Assignment) Act, 1971 in violation of the agreement entered into with the respondent company. The government was sought to be prevented from acquiring the land on the ground of estoppel, but the Supreme Court refused to apply the doctrine on the ground that the State cannot be prevented from performing the legislative functions.[6] The opinion of Palekar J. in this case was upheld by Bhagwati J. in *M. P. Sugar Mills* v. *State of U. P.*[7] In this way Kailasam J. in *Jit Ram Shiv Kumar case, supra,* has rightly remarked that, "there can be no promissory estoppel against the exercise of legislative power and the legislature cannot be precluded from exercising its legislative functions by resort to the doctrine of promissory estoppel."[8]

Regarding second point also Kailasam J. is right and the opinion expressed by him is consistent with previous judicial pronouncements. In *Maritime Electric Co. Ltd.*, v. *General Dairies Ltd.*[9], the doctrine of estoppel was invoked to prevent the electric company from recovering the dues, which had not been charged earlier due to the faulty billing, because meter had recorded only $\frac{1}{10}$th of the electricity consumed. Thus, the company could realise less amount than the statutory charges. Refusing to apply the doctrine of promissory estoppel, Lord Mangham observed :

"Where the Statute imposes a duty of positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it.....it cannot, therefore, avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a Statutory obligation...".[10]

In the *M. P. Sugar Mills case, supra,* Bhagwati J. also had opined that the doctrine cannot be invoked for preventing the Government from acting in discharge of its duty under the law. He had clearly said :

".....Where the Government owes a duty to the public to act differently, promissory estoppel cannot be invoked to prevent the Government from doing so. .....Where the Government owes a duty to the public

6. *See, Id.* at 688.
7. A. I. R. 1979 S. C. 621. *See.* at 647.
8. *Jit Ram Shiv Kumar, supra,* at 1302.
9. (1937) A. C. 610.
10. *Id.* at 620.

to act in a particular manner, and here obviously duty means a course of conduct enjoined by law, the doctrine of promissory estoppel cannot be invoked for preventing the government from acting in discharge of its duty under the law. The doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law."[11]

Thus the opinion of Kailasam, J., in *Jit Ram Shiv Kumar* case is in accordance with the well established principle that the doctrine of promissory estoppel cannot be applied to prevent the Government from discharging its statutory duties.

So far as the third point is concerned the opinion of Kailasam J. that promissory estoppel cannot apply against the government for the unauthorised acts of its officers, because then the doctrine of ultra vires would come in play, has logically sound basis. The same view was adopted by Bhagwati J. in the *M. P. Sugar Mills* case. In this case the petitioners had established Vanaspati factory relying on a news item published by the tax department in the National Herald, a daily newspaper, and on the representation made by the chief secretary of the state that the factory will remain exempted from sales tax for three years. But later on this exemption was refused. The government had contended that the act of its officers was unauthorised, and so that Government could not be compelled to act in accordance with the representation made by those officers. It was opined by Bhagwati J. that there can be no estoppel against the ultra vires acts of officers. Thus, this principle is a well established principle and, whenever a case is decided on the basis of it, courts always refer to the decision of House of Lords in *Howell* v. *Falmouth Boat Construction Ltd.*[12] In this case the plaintiff, ship repairers, at the order of the defendant did alterations and repairs to a naval vessel. All the alterations and repairs were done after inspection by and with the oral permission of the licencing officer. The licencing officer had signed a written licence in favour of plaintiff authorising them to carry out certain alterations and repairs. But some alterations and repairs, which were not covered by this licence, were done by express oral permission of the licencing officer. While in the written licence there was an express condition that "this licence shall automatically determine if any unauthorised alterations or repairs were carried out." The Admiralty, acting under Reg. 55 of the Defence (General) Regulations, 1939 required that no person whose business was the repair and alteration of the ship was to carry out in U. K. any repair or alterations

11. *M. P. Sugar Mills* case, *supra,* at 646.
12. (1951) 2 All. E. R. 278.

to ships otherwise than to the order of any department of His Majesty's Government in U. K. "except under the authority of a licence granted by the Admiralty." The question arose whether the plaintiff was guilty of committing illegality because alterations and repairs were not covered by written licence or estoppel should be applied against the Government because these alterations and repairs were done on the basis of the oral permission of the licencing officer.

In the court of Appeal, Denning J. applied estoppel and laid down the principle that "whenever Government officers, in their dealing with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume, He does not know and cannot be expected to know the limits of their authority, and he ought not to suffer if they exceed it.[13]

But in appeal, the House of Lords overruled this principle and laid down that "the illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a Government Officer, howsoever high or low in hierarchy."[14] After this decision the law has been well-settled that in case of unauthorised act committed by government officers, the doctrine of promissory estoppel will not apply against the government. And this principle was followed by Bhagwati in *M. P. Sugar Mills case, supra* and by Kailasam J. in *Jit Ram Siv Kumar, supra.*

Therefore, logically speaking, the above-mentioned stand taken by Kailasam J. has a sound basis, but from the stand-point of the innocent common man who relied on the advice of the government officer and altered his position, the question remains unanswered. This problem had rightly been highlighted in the dissenting opinion by Jackson J. in the famous American case *Federal Crop Insurance Corporation* v. *Merrill.*[15] He observed :

13. *Falmouth Boat Construction Ltd* v. *Howell* (1950) 2 K. B. 16 at 25-26.
14. (1951) 2 All. E. R. 278 at 280.
15. (1947) 332 U. S. 380. In this case, under Crop Insurance Regulations, issued by Corporation, the insurance of reseeded wheat on winter wheat acreage was prohibited. A large portion of respondent's crop was of this prohibited character, despite of this the local agent insured the whole crop of the respondents as the local agent was unaware of the regulations. When due to draught, respondent's crop was destroyed, he sought insurance money which was refused on the ground that insurance was illegal. The majority opinion in the Supreme Court was delivered by Frank-furter J. who refused to apply estoppel saying that act of local agent was unauthorised and ultra vires *See* at 384.

"To my mind it is an absurdity to hold that every farmer who insures his crop knows what the federal register contains or even knows that there is such a publication. If he were to pursue this voluminous and dull publication as it is issued from time to time inorder to make sure whether anything has been promulgated that affects his rights. he would never need crop insurance, for he would never get time to plant any crop. Nor am I convinced that a reading of technically worded regulations would enlighten him much in any event "[16]

Jackson J. wanted to show that liability to find out the intra vires of authority has been imposed on the innocent individual who has no resource to know the law, and the exemption has been granted to the government officers who have a lot of resources to know the law, and are supposed to know the limits of their authority. It will be observed that the approach of Jackson J. and Denning J. is similar. But this approach, as has been mentioned, was totally rejected by majority judges in *Merrill's case*, by the House of Lords in *Howell case* and by Kailasam J. in *Jit Ram Shiv Kumar case*. But Bhagwati J. in *M. P. Sugar Mills case* tried to balance both the approaches, because on the one hand he maintained that there can be no estoppel against the ultra vires acts of officers because, in that case it would be inequitable to apply the doctrine against the government, but on the other hand he said that it is a moral principle than a legal one[17], and on this basis he applied estoppel saying that the gap between law and morality should be filled.[18] It is relevant to mention that Kailasam J. in *Jit Ram Shiv Kumar case* agreed with Bhagwati J. so far as the non-application of the doctrine in cases of ultra vires Acts of the government officers are concerned, but he totally rejected the morality aspect emphasised by Bhagwati J. and condemned him by calling it an illustration of judicial activism.[19] But it is submitted that, as history shows, whenever judiciary felt it impossible to do justice by adopting legalistic approach, it always developed certain doctrines and principles based on equity and morality and thus filled the gap between law and justice, otherwise, there would have been nothing like Administrative law, no court of equity in England and no principle of natural justice. So, this is the performance of its duty by judiciary in a true sense, and to condemn it as 'Judicial activism' is unfortunate.

16. *Id.* at 387.
17. *See, M. P. Sugar Mills, supra,* at 644.
18. *See, M. P. Sugar Mills, supra,* at 644.
19. *See, Jit Ram Shiv Kumar, supra* at 1303.

It is submitted that so far as the conclusion that the doctrine of promissory estoppel cannot be applied against the ultra vires acts of officers is concerned, nobody can challenge it, but from the standpoint of the innocent individual equity demands to give him some relief that is why certain authors like A. W. Brodley[20] and B. C. Gould[21] opined that if promissory estoppel cannot apply against the government in this situation, then equity and justice require that the individual must be given compensation. It may be pointed out that regarding tax matters M. P. Jain and S. N. Jain have taken the view that promissory estoppel will apply even though the act of officers is ultra vires, because it is their daily business to give advice to individuals.[22] Thus liberal ideas in this respect also are developing, and the adoption of the strict legalistic approach in this matter, as has been adopted by Kailasam J. requires reconsideration.

Regarding the fourth point so far as the applicability of the doctrine of promissory estoppel against government, Kailasam J. said that when an officer makes promise or representation while acting within the scope of his authority, then the officer cannot arbitrarily act on his mere whim and ignore the promise on some undefined and undisclosed grounds of necessity, but in the fifth point he made an exception to it by saying that the officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on the general interest of the State.[23]

While laying down the above-mentioned principle Kailasam J. referred to the opinion of Justice Bhagwati in the *M. P. Sugar Mills case* and said that Bhagwati J. had wrongly interpreted the law laid down by Shah J. in *Union of India* v. *Indo-Afghan Agencies case.*[24] Here Kailasam J. was referring to the opinion of Bhagwati J. where he had said that after *Indo-Afghan Agencies* case it became a well established law that the defence of executive necessity cannot be raised by the government where it dishonoured its solemn promises.[25] It is to be noted that in the *Indo-Afghan Agencies* case the defence of executive necessity was raised for the first time in India by the Government. It so happened that the Government of India had promulgated Export Promotion Scheme in which it was provided that the exporters of woolen goods shall be entitled to the Import Licence Certificate of the same F. O. B. value. The purpose was to provide an incentive to the export of woolen goods. The petitioners exported woolen goods but were given Import Licence Certificate of less value than assured. The petitioners demanded the application of the principle of promissory estoppel, but the government raised the defence of executive necessity saying that it must be permitted to adjust its policy in accordance with the changes in the circumstances, and in this respect it heavily relied on *Amphitrite decision.*[26] But this defence was negativated by Shah J. who delivered the judgement of the Supreme Court in this case. Apart from this decision Bhagwati J. had also referred the decision of Denning J. in *Robertson* v. *Minister of Pensions,*[27] where he had opined that "...Nor can the crown escape by praying in aid the doctrine of executive necessity that is, the doctrine that the crown can not bind itself so as to fetter its future executive action."[28] It was pointed out by Bhagwati J. that though the decision of Denning J. in the above-mentioned case was overruled by the House of Lords in *Howell* v. *Falmouth Boat Construction Ltd., (Supra)*, but on the point of the doctrine of executive necessity, the House of Lords had expressed no disapproval.[29]

But Kailasam J. in *Jit Ram Shiv Kumar, (Supra,)* dissented from

20. *See*, Case and Comment, Estoppel, (1971) 29 Camb. L. J. 3.
21. *See*, Comment (1971) 87 Law Q. Rev. 15.
22. "In tax matters the advice should be binding on the government even in the face of contrary express provisions of the Statute. It is well known that the tax department often in practice tries to lessen the regcurs of the strict tax laws through issuing administrate directions even though such concesssions are strictly against the law. It is the general practice in tax matters the government should be prevented through estoppel from withdrawing such concessions in a capricious manner when equities have already arisen in favour of the tax-payers." M. P. Jain & S. N. Jain *Principles of Administrative Law*, 645 (3rd Edition 1979).
23. *See*, *Jit Ram Shiv Kumar*, *supra* at 1302.
24. A. I. R. 1968 S. C. 718.
25. "There was a time when the doctrine of executive necessity was regarded as sufficient justification for the government to repudiate even its contractual obligations, but, let it be said to the eternal glory of this court, this doctrine as emphatically negatived in the Indo-Afgrn Agencies case and Supremacy of the rule of law was established", as *per* Bhagwati J. in *M. P. Sugar Mills*, supra, at 643.
26. "It is not competent for the Govt. to fetter its future executive action which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of State", as *per* Rawlatt J. in *Amphitrite*, (1921) 3 K. B. 500 at 503.
27. (1949) 1 K. B. 227.
28. *Id* at 231.
29. *See*, *M. P. Sugar Mills*, *supra*, at 638.

Bhagwati J. and pointed out that the non-availability of the doctrine of executive necessity in favour of government should not be taken as an established law. According to him whenever the defence of executive necessity is raised by the government, courts should scrutinise facts and see whether there is, in fact, the scarcity of foreign exchange, change in economic climate etc. In other words the defence should not be raised vaguely and generally. This is the substance of above mentioned fourth point mentioned by Kailasam J. regarding the applicability of the doctrine of promissory estoppel against government. In his opinion change in economic climate, non-availability of foreign exchange etc, are special considerations, if they exist in fact, then the fifth point mentioned by him will come in operation and the defence of executive necessity will succeed, and on that basis the government will be free to change its policy.

It is submitted that Kailasam J. has wrongly interpreted Bhagwati J. It seems that he concentrated himself on a particular part of the opinion of Bhagwati J, in the *M. P. Sugar Mills* case. If we study the whole opinion of Bhagwati J., it becomes clear that the stand taken by Bhagwati J. was the same as that of Kailasam J. in *Jit Ram Siv Kumar*, regarding the defence of executive necessity. The following para from the judgement of Bhagwati J. will make the point clear :—

"When the government is able to show that in view of facts which have transpired since the making of the promise, public interest would be prejudiced if the government were required to carryout the promise, the court would have to balance the public interest in the government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position, and the public interest likely to suffer if the promise were required to be carried out by the government, and determine which way the equity lies. It would not be enough for the government just to say that public interest requires that the government should not be required to carryout the promise or that the public interest would suffer if the Government were required to honour it. The government cannot, as Shah J. pointed out in *Indo-Afghan Agencies* case, claim to be exempted from the liability to carryout the promise "on some indefinite and undisclosed grounds of necessity or expediency", nor can the government claim to be the sole judge of its liability.... if the government wants to resist the liability it will have to disclose the court what are the subsequent events on the ground of which the government claims to be exempted from the liability and it would be for the courts to decide whether

those events are such as to render it inequitable to enforce the liability against the government. Mere claim of the change of policy would not be sufficient to exonerate the government from the liability, the government would have to show what precisely is the changed policy and also its reason and justification, so the court can judge for itself which way the public interest lies and what equity of the case demands."[30]

Another area touched by Kailasam J. in *Jit Ram Shiv Kumar* which invites some comments is related to the defence raised by the government that the doctrine of promissory estoppel does not apply regarding the exercise of sovereign functions by the government. Kailasam J. has supported this idea. It is to be noted here that if, dealing with non-application of the doctrine, Kailasam J. had confined himself to sovereign and legislative functions only, there would have been no problems but he included in this matter executive functions also, and this created confusion. In this connection he relied on the decision of the Supreme Court in *Excise Commissioner U. P.* v. *Ram Kumar*[31] where it was observed that "It is now well settled by a catena of decisions that there can be no question of estoppel against the government in the exercise of its legislation, sovereign or executive power."[32] Commenting on this decision Bhagwati J. in the *M. P. sugar Mills* case, *Supra,* had pointed out that the court had unnecessarily made those sweeping remark and it should be taken as an obiter.[33] But Kailasam, J., opined that the view of this court has been that the principle of estoppel is not available against the government in the exercise of legislative, sovereign or executive power.[34] He clearly said that the above-mentioned observation of the court in *Ram Kumar* case should not be taken as an obiter but as well established law. This opinion of Kailasam J. will undoubtedly affect the coverage of the doctrine of promissory estoppel in Administrative law as defined by Bhagwati J in the *M. P. Sugar Mills* case, because it negativated the application of this doctrine even against the executive power of the government in addition to sovereign and legislative power.

Furthermore, regarding the application of the doctrine of promissory estoppel Kailasam J. in *Jit Ram Shiv Kumar* case adopted a purely legalistic approach and opined that "The doctrine of promissory

30. *M. P Sugar Mills, supra,* at 643, 644.
31. A. I. R. 1976 S. C. 2237.
32. *Id* at 2241.
33. *M. P. Sugar Mills, supra,* at
34. *Jit Ram Shiv Kumar, supra,* at 1303.

estoppel is not very helpful as we are governed by the various provisions of the Indian Contract Act. Sections 65 and 70 provide for certain reliefs in void contracts and in unenforceable contracts where a person relying on a representation has acted upon it and put himself in a disadvantageous position further we have to bear in mind that the Indian constitution as a matter of high policy in public interest has created Art. 299 so as to save the government liability arising out of the unauthorised acts of its officers and contracts not duly executed."[35] While Bhagwati J. in *M. P. Suggar Mills* case had adopted totally different approach. He had maintained that the basis of this doctrine is the interposition of equity. Equity has always, true to form, stepped in to mitigate the rigours of the strict law [36] He made it clear that this doctrine had no concern with the Law of Contract or Law of Evidence, it was an equitable doctrine, and therefore, in its application the argument of lawful consideration should not be raised.

It is submitted that in a country like India the applicability of the doctrine of Promissory Estoppel appears to be a necessity if the citizen has to be provided relief against administrative action. This is not to suggest that the public interest is to be neglected. Actually, a balanced approach is required in this regard. Our difference with the approach adopted by Justice Kailasham is that he has substantially reduced the area of application of the doctrine, while Justice Bhagwati has made an attempt to enlarge its scope.

35. *Id.* at 1304,
36. *See, M. P. Sugar Mills, supra,* at.

SEARCH AND SEIZURE—"INFORMATION", "REASON TO BELIEVE" AND "REASON TO SUSPECT"– DEFINED AND DELINEATED*

By

SHANKAR PRASAD SRIVASTAVA+

Section 132 of the Income-tax Act, 1961, gives the power to the Director of Inspection or the Commissioner, when in consequence of "information" in his possession, he has "reason to believe" that books of account, documents, money, bullion, jewellery or other valuable articles are kept in any building, vessel, vehicle or aircraft, which have either not been disclosed or would not be disclosed, to authorise any Deputy Director of Inspection, Inspecting Assistant Commissioner, Assistant Director of Inspection or Income-tax Officer, to enter and search any place or thing mentioned above, where he has "reason to suspect", that such books of account, money, bullion, jewellery or other valuable articles or things are kept. The three words and phrases "information", "reason to believe" and "reason to suspect", though of utmost importance, have not been defined in the Act and thus have led to litigation. An attempt has been made in the following pages to define and delineate these words and phrases.

Section 132 enjoins that the 'reason to believe' must be in consequence of information in the possession of the Authorising Officer. But what constitutes 'information'? The Income-tax Act, 1961 does not define this word. According to the Shorter Oxford Dictionary, 'information', as far as relevant to our purpose, means, 'that of which one is apprised or told'. The Random House Dictionary (College ed.) defines it as 'knowledge communicated or received concerning a particular fact or circumstances, news; any knowledge gained through communication, research, instruction etc.' Thus it is clear that any knowledge or news if told or apprised to any person will constitute information and also any knowledge or news gained through research, instruction etc.

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There are not many cases in which the interpretation of this word came up pointedly for consideration, particularly in the context in which it has been used in section 132. Even in cases available on the point the true meaning and content of this word as used in section 132 have not been determined. They only decide whether under the circumstances of the case there was any information in possession of the authcrising officer. On the other hand, there are quite a few cases under section 147 (b)[1] of the 1961 Act and under section 34 (1) (b) of the 1922 Act (corresponding to the present section 147 (b) of the new Act) and they discuss at length what constitutes 'information' within the meaning of that section. As the phraseology is identical in section 132 and these sections, we may look into such of these cases as are relevant to ascertain the true meaning and content of the word 'information' as used in section 132.

