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THE INTERNATIONAL COURT AND SOUTH WEST AFRICA

THE IMPLICATIONS OF THE JUDGMENT*

by

ROSALYN HIGGINS **

The recent international litigation over South West Africa, and the judgment which the International Court of Justice eventually handed down on July 18, 1966, have both attracted much public interest to the Court and excited much comment from laymen no less than lawyers.

There can be little doubt that the judgment will be of great significance so far as both international law and international politics are concerned. Law and politics are here so closely interwoven that to understand the Judgment — and to try to assess its consequences — requires first a brief résumé of the events leading to the litigation.

I. BACKGROUND

South West Africa, a former German colony, was placed under mandate at the end of the First World War. Article 22 of the League of Nations Covenant laid down the Mandate system, under which ex-enemy territories would be governed by individual states, who in turn were to be accountable to the League. The peoples in these ex-enemy territories who were 'not yet able to stand by themselves under the strenuous conditions of the modern world' were to be governed for their own 'well-being and development' and as 'a sacred trust for civilization' (Article 22(1)). South West Africa was classified as a 'C' Group Mandate — that is to say, one which was regarded as appropriate to be administered as an integral portion of the Mandatory's territory; and it was allotted to his Britannic Majesty, for and on behalf of South Africa. Under Article 2 of the Mandate, South Africa was required to 'promote to the utmost the material and moral well-being and social progress of the inhabitants';

* This article is an updated version of an article which originally appeared in *International Affairs*, October 1966.

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and under Article 6 agreed to submit reports annually to the League Council.

When the League died, the United Nations established a system which was comparable in many respects — the trusteeship system. Article 77 of the UN Charter specified that the trusteeship system

‘shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: (a) territories now held under mandate...’

South Africa was the only Mandatory not to place her territory under trusteeship, and after 1949 ceased to send any reports to the UN. She denied any legal obligation to submit to the supervision of the UN, declaring that the Mandate, and all the duties incurred thereunder, had lapsed with the dissolution of the League. Alongside the political measures which the UN initiated to break out of this *impasse*, the General Assembly asked the International Court a series of legal questions, to which the Court gave its replies in three Advisory Opinions.

In 1950, the Court advised that South West Africa was still a mandated territory; it rejected South Africa’s contention that the Mandate had lapsed with the demise of the League. The Court emphasised that the Mandate was more than a mere contract between parties — it was an ‘international institution with an international object — a sacred trust of civilization’¹ — and still survived. The Court also observed that if the Mandate had lapsed, so would any rights which South Africa had in the territory. As a Mandatory, South Africa was, the Court advised, under a legal obligation to submit to international supervision and to provide reports. The General Assembly was legally qualified to exercise the supervisory functions concerning the Mandate.

At the same time, the Court indicated that South Africa was *not* obliged to place South West Africa under the new trusteeship system of the Charter; though South Africa could not legally deny the continued existence of the Mandate and her own obligations thereunder, she was entitled to insist upon the retention of the status of South West Africa as a mandated territory rather than as a UN trusteeship territory.

The Assembly sought to fulfil its supervisory role as best it could, in the absence of annual reports from South Africa and in face of a refusal to give effect to the Court’s Advisory Opinion.² South Africa contended that any decision which the General Assembly purported to reach on oral and written petitions from South West

¹ ICJ Reports, *Status of South West Africa*, 1950, p. 132.

² Advisory Opinions, though authoritative, are not strictly binding, whereas Judgments of the Court are: See below.

Africa were invalid, since they had been taken by a two-thirds majority. South Africa pointed out that the League Council, when it had supervised the Mandate, required unanimity. The Court confirmed the propriety of the Assembly's action in an Advisory Opinion given in 1955.³

The very next year South West Africa was again before the Court, which was now asked whether the Assembly's subcommittee on South West Africa (established in 1953) was entitled to grant hearings to petitioners. This issue turned on whether the granting of oral hearings — when the League Council had only made use of written petitions — was a new and unjustified degree of supervision by the United Nations. The Court once more found that the Assembly's procedure was justified; although it was correct that the UN General Assembly should not seek to extend its supervisory powers beyond those of the League of Nations, nonetheless the League Council could have decided to receive oral petitions if it had so desired; and thus this authority was available to the Assembly.⁴ From 1956 to 1960 the question of the Mandate was dealt with largely in the General Assembly of the United Nations, but, in spite of a plethora of committees assigned to examine the question, little progress was made. By the end of that decade, with many new African states now members of the UN, a new idea took root — namely, to explore the possibilities which contentious litigation offered in respect of South West Africa.

II. CONTENTIOUS PROCEEDINGS, 1960-1966

A judgment of the Court, given in respect of particular litigation, is binding upon the parties. Advisory Opinions of the Court, given in response to requests by UN organs or agencies, are not.

This situation, together with the fact that procedures for enforcing a judgment of the Court (but not an Advisory Opinion) exist in the Charter, made the African states eager to engage in litigation over South West Africa.

Article 7 of the Mandate had provided that

'...if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice'.

Ethiopia and Liberia, both former Members of the League, decided to institute proceedings, and they claimed that the Inter-

³ *ICJ Reports, SW Africa Voting Procedure, 1955.*

⁴ *ICJ Reports, Hearing of Oral Petitions on SW Africa, 1956.*

national Court was the appropriate forum, since Article 37 of its Statute states:

'Whenever a treaty or convention in force provides for reference of a matter to ... the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.'

The applicants asked the Court to confirm that South West Africa was a territory under Mandate, and to find that the Mandate was a treaty within the meaning of Article 37 of the Court's statute; that South Africa retained the obligations under the Mandate and under Article 22 of the League; and that the UN was entitled to exercise the supervisory functions of the League in relation to the mandated territory. In addition, the Court was invited to go beyond its Advisory Opinions, and to find that South Africa had violated its obligations under the Mandate through, *inter alia*, introducing *apartheid*, establishing military bases in South West Africa, and refusing to submit reports and to transmit petitions.

South Africa denied that the Court had jurisdiction to examine these claims. She argued that the Mandate was not a 'treaty or convention in force' (as required by Article 37 of the Statute of the Court), having died with the League. The Union Government also contended that neither Ethiopia nor Liberia was 'another Member of the League of Nations' (as required by Article 7 of the Mandate); and that no 'dispute' existed on which jurisdiction under that Article could be founded, because no material interests of Ethiopia or Liberia or of their nationals were involved. Finally, South Africa denied that the alleged dispute was one which 'cannot be settled by negotiation' within the meaning of Article 7 of the Mandate.

Given these objections, the International Court decided that a preliminary judgment concerning its jurisdiction was needed, to see if it had the authority to examine the substantive claims made by the Applicants. On December 21, 1962, the Court found — by the narrowest possible majority, eight votes to seven — that it had jurisdiction to proceed to an examination of the merits of the case. The Court declared that the Mandate was indeed an international agreement having the character of a treaty. This treaty established an 'international' régime which could not be said to have lapsed with the dissolution of the League. The Court said that the Clause (Article 7) of the Mandate which related to judicial recourse in the event of a dispute was an essential component of the administration of 'a sacred trust of civilization', and that it also survived; and that Ethiopia and Liberia could each be termed 'another Member of the League of Nations', within the meaning of the Article. Further the Court rejected South Africa's argument that, in the absence of any special or material interest in South West Africa by Ethiopia and

Liberia, no 'dispute' could be said to exist. The Court found that a 'dispute' existed nonetheless, and that the deadlock which had been reached warranted the deduction that this dispute could not be settled by negotiation.⁵

Having rejected all of South Africa's objections to its jurisdiction, the path was now clear for the Court to proceed to examine the substantive merits of the case. And this it did, between 1962 and 1966 in written and oral proceedings of unprecedented volume and complexity.

