
INTERNATIONAL YEAR



FOR HUMAN RIGHTS

WORKING PAPERS

CONFERENCE OF JURISTS
ON THE
RIGHT TO FREEDOM OF MOVEMENT

BANGALORE, INDIA
JANUARY 10-14, 1968

MYSORE STATE COMMISSION OF JURISTS
INDIAN COMMISSION OF JURISTS
INTERNATIONAL COMMISSION OF JURISTS

INTERNATIONAL YEAR FOR HUMAN RIGHTS

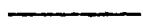
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This Volume embodies a Preface by the Secretary-General of the International Commission of Jurists and the following Working Papers for use by the Committees at the Conference:

- I. Working Paper on The Right to Freedom of Movement Within a Country.
- II. Working Paper on The Right to Freedom of Movement Outside one's Country.
- III. Proposal for the setting up of A Council of Asia and the Pacific.

P R E F A C E

In 1963 the General Assembly of the United Nations designated 1968, the year which is the twentieth anniversary of the Universal Declaration of Human Rights, as the International Year for Human Rights. Thereafter the General Assembly at its twentieth session in 1965 adopted a Resolution entitled "International Year for Human Rights". By this Resolution the General Assembly, "considering that the further promotion and development of respect for human rights and fundamental freedoms contributes to the strengthening of peace throughout the world and to friendship between peoples", called upon, inter alia, "the national and international organisations concerned to devote the year 1968 to intensified efforts and undertakings in the field of human rights, including an international review of achievements in this field.

In the same year the Secretary-General of the United Nations, U Thant, issued a message in which he called upon governments, organisations and individuals alike to seize every opportunity and undertake every kind of positive effort to promote the peace and wellbeing of mankind.

Human rights are not only of direct relevance to the activities of the International Commission of Jurists, but indeed form the very basis of the Rule of Law. Therefore, in response to these calls, the Commission is, both directly and through its National Sections, making its contribution to Human Rights Year by spreading the message of the Universal Declaration through its publications, through conferences and seminars and through local and regional action.

The Commission therefore welcomes the initiative taken by the Mysore State Commission of Jurists to organise this Conference on 'The Right to Freedom of Movement' in Bangalore early in January 1968. This Conference, convened by the Mysore State Commission acting in collaboration with the International Commission of Jurists and the Indian Commission of Jurists, will be the first major event in the International Year for Human Rights and will make an important contribution towards the promotion and realization of the right to freedom of movement which is a most important human right.

The theme of this Conference was chosen in consultation with the Indian Commission of Jurists and the Mysore State Commission of Jurists. Its choice was actuated by two important considerations. The first is the fact that the growing tendency of States to restrict this right has made this topic one of prime importance for the individual today. Secondly, freedom of movement has attracted particular notice in India in view of certain recent illuminating judgments of the Supreme Court of India relating to freedom of movement both within and outside a country.

Although the theme of this Conference relates to a specific human right and not to human rights in general, it is expected that the Conference will be the forerunner of many similar conferences and seminars organised both by the International Commission of Jurists and under other auspices dealing with other specific human rights. In this connection it is hoped that a Conference of International Non-Governmental Organisations to be held in Geneva later in January and at which human rights problems will be examined in a more general way will provide an incentive to Non-Governmental Organisations interested in the field of human rights to organise meetings and seminars at which different aspects of human rights will be discussed and to set up committees and action groups aimed at creating a greater awareness and respect for human rights throughout the world.

It is proposed to set up two Committees at the Bangalore Conference, the first to deal with freedom of movement within a country and the second with freedom of movement outside one's country. Attention should also be drawn to the fact that a Special Committee will be constituted at the Bangalore Conference to consider a proposal for the setting up of a Council of Asia and the Pacific on lines similar to the Council of Europe. It is hoped that through its deliberations this Special Committee will lay the foundations for the creation of a regional institution capable of protecting the rights and freedoms of the citizens of its member States and analogous to the Council of Europe.

The choice of Mysore as the venue of this important Conference was a happy one. Mysore is not only an ancient seat of Indian culture; it is also a state which has had over the centuries political, social and cultural relations with other powerful and ancient states in India as well as with other South-East Asian civilizations. The International Commission of Jurists favoured the Bangalore project as its first major contribution to Human Rights Year as it felt that India, the largest democracy in the world and a country which has always stood for the Rule of Law and fundamental rights, would provide the most suitable venue for a Conference of this nature. Further, India, unlike the affluent countries of Europe and North America, and in common with the less affluent countries of the world, has real problems in relation to human rights and the Rule of Law calling for urgent examination and solution within the democratic framework.

The three Working Papers, which are intended to provide a basis for the discussions both in the Committee and in the Plenary Sessions of the Conference, have been prepared by distinguished Indian lawyers. Our special thanks are due to the authors, Mr. Purshottam Trikamdass, Mr. Chandra Kantaraj Urs, Mr. A. N. Jayaram, Mr. C. R. Somasekheran and Mr. S. Vijayashankar, and also to Mr. J. M. Mukhi of the Indian Commission of Jurists for some useful notes submitted on passports and the right of exit.

In conclusion, I should be failing in my duty if I did not offer my heartfelt thanks on behalf of the International Commission of Jurists to the members of the Executive Councils of the Indian Commission of Jurists and the Mysore State Commission of Jurists but for whose untiring efforts the holding of this Conference would not have been possible.

Seán MacBride
Secretary-General
International Commission
of Jurists

WORKING PAPER

on

RIGHT TO FREEDOM OF MOVEMENT
WITHIN A COUNTRY

by

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INTRODUCTION

Article 13(1) of the Universal Declaration of Human Rights states that:

"Everyone has the right to freedom of movement and residence within the borders of each state."

The purpose of this working paper is to examine the importance of Freedom of Movement within the borders of a country and the necessity for safeguarding it against executive, legislative or other abuse, detrimental to the development of the human personality.

The enshrining of the Freedom of Movement in Article 13 of the Universal Declaration of Human Rights is an affirmation of the importance of the right in a document which has been characterised as the 'International Magna Carta'. In the year dedicated by the United Nations as the 'HUMAN RIGHTS YEAR', it is but appropriate that a closer examination be made of the scope and extent of this right as it now exists in several states and of the means by which its enjoyment may be made more effective. It is also necessary to examine the present basis of the right and to redefine it in the light of the recent experience which led to the Universal Declaration of Human Rights.

The right to Freedom of Movement is an important aspect of the personal liberty of the individual. A deprivation of this important right results in many cases in the deprivation or restriction of many cognate freedoms. Consequently, while it is true that all rights in an organised society are re-

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lative rather than absolute, in the ultimate analysis, it is only respect for freedom that will give beauty and meaning to men's lives.

SCOPE AND EXTENT OF THE RIGHT

The Magna Carta is among the earliest documents to enshrine this Freedom. It declares:

"No free man should be arrested or imprisoned or disseised or outlawed or exiled or in any way molested; nor will we go upon him, nor will we send upon him, except upon a legal judgment of his peers or by the justice of the King in cases in which this has been the common procedure, the law of the land in effect everywhere and accepted as such."

While the right to protection of the human person from physical restraint or, to use Herbert Spencer's phrase, "the right of motion and locomotion" had been recognised even from early times, the protection of such rights was not from any refined respect for the human personality, but by reason of the apprehended inconvenience to established authority or threat to social order that might have resulted from a denial of the right. The protection then extended to the right had no political or moral import to it, such as is contemplated in Article 29(2) of the Universal Declaration of Human Rights, which runs:

"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

By the time of Blackstone, however, the right to such Freedom of Movement had received its affirmation on the modern basis which gives recognition to the deep spiritual need of a human being to develop his personality to the fullest extent. In dealing with the right to free enjoyment of personal liberty, Blackstone says:

"Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of Law."¹

Dicey has stated that the right to personal liberty means in substance "a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification".²

¹ Blackstone Commentaries, Vol.1, page 105.

² Dicey, "Law of the Constitution", Ninth Edition, page 207.

In Ridge's Constitution, it is said:

"that the right to personal freedom means simply that the person may do what he likes or go where he likes provided he breaks no law and does not infringe the rights of others".¹

More recently in his book "The Idea of Law", Dennis Lloyd in listing ten main values of legal freedom includes personal freedom among them and says:

"Freedom to travel, both within and outside the confines of the territory of the State, raises important issues of personal freedom. This type of freedom has largely been regarded as axiomatic in modern times in Western Europe, but certainly not in Eastern Europe, where restrictions on travel and residence in particular cities or territories have been traditionally severe".²

Harry Street in his book "Freedom, the Individual and the Law", says

"The freedom to travel is of course an important freedom; men want to travel abroad on business, for family visits, to consult with experts in their profession for educational and recreational purposes".³

Justice Subbarao of the Supreme Court of India, speaking of freedom of movement in a free country, defined a free country as:

"A country where a citizen may do whatever he likes, speak to whomsoever he wants, meet people of his own choice without apprehension, subject of course to the law of social control."⁴

MODERN STATES AND THE RIGHT TO FREEDOM OF MOVEMENT

Modern states have generally recognised the importance of the right to Freedom of Movement and there is no definite tendency among them to arbitrarily deny it. It is, however, true that the number of states permitting Freedom of Movement within their borders is relatively larger than those that permit such freedom in regard to exit from and entry into the state.⁵ In some countries such as the United Kingdom where there is no specific incorporation of this right in any law, the Courts traditionally protect the right on the assumption that the enjoyment of such a right is permitted by the law of the land. In others, it is embodied in a basic document such as

¹ Ridge's Constitution, Eighth Edition, page 371.

² Dennis Lloyd 'The Idea of Law', page 160

³ Harry Street, 'Freedom, the Individual and the Law', page 273.

⁴ Kharak Singh v. State of U.P., AIR, 1963 S.C., page 1295 at page 1301

⁵ According to a United Nations survey.

in a Constitution or any other law. It is also to be noticed that many countries which have attained freedom subsequent to the adoption of the Universal Declaration of Human Rights, have incorporated this right to Freedom of Movement in their Constitution in language closely similar to that of the Declaration.¹

Examples of the incorporation of this right in some Constitutions are cited below.

France: "To every man is guaranteed as a natural and civil right the power to go, to remain or to depart without being arrested or detained except in accordance with the procedure established by the Constitution." - Article 1, Constitution of France, 1791.

Argentina: "All inhabitants of the nation enjoy the following rights in conformity with the laws which regulate their exercise; viz.: to enter, to remain, to traverse and to depart from Argentinian territory." - Article 14, Constitution of Argentina, 1853.

Switzerland: "No Swiss citizen shall be expelled from the territory of the Confederation or from his Canton of origin." - Article 44, Constitution of Switzerland, 1874.

Mexico: "Every man has the right to enter and depart from the Republic, to travel across its territory, and to change his residence without the necessity of a card of identity, passport, safe conduct or any other formalities. The exercise of the right shall be subject to the authority of the Courts in cases of civil or criminal responsibility, and to that of the administration in respect of the restrictions which may be imposed by laws in the matter of emigration, immigration or of public interest or which may be imposed on resident foreigners dangerous to peace." - Article 11, Constitution of Mexico, 1917.

Brazil: "In time of peace, any person, together with his property, may enter the national territory, remain therein or leave it, provided that the requirements of the law are duly fulfilled." - Article 142, Constitution of Brazil, 1946.

Italy: "Every citizen may freely circulate and remain in any part whatsoever of the national territory subject to such limitations as law may generally establish on grounds of health or security. No restriction may be imposed for political reasons. Every citizen is free to leave the territory of the Republic and to re-enter, subject to the obligations imposed by law." - Article 16, Constitution of Italy, 1948.