Meaning of 'information'

'Information'[2], it has been held by the Punjab High Court in *C. I. T.* v. *Jagan Nath Maheshwari*,[3] is synonymous with knowledge, or awareness in contradiction to apprehension, suspision, or misgivings. It should be more than mere gossip or rumour.[4] According to the Allahabad High Court[5] the word 'information' as used in the provision covers all kinds of information received from any person whatsoever or in any manner whatsoever; all that is required is that the Income-tax Officer sh uld learn some thing which he did not know previously. Thus the only thing that is required to constitute information is that, the authorising officer should come to learn some thing which he did not know previously. If he, in fact, comes to know something new then it is immaterial whether he could have obtained the same information by applying due deligence. In other

1. Section 147(b) of the Income-tax Act, 1961, enpowers the Income-tax Officer to reopen a previously completed assessment of an assessee if he has reason to believe in consequence of information in his possession that income chargeable to tax has escaped assessment for any assessment year.
2. Different High Courts have defined the term 'information' differently. Thus, in *Rajasthan Textile (Agencies)* v. *Das Gupta I. T. O.* (1964) 52 ITR 1 the Bombay High Court held that information means some thing that the mind has acquired ; in *Glen Leven Estate Ltd.* v. *I.T. O.* (1973) 88 ITR 39 the Kerala High Court held that information means knowledge; it may be self acquired or it might come from third party ; In *Bai Aimai Gustaji Karaka* v. *G. T. O.* (1975) 99 ITR 257 the Gujrat High Court held that information is which acquaints, enlightens or instructs the mind.
3. (1957) 32 I. T. R. 426.
4. *Bai Aimai Gustadji Karaka* v. *G. T. O.* (1971) 99 I. T. R. 257.
5. *Asgar Ali Mohammad Ali* v. *C. I. T.* (1964) 52 I. T. R. 962.

words, even if the information be such which the authorising officer could have obtained earlier by applying due deligence but he in fact did not obtain, nevertheless, it will be sufficient information.[6] The authorising officer may obtain information from any source. There is nothing wrong if the information is obtained from a person who is inimical to the assessee.[7] It may be supplied orally or in writing. However, the Punjab High Court has expressed the opinion that the propriety demands that if the information is supplied, the officer should record notes of it so that the same may assist him in coming to the conclusion that an action under section 132 is called for.[8]

Stage of the possession of information

The above discussion leads us to another question namely, at what stage the Authorising Officer should come to possess the information ? Whether he should come to possess the information immediately before he issues the warrant of authorisation or can he issue an authorisation on the basis of an information which was with him since long. To put it in different words, can the Authorising Officer issue an authorisation on the basis of information which he had with him previously.

As regards Section 34 (1) (b) of the old Act, and section 147 (b) of the present Act, the position is that the Income-tax Officer should acquire the information subsequent to the original assessment order.[9] He cannot change his opinion on the same material and facts which he had at the time of origional assessment order.[10] Since there is no question of assessment or reassessment, the same proposition cannot apply as regards cases under section 132. However, on the parity of reasons it can be said that the Authorising officer should take the decision as to whether an

6. In *Asgar Ali* v. *C. I. T.* (1964) 52 I. T. R. 962, a case under section 34 (1) (b) of the old Act, it was held by the Allahabad High Court that any information which could have been obtained by the Income-tax Officer by investigation of the records or by applying due deligence at the time of original assessment but which he did not in fact obtain will constitute sufficient information within the meaning of that section. Similar approach has been depicted in various other cases like in *C. I. T* v. *A Raman & Co.* (1968) 67 I. T. R. 11 (S. C.) ; *Bhimraj Pannalal* v *C. I. T.* (1957) 32 I. T. R. 289 ; *Sonkaralinga* v. *C. I. T.* (1963) 481 I. T. R. 314 ; *C. I. T.* v. *Rathinasabapathy Mudaliar* (1964) 51 I. T. R. 204. On the same anology, it is submitted, it must be held that the authorising officer's lack of due deligence in obtaining an information earlier would not change the nature of the information if it is obtained subsequently.
7. *V. K. Jain* v. *Union of India* (1975) 90 I. T. R. 469.
8. *O. P. Jindal* v. *Union of India* (1976) 104 I. T. R. 389.

action under section 132 is called for or not, at the earliest opportunity after the information comes to his possession. Once he has applied his mind on this aspect, then subsequently he should not change his opinion on the same information and issue an authorisation. To illustrate, suppose the Commissioner comes to know that an assessee is maintaining duplicate set of books of account and he keeps mum. Now if he wishes to issue an authorisation on this very information without there being any new information, he can not do so in that event, his action will not be on the basis of information, but on the basis of mere change of opinion. Thus, it is submitted that the test under such circumstances should be—whether the Authorising Officer had an opportunity to apply his mind on the information and in fact he applied his mind on the desirability of an action under section 132? If the answer to this question is 'yes' then he should not issue an authorisation on the same information subsequently and if the answer is 'no' then he can. Here we may quote the observation of the Punjab High Court in *H. L. Sibal* v. *C. I. T.*[11] The Court observed :

> So far as section 34 of the Indian Income-tax Act, 1922, and section 147 of the Act are concerned, it has been repeatedly held that power to act on information is not to be confused with the power to revise the earlier conclusion. The Income-tax Officer is not permitted to apply his mind afresh to the same issue or to correct his or his predecessor's errors of judgement.

The Court further observed,[12] after quoting from the decision of the Supreme Court in *Income-tax Officer* v. *Nawab Barkat Ali Khan Bahadur*,[13] a case under section 34 of the old Act :

> On a parity of reasoning, it must be held that the Commissioner of Income tax while acting under section 132 (1) of the Act must come into possession of some new material before he can take resort to the drastic measure of issuing a search warrant. When he receives some relevant new information, it would perhaps be permissible for him to look into the old record for his satisfaction but

9. *Maharaj Kumar Kamal Singh* v. *C. I. T.* (1959) 35 I. T. R. 1 (S. C.); *C. I. T* v. *A Raman & Co.* (1968) 67 I. T. R. 11 (S. C); *Bankipur Club Ltd.* v. *C. I T.* (1971) 82 I. T. R. 831 (S. C.)
10. *C. I. T.* v. *Dinesh Chandra H. Shah* (1971) 82 I. T. R. 367 (S. C.); *Income Tax Officer* v. *Nawab Barkat Ali Khan* (1974) 97 I. T. R. 239.
11. (1975) 101 I. T. R. 112, 138.
12. *Ibid.*
13. (1974) 97 I. T. R. 293.

> it is extremely doubtful if he can give his own interpretation to the circumstances on the basis of which assessments have been framed against an assessee for the previous years for the purpose of issuing a search warrant.

Though we agree generally with the above observation, the latter part does not seem to be appropriate, inasmuch as it prohibits the Authorising Officer from giving his own interpretation only to the circumstances on the basis of which assessments have been framed against an assessee. One may infer from it that the Authorising Officer may give his own interpretation to the circumstances or information on the basis of which a reasonable belief might be entertained but on the basis of which assessments were not framed. To illustrate, suppose some information comes to the possession of the Authorising officer after the assessments were completed, he considers it and puts it aside as being not sufficient to initiate an action under section 132. Now if the above noted inference is correct, then he can subsequently change his opinion and issue an authorisation on this very information for on the basis of this information assessments were not framed But as has already been submitted that such a course of action is not, and cannot be, open to the Authorising officer. This makes it clear that the latter part of the above quoted observation of the Punjab High Court is not quite appropriate. Though it applies and accepts as correct for section 132 the rule that mere change of opinion on the same set of facts would not constitute information, enunciated in cases under section 147 (b) of the 1961 Act and corresponding section of the old Act, it does not bring the application of the rules to its logical conclusion.

However, that part of the observation may be justified on the ground that the facts of the case were such that nothing more than what was observed by the Court was necessary to dispose off the case. In this case the petitioner was a leading lawyer of Patiala High Court. Persuant to the authorisation issued by the Commissioner his, and the residences of several other lawyers were searched simultaneously on the same day. The petitioner challenged the search on various grounds, one of them was that the Commissioner did not possess any information on the basis of which he could have entertained a reasonable belief postulated by section 132. The Commissioner, on the other hand, relied on the following information—(i) large scale tax evasion being practiced by Patiala lawyers as most of them were submitting estimated incomes and no accounts or fee books or briefs to support the gross receipt were maintained ; (ii)

they were living in good style and had assets which were not disclosed to the department and which, according to both the I. T. O./I. A. Cs, they would not disclose for the purposes of Income-tax Act, unless action under section 132 was taken against them. The Court held that there was nothing new in the possession of the Commissioner; all these information were with the department at the time the assessments of the assessee were formed and that he merely changed his opinion in the garb of information to issue an authorisation under section 132. Thus, as in this case the Commissioner gave his own interpretation to the circumstances on the basis of which assessments were formed against the assessee, nothing more than what was observed by the High Court was necessary to dispose off the case. Thus, the said part of the observation was largely influenced by the facts of the case hence, it should not be taken as laying down a general rule to be applicable in all cases.

Information as to the correct and true state of law : whether information is within the meaning of section 132 ?

It is well settled, through a series of cases that the word 'information', as used in section 147(b) of the new Income-tax Act and in the corresponding section of the old Act, includes within itself information as to the correct and true state of law.[14] It also includes information as to the relevant judicial decisions.[15] Courts in coming to these conclusions have relied heavily on the context in which the word 'information' has been used in these sections. The Supreme Court observed in *Maharaja Kumar Kamal Singh* v. *C. I. T.*[16] :

> If the word information used in other provisions of the Act denotes information as to facts or particulars, that would not necessarily determine the meaning of the same word in section 34(1 (b). The denotation of the same word naturally depends on the context of the particular provision in which it is used.

This observation makes it clear that the word 'information' must be interpreted in the particular context in which it has been used and that its meaning may change from provision to provision, depending upon the context in which it has been used. Bearing in mind the above dictum, let us examine whether the word 'information', as used in section 132, includes within itself information as to the correct and true state of law.

14. *Maharaja Kumar Kamal Singh* v. *C. I. T.* (1959) 35 I. T. R. 1 (S. C.) ; *v. Jaganmohan Rai* v. *C. I. T.* (1970) 75 I. T. R. 373 (S. C.).
15. *Ibid.*
16. (1959) 35 I. T. R. 1 (6) (S. C.).

Under clause (a) of section 132 (1) the Authorising Officer is required to form a belief that the person concerned has not complied with a notice or summons issued to him as contemplated by that clause. In the very nature of the things, the Authorising Officer can form the requisite belief only after consulting the official records. Under no circumstance information as to the true state of law can have a bearing on the information of such a belief. Similarly under clause (b) of section 132(1) the Authorising Officer is required to entertain a reasonable belief that the person to whom a notice or summons as contemplated in clause (a) has been issued or will be issued will not or would not produce or cause to be produced the relevant books of account and other documents. What the Authorising Officer has to do is to guess the possible behaviour of the person concerned. This he can do on the basis of information about his past behaviour, his intention as evinced from surrounding circumstances or on the basis of the reports of secret investigations. Information as to the true and correct state of law cannot have a bearing upon the formation of such a belief. Under clause (c) of section 132(1) the Authorising Officer must entertain a reasonable belief that the person concerned is in possession of money, jewellary or other valuable articles or things which has not been disclosed or would not be disclosed, for the purposes of the 1961 Act, or the 1922 Act. Here too, only information as to facts, and not as to the true and correct state of law, can lead to the requisite belief. It should be noted that in clause (c) of section 132(1) the words used are 'has not been *disclosed* or would not-be *disclosed*' unlike the words of section 147(b) 'income has escaped assessment'. Information as to the true state of law can certainly have a bearing on the formation of a belief that income has escaped assessment but the same cannot have a bearing on the formation of a belief that the person concerned has not disclosed or would not disclose the money, jewellery etc., for the purposes of Income-tax Act. To take an example, suppose an Income-tax Officer did not include a minor's income in the assessment of his father and he did so in several cases. One such case reaches the Supreme Court and the Court holds that the Income-tax Officer was wrong insofar as he did not include the minor's income in his father's assessment. Now the information that a minor's income should be included in the assessment of his father which is an information as to the true and correct state of law, can well furnish a ground to believe that in other cases which did not reach the Supreme Court but in which Minor's incomes were not included in the assessments of their father income has escaped assessment. But as regards belief that a particular person has

not disclosed or would not disclose money etc., which related to the conduct of the person concerned, and hence, only factual information can form basis of the belief.

Thus, the context requires that the word 'information' as used in section 132 should receive a narrow interpretation, limited to facts or factual materials as distinct from the information as to the true and correct state of law.

We are fortified in our view by the holding of the Punjab High Court in *Om Prakash Jindal* v. *Union of India*.[17] The Court interpreted the word 'information' in the context in which it has been used in section 132, and oberved.[18] that "Information would mean statement of facts."

Nature of 'Information'

As to what should be the nature of information, the Mysore High Court has held that it should be reliable, such on which a reasonable man may entertain the requisite belief. Narayana J. observed in *C. Venkata Reddy* v. *C. I. T.*[19] :

> ···information in the possession of the officer is not mere canard or an unverified piece of gossip but information which, in the circumstances may be regarded as fairly reliable, because no belief can ever be said to flow reasonably from any thing but information which may be regarded as fairly reliable.

Similarly the Delhi High Court has held in *Balwant Singh* v. *R. D. Shah*[20], that the information should not be irrelevant for the formation of the belief. However, other cases do not depict the same trend. In most of the cases the Courts do not take pains to ascertain the reliability of the information. Mere assertion by the Authorising Officer in the affidavit that he had information in his possession suffice the purpose, and the courts do not travel further to ascertain whether the information was reliable or not. In this regard, the approach of the Mysore High Court and that of the Delhi High Court is not conventional in asmuch as, it tried to ascertain whether the information was reliable or not.

Dr. S. N. Jain[21] is of the view that such an approach is not warranted by the rules of Administrative law. Nevertheless, the approach is a welcome one. The advantage of this approach is that an effective check is placed on the enthusiasm of the Authorising Officer to issue an authorisation on unspecific, vague and flimsy information. It is submitted that this approach should be adhered to and scrupulously followed.

17. (1976) 104 I. T. R 389.
18. *Id. at.* 399.
19. (1967) 66 I. T. R. 212, 238.
20. (1969) 71 I. T. R. 550; See also *C. I T.* v. *Ramesh Chander* (1974) 93 I. T. R. 450.
21. Search and Seizure under Income-tax Law (1975) v. 38 *Taxation* (11) 1. He maintains that it is for the Authorised Officer to ascertain whether the information was reliable or not and the Courts cannot be asked, in a writ petition, to do the same.

Concept of 'Reason to Believe'

The Authorising Officer can issue an authorisation under section 132 (1) only if he has 'reason to believe' that one or more of the conditions under clauses (a), (b) and (c) of that sub-section are satisfied. Thus, the power to issue an authorisation has been made dependent on the existance of 'reason to believe'. The question arises what is the true import and content of the expression 'reason to believe ?' In this regard the definition clause of the Income-tax Act, 1961, is of no avail as the expression has not been defined by it. Further, the area of interpretation of this expression suffers from paucity of cases ; there being no Supreme Court case directly on this point. We have only a few High Court cases. These cases too, have relied on the decisions under section 147[22] of 1961 Act and section 34 of the 1922 Act (corresponding to the section 147 of the 1961 Act) which have the same expression.[23] In the following paragraph an attempt has been made to ascertain the true meaning and import of this expression with the help of cases under section 132 as well as under section 147 of the new Act and the corresponding section of the

22. Section 147, which deals with the re-assessment of escaped incomes, confers the power on the Income-tax Officer to start re-assessment proceeding only when he has reason to believe that income has escaped assessment.
23. Thus, the Mysore High Court, after quoting from *Narayanappa* v *C. I. T* (1967) 63 I. T. R. 219, a case under section 34 (1) (b) of old Act dealing with the expression 'reason to believe', observed in *C Venkata Reddy* v. *C. I. T.* (1967) 66 I. T. R. 212 p. 244 : "we think the same principles would apply to the same expression occuring section 132 of the Income-tax Act. In *H. S Sibal* v. *C I. T.* (1975) 101 I. T. R. 112 the Punjab High Court quoted extensively from the cases under section 147 of the 1961 Act and section 34 of the old Act and observed : "From the case decided under section 147 of the Act, additional support can be obtained for the conclusion...." Similarly in *N. K. Textile Mills* v. *C I. T.* (1966) 62 I. T. R 58, the Punjab High Court relied on the observation of Shah J. of the Supreme Court in *Calcutta Discount* v. *I T. O.* (1961) 41 I. T. R. 191, a case under section 34 (1) (a) of the Income-tax Act, 1922, which was with regard to the true import and meaning of the expression 'has reason to believe'. See also *Ramjibhai Kalidas* v. *I. G. Desai* (1971) 80 I. T. R. 721 ; *Balwant Singh* v. *Director of Inspectian* (1969) 71 I. T. R. 550 ; *Mamchand & Co* v. *C. I. T.* (1970) 76 I. T. R. 217.

old Act. 'Reason to believe' or a 'reasonable belief'[24] has been interpreted as denoting a state of mind that lies in between the state of conviction and su piction P. N. Bhagwati as C. J. of the Gujarat High Court (as he then was) has aptly observed[25] :

> The state of mind immediately next below the stage of conviction would be 'reason to believe' and the legislature has insisted on that state of mind as a condition precedent for exercise of the power to issue authorisation. It is significant to note that the legislature has prescribed the existance of 'reason to believe' and not 'reason to suspect'. 'Reason to suspect' would indicate a lower state of mind than that connoted by the words 'reason to believe'.

The belief is, said the Punjab High Court in *O. P. Jindal* v. *U.O.I.*[26] : "the assent of mind to the truth of what has been conveyed by the information, whereas mere suspection may not be sufficient, but the conviction of the nature required in criminal cases cannot be insisted upon."

The Authorising Officer must reach this state of mind before he ventures upon a search and seizure proceeding. Being a state of mind, in the very nature of the things, it is a matter of subjective satisfaction on the part of Authorising Officer. However, the expression postulates belief and existence of reasons for that belief ; it does not mean purely subjective satisfaction on the part of the Authorisation Officer.[27] The belief must be held in good faith and it cannot be merely a pretence.[28] Elaborating this point, the Gujarat High Court, after quoting passages from decisions of the Supreme Court,[29] has observed[30] :

24. In cases under section 147 of the new Act and 34 of the old Act and also under section 132, the expressions 'reason to believe' and 'reasonable belief' have been used inchangeably as meaning the same thing for example see *Mohd. Kunchi* v. *Mohd Koya* (1973) 91 I. T. R. 301, 305
25. *Ramji Bhai Kalidas* v. *I. G. Desai* (1971) 80 I. T. R. 721, 737.
26. (1975) 104 I. T. R. 389, 399.
27. *Gulab & Co.* v. *Superintendent of Central Excise* (1975) 98 I. T. R. 581 ; See also *Calcutta Discount Co. Ltd.* v. *I. T. O.* (1961) 41 I. T. R. 191 (the Judgement of Shah J.) ; *S. Narayanappa* v. *C. I. T.* (1967) 63 I. T. R. 219 (S. C.) ; v. *Lakshmani Mewal Das* (1976) 103 I. T. R. 431, all cases under re-assessment provisions, dealing with the expression 'reason to believe', which on particular reason apply to the same expression under section 132. See *supra* note 23.
28. *Ibid.*
29. The cases are *Calcutta Discount Co.* v. *I. T. O.* (1961) 41 I. T. R. 191 ; *S. Narainappa* v. *C. I. T.* (1967) 63 I. T. R. 219 ; *Barium Chemicals Ltd.* v. *Company Law Board*, A. I. R. 1967 S. C. 295.
30. *Ramji bhai Kalidas* v. *I. G. Desai* (1971) 80 I. T. R. 721, 729, followed in C. I. T. v. *Ramesh Chander* (1974) 93 I. T. R. 450.

> These decisions of the Supreme Court make it clear that if the grounds on which 'reason to believe' is founded are not relevant to the subject matter of the inquiry or are extraneous to the scope and purpose of the statute or are such as no rational human being can consider connected with the fact in respect of which the belief is to be entertained so that no, reasonable person can come to such a belief, the exercise of the power would be bad. The court would say in such a case that the reasons for the belief have no rational connection or relevant bearing to the formation of the belief and the belief, therefore, not truly held but it is merely a pretence.

"The basis for the exercise of the power," observed the Mysore High Court, "it should be noticed, is not mere suspection".[31] The expression predicates that the Authorising officer holds the belief induced by the existence of the reasons.[32] It contemplates the existence of reasons on which the belief is founded, and not merely a belief in the existence of reasons inducing the belief.[33]

These cases make it clear that the belief of the Authorising Officer must be backed and induced by reasons. The very expression 'reason to believe' mean that there are grounds for necessary belief.[34] The reasons should be such on which a reasonable man may entertain the belief. In the words of Calcutta High Court, the words 'reason to believe' mean that reasons should exist.[35]

However, mere possession of reasons is not enough. The Authorising Officer must perform a further necessary mental act of accepting the material and information as reliable and forming the belief that they can be acted upon.[36] Therefore, neither reasons alone nor the belief in isolation will be sufficient to constitute 'reason to believe'. The reasons should be coupled with the belief.[37] Further support for this proposition can be obtained from the words employed in the prescribed form of authorisation, Form No. 45 of the Income-tax Rules, 1962. The text of the form starts with the words, 'whereas information has been laid before me and *on consideration thereof* I have reason to believe...'