The judgment which the Court eventually handed down on July 18, 1966, came as a great surprise to the waiting world, because it did not in fact provide any answers to the substantive issues raised by the parties. Instead, the Court declared (by the President's casting vote, seven votes to seven) that it had first decided to deal with an 'antecedent' question: namely, whether Ethiopia and Liberia had any 'legal interest' in the subject-matter of their claim. The Court said that unless this could be answered in the affirmative, Ethiopia and Liberia would not be entitled to a Judgment from the Court. The Court then proceeded to find that those clauses of the Mandate which referred to the 'conduct' or carrying out of the duties of the Mandatory, did *not* give a right to *all* League members to have recourse to the Court: that in respect of these 'conduct' provisions they first had to show some special, national interest before they were entitled to a pronouncement from the Court. And the Court found that neither Ethiopia nor Liberia had such 'special' interests. The Court thus declined to adjudicate, one way or the other, on the merits of the case.

How did this result come about? Is the argument unanswerable at law? And what are the likely repercussions? It is to these questions that the rest of this article is addressed.

III. THE PROBLEMS PRESENTED BY THE JUDGMENT

The Court's judgment of July — and the separate and dissenting opinions attached thereto — lay before us legal considerations of the utmost fascination. Both because of the professional complexity of the points involved, and because of the sheer volume of the judgment (it runs to some 505 pages), it is obviously inappropriate to examine them in any detail here.

Nevertheless, while for lawyers there is in the decision a wealth of jurisprudence that will have to be closely studied, three or four particular questions emerge which, while essentially legal in nature,

⁵ *ICJ Reports, Ethiopia v. South Africa; Liberia v. South Africa, Preliminary Objections 1962.*

raise policy considerations of fundamental importance and thus merit further comment here.

A. How does it come about at this stage that the Court can decide — after a judgment in 1962 on the preliminary issues, and after four years' litigation on the substantive merits of the dispute — that it must decline to pronounce at all on the Applicants' claims?

There are several closely related points here. The first is to ask whether, in a case on the merits of the dispute, the Court can base its Judgment on the Applicants' legal standing, rather than on the rights and wrongs of their legal arguments. In the present stage of international law, the competence of the International Court is only a limited one, and a reluctant litigant — that is to say, a Respondent to a legal claim which the Applicant wishes to place before the Court for adjudication — may seek to show that the Court's competence is inadequate in this particular regard. The Court will hear arguments from both the parties on this matter, and will then pronounce on these preliminary objections raised by the Respondent. This is, of course, exactly what happened in the 1962 Judgment of the Court in which it found, by eight votes to seven, that it had jurisdiction to proceed to an adjudication of the merits of this dispute over South West Africa.

It must be explained, however, that it is not legally necessary for there to be a rigid separation in time between consideration of the jurisdiction of the Court and consideration of the merits of the arguments. The Court may, after a hearing on a preliminary point, either accept the Respondent's ⁶ arguments (in which case the Applicant's case will be dismissed, and he will not be entitled to proceed to the next phase of the litigation, to argue the merits of the dispute); or reject the Respondent's arguments (in which case the Applicant will be entitled so to proceed). But a third alternative is available to the Court, whereby it may decide (under Article 62(5) of the Rules of Court) to attach all of the preliminary objections, or such preliminary objections as it chooses, to the subsequent case on the merits of the dispute. The major reason for this is, quite simply, because the arguments on a particular preliminary jurisdictional point may be very similar to those which would be raised on the

⁶ In actual fact, when a self-contained case takes place on preliminary objections which have been raised, the State which raises the objections (and who would be the Respondent in any subsequent case on the merits) appears now as the Applicant. But, for the sake of clarity, I have used the term 'Applicant' and 'Respondent' throughout in reference to the same parties, i.e. in the context of the South West African case, the Applicants are taken to mean Ethiopia and Liberia, and the Respondent South Africa.

merits of the case; and thus it is convenient and economical for the Court to look at them together. The Court has availed itself on many occasions of this right to join preliminary objections to its examination of the merits.⁷

The logical outcome of this is that it is possible, after extended litigation on the merits of a dispute, for the Court to decide the case against the Applicant on the grounds of what originally appeared as a preliminary objection. The instinctive reaction of many laymen is to assume that this is a scandalous waste of time and resources, and yet another example of the law as an ass. But it has to be remembered that the attachment of a preliminary objection to the merits of the case may in fact have prevented a wasteful repetition of the arguments in both phases of the case. Thus, in so far as criticism of the Judgment of July 1966 rests simply on the fact that the Court's grounds for this decision, after long litigation on matters of substance, appeared to rest on preliminary or jurisdictional matters, the criticism rather misses the point.

The really relevant point, in the view of this writer, is the Court's reliance on such points, at the end of a long case on the merits, when it had *given no indication at all* to the parties, at the end of the preliminary case that it proposed to carry certain points forward to be attached to the merits. Not only is there no precedent for this, but the failure to give notice that certain preliminary points will be attached to the subsequent case on the merits effectively removes from the Applicant the option to withdraw at that stage, if he believes that the risks are too great to proceed to the merits. In the case of poor nations, facing the cost of protracted litigation, this is an option which should certainly be safeguarded. Moreover, a failure to indicate that certain preliminary points remain to be examined at the same time as the merits, makes it exceedingly difficult for counsel to direct their pleadings to all the relevant points.

Ethiopia and Liberia had every reason to believe that all questions relating to their right to obtain a judgment had already been settled in 1962. The Court has now classified the grounds on which it declined to pronounce on the merits of the case as a question 'that appertained to the merits of this case but which had an antecedent character'. It further said that 'despite the antecedent character of this question, the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved.'⁸ The question remains, however — why were the parties given no warning in 1962 that an 'antecedent question' remained to be answered, and why did the Court proceed to assume,

⁷ See, for example, the *Barcelona Traction Case* (preliminary objections) 1964, p. 43; *Rights of Passage Case* (preliminary objections) 1957, pp. 150-152.

⁸ *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, (hereafter referred to as *ICJ Reports 1966*), p. 18.

without full argument, the propriety of its action in raising the point at this juncture? There is nothing in the judgment which, to this writer, provides a satisfactory answer.

B. Has the Court really reversed its own decision of 1962? That is to say, how compatible is its present Judgment with its Judgment in 1962 that it had jurisdiction to proceed to the merits?

In fact the Court never addressed itself to the line of argument laid out in the preceding paragraph, because it indicated that the right or otherwise of Ethiopia and Liberia to obtain an answer from it, though of an 'antecedent character' was *not* a 'preliminary question'. Now, the question is not whether such an exceedingly fine distinction is known to the law (conceptually, it is, under the established distinction between jurisdiction and admissibility) but whether it was appropriate or valid to this particular case. It is extremely difficult to see that the question of Ethiopia's and Liberia's legal right in the subject-matter of their claims (which was the point at issue) was not a preliminary matter to be disposed of in the first phase of proceedings culminating in 1962, and that it had indeed been so disposed of.

It will be recalled that in 1962 the Court had been asked by South Africa to declare that Ethiopia and Liberia could not institute proceedings under the enabling clause of Article 7 (2) of the Mandate. Among the arguments she had advanced was that no 'dispute' (as required in Article 7 (2)) existed between herself and Ethiopia and Liberia, because they had no special, national interest in the Mandate over South West Africa. The Court had rejected this argument. But now, in 1966, the Court sought to explain this effective reversal by saying: 'To hold that the parties in any given case belong to the category of State specified in the Clause — that the dispute has the specified character — and that the forum is the one specified — is not the same thing as finding the existence of a legal right or interest relative to the merits of the claim.'⁹ But it *must* be the same thing — for the categories of State specified in the clause are presumably those who *do* have a legal interest in the carrying out of the Mandate. Moreover, the Court in 1962 classified the Applicants as falling within that category, not as an abstract proposition, but in relation to an already existing and formulated set of claims.

Agreement with the judgment on this point entails acceptance of the Court's view that the evidence showed that a right of access to the Court by individual members was only intended in respect of national rights under the Mandate, and that it was only in respect of these that they had a legal interest. Yet the dissenting judges, exam-

⁹ *ICJ Reports 1966*, p. 37.

ining the same evidence, reached a different conclusion, finding that an individual League member had a general legal interest in the observation of the Mandate, from which could flow a right to secure a Judgment from the Court under Article 7. The premises on which the Court's view rests, moreover, are not in accordance with the common legal practice whereby success in showing standing to initiate an action in a particular forum presupposes a legal interest in the subject matter.