India: "All citizens shall have the right ... to move freely throughout the territory of India ... Nothing in the ... said clause shall affect the operation of any existing law in so far as it imposes or prevent the state from making any law imposing reasonable restrictions on the exercise of ... the right(s) ...

¹ See, as examples, provisions of the Constitutions of Senegal and Cameroun set out below.

either in the interests of any Scheduled Tribe" - Article 19(1)(d) and 19(5) of the Constitution of India, 1950.

Germany: "All Germans shall enjoy freedom of movement throughout the federal territory. This right may be restricted only by law and only in cases in which there exists no adequate ground for the existence of the right and as a result a special burden would fall upon the public, or in which restriction is necessary for the protection of Juveniles against neglect, or for combating danger from epidemics or to prevent criminal acts." - Article 11, Constitution of the West German Republic, 1949.

Cyprus: "Every person has a right to move freely throughout the territory of the Republic and to reside in any part thereof subject to any restrictions imposed by Law and which are necessary only for the purpose of defence or public health or provided punishment to be passed by a competent Court." - Article 13, Constitution of Cyprus, 1960.

Nigeria: (1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof; and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto.

(2) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

(a) restricting the movement or residence of any person within Nigeria in the interest of defence, public safety, public order, public morality or public health;

(b) for the removal of persons from Nigeria to be tried outside Nigeria for criminal offences or to undergo imprisonment outside Nigeria in execution of the sentences of courts in respect of criminal offences of which they have been found guilty;

(c) imposing restrictions upon the movement or residence within Nigeria of members of the public service of the Federation or the public service of a Region, members of the armed forces of the Federation or members of a police force." - Section 27, Constitution of the Federation of Nigeria, 1963.

Ghana: "... subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived ... of the right to move and assemble without hindrance." - Article 13 of the Constitution.

Senegal: All citizens of the Republic shall have the right to freedom of movement and of residence throughout the Republic of Senegal. This right may be restricted only by law. No persons may be subjected to security measures except in cases provided by law - Article 11, Constitution of the Republic of Senegal, 1960.

Cameroun: "Everybody shall have the right to freedom of residence and movement, subject to the regulations concerning public order and public health." - Cameroun Constitution of 1960.

Somalia: "All citizens shall have the right to reside and travel freely in any part of the national territory and shall not be subjected to any deportation." - Article 11 of the Constitution of the Somali Republic, 1960.

NEED FOR RESTRICTIONS ON THE FREEDOM OF MOVEMENT

The conflict between man and the State is as old as human history. It is trite to observe that in an organised society, there can be no absolute liberty without social control. In the words of Edmund Burke "Liberty too must be limited in order to be possessed". While the imposition of social control delimits personal liberty, it also results in the enlargement of general personal liberty, for, in the modern state, liberty is dependent on the existence of authority. "Liberty, in a word, has to be reconciled with the necessities of the social processes; it has to find terms upon which to live with authority."¹

The following may be regarded as the essential functions of a Government:

- (a) Maintenance of order
- (b) Ensuring the proper functioning of public services
- (c) Ensuring the survival of the nation
- (d) Protection of its own authority and safety.²

All the rules of social life impose restrictions on the freedom of individuals. The rules, however, must allow the maximum of freedom that is compatible with the general interest and the harmonious adjustment of individual relations.

Having thus stated the need for restriction on the right to Freedom of Movement in the larger interests of the preservation of the right itself, it is now necessary to examine the nature and extent of the restriction generally imposed by states on the enjoyment of this freedom.

NATURE OF RESTRICTION IMPOSED BY STATES

The restrictions imposed by a state on the enjoyment of the Freedom of Movement can assume one of three forms:

- (a) Prohibition of entry of a person into a specified area in the state;

¹ Laski, 'Liberty', IX, page 444.

² Levasseur: 'Justice and State Security', Journal of the International Commission of Jurists, Vol. V, No. 2 (Winter 1964) pp. 234 et seq.

- (b) Prohibition of exit of a person from a specified area in the state

o r

- (c) Expulsion of a person from a specified area in the state.

The restrictions imposed by the states may broadly be categoried as:

- (a) the restrictions imposed on the basis of citizenship

a n d

- (b) general restrictions applicable to citizens and non-citizens alike.

In the Constitution and other laws of some countries, the right to Freedom of Movement is sought to be secured only for the citizen. For example, in the Constitution of the United States of America, India, Ghana, Senegal, Nigeria, the Federal Republic of Germany and Italy, this right is available only to citizens. In the Constitution of some countries, for example, Japan, Ghana, Cyprus, France, Argentina, Mexico and Brazil, the right to Freedom of Movement is available to all persons regardless of their citizenship.

The pattern of restrictions that are imposed by states on the enjoyment of this freedom are of a wide range. Thus, for instance, a country like South Africa has legitimised the imposition of various restrictions on this right on the sole basis of race,¹ whereas countries such as France, Japan and Argentina have attempted to secure this freedom for all persons irrespective of their citizenship. A few examples of restrictions imposed are given below.

REASONABLENESS OF RESTRICTIONS IMPOSED BY STATES

Generally speaking, the states imposing restrictions on Freedom of Movement seek to do so only by the authority of law. This by itself is no safeguard against the abuse of the right by an act of the legislature, unless the right is embodied in the Constitution which prohibits the making of a law imposing restrictions on the enjoyment of this freedom except upon the grounds stated in the Constitution. While it is the prerogative of a state to impose such restrictions on the enjoyment of this freedom for the protection of any interests which it may regard as vital to its security or welfare, yet the restrictions imposed should conform to the standards laid down by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (1966) which embody the ideals and aspirations

¹ See Report of the International Commission of Jurists on "South Africa and the Rule of Law"; also Bulletins of the I.C.J. No. 22 (April 1965, pp. 35-42), No. 28 (December 1966, pp. 65-66) and No. 30 (June 1967, pp. 26-30).

of all civilised peoples. The International Covenant on Civil and Political Rights states:

- "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order ("Ordre public"), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country."¹

Having regard to the practice of states, there is a broad consensus which appears to recognise restrictions imposed on the following grounds as reasonable restrictions:

- (1) Security of the State;
- (2) Public Order, Health, Morals or Safety;
- (3) Proper functioning of Public Services and maintenance of supplies essential to the Community.
- (4) Protection of any particular interest regarded by the State as important.²

It may also be stated that restrictions imposed only on grounds of nationality, race, religion or political views would be unreasonable when tested by the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which extend this freedom to all persons lawfully within the territory of a state regardless of their Citizenship.

COURTS AND THE FREEDOM OF MOVEMENT

The following decisions have been cited only for the reason that they embody the cumulative judicial experience of several states and may therefore be regarded as indicative of views shared by many other states.

¹ Article 12 of the Covenant; see also Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

² Thus for example, Article 19(5) of the Indian Constitution provides for the imposition of restrictions "for the protection of interests of any Scheduled Tribe." The Assam High Court has upheld these restrictions in Dhan Bahadur Ghorti v. State - AIR 1953 Assam, page 61.

Where there is no express provision in the Constitution of the United States dealing with the Freedom of Movement, it has been held that the term "Liberty" in the Fifth Amendment means not only the right of the citizen to be free from mere physical restraint of his person but also the right to be free in the enjoyment of all his faculties and freedoms and includes the right of locomotion i.e., the right to remove oneself from one place to another according to one's inclination.¹

In the State of Madhya Pradesh v. Thakur Bharat Singh², decided on January 23, 1967, the Supreme Court of India considered the validity of Section 3(1)(b) of the Madhya Pradesh Public Security Act 1959, which purported to authorise the State to order a person to reside in the place where he was ordinarily resident, as well as to order a person ordinarily resident in one area to go to another area or place within the State and stay within that area or place. The Act also provided that, if a person served with an order under the Act failed to carry out that order, he could be removed to the area or place designated in the order, and also be punished with imprisonment and/or fine. It gave no opportunity to the person affected of being heard before the place where he was ordered to go or remain was selected. The Supreme Court held that Section 3(1)(b) of the Act purported to authorise the imposition of unreasonable restrictions on the freedom of movement of the individual and held that the clause was therefore void.

In Minister of the Interior v. Madame Vicini³, the Conseil d'Etat of France stated that Article 107 of the Code de l'Administration communale enabled a Prefect (an administrative head of a region) to take all measures necessary within his area of administration for the maintenance of public health, security and peace. He could therefore regulate the movement and the stay of nomads for the purpose of avoiding any danger to public health, security and peace. The Conseil d'Etat held, however, that a Prefect infringed the fundamental right of the individual to freedom of movement when he prohibited permanently and in absolute terms the camping and the stay of nomads in all or any part of the areas under his administration. General prohibitory orders, in the absence of exceptional circumstances, could not be justified.

In Williams v. Majedodunmi⁴, the Federal Supreme Court of Nigeria held that every citizen of Nigeria was entitled to move freely throughout the Federation, and that the movement or residence of any person within Nigeria could be restricted only in the interest of defence, public safety, public order, public morality or public health.

¹ Bauer v. Acheson, (1952) 106 F. Supp. page 445.

² See Weeramantry, Digest of Judicial Decisions on Aspects of the Rule of Law, Journal of the International Commission of Jurists, Vol. VIII, No. 2, Special Issue, International Year for Human Rights, Part I, p. 133.

³ See Digest of Judicial Decisions on the Rule of Law, Journal of the I.C.J. Vol. VII, No. 1 (Summer 1966), pp. 142-3.

⁴ See Digest of Judicial Decisions on the Rule of Law, Journal of the I.C.J. Vol. VII, No. 1, pp. 143-4: see also (1962) 1 All Nigeria Law Reports, p. 324.

In Jeshingbhai v. Emperor¹, the High Court of Bombay, interpreting the provisions of the Bombay Security Measures Act, held that the restrictions imposed thereunder were void as they imposed unreasonable restrictions. The Act in question (a) had not imposed a maximum limit on the duration of the time for which restrictions could be imposed; (b) provided no right to the person to be heard in his defence and (c) imposed no obligation upon the authorities concerned to furnish the ground for such restriction. The Court also held that, in order to decide whether or not the restriction was unreasonable, the entire nature of the restriction must be looked into.

The Supreme Court of India upheld the restrictions imposed on the Freedom of Movement of a person under the provisions of the City of Bombay Police Act, 1902, under which it was possible to restrict the movements or acts of any person causing harm to person or property or under circumstances when there were reasons for believing that such person was engaged or was about to engage in the commission of an offence. The Act was upheld as it fixed not only the maximum period for imposition of restrictions but also made provision for furnishing in writing to the person charged with the offending acts the grounds upon which he was charged.²

Section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956, enabled the magistrate, on receiving information that any woman or girl within the limits of his jurisdiction was a prostitute, to record the substance of such information and call upon her by a notice to show cause why she should not be required to "remove herself from the place and be prohibited from re-entering it". Relying upon an earlier judgment, the Supreme Court of India held that the reasonableness of a restriction depended on "the values of life in a society, the circumstances obtaining at a particular point of time when the restriction is imposed, the degree and the urgency of the evil sought to be controlled and similar others". Once the conclusion was reached that the activities of a prostitute in a particular area, having regard to the conditions obtaining therein, are so subversive of public morals or so destructive of public health that it was necessary in the public interest to deport her from that place, the restriction thereafter imposed on the person cannot be said to be unreasonable.³

In State of Madhya Pradesh v. Baldeo Prasad⁴ the Supreme Court of India struck down Sections 4 and 4(a) of the C.P. & Berar Goondas Act, 1946, as contravening the freedom of movement guaranteed in Article 19(1)(d) of the Indian Constitution. "Goonda" was defined as meaning "a hooligan, rough or a vagabond" and as including a person who is "dangerous to public peace and tranquillity". On the grounds that the definition was inconclusive and that no opportunity was given to the person to show that he was not a goonda, the Court struck down the section as violative of the Constitutional provision guaranteeing the right to Freedom of Movement.⁵

¹ AIR 1950 Bombay, page 363.