31. *C. Venkata Reddy* v. *C. I. T.* (1967) 66 I. T. R. 212, 238.
32. See Shah J. in *Calcutta Discount Co. Ltd.* v. *I. T. O.* (1961) 41 I. T. R. 191.
33. *Ibid.*
34. *O. P. Jindal* v. *Union of India* (1970) 104 I. T. R. 389.
35. *Mamchandra & Co.* v. *C. I. T.* (1970) 76 I. T. R. 217.
36. *Ramanaraian Bhojnagarwal* v. *I. T. O.* (1970) 77 I. T. R. 653.
37. *Raghubardayal Ramkishan* v. *C. I. T.* (1967) 63 I. T. R. 572.

(Emphasis added). This suggests clearly that the authorisation can only be issued when the Authorising Officer has exercised his mind and has accepted the information as reliable and sufficient to initiate a proceeding under section 132.

t would not be out of place to travel a bit beyond the confines of the Income-tax Act. There are several other statutes,[38] both Indian and English, which employ the same or similar expressions to make the exercise of discretionary power subject to the existence of a particular stage of mind. Thus, in certain statutes the phraseology is 'reasonable grounds for believing'[39] in others it is 'opinion that there are circumstances suggesting'[40] and in yet others it is 'reasonable grounds to believe'.[41] Whatever may be the phraseology the basic element remains the same, that is, the officer exercising the discretionary power must exercise his mind and should reach that particular stage of mind, as is contemplated by the relevant statute, before he exercises the power conferred. In other words, he should form requisite belief, suspicion or the opinion, as the case may be, that the case is one fit for the exercise of the power.

Commenting upon the words 'where the controller has reasonable ground to believe that any dealer is unfit to be allowed to continue as a dealer', occuring in Regulation 62 ot the Defence (Control of Textiles) Regulations, 1945, Lord Radcliffe of the Privy Council observed[42] :

> After all, words such as these are commonly found when a legislature of law making authority confers powers on a minister or official. However, read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power.

Lord Read of the Privy Council in a subsequent case,[43] has expressed the same view as regards the construction of 'similar words occuring now-a-days in several statutes'.

38. The Customs Act, 1962 ; The Suppression of Immoral Traffic in Women and Girls Act ; The Wealth tax Act ; etc.
39. The Suppression of Immoral Traffic in Women and Girls Act.
40. The Companies Act, 1956 Section 237 (b).
41. Regulation 62 of Defence (Central Textiles) Regulations, 1945.
42. *Nakkuda Ali* v. *Jayaratne* (1951) A. C. 66 (P. C.) quoted from A. I. R. 1967 (S. C.) 295, 323-24.
43. *Ridge* v. *Boldwin* 1964 (A. C.) 40.

This device, i. e., to subject the exercise of discretionary power to the existence of particular state of mind, has got one more advantage, apart from limiting the exercise of the power. This substitutes the Rules of natural justice in cases where the nature of action is neither judicial nor quasi-judicial. It is a trite proposition of law that an authority is not required to follow the rules of Natural Justice if the nature of his action is neither judicial nor quasi-judicial Thus, if the nature of the action is neither judicial nor quasi-judicial, an order affecting a person may be passed without affording him a reasonable opportunity of being heard. This harsh situation is mitigated up to a large extent by the employment of this device This ensures that although the action has been taken without observing the rules of natural justice, yet it is taken only when the officer concerned reached the state of mind contemplated by the relevant statute. The Supreme Court,[44] through Shelat J., has observed aptly :

> . the words 'reason to believe' or 'in the opinion of' do not always lead to the construction that the process of entertaining 'reason to believe' or 'the opinion' is an altogether subjective process not leading itself even to a limited scrutiny by the court that such 'a reason to believe' or 'opinion' was not formed on relevant facts or within the limits or *as Lord Radcliffe and Lord Reid called the restraints of the statue as an alternative safeguard to rules of* natural justice when the function is administrative.

All these observations, which are with regard to the object behind prescribing the existence of a particular stage of mind as a condition precedent to the execise of discretionary power apply equally to the expression 'reason to believe' as used in section 132 of the Income-tax Act, 1961. Thus, in section 132 this condition precedent performs three distinct functions :

(i) it makes the grant of the power in conformity with the fundamental rights of the Constitution, Article 14 and 19 in particular ;

(ii) it limits the exercise of the power to the cases where the Authorising Officer honestly believes that one or more of the conditions enumerated in section 132 (1) exist ; and

(iii) it serves as a substitute for the rules of natural justice which

44. *Barium Chemicals Ltd.* v. *Company Law Board*, A. I. R. (1967) 295 (S. C.) 324.

are not to be observed as the nature of the act of authorisation is administrative.[45]

Reason to Suspect

Clause (1) of section 132 (1) provides that only that building or place, can be ordered to be searched where the Authorising Officer has reason to suspect that articles to be searched and seized are kept, and not just any building or place. Chief Justice P. N. Bhagwati of the Gujarat High Court (as he then was) in *Ramjibhai Kalidas* v. *I. G. Desai*,[46] while distinguishing 'reason to suspect' from 'reason to believe' has said that the former indicates a lower stage of mind than what is connoted by the latter. We have seen that the expression reason to believe does not mean a purely subjective satisfaction on the part of the Authorising Officer ; it must be one backed and induced by reasons so much so that a reasonable person acting under the similar circumstances could have come to the same belief. On parity of reasons, it must be said that reason to suspect does not mean a purely subjective suspicion on the part of Authorising Officer. There must be materials with the Authorising Officer to warrant the suspicion. This is a natural corollary of the expression 'reason to suspect' which means that the suspicion should be backed by reasons and reasons should be such which may induce any reasonable person to form the same suspicion,

The use of the expression 'reason to suspect', instead of suspicion in isolation, gives a leeway for judicial intervention as regards the selection of building or place etc., for search operation. An aggrieved person can challenge the search of a building or place on the ground that the Authorising Officer had nothing to support his purported suspicion that articles to be seized were kept in that building or place, etc.[47] The search of a building or place etc., can also be challenged on the grounds of malafide i. e. the building was searched not because the Authorising

45. *I T O.* v. *Seth Brothers* (1969) 67 1-TR 836
46. (1971) 80 I. T. R. 721.
47. It must be borne very clearly in mind that here search of a particular building or place alone is assailed and not the whole search operation To take an example, assume that the Authorising Officer forms the requisite belief that 'A' is in possession of undisclosed assets and he authorises search of all the premises belonging to 'A' and also of 'B', his relation. Now, if 'B' is able to show that there was nothing with the Authorising Officer to warrant his suspicion that such assets could be found in premises of 'B', the search of the premises of 'B' alone will be declared illegal and not that of 'A's also.

Officer had reason to suspect that articles to be searched and seized were kept in it but because of some ulterior motive. However, we are aware that, in the very nature of the things, the chances of success to such challenges are extremely low, It would be very difficult for an assessee to show that the materials with the Authorising Officer were such on which a reasonable person acting under similar circumstances could not have formed the same suspicion. Even if there is a remote possibility to thinking that the articles to be seized are kept in such a building the Court will not interfere. As in cases of 'reason to believe' so here too, the Courts would not go into the sufficiency or adequacy of the materials on which the Authorising Officer formed the suspicion. Nevertheless, at least in some extreme cases, search of a building or place can be assailed on this ground. In *C. I. T.* v. *Ramesh Chander*,[48] search was authorised not only of the police station where the Authorising Officer had definite knowledge that the articles to be seized were lying, but also of the residential and business premises of all the partners of the firm with which Ramesh Chander was connected. The question arises that if the C. I. T. had, admitedly, knowledge that the sum to be seized were lying in the police station, how could he have suspected, not to say of reasonably, that the same was kept in the business and residential premises of the partners ? However, searches of the business and residential premises were not challenged nor was this point raised, and hence the Court had no occasion to pronounce on this issue. But had it been raised, we believe, the Court would have struck the searches of residential and business premises. Therefore, we believe that in some cases at least the search of a particular building or place can be successfully challenged on the ground that the Authorising Officer had no reason to suspect at all or that the material with him were such on which no reasonable person would have formed the same suspicion. Further, we may point out that a misconception prevails that whenever an authorisation is issued against a person, group or company, business and residential premises of all the person connected with such a person, group or company are also authorised to be searched. The Shah Commission noted this fact with concern in case of search and seizure operation in case of the Bajaj Group of Companies and observed that the sooner this procedure, which was described by the department as normal, was stopped the better it was for citizens of this country.[49] The disclosure further underlined the need to exploit the judicial control in this regard.

48. (1974) 93 I. T. R. 450.
49. *I Ind Interim Report of the Shah Commission*, p. 16.

Is Search of a building or place etc. where the Authorisation Officer has definite knowledge that articles fo be searched and seized are kept whether permissible ?

The scheme of section 132 is that before powers under it are invoked, the Authorising Officer should entertain a reasonable belief that one or more of the statutory conditions exist and then he should have reason to suspect that the articles in respect of which he formed the belief, as referred to above, are kept in a particular place or building. It is only such a building or place which can be subjected to the search operations under section 132. The section is so couched, obviously, because in the very nature of the things, the Authorising Officer will not be able to know, in most of the cases, the location of articles to be searched and seized and he will have to form a suspicion as regards the building or the place where such things are kept. So long as the Authorising Officer has no definite knowledge about the exact location of such things, no problem arises. But it may so happen that the Authorising Officer may be knowing for certain the exact location of such articles. Whether in such cases too, a search and seizure can be authorised ? To take a concrete case, assume that the Authorising Officer forms the belief that 'A' is in possession of assets which have not been disclosed for the purposes of the Income-tax Act. Assume further that he also knows for certain the place where such assets are kept. The question arises, can such a place be ordered to be searched ? This question came up for consideration pointedly in *Motilal* v. *Preventive Intelligence Officer.*[50] In this case, the assets to be searched and seized had already been seized by the Central Excise authorities and were lying in the office of the Collector of Customs. The Income-tax authorities had full knowledge of this fact, even then they invoked powers under section 132. The Allahabad High Court held that search pre-supposes some thing hidden or concealed and there can be no question of search, in the very nature of the things of articles, the exact location of which is known.[51]

50. (1971) 80 I. T. R. 418.

51 Justice Pathak of the Allahabad High Court observed :
"..In my opinion, the power conferred under section 132 (1) is contemplated in relation to those cases where the precise location of articles or things is not known to the income-tax department.." at p. 422.
Concurring with him, Justice Gulati observed :
"From a reading of that section (section 132) it is obvious that section 132 is applied only to unearth hidden books of accounts and assets." at p. 427.

Thus, it is clear that the Allahabad High Court took the word 'search' as implying exploratory investigation, one in which things hidden or concealed are brought to surface.[52] On the other hand, the Madhya Pradesh, Punjab and Madras High Courts have declined to accept this view. They have held that powers under section 132 can be invoked even in cases where the precise location of articles to be searched and seized is known. In *C. I. T.* v. *Ramesh Chander*,[53] the Punjab High Court held that it was not necessary that articles to be searched and seized should be in hidden or concealed form to attract the application of section 132; it was sufficient if they were not disclosed for the purposes of incometax Act. In this case the assets to be searched and seized were lying at a police station and this fact was known to the C. I. T. who authorised the search. In *Panna Lal* v. *I. T. O.*[54] the Madhya Pradesh High Court did not raise the question properly. Instead of concentrating on the main issue-how one can conceive of 'search' and 'reason to suspect' when precise location of articles is known; the Court decided the case basing itself on the interpretation of the expression 'reason to believe' which, the Court held, signified that the Authorising Officer must be satisfied that things to be searched were in possession of a particular person. The Court conceded, though impliedly, that the word 'search' literally means exploratory investigation but held that to say that a search cannot be authorised in cases where the exact location of articles is known would tentamount to deny any importance to the expression 'reason to believe' and the object of the section. In *Gulab & Co.* v. *Supdt. of Central Excise*[55] the Madras High Court answered the problem by observing[56] :

It would be prepcsterous to hold that a warrant for search and seizure could be issued only when it was not known to the income-

52. In *K. Choyy* v. *Syed Abdulla Bafakki* (1973) 91 I. T. R. 144, the sum to be seized as, to the full knowledge of the income tax authorities, in custody of the Court in respect of which the authorisation was issued. The Kerala High Court held that as the sum was not found as a result of search, its seizure was not permissible because Clause (iii) of section 132 (1) contemplates seizure of only those things which are found as a result of a search. It is implied in this decision that the Kerala High Court also took the word 'search' as implying exploratory investigation.
See also the decision of Orissa High Court in *Habibandhu Das* v. *Union of India*, (1973) 91 I. T. R. 156, which was relied on by the Kerala High Court.

53. (1974) 93 I. T. R. 450.

54. (1974) 93 I. T. R. 480.

55. (1975) 98 I. T. R. 581.

56. *Id* at 592-93.

tax department that the articles or books are kept in a particular place or building and could be issued only if the Commissioner has reason to suspect that articles or books are kept in a particular place or building and for which a search is, therefore, necessary. Even the phrase 'reason to suspect' in section 132 (l) (c) (i) implies that the Commissioner must have reasonable grounds for thinking that the goods are kept in a particular place which would also include a case where it is known for certain that the goods are kept in a particular place.

Thus, we see a great deal of divergence of opinion on this issue. The whole matter veers round the meaning of the word 'search' and that of the expression 'reason to suspect'. We have seen that 'reason to suspect' means a reasonable suspicion—a lower stage of mind than what is connoted by the expression 'reason to believe'. This being the state of things, it is difficult to agree with the view of the Madras High Court when it says that reason to suspect would also include a case where the location of articles are known for certain. In fact, the question of suspicion, reasonable or otherwise, arises only when there is no definite knowledge about the things. Conviction and suspicion go against each other, one's absence is the condition of other's presence.

Conclusion

Thus we see that despite judicial interpretation, these three words and phrases give a wide latitude to the Income-tax authorities to order for search and seizure, and this state of affairs is likely to continue so long as the subjective satisfaction is involved.

VIVIANA GALLARDO CASE AND THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

DHIRENDRA P. VERMA*

I. Introduction :

The American Convention on Human Rights, done at San Jose on 22 November 1969, entered into force on 18 July 1978.[1] Its object is to guarantee the individual's basic human dignity by means of a system in the American Continent. It has made an advance over the American Declaration of the Rights and Duties of Man (the Bogota Charter) of 1948 and has been lauded as "the most complete of the human rights conventions at the regional or United Nations level". It has established two bodies to assure the effective accomplishment of rights :

(a) the Inter-American Commission on Human Rights ; and,

(b) the Inter-American Court of Human Rights.[2]

The Court consists of seven judges, out of which five judges constitute a quorum. Thus the use of smaller chambers, as practiced by the European Court of Human Rights, is not possible in the Inter-American Court. The Statute of the Court, adopted by the General Assembly of the Organization of American States (OAS), provides that the judges shall be free to exercise their respective professions to teach, to practice law or to hold any occupation in their own countries.[3] Thus the judges are neither on the payroll of the OAS nor do they live in Costa Rica, the permannent seat of the Court.[4]

The Court delivered its first judgment on 13 November, 1981 on the application of the Government of Costa Rica in the matter of Viviana Gallardo *et al*. The Court ruled against the Government and held the case inadmissible on procedural grounds, but the ruling, being the first

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1. Recent Actions Regarding Treaties To Which The United States Is Not A Party, 18 *INTERNATIONAL LEGAL MATERIALS* 1189 (1979).
2. International Commission of Jurists, *THE REVIEW* (No. 21 December 1978), 29.
3. The Statute, Article 18.
4. Thomas Buergenthal, The Inter-American Court of Human Rights, 76 *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 1982, 231-245.

judgment of the Court, has its significance in the jurisprudence of the regional human rights court. When the development of case law is awaited, it is timely to discuss some issues which emerged in the present case as pointer to the emerging role of individual in international law.

II. Background :

Viviana Gallardo Camacho, a Costa Rican woman was murdered in prison and her two cell-mates, Alexandra Maria Bonilla Leiva and Magaly Salazar Nassar, were wounded by a civil guard on duty on 1 July, 1981.[5] The Government of Costa Rica instituted this case before the Inter-American Court on 15 July, 1981 ; it invoked Article 62 (3) of the Convention and requested the Court to decide whether the acts of its national authorities had committed violation of human rights guaranteed under Art. 4 and 5, and any other rights protected by the Convention.[6] By a unilateral declaration, the Government waived the requirement of the prior exhaustion of the domestic legal remedies and other procedures set forth in Art. 48 to 50 of the Convention.[7] Since the Government of Costa Rica had doubt that the Court may not exercise its jurisdiction in a case where the requirements of Art. 48 to 50 were not completed, the Government requested that its application be referred in that situation to the Inter-American Commission on Human Rights.[8]

III. Points in issue :

There were two points for consideration before the Court :

(1) what effects were to be given to the waiver of the procedures ; and,

(2) whether the case was admissible before the Court.

The Court considered, in its preliminary decision of 22 July, 1981, that the Government and the Inter-American Commission be requested

5. Inter-American Court of Human Rights : Decision on the Application of the Government of Costa Rica with Regard to Viviana Gallardo *et al* 20 ILM 1424-1435, at 1424-1425, para. 1 (1981). (Hereafter cited as the *Viviana Gallardo case* : *The Decision*).
6. Inter-American Court of Human Rights : Preliminary Decision on the Application of the Goverment of Costa Rica with Regard to Viviana Gallardo *et al*. 20 ILM 1057-1059, at 1057, para. 1 (1981). (Hereatter cited as the *Viviana Gallardo case : Preliminary Decision*). Article 4 of the Convention protects the right to life, while Article 5 guarantees that "*no one shall be subjected to torture, or to cruel, inhuman or degrading punishment*."
7. *Ibid* para. 2 ; *Viviana Gallardo case* : *The Decision*, at 1425, para. 2.
3. *Viviana Gallardo case* : *Preliminary Decision*, at 1057, para. 3.

to express their views on the Court's jurisdiction to deal with the case at that stage.[9] The Costa Rican Government, in its brief submitted to the Secretariat of the Court on 6 October, 1981, argued that a state could waive the procedural requirement of prior exhaustion of domestic remedies rule since it was established for the benefit of the state; and inasmuch as the Commission was to seek, according to Art. 48 (1) (f) of the Convention, a friendly settlement of the matter submitted to it, the Goverment expressed that there was "no judicial interest" in complying with the provisions of that article.[10] Contrary to this, the Commission pleaded, in its reply of 13 October 1981, that the procedures set forth in Articles 48 to 50 could "not be dispensed with in any case that might be brought before the court". It asserted that the Court, in this way, can not hear the case unless the procedures were completed.[11]

1. Waiver of procedure before the Commission :

The Court decided to determine what legal consequences be attached to the waiver of procedural requirements of the Commission, or in other words, whether the requirements, were waivable. Article 45 (1) (a) clearly indicates that any communication may not be lodged with the Commission unless the local remedies available in municipal law were exhausted in accordance with generally recognized principles of international law ; and Article 61 (2) conditions, on the other hand, that the Court may not hear a case unless the procedures before the Commission were exhausted.[12] The waiver of procedure before the Commission and exhaustion of local remedies available in a municipal law are the two different things. It is noticeable that exhaustion of the local remedies rule is a condition precedent to attract the procedural requirements of the Commission, and that the Court can not, at the same time, exercise its adjudicatory jurisdiction unless the procedures before the Commission were exhausted.