If the Court is really saying that Ethiopia and Liberia can be adjudicated in 1962 to have legal standing to bring a case, but not to be entitled to get an answer in 1966 because of lack of legal interest in the subject-matter, then one is entitled to ask the Court: 'What claim could Ethiopia and Liberia have presented after they had been deemed entitled to proceed in 1962, in order to get an answer from the Court?' To reply, as the Court does by implication, that a claim which rested on a 'special interest' would have got an answer, is hardly satisfactory. For the Court knew in 1962 that Ethiopia and Liberia were claiming no 'special' or 'national' interest in the Mandate, but only that legal interest inherent in all former members of the League. Moreover, in 1962 the Court had heard much argument on the point of whether a dispute sufficient to institute proceedings existed between the Applicants and the Respondent; and it had addressed itself to the question of this, relying in turn upon Ethiopia and Liberia showing a special particular interest in the implementation of the Mandate. The Court explicitly stated that

'... the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members.'¹⁰

It thus remains baffling for the Court to assert that it was now dealing with a new point, which had not been covered in 1962. It seems impossible to disagree with the view expressed by the distinguished United States member of the Court, Judge Jessup, that the Court had in effect reversed its judgment of 1962.¹¹ (This is a point separate from, though related to, the question of *res judicata* — namely, the finality of a judicial decision, and whether a decision on jurisdiction can so be classified, thus preventing a subsequent reversal. The various judges did address themselves at some length to this question, but the Court did not regard it as directly relevant, simply because it declared that the finding that the Court had jurisdiction in 1962 was different from a finding that the Applicants did not have legal standing in the next phase of the case.)

¹⁰ ICJ Reports, 1962, p. 343.

¹¹ ICJ Reports, 1966, p. 330.

Two other points require mention in this context. The first is that the grounds upon which the Court gave its Judgment — namely, a lack of legal interest by the Applicants in the subject-matter of the claim — was not even advanced in the final submissions by the Respondent.¹² The Court, however, while conceding that South Africa's final submissions 'ask simply for a rejection of those of the Applicants, both generally and in detail' (that is, on the substantive issues), pointed out that the final submissions did at least ask the Court to base its findings on 'statements of fact and law as set forth in (its) pleadings . . .', and that South Africa had, in the course of its pleadings, denied that the Applicants had any legal standing in the subject-matter of their claim. The Court then suggested that, given the 1962 Judgment, 'it clearly cannot have been intended merely as an argument against the applicability of the jurisdictional clause of the Mandate'. Thus the Court points to a legal argument made by South Africa at one remove, supposes that it relates to the merits and not to jurisdiction (though several of South Africa's arguments on the merits were in effect a mere repetition of its previous objections to the Court's jurisdiction, presumably entered for the record), and then relies on that argument, rather than addressing itself to the clear and unambiguous, albeit voluminous large, argument on the substance of the dispute.

This leads us to the second point. The Court then also indicated in its latest Judgment, undoubtedly correctly, that it is entitled to select *proprio motu* the basis of its decision. That is to say, under Article 53 of its Statute, it is, by implication, not required to rely on arguments advanced by the litigants, but can rely on what it finds the most telling and relevant legal grounds. This is a well-established legal principle, but, with all due deference, its invocation does not really seem to answer all the points we have raised. As with any other legal principle, its nature and scope are subject to certain limitations: and it remains relevant to ask whether, when there has already been a judicial decision on preliminary questions, and when the Court has failed to avail itself of its right to declare that certain outstanding preliminary points shall be attached to the subsequent case on the merits, it is really open to the Court to rely, after four years of litigation, upon the *proprio motu* principle to discover an outstanding 'antecedent question pertaining to the merits'. Reliance on the *proprio motu* argument, in the particular circumstances of this case, seems to this writer to run counter to another well-established principle of international law — '*interest rei publicae res judicata non rescindi*'. The *proprio motu* principle is not a licence to ignore established legal concepts, nor to avoid issues upon which one has

¹² As pointed out by Judge Jessup, at p. 328.

legal jurisdiction to pronounce; it is a principle designed to affirm the Court's superior understanding of the law to that of the parties before it.

C. Was the Court in any event correct in its assertion that the Applicants had to show a 'special' legal interest in the Mandate before they could require the Court to give a declaratory Judgment on litigation relating to it?

Quite apart from the question of the compatibility of the Court's insistence that such a 'special' interest be shown with its own Judgment of 1962, is this alleged requirement really valid at law? This problem is argued very fully in the Judgment itself,¹³ and one can do no more here than to provide a brief and compressed version of the different views.

On this question, the Court rested its case on the view that the substantive provisions of the Mandate fell into two broad categories — those provisions which conferred certain rights relative to the mandated territory upon members of the League as individual States, and those provisions which defined the Mandatory's powers and obligations. This latter category the Court termed 'conduct' provisions, and they include the system of international accountability by the Mandatory for the proper carrying out of its obligations. An example which the Court gave of the former 'particular' category was the guarantee, in Article 5 of the South West Africa Mandate, that missionaries of the nationality of any League Member should be able to enter South West Africa. As we have seen, Article 7 of the Mandate provides that 'if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute . . . shall be submitted to the Permanent Court of International Justice . . .'

The Court, basing itself upon the distinction it had drawn between the two categories of provisions in the Mandate, said in the 1966 Judgment that the right of access to the Court, provided for in Article 7 *was only available to individual States in relation to alleged breaches of particular rights which they had been granted in respect of the mandated territory* (such as the right of entry for missionaries of their own nationality). The Court thus *rejected the notion that individual States could submit to it a dispute about the 'conduct' provisions*, that is, about the proper carrying out of the Mandate by

¹³ And a close reading of both the 1962 and 1966 Judgments is necessary for a proper understanding of this point, not least because the answer turns in part upon the intentions of the drafters of the Mandate. See *ICJ Reports, 1966*, pp. 20-23, 25-34; see also pp. 378-388, per Judge Jessup.

the Mandatory. The Court found that it was for the League Council to go to the Court about such aspects of the Mandate.

Several things need to be said about this. The first is that the distinction which the Court is seeking to draw between 'particular' provisions and 'conduct' provisions — and especially the corollary that different legal interests exist for the implementation of these two categories — is a concept hitherto unpropounded in international law. There is nothing in the wording of Article 7 of the Mandate which supports it: while it is ambiguous as to whether the League Council or individual members (or both) may take a dispute to the Court, it does not indicate that individual Members may go to the Court about disputes over 'particular rights' provisions, while only the League Council itself may go to the Court over 'conduct' provisions.

The implications of what the Court has here said are exceedingly important, not only in respect of this particular litigation, but because it clearly implies that only the United Nations may go to the Court for legal determination of disputed matters relating to the 'conduct' provisions. Yet — and this is a point the repercussions of which the Court completely sidesteps in its Judgment — the United Nations (like the League Council) is only entitled at law to ask for an Advisory Opinion. An Advisory Opinion is not legally binding, and South Africa has already shown, by her response to the three earlier Advisory Opinions on South West Africa, that she does not feel obliged to comply with these judicial Opinions. Only states may seek from the Court a Judgment, which *is* legally binding. Thus the effect of the Court's Judgment is to rule that in spite of the recourse to judicial procedure provided for in Article 7 of the Mandate, no Mandatory in breach of its obligations under the Mandate will be faced by a binding judgment thereon. There is removed from the Mandatory the sanction of being publicly seen not to comply with a binding Judgment of the International Court. And of course, the possibility of enforcing compliance with such a Judgment, under the terms of Article 94 of the Charter,¹⁴ is also removed. By its judgment then, the Court is, in principle, protecting a Mandatory who may be in breach of a Mandate, both from the full legal force of a binding adjudication¹⁵ and from ensuing political action (should

¹⁴ Article 94 states, in para. 2: 'If any party to a case fails to perform the obligations incumbent upon it under a Judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems it necessary, make recommendations or decide upon measures to be taken to give effect to the Judgment'.