² Gurbachan Singh v. State of Bombay - AIR 1952 S.C., page 221.

³ State of Uttar Pradesh v. Kaushaliya - AIR 1964 S.C., page 416.

⁴ AIR 1961 S.C., page 293.

⁵ See also Ibingira and others v. The Government of Uganda, Digest of Judicial Decisions on the Rule of Law, Journal of I.C.J. Vol. VIII, No. 1 (Summer 1967) at page 116.

ENJOYMENT OF THE FREEDOM DURING AN EMERGENCY

The right to Freedom of Movement assumes great importance during emergencies like war, civil commotion etc. when the enjoyment of the right is subjected to great stress and strain.

For the enforcement of the Rule of Law and the protection of this valuable basic right, it is necessary to define the ambit of state action relating to this right. Adequate provision must be made for the proper adjudication of the grievances of persons whose freedom is curtailed and the best procedure will have to be evolved to ensure the same. Ordinarily, the Courts should be the custodians of the right. The experience of even such established democracies as the United Kingdom shows that the power to determine whether in the circumstances prevailing in the country a person's right to this freedom may be curtailed has often been left to the subjective satisfaction of a Minister or other state official. An honest though erroneous decision of the state officer or Minister concerned often places the matter beyond judicial review. The question attracted great public attention when the decision in Liversidge v. Anderson¹ was delivered and the debate still continues. In many countries that gained independence in recent times, the rule in Liversidge v. Anderson has come to be followed.

Sir Carleton Allen supported the minority opinion of Lord Atkin and observed: "The hinge of Lord Atkin's speech is that the term 'reasonable cause' has up to the date of this decision had one clear meaning, and one plain effect, in every branch of our law, whether common or statutory. It has involved an objective test, by an independent tribunal, of the reasonableness claimed for the conduct which is impugned. Lord Atkin had supported this proposition by abundant illustration and has stated categorically that there is no known exception to it ..."

Sir Carleton vehemently argued for the position that in all such cases the test ought to be the objective satisfaction that will stand the test of scrutiny by Courts of Law before which the order is assailed; in any event, the conclusion of Sir Carleton is very relevant when the result of the many decisions of various Commonwealth countries is reviewed. It is important to note the observation of Sir Carleton that "The spectacle of dispassionate justice and of calm adherence to the law of the land, even in the face of imminent danger, will always be more admired than the immunity of executive action on any grounds of temporary urgency; and it will be particularly admired at a time when the nation is embattled against no enemy more sinister than the odious doctrine that the administration of justice is subservient to the requirement of 'policy'". In view of the clear enunciation in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights of this precious right, and the restrictions that could be legitimately imposed to secure the competing state interest, it has become imperative that the position declared in the "Law of Lagos"² must be secured. The relevant portion of the Law of Lagos reads as follows:

¹ 1942 A.C. 260

² See Report of the International Commission of Jurists on 'African Conference on the Rule of Law' (1961) p. 11.

"That fundamental human rights, especially the right to personal liberty, should be written and entrenched in the Constitutions of all countries and that such personal liberty should not in peace time be restricted without trial in a Court of Law".

Whether an aggrieved person whose freedom of movement is curtailed during an emergency is permitted to resort to the ordinary Courts of the land or not, he must be afforded an opportunity of vindicating his rights at least before an impartial administrative tribunal with adequate safeguards for his defence, with aid of Counsel where necessary. The law permitting the deprivation of the right during the periods of emergency should, besides stipulating the maximum period of the deprivation of the right, also contain provisions requiring the Government to submit periodical reports to the legislature.

REMEDIES FOR ENFORCEMENT OF THE RIGHT TO FREEDOM OF MOVEMENT

Ordinarily the Courts of the State are entrusted with the power to enforce this right and to deal with cases of denial of this freedom, in accordance with the provisions of the Constitution or any other law made by the State. If, however, the right is conferred upon any other authority and the power of the ordinary courts is ousted, it would be necessary to examine whether adequate safeguards have been provided for the enforcement of the right. The writ of Habeas Corpus which originated in England, now shorn of all its crippling technicalities, is yet the most effective mode by which freedom is assured to the individual in most of the "common law" countries. In others, the access to courts competent to grant relief affords the necessary protection. Except in times of war or other emergency, the ordinary courts should be vested with the power to grant the necessary relief. If for compelling reasons the jurisdiction is vested in special tribunals, their decisions should be made justiciable.

SOME SUGGESTED CONCLUSIONS

The following Conclusions may be suggested:

1) The right to Freedom of Movement is a right which is vital to the full development of the human personality and must be recognised and protected by every State in adherence to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

2) The right to Freedom of Movement within the borders of a State must be made available to every person lawfully upon the territory of a State irrespective of his citizenship, race, colour, religion or political affinity. Incorporation of the right in substantive law as well as procedural safeguards for its enjoyment must be ensured.

3) Considering the need to maintain a balance between the freedom of the individual and the general welfare of the community, reasonable restrictions may be imposed on the enjoyment of the right. Such restrictions may, however, be imposed only if the following conditions are satisfied:

- a) The law provides for the imposition of restrictions in the interests of the security of the State, public order, health, morals or safety, or the proper functioning of the public services and the maintenance of supplies essential to the community, or for the purpose of securing due recognition and respect for the rights and freedoms of others.
 - b) The restrictions imposed do not go beyond what is permitted by the law relating to the particular situation.
 - c) The restrictions are reasonable from the point of view of substantive as well as procedural law.
 - d) The restrictions are not arbitrary or excessive or beyond what is required in the interests of the general public.
 - e) The legal validity of such restrictions is made justiciable before the ordinary Courts of the State in times of peace.
 - f) The restrictions in times of war are open to review before the Courts, or at least an impartial administrative tribunal whose procedure conforms substantially to the procedure of ordinary courts, and is subject to final judicial review.
 - g) The law permitting the imposition of the restrictions fixes the maximum limit of the period of restriction, requires the making of periodical reports to the Legislature and provides similar safeguards against arbitrariness and abuse.
 - h) The circumstances under which restrictions may be imposed and the procedure for their imposition are entrenched in the Constitution or in a law.
- 4) Jurists the world over should build up public opinion which will impel States to recognise the importance of this freedom and to act conformably to the letter and spirit of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

WORKING PAPER

on

RIGHT TO FREEDOM OF MOVEMENT OUTSIDE ONE'S COUNTRY

By

M. P. Chandra Kantaraj Urs*

INTRODUCTION

Freedom of movement is one of the most important of the fundamental freedoms of mankind. The evolution of man and the growth of man's sophisticated concepts of freedom of speech, freedom of association, freedom of religion and the like have assumed great significance and importance in modern times and tend to attract greater attention than freedom of movement. These other freedoms or fundamental rights of man are social and political in concept and value. But freedom of movement was the very factor which helped man to survive and evolve himself into what he is today. It will always remain basic and vital to the enjoyment of many other rights and freedoms.

This Working Paper is concerned with the right to freedom of movement outside one's country, or, in other words, with the right of exit, of travel abroad and of return to one's State. It has often been correctly stressed that this right is no less natural a right than is freedom of movement within a country, freedom of expression or freedom of religion. Louis L. Jaffe, comparing it with these other rights, said:

Like these other rights, it nourishes the self-determining creative character of the individual not simply by the mere enlarging of his freedom of action, but by expanding the scope of his experience. Nor is the value limited to the individual. It attests to the community of nations; brings its peoples together; promotes familiarity and understanding; enriches and diversifies our science and culture. It is this movement of men and ideas on which our very culture rests. Even where the object of the visit is criticism, it promotes that continuous human dialogue whose aim is mutual adjustment and toleration.¹

In an article on 'Freedom of Movement: Right of Exit' which appeared in the Journal of the International Commission of Jurists, Vol. IV, No. 1 (Summer 1962) Dr. Rudolf Torovsky¹, in dealing with the nature and signifi-

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¹ Louis L. Jaffe on "The Passport Problem", Foreign Affairs, Vol. 35, p. 25.

² Dr. jur. (Vienna); former member of the Legal Staff of the International Commission of Jurists.

cance of that right, says:

The individual Human Rights do not exist in isolation and the granting or refusal of one basic right may decisively affect enjoyment of one or more other basic rights. This is particularly so in the case of freedom of exit, for it is an important prerequisite or at least an important additional factor in the enjoyment of several other basic rights. In specific cases, for instance, the absence of freedom of exit may eliminate either wholly or partially the practical possibility of enjoying the right to life, freedom and inviolability of the human being, the right of religious freedom, the right of free expression and formation of opinion, and the right to work and a decent standard of living, to name only a few.

In conclusion it may be said that freedom of exit is by nature one of those basic freedoms which result logically from the principle of individual freedom and that it is of outstanding importance in view of its relationship to the other human rights and of its vital contents with regard to human existence and development potentialities. Freedom of exit is, for these various reasons, essential to a free and democratic society. Although it cannot be claimed that democracy cannot exist without freedom of exit, - but there can be no liberal democracy without it - it can nevertheless be said that one of the first actions on the part of any dictatorship or police State is very often to deny the population freedom of movement in the broadest sense.

HISTORICAL BACKGROUND TO RESTRICTIONS ON RIGHT

Down the ages man has learnt to conquer the natural obstructions to his freedom of movement and has now reached a stage where he is well on his way to mastery of the space around the earth and perhaps in due course of the universe itself. However, man-made restrictions persist; indeed, the progress and acceleration of the technical aspects of transportation on one hand and the widening of the scope of human rights on the other make them appear more anachronistic and objectionable than ever.

It would not be necessary here to make a detailed historical survey of the reasons and circumstances that brought about and maintain the curtailment of man's freedom of movement. One could briefly sum up these reasons and circumstances by stating that the crystallisation of the concepts of "State" and "Sovereignty" in modern societies was the basic factor which brought about restrictions on the freedom of movement of man outside his own country, and rendered him unable to use to best advantage his conquest of barriers imposed by nature. The reasons that impel many modern States to insist on restrictions on the freedom of movement outside the country appear to fall under two broad heads. One is economic and the other political. They are closely interrelated, each having had at various historical stages precedence over the other.

In the early period of the history of civilisation the need for peaceful travel beyond the frontiers of an individual's community arose mainly for two reasons. One was trade and commerce and the other the pursuit of knowledge. In the absence of powerful national states in the modern sense independent medieval cities and feudal territories exercised strict controls over the movement of merchandise, and the exchange of goods was then, if anything, more cumbersome than in our time. By the same token, cogent restrictions were imposed on individuals seeking to ply their trade in foreign lands. The reasons for such limitations on persons were primarily economic and social. They reflected the protection of influential local guilds against outside competition; often were they motivated by the defence against epidemics which could then be fought only by an effective quarantine. The resulting situation must be viewed from the historical perspective of the period; by and large, however, the innocent traveller was not subject to the multitude of bureaucratic procedures imposed by present-day political and economic considerations often constituting a serious invasion of privacy.