It is not gainsaying the fact that the exhaustion of local remedies is a procedural step which is to be completed before the Commission may exercise its jurisdiction.[13] All the remedies of legal protection, admini-

9. *Id.* at 1058, paras. 4 and 1.
10. *Viviana Gallardo case* : *The Decision*, at 1425-1426, para. 8.
11. *Id.* at 1426, para. 9.
12. *Id.* at 1426-1428, paras. 12, 14, 18 and 19.
13. Ivan L. Head, A Fresh Look at the Local Remedies Rule, 5 *CANADIAN YEARBOOK OF INTER-NATIONAL LAW*, 1967, 142-158, at 150-151. J. E. S. Fawcett, *The Exhaustion of Local Remedies* : *Substance or Procedure* ?, 31 *BRITISH YEARBOOK OF INTERNATIONAL LAW*, 1954, 452-458,

strative as well judicial, available in a municipal law be pursued and exhausted, before a state can bring the issue before the Commission. It was observed in the *Case of Certain Norwegian Loans* (*France v. Norway*) that an attempt must be made to exhaust the domestic remedies, howsoever "contingent and theoratical" they may be.[14] The International Court of Justice has also regarded the exhaustion of local remedies as "a well established rule of customary international law ..".[15] Nevertheless, there are ample evidences of waiver of prior exhaustion of domestic remedies in international practice. Judge Hersch Lauterpacht has observed, in his separate opinion in the *Norwegian Loans* case, that the local remedy rule was neither rigid nor purely technical, and the rule was not followed on the following principles :

> ".. (1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had ; (2) no such proof is required if their exists legislation which on the face of it deprives the private claimants of a remedy ; (3) in that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy its existence can nevertheless reasonably be assumed ..".[16]

So far as the exhaustion of local remedies in the Inter-American system is concerned, it is waivable in the followieg circumstances :

(i) non-existence of local remedies ;

(ii) undue delay ;

(iii) possibility that applicant be hampered in the exercise of local remedies ;

(iv) suspension of guarantees of due process ; and,

(v) ineffectiveness of the remedies of *amparo* and *habeas* corpus.[17]

Since either of these situations is not present in the *Viviana Gallardo et al.* matter, the waiver of local remedies and procedures by the Costa Rican Government does not appear to have justification. However, the Inter-American Court avoided any opinion at that stage of proceedings

14. [1957) ICJ Rep 9, at 39
15. *Interhandel Case* (*Switzerland v. United States of American*) (*Preliminary Objections*), [1959] ICJ 6, at 27.
16. *Supra* n. 14; *Viviana Gallardo case : The Decision*, at 1429, para. 26.
17. A. A. Concado Trindade, Exhaustion of Local Remedies in the Inter-American System, 18 *INDIAN JOURNAL OF INTERNATIONAL LAW*, 1978, 345-351, at 348-349.

on the scope and effect of the waiver and observed that it was a matter which concerned the interpretation of Art. 46 and 47 of the Convention.[18]

In a legal consideration of the waiver of procedure before the Commission, the Court looked into the preparatory or preliminary role of the Commission in adjudicatory functions of the Court The Commission can submit cases to the Court, request its advisory opinion and acquire a quasi-judicial role in proceeding before the Court if some attributes, assigned to the Commission, were to be completed before the Court could start hearing a case. In addition, it can investigate into the allegation of human rights violation and execute conciliatory function towards friendly settlement and recommend to remedy the violations. The states has therefore obligations, observed the Court, to provide "all the pertinent information and submissions" to the Commission in the first place.[19] The Commission's decisions on the admissibility of applications, however, are not—like that of the European Commission on Human Rights—the judicial decisions *stictu sensu* rather resemble "administrative pronouncements".[20]

The Commission is not created for the sole benefits of the states but also for the individuals. It can receive complaints from the victims of the human rights violation and any other individual referred to in Article 44 of the Convention. The procedural requirement before the Commission were waivable only in one exceptional situation where it was indicated clearly that such a waiver would not impaire the fu ction of the Commission. The exceptional situation was one where the case was instituted not by an individual against a state, but by a state against another state. Since the *Viviana Gallardo* case was not instituted by Costa

18. *Viviana Gallardo case* ; *The Decision*, at 1429-1430, paras. 26-27. Articles 46 and 47 of the Convention read as follows :
"Art. 46 (1) : *Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the f llowing requirements* :
(a) *that the remedies under domestic law have been pursue ! and exhausted in accordance with generally recognized principles of international law;*
Art. 47 : *The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if* :
(a) *any of the requirements indicated in Article 46 has not been met;*
....."
19. *Id.* at 1428, paras. 21 and 22.
20. Trindade, *Supra* n. 17, at 349.

Rica against any other state, the Court held, therefore, that the Government could not waive the procedural requirements before the Commission and it lacked the authority of such waiver An attempt of waiver in case like the present one may amount to, in the opinion of the Court, the impairement of "the institutional integrity of the protective system guaranteed by the Convention."[21]

2. Question of admissibility :

Jurisdictional issues are different from the question of admissibility of a case before the Court. This difference is very clear in the present case inasmuch as the Court considered the application inadmissible inspite of the fact that all the requirements for the exercise of the court's jurisdiction were complete. The Court had *ratione materiae* jurisdiction as the application involved interpretation of Articles 4 and 5 of the Convention ; it had *ratione personae* jurisdiction as the applicant had fulfilled the requirements of Article 61 (1) of the Convention by accepting the binding jurisdiction of the Court. In fact, the Court did not lack jurisdiction rather the application was treated inadmissible in view of the fact that the applicant had failed to comply with the procedural requirement necessary for the Court to entertain the case.[22]

According to the Convention, a complaint before the Commission could be admissible only when the procedural requirement of the prior exhaustion of domestic remedy was completed. Since the matter was not dealt with by the Commission, the Court argued that it could not examine the matter directly and it did not give any opinion on the scope and effect of the waiver and intended to retain the case on its docket so long the procedural requirements were not met with. The Court had done it for the two reasons :

(1) that the Government had requested in its application that the matter be referred, in case of difficulty by the Court, to the Commission ;[23]

(2) that the Court was aware of its obligation to reconcile—

(i) "the interests of the victims that the full enjoyment of their rights" assured under the Convention be protected; and,

(ii) the interests of "the institutional integrity of the system" established by the Convention be safeguarded.[24] Hence, the Court held

21. *Viviana Gallardo case* : *The Decision*, at 1428-1429, paras. 22 and 25.
22. *Id.* at 1430, para. 28.
28. *Viviana Gallardo case* : *Preliminary Decision*, at 105', para. 3.
24 *Viviana Gallardo case* : *The Decision*, at 1426-1427, para. 13

that it had no objection to referral of the matter to the Commission.

IV. Conclusion :

Since Costa Rica directly submitted the *Viviana Gallardo* case with the Court and unilaterally claimed the waiver of procedure before the Inter-American Commission, the Court had no alternative except to rightly hold the case inadmissible. The Court's approach was also correct to retain the matter on docket for the two reasons mentioned above, but one can not fail to indicate that the Court's action to refer the matter to the Commission is not supported by any provision of the American Convention on Human Rights nor by any Rules of Procedures and the Statute of the Inter-American Court. Once the Court had ruled against the Government and retained the matter on its docket, it was further the buisness of the applicant to refer the issue to the Commission. The Court did, by referral of the matter, something which was not expressly granted.

Though the decision of inadmissibility is no doubt very simple, nevertheless the Court's opinion has added to the jurisprudence of the regional courts for the protection of basic rights of human dignity. By a decision, in which role of the Commission has been emphasized, the Court has left open the course where individual's right to appear before the Commission receives due respect in a situation where the Convention has barred individuals to bring a case to the tribunal. On a petition by individual against violation of human rights, the Commission acquires power to investigate, conciliate and to exercise quasiadjudicatory functions. If the Court would have permitted the Costa Rican Government a direct access to the Court, all interests of the individuals in the human rights cases in the Inter-American system would have been impaired. By not doing so, the Court has indeed protected the institutional integrity of the Inter-American system of Human Rights.

CAPITAL PUNISHMENT : A POLITICAL COMPROMISE

MAHENDRA P. SINGH*

"Society is moved to compassion when it hears of the kidnapping or murder of one child, but it is criminally indifferent to the mass murder of so many thousands of children who die every year from lack of facilities, agonizing with pain. Their innocent eyes, death already shining in them, seem to look into some vague infinity as if entreating forgiveness for human selfishness, as if asking God to stay wrath."**

I

The controversy over Capital Punishment in not new. Its roots lie deep in human history and its battles have been waged on and off on a political level for almost two centuries. Law enforcement and prosecutorial groups tend to be strongly supportive of Capital Punishment; criminologists, social scientists and jurisprudes tend generally to be opposed.[1] This extreme penalty, an amalgamation of collective vengeance and deterrence, has scientifically lost its penological purpose particularly in the context of traditional crimes and is functionally non-utilitarian. At the global level it has claimed numerous polit cally outstanding and socially significant lives and it still continues particularly in the third world countries where the governments are dictatorially hysteric and lethargic. To be precise, if murder by an individual or a group of innividuals is undesirable how could it be rationally permitted and juridically justified when committed by the state or the body politic.

In a time frame continuum, different political communities have dealt with it differently and its have or have not depends on the socio-economic conditions, state structure and political milieu of a particular society. A proper treatment to Capital Punishment depends also on the degree of scientific approach with human content of the societal reaction towards this diabolic penalty.

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** Fidel Castro *History Will Absolve Me.*, 40, 1978.

1. James T. Carey, *Introduction to Criminology*, 272, 1978.

II

CAPITAL PUNISHMENT : BEHAVIOURAL SCIENCES

Not a singl: a sumption underlying the historically exhausted classical theory of Capital Punishment can be squared with the facts about the human nature and behavioural pattern that have been established through the progress of scientific and sociological thought.[2]

Death penalty, originally emerging out of superistitious demonism, grew through the classical theory on the basis of collective retribution against the violator who chose freely to go brutally adrift and now it survives as a deterrent in addition to the fulfilling of collective social revenge.

Death sentence is principally associated with the offence of murder.[3] The effectivity of death sentence as a deterrent is scientifically doubtful. first, in relation to the persons whose mental geometry is unfit to appreciate their activities and the consequences thereof-criminal or oth rwise; secondly, in relation to situationally automated persons ; and thirdly, in relation to those who are victims of social habits and subcultural goals that have deprived them of their sense of socially approved responsibility and the normal value placed on human life which might grow under the influence of various criminogenic factors to which one may add family feuds, caste prejudicies, religious fanaticism, political rivalries, and ecological underworlds particularly in the Indian context.

The specific direction of the motives and drives is learned from definitions of the legal codes as favourable or unfavourable.[4] In the

2. Barnes and Teeters, *New Horizons in Criminology*, 1966, 314.
3. Under the Indian Penal Code, Death Sentence is prescribed for the following :
   (i) it must be awarded when murder is committed by a person under sentence of imprisonment for life (S 303).
   (ii) Waging war against the Govt. of India (S. 121).
   (iii) Abetting mutiny actually committed (S. 132).
   (iv) Giving or fabricating false evidence upon which an innocent person suffers death (S. 194).
   (v) Murder which may be punished with death or imprisonment for life (S. 302)
   (vi) Abetment of suicide of a minor or insane or intoxicated person (S. 305).
   (vii) Dacoity accompanied with murder (S 396).
   (viii) Attempt to murder by a person under sentence of imprisonment for life if hurt is caused (S. 307).
4. Sutherland and Cressey, *Principles of Criminology* (10th Edn) p. 80,

complicated judicial process, which is inordinately delayed and exhorbitantly priced, the conviction, ultimately, turns to be a vague determination. Travelling through fabrication, forensic manipulations, perjury, hostility of witnesses and political and economic influences, most of the real culprits are shiphonned through and a few, generally destitutes, are awarded and ultimately executed. The scope of executive clemency in the Constitution of India[5] is vulnerable for political manoeuvability which has presently been put on the judicial anvil. Thus this extreme penalty is rarely resorted to and much of its deterrent magic vanishes.

Political criminal differs from the conventional one and to such a potential convictional criminal[6] even the death penalty is least deterrent as he moves with a kind of altruistic social end :

> He does not operate in terms of any egoistic motivation but non personally in the light of larger ends. His law violation is designed to legitimate certain social ideas he holds and is "instrumental" to his ideology...convictional criminal is less concerned with the actual mechanics of the crime...and feels at peace when it is over...[7]

Historically, political executions have not been able to check the revolution of rising expectation instead it has taken the lives of those who could have been valuable in terms of civilised human progress towards freedom, peace and happiness Politically illegitimate execution of Mr. Bhutto is the recent one in the long continuing chain. Its abolition or retention could not sufficiently be correlated with increasing or decreasing rate of homicides even in the societies which have homogeneous population.

Capital Punishment, thus, has become unscientific criminologically; non-utilitarian victimologically and ultimately degrading in the civilized humanitarian perspective.

III

CAPITAL PUNISHMENT : JURISCULTURE

Legislative development in India in this regard has been slow but steady which is discernible through section 302 India Penal Code read

5. There is the President's power under Article 72 (i) to grant reprieve and pardon as well as the Governor's power of commutation under Art. 161 of the Constitution of India.
6. See, Schafer "The Concept of Political Criminal."
7. *Supra* note 1 p. 329.

with S. 354 (3) and S. 235 (2) of the Code of Criminal Procedure. Successive amendments have shifted punitive focus from death to incarceration for life generally This shift in legislative emphasis is that life imprisonment is the rule and death penalty the exception where special reasons compel to eliminate the deviant.

The legislative vacuum between conviction and death sentence, presumably, invites individualization[8] of punishment crystalised in the form of 'special reasons'. In absence of legislative postulates and any-procedure of pre-sentence inquiry the judicial discretion may hit, *inter-alia*, the equal protection guaranteed under Article 14 of the Constitution of India. Death penalty, resultantiy eroding seven basic freedoms, infringes Article 19, and also attracts Article 21 which guarantees life and liberty.

There is a long list of cases[9] to discern the judicial dynamics directed towards the centre, left and right but it would be sufficient, here, to take three popular representatives *Jagmohan*,[10] *Bachan*[11] and *Rajendra*.[12]

In view of the same points discussed *mutatis mutandis*, in detail, in *Bachan*, it would be sufficient to deal *Jagmohan* very precisely. In *Jagmohan*, the constitutionality of S. 302 Indian Penal Code was challanged that if infringed Arts. 14, 19 and 21 of the Constitution of India. As all the attending, aggravating and mitigating circumstances are sufficiently known to the decision makers and as no two cases could be similar, S. 302 could not be said to be violative of equal protection guaranteed under Article 14 of the Constitution of India. Nor could it violate Article 21 as the death sentence is imposed after trial in accordance with the procedure established by law.

8. Individualization "is the recognition and understanding of each client's unique qualities.."
   Mark Monger, *Case Work in Probation*, 132, 1972.
9. See, *Nagendra Kumar*, AIR 1960 S. C. 430 ; *Carlose John*, AIR 1977 S. C 349 ; *Ediga Anamma* v. *State of Andhra Pradesh*, AIR 1974 S C. 799 ; *Namu Ram* v. *State of Assam*, AIR 1975 S. C 762 ; *Harnam* v. *State*, AIR 1976 S. C. 2071 ; *Kartar Singh*, AIR 1977 S. C. 349 ; *Fatehchand Himmatlal* v. *State of Maharastra* (1977) 2 SCR 828 ; *Shiv Mohan Singh* v. *State*, (1977) 3 SCR 172 ; *Charles Sobraj* v. *Superintendent*, (1979) 1 SCR 512.
10. *Jagmohan Singh* v. *State of Uttar Pradesh*, AIR 1973 S. C. 947.
11. *Bachan Singh* v. *State of Punjab*, AIR 1980 S. C. 898.
12. *Rajendra Prasad* v. *State of Uttar Pradesh*, AIR 1970 S. C. 916.

In *Bachan* v. *State of Punjab*, the constitutionality of S. 302 was the subject matter of a detailed discussion in view of Arts. 14, 19 and 21 of the Constitution. The plurality of decision makers took the help of prevailing penological dilemma and to rationalize the pejorative predisposition and observed :

> . ...If in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in the Parliament, has repeatedly in the last three decades rejected all attempts including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilized countries in the world, if the framers of the Indian Constitution were fully aware of the existence of death penalty as punishment for murder under the Indian Penal Code, if 35th and subsequent reports of the Law Commission suggesting retention of death penalty and recommending revision of the Criminal Procedure Code and the insertion of new sections 235 (2) and 354 (3) in that code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-73 it took up, revision of the code of 1898 and replaced it by the Code of 1973, it is not pos ible to hold that the provision of death penalty as an alternative punishment for murder in S. 302, Penal Code, is unreasonable and not in the public interest.[18]

The delineation made above was a kind of judicial intuition to the summit court. Judicial rationalization of the predisposed notions is manifest as even in absence of any scientific rider in favour of death penalty, in socially utilitarian terms, the prevailing confusion in the field led the decision makers to grant benefit of doubt while awarding a proper rational sentence to the death sentence itself. This negative, and scientifically defeatist's approach is apparent when the Law Commission advocated the retention of death penalty when they justified it not with reference to penological parameters or any known theories of punishment. The 35th Law Commission observed :

> It is difficult to rule out the validity of or the strength behind, many of the arguments for abolition. Nor does commission treat

13. *Bachan Singh* v. *State of Panjab*, AIR 1980 S. C. 898 at 929.

> lightly the argument based on the irrevocability, of the sentence of death, the need for a modern approach, the severity of capital punishment, and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.[14]

Although impressed by the arguments for abolition certain artifactual, intuitive, non-empirical and vague factors like vastness, morality and diversity etc. compelled them to succumb to a non-compromising dotard's idea of retention. The Commission observed :

> Having, regard, however, to the conditions in India, to the variety in the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining Law and order in the country at the present juncture, India can not risk in the experiment of abolition of capital punishment.

Article 21,[15] expanded and read in view of *Maneka Gandhi*,[16] approached the 'Due process' and means, now, that a person may be deprived of his life or personal liberty only in accordance with fair, just and reasonable procedure established by valid law.[17] Unlike *Jagmohan*, wherein death sentence was required to be in accordance with the procedure established by Law, now S. 302 of the Penal Code was to be scrutinized on the basis of the extended meaning of Art. 21 in view of *Maneka Gandhi'r* decision.

It was held in *Bachan* that as the execution by hanging was known to the framers of the Constitution, it could not be said in view of the other provisions of the Constitution that it is unreasonable, cruel or unusual punishment and it is against the basic spirit or structure of the Constitution.

14. 35th *Report, Law Commission of India* pp. 354-55.
15. Article 21 reads as :
> "No person shall be deprived of his life or personal liberty except according to procedures established by law."

if this Article is expanded in accordance with interpretative principle indicated in *Maneka Gandhi*, it will read as follows :
> "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."

See, *Bachan Singh* v. *State of Punjab*, AIR 1980 S. C. 898 at 930.
16. *Maneka Gandhi* v. *Union of India*, AIR 1978 S. C. 597.
17. *Ibid*.

Further, Article 6, cls. (1) and (2) of the International Covenant on Civil and Political Rights, said the Supreme Court, to which India has acceded in 1979 is of no avail as it permits death penalty in certain circumstances provided it is not inflicted arbitrarily. The Indian processual and substantive criminal justice was, thus, held to be in accord with its international commitment.[18]

Justice Bhagwati in *Bachan* was not satisfied with the majority opinion that section 302 IPC read with sections 235 (2) and 354 (3) of the Code of Criminal Procedure has enough scope for pre-sentence inquiry and individualization of the sentence following the conviction. Justice Bhagwati in his dissent, however, declared S. 302 IPC to be ultra-vires and void being violative of Arts. 14 and 21 since it did not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence.[19]

It is submitted that Justice Bhagwati in his dissent declared the silent path, under section 302 IPC, to approach death sentence to be unconstitutional in absence of legislative guidelines and not the death sentence itself as it was declared to be an anachronism, degrading to human dignity and unnecessary in modern life by Brennan and Marshall JJ. in *Furman* v. *Georgia*.[20]

To begin with *Rajendra Prasad* v. *State of U. P.*,[21] in the end of this chapter might be a chronological upset, yet for a functional inference it would be better to consider this Landmark decision by Justice V. R. Krishna Iyer along with the dissenting opinion of Justice Bhagwati in *Bachan*. Justice Iyer, through *Rajendra Prasad* moves with futurologist's wisdom to 'canalise the sentencing discretion' regarding death sentence in its 'integral perspective' lest it should have been declared *ultra vires* in view of Arts. 14, 19 and 21 of the Constitution of India. Had the spirit of *Rajendra Prasad* been carried through plurality in *Bachan*, it would have, perhaps, not been a judicial compulsion for Justice Bhagwati to declare S. 302 IPC unconstitutional while dissenting in *Bachan*.

Justice Iyer's judicial effort in *Rajendra* was, through 'interstitial legislation', to provide constitutional basis to the capital punishment if at all it is to survive in relation to certain restricted types of offences :

18. *See Bachan Singh* v. *State of Punjab*, AIR 1980 S. C. p, 931.
19. *Ibid.*
20. (1972) 408 U. S. 238.
21. AIR 1979 S. C. 916.

> "We banish possible confusion about the precise issue before us—it is not the constitutionality of the provision for death penalty, but only the canalisation of the sentencing discretion in a competing situation. The former problem is now beyond forensic doubt after Jagmohan Singh,[22] and the latter is in critical need of tangible guidelines at once constitutional and functional."[23]

Justice Iyer in *Rajendra*, while combining science and romantic theology; superstition and reason and taking help of even Gandhi and Buddha to afford a human context to capital punishment, has also bridged the discriminative gap between conviction and death sentence.