¹⁵ There is one side point that may be mentioned here: it is, perhaps, just conceivable, that within the terms of the Court's distinction of the legal rights flowing from the 'particular' and 'conduct' provisions, there does exist still a State or States who can show (though Ethiopia and Liberia could not)

it be deemed necessary) to secure compliance with that adjudication. This can hardly be what was envisaged by those who framed the Mandate provisions, given their intention to promote a system of effective international accountability. The Court's pronouncement on this point militates against any effective supervision of the 'conduct' provisions, which lie at the heart of a Mandate. This point, it must be emphasised, is a general one: it does not entail any assumptions as to whether South Africa is, or is not, in breach of her obligations under the Mandate for South West Africa.

As early as 1950, in the Advisory Opinion (though this particular point was not then directly in issue) the then British member of the International Court, Sir Arnold McNair (as he then was), stated:

'Every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate. . .'.¹⁶

And Judge Read — who, like Sir Arnold McNair formed part of the majority of the Court on this occasion, and attached a separate opinion¹⁷ — also firmly declared:

'the first, and the most important (of the international obligations of the Mandatory) were obligations designed to secure and protect the well-being of the inhabitants. They did not enure to the benefit of the Members of the League, although each and every Member had a legal right to insist upon their discharge ... and a legal right to assert its interest against the Union by invoking the compulsory jurisdiction of the Permanent Court (Article 7 of the Mandate Agreement)'.¹⁸

In 1962 the Court (the majority of which did not, of course, comprise those members forming the majority in 1966) itself declared:

'The only effective recourse for protection of the sacred trust would be for a member or members of the League to ... bring the dispute ... to the Court for adjudication'.

a sufficient legal interest in the 'conduct' of the Mandate to secure a Judgment from the Court. The Principal and Allied Associated Powers come to mind, but the whole tenor of the Court's Judgment goes against their possible success as litigants. Indeed, Judge Jessup, in his dissenting Judgment, excludes the possibility.

¹⁶ Advisory Opinion on the International Status of South West Africa, *ICJ Reports*, 1950, at p. 158.

¹⁷ Under Article 57 of the Statute of the Court, the right is given to a Judge, if his views do not coincide on all points with the majority judgment, and whether he agrees with that judgment or not, to give a 'separate opinion'. Thus both Judges who cast their votes for the majority's decision, and those who vote against it, may append separate statements. The separate opinions of those disagreeing with the majority view are customarily called 'dissenting opinions'.

¹⁸ *Ibid.*, pp. 164, 165.

Indeed

'without this additional security the supervision by the League and its members could not be effective in the last resort'.¹⁹

It only remains to add that a considerable body of evidence supporting this viewpoint was pressed by Judge Jessup and the other dissenting Judges in the 1966 Judgment.

IV. HOW IT CAME ABOUT — THE EXTRA-LEGAL FACTORS

There has, since the Court's Judgment, been a good deal of public interest expressed in the question of the independence of an international judiciary from national pressures. The Court has always shown itself to be an independently-minded body of the highest standing, and there has been no evidence that Judges have been subject to pressures from their own governments. Still less is it to be supposed that they have succumbed to any such pressure. Indeed, there have been occasions when a judge has voted against the claims of his own country when it brought a case before the Court, and the bench has been scrupulous in its judicial impartiality. Moreover, it can be safely asserted that Western Foreign Offices would consider such pressure to be as undesirable as would the Judges themselves, well knowing that a really free judiciary is a safeguard to be supported at all costs. What the Judges decided — in this case as in others — is what they believe the law to be and nothing else.

This is not to say, however, that individual Judges are completely uninfluenced by their background. One's particular form of legal training, and the community in which one has lived, inevitably affect one's general philosophy and outlook. But the study and pursuit of international law transcend national boundaries, and any one Judge will, in the acquisition of his great learning, have been exposed to more than purely national influences. Those who seek to examine personal factors in the Judgments of the Court will find it hard to point to clearcut 'national' or 'ideological' attitudes: and the votes in this *South-West Africa Case* — with the Russian and United States Judges dissenting, and the Polish and British Judges voting with the majority — illustrate this principle. Infinitely more relevant are individual, intellectual differences of outlook concerning the scope and nature of international law, and of the Court itself. It is here that certain differences in attitude between the various Judges become more predictable.

It has been interesting to observe an apparently fairly widely-held lay assumption which has come to light in the wake of this

¹⁹ *ICJ Reports* 1962, p. 336.

case: namely, that if a group of lawyers are indeed impartial, and free from undue pressure, they should therefore necessarily come up with the same legal conclusions in a given case. But the legal process does not involve merely the application of certain rules to particular circumstances; it also involves interpreting whether the scope of certain rules does indeed extend to the particular circumstances. And it is in this interpretative function — which is particularly important in the international system, lacking as it does a central legislature — that the individual standpoints and philosophies of the individual Judges become so relevant.

When discussing — as we have above — whether in fact the Court in 1966 effectively reversed its own decision in 1962, it must be borne in mind that the Judges who comprised the majority in 1966, and thus speak for 'The Court' as such, were those who formed the minority in 1962. The delicate balance of eight to seven, which had been struck on the jurisdictional questions decided in 1962, was altered in the intervening months by a series of unforeseeable events. Judge Bawadi of Egypt died; at the elections held to fill this vacancy, Judge Ammoun of the Lebanon was successful, but obviously he could not be brought into the case after proceedings had begun. Judge Bustamante y Rivero was prevented by illness from participating. And it is now general knowledge that Judge Sir Zafrullah Khan, of Pakistan, withdrew from the case.²⁰

Further the Judgment of the Court begins by saying that on March 14, 1965, South Africa

'notified the Court of its intention to make an application to the Court relating to the composition of the Court... The Court heard the contention of the Parties with regard to the application at closed hearings...'

But, the Judgment continues, the Court

'decided not to accede to the application'.²¹

This application is believed to have been in respect of Judge Padilla Nervo²². As for Judge Sir Zafrullah Khan, there remain two alternatives — either that Judge Sir Zafrullah Khan withdrew on his own initiative, or that he withdrew as the result of a suggestion

²⁰ Not least because of Sir Zafrullah Khan's own comments to various newspapers, e.g. *The Observer*, July 1965.

²¹ *ICJ Reports* 1966, p. 9.

²² See the comment by one of the most learned commentators on the Court, who notes that the identity of the Judge concerned was not mentioned in either South Africa's published basis of application or the Court's order thereon (March 18, 1965), but adds: 'cf. the Judges present at the public hearings of 15 and 18 March 1965 and those "present" for the order'. Rosenne, *The Law and Practice of the International Court*, Vol. 1, p. 196.

by the President of the Court. Both these possibilities would fall within Article 24 of the Statute of the Court:

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.
2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.
3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

It is idle to speculate as to what occurred behind closed doors. Suffice it to say that the comments made to the Press by Judge Sir Zafrullah Khan, indicate that his withdrawal was as a result of action falling within Article 24 (2) and (3) above. As to the grounds for such withdrawal, here too, one is necessarily within the realm of speculation. But it is believed that two main grounds were advanced — that the Judge concerned had been a prominent member of his national delegation at the UN at a time when it had voted against South Africa on South-West African matters²³; and that he had at one stage been nominated by Ethiopia and Liberia as their intended Judge *ad hoc*, though he did not in fact so act, as he was elected to the Court itself. (Under Article 31 of the Statute, a party which has no national Judge sitting upon the Bench is entitled to appoint a Judge *ad hoc* for the particular case. Neither South Africa, on the one hand, nor Ethiopia or Liberia on the other, had nationals currently on the Bench. The former selected Judge van Wyk of South Africa, and the latter Judge Mbanefo of Nigeria).