With the advent of the modern age, the concept of trade and commerce across national borders has undergone a basic review. The political upheavals in Europe, the emergence of independent young States in the new world, the dynamics of the industrial age and the race for colonisation with its consequent commercial rivalry, are all among the factors which hastened this process. In the place of a relatively simple exchange of goods there sprang up monopolies, tariffs and other restrictions on free trade.

Looking at the political reasons, one finds that with the development of national States and their growing emphasis on unfettered sovereignty, freedom of movement of the individual began to be gradually regulated on political rather than economic grounds. World War One brought about an almost total prohibition of innocent travel in the world; in its aftermath, the control over individual travel exercised by the State of origin as well as by that of destination, remained greatly strengthened. After World War Two, the aggressive assertion of competing ideologies provoked a wave of security consciousness with the maze of protective measures against political subversion we know today.

Only slowly does the realisation dawn in some parts of the world of the advantages to be derived from the abolition of travel restrictions for the furtherance of mutual understanding among peoples and, ultimately, of permanent peace.

SCOPE AND CONTENT OF THE RIGHT

The growing tendency of States to place restrictions upon the right to travel abroad had made it all the more important that the scope and content of the right to freedom of movement should be closely examined and defined.

From the standpoint of the object of travel abroad, travel outside one's country can be classified under three distinct headings:

- 1) Travel in pursuit of knowledge and recreation or to improve one's professional qualifications or commercial prospects.

- 2) Travel for purposes of earning a livelihood temporarily in another country.
- 3) Travel with the intention of settling down permanently in another country.

In the case of the first and second of these categories, there is always an animus revertendi or an intention to return to one's state of origin. In the case of the third category there is no such intention, the intention being to set up a new life in another state permanently, often involving the renunciation of citizenship rights in the country of origin.

When considering the scope of the right to freedom of movement outside one's country as it is understood today, one finds that it consists of three limbs, namely, the right of exit, the right of movement, sojourn and residence abroad and the right of return.

The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948, enunciates the right to freedom of movement in the following terms:

Article 13 (1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

The member states of the UN, by adopting the Universal Declaration, have in effect agreed to restrict neither the right of their citizens to freedom of movement within their country nor their freedom to leave and return to their country. They have by implication also agreed not to refuse entry to citizens of other countries except for a valid reason.

Provisions relating to the right to leave and to return to one's country are found in certain international instruments other than the Universal Declaration of Human Rights. The International Covenant of Civil and Political Rights, which was adopted by the General Assembly of the United Nations on December 16, 1966, specifies that everyone shall be free to leave any country, including his own.¹ The same provision is to be found in the Draft Central American and Inter-American Conventions of Human Rights.² These Draft Conventions also secure to the individual the right to enter his own country.³

Article 18 of the European Social Charter signed by the member States of the Council of Europe on October 18, 1961, deals with a more particular aspect of the right to leave one's country. By that Article the contracting States expressly acknowledge the right of their nationals to leave their country to engage in a gainful occupation in the territories of any one of the contracting States.

¹ Article 12 (2) b.

² Articles 16 (1) b and 15 (1) b respectively.

³ Articles 16 (2) b and 15 (2) b respectively.

INCORPORATION OF THE RIGHT IN WRITTEN CONSTITUTIONS

Many countries, some of them before and others since the adoption of the Universal Declaration of Human Rights, having incorporated several of the principles underlying the Declaration in their Constitutions. India is one such country. Some democratic countries which do not have a written constitution, such as England, and others which have a written constitution but not one which incorporates guarantees of fundamental rights, such as Ceylon, have had the benefit of a liberal Executive and effective Judiciary to ensure that most of the basic human rights and fundamental freedoms are protected.

The provisions of article 13, para. 2 of the Universal Declaration of Human Rights relating to freedom of movement outside one's country, have been incorporated in the written constitutions of quite a few countries. Noteworthy examples are the following:

Japanese Constitution of 1946, Article 22, paragraph 2:

"Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate."

Indonesian Constitution of 1950, Article 9, paragraph 2:

"Everyone has the right to leave the country and - being citizen or resident - to return thereto."

Italian Constitution of 1948, Article 16, paragraph 2:

"Every citizen has the right to leave the territory of the Republic and to re-enter it, provided the obligations of law are respected."

Argentine Constitution of 1949, Article 26

"All inhabitants of the Nation enjoy the following rights, in accordance with the laws which regulate the exercise thereof ... of entering, staying in, travelling over and leaving the Argentine territory..."

In the Indian Constitution of 1950 there is no specific provision in the Chapter dealing with the fundamental rights of Indian citizens guaranteeing the right of exit or the right to travel outside the country. During the days of British rule, the issue of passports or other travel documents was the prerogative of the Crown. The early attempts made by a few citizens at the time when the Constitution of Independent India was being discussed to have the freedom of movement outside the country declared as one of the fundamental rights guaranteed did not meet with success.

PASSPORTS

The "passport" as a requirement for exit from one's country and travel abroad is a modern innovation. Inasmuch as the holding of a valid passport is today a sine qua non for travel almost everywhere, it is important to examine what is a passport, what is its real function and why a state considers that it is necessary for its citizens to hold one in order to travel abroad.

The passport is in a sense a travel document. It is an official certificate of identity and nationality granted by the home country in a form recognised and accepted by the foreign country of sojourn as evidence of the "returnability" of the holder, that is of the obligation in international law of the issuing country to take him back, and therefore of his acceptability as entrant in the foreign country. It has no legal bearing on either the power or the obligation to give diplomatic protection.¹

The passport is also an "exit permit" in countries which require their citizens to be in possession of a passport as a condition of departure. Some other countries require a special exit permit to be endorsed in the passport in respect of each journey. Different considerations apply to return to one's country, for a country has no right to refuse entry to its citizens. Thus, while a passport provides simple and immediately acceptable proof of nationality, and hence of the right to enter the country, it is not a legal requirement of entry for nationals of the country, who may prove their nationality in other ways.

A passport today may therefore be necessary in the first place in order to leave one's country. Even if it is not - as is the case for some countries - it is nonetheless essential for travel abroad, for all countries normally require a foreigner to produce a passport or other acceptable travel document before they will allow him to enter their territory, and in some countries before they will allow him to leave. It is of little value for a man to be able to leave his country without a passport if no other country will permit him to enter, so that all persons, whatever the attitude of their own country, in practice require a passport in order to leave their country.

There are certain other kinds of travel documents issued and accepted in special cases. These apply mainly to refugees and stateless persons, to whom travel documents are issued by host countries under international agreements. These include Nansen certificates, issued during the life of the League of Nations, and documents issued under the Convention relating to the Status of Refugees of 1951 and under the Convention relating to the Status of Stateless Persons of 1954.

Most, if not all, states claim an absolute right to grant or refuse a passport in the discretion of the appropriate government department. The result is that a citizen's freedom of movement abroad is made subject to the exercise of governmental discretion in his favour. While it must be accepted that there may be valid grounds on which a State may refuse to let a citizen leave the country - these are discussed below - it would seem to be clearly contrary to the letter and spirit of the Universal Declaration of Human Rights to leave the decision whether to grant or refuse a passport entirely to the executive. The Rule of Law would seem to require rather that the fundamental principle should be established that every citizen has a right to a passport; the circumstances in which a passport can be refused should then be defined by statute and their application in a particular case should be subject to challenge in the Courts, which should have power to decide whether the particular refusal was justified or not.

¹ See Weis, "Nationality and Statelessness in International Law"; Diplock, "Passports and Protection in International Law", in Grotius Society Transactions, 1946, Volume 32, page 42.

In certain countries - particularly where freedom of movement is guaranteed by the Constitution and thus provides a basis for judicial intervention - there is already a movement in this direction. Recent decisions of the Indian Courts on the subject are examined later in this Working Paper.

At the present time, however, it is still normal practice for governments to retain their discretion in the field of passports. In addition to refusing to grant a passport at all, they may limit and control the movements of a person whom they do permit to leave the country by endorsing the passport for certain countries only. Such restrictions on the countries which may be visited may be imposed on individuals whose activities the government wishes to control, or may be imposed generally on all citizens travelling abroad in order to prevent them from visiting specific countries.

Even though a passport has been issued, this is not a guarantee that the recipient will be able to travel freely on it for the period of its validity. It may be cancelled and impounded at any time; its renewal may be refused. Other more subtle forms of control may be exercised: a passport may be issued valid only for one specific journey: the grant of an application for a passport may be delayed so long that the object of the applicant in travelling abroad is frustrated. A person living or making a long stay abroad may be compelled to return home by the refusal to renew his passport abroad.

In addition to the need to work towards the establishment of the right to a passport, in the sense suggested above, it is also important to encourage the conclusion of bilateral or multilateral treaties between States under which nationals of the States parties to them may move between the territories of those States without a passport. Such treaties exist, for example, between the six members of the European Economic Community, between the Scandinavian countries and between a number of Latin-American States. In each case, the person's national identity card is all that is needed to travel to any of the States parties to the treaty.

ADDITIONAL FORMS OF CONTROL OVER EXIT

In addition to passport legislation, each country has a number of other provisions restricting freedom of exit, chief among these being measures to protect emigrants, public health standards, currency regulations, and customs regulations. ¹

There are also some special requirements in certain countries which persons desiring to leave those countries have to satisfy before they are granted permission to leave.

Some countries require that the prospective traveller should satisfy the income tax authorities that he has paid all taxes due or that he has made suitable arrangements for payment of balance taxes due during his absence and obtained from them a Tax Clearance Certificate before permission to leave is granted.

¹ Torovsky on 'Freedom of Movement: Right of Exit', Journal of the International Commission of Jurists, Vol. IV, No. 1 (Summer 1962), p. 84.

A requirement peculiar to India is that the prospective traveller should fill in a 'P' form containing questions relating to currency and foreign exchange involved in his trip and have it approved by the Reserve Bank of India before being permitted to leave the country.

The grounds on which the right has been denied have included:

- (1) Lack of qualification, especially absence of citizenship rights.
- (2) National Security, National Interest, National Economy, Public Order, Public Health, Public Morals.

Examples are:

"Errands hostile and injurious to the peace of the country"
Taking part in "insurrectionary assemblages"
Enlisting in foreign armies
Taking part in Communist or other subversive organisations
"Prejudicing the orderly conduct of foreign relations"
Prejudicing the "national interest"
Speaking and agitating abroad against the policies of the Government, or speaking contrary to the national interest, or committing other lèse majesté
Fleeing from the obligation to pay taxes
Avoiding military service
Avoiding paying civil debts
Fleeing from the course of justice after having committed a crime or fraud
Prostitution

- (3) Protection of the citizen:

Examples are:

Prevention of slave traffic
Prevention of exploitation of labour

- (4) Friendly and peaceful relations with foreign countries, for example, participation in political opposition, terrorism or insurrection prejudicing the good relations between the national's State and the State visited.

It is important, as has already been stated in connection with passports, that the grounds on which a person can be refused permission to leave his country and denied a passport should not be left to the discretion of the Government but should be laid down by law. Article 12 of the Covenant on Civil and Political Rights recognizes that the right to freedom of movement, including the right to leave one's country,

shall not be subject to any restrictions except those which are provided for by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Limitations imposed in accordance with this provision should be sufficient to protect the interests and welfare of the country concerned, while at the same time leaving free to travel those whom there are no compelling reasons to prevent from leaving the country.

ENTRY INTO FOREIGN COUNTRIES

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not recognise freedom of movement as extending to the right to enter a foreign country. They go no further than providing that all persons lawfully resident in a country - including foreigners - shall have the right to move about within that country and to leave it.