According to Justice Iyer, shorn of all poetics, approached in its logical, criminological context, impregnated with Constitutional values, the extinction of human life could be permitted only where the violator is a social gangrene and nothing less than elimination could serve the penological pursuit. Considered thus, the death penalty could be inflicted in the cases of three categories of criminals that are scientifically beyond any therapeutic treatment.

(i) for white collar offences ;

(ii) for anti-social offences ; and

(iii) for exterminating a person who is a menace to the society i. e. a hardened criminal.

Death penalty, even to these three types of violators has to be concluded after intensive individualization with a sense of reverence to human life. The sphere of death penalty must be juristically limited to these 'special reasons' lest it becomes unconstitutional.

> "Death penalty is constitutionalised by reading into S. 353(3) Cr. P. C., those special reasons which validate the sentence as reasonably necessitous and non-arbitrary, as just in the special societal circumstances."[24]

IV

Politics of Capital Punishment

If we accept, however, the synthesis emerging out of judicial dialectics along with the present legislative framework, the sphere of death

22. *Jagmohan Singh* v. *State of U. P.*, AIR 1973 S. C. 947.
23. *Rajendra Prasad* v. *State of U P.*, AIR 1979 S. C. 916 at 920.
24. Justice Iyer, in *Rajendra* at 934.

penalty would be reasonably restricted and it wonld be resorted to in the rarest of rare situations. We lack convincing empirical studies regarding the penological significance of capital punishment which could suggest either its abolition or retention. Even if we have it, the empiricism and legalistics alone can not decide the issue and it has to be considered in the perspective of basics characteristically inherent in a particular social and political order. While discussing the politics of capital punishment, I never intend to brand either abolitionists to be radical democrats or retentionists to be fascists. The debate-to hang or not-reduces to be a political problem with reference to the National Priorities in sight. It becomes a political issue if we make structural analysis in terms of existing social and legal institutions *vis-a-vis* the avowed cultural goals In the state structure, death penalty has become, though ignorantly introduced, a persistent and integral part of the social contract and while considering its abolition or retention its effect on the people's faith in the existing political order and governance also becomes relevant.

The popular spirit, let few intellectuals alone, believes in the responsibility of the State in executing the murderer. Criminology of the West has failed to explain the hysteric carnages during the recent years in the west of Uttar Pradesh. Amidst religious fanaticism, caste prejudices and the growing unique political norms hitherto unknown, people in general still applaud the statesman who takes a vow in public to annihilate the violator. In such a social climate where the societal reaction does not behave in a logical fashion the body politic would not like to meet the fate of Socrates or Gallelio.

In the continuing colonial police organization which has hither to been not scientifically oriented and which rests on the classical belief that the violators should be treated in the equally criminal way, if the capital punishment is withdrawn totally, there would be a race for killing in the cloak of encounters which is a new dimension in the administration of criminal justice, particularly in India.

Incarceration, as an alternative of death sentence, in third world countries and particularly in India where more than half of the people live in conditions even worse than worst prison atmosphere, may also be considered as it may affect the crime rate. Another significant point in this regard is that most of the studies are with reference to the deterrent effect of capital punishment in view of murder and certain other traditional crimes. In the present context a new class of criminals is coming up and in terms of social danger their activities concern us more than the traditional violators. These 'Public Welfare' criminals are beyond the therapeutic treatment and their crimogenesis is entirely different from that of the traditional violators. Such deviants are in need of life long isolatian or elimination. In all types of existing social orders with varying political and economic structures, including the socialist political communities,[25] death penalty exists for some offence or the other :

> "...in spite of the abolitionist movement, only 18 states in the world have abolished the death penalty for all offences while 8 more have retained it for specific offences committed in time of war."[26]

In India all political attempts for statutory abolition of death sentence have proved abortive due to the persistent opposition by the Government.[27]

Behaviourally dwindling penological significance of Death Sentence and global dimension of abolitionist movement, however, have been successful during the yester years to restrict the area of death penalty. If it continues, it is due to the lack of scientific orientation of the people in an inhuman, egoistic and discriminative social and political order superstructured by dehumanised jural postulates. It may also be required for the continuity of a state-structure based on the idea of fear, domination and annihilation of dissent-present or potential. To conclude, scientific wisdom must suggest its total abolition ; aboriginal superstition may prompt us to retain it and between the lines, Capital Punishment is a political compromise.

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25. "In U. S. S. R. as many as 18 offences are punishable with death" See, *Report of Amnesty International*, 1979.
26. *Bachan Singh* v. *State of Punjab*, AIR 1980 S. C. at 928.
27. In 1931 an abolition bill was introduced in the Legistative Assembly by Gaya Prasad Singh ; in 1956, a bill was introduced in the Lok Sabha by Mukund Lal Agarwal, in 1958, a resolution for abolition was moved in Rajya Sabha by the great film artist Prithviraj Kapur ; in 1962 a resolution was moved in the Lok Sabha by Raghu Nath Singh for abolition of Capital Punishment.

THE CONCEPT* OF PERSONAL LIBERTY AND INDIAN JUDICIARY 1950-81

C. M. JARIWALA+

Introduction

The concept of personal liberty provided in article 39 of the Magna carta of 1225 said that no free man should be taken or imprisoned or disseised or outlawed or exiled except according to the law of Land. This was interpreted by Blackstone to mean "the freedom of locomotion; of changing situation or moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law."[1] Dicey defined the concept to mean a legal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that did not admit of legal justification.[2] Later on Lord Denning and Lord Lloyd defined the concept of personal liberty to mean per onal freedom.[3]

The constitution of the United States of America simply used the word 'liberty' in the liberty clause. At first the Supreme Court of America interpreted the word 'liberty' in the Blackstonian sense[4] but later on it was painted with multifacet colours[5] with wide dimensions including, the right to engage all his faculties,[6] to be free to use them in all lawful ways, to live and work, to earn livelihood, to contract, to acquire useful knowledge, to marry, to establish a home, to bring up children, to follow ordinary pursuit of happiness,[6] etc.

* This paper deals with the *Concept only* and other developments are outside the perview of this paper. This paper is an extension of the author's unpublished paper, *the changing Dimension of the concept of Personal Liberty* read at Ranikhet Seminar on "Supreme Court And Civil Liberties", 1979.

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1. *Blackstone* (George Chase's Edi.) (Ed. 4) Book I, p. 73.
2. *Dicey on Constitutional Law*, (Ed 9) pp. 207, 208.
3. A. Denning, *Freedom Under the Law*, Lloyd, *The Idea of Law*, 1964, 159.
4. *See*, for example, *Munn* v. *Illinois*, (1876) 94 U. S. 113, 114 *per* Field J.
5. *See*, for example, *Allegayer* v. *Louisiana*, (1397) 165 U. S. 578, 589.
6. *Mayer* v. *Nebraska*, (1923) 262 U. S. 390, 399 ; *Bolling* v. *Sharpe*, (1964) 347 U. S. 497, 499 ; *Kent* v. *Dulles* (1958) 357 U. S. 116.

There is no uniformity in the personal liberty clause of the other constitutions. For example, the constitutions of Cambodia,[7] Japan[8] and Nepal[9] used the word 'liberty'; whereas, the constitutions of German Democratic Republic,[10] Ireland,[11] Italy[12] and Portugal[13] incorporated the expression 'personal liberty' Article 127 of the Constitution (Fundamental Law) of the U. S. S. R. 1936 provided for inviolability of person.

The dual approach of the world constitutions in the intial stage brought in uncertainty in the mind of the Constituent Assembly. This is evident from the fact that the first draft of the constitution of India used the word 'liberty',[14] it was later on that the word 'personal' was added. Now article 21 of the constitution of India guarantees the fundamental right to "life or personal liberty."[15] During the period from 1950-1981 there were cases decided by the Supreme Court and the High courts. These decisions show interesting trends where the courts sang the song of personal liberty at different frequencies. The judicial approach with respect to the concept of personal liberty during the above period may be examined under the following heads.

At the Dawn of Independence :

It was immediately after the commencement of the constitution of India that the highest court of the country had to face a difficult task to colour the concept of personal liberty for Free India. The judges had the Pre-Independence tools to interpret the India liberty clause. This was no easy task for the judges of the Supreme Court. In the very first case on Fundamental right,[16] one Gopalan was detained under the Preventive Detention Act, 1950 and he unsuccessfully claimed protection of the right to personal liberty guaranteed in article 21 including the freedom of movement throughout the territory of India ensured under article 19 (1)

7. Art. 3.
8. Art. 13.
9. Art. 18.
10. Art. 8 (inviolability of the home, secrecy of the mail, and the right to take up residence at any place).
11. Art. 40 (4) (i).
12. Art. 13 (Detention, inspection or personal search or any other restriction of personal liberty.)
13. Art. 8 (vii) (Article 8 makes a distinction between personal safety, arrest and personal liberty.)
14. *C. A. D.*, Vol. III, 1947, 441.
15. *C. A. D.*, Vol. VII, 1948, 1001.
16. *Gopalan* v. *State of Mad.*, A. I. R. 1950 S. C. 27.

(d). The Supreme Court was confronted with the question whether the concept of personal liberty included the freedom of movement. The majority opinion was that the right to personal liberty was not so wide as to include within it the freedom of movement throughout the territory of India. Chief Justice Kania[17] and Patanjali Sastri,[18] Mukherjea[19] and Das,[20] JJ., were of the opinion that if the concept of 'personal liberty' was interpreted to include the freedom of movement throughout the territory of India then article 19 (1) (d) would become redundant and they kept both the freedoms in separate compartments.

In the majority opinion, the judges did not follow the same line of approach. Justice Mukherjea for example adopted a too restricted view. According to the learned judge the concept of "personal liberty" was restricted "to freedom from physical restraint of a person by incarceration or otherwise." On the otherhand, Kania C. J., and Das, J. treated the concept as compendious expression so as to include, according to Kania, C.J., "the right to eat and drink, the right to work, play, swim and numerous other rights." Justice Patanjali Sastri opined article 21 as the fusion of substantive rights. Fazl Ali, J., the lone dissentor, was of the opinion that, "the addition of the word 'personal' " did not change the meaning of the concept of liberty.[21] According to the learned judge the expression 'personal liberty', consisted, *inter alia*, freedom of movement and locomotion.

The majority of the court did not connect the right to personal liberty with the freedom of movement because they had the difficulty in balancing two provisions of the constitution. On the one hand, was the right to personal liberty read with article 19 (1) (d) and article 19 (5,; and on the other was the constitutional recognition to the draconian law of preventive detention under article 22. Moreover, the judges were administering justice with the English scale. Can it be presumed that the court was more concerned about protecting the nascent Indian democracy against any danger from opposition of which Gopal.n was one? Thus at the dawn of Independence, the tender plant of personal liberty was cordoned off as to allow restricted freedom to the free people of free India.

17. *Id.* at 37.
18. *Id.* at 71.
19. *Id.* at 97.
20. *Id.* at 111.
21. *Id.* at 53, 54; *See* also *Kashindra* v. *Chief Secy. of W. B.*, Misc. case No. 166 of 1950 F. B. where Sen, J., opined that, "personal liberty came within Art. 19 (1) (d)."

The Next Decade :

In *Hamdard Dawakhana* v. *Union of India*,[22] the Drug and Magic Remedies (objectionable Adertisement) Act, 1954 in section 8 authorised the state officials to seize and detain any document, article or thing which such person had reason to believe contained any advertisement which contravened any of the provisions of this Act, and such article or thing could be forfeited by the Government. In the light of enforcement of this provision the petitioners experienced difficulty in the matter of publicity for their products; moreover, the authorities had seized some of their products for the violation of the Act and the petitioners challenged such action as violative of, *inter alia*, article 21. The Supreme Court applied the personal liberty clause in this case, and struck down the above provisions of section 8. Kapur, J., while passing the above order, did not deal with the matter as to how the right to personal liberty was involved in this case. Does it mean that the Supreme Court was trying to cover the property right in concept of personal liberty? Can Kapur, J., be said to have overstepped *Gopalan's* dictum when he joined article 21 with article 31 and in turn articles 19 (1) (g) and 19 (1) (f)?

Whether the right to livelihood came within the purview of article 21, was the question before the Supreme Court in *In re Sant Ram's* case.[23] In this case the petitioner, whose name was included in the list of touts in accordance with Rule 24 (i), 0. IV-A of the Supreme Court Rules, claimed protection, *inter alia*, of article 21. He argued that a restriction on his livelihood affected his right to "life" in article 21 but the court unanimously rejected this argument. Sinha, C. J., took the stand that, "the language of Art. 21 cannot be pressed into aid of the argument that the word "life" in Article 21 includes "livelihood" also." The learned Chief Justice was of the opinion that the right to livelihood" is included in the freedom enumerated in Article 19, particularly Clause (g), or even in Article 16 in a limited sense."[24] In this case the petitioner missed the opportunity to press in the concept of personal liberty and the court had to deal only with the right to life. The Supreme Court's silence on the

22. A. I. R. 1960 S. C. 554. But see the restricted approach of the Supreme Court when internment and externment aspects of personal liberty had no reference to article 21 in *State of M. P.* v. *Baldeo Prasad*, A. I. R. 1961 S. C. 293; *Dr. Khare* v. *State of Del.*, A. I. R. 1950 S. C. 211.
23. A. I. R. 1960 S. C. 932.
24. *Id.* at 935. See American Judicial dynamism where the court interpreted 'liberty' to include the right to earn livelihood—*Allegeyer* v. *Louisiana* (1897) 165 U. S. 578, 589.

point shows that the court was still in the close grip of the restricted view in *Gopalan's* case. Thus the personal liberty did not find suitable atmosphere for expansion even after ten years of the commencement of the constitution of India.

The First Emergency :

In India the first emergency was imposed in the year 1962 which continued till 1968. Immediately after the proclamation of emergency, the Supreme Court once again got an opportunity to define the concept of personal liberty. In *Kharak Singh's* case,[25] the petitioner, who was challaned in a case of dacoity, was released for want of evidence against him. Later on he was put under surveillance of the police officials under Regulation 236 of the U. P. Police Regulations. This regulation provided for secret picketing of the house or approaches of the house of suspect, domiciliary visit at night, detailed periodical inquiries into repute, habit, associations, income, expenses and occupations and reporting to the police station of absence and movement from home, etc. The Supreme Court by the majority of 4 : 2 declared that part of regulation 236 bad which authorised domiciliary visits as offending the right to personal liberty. But Subba Rao, J., for self and Shah, J., dissenting, held the entire provision of surveillance in regulation 236 (a) to (f) unconstitutional on the ground of violation of articles 19 (1) (d) and 21.

Ayyangar, J. for himself and for Imam C. J., Sinha and Mudholkar, JJ. first examined whether secret picketing of the house of the suspect affected, *inter alia* the right to personal liberty. The majority was of the opinion that the purpose of secret picketing was to ascertain the identity of the person or persons who visited the house of the suspect so that the police could know the nature of activities in which the suspect was involved. This, according to the court, could not "in any material or palpable form affect, his personal liberty within Article 21."[26] Ayyangar, J., followed the *Gopalan's* test of 'direct and immediate effect"[27] and held that personal sensitiveness was not covered directly as well as tangibly under the concept of personal liberty.

The provision for domiciliary visits at night was another ground of attack. Ayyangar, J., in order to find out whether the domiciliary visit

25. *Kharak Singh* v. *State of U. P.*, A. I. R. 1963 S. C. 1295.
26. *Id.* at 1300.
27. *Gopalan* v, *State of Mad.*, A. I. R. 1950 S. C. 27.

was an infringement of personal liberty, travelled from English[28] to American[29] case law and concluded that an unauthorised intrusion into the residence of a citizen, the knocking at his door at nighttime disturbing his sleep and ordinary comfort, being essentials of personal liberty, attracted article 21.

Now coming to regulation 236 (c), (d) and (e) which provided for periodical inquiries by police authority into repute, habits, associations, income, expenses, occupation, movement and absences from home, etc., they were challenged on the ground of violation of personal liberty. The majority opinion set aside this attack on the ground that the above activities were attributes of privacy and if "privacy is invaded', according to Ayyangar, J , "we donot consider that Article 21 has any relevance in the context."[30] The learned judge further opined that as the right of privacy "is not a guaranteed right under our Constitution," there was no question of "infringment of a fundamental right guaranteed by Part III." But this restricted view was not followed in *Govinda* v. *State of M. P.*[31], where Mathew, J., opined that this right could not be outrightly excluded from personal liberty, and according to the learned judge, "(T) he right to privacy in any event will necessarily have to go through a process of case-by-case development."[32]

The majority court in the instant case did not seriously develop the concept of personal liberty. It looks as if the majority court at first sailed towards the restricted approach in *Gopalan's* case but later on it started its journey on the expansive approach and ultimately it cut out "personal sensitiveness" and "privacy" from the concept of personal liberty. The court further allowed *Gopalan's* watertight compartments of articles 19 (1) (d) and 21. Thus even after thirteen years of *Gopalan's* case, the majority still adopted a restrictive approach in interpreting the concept of personal liberty. In *Khark Singh's* case as compared to *Gopalan's* case it was not a politician's case but a disreputable character

28. See *Semayne's case* (1604) 5 o Rep. 91a. Though this case dealt with the property right yet, Ayyangar, J., allowed support even to personal liberty case law as it, according to the learned Jndge, "embodies an abiding principle which transeends mere protection of property rights and expounds a concept of personal liberty " *Id* at 1303.
29. *Munn* v. *Illinois*, (1876) 94 U. S. 113 ; *Wolf* v. *Colorado* (1948) 338 U. S. 25. *Id.* at 1302.
30. *Id.* at 1303.
31. A. I. R. 1975 S. C. 1378, 1385.
32. *Id.* at 1385.

was claiming the protection of his personal liberty. And the majority court did not allow the growth of personal liberty plant in such a situation.

Subba Rao, J., for self and Shah, J., dissenting, held that all the provisions of regulation 236 were unconstitutional under articles 19 (1) (d) and 21. The minority court unlike the majority, took the help of the American liberty jurisprudence[33] to expand the frontiers of the Indian personal liberty jurisprudence. The learned judge brought in personal sensitiveness in the personal liberty when the opined,

> In an uncivilized society where there are no inhibitions, only physical restraints may deteract from personal liberty, but as civilization advances the psychological restraints are more effective than physical one The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's action through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complex can be described as physical restraints.[34]

The "civilized" and the "modern scientific" interpretation of Justice, Subba Rao, further expanded the area of personal liberty to reach to the right to privacy which was considered as "an essential ingredient of personal Liberty."[35] According to Subba Rao, J., every democratic country sanctified the right to rest, physical happiness, peace of mind and security and resort with his family in his house and in that light the concept of personal liberty should be defined as,

> a right of an individual to be free from restrictions or encroaehments on his person, whether those restrictions or encroachments are *directly imposed or indirectly brought about* by calculated measures.[36]

In the light of the above dynamism, the minority court applied article 21 against all the acts of surveillance under regulation 236.

The 'carving' out approach in distingushing articles 19 (1) (d) and 21 of the majorities in *Gopalan's* and *Khark Singh's* cases was also dissented in the instant case. Subba Rao, J. opined that, "this is not a

33. *Id.* at 1305 where Subba Rao, J., cited a more recent case law of *Bolling* v. *Sharpe* (1954) 247 U. S 497 and the learned Judge did not approve the approaches of Dicey and Blackstone,
34. *Id.* at 1305-1306.
35. *Id.* at 1306.
36. *Id.* at 1306 *(emphasis supplied).*

correct approach". According to the learned judge "the fundamental right of life and personal liberty have many attributes and some of them are found in Article 19."[37] The learned judge further allowed even indirectly related right to get the label of the right to personal liberty. This will allow all the rights even indirectly related to personal liberty to get protection of article 21. It may be submitted that in the present case Subba Rao, J., was so much influenced by the dynamics of the American liberty clause[38] that he tried to bring in concepts related to right to "life" through personal liberty;[38a] whereas, in article 21 of the Indian Constitution the word 'life' finds a separate place which is missing in the American clause.

Is taking of blood from the human body for ascertaining a case of intoxication affects the right to personal liberty? In *State* v. *Sheshappa*,[39] the accused, who was charged under the Bombay Prohibition Act, offered resistence to the medical officer before whom he was produced and he refused to allow the medical officer to collect his blood on one of the grounds that it violated his personal liberty or life guaranteed under article 21. The Bombay High Court examined the validity of the above provision under the personal liberty clause. The court, following the American case law,[40] held that the right to personal liberty or life "included the right not to allow taking of a sample of blood but in the present case as it was in accordance with the provision of article 21, it was held not to be bad.