Article 17 of the Court's statute stipulates that no person may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of another Court, or of a commission of enquiry, 'or in any other capacity'. Whether this last phrase is broad enough to cover mere designation as a Judge *ad hoc*, without subsequent participation, is doubtful. But the broader wording of Article 24 would seem to give the President of the Court authority to raise such a point as 'some special reason' why a Judge should not sit in a particular case, and for the Court to decide upon this matter. A regular Judge of the Court who happens to be of the nationality of one of the Parties before it is entitled to remain upon the Bench: his judicial impartiality is assumed. It was, of course, never intended that the right to nominate an *ad hoc* Judge should introduce an element of

²³ This argument is believed also to have been raised by South Africa in respect of Judge Padilla Nervo. If this is correct, then it is likely that the alternative ground — nomination to the *ad hoc* judgeship — was to prove telling in Sir Zafrullah Khan's case.

bias — rather was it granted to encourage nations which did not happen to have a national upon the Bench to use the Court nonetheless: it was thought of as an unnecessary but confidence-inspiring concession to human suspicion. While the statistical sample is smaller, it is nonetheless true, however, that *ad hoc* Judges have been less ready to vote against the party nominating them. Occasionally, on very limited points, they have done so, but this has happened proportionately less frequently than permanent Judges on the Bench have voted against their own nations.²⁴

There have been examples, before the Permanent Court of International Justice, of a judge previously nominated *ad hoc* sitting, in the event, as a member of the Court in respect of the same case, having been elected to the Court in the interim.²⁵

It would seem, therefore, that this does not cause automatic ineligibility: the residual authority of the President under Article 24 (2) would seem to rest upon evidence of some *personal* disability of the particular judge concerned.

In looking at the factors surrounding this decision, a further point deserves consideration. The Court has, in the past, been understandably concerned to uphold the authority of international law. One proper means of doing this has been by refusing to exercise its jurisdiction if its judgment were to be 'without object' — that is to say, without any legal effect whatsoever. Thus if, as in the case alluded to here, the argument related to rights and duties under a no-longer existing treaty, the Court may decline to adjudicate.²⁶ But the question of susceptibility of compliance must be an objective one, and

'a legitimate exercise of judicial reasoning. It would . . . be quite improper for the Court to contemplate a refusal by one party to comply with its decision, and to take that as a ground for its decision on the matter of propriety'.²⁷

²⁴ The relevance of this depends, of course, on the merit or otherwise of the particular claims advanced; so no general conclusion can be drawn. But for the details, see Rosenne, *op. cit.*, Vol. 2, pp. 939-942.

²⁵ Thus Judge Charles de Visscher was nominated as *ad hoc* judge by Belgium in respect of both the *Borchgrave Case* (vs. Spain) and the *Water from the Meuse Case* (vs. Netherlands). In both cases he sat upon the Court in his subsequent capacity as an elected Judge of the Court: PCIJ Series A/B, No. 70, p. 5; *ibid.*, No. 72, p. 160. Judge Zafrullah Khan was not, of course, a national of Ethiopia or Liberia: consequently, his subsequent election to the Court did not deprive them of their right to a judge *ad hoc*. Once again, they did not nominate a judge of their own nationality.

²⁶ *Northern Cameroons Case*, ICJ Reports, 1963.

²⁷ Rosenne, *The Law and Practice of the International Court*, Vol. 1, p. 310, n.1. He goes on to regret that the Judgment of the *Northern Cameroons Case* did not make this clear.

This is surely correct. And one might also add that contemplation of the difficulties in which many nations might find themselves, concerning the enforcement of a Judgment against a State refusing to comply, should be still less a ground, tacit or otherwise, for a decision not to adjudicate upon the merits of a case.

Having said this, one might also observe that political motivations on the part of one or more of the parties to a case is not in itself an argument for the Court to refuse to adjudicate. Indeed, the Court itself has said on a previous occasion that, so long as there was a legal question put to it for answer, it was not concerned with the motives which prompted the formulation of the question.²⁸ They did not transform the Court's task from a judicial one into a political one. And so it is with the South West African question. Certain persons have attempted, in supporting this Judgment, to suggest that which the Court itself has not — namely, that this is a solely 'political' dispute of which it should have no part: the Court did not, however, say this; clear legal claims were submitted to the Court, and the Court merely said that in respect of the 'conduct provisions' of the Mandate, no judicial recourse existed to individual states which lacked a 'special interest'. This is a different point, and one we have discussed above.

But in addition to these abstract considerations, the Court was faced with a discomfiting recent piece of history — it had given an Advisory Opinion on a highly-charged and controversial subject, namely, the question of UN expenses incurred in peacekeeping in Gaza and the Congo. It had pronounced on the legal issues, but the political rifts between nations had remained, and in spite of the 'acceptance' of the Opinion by the General Assembly, many states continued to ignore it. The Court can hardly have relished the prospect of becoming embroiled in the South West African controversy; and those who contributed to its lack of confidence in the compliance of nations with its Judgments and Opinions should feel some embarrassment in chastising the Court so roundly in the South West Africa case. The Soviet Union is a country in point. Indeed, other aspects of the criticism of this case are equally disquieting. Only a very few governments accept, without qualification, the jurisdiction of the International Court. Yet the citizens of many countries who do not accept the Court's jurisdiction, or accept it only under very limited conditions, feel no compunction in castigating the Court for declining to pronounce on exceedingly explosive matters affecting the vital interest of other states. These citizens have not, in the main part, been noticeably in the forefront of any campaign to get their own governments to assign more authority to the Court. If the

²⁸ *The Admission Case, ICJ Reports, 1948, at p. 61.*

nations of the world *really* want an International Court which will decide legal questions which may have highly political repercussions, then they must act accordingly and accept in advance, and on the broadest possible basis, the Court's legal right to settle disputes.

Even those nations which have been comparatively well disposed towards the concept of the judicial settlement of disputes, have made it fairly clear by their international conduct that a decision on the merits of the *South West Africa Case* would be highly embarrassing to them politically. If men send up smoke-signals, they must not be surprised if they are read. There has been too much propensity to assign blame elsewhere, and too little inclination to examine the cleanliness of one's own hands.

V. PROSPECTS FOR THE FUTURE

One is left with the question: what now? And that question embraces both the future of the Court and the future of South West Africa.

A. The Future of the Court

This Judgment of the Court has attracted much more lay interest than any other case which has come before it; and the reaction to it — outside of Southern Africa, in any event — has been largely hostile. The dismay expressed, sometimes in terms of great vehemence, has not by any means been limited to Africans. Criticism has also been widely voiced by white opponents of *apartheid* and by those who had hoped for a judicial role in the supervision of the Mandate. They have been joined in their criticisms by those who denigrate the significance of international law and who see the Court's Judgment as further proof of the irrelevance of international law in the contemporary world. Thus both those whose reaction is dismay and those whose reaction is cynical satisfaction are united in their response to the Court's Judgment. This is not to say that all the criticism directed at the Judgment is well founded. It is not, and much of it stems from an inadequate appreciation of the legal issues involved. But it nonetheless remains true that, outside of the parties directly involved there *has* been hostile reaction, and that this has by no means been limited to Africans. Nor is it a question of a united fellowship of international lawyers defending the Judgment against the attacks of unreasoning laymen. The unease is not confined to lay opinion, though the grounds on which it is based may differ as between lawyer and layman. Non-lawyers are proud to assume that 'international law' and 'international adjudication' are synonymous concepts, and accordingly, find in their disapproval of the Court an adequate reason for proclaiming that they 'no longer believe in international law' or that 'international law doesn't work'.

This sort of reaction, though psychologically interesting, is not very impressive because it is based on misconceptions. Litigation, followed by judicial decision, forms only a very small portion of the corpus of international law. Every single day, international law acts through a vast web of reciprocal rights and duties, as an effective restraint upon excesses in state behaviour and as a guide to orderly international intercourse. These rules of international law stem only in very small part from judicial decisions, being more commonly based on the alternative legal sources of custom and treaty. The person who thinks of the law of nations solely as collective sanctions pursuant upon a judicial decision is trapped in his own mythology.

But the international lawyer can gain little comfort from the fact that this particular response to the Court's Judgment is not well-grounded; for international law is based in essence upon consent — consent as evidenced by the granting of jurisdiction to a Court, by the permitting of a custom to evolve and by the acceptance of norms enunciated in a treaty. And consent necessarily presupposes confidence; and confidence has undoubtedly been undermined by the Court's decision.