The extent and the method of control over the entry of foreigners into a country vary according to the purpose for which the foreigner wishes to enter. In nearly all cases, however, states invariably reserve to themselves the right to refuse to admit a foreigner without giving reasons. The reasons for the retention of this right - which is an aspect of national sovereignty - are many and complex. Social and economic factors - overcrowding and the threat of unemployment - are involved as well as considerations of national security and defence.

While there is thus little likelihood of freedom of movement being extended to include the right to enter foreign countries, a good deal has been and can still be done to simplify the formalities involved and to define and limit the grounds on which entry may be refused.

In the first place, certain countries have by treaty extended full freedom of movement, including freedom of entry, to nationals of the other states parties to the treaty. This is the case, for example, in the European Economic Community, in Scandinavia where the countries have joined in the Nordic Council, and between a number of countries of Latin-America. The network of such treaties could be extended.

Secondly, the practice of requiring visas for persons entering a country could be, if not abolished, at least modified, so that visas be required only in cases where there is seen to be a real need for the country concerned to exercise the additional control involved in the grant of a visa. Indeed, it can be argued that this control can be exercised by methods other than the grant of a visa, and that the visa system could be completely abolished without damaging any essential interests.

The purposes for which a foreigner wishes to enter a country can be divided into five broad categories: permanent settlement; work; study; tourism; a visit connected with business or professional activities. In the last two cases, the visit is of short duration and it is difficult to see what purpose the visa serves that is not adequately served by the passport. In the case of persons wishing to settle permanently, it would be sufficient to require the granting of a residence permit either before arrival or within a specified period of arrival. Similarly, in the case of

persons wishing to enter to take up employment the granting of a work permit - either in respect of a specific job or enabling the person concerned to seek work - would seem to permit the exercise of the necessary control. In the case of students, all that should be necessary is that they should be able to show that they have a place at a school or college, or that they have sufficient means of support to enable them to pursue private studies or research.

The number of bi-lateral and multi-lateral treaties under which visas are no longer required by nationals of the States parties has grown encouragingly in recent years. Even more encouraging is the practice adopted by some states of unilaterally abolishing visa requirements for visitors, to which considerable impetus was given during International Tourist Year, 1967. It is to be hoped that the practice of concluding such treaties will continue until the visa has become a thing of the past.

It has to be recognised that in the present world context States must retain the right to refuse permission to foreigners to settle permanently or obtain employment in their country, since control over these matters may be essential in order to preserve political, economic and social stability. On the other hand, there seems to be no reason why States should not recognise the right of foreigners to visit their country for purposes of study, tourism or of their business or profession. The recognition of such a right, with a list of clearly defined exceptions (such as lack of funds, reasonable grounds for suspecting an intention to commit a criminal offence) would be an important step forward in opening up the world to freedom of movement for all.

COURTS AND THE RIGHT

Recently, both the Supreme Court and some of the High Courts of India, notably those of Maharashtra and Mysore, have in some important judgments recognised the right of exit as a fundamental right of the individual. In doing so, the Courts based their judgments on the view that the refusal to issue passports to citizens who applied for them was a violation of Article 21 of the Indian Constitution which states:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

In the case of Sadashiva Rao v. the Union of India¹, Mr. Justice K. S. Hegde of the Mysore High Court (now a Judge of the Supreme Court of India) held,

For the reasons mentioned above, we are of the opinion that the Government, by refusing to issue the passports asked for by the petitioners, have deprived the petitioners of their 'personal liberty', and thereby they have infringed Art. 21 of the Constitution.

In coming to the conclusion that personal liberty included freedom to travel outside the country, considerable reliance was placed on the judicial views expressed in other democratic countries, notably those of the Supreme

¹ per Hegde and Honniah JJ. - Mysore Law Journal, Volume 44, 1965 (2) at page 605.

Court of the United States of America. In the Rockwell Kent Case¹ Mr. Justice Douglas observed as follows:

The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution of 1787 (1956), 171-181, 187 etc. seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of value.

In the case of Satwant Singh Sawhney v. Assistant Passport Officer² the Supreme Court of India, having considered conflicting decisions of the Indian High Courts on the question of the right of exit, held by a majority judgment that the right to travel was part of the personal liberty of an individual within the meaning of Article 21 of the Indian Constitution and a right of which he could not be deprived except according to procedure established by law. The majority judgment, delivered on April 10, 1967 by Mr. Justice Subba Rao, the then Chief Justice, also held that the discretion claimed by the Indian Government to issue, deny, withdraw or cancel a passport was a violation of the doctrine of equality before the law enshrined in Article 14 of the Constitution.

The judgment also observed that, as a result of international conventions and usage among nations, it was not possible for a person residing in India to visit foreign countries, with a few exceptions, without the possession of a passport. A passport was required for protection; it was a document of identity and was prima facie evidence of nationality: in modern times it not only controlled exit from the State to which one belonged but also entry into other States. It had in effect become a condition of free travel. The want of a passport prevented a person from leaving India, and the Government, by withholding such passport, deprived him of his right to travel abroad. This right was a right which every person living in India, whether a citizen or not, enjoyed. No person should be deprived of this right to travel, except according to the procedure established by law. There existed no law made by the State regulating or depriving persons of the right to travel.

In dealing with the doctrine of equality before the law enshrined in Article 14 of the Constitution, the Court expressed the view that this doc-

¹ Kent v. Dulles, Supreme Court, 12 L. Ed., 2d, page 992.

² Writ Petition No. 230 of 1966; also Weeramantry, Digest of Judicial Decisions on Aspects of the Rule of Law, Journal of the International Commission of Jurists, Vol. VIII, No. 2, p. 134.

trine was a necessary corollary to the high concept of the Rule of Law accepted in the Indian Constitution and continued:

Secondly, such a law would be void, if it discriminates or enables an authority to discriminate between persons without just classification. What a legislature could not do, the executive could not obviously do. But in the present case the executive claims a right to issue a passport at its discretion; that is to say, it can at its discretion prevent a person from leaving India on foreign travel. Whether the right to travel is part of personal liberty or not within the meaning of Art. 21 of the Constitution, such an arbitrary prevention of a person from travelling abroad will certainly affect him prejudicially. A person may like to go abroad for many reasons. He may like to see the world, to study abroad, to undergo medical treatment that is not available in our country, to collaborate in scientific research, to develop his mental horizon in different fields and such others. An executive arbitrariness can prevent one from doing so and permit another to travel merely for pleasure. While in the case of enacted law one knows where one stands, in the case of unchannelled arbitrary discretion, discrimination is writ large on the face of it. Such a discretion patently violates the doctrine of equality, for the difference in the treatment of persons rests solely on the arbitrary selection of the executive. The argument that the said discretionary power of the State is a political or a diplomatic one does not make it any the less an executive power. We therefore hold that the order refusing to issue the passport to the petitioner offends Article 14 of the Constitution.¹

SECURITY OF MOVEMENT AND RESIDENCE ABROAD AND THE RIGHT OF ASYLUM

Besides the right of exit from and return to one's own country, the other important aspects of freedom of movement are the right to security of movement and residence when abroad and the right of asylum.

Right to Security of Movement and Residence

In the case of persons who have left their country only temporarily for such purposes as travel, acquiring knowledge or furthering their commercial interests, it is vital that their stay abroad should be secure in the sense that there should be no restrictions placed on their right of movement during such time either by their own State or by the State in which they happen to reside. This right to security of movement and residence will be dealt with

¹ See also Aseerwatham v. Permanent Secretary, Ministry of Defence and External Affairs and Others, Digest of Judicial Decisions on the Rule of Law, ICJ Journal Vol. VI, No. 2 (Winter 1965), pp. 319-320, and Gooneratne v. Permanent Secretary, Ministry of Defence and External Affairs and Another, same Vol. of above Digest, p. 320.

in greater detail in the section of this Working Paper dealing with Abductions, which applies both to persons residing abroad with the consent of their country on valid passports and, more particularly, to those who have been granted political asylum.

The Right of Asylum

The right of asylum, enshrined in Article 14 of the Universal Declaration of Human Rights, confers an important right on the refugee from persecution. The Article provides that:

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

One can well imagine the serious implications of being compelled to take an irrevocable decision to leave one's country because of persecution in whatever form and because one fears for one's life and freedom. In such a situation to find, after a long, exhausting and sometimes dangerous journey to the frontiers of the country in which it is hoped to find asylum, that entry is refused is perhaps "the unkindest cut of all".

The refugee problem is an age-old one. Today the word "refugee" has been defined to mean a person who is outside his former home country because of fear of persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion and who cannot or will not avail himself of the protection afforded him, if any, by his country of origin. Dealing with the old and the modern approach to the refugee problem, Prince Sadruddin Aga Khan, the United Nations High Commissioner for Refugees, says¹:

History relates how particular groups fled in times of disturbances because their lives or their property were in danger, or they were not allowed to live according to their creed. They found asylum in other countries, very often receiving help from people who thought like them or belonged to the same religion. Such active generosity was sometimes viewed with considerable suspicion by the State from which the refugees had fled and denounced as an unfriendly act. Even in more recent times, help to refugees was the subject of much controversy. There has, however, been a definite change of heart in this respect. More and more, the refugee problem has come to be regarded as a matter of concern to the international community as a whole, calling for action of a purely humanitarian and non-political nature, which needs the support and co-operation of all States irrespective of their attitude towards the political or other causes that are at the root of the problem.

¹ Prince Sadruddin Aga Khan - Asylum - Article 14 of the Universal Declaration of Human Rights, Journal of the International Commission of Jurists, Vol. VIII, No. 2, Special Issue for International Year for Human Rights, Part I, pp. 27-28.

There is unhappily a growing tendency among States to refuse to accept the fact that political opponents have received asylum abroad, and to attempt to secure their return, if necessary by unlawful and forcible means. Examples of this practice are given in the next section. It is important to emphasise at this stage, however, that it is essential that the fact that asylum has been granted should be recognised not only by the State granting it and third-party States, but also by the State of which the refugee is or was a national. He must be able to live in his State of Asylum, and to travel to other States, free from the danger of being returned against his will to the State from which he has sought asylum.

Unlawful Interference with Freedom of Movement Abroad

Without the security that enables one to profit from it, freedom to travel abroad is nothing more than a declaration of good intention. The abduction or kidnapping of persons sojourning or travelling abroad constitutes a grave violation of the right to security of movement and residence outside one's country. The only procedure by which such persons can be lawfully removed or repatriated to their country of origin is provided by the Law of Extradition as recognised by the Rules of International Law.

It will be useful to refer to the following observations on abduction outside national territory in violation of the Law of Extradition and the Right of Asylum:

As intercourse between nations became more frequent, the principle of international solidarity gave birth to the law of extradition, which is the corollary of the right to asylum in a foreign country. Thus, a person who has fled to another country can be brought back to the jurisdiction of the country from which he has fled in various ways: first, legally by virtue of regular extradition proceedings; or illegally by irregular extradition proceedings, or, even more serious, by an abduction which may be effected by agents of the state which wants to try the person abducted, but also by agents of the state giving asylum, perhaps even by private individuals, or with their collaboration.¹

In recent years, such abductions have occurred with increasing frequency. They have involved both persons who have been granted asylum and persons who have left their country legally and are living or travelling abroad on valid passports. They have taken place both on the territory of foreign states and in the course of journeys. Somewhat different legal considerations arise according to whether the abduction took place on foreign territory or in a place having an international character.