The right to write a book and eventually to get it published was considered as a part of the right to personal liberty.[41] A detenu, who was not allowed to send his book entitled "Inside the Atom" for publication, claimed protection under article 21. The Supreme Court held that as the Bombay Conditions of Detention Order, 1951 did not authorise

37. *Id.* at 1305.
38. *See* Subba Rao, J. supporting Field J's definition of 'Life' in *Munn* v. *Illinois* (1877) 94 U. S. 113. 142; *id* at 1306.
38A. The Post *Maneka* case law uses the term "personal liberty" alongwith "life" while dealing with cases on personal liberty.
39. A. I R. 1964 Bom. 253.
40. *Breithaupt* v. *Abram* (1957) 352 U. S. 432, where the majority held taking of blood was a part of liberty but taking of blood by a skilled technician was not bad.
41. *Maharastra State* v. *Prabhakar*, A. I. R. 1966 S. C. 424; See also *M. A. Khan* v. *State*, A. I. R. 1967 Bom. 254; Das J. and Kania C. *J.* in *Gopalan's case, id.* at 111, *Mayer* v. *Nebraska* (1923) 167 U. S. 390, 399 right to acqire useful knowledge.

the authority to impose ban on writing a book or sending it for publication, the Maharashtra Government violated the detenu's right to personal liberty. On behalf of the State it was argued that when a person was detained he lost his freedom, and as he was no longer a freeman, he could enjoy only those privileges which were available to him. But Subba Rao, J ,[42] speaking for the court, rightly rejected the restricted view of Das, J., in *Gopalan's* case[43] and pointed out that the court should follow a liberal attitude towards the right to personal liberty unless there were compelling reasons otherwise.

At the last stage of the withdrawl of the proclamation of emergency, the high courts and the Supreme Court were asked to decide whether a right to travel abroad was included in the concept of personal liberty. The Full Bench of Bombay,[44] Kerala,[45] and the Mysore High Courts[46] expanded the frontiers of personal liberty to include the right to travel abroad as well. The high courts heaviiy relied on the liberal view of personal liberty in *Gopalan's* and *Kharak Singh's* cases and the English, American and International personal liberty jurisprudence as well. The high courts took the stand that, "to stop a person from going out or from entering the country is to impose a physical restraint on his person" and it would attract the personal liberty clause.[47] The Full Bench[47A] declared that an unauthorised refusal of passport would be violative of article 21. The high courts, treated 'personal liberty in article 21 to include 'residue' of personal freedom.[48] Chief Justice Tambe defined 'personal liberty' to include "a full range of conduct which an individual is free to pursue within law, for instance, eat and drink what he likes, mix with people whom he likes, read what he likes, sleep when and as long as he likes, say what he likes, travel wherever he likes, go wherever he likes, follow profession, vocation or business he likes."[49]

The Full Bench of the Delhi High Court[44] took a different stand.

42. *Id.* at 428.
43. A. I. R. 1950 S. C. 27, 108. Even the Magna Carter used the word "freeman."
44. *A. G. Kazi* v. *C. V. Jethwani*, A. I. R. 1967 Bom. 235 (F. B.); *Choithram* v. *A. G. Kazi*, A. I. R. 1966 Bom. 54.
45 *Francis* v. *Govt. of India*, A. I. R. 1966 Ker. 20 (F. B.).
46. *Dr S. S. Rao* v. *Union of India*, 1965 (2) Mys. L. J. 665.
47. *Id* at 28
47A. See *Supra* note 44.
48. *Id.* at 240 *per* Tambe, C. J., and *id.* at 240 *per* Menon, C. J. and *id* at 29 *per* Raman Nayarm J.
49. A. I. R. 1967 Bom. 235 (F. B.) 240.
44. *Rabindra Nath* v. *Regl. Passport Offi.*, A. I. R. 1967 Delhi 1 (F. B.)

The Court had the problem whether 'non citizen' was also included in 'person' under article 21 because that would mean, 'non-citizen or aliens who are included in the word "person" though not guaranteed free movement throughout the t rritory of India, have been guaranteed the fundamental right of going out of this country and coming in"[45] and such interpratation according to Dua, Ag. C. J., would be against "interests of national security".[45] And in the light of above reasoning the learned Acting Chief Justice refused to accept the contention that "personal liberty guaranteed by Article 21 is intended to extend to the liberty of going out of India and coming back".[45] It is submitted that a mere fact that a non-citizen[46] could also claim protection of the said right or allowing such person would be against the interest of national security could not be considered as powerful reasonings so as to restrict the scope of multi-dimensional concept.

The judicial dichotomy of the right to get passport was ultimately brought to the Supreme Court in *Satwant Singh's* case[47] where the petitioner, a citizen of India having import-export business, had to go abroad in connection with his business but the government withdrew his passport facilities. The petitioner challenged the action under *inter alia*, article 21. Chief Justice Subba Rao now in majority with Shelat and Vaidialingam, JJ., tried to raise the Indian personal liberty jurisprudence to the height of the American clause when he opined, " 'Liberty' in our Constitution bears the same comprehensive meaning as is given to the expression "Liberty" by the 5th and 14th Amendment to the U. S. Constitution".[48] But the learned Chief Justice could not bring it on par with the American liberty clause because personal liberty according to him did not include "the ingredients of "liberty" enshrined in Art. 19 of the Constitution".[48] And thus, according to the majority, the right to travel abroad was covered by the expression 'personal liberty'. But Hidayatullah, J., with whom Shah, J., also joined forming minority, was of the opinion that a passport was a political document over which the government had ownership and as such no fundamental right to travel abroad could be claimed. The learned judge refused to take support

45. *Id.* at 6. Kapur, J., agreeing with the Acting C. J., opined "(A) 11 liberties are the result of social process and each constibutional liberty has to be weighed against considerations of order, stability and security". *Id.* at 12.
46. *See* now *Anwar* v. *State of J. & K.*, A. I. R. 1971 S. C. 337 where the Supreme Court allowed even 'non-citizen' to claim protection of article 21.
47. *Satwant Singh* v. *A. P. O., New Delhi.* A. I. R. 967 S. C. 1836.
48. *Id.* at 844

from the American developments because according to him a "claim of such a right must be established strictly on the terms of our own Fundamental Law'.[49] The majority of the Court in the present case affirmed the minority view in *Kharak Singh's* case.

In *P. Sagar's* case[50] the petitioner urged the Andhra Pradesh High Court to extend the scope of personal liberty to the right to get admission to an educational institution. The high court rejected the plea to draw analogy in this matter from the case law on the Vth Amendment of the American Constitution. Because According to the court, "the American Constitution is a concise document, couched in general terms, our Constitution is somewhat more specific".[51] In the present case the government order making reservation for backward classes was attacked on the ground of violation of the right to personal liberty. It was urged for the petitioner that personal liberty included the right to get admission in the educational institution and intellectual freedom as well. Reddy, C. J., setting aside the above argument, opined that under article 15 (4) the State was permitted to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and when such provisions were made in respect of educational institution it did not affect the right to personal liberty under article 21. Allowing the above plea would according to the learned Chief Justice mean, "to take away by this guarantee what was positively permitted under Article 15 (4)".[52] Thus the educational and intellectual freedom was kept out of the bounds of personal liberty.

The first Emergency era saw two more dissenters joining hands with Fazl Ali., the only dissenter in *Gopalan's* case. Subba Rao, and Shah, JJ., who formed minority in *Kharak Singh's* case were greatly influenced by the developments in the American liberty jurisprudence; and secondly, they were trying to bring their dynamism of property right[53] in the per-

49. *Id.* at 1849-1850, The minority judgement was delivered after 24 days of the majority opinion. Is it not an unusal step in the judicial process ?
50. *F. Sagar* v. *State A. P.*, A. I. R. 1968 A. P. 165. See also *State of A. P.* v. *I. Narendra Nath*, A. I. U. 1971 S. O. 2560 where the Supreme Court did not allow entry to the medical college a part of personal liberty, *id* at 2567.
51. *Id.* at 183.
52. *Id.* at 182.
53. *See Kochhuni* v. *State of Mad.*, A. I. R. 1960 S. C. 1080, 1093 where the majority including Subba Rao and Shah, JJ., was inclined to follow Fazl Ali, J., in *Gopalan's* case.

sonal liberty jurisprudence. At one point the minority in *Kharak Singh's* case seems to have overstepped Fazl Ali, J., when it allowed even rights indirectly related to come within the right to personal liberty. Later on Subba Rao, J., who was in minority in *Kharak Singh's* case got unanimous support in *Prabhakar's* case. He also carried majority with him when he was elevated to the chair of the Chief Justice of India in *Satwant Singh's* case but this time unfortunately Shah, J., who had joined with Subba Rao, J., in *Kharak Singh's* case, did not join Subba Rao, C. J.'s majority and adopted a restricted view of personal liberty with Hidayatullah, J., Inspite of the all out efforts, the dynamism of Subba Rao, C. J., did not reach to the far reaching expectation of Fazl Ali, J., in the *Gopalan's* case. At the high court level, the majority of the high courts during this period, tried their level best to allow the tender plant to grow unrestricted under the support from the expansive approach of *Gopalan's* case. After taking stock of opinions during the first Emergency one may conclude that leaving a mariginal minority of the judges of the Supreme Court and the high Courts, most of the judges did not favour the restricted approach to the right of personal liberty.

The Second and the longest Emergency

India saw the second emergency having the longest spell starting from 1971, and when the 1971 emergency was in force another proclamation of emergency was issued on 26th June, 1975, which was ultimately withdrawn on 22nd March, 1977.

In the initial period of emergency, the judiciary was busy in connecting the personal liberty provision with article 19 and also article 14. The Supreme Court got support from *Bank Nationalisation's*[54] case and in *Sambhn Nath's*,[55] *H. Saha's*,[56] *Khudiram's*[57] cases, the court overruled *Gopalan's* majority on the point that article 21 was a self-contained code, one of the advantages of linking article 21 with article 19 would be that those aspects of personal liberty which are interlinked would still survive during emergency because now article 21 is placed beyond suspension under article 359. The another development of this period was that the majority view of *Kharak Singh's* case which kept out privacy from

54. *Cooper* v. *Union oj India*, A. I. R. 1970 S. C. 564.
55. *Sambhu Nath Sarkar* v. *State of W. B.*, A. I. R. 1973 S. C. 1425.
56. *H. Saha* v. *State of W. B.*, A. I. R. 1974 S. C. 2154.
57. *Khudiram* v. *State of W. B.*, A. I. R. 1975 S. C. 550.
58. *C. Subba Rao* v. *Supreme Commanadr. Def. For.*, A. I. R. 1980 A. P. 172, 175.

personal liberty was not followed in *Govind's* case[59] where Mathew, J., suggested its inclusion in the concept of personal liberty on the basis of case-by-case development.

During the second emergency the important pronouncement was of *Shiva Kant Shukla's* case.[60] In this case the respondents, who were detained under the law relating to preventive detention, claimed protection of the right to personal liberty available under the common law, the natural law and the law of nations. The problem in this case was that the President under article 359 by an order suspended the right to enforce fundamental rights which included, *inter alia*, rights under article 21. Now the question was whether the expression "personal liberty" under article 21 included the rights available under the above laws, or could those rights be claimed independently irrespective of the suspension of enforcement of article 21.

At the high court level, the High Courts of Delhi, Karnatak, Bombay (Nagpur Bench), Allahabad, Madras, Rajasthan, Madhya Pradesh, Andhra Pradesh and Punjab and Haryana unanimously extended the protection of personal liberty even during emergency.[60A]

The Supreme Court in apppeal by 5 : 1 reversed the high Courts ruling. Ray, C. J., Beg, Chandrachud and Bhagwati, JJ., formed the majority and Justice Khanna alone delivered the minority view. Ray, C. J.,[61] Beg[62] and Bhagwati,[63] JJ., interpreted the expression "personal liberty" in article 21 to include "all aspects of personal liberty". Chandrachud, J., (as he then was) did "express no firm opinion", "as regards the claim to personal liberty",[64] but there are passages in his judgement where one can infer that the learned judge also toed the line of the majority approach. For example, Chandrachud, J., said that Part III guaranteed not only "conferred rights" but also "rights of same variety or kind",[65] and that, "the claim on the basis of other law", according to chandrachud, J., would fail "in face of a Presidential order of the kind which has been placed in the instant case".[64] Some of the judges, forming the

59. *Govinda* v. *State of M. P.*, A. I. R. 1975 S. C. 1378.
60. *A. D. M. Jabalpur* v. *S. Shukla*, A. I. R. 1976 S. C. 1255. See also *Union of Indta* v. *Bhanndas*, A.I.R. 1977 S.C. 1027, 1044—Jaswant Singh, J., "all varieties or aspects of freedom of person compendiously described as personal liberty."
60A. See *id* at 1219. It is unfortunate that these judgements remain unpublished.
61. *Id*. at 1230, 1241.
62. *Id*. at 1293, 1297.
63. *Id*. at 1361.
64. *Id*. at 1339.
65. *Id*. at 1337.

majority opinion, used the expression "personal freedom" in place of personal liberty.[66] Thus according to the majority, the natural rights, common law rights and rights available under the existing law or other laws relating to personal liberty had no separate existence.[67] On the contrary, Justice Khanna, dissenting, was of the opinion that article 21 was not the sole repository of the right to personal liberty. According to the learned judge, the "fact that the Framers of the Constitution made an aspect of such right a part of the fundamental right, did not have the effect of exterminating the independent identity of such right and of making Art. 21 to be the sole repository of that right."[68] The opinion of the learned judge thus created a distinction between the right to personal liberty under article 21 and same right availabe under other laws. Such distinction, according to the learned judge would not allow "all aspects of personal liberty" to be caged in article 21.

The net result of the majority in *Shivkant Shukla's* case is that though the dynamic of "all aspects of personal liberty" or "personal freedom" widened the horizon of the concept of personal liberty in article 21 yet, the "judicial compulsion"[69] in effect did not allow any protection to the detenus.

In *Vidya Sagar* v. *Ram Das*,[70] the petitioner adovocated that the right to claim maintenance for the dependents of the prisoners or detenus was a part of the right under article 21. But the Allahabad High Court, rejecting the contention, opined that the right to personal liberty did not include the right to live which was an attribute of "economic freedom and the freedom from want" which was "envisaged by Art. 39 (a) and Art. 41 of the constitution".[71]

To sum up, during the second emergency period the judiciary did not change the colour of personal liberty inspite of emergency; on the contrary, it broadened its forntiers, but the judiciary, the Supreme

66. *See per* Beg. J., *id*. at 1293 ; Chandrachud, J., *id*. at 1336.
67. The amended Section 18 of the Maintenance of Internal Security Act, 1971 suspended the operation of "the right to personal liberty by virtue of natural law or common law...." but the question is : Has the President the power under Art. 359 (1) to suspend rights available outside Part III of the Constitution ?
68. *Id*. at 1256; 1276.
69. *Id*. at 1385, *Per* Bhagwati, J.—"..driven by *judicial compulsion* that I have come to the conclusion". (Emphesis Sugglied).
70. A. I. R. 1976 All 414.
71. *Id*. at 415.

Court, excluding some of the high courts,[71A] did not allow the detenus to regain their freedom.

The Post-Emergency Period

After eleven years of *Satwant Singh's* case[72] the controversy whether the right to travel abroad formed a part of general right to personal liberty came up before the seven judges Bench of the Supreme Court in *Maneka Gandhi's* case.[73] In this case the government of India impounded the passport of the petitioner in public interest and the government in the interest of general public did not give reason for this decision. The petitioner challenged this order on the grounds, *inter alia*, the violation of the right to personal liberty. Bhagwati, J., for himself and for Untawalia and Murtaza Fazal Ali, JJ., and with whom Chandrachud and Kailasam, JJ. also agreed, did not interfere with the order in view of the assurance of Attorney General that the petitioner would be given an opportunity of hearing. Though in general agreement with the majority view Beg, C. J., and Krishna Iyer, J. to some extent, held that the order should be quashed.

Now coming to the concept of personal liberty, the Supreme Court unanimously held that the right to traval abroad was included in the concept. Justice Bhagwati, expanding the horizon of the right to travel abroad, opined,

> it nourishes independent and self determining creative character of the individual not only by extending his freedom of action, but also by extending the scope of the experience, It is a right which gives intellectual and creative workers in particular the opportunity of extending their spiritual and intellectual horizon .... The right also extends to private life : marriage, family and friendship ..this freedom would be a highly valuable right where man finds himself obliged to flee [74]

Beg, C. J., went to the extent that article 21 comprised. Blackstonian dual concepts of "personal security" and "personal liberty".[75] Justice Krishna Iyer also sang the song in that frequency when he observed,

71A. *See, Suprn* note 70A.
72. A. I. R. 1967 S. C. 1836.
73. *Maneka Gandhi* v. *Union of India*, AIR 1978 S. C. 597.
74. *Id*. at 639.
75. *Id*. at 608

"(B) asically Blackstone is still current coin."[76] The learned judge endorsed Tambe, C. J.'s view in *Kazi's* case allowing multidimensions of personal liberty.[77]

Justice Bhagwati, while inter-linking articles 21 and 19 (1), defined personal liberty to cover, "a variety of rights and some of which were raised to the status of distinct fundamental rights and were given additional protection under article 19 (1)."[78] The learned judge, while giving the above definition suggested judicial activism in this field. He opined,

> (T)he attempt of the court should be to expand the reach and ambit of the Fundamental Right rather than attenuate their meaning and content by a process of judicial construction.[79]

The above view put the concept of personal liberty in a position advocated by Justice Fazl Ali in 1950.

The zeal with which the court widened the scope of personal liberty, it is submitted, was not put into operation in this case. In this case though the court was convinced that there was a violation of the petitioner's right to personal liberty yet, in the light of the assurance from the government that she would be given a right of hearing, the majority did not interfere with the impugned order. It is submitted that once an action attracted unconstitutionality under Part III of the constitution, then article 13 (2) imposed a mandatory duty on the court to quash such action.

The aftermath of the *Maneka Gandhi* case was that the right to life and personal liberty taken together was expanded to include the right to education.[80] When due to delay in admission, the petitioner could not file his nomination paper for the student's Union Election in time and his nomination paper was rejected. He claimed protection of article 21 on the ground that the right to education, which included participation in the activities of the Delhi University Student's Union, was included in the expression of life and personal liberty and this right was curtailed because no sufficient time was given to the petitioner to file nomination. Justice

76. *Id.* at 657. *See contra*, Kailasham, J., *id* at 676., where the learned judge said, "personal liberty in article 21...is different from other rights enumerated in artticle 19 of the Constitution".
77. *Id.* at 654.
78. *Id.* at 622.
79. *Id.* at 622.
80. *A. V. Chandal* v. *Delhi Univ.*, A. I. R. 1978 Del. 308
See contra State of A. P. v. *Narendra Nath*, A. I. R. 1971 S. C. 2560,

Deshpande, following the *Maneka Gandhi* wave length, opined that the expression "life and personal liberty" in article 21 included variety of rights, though not included in part III of the constitution, provided they were necessary for the full development of the personality of the individual. On the line of above reasoning, the learned judge concluded "(T) he right to education is, therefore, also included in Art. 21 of the Constitution".[81] And as the University authorities fixed the date of election when admissions were going on, the rejection of the nomination paper of the petitioner, "resulted, therefore in denial of exercise of the fundamental right to education by the petitioner".[82]

Once a person is put in the prison cell, is the right to personal liberty still avilable? The post *Maneka* cases took the stand that the mere fact that the accused or convict was lodged in prison, it did not reduce such person into a non-person.[83] The Supreme Court included in the expression "personal liberty and life" liberty to move, mix, mingle, talk, share company with co-prisoners,[84] to get newspaper at his cost,[85] to get toilet requisites, to consult private doctors, to have communication and interview with others, to allow the detenu to move outside to attend to some religious ceremonies or last rites of his kith and kin.[86]

The incorporation of fair and just procedure in article 21 by the judicial activism in *Menaka's* case has wide ranging consequences. Now the judiciary tried to treat "speedy trial"[87] free legal aid to indigent and poor accused[88] "as a" part of fundamental right to life and personal liberty.