We are not suggesting that the Court, in giving its Judgment, should have been guided by considerations of whether it would be 'well-received' or 'badly-received'. The Court, must, of course, give consideration solely to the law as it exists. But it does seem to this writer that there are objective grounds for anxiety that the Court has not in fact done so, and that, as Judge Jessup put it in his dissenting Opinion, it has given a Judgment 'completely unfounded in law'.²⁹

One of the most curious aspects of the whole affair has been the direction in which the anger of certain Western critics has been channelled. There have been demands for 'the reform of the Court', and for governmental action to ensure that 'such a judgment could not happen again'. Certain Western commentators have undoubtedly seen in such suggestions a possible method of attempting to remove the stigma which they now feel attaches to them in the eyes of the African nations. But this is hardly a liberal approach to the independence of the judiciary. If there were grounds for 'reforming' the Court, they must surely lie in evidence called from a series of judgments, not from the fact of one decision with which one does not agree (no matter with what good reason). It comes ill from those who declare that 'international law must be carried out' to suggest that tinkering with the Court in the matter of the selection of Judges is an appropriate way to achieve this objective.

There have been misgivings expressed about the fact that only

²⁹ *ICJ Reports 1966*, p. 323.

the casting vote of the President tipped the balance; but it is virtually impossible to avoid all contingencies whereby the Court might be left with an even number of Judges at the end of a case; and a casting vote is thus necessary. Indeed, the clamour on this particular aspect is largely beside the point, and it is better to adopt Judge Jessup's view that it is not 'justifiable or proper to disparage opinions or judgments of the Court by stressing the size of the majority'. For an international community, which has shown little interest in 15 years' work by the Court, now to clamour for hasty procedural reform, in the wake of a decision of which it disapproves, is not a very praiseworthy spectacle.

By definition, Judges *ad hoc* sit on the Court only for the duration of the case for which they were appointed. Neither Judge van Wyk (who voted with the majority) nor Judge Sir Louis Mbanefo (who dissented) remain upon the bench of the Court. Of the other seven majority Judges, the terms of office of three have recently expired. The tenure of Judges Sir Percy Spender, Winiarski and Spiropoulos came to an end on February 5, 1967. So too did that of Judge Koo, who dissented. During the twenty-first session of the Assembly, elections were held to fill these vacancies. The members of the Court are elected by the General Assembly and by the Security Council (Article 4 of the Court's Statute). These two organs (with no distinction being made in the Security Council as between permanent and non-permanent members) proceed independently of one another to elect the members.³⁰ Those candidates who obtain an absolute majority of votes in both the General Assembly and the Security Council are deemed elected.³¹ It became inevitable that when the elections fell due in the autumn of 1966, the manner in which the Court disposed of this Judgment would introduce into the minds of the majority of the General Assembly the determination that white Commonwealth Judges should not be elected. The position of western European candidates would also be made more difficult. This indeed proved to be the case, and although this is neither the time nor place to analyse the election results, one may note that at least one distinguished candidate, who had had very high hopes of election, found that, after the Judgment on South West Africa, they could not be realized. The Judgment of the Court would seem to have put a nail in the coffin of the standard laid down in Article 9 of the Statute — namely, that the bench should represent the principal legal systems of the world and possess the highest conceivable qualifications of those nominated. In spite of the 'political' voting

³⁰ Article 8.

³¹ Article 10 (1). Provisions are also made for certain complications which may arise under this voting procedure.

procedure, it is a standard which till now has been widely upheld.

The balance³² of the Court was not radically altered by the 1966 elections (Judges Bengzon, Lachs, Onyeama and Petrèn were elected to the vacant seats, and Judge Ammoun succeeds himself for a second term). However, there was some unmistakeable writing to be seen on the wall, and if the present weighting and standards do drastically alter, it is possible that the older nations — those nations who have hitherto made most use of the Court — will become less and less inclined to submit to international adjudication. The comparatively few cases which come before the Court could well dwindle further in number. The Court has before it at the moment only the second phase of the *Barcelona Traction Case*, though it is possible that Japan and New Zealand may go to the Court over their fisheries dispute, and Denmark, Holland and Germany over their dispute on the continental shelf. The United Kingdom government has undoubtedly been motivated in its offer to put the Gibraltar question before the Court, by a desire to support the Court at this critical juncture, as well as by other considerations. The offer was not accepted by Spain.

As for the developing nations, they will be less inclined than ever to use the Court, even if the composition of the Court becomes markedly less European. Complete antagonism to the International Court, and to the employment of legal means to resolve disputes, is likely to result. International lawyers have been faced with the problem of a marked disinclination by the newer nations to resolve their disputes by use of the Court. (Though the ostensibly wider acceptance of the jurisdiction of the Court by the western nations is illusory to the extent that far-reaching reservations to such acceptance are not uncommon). Many of the developing countries have felt that the Bench was basically of a pro-Western disposition, and that in any event it would be applying a law which was formed without their participation and which frequently runs against their interests. Western international lawyers have devoted considerable energies to proclaiming the universality of international law, indicating methods by which the new nations can participate in its development, and to urging the advantages of international adjudication. If one is honest, one must admit that *any* decision in favour of South Africa — including one based on the major substantive issues of the case — would have occasioned widespread hostility to the Court in Afro-Asian Countries. But Western lawyers could in conscience have pointed out that the International Court is the highest Court in the

³² Australia, China, Poland, Lebanon, Greece, United Kingdom, U.S.S.R., Japan, Peru, U.S.A., Italy, Pakistan, Mexico, Senegal and France in July 1966; with nationals from the Philippines, Sweden and Nigeria, replacing those from Australia, Greece and China in February 1967.

world, and that it had given a binding Judgment, which must be respected, on exceedingly complex points of law. They could also have asserted that an unfavourable Judgment upon a particular issue does not negate the overall advantages of international adjudication.

Both the manner in which the Court disposed of the case, and, to a lesser degree the grounds upon which it did so, make it far from easy to embrace this plea with any enthusiasm. One is now required to promote a system whereby years of legal argument and expense will not necessarily lead to a pronouncement on the substantive issues, even though the Applicants had reason to believe that all questions concerning their right to obtain a Judgment had already been settled. Any evangelism for use of the Court is likely to wane sharply. If a large number of Western observers see the Judgment as an attempt to dodge uncomfortable questions, then an even larger number of Africans see it as a denial by white men of the use of the legal process to the coloured nations. The prospects for the use of the Court — and the inadequate use of the Court has been a longstanding problem — are thus exceedingly gloomy; and the work to be done in expanding those areas where international rules are already accepted, and the hopes of building a universal legal order, have received a severe setback too. The very rough handling that the financial requirements of the Court received in the Fifth Committee of the Assembly was another indirect outcome of the South West Africa Judgment. The Budgetary Committee had been asked to approve an additional appropriation of \$ 72,500 for the Court, and this was rejected by 40 votes to 27, with 13 abstentions. This hampering of the efficient exercise of the judicial function is to be deplored, but the motives were clear enough — the Africans in the Committee pointed to the expenses they had incurred in a protracted litigation, only to hear that the Court could not pronounce on the merits.³³

(b) The Future for South West Africa

(i) *What is the law on the South West Africa Mandate?*

Some confusion has arisen on this question, because among the claims put before the Court was a cluster of requests for the Court to reaffirm, in this binding Judgment, points which it had already made during the course of its Advisory Opinions of 1950, 1955 and 1956. The aim, clearly, was to give the quality of legally binding decisions to points which had previously ranked as Advisory Opin-

³³ And see *The Times* leader 12 Oct. 1966, which is not unsympathetic to the African viewpoint.

ions. Thus the Court was asked to declare that South West Africa was a territory under Mandate; that the Mandate was still in force; that South Africa remained subject to the obligations in the Mandate, and in Article 22 of the League Covenant; that the UN was legally qualified to exercise the supervisory functions previously exercised by the League of Nations; and that South Africa was legally required to submit an annual report to the United Nations and to transmit petitions from the inhabitants of the territory of South West Africa.