(a) Abductions from foreign territory²

A recent case of abductions from the territory of a foreign state oc-

¹ Daniel Marchand "Abductions effected outside national territory", Journal of the International Commission of Jurists (Winter 1966), Vol. VII, No. 2.

² See ICJ Bulletin No. 32, December 1967.

curred in June 1967 when a number of South Korean nationals lawfully residing in the Federal Republic of Germany and France were forcibly removed to South Korea by agents of the South Korean Government. It is clear that in international law such action amounts to a violation of the territorial sovereignty of the State from which the abduction was effected. This fact was recognised by the South Korean Government, which formally apologised to the Governments of the Federal Republic of Germany and of France and gave an undertaking that nationals who had been forced to return to South Korea against their will would be allowed to leave the country. In spite of this assurance a number of those concerned were tried on charges of spying for North Korea and sentenced either to death or to terms of imprisonment.

It should be borne in mind that an abduction carried out on foreign territory constitutes a violation of two fundamental principles of international law; first, the abduction undermines the territorial sovereignty of the State on whose territory it is carried out and, second, it is contrary to one of the fundamental rights of the individual who has received asylum in the State whose sovereignty has been infringed, namely, the right to 'liberty and security of person' (Article 3 of the Universal Declaration of Human Rights).

As far as the first principle is concerned, the great jurist Vattel wrote, as early as 1773, in his work: The Law of Nations or the Principles of Natural Law Governing the Behaviour and Practice of States:

Not only is it unlawful to usurp another's territory, there is also an obligation to respect it and to forbear from any act infringing its sovereignty, for no Nation may assume any rights thereover. To enter another's territory under force of arms in order to pursue and abduct a wrong-doer is to commit a tort against that State.

A striking fact in connection with the second principle, which is illustrated by the case of the Koreans referred to above, is that the individuals involved, whose freedom of movement had been interfered with in a dramatic manner, had no right of redress. The great weakness of the traditional concept of international law, which recognises only states as subjects, is that it provides no means by which the individual whose rights have been infringed can obtain a remedy. The individual who is lawfully residing on the territory of a state of which he is not a national, whether he has left his own country in the ordinary way on a valid passport or whether he has been granted asylum, should, when his freedom of movement has been violated by his forcible return to his state of origin, be able to obtain reparation for the prejudice sustained: he should be restored to his previous condition of liberty, and he should be able to institute proceedings to this end himself and not be dependent upon action being taken by the State whose sovereignty was violated by his abduction.

(b) Abductions from ships and aeroplanes

There have recently been a whole series of abductions from aeroplanes in transit from one country to another. The most recent cases include the following:

On October 29, 1966, the members of the Guinean delegation to the Summit Conference of the Organisation of African Unity, headed by the Minister of Foreign Affairs, were arrested in Accra when the aeroplane in which they were travelling made a scheduled landing there. After considerable pressure had been brought to bear, the delegation was released on November 5, and able to attend the Meeting of the OAU, which had been delayed.

On October 31, 1966, an abduction took place during an emergency landing made necessary by a technical fault in the aeroplane (though the fact that there really was such a fault has been contested). This abduction was carried out in Prague from an aeroplane of the Soviet airline Aeroflot. The victim was Mr. V. J. Kazan, an American citizen of Czech origin, who had in 1963 been accused in Prague of high treason, espionage and attempted assassination. He was sentenced to eight years' imprisonment on February 1, 1967 by the Prague Municipal Court, but was immediately released and allowed to leave the country.

On June 27, 1967 the Guinean delegation to the United Nations General Assembly, which was on its way home from New York, was arrested in Abidjan where the aeroplane had been forced to land as a result of bad weather. The delegation included the Minister of Foreign Affairs and the Permanent Representative of Guinea to the United Nations. After numerous protests, a number of citizens of the Ivory Coast who had been in detention in Conakry were released and the Ivory Coast Government released all the Guinean nationals detained in the Ivory Coast, including the two Ministers.

On July 1, 1967, Mr. Moïse Tschombe, the former Prime Minister of the Congo, who had been condemned to death in his absence and was living in Spain, was flying in a private aircraft between two of the Balearic Islands when the pilot was compelled by threats of violence to change direction and land in Algeria. As soon as it became known that Mr. Tschombe was in Algeria, the Government of the Democratic Republic of the Congo requested his extradition, and an order to this effect was made by the Supreme Court of Algeria. It has not so far been carried out and Mr. Tschombe is still in detention in Algeria.

These repeated abductions raise the following question: Does a State have the right to seize a person on board an aircraft or a ship making a regular or emergency landing on its territory?

In relation to acts committed on board a ship or an aircraft, the first principle to be considered in deciding which State has jurisdiction over such acts is the law of the flag.

The relevant rules of international law are the same for ships and aircraft. For aircraft the relevant provisions are as follows: "Aircraft have the nationality of the State in which they are registered".¹ "The State in which an aircraft is registered has jurisdiction over offences and acts committed on board."²

¹ Article 17, Convention of Chicago relating to International Civil Aviation of December 7, 1944.

² Article 3, para. 1 of the Convention of Tokyo relating to offences and certain other acts committed on board aircraft of September 14, 1963.

Thus ships and aircraft are assimilated to the State whose flag they bear. Consequently, everyone on board the ship or aircraft, including foreigners, is subject to the law of the flag. An example of the consequences is to be found in the period of prohibition in the United States: from the moment any person boarded an American ship, even in a foreign port, he was subject to the prohibition laws and could not have any alcohol in his possession while on board.

However, when a ship or an aircraft is in a foreign port or airport, the law of the flag comes into competition with the law of the foreign State. As a general rule, the laws of the foreign State relating to police, security, health and customs apply. For example, when slave-dealing was still lawful in the United States, foreign ships transporting slaves which put into the port of an anti-slave State found that the law prohibiting slavery was applied and the slaves on board were freed.

However, there are certain exceptions to the principle that the law of the country concerned prevails over the law of the flag.

(i) Forced landings

Forced landings occur when a ship is compelled to put into a foreign port as a result of an act of God: the state of the sea, damage to the ship, mutiny or acts of violence on board, etc. In such a case, the ship and its passengers do not fall within the jurisdiction of the law of the foreign port. For example, during the French revolution a number of royalist exiles landed on the French coast as a result of a shipwreck. They were arrested but released and allowed to leave the country on the ground that it was contrary to the principles of the law of civilised nations to take advantage of a shipwreck to bring its victims to justice.

Similar principles apply to forced landings by aircraft as a result of atmospheric conditions, technical faults or acts of violence on board, etc. Thus, the Convention of Tokyo of September 14, 1963, provides that, when an aircraft has been forced to make an unscheduled landing as a result of acts or threats of violence of a passenger,

"Every State party on whose territory the aircraft lands shall allow the passengers and crew to continue their journey as soon as possible. It shall restore the aircraft and its cargo to those who have a right thereto."

Thus, it is clear that in the case of a forced landing the State on whose territory the landing has occurred cannot arrest any of the persons on board the ship or aircraft involved.

(ii) Regular landings

In the case of regular landings the law of the foreign State normally applies, as has already been stated. There is, however, one important restriction to this principle: the foreign State can only exercise its jurisdiction to the extent that it is directly interested in or affected by events

occurring on board, or when it appears to be in a better position than any other State to administer justice in the case in question. Thus, when events occurring on board involve exclusively persons travelling on the ship or aircraft, they remain within the jurisdiction of the State whose flag it flies.

This is expressly provided for, as far as aircraft are concerned, by the Tokyo Convention of September 1963.

There is one further rule which is generally respected under international law in those cases in which the State on whose territory the landing has been made claims jurisdiction.

When making an arrest the authorities usually request the presence of the consul of the country whose national is involved. This rule is incorporated in many consular conventions and provides valuable protection for the individuals concerned.

The most important limitation on the competence of the foreign State is found in the prohibition of action contrary to the rules of international law. This rule finds expression in two important decisions of the International Court of Justice: the Fisheries Case of December 18, 1951 and the Nottebohm Case of April 6, 1955, in which the Court held that an act of naturalisation which has the result of extending the jurisdiction of the naturalising State to the person naturalised - and the position resulting from an arrest is comparable - can only be invoked against a third State if the act, which is unilateral, conforms to the relevant principles of international law.

(c) Methods of redress

The rules of international law relative to cases of abduction have been worked out essentially with reference to abductions effected on foreign territory. Abductions from a ship or an aeroplane flying the flag of a foreign country are a recent phenomenon and no precise rules have yet been evolved to cover them.

This Conference provides a useful opportunity for the adoption of conclusions covering this important topic, which could form the basis of an international convention. Such a convention should not only lay down clearly the rules of international law relating to abductions, but make provision for an effective remedy for the individual who is the victim of such an abduction.

It must be strongly stated that the individual who has been irregularly returned to his country, whether from a foreign country or in the course of a journey, should be himself able to institute proceedings for the purpose of having his rights and liberty restored to him, even in cases in which the State whose sovereignty has been violated does not protest. It is obvious that the only minimum reparation in the matter is the release of the individual, which involves giving him the opportunity to return to the State in which he was resident, or towards which he was travelling at the time of his abduction. In appropriate cases, reparation should include compensation for damage or injury sustained. Such reparation could be granted either through the national tribunals of the State which has effected the abduction, or through appropriate international tribunals.

It can be argued forcibly that it is the duty of national jurisdictions to extend their protection to the individual who is brought before them in violation of the rules of international law. Thus, if a state which has unlawfully abducted a citizen from a foreign country brings him to trial before the national courts, those courts should refuse to try him on the ground that he has not been properly brought before them.

In cases where the individual's rights are not protected at the national level, he should be able to have recourse to an international tribunal such as the European Commission and Court of Human Rights. Such an international jurisdiction, not being subject to the pressures and influences which could be exerted on domestic courts, should, with due impartiality, be able to protect the freedom of the individual.

SOME SUGGESTED CONCLUSIONS

Scope and Content of the Right

1) Freedom of movement outside one's country may involve three elements:

- a) departure from one's country;
- b) entry into, travel within and exit from a foreign country; and
- c) return to one's country.

Somewhat different considerations apply to each of these elements. Nevertheless, if freedom of movement is to be enjoyed to the full, they should each receive the widest possible protection that is compatible with all legitimate interests involved.

2) It should be recognised by each State that its citizens have a right to leave their country, whether temporarily or permanently, and to visit without restriction by their State the foreign countries of their choice. This right should be protected by legislation, and the grounds on which it can be refused should be clearly defined. Such grounds should be limited to those which are necessary to protect national security, public order, public health or morals or the rights and freedoms of others. They may include grounds based on exchange control regulations where these are necessary to protect the economy of the country; failure to pay outstanding taxes; an outstanding criminal investigation or trial; an attempt to avoid military service.

A refusal of permission to leave one's country or to travel to a specific foreign country should be subject to an appeal to a Court of Law.

3) The right of the individual to return to the country of which he is a citizen should be recognized without limitation. At the most, a State should have power to detain a citizen returning to his country for such period as is necessary, (a) to establish his nationality if it is in doubt; or (b) for the protection of public health.

4) With some exceptions established by treaties, States do not permit foreigners to enter their country as of right. While it must be recognised that States must continue to control the entry of foreigners for the purpose of long-term or permanent residence or of employment, there seems to be no reason why foreigners should not be accorded a right to visit a State for a limited period as tourists, for business or professional purposes or for study. Such a right, if granted subject to clearly defined grounds on which it could be refused in specific cases, would not appear to infringe any vital interest of the State granting it.