In *Francis Coralie's* case,[89] the judicial activism of Bhagwati J., in *Menaka's* case was enlarged by Bhagwati, J. to include, "the right to have interviews with members of the family and friends is clearly part of personal liberty."[89] In this case the petitioner was not allowed to meet her daughter aged five years. Justice Krishna Iyer further inter-

81. *Id.* at 314
82. *Id.* at 317
83. *Sunil Batra* v. *Delhi Admi.*, A. I. R. 1978 S. C. 1675, 1727. *Charles Sobraj Suptd, Central Jail, Tihar*, AIR 1978 S. C. 1514
84. Id. at 1732
85. *M. A. Khan* v. *State*, AIR 1967 Bom. 254.
86. *Union of Iadia* v. *Bhanudas*, A. I. R. 1977 S. C. 1027.
87. *Hussainara Khatoon* v. *State of Bih.*, A. I. R. 1979 S. C. 1360 (a case of Public Interest Lifigation)
88 *Hussainara Khatoon* v. State of Bih., A. I. R. 1979 S. C. 1369 (a case of Public Interest Lifigation)
89. *Francis Caralie* v. *Union Terri of Del.*, AIR 1981 S. C. 746

preted liberty or life in its wider sense too perate where "pushing the prisoners into a solitary cell, denial of necessary aminity, transfer to a distant prison where visits or society of friends or relatives may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like".[90] The above *Prison condition* cases of post *Menaka* era will have far reaching consequences. Now the jail authorities, whether emergency or no emergency, would not be in a position to bolt t e prisoners behind the dark solitary cell and allow them to live a vegitative life and count the last days of their life.

One of the interesting development of the post *Menaka* era was that now the petitioners were trying to plead to include the right to property in the concept of personal liberty. This plea was taken because the fundamental right to property guaranted under articles 19 (1) (f) and 31 was abolished and now it was recognised merely as a constitutional right under article 300A; and secondly, the zeal of activist judges might expand the scope of personal liberty in this regard. In *Ambika Prasad* v. *State of U.P.*,[91] it was urged, "(P) roprietary personality was integral to personal liberty and a mayhem inflicted on a man's property was an amputation of his personal liberty" but Justice Krishna Iyer, the most activist judge of *Menaka's* case,[92] refused this argument and opined,

> Inflating Menaka Gandhi to impatt a healing touch to those whose property taken by feigning loss of personal liberty when the state takes only property. Menaka Gandhi is no universal nostrum or cure-all when all other arguments fail.[93]

The learned judge observed that there may be cases where "a penniless proletarian is unfree in his movement"[2] but a distinction had to be maintained between property and personal liberty jurisprudence. Though the constitution (Forty-Fourth Amendment) Act removed the fundamental right to p operty from Part III so that Indian socialism may become a reality yet, the ghost of property right still resides in some parts of Part III but not exclusively in article 21. The American liberty clause also, marks a distction between "liberty" and "property".

On these lines the Andhra Pradesh High Court[94] also did not

90. *Sunil Batra* v. *Del. Admi.*, AIR 1980 S C. 1579
91. A. I. R. 1980 S. C. 1762.
92. The learned judge in Menaka's case, brought liberally the American Dua process of law in article 21. Thus he fulfils the pious hope of Justice Fazi Ali in *Gopalan's* case.
93. *Id.* at 1767.
94. *Mustafa Hussain* v. *Union of India*, AIR 1981 A. P. 283.

allow the plea that the order which required lessors to enter into a fresh lease affected personal liberty of the lessors. Reddy, J, pointed out that the expression "personal liberty" is a "bundle of many other rights" but it did not include "the lessors right to get a fresh lease" or "put these plots of land to whatever use they like". However, the Full Bench of the Andhra Pradesh High Court[95] allowed *Menaka* wave length to include the right to work in personal liberty but this was done by docketing together articles 14,16 and 21. In this case no remuneration was given to the employee during the period of his suspension. Chaudhary, J., opined that the right to get full remuneration for the period of suspension was a part of right to work, and it, "is protected by articles 14,16 and 21 of our constitutlon".

The post emergency period got the Bhagwati fertilizer which was so powerful that the personal liberty plant started bearing new branches but the judiciary was still slow in accepting Krishna Iyer's far reaching activism, and the goal of excellence of *Gopalan's* minority. However during this period one can see a transition from judicial compulsion to judicial activism. Now the right to personal liberty was enlarged to include the right of education, rights of prisoner, right to work, etc. However *Menaka* was not treated as all-cure medicines.

Epilogue

The Indian judiciary made landmark contributions in interpreting the expression personal liberty. It took a century or more for the English and American judiciary to paint "liberty" in multi-colour but the Indian courts took just two decades to reach to that height. The personal liberty clause, at one time considered as impotent, poor and skelton without life and blood, was nourished year by year to grow into a banyan tree which could withstand any storm. Now the residury freedom clause will give to the petitioners a master key to unlock treasures in the personal liberty locker. However, in the activist zeal, the judiciary must see that the dynamism of Indian liberty jurisprudence does not remain a mere paper justice. Has the legal aid reached to the doorstep of the people of India ? Have we renovated the prison cell ? Further, the judiciary must be careful to see that it does not allow subversive freedom to eat away the fruits of the banyan tree which grew up through the hard judicial labour of thirty-one years.

Now coming to the judicial process in action in this area, from

95. *A. P. S. R. T. Court* v. *Labour Court, Guntur*, A IR. 1980 A. P. 132 (F. B.)

the very first case on personal liberty the Supreme Court was divided and the subsequent case law also witnessed concurring and minority opinions. These opinions have, what Chief Justice Huges[96] called, corrected the error of the judicial betrayal. Fazl Ali, J. the lone voice of 1950, which at that time was considered as a cry for moon, now received the official seal of Subba Rao's, Bhagwati's and Krishna Iyer's courts. However the fashion of separate opinions by some or all judges leaves vagueness and uncertainty and a way for the legislature or executive to encash their action. There were few judges who changed their views either due to the changed environment or constitution of a new Bench. But instances were also there when the judges did not change their views in the above circumstances. On the whole the Indian judiciary spoke the same language for the concept of personal liberty in peace and emergency. However, in this respect the high courts were more responsive and sensitive as compared to the Supreme Court of India. Last but not the least the public interest litigation gained entry in the Indian administration of justice through the personal liberty case law. The judical activism in this area is a befitting tributes to those who sacrificed their lives to give we the People of India the fundamental right to personal liberty. Let the Indian liberty grow, India democracy will flourish.

96. *Prophet with honour*, Alan Barth 1974, 3-6

BOOK REVIEW

V. D. Kulshrestha's, Landmarks in Indian Legal and Constitutional History Revised by Vijay Malik Eastern Book Company, Lucknow pp. XVII & 474 : price Rs. 27.50.

The roots of present are deeply buried in the past and the present law cannot adequately be understood without the proper study of its origin and development. Many important beliefs and doctrines of today are deep-rooted in the ancient ideologies. In order to understand properly the judicial system of today it is necessary to consider briefly the ancient judicial system of India. The book under review already known to students of Indian Legal History, provides a brief survey of the Judicial System of Ancient and Mediaeval periods of India. The book first appeared in 1959 and its last fourth revised edition was published in 1977. The fifth edition r evised by Mr. Vijay Malik updates the Constitutional developments since 1977.

The book is divided into sixteen chapters. In its fifth edition the book has been left almost untouched except updating the constitutional developments by referring to the latest decisions such as the *Mineral Milis* case (1980) 3 SCC 625 and the Constitutional changes upto Forty-fifth Amendment Act, 1980. In Chapter XV the present book also incorporates "Fundamental Duties"—an important feature added to the constitution by the Forty-second Amendment Act. The book also deals with the Report of the Law Commission of India submitted on 4th Sept., 1980. The addition of these uptodate materials has certainly enhanced the usefulness of the book.

A careful and analytical survey of the important legal developments and comprehensive and upto date treatment of the subject is yet another feature of the book. The material on the constitutional developments in India as well as the history of the development of administrative and judicial institutions s nce the setting up by the East India Company of its settlements in India together with a brief reference to the judicial systems in ancient and medieval periods has been arranged systematically and with great care. Important and major topics are pro erly indexed at the end of the book which would certainly help the reader in locating the matter of his immediate interest. The book also has a fairly long bibliography which enhances its utility.

The book under review is a good text book for students of LL. B. Its utility has been established beyond doubt by the fact that it had gone through five editions. The Publishers deserve appreciation for giving a good get up to the Book and keeping the price of the book at a reasonable level inspite of the tremendous increase in the cost of publication.

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Joseph Rotblat, Nuclear Radiation in Warfare, (London: Taylor and Francis. Published for the Stockholm International Peace Research Institute, 1981, 149+xvii pp.

The fundamental issue raised in this "shattering treatise" is whether mankind can survive a nuclear exchange between the superpowers. While conceding that not every living creature would be exterminated if present levels of nuclear armaments were utilized in a total war, at least one-third of the earth's population would perish, in the view of Professor Rothblat. But this is not to say that the outcome of any nuclear confrontation can be predicted with any degree of certainty. Not even our sophisticated computers can accurately predict the short and long-term effects of radiation upon two billion people and the global environment. Consequently, the predictability of survivai following nuclear discharges depends on the methods of evaluation employed. Though scientists disagree on the effects of nuclear explosions, our statesmen, decision-makers and "tragically" military commanders will make the final decisions. It is, therefore, possible to "slant the basic question," as to the possible level of destruction. As the author observes: "Which of the two methods of estimating the casualty toll is adopted depends on basic concepts about nuclear war, namely whether a nuclear war is regarded as unthinkable, because once started it is bound to escalate into an all-out war, or whether it is accepted as a fact of life in modern society" (p. 109).

The book's scope is specialized in that the third killer-radiation-is selected for intensive analysis. The first two, previously receiving the major share of attention from scientists, namely, "loss of life by mechanical blast, or [secondly] by burns from the heat of the fire-ball" (p. 2) are treated incidentally to the examination of the permanent destruction that can be caused by radiation and its impact upon future generations.

The second underlying theme that is reiterated in the series of specialized chapters is the uncertainty, i. e. lack of credibility, of any prediction concerning unlimited casualties and destruction of property. No one can accurately calculate the potential destruction facing mankind and his habitat-planet earth.

As is true of the series of SIPRI,[1] complete scientific and technical

1, E. g., SIPRI, Nuclear Energy and Nuclear Weapon Proliferation (1 79); Westing, Warfare In A Fragile World (1980); SIPRI, Internationalization to Prevent the Spread of Nuclear Weapons (1981); The NPT: The Main Political Barrier to Nuclear Weapon Proliferation (198); and Outer Space—A new Dimension of the Arms Race (1982). See generally World Armaments and Disarmament: SIPRI Yearbook 1981 (for the ten year survey of weapons proliferation) and id. SIPRI Yearbook 1982 (for the most recent developments in the arms race).

data is provided for the non-scientist. Such information is basic to any decision made in the political sphere. In this regard, it needs to be emphasized that this book is highly technical and must be studied rather than merely read. When the full potential of radiation destruction is comprehended, the mind "boggles." At some point, a reader becomes emotionally involved at the prospects of millions of casualties from the effects of the blast and fallout; this book sets forth the longer-range impact of lingering radiation.

As pointed out in Chapter Two, *Digest af Nuclear Weaponry* (pp. 4-25), "the total megatonnage amounts to 5 tons of high explosives for each inhabitant of the Earth, an unprecidented and awesome accumulation of destructive potential" (p. 23). Chapter Three, *Biological Effects of Radiations on Man* (pp. 26-58) is gruesome; it sets forth the precise medical details of radiation upon human organs, e. g. effects on blood-forming system, effects on gastrointestina system, and effects upon the central nervous system. Here, then, is the final degradation of the human being—specifically, genocide on a global scale and the ultimate denial of human rights, in the reviewer's submission.

There are prior instances in which nuclear devices have been exploded: 1) the Japanese cities of Hiroshima and Nagasaki, 2) the series of tests in the Marshall Islands, and 3) the accidental fall-out on a Japanese fishing vessel. (See e. g., p. 42.) The ramifications of these distinct causes (from deliberate to accidental) result in one conclusion, namely, the lasting effects on both living creatures and the habitat were far graver and longer lasting than experts originally foresaw. Particularly in the Marshall Islands, the long-term effects on the soil, water supply, and ecological chain have still to be determined. Some of these islands remain uninhabitable, and it is improbable that the radiation levels will ever completely decay. As has been shown in connection with the survivors in the above three examples, they have sustained long-term injuries from radiation, such as cancer; however, it is their unborn decendents who will continue to suffer from the latent defects inflicted upon the genetic chain.

Chapter Four, *Radiations From Nuclear Explosions* (pp. 59-103), the longest in the book, deals with these problems of dosages of radiation distribution of fall-out, and the many centuries required for the decay of radiation. Maximum insight is provided into the impact upon our planet, such as the destruction of the life cycle, as a result of contamination of air and water. Plants and animals will be unfit for consumption, and some essential species will be destroyed, as the ecology is altered. (See e. g.,

pp. 100-103.) Perhaps the contamination of the soil will have the most disasterous effect upon the global environment.

With Chapter Five, *Radiation Casualties in a Nuclear War* (pp. 104-114), the book enters the political phase. Contrasted with the raw scientific data, it now becomes necessary to arrive at value judgments as to the total consequences of nuclear warfare. Precisely, computers only deal with single factors; yet as seen in connection with the Japanese cities, there is a compounding of factors that are present in wartime. Not only were the effects of fall-out combined with those from lingering radiation, but the population suffered from inadequate food supplies, lack of medical care, plus a shortage of pure drinking water. Such compounding of destructive forces is considered in its numerous ramifications, e. g. the contamination of the milk supply as the result of cows consuming radioactive grass, which in turn affects humans.

As the final sections in the book indicate, civil defense schemes are, for the most part, ineffective against long-term radiation. Similarly, plans for mass evacuations of populations will prove unreliable, largely because of a lack of support facilities. (See p. 116 et seq.)

As Professor Rotblat approaches his conclusions, the theme of "uncertainty" of results reemerges. It is impossible to predict the plight, indeed the suffering, of survivors. Unless existing stockpiles of nuclear devices are increased by a factor of ten, the world's population will not be totally destroyed.

It needs to be emphasized that a third force is emerging that drastically increases the possibility of a nuclear holocaust. China possesses nuclear weapons; such states as Israel, Pakistan, and India have the capacity to construct the bomb; and the possibility of terrorist attacks on nuclear facilities (and even the production of their own weapons) are distinct possibilities. (See Ch. 7, *Other Warlike Uses of Radiation*, pp. 125-138.)

The author concludes that the only viable solution is to prevent a nuclear exchange and, secondly, to eliminate existing nuclear stockpiles. This goal is also supported by SIPRI.

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Matte, Nicolas Mateesco,* Space Policy and Programmes Today and Tomorrow : The Vanishing Duopole. Montreal : Institute and Center of Air and Space Law, McGill University. 1980, 183+xiii pp.

Professor Matte defends the thesis that the exclusive role of the superpowers in outer space is in the process of deminishing : the duopole of the U. S. and the USSR is in the process of "vanishing," as a "third force" emerges in the space race. Specifically, other states, notably Japan, China, and Canada are developing significant programs. Moreover, the formerly exclusive duopole is being further challenged by the efforts of Western European powers, cooperating through the European Space Agency (ESA). However it is not to be assumed that their primary role—especially in the military realm—will deminish, as is shown by the book's review (and historical analysis) of space ventures. In reality, then, as was demonstrated even a bit more forcefully in Professor Matte's 1980 Hague Academy lectures,[1] outer space is still dominated by the superpowers, because of the fact that only the U. S. and the USSR possess the technological capability to construct and place into orbit, or beyond, massive space hardware. Even ESA is presently dependent on the delivery systems of NASA. Nonetheless, in adopting a long range view of future space activity, Professor Matte demonstrates a far-reaching approach to the emerging space law, which in reality is still in an embryo stage. Yet the growing proliferation of space programs by other nations and international organizations may influence, and even modify, the regime in space.[2]

The second hypothesis to be tested in the book stems from law creating forces; precisely, "the development of space technology has been inextricably linked with public policy decisions...[3] This second hypothesis becomes apparent when the diverse positions of six United States

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1. Aerospace Law and Telecommunications Satellites 106 *Recueil des Cours*, 1980 I, 119. See also, N. Matte, *Aerospace Law From Scientific Exploration to Commercial Utilization*, 1977 ; N. Matte, *Aerospace Law*, 1969 ; and N. Matte & M. Matte, Télésat, *Symphonie et la coopération spatiale régionale*, 1978. See generally, *Legal Implications of Remote Sensing From Outer Space*, 1976 ; *Gormley*, Book Review, 1 *Hastings Int'l & Comp. L. Rev.* 1977, 225.
2. *Matte, Space Policy and Programs Today and Tomorrow*, 1980, 2-3, [hereinafter cited as *Space Policy*].
3. *Id.* at 3.

presidents are considered. Moreover, the growing number of space policies "that are still in a transitional stage, as reflected in their corresponding programmes,"[4] have the effect of intensifying pressure on space resources, such as the limited area of the geostationary orbit.[5] The third hypothesis—also conceived of as a concluding thought—is "that with the emergence of other space powers will come the increasing need to share human and material resources in the application of space technology."[6] Indeed, the reality of Matte's far-sighted approach toward the formerly unlimited and endless realms of space reflect his continuing concern for the law of the sea. From the perspective of the numerous United Nations Law of the Sea Conferences, which are witnessing the extension of national sovereignty over the formerly free high seas, it seems all too likely that man's need (and greed) for space resources has the potential for the destruction of the space environment, particularly when the growing military confrontation in space is also taken into account,

The opening portions of the book present an especially interesting historical analysis of the development of those early activities that commenced with the launching of Sputnik I. Beginning with the policies of President Eisenhower, the U. S. sought to achieve a dominant position, not only in the military realm but also for peaceful purposes.

Space programs, therefore, are governed by political considerations, which in turn are all too frequently dominated by military considerations. Unfortunately, the United Nations proved to be unable to deal with the space race. Admittedly, several of the U. N.'s resolutions, such as the *Declaration of Guiding Principles Governing the Actvities of States in the Exploration and Use of Outer Space*,[7] have played a major part in developing space law: however, the U. N., and its Committee on the Peaceful Uses of Outer Space (COPUOS) (plus the sub-committees) have been unable to persuade the space powers (and even the non-space powers) to cooperate toward their mutual goals and, similarly, for the benefit of mankind and all peoples. In addition, the opening of the Outer Space

4. *Id.*
5. Discussed more fully in Aerospace Law and Telecommunications Law, *supra* note 1. Matte compares the allocation of wave lengths by the ITU with proposals to utilize space. He anticipates a similar "exhaustion" of spacial areas and resources. See *Space Policy*, 126-27.
6. *Space Policy*, 3
7. U N. Gen. Ass. Res. 1721 (XVI), adopted December 20, 1961.

Treaty[8] for signature stands as an accomplishment of the General Assembly. Nevertheless, international institutions did not exercise a significant influence, during the early period (1957-1969). It remained for Western Europe to undertake serious regional cooperation. At first unsuccessful in realizing positive results largely because of the ineffectiveness of ELDO to perfect a launching system, ESA (the successor organization) has largely fullfilled the hopes of the late General De Gaulle and emerged as the possible third force.[9] But in one important regard the dream of De Gaulle has yet to beome a reality : ESA is still dependent on NASA, particularly as to its delivery systems, as are the majority of national programs (with the exception of the Communist bloc and China). Notwithstanding the ARIANE launcher, it does not appear that the dependence on NASA will disappear in the near future; however, Professor Matte is quite correct in examining national and regional attempts to achieve independence fron NASA.[10] For instance, it is even conceivable that ESA, in collaboration with private enterprise, may eventually be in a position to compete with the United States. In this context, ESA has taken steps to establish a private company, the Commercial Ariane Satellite Launch Company, which will become a separate legal entity. "The organizers of the venture believe that only a commereial enterprise could favourably compete with the shuttle."[11]

On the other hand, NASA and ESA have signed an agreement to cooperate in the development of the space telescope.

Against the background of these major undertakings are the emerging national efforts, including a growing awareness of the importance of space activities by the developing nations. Some LDCS cooperate with the industrialized powers, as can be seen from the recently terminated OTRAG agreement between German private industry and the Govern-

8. Treaty on Principles Governing the Activities of State in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, [1967] 18 U. S. T. 2410, T. I. A. S. No. 6347, 610 U. N. T S. 205 (effective October 10, 1967).
9. It is valid to conclude that ESA represents the third entity in space, and to place (for the purpose of analysis) ESA ahead of the Federal Rupublic of Germany because of European collaboration with the space shuttle Accord generally, Diederiks-Verschoor & Gormley, The Future Legal Status of Nongovernmental Entities In Outer Space : Private Individuals and Companies As Subjects and Beneficiaries of International Space Law, 5 *J. Space L.* 1977, 125, 143-44.
10. *Space Policy*, 71-76 & 126.
11. *Id.* at 72.

ment of Zaire. In addition. China has launched eight satellites; Canada is creating a launch company; and Japan is only behind the two superpowers in the development of an autonomous and comprehensive space program that is devoted exclusively to peaceful purposes. The book recognizes these growing accomplishments and is especially conscious of their future potential, as for example the French plans.