The Court, by declining to pronounce upon the merits of this case, has also declined to pronounce on these points, though all of them form part of the jurisprudence of the Court through its earlier Advisory Opinions. Indeed, the continued existence of the Mandate had been, incidentally but fairly clearly, assumed by the Court in the Judgment of 1962.

The correct answer on these points would seem to be that the affirmative pronouncements by the Court in 1950, 1955 and 1956 remain authoritative — despite the fact that the Court declined to pronounce on these questions, as well as on other claims concerning the alleged breach of the Mandate and of a norm of international law. The Court regarded its present judgment as ‘without prejudice’ even to the continued existence of the Mandate — the most basic of matters, pronounced upon affirmatively in 1950, and from which all else flows.

In logic, it seems inevitable that once the Court found that Ethiopia and Liberia had no legal standing which would entitle them to obtain a Judgment from the Court, the Court was obliged not to reply on any of the substantive points raised by the Applicants. Nonetheless, one may feel with Judge Jessup that it is one of the unfortunate repercussions of this Judgment that

‘In the course of three Advisory Opinions rendered in 1950, 1955 and 1956, and in its Judgment of December 21, 1962, the Court never deviated from its conclusion that the Mandate survived the dissolution of the League of Nations and that South West Africa is still a territory subject to the Mandate. (But) By its Judgment of today, the Court in effect decides that Applicants have no standing to ask the Court even for a declaration that the territory is still subject to the Mandate’.³⁴

Certain South African publications have sought to suggest that, in any event the Judgment meant that the Mandate was ‘in effect, dead’. The Court in 1950, and again 1962, emphasized that South Africa’s rights in the Territory depended upon the continued existence of the mandate. South Africa’s attitude towards the continuation of the mandate has in consequence been somewhat ambiguous. South Africa sought to deny both the competence of the Court (in 1962)

³⁴ *ICJ Reports 1966*, p. 327.

and her own legal obligations (in 1966) on the grounds, *inter alia*, that the mandate no longer existed. But — perhaps bearing in mind the Court's dictum on the relationship between South Africa's rights and the continuation of the mandate — she advanced an alternative argument, namely that even if the mandate existed, there was no supervisory organ in respect of it. (See Clause 2a of South Africa's Counter-Memorial, *ICJ Reports 1966*, p. 14). This argument, of course, was the one which Judge McNair had advanced in 1950, and was among those supported by Judges Fitzmaurice and Spender in their dissent in 1962.

In his first speech before the General Assembly, on September 26, 1966, Mr. D. P. de Villiers, S.C., merely stated that the survival of the Mandate was a question which, because of the terms of the 1966 Judgment 'was therefore left open' (p. 4, Official text issued by South African Mission to the UN). In a subsequent speech, however, the South African representative, faced with the prospect of an attempt by the Assembly to revoke the mandate, declared that South African rights in South West Africa were not contingent upon the mandate, but flowed from *rights of conquest*. Given the whole purpose of the mandates system, this claim is of very doubtful legal validity. Whereas the law on the compatibility of *apartheid* with the Mandate, and with general international law, remains uncharted, the pronouncements of the Court in its earlier Advisory Opinions on the continued existence of the Mandate, and rights and duties thereunder, remain authoritative. Legally, the Mandate continued in existence at least until the General Assembly Resolution, last October, revoking it, and South Africa and the United Nations thus retained their respective rights and obligations thereunder.

(ii) *Revocation of the Mandate*

A foreseeable consequence of the Judgment was a strong campaign for the revocation of the Mandate. It had the attraction of being one of the few untried approaches in the South West Africa controversy, and the Afro-Asian states were bound to urge that the Court's Judgment was a clear indication that only political action would achieve any progress. They pointed to South Africa's long history of non-co-operation with the UN over the Mandate (a history which antedates by a decade the emergence of large numbers of new African states and their membership of the UN), and insisted that the time had now come for South Africa to be deprived of the Mandate.

We are here, in many ways, at the heart of the matter. Although South West Africa has long been a matter of considerable concern to the United Nations, the latter's major preoccupation has been with the whole question of *apartheid*. The implementation of the Mandate has been seen as inextricably woven in with the wider

problem. The protection from intervention which the Charter affords states on matters of purely domestic policy (though a limited exception is to be found in the human rights provisions of Articles 55 and 56) has made it extremely difficult to mount effective international opposition to *apartheid* in South Africa. But specific international obligations attach to the South West Africa Mandate, and it was seen as a possible inroad into the whole question of *apartheid*. Impatient Africans had long been assured by most Western countries that they, too, deplored *apartheid*; but, it had been correctly explained, such a policy did not make South Africa liable to collective sanctions under international law. The possibility of instituting litigation over South West Africa presented the African states with the chance of having behind them — albeit only in reference to the Mandated Territory — a judicial order to desist from the practice of *apartheid*: and it was felt that this was an authority which the Western Powers, with their traditional respect for the judicial process would find politically very embarrassing not to support. In other words, the Africans hoped that a decision in their favour would force the hands of the United Kingdom and the United States in the Security Council.

But there was from the start a confusion as to objectives, for while on the one hand the Africans sought a judicial determination on the proper implementation of the Mandate, what they *really* wanted was no Mandate at all. This dichotomy between what they thought prudent to seek from the Court — the effective carrying out of the Mandate — and what they at heart ultimately hoped for — independence for South West Africa — became inevitable after the passing of General Assembly resolution 1514 in 1960, on the Granting of Independence to Colonial Peoples. In other words, the point had already been reached by 1966 whereby the weight of African political activity was directed towards independence, and not towards the full and effective implementation of the Mandate.

But the Court's Judgment — even if it had gone completely in favour of Ethiopia and Liberia — would have provided no legal grounds for a demand for independence for the territory.

A plea for revocation of the Mandate, therefore, would in this writer's opinion only have been postponed by a Judgment on the merits of the case. It was bound to come in a few years anyway. But revocation does present a great dilemma, both legally and politically. Legally, everything the Court has said between 1950 and 1962 concerning South Africa's obligations and the UN's authority as a supervisory body rests on the continued existence of the Mandate in its present form. One puts some 12 years of consistent jurisprudence in jeopardy if the status of the Mandate is now altered, for it is not entirely clear that the legal rights held by the UN under the

Mandate would remain the same. Moreover, in 1950 the Court declared that the competence to 'modify the international status of South West Africa rests with the Union of South Africa acting with the consent of the United Nations'³⁵. This answer was, it is true, given in reply to a query as to whether South Africa could alter unilaterally the status of the Mandate, or if not, where such authority lay: but it is hardly clear evidence of competence of the Assembly to revoke the Mandate unilaterally.

A party may legitimately invoke a material breach of a treaty as a ground for terminating the treaty or suspending its operation in whole or in part. A 'material breach' consists of the violation of a provision essential to the accomplishment of the object or purpose of the treaty. (See Article 57 of the International Law Commission's recently adopted articles on the law of Treaties). But, in respect of the Mandate, several points arise: first, there still exists no clear judicial pronouncement that South Africa is in breach of fundamental obligations which are essential to the purpose of the Mandate. The Advisory Opinions did not address themselves, in so many words, to whether South Africa was in breach of the Mandate: they sought to clarify the rights and duties at issue. Moreover the Court has at no time indicated that the Mandate prohibits *apartheid*, still less that South Africa is thus in material breach of the Mandate. This is not to say that the initial right to invoke a material breach as grounds for terminating a treaty depends upon a prior judicial pronouncement: it is merely to point, in a world in which unilateral denunciations of international commitments are all too common, to the desirability of such judicial authority. Second, doubts exist as to whether the United Nations is in fact a 'party' to the Mandate, in the sense of possessing such contingent rights of termination. It is perhaps arguable that the only authority it has, is in respect of supervision of the Mandate. And third, it is not entirely clear that ordinary treaty rules apply to the Mandate, because in addition to being a treaty, it is an instrument *sui generis*, establishing a 'sacred trust' and a right *in rem*. Neither the terms of the Mandate nor Article 22 of the League envisage revocation as a sanction available for non-fulfilment of the Mandate by the Mandatory. The revocation of a Mandate may require additional considerations over and above the guiding rules of treaty law.