5) The adoption of treaties under which citizens of the States parties thereto are accorded full freedom of movement within the territories of the contracting States should be encouraged.

6) The right of a person to leave a foreign country should be guaranteed subject to two limitations only. He may be refused permission to leave (a) for such period as is necessary for reasons of public health; (b) if there are reasonable grounds for suspecting that he has committed a criminal offence in the foreign country concerned, until he has been tried and acquitted or found guilty and served any sentence of imprisonment or paid any fine imposed on him.

Passports and Visas

7) Since a passport is generally necessary for travel abroad, the right of the individual to a passport valid for travel abroad generally should be recognised. The grounds on which a passport may be refused or issued subject to limitations should be clearly defined by law in terms of Conclusion 2 above.

8) Refugees and stateless persons should have a right to a travel document acceptable to States in lieu of a passport. Insofar as current international instruments do not make comprehensive provision for the granting of universally acceptable travel documents to such persons, they should be completed by further international agreements, the full and effective application of which should be subject to the supervision of the United Nations.

9) The conclusion of treaties under which citizens of the States parties thereto may travel freely between the territories of those States without a passport should be encouraged.

10) States should be encouraged to examine their visa requirements with a view to their eventual abolition as in most, if not all, cases it does not appear that the visa serves any essential purpose. While the abolition of visa requirements has usually been achieved by treaties between the States concerned, the unilateral abolition of visa requirements undertaken by some States is a simpler procedure and is to be recommended.

Security of Movement and Residence Abroad

11) It is vital that the freedom of movement of those travelling outside their country should be secure and should not be unlawfully interfered with either by their own State or by the State in which they are present.

12) This principle applies both to those who are abroad with the consent of their country and to those who have received political asylum. In the case of the latter, the fact that asylum has been granted should be recognised and accepted by the State of which the refugee is or was a national. He must be able to live and travel free from the danger of being returned against his will to the State from which he has sought asylum.

13) The abduction of persons from the territory of a foreign State is a violation of territorial sovereignty and contrary to the rules of international law. Abductions of persons from foreign ships or aircraft by the authorities of a State at whose port or airport a landing has been made of persons not intending to terminate their journey at that stage should, insofar as is not already the case, also be condemned and internationally outlawed.

14) The individual whose freedom of movement has been infringed by his unlawful abduction from foreign territory or from a ship or aircraft should enjoy the right to have recourse to the Courts of the State which abducted him to secure his release and return to the State from which he was abducted, and to obtain compensation for any loss or damage sustained as a result of his unlawful abduction. Where he does not have such recourse, he should be able to have recourse to an international tribunal for the protection of his rights.

15) The principles embodied in this section of the Conclusions could conveniently be incorporated in an international convention.

PROPOSAL FOR THE SETTING UP OF A
COUNCIL OF ASIA AND THE PACIFIC

By

Purshottam Trikamdas^{*}

At the Ceylon Colloquium, which was convened by the Ceylon Section of the International Commission of Jurists in January 1966, a Resolution in the form of a proposal was accepted. The Resolution reads:

- "1. On the Asian Continent and in the Pacific Region there are many countries which have achieved their independence in recent years. These and other countries in the area have numerous problems of common interest and urgency relating to fundamental freedoms and social, economic and cultural matters.
2. This Conference considers that the sharing of experience by these countries would be of great value to them all.
3. This Conference therefore considers that machinery for debate, consultation and co-ordinated action at Parliamentary and Governmental levels is necessary for implementing the common aspirations and needs of these countries, resolving their problems, and promoting peace based upon social justice and international co-operation.
4. This Conference therefore favours the establishment of an organization representing Parliaments and Governments for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social development based on the Rule of Law and social justice.
5. Participation in this organisation shall not affect the collaboration of its Members in the work of the United Nations and of other international organisations or unions to which they are parties.
6. Matters relating to National Defence shall not fall within the scope of the Council of Asia and the Pacific.
7. In this connection it would be relevant to have regard to the manner in which similar problems in Europe have been dealt with by the Statute and the working of the Council of Europe."

While it must be recognised that in the conditions prevailing in Asia and the Pacific region it may not be possible to accept the Council of Europe

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as a blue-print, it can, generally speaking, be considered as a model because its work has very great relevance to any proposal to set up a Council of Asia and the Pacific.

It is true that there are numerous international and regional organisations in which many of the Asian and Pacific countries participate. These, however, meet once in a while and by and large disperse after discussions on certain specific subjects. Further, such conferences have the dead weight of officials confined to their respective briefs. Such conferences, from their very nature and composition, are not capable of breaking fresh ground, nor from such barren soil does one expect the sprouting of any original ideas. A Council of Asia and the Pacific would be entirely different from these, because it would be an organ of permanent discussion and co-operation, representative of Parliaments and Governments, which can achieve a great deal more than occasional meetings on specific questions. Once the question of national defence is eliminated from its purview, non-aligned countries would not find it difficult to join and participate in the work of such an organization along with the aligned. An organisation of that nature should be able within a short space of time to have to its credit many achievements in the field of mutual co-operation. The Asian and Pacific Council, unlike the Council of Europe, would not have the aim of ultimate political unity, but this would not in any way detract from its value and it may be stated that a proposal to create such an organisation would be worthy of consideration by all countries that accept a democratic way of life.

There are many regional organisations in the world which have schemes of co-operation on paper but where the representation is confined to Governments. Further, they are more concerned with political and military questions than with questions of economic and social co-operation. The Arab League and the Organisation of African Unity are two such organisations. If these organisations have not made the headway they should have made in economic and social co-operation, the reasons would be found in their heterogeneous character and the absence of any representation of the people which can only be possible when representative government exists.

Against this background, let us now consider in detail the proposal put forward at the Ceylon Colloquium. Paragraph 1 states that in the newly independent countries numerous problems of common interest and urgency relating to fundamental freedoms and social, economic and cultural matters exist. This paragraph and the second paragraph have got to be considered together.

There are the most important problems of political freedom, economic development, education, health, housing and similar other social problems. There are also the problems of co-operation in the intellectual and social fields. Then again there is the question of exchange of information in these fields which would be of common interest to all.

The economic problems would include agricultural and industrial development of these areas and would embrace the bigger questions like currency reform and common market. It is well known that many of these countries have debased currencies, often due to the mis-management or the grandiose programmes of development undertaken without the resources needed for such programmes. Constant exchange of information on these subjects as well as of skills

would undoubtedly be to the benefit of all.

It is almost axiomatic that a country which loses political freedom would be subject to the vagaries of the coterie in command.

On December 10, 1948, the UN Assembly passed the Universal Declaration of Human Rights. It may be noted that this Declaration, without anything more, would not be binding on the member nations and, although the UN has been working on the task of putting its provisions into the form of conventions, the completion of such a task will take a long time, in view of the heterogeneous character of the UN itself. As matters stand, the Universal Declaration is but a hope, an aspiration and a norm to which all civilised countries should adhere. An organisation, as envisaged by the Colombo Resolution, could undertake to implement the basic human freedoms by a convention agreed to by its constituent members.

In Europe, the Council of Europe, which has a magnificent record, undertook soon after its organisation the task of formulating a convention of Human Rights and this convention became effective in 1950. This was a great step forward even in Europe where most of the constituent countries had a democratic basis. This convention gave to an individual citizen of any of the member countries the right to complain to the Commission of Human Rights of infringement of his basic human rights. Every year hundreds of such complaints are entertained by this Commission and, if necessary, the question goes to the European Court of Human Rights, organised by the Council of Europe and the decisions of this Court would be binding on the member countries. It may be noted here that, to some extent, each of the member countries has agreed, by this convention, to surrender part of its sovereignty by accepting the decisions of a supra-national organisation. In a world, which is compelled to become more interdependent in the face of modern development and technical advancement, it is not unnatural that in order to achieve a common goal the ideas of national sovereignty will have to be substantially modified by common consent and for a common endeavour.

Apart from the Convention of Human Rights, the Council has to its credit co-operation in many social, economic and cultural fields. The Council has also been responsible for taking the initiative in the numerous organisations of co-operation which exist in Europe today, notably the Coal and Steel organisations and the European Common Market.

The question then arises as to what form such an organisation should take in order to be effective. Paragraphs 3 and 4 deal with this subject.

It will be noticed that paragraph 3 of the proposal stresses consultation and co-ordinated action at parliamentary and governmental levels. The proposal also mentions that economic and social development based on Rule of Law and social justice would be also the basis of such an organisation.

In the organisation of the Council of Asia and the Pacific, paragraphs 3 and 4 must be borne in mind. It is also to be hoped that the countries in our part of the world will pay a little more attention to economic and social co-operation than purely political summits. Such co-operation, it is neces-

sary to repeat, can only be meaningful if it is undertaken by countries who, generally speaking, accept democracy and people's participation in such an organisation.

Here again it is possible to take the Council of Europe as a model. As it is constituted, each member country sends representatives elected by its Parliament. These representatives are not delegates for such country and carry no mandate with them. In the meetings of the Council, they do not sit in blocks and they freely put forward their views while considering the topics which they are discussing and their recommendations are forwarded to the Council of Ministers, which consists of the Foreign Ministers of those countries, and the Council of Ministers, when they take any decision, recommend to the various countries that these decisions be implemented.

It is necessary to remember that the organisation, visualised by the Colombo Resolution, can only bear fruitful results if the members have basically a common social and political objective. The Council of Asia and the Pacific would, therefore, not be a conglomeration of all the countries in the region, not a gathering of heterogeneous ideas and ideologies, not a Bandung. The members of such organisation would have to subscribe to the Rule of Law and their representatives will be elected by their Parliaments so that it does not become another purely governmental organisation. The representation by Parliaments ensures that the people in member countries are effectively represented and ultimately it is their recommendations which would be carried into effect.

Paragraphs 5 and 6 may be taken together. Paragraph 5 makes it clear that the member countries would be free to collaborate in the work of the United Nations and other organisations or unions to which they are parties.

Paragraph 6 is very important. It states:

"Matters relating to National Defence shall not fall within the scope of the Council of Asia and the Pacific."

When the Council of Europe was being organised, there were in Europe countries which belonged to NATO and others like Ireland and Sweden which were neutral. It was the wisdom of the organisers to invite the two neutral countries to participate in the work of organising the Council of Europe, which both of them joined because matters of national defence were kept out of the scope of the Council of Europe. It may be noted that later Switzerland - which carries its neutrality to the extent of not joining the UN - and Austria also joined this organisation.

In our region also, there are countries that belong to various defence organisations like CENTO and SEATO and others with ad-hoc defence arrangements. A clause of the nature mentioned in paragraph 6 would enable the neutrals and others who are parties to defence organisations to come together in a common endeavour and for a purpose common to all. It may also happen that with an organisation of this nature, the smaller countries in the region would not feel isolated and might be enabled to disencumber themselves after some time from these defence arrangements. Even if such a thing does not come to pass,

mutual co-operation in many fields of common interest would be a positive gain. In this region, it is sad to say, the various countries know little about each other although they might know a little more about Europe and the United States.

In recent months, two organisations for mutual co-operation have come into existence in South East Asia and the Pacific of which note must be taken. These are: (1) Asian and Pacific Council (ASPAC) consisting of Japan, South Korea, Taiwan, The Philippines, South Vietnam, Thailand and Malaysia; and (2) The Association of South-East Asian Nations (ASEAN) composed of Thailand, The Philippines, Malaysia, Singapore and Indonesia. This is a revival of the Association of South-East Asia (ASA), which was formed as early as 1960. The membership at that time was Malaya, Thailand and the Philippines. However, this Association remained practically moribund because, before it could function, the Sokarno's confrontation policy had begun.