It can only be hoped that Western Europe, while developing its own space programs, will place greater emphasis upon cooperation than competition, possibly within the context of the United Nations, in the reviewer's submission.

But in seeking increased cooperation within the United Nations—as proposed in the book—present shortcomings in the legal regime governing outer space must got to be minimized. Fortunately, the author enunciates the weaknesses and the gaps within the series of space treaties.[12] Such criticism as: "The three texts approved were of a general nature, and inadequate in practical application,"[13] serves as the concluding remark to the book's historical analysis, which in turn serve as the foundation for proposed new regimes in space.

Chapter IV, *Tomorrow : National and International Suggestions For New Policies and Programs. Emerging International Law,*[14] represents an additional thrust by the book in that new solutions are sought. Indeed, the examination of possible new approaches represents one of the book's major contributions. Following the examination of the events that have taken place since the 1950's new policies and programs are sought. Underlying Professor Matte's approach is his conception of the *new international law* of which the law of outer space, the new economic order, the transfer of technology, and development law are essential rubrics.[15] Beginning with a criticism of Presidents Nixon and Carter's restrictions of space activities, culminating in a freeze of NASA's budget in 1972, the author concedes that the United States has lost its position of leadership, owing to short-sighted policies that have been dictated by budgetary considerations. Proposals to reconsider American space programs, such

12. See e. g , *id.* at 92.
13. *Id.*
14. *Id* at 95-124.
15 Matte also treats space law within the corpus of the new international law in his Hague Academy lectures, *supra* note 1. He conceives of the new international law as one step toward the creation of an international community.
16. See e. g., *Space Policy*, 96-104.

as the creation of a new centralized council (patterned on the original National Aeronautics and Space Council established by the NASA Act of 1958 and abolished during the Nixon administration), closer consultation with Congress and congressional committees, the acceleration of an operational remote sensing system, and greater public awareness, are offered by Professor Matte.[16] Still, the inescapable conclusion is that : "As to programmes which may assure future U. S. leadership, present programmes seem to be sadly inadequate, their timidity and lack of of foresight."[17]

Issues of international scope are examined prior to arriving at proposals seeking future action.

(1) Sovereignty over the geostationary orbit
(2) Utilization of space by the developing countries
(3) Cost reduction of international space activities
(4) Satellite communications
(5) Cooperation in space
(6) Development of institutional infrastructures
(7) Export of space technology and technology transfer
(8) United Nations Conference on Outer Space.[18]

In analyzing each of these issues, conclusions are offered.[19] For instance, Professor Matte emphasizes the international status of outer space : no state or group of states may claim sovereignty in outer space, and he proposes that an international codicile be attached to the Outer Space Treaty. Accordingly, regional and international cooperation are encouraged, in order to more effectively utilize the resources of space, including joint ventures. Within this context, the future position of developing states is again considered. That is to say, the major problem is not the transfer of technology to LDCs but rather its effective utilization by those states lacking an industrial capacity Further proposals, designed to deal with the aforementioned eight major issues, center on increased international cooperation and collaboration, as for example the creation of a joint NASA-ESA Board, an International Space Council, greater coordination in the utilization of remote sensing and communication

17. *Id.* at 97. In this context the section, Bills Advocating a Stronger Space Policy, *id.* at 104-09, sheds further insight into current proposals.
18. *Id.* at 109.
19. See *id.* at 109-115.

satellites, and finally the adoption of additional international space agreements "concerning freedom of space, rules of the road, identification of satellites, provisions for the right of innocent passage, control of synchronous orbit...,"[20] and further scientific consultation.

The combined impact of these undertakings, including existing multilateral agreements, results in an emerging international law, which will form a body of legal guidelines for conducting future space activities.

In anticipating the concluding chapter, the evolution of space law and international law is enunciated, as follow :

> But space activities develop rapidly, and the emerging law becomes obsolete before it is implemented and proves to be inadequate to regulate technological, economic or political changes. There is an urgent need for a revitalized legal regime for space to cope with the fact that space is quickly becoming an integral part of our lives on Earth. Earth-oriented space activities, particularly in the orbital sector, are transforming the fundamental rights upon which states have, in the past, built up their international relations. These changes present legal challenges which require new and imaginative solutions [21]

As shown above, private enterprise will assume a key position : non-governmental private enterprises will be in a position to act on their own initiative and even to conduct launchings, despite possible legal issues of damages inflicted upon the earth's surface or in space.

On the negative side, the *Regulation of the Military Uses of the Space and the Prevention of Hazards*[22] must not be minimized. It can only be regretted that the book did not deal in a bit more detail with the increasing military involvment, owing to the fact that the major portion of space ventures by the superpowers have direct military ramifications. Nonetheless, some proposals are advanced, as for example the creation of a security zone that would provide protection against falling debris. As a first stage, an intergovernmental information and warning system on uncontrollable space objects should be established.

Professor Matte concludes his thoughtful treatise by expressing the hope that the emerging international law will include a "space policy for

20. *Id.* at 114.
21. *Id.* at 115.
22. *Id.* at 119-22.

mankind," which "requires a different approach and goals, and the problems of living in outer space..."[23]

Following the initial success in space by the USSR and the U. S. (utilizing Dr. Vernher von Braun's experience), the duopole held an unrivalled position in space exploration; but this duopole has begun deminish, as other states, and ESA, attempt to acquire the necessary space technology for peaceful purposes. The counterpart of this rising "third force" in space is the increasing significance of private enterprise and non-governmental entities. Beyond question, the reviewer supports this awareness of the importance of companies and non-governmental interests.[24]

One of the main contributions of the eight numbered conclusions is the recognition of the evolutionary nature of space law, with the result that :

> The transnational implications of the use of space and the transition towards appropriate socio-economic and cultural international organizations, once more testify to the obsolete character of the few agreements and conventions so far elaborated upon by the United Nations, and the need for the revamping of future international cooperation on other bases than absolute sovereignty, independence and *de facto* equality.[25]

As a corollary to this modification of space law, new institutions will be required to facilitate regional and international cooperation (and similarly participation). The subsequent step is for the adjustment and integration of national policies—particularly those of the United States and Russia—into a world-wide policy. The aut or then concludes : "The proliferation of knowledge helps in replacing the former politically imbued policies of co-existence and détente, and will facilitate an entente, an understanding, between the U. S. S. R. and the U. S A."[26] All policy makers should support Professor Matte's far-sighted approach, notwithstanding the current political climate within the United Nations. The conclusions then emphasize, presumably by way of a recommendation, that "[i]t is the U. S. A. 's privilege and responsibility to assume the leadership in formulating a civil space policy based on

23. *Id.* at 125.
24. See e. g., Diederiks-Verschool & Gormley, The Future Role of Individuals, *supra* note 9, at 140-42.
25. *Space Policy*, 127.
26. *Id.* at 128.

co-sharing by association of other nations in the new order."[27] Such an assumption of a position of leadership by the United States is the concluding thought (offered in the hope that the U. S. S. R. will "enter into a global space cooperation effort, which will replace the current apprehension and mistrust and which will eventually, embrace all sectors of human activity, space, of course, included"[28]) advanced in the book.

Professor Matte's plea for the survival of humanity[29] must be applauded by all men of good will, who are conscious of the evolving new international law. He has dealt with an extremely difficult phase of evolving jurisprudence. Admittedly, the three hypotheses are difficult to sustain from a perspective of positive law, as for example the vanishing duopole. Nevertheless, Professor Matte in his multi-disciplinary study, that incorporates public policy considerations sheds, new insight into the field of space law. The author has not only provided some new insight, but has "said something new," concerning the future legal status of o ter space.

W. Paul Gormley**

27. *Id.* (footnotes omitted)
28. *Id.* at 129 (footnote omitted).
29. Matte concludes :

    The new order, to which space policy should ultimately strive, should not only focus on the expected benefits to be derived by all mankind—as they have a subjective connotation and may, sometimes, be less promising than expected—but rather on a continuous effort to assure humanity's survival. This might produce the necessary ultimate solidarity of mankind and help to avoid possible star wars by a gradual transfer of military technology to international civil use. The alternative is eternal silence.

    Id. at 130

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H. R. Khanna, Mrking of India's Constitution, Eastem Book Company pp. vii+121, Rs. 40/- (1981)

THIS slim book[1] contains the text of the three Lectures delivered by Mr. Justice H. R. Khanna for Sulakhani Mahajan Trust in March 1981. Mr. Justice H. R. Khanna, formerly the Judge of the Supreme Court of India, the Chairman of the Law Commission of India and the Union Law Minister, needs no introduction to the scholars of law The book under review provides a brief but insightful account of the work of the Constituent Assembly which drafted the Constitution of Ind a It tells us that our Consitution emerged as a result of careful deliberations and discussions. It suggests that the constitution should not be disfigured by too many amendments on the pretext that the existing system is not working well. The central contribution of this book lies in its focus on the fact that the success of a Constitution does not depend upon its provisions but on those who work its provisions.

In this review an endeavour is made to systematize the main themes of the book as follows :

I. The Oligarchy within the Constituent Assembly

The author's study begins with a description of the moral qualities of those who are entrusted with the task of framing the Constitution of a nation. These men must put aside for the time being the "ambition which drives the politician to search for power", they must be men of vision, yet they should not forget the "grass roots".[2] The framing of a Constitution, according to the author, calls for the highest Statecraft and the framers should be conscious of the Supreme importance of their assignment because "on their wisdom and sagacity, their vision and foresight, their perspicacity and discernment depend the mode of life, happiness and well-being of succeeding generations of men, women and children.[3]"

The author rightly thinks that the framers of India's Constitution were fully alive to their historic role and they were the politicians who were attached to certain values and convictions. Those who framed the Constitution represented the cream of those in public life and were inspi-

1. H. R. Khanna, '*Making of India's Constitution*' (1981)
2. *Id* at 2
3. Ibid

red by high sense of dedication. Few members of the Constituent Assembly wielded tremendous influence and enjoyed immense popular confidence. Jawaharlal Nehru, Sardar Patel, Rajendra Prasad and Maulana Azad, constituted an "Oligarchy" within the Constituent Assembly.[4] Nehru was the Assembly's idealist, Patel was the iron man of India and Prasad was the suffering servant of India. Assembly was Congress and Congress was India. The honour of Nehru was unquestioned. Nehru, Patel, Prasad and Azad had 'god-like' status but "despite prestige and influence, they allowed issues to be decided democratically after genuine debate. The Assembly was made of strong willed men and the leaders themselves were peculiarly responsive and refused to arrogate to themselves all the wisdom.[5]" The 'Oligarchy' thus promoted consensus in the Assembly. The four leaders of the Assembly were also the four heroes of the struggle for independence and held supreme and unrivalled sway over the people of India.

The author seems to suggest that the smooth drafting of the Constitution by consensus was made possible mainly due to the dynamic and charismatic leadership of Nehru, Patel, Prasad and Azad.[6] The value of the above narration of the dynamics of political leadership lies for its relevance in comparing the political culture of the constitution-making elite of that time with the political culture in the post-independence India. Here the students of political sociology will be inclined to agree with the view that whereas the political culture of that time symbolized a sense of dedication and loyalty to the human values, the "new political culture" marks a transition from "dedicationism to professionalism in politics and leadership.[7]" The new political culture means "a new orientation towards power-relationship and power-maximisation" to retain authority, the sense of dedication and loyalty to the national interest remaining only secondary consideration.

4. *Id* at 11
5. *Ibid*
6. In addition to the Oligarchy of four, Pandit Pant, Sittaramayya, Alladi Krishnaswamy Ayyar, N. G. Ayyangar, Munshi, Ambedkar and Satya Narayan Sinha also played influential role in the Constitution Making. B. N. Rau, also played the crucial role as constitutional advisor, although he was not a member of the Constituent Assembly.
7. Upendra Baxi, "The Little Done, The Vast Undone"—Some Reflections On Reading Granville Austin's, The Indian Constitution, 9 *J. I. L. I.* 323, 330 (1967)

II. The Pursuit of Social Revolution

The author informs us that the inclusion of both the fundamental rights and the directive principles in the Constitution had its roots in the struggle for independence and was the result of "a reaction against some of the oppressive measures taken against those engaged in that struggle."[9] The fundamental rights were necessary not only as assurances and guarantees to the minorities, but also for prescribing a standard of conduct for the legislatures, governments and Courts."[10] The framers first settled the list of Fundamental Rights and then divided them into justiciable and non-justiceable rights both designed to usher social revolution in India.

The author's treatment of the debate on the drafting of various fundamental rights gives one an impression that the draftsmen were influenced more by the western liberal thoughts and ideas of Marx, Green, Laski and other western political thinkers than by the ideas of Gandhi or Swami Vivekananda. The western influence was inevitable since many Indian intellectuals of that time had frequent exposure to the ideas of western thinkers and the experiences of European, British and American Constitutions. The author says that in the final drafting of many provisions relating to fundamental rights B. N. Rau had played a crucial constitutional advisor's role. For instance, Munshi's draft of the present Article 21, provided that "no person shall be deprived of his life, liberty or property without due process of law". This provision was apparently based on the Fifth and Fourteenth Amendments to the U. S. Constitution. In the initial stages most of the Assembly's members agreed to Munshi's draft. Meanwhile, during the course of his visit to the United States, B. N. Rau had discussion with Justice Frankfurter of the U. S. Supreme Court who expressed the view that power of review implied in 'due process' clause was not only undemocratic as it gave to a few judges the power of vetoing legislation enacted by the representatives of the nation but also threw an unfair burden on the judiciary. The Drafting Committee, thereafter, replaced the expression "without due process of law" by the expression "except according to procedure established by law" which was again borrowed from Article 31 of the Japanese Constitution.[11] The 'due process clause' was rejected to establish the superiority of legis-

8. *Id* at 330-31
9. *Supra* n. j at 22
10. *Id* at 26
11. *Id* at 38

lative wisdom over judicial wisdom. Similarly the present Article 15 (3) (providing for special treatment to women and children) was enacted on the suggestion of B. N. Rau on the basis of his discussion with Justice Frankfurter.

The author tells us that the commitment of national leaders for a better future of the people of India and their pursuit to usher social revolution contributed greatly to the inclusion of the directive principles. The Sapru Report of 1945 drew a distinction between 'justiciable' and 'non-justiciable' fundamental rights.[12] B. N. Rau also advocated the classification between fundamental rights and fundamental principles of State policy.[13] The author observes that even at the time of the drafting, it was assumed by most members of the Assembly that the directive principles had only educative value and were in the nature of moral precepts although Munshi, Ambedkar and K. T. Shah wanted the principles to be justiciable.[14] B. N. Rau had suggested that no law which might have been made by the State in pursuance of the directive principle of State policy should be void merely on the ground that it was inconsistent with fundamental rights.[15] The Drafting Committee did not take into account the above amendment suggested by Rau. The distinction made by Sapru Report between justiciable and non-justiciable rights and the Irish scheme of directive principles were very helpful to to the Indian Constitution-makers. And thus these principles even though were enacted in the atmosphere of social revolution yet, they remained a "veritable dustbin of sentiments" as very aptly remarked by T. T. Krishnamachari.[16] The author ends the discussion of the debate over the directive principles by the following quotation from the speech of Ambedkar[17] :

> "...who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it (the directive principles . In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles He cannot ignore them. He may not have

12. *Id* at 57
13. *Id* at 58-59
14. *Id* at 59
15. *Ibid*
16. *Id* at 58
17. *Id* at 60

to answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time."

III. The Choice of Political Institution

The author's account of the debate on the choice of political institution is very refreshing and provides an interesting insight into the mental processes of the framers in deciding to go for parliamentary democracy and a federal system with a strong bias in favour of the Centre. He says that the greatmen who framed the Constitution had an ambition to "wipe every tear from every eye."[18] They had hoped that the elected representatives would be capable and men of integrity and character and would be able to make the best of the Constitution. And for achieving this goal, according to the author they turned to the British model of parliamentary democracy and categorically rejected the American Presidential form of government.

Gandhi had put two plans-one in January 1946 and another in January 1948. The latter plan had contemplated disbanding of Congress and turning it into a Social Service Organisation based on a nation-wide net work of panchayats. Rajendra prasad, an ardent Gandhian, also supported the Gandhian idea of village as a unit of social organisation. Congress and Constituent Assembly rejected the Gandhian Plan as an alternative to parliamentary democracy. Nehru believed that political, social and economic progress of the country could be assured by Congress alone. Congress alone could guarantee a stable government strong enough organisationally to maintain its hold and influence over the people and the Gandhian village society simply could not achieve all these goals.[19] In a sense, thus, Congress and Assembly were not Gandhian but wedded to the liberal political institutions of the West.

The author does not agree with the criticism often levelled by some that the Indian Constitution is un-Indian in as much as it is based on foreign and not on the indigenous mechanism following Gandhian teachings.[20] It is not fair to say, the author argues, that the Constitution is un-Indian on the ground that it incorporated alien notions which had no manifest relation with the fundamental spirit and cultural traditions of India. He says that after deliberating over the matters, the members of the Assembly decided not to go in for a Gandhian Constitution and they felt that there was nothing un-Indian in adopting liberal

18. *Id* at 16-17
19. *Id* at 18-19
20. *Id* at 117

institutions of some other countries especially those institutions which had been a source of strength and inspiration during the years of India's struggle for freedom.[21]

The author is of the view that only a parliamentary form of government could fulfil the promise of Congress to introduce universal adult franchise of free India. Nehru and Patel believed that the problem of princely states and their integration, the desire to have a federal system, the riot which occurred at the time of the partition of the country—all these needed a strong Centre. If India's political structure was based upon village society, the country could not be protected from foreign aggression. The author himself is a votary of a strong centre. He argues that the needs of a modern state, the economic exegencies, the fear of war, the urge to have a welfare state have all resulted in enlarging the power of national government irrespective of the fact whether the country has a unitary Constitution or a federal Constitution.[22] He agrees with Wheare that democracy and centralization have gone together in most countries of the world.[23] He further observed.[24]

> The history of India reveals that whenever the Centre has become weak, it has invariably been followed by the process of disintegration. A weak Centre has set in motion seccessionist forces and resulted in loosening the ties which bind the different parts of the country together. On the contrary, a strong and stable, Centre has deterred the emergence of fissiparous tendencies. It is no mere accident that the most glorious chapters of India's history have synchronised with the periods when we had a strong and stable centre.

The author's account of the debate on the choice between Presidential and Parliamentary system of government provides an eye opener to those who still want to switch over to the Presidential system on the ground that the Parliamentary system has not worked well. The Parliamentary system of government was adopted by the framers in the spirit of dedication to the principles of responsiveness of the government to the people. It was felt that the Presidential system even though stable, was less responsible to the people. Ambedkar in the course of his speech

21. *Ibid*
22. *Id* at 91-92
23. *Id* at 94
24. *Id* at 97

delivered on November 4, 1948 highlighted the difference between the two systems. According to him the American system gave more stability but less responsibility; whereas, the British system gave more responsibility but less stability. The American executive was a non-parliamentary executive which meant that it was not dependent for its existence upon a majority in the Congress, while the British executive was dependent upon a majority in Parliament. The assessment of responsibility of the executive was both daily and periodic in a parliamentary system. The daily assessment was done by the members of Parliament and periodic assessment was done by the electorates at the time of election. The Draft Constitution thus preferred responsibility to more stability.[25]

Interestingly enough the author himself is against the introduction of Presidential form of government in India at the present juncture. He makes a comparative studyof the Afro-Asian countries and says :

> "Whatever might have been the experience of the US about the Presidential system, the experience of that system in Asian and African countries has been that hardly any President has gone out office as a result of election. Only natural death or a coup has resulted in the displacement of the President. As against that only in a Parliamentary system could Mrs. Gandhi be forced to step down from the office of the Prime Minister as a result of election in 1977 and again only in a Parliamentary system could she return to that office in 1980 as a result of elections. One looks in vain for such a precedent in Asian and African countries having Presidential system."

The book ends with an appeal to those in power to respect the spirit and idealism of the founding fathers enshrined in the Constitution. The founding fathers were genuinely wedded to the principles of democracy and political ethics. The author rightly observes that the successful working of the democratic institutions requires willingness to respect the view point of others, capacity for compromise and accommodation. Whatever may be the provisions of the Constitution, its ultimate success and effectiveness for public weal depends upon the persons who work them and the way those provisions are worked" "and this necessarily

25. *Id* at 68-69
26. *Id* at 69

postulates that the persons who are to work the system should be men of calibre, endowed with vision and possessed of catholicity of approach."[27]

The book is eminently readable and is written in clear and simple language. It provides a salutary reminder to the legal scholars, political scientists and those in power that it is the men who fail a system and there is nothing wrong in the system itself.

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27. *Id* at 720.

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