It is very heartening to learn that these organisations have come into existence. It will be noticed that some of the countries are members of both and it may be desirable if the two organisations join together into a single organisation, leaving it open to Australia and New Zealand to join at a later stage.

Attention has been drawn to the Council of Europe, which has in the past few years chalked out a magnificent path in international co-operation. It will therefore be useful to consider briefly the Council of Europe and its work.

THE COUNCIL OF EUROPE

It is in this context that an examination of the origin, structure and the work of the Council of Europe becomes relevant.

The Council of Europe has from its inception become an inspirer of many ideas of co-operation. It acts also as a clearing house between the many European international organisations.

The two Wars and the expansion of aggressive and totalitarian communism in Europe gave rise to a feeling that those countries in Europe which accepted democracy should be brought together in an organisation to deal with common problems with the ultimate objective of political unity. However, this could not be achieved in a day with each country jealous of its sovereignty.

After the establishment of the United Nations, many in Europe had the feeling that because of the heterogeneous character of the organisation itself, it was not possible to implement with reasonable speed many of the proposals of the United Nations and that regional organisations may be more suited for this purpose. For example, the Universal Declaration of Human Rights of 1948 was one of those documents, the implementation of which would be the very foundation of a society based on the Rule of Law. Left to the United Nations, a covenant based on the Declaration would possibly take many many years before being generally subscribed to by its member nations.

In view of this, many leaders of non-communist Europe called for the establishment of a Council of Europe.

The idea of such an organisation had, in fact, been broadcast by Winston Churchill as early as 1943.

With this end in view, the signatories of the Brussels Treaty 1948 (Belgium, France, Luxembourg, the Netherlands and the United Kingdom) convened a conference to which Denmark, Ireland, Italy, Norway and Sweden were invited. This conference, in which, it should be noted, two neutral countries like Ireland and Sweden participated, drafted the statute of the proposed Council of Europe and they signed it on May 5, 1949 at London. All the participants became signatories to the statute and the Council of Europe came into existence. The signatories were conscious that such a body, in order to be effective, must be composed of countries which were like-minded and accepted that individual freedom, political freedom and Rule of Law were the principles which form the basis of all genuine democracy, as stated in the Preamble.

Aim of the Council

The aim of the Council, as set out in Article 1, is to achieve greater unity between its members for the purpose of realising the ideals and principles, which are their common heritage, and facilitating their economic and social progress. The same Article made it clear that the said aim was to be achieved by discussion on questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms. The same Article made it clear that the fact of its membership did not affect the collaboration by the members in the work of United Nations and other international organisations, to which they may be parties.

Realising that any organisation, for the achievement of the aims already mentioned, had to keep itself clear of questions of national defence, the statute provided that matters relating to national defence did not fall within the scope of the Council. This made it possible for Ireland and Sweden and later on Austria, Cyprus and Switzerland (all believing in neutrality and non-alignment) to become members of the Council.

Membership

Article 3 specifically provided that every member must accept the principle of the Rule of Law and the enjoyment by all persons within its jurisdiction of Human Rights and Fundamental Freedoms.

Article 4 states that the existing members of the Council would invite any other European state, which is considered able and willing, to fulfil the requirements stated above, to become a member of the Council.

From its original membership of 10, it has now 18 members.

Structure

The structure of the Council consists of the Committee of Ministers and a Consultative Assembly. The Committee of Ministers consists of the Foreign Ministers of the member states. So far as the Consultative Assembly is concerned, the structure is of an extremely revolutionary character. The Assembly consists of representatives of each member state, elected by its Parliament or appointed in such manner as that Parliament shall decide. The representation has been fixed bearing in mind the population of each member state, but not on a proportional basis. The lowest number of seats, to which a member state is entitled, is 3 and the highest number of seats is 18. For example, Iceland with its population of 180,000 gets 3 members and the German Federal Republic with 54 million gets 18 members. Although the Consultative Assembly consists of representatives of various member states, almost from its inception, in actual practice the members do not sit in blocks in the Assembly and matters of common interest, therefore, are easier to discuss on their merits. Each member expresses only his personal views and not those of his country's government and everybody expresses freely what he thinks on any question, the member governments having undertaken to respect the representatives' freedom of speech and not to make them accountable for any statements made in the Council. Thus, each member is a representative of his country but not a delegate. The sessions of the Assembly are held publicly and the Assembly expresses itself freely. One of the important characteristics of the Assembly is majority voting without any veto. It is also to be noted that there is no single executive. However, single executives have been created as a result of some of the Conventions, notable among which is the European Convention of Human Rights. The Assembly meets at least once a year and the average length of the sessions has been about 30 days. The Council of Ministers meets more often.

The Assembly is free to make any recommendations to the Committee of Ministers and the Consultative Assembly. According to the statute, the Committee of Ministers, on the recommendations of the Consultative Assembly or on its own initiative, considers the adoption by governments of a common policy with regard to particular matters. Conventions are drawn up and on ratification come into force.

This process short-circuits the more cumbersome method of ad hoc and sporadic conference for the purpose of arriving at an agreement on questions of common interest. It is because the process is continuous and permanent that in the short time since its inception the Council has been able to achieve so much.

There is a permanent secretariat, which is at the seat of the Council at Strasbourg.

In 1951, by an amendment of the statute, a Joint Committee representing the Assembly and the Council of Ministers was provided for. This Joint Committee is expected to perform, more particularly, the following functions:

- (a) To examine the problems which are common to those organs;

- (b) to draw the attention of those two organs to questions which appear to be of particular interest to the Council of Europe;
- (c) to make proposals for the draft Agenda of the sessions of the Committee of Ministers and of the Consultative Assembly;
- (d) to examine and promote means of giving practical effect to the recommendations adopted by one or other of these two organs.

The Joint Committee is composed of 12 members, five representing the Committee of Ministers and seven representing the Consultative Assembly. The number of members of this Committee may be increased by an agreement between the Committee of Ministers and the Assembly. The conclusions of the Joint Committee are reached by consensus and not by voting.

Finance

The finance for the work of the Council is raised from members, in proportion to their reputation.

Work of the Council

During the short time of its existence, what may be described as the legislative work of the Council has produced more than 50 Conventions, which are akin to common laws for these various countries. These Conventions are in the field of Human Rights, Social Charter, Social Questions, Public Health, Cultural Questions, Intellectual Property, Legal Questions and Settlement of Disputes and Travel in Europe.

One of the first tasks undertaken was a draft Convention for the Protection of Human Rights and Fundamental Freedoms and by November 1950, the Convention of Human Rights was opened for signature and it came into force on 3rd September 1953.

Since July 1955, the right of an individual to bring a case against a State including his own has been in force in those countries which have subscribed to that provision. On January 21, 1959, the European Court of Human Rights was elected. The Court of Human Rights consists of as many Judges as there are members of the Council. These Judges are elected by the Consultative Assembly from among the persons nominated by the members of the Council of Europe. Each member is entitled to nominate 3 candidates, of whom two at least should be its nationals.

The European Convention of Human Rights

This Convention has taken from the list of Human Rights, enumerated in the Universal Declaration, certain rights which may briefly be described as fundamental rights of the individual, such as:-

- (1) right to life;
- (2) right not to be subjected to torture or to inhuman or degrading treatment or punishment;
- (3) right not to be held in slavery, or be compelled to perform forced labour;
- (4) liberty and security of person;
- (5) fair and public hearing by an impartial tribunal in any civil or criminal trial;
- (6) provision against retrospective creation of criminal offences;
- (7) protection of private and family life, home and correspondence;
- (8) freedom of thought, conscience and religion;
- (9) freedom of expression;
- (10) freedom of peaceful assembly;
- (11) right of men and women of marriageable age to marry and to found a family;
- (12) right to a remedy in the national courts against any violation irrespective of the fact that the violation has been committed by public officials;
- (13) prohibition of discrimination on the ground of sex, race, colour, language, religion, political or other affiliation, national or social origin, association with national minority, property, birth or other status.

By a Protocol dated March 20, 1952, among other rights, it is provided that no person shall be denied the right to education and parties have undertaken to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

By this Convention was set up the European Commission of Human Rights and the European Court of Human Rights. The Convention provided, among other things, the right of the individual to petition to the Commission for alleged violations of the rights guaranteed by this Convention. This again is a very extraordinary and revolutionary measure because the governments have, to some extent, surrendered their sovereignty in favour of an International Commission and an International Court, whose decisions would be binding on those members who have agreed to accept the jurisdiction of the Court and the right of individual petition.

Today 11 countries have accepted the right of individual petition under Article 25 of the Convention of Human Rights and 10 countries have accepted the compulsory jurisdiction under Article 46 concerning the interpretation and application of the Convention of Human Rights.

By the end of 1965, more than 2,698 petitions were received. These petitions are looked into by the Commission of Human Rights and thereafter, if the Commission so decides, some of these are referred to the Council of Ministers to try to bring about a settlement. If this fails, the matter is referred to the Court. So far, two cases have been referred to the Court. The importance of this Convention can be judged by the fact that one of the signatories had to amend its Constitution and three others their Criminal Codes to bring them in line with the provisions of the Convention.

The process of guaranteeing social and economic rights was later undertaken and it resulted in the European Social Charter, which came into force on February 26, 1965. The rights in the Charter are akin to those mentioned in the Chapter on Directive Principles in the Indian Constitution.

It may be mentioned that, encouraged by the European Convention of Human Rights, the Central American Draft Convention and the Inter-American Draft Convention have been drawn up and are under consideration by the relevant countries.

Travel in Europe

So far as the member countries are concerned, by the elimination of visas and simplification of the process of obtaining travel documents valid throughout the member countries, the freedom of movement has been, to a large extent, secured.

Refugees

The problem of the settlement of refugees in Europe has been successfully tackled.

Education

In the educational field, a Convention on the equivalence of diplomas leading to admission to universities, of periods of university study and of academic recognition of university qualifications has also been signed.

Law

In the legal field, Conventions have also been signed regarding extradition, legal assistance, commerce and arbitration. Work has also been done regarding the unification of the Law of Patents.

Medicine

Work also is in progress in connection with a common pharmacopea for the member countries.

Other Matters

There are numerous other subjects on which Conventions have been prepared. These and the others already referred to have, in effect, created a European Community of Law. All this has been made possible because the Council is able to legislate without reference to governments and Parliaments.

There are numerous organisations in Europe which have been built up for co-operation in several fields like the European Coal and Steel Community, the European Economic Community and others. Many of these organisations originated in the Council of Europe and, although they are autonomous, they work in close co-operation with the Council of Europe. The Council also works in close co-operation with larger international organisations like the United Nations and its permanent agencies. It may be fairly said that, while the Council of Europe is primarily concerned with work among its members, it is by no means a parochial or an exclusive organisation working in the closed circle of its members.

ASIA AND PACIFIC REGION

The question then arises whether there is a possibility of creating a similar organisation for Asia and the Pacific. It is true that the members of the Council of Europe have territories which are contiguous to each other and in Asia and the Pacific the countries are far-flung. Nevertheless, it may be worthwhile to take into serious consideration the question of close co-operation in numerous matters of common interest to the Asian and Pacific countries. It is necessary to point out again that such co-operation can only be possible between like-minded countries, countries accepting the common ideals of the Rule of Law and Fundamental Human Rights, which alone are capable of creating a community of the free and the equal dedicated to the pursuit of common aims in cultural, economic and social matters.