All these are very real problems. Yet at the same time the Assembly has been extremely mindful of its impotence, because of South African non-co-operation, as an effective supervisory body. It was faced, in the autumn of 1966, with the unhappy choice between

³⁵ *Advisory Opinion on the Status of South West Africa*, ICJ Reports 1950, p. 143.

continuing with the previous well-tried, but ineffectual pattern, or endeavouring to strike out in a new direction — albeit one overlaid with certain legal obstacles. In the General Assembly debates the vast majority of nations did not in the opinion of this writer, address themselves adequately to the legal problems mentioned above. There was no serious analysis of the competence of the Assembly, in respect of altering the Mandate. For a small group of nations, however, these questions — among others — undoubtedly presented grave problems. Not only should the legal complications have been acknowledged, but political misgivings were also felt, because it was far from easy to see the advantage of taking action which was unlikely to lead to effective results. It was felt by these countries that an Assembly resolution would be a revocation in name only; for, without South African approval, a UN administration for the Territory would be a mere paper plan. Further, the revocation of the Mandate seemed just that sort of open-ended policy in South Africa which most western nations had been so intent on avoiding: the reactions from South Africa were unpredictable, the extent of the commitment unassessable, and the pressures for escalation very considerable. At the same time, those western nations who had proclaimed their dislike of *apartheid* were under very heavy pressure in the Assembly: and the Court's Judgment of 1966 made that pressure all the greater. The United Kingdom's position was especially difficult, in the light of its failure to end the rebellion in Rhodesia, its traditional interests in southern Africa, and its genuine desire to see an effective implementation of the Mandate.

In a carefully measured speech Lord Caradon, the British representative, told the Assembly that, contrary to the South African assertions, the 1950, 1955 and 1956 Advisory Opinions stood unimpaired. South West Africa remained a territory under Mandate, and South Africa's obligations continued also. Lord Caradon then took up what was in effect a theme that Judges McNair and Read had pursued in the Advisory Opinion of 1950 — that South Africa's rights in South West Africa were concomitant with her obligations, that the authority which she had been given in the Territory was for the purpose of being able to carry out her duties under the Mandate.

At the heart of her duties, ran the United Kingdom argument, was international accountability, in the form of reports to UN, and the transmission of petitions. This led the British representative to a conclusion which marked a radical departure in British policy:

'(The South African Government) cannot deny their essential obligations under the Mandate without forfeiting whatever rights they have acquired in relation to the administration of the Mandate. They no longer have the right to carry the sacred trust conferred upon them'.

Thus the emphasis is on the lapse of South Africa's rights,

rather than on formal revocation of the Mandate; and on accountability (upon which the Court *has* pronounced) rather than *apartheid* (upon which it has not). It was therefore the British view — and the United States one — that detailed study, on the legal, political and administrative levels should go forward to see how to achieve the declared objective. Lord Caradon felt that a detailed spelling out of the UN's legal and practicable role in the administration of South West Africa was necessary before the Assembly declared South Africa's rights in the territory forfeited. When the Resolution to terminate the mandate was debated, the United States tried to introduce an amendment to this effect, without success. The United Kingdom for this reason abstained on the resolution — in spite of the very strong speech by its representative — though the United States joined those nations voting in favour of the resolution:

General Assembly Resolution 2145 (XXI)

The General Assembly,

Reaffirming the inalienable right of the people of South West Africa to freedom and independence in accordance with the Charter of the United Nations, General Assembly resolution 1514 (XV) of 14 December 1960 and earlier Assembly resolutions concerning the Mandated Territory of South West Africa,

Recalling the advisory opinion of the International Court of Justice of 11 July, 1950, accepted by the General Assembly in its resolution 449 A (V) of 13 December 1950, and the advisory opinions of 7 June 1955 and 1 June 1956 as well as the judgment of 21 December 1962, which have established the fact that South Africa continues to have obligations under the Mandate which was entrusted to it on 17 December 1920 and that the United Nations as the successor to the League of Nations has supervisory powers in respect of South West Africa,

Gravely concerned at the situation in the Mandated Territory, which has seriously deteriorated following the judgment of the International Court of Justice of 18 July 1966,

Having studied the reports of the various committees which had been established to exercise the supervisory functions of the United Nations over the administration of the Mandated Territory of South West Africa,

Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights,

Reaffirming its resolution 2074 (XX) of 17 December 1965, in particular paragraph 4 thereof which condemned the policies of apartheid and racial discrimination practised by the Government of South Africa in South West Africa as constituting a crime against humanity,

Emphasizing that the problem of South West Africa is an issue falling within the terms of General Assembly resolution 1514 (XV),

Considering that all the efforts of the United Nations to induce the Government of South Africa to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail,

Mindful of the obligations of the United Nations towards the people of South West Africa,

Noting with deep concern the explosive situation which exists in the southern region of Africa,

Affirming its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory.

1. *Reaffirms* that the provisions of General Assembly resolution 1514 (XV) are fully applicable to the people of the Mandated Territory of South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations.

2. *Reaffirms further* that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence.

3. *Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa, and has, in fact, disavowed the Mandate;

4. *Decides* that the Mandate conferred upon his Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations;

5. *Resolves* that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa;

6. *Establishes an Ad Hoc Committee* for South West Africa — composed of fourteen Member States to be designated by the President of the General Assembly — to recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence, and to report to the General Assembly at a special session as soon as possible and in any event not later than April 1967;

7. *Calls upon* the Government of South Africa forthwith to refrain and desist from any action, constitutional, administrative, political or otherwise, which will in any manner whatsoever alter or tend to alter the present international status of South West Africa;

8. *Calls the attention* of the Security Council to the present resolution;

9. *Requests* all States to extend their whole-hearted co-operation and to render assistance in the implementation of the present resolution;

10. *Requests* the Secretary-General to provide all assistance necessary to implement the present resolution and to enable the *Ad Hoc Committee* for South West Africa to perform its duties.

The resolution was adopted by 114 votes in favour, to 2 against (South Africa and Portugal), with Malawi, France and the United Kingdom abstaining, and Botswana and Lesotho absenting themselves. To this writer, the import of the resolution is far from clear; on the one hand, it is reaffirmed that South West Africa shall have an 'international status' until independence; on the other hand, it decides that the Mandate is terminated. An attempt is made to bridge these concepts, by resolving that the United Nations must discharge

South Africa's former responsibilities to the territory, though the legal basis is not specified, nor is the appropriate organ. One can do no more than say that intractable problems are being dealt with pragmatically, and clarity is not always desirable, or possible, in the pragmatic approach.

In November 1966, the *Ad Hoc* Committee provided for in the resolution was set up, comprising Canada, Chile, Czechoslovakia, Ethiopia, Finland, Italy, Japan, Mexico, Nigeria, Pakistan, Senegal, U.S.S.R., the United Arab Republic and the United States. The United Kingdom declined to serve. The report of this Committee will mark the next stage of the South West Africa problem. The ripples flowing from the Court's Judgment in July 1966 are likely to continue for some time yet.

(iii) *The possibility of an Advisory Opinion*

It was in theory at least, still open to the General Assembly to request of the Court an Advisory Opinion on those legal claims upon which Ethiopia and Liberia's case rested. That is to say, the Court could have been asked to confirm the continued existence of the Mandate, the UN's supervisory role, and South Africa's obligations thereunder. The Court could also have been requested to advise as to whether *apartheid* is contrary to Article 2 of the Mandate, and contrary to a norm of general international law. It would seem that, in an Advisory Opinion, the Court could *not* properly be asked — as it had been in the 1966 case — to issue an order to South Africa to 'desist' from such of those actions as the Court might find contrary to the Mandate or international law. The advisory jurisdiction of the Court does not extend beyond mere advice as to what the law is³⁶; the authority to command specific action from a state, as a consequence to its determination of the law, is available only in contentious cases between states. But the Court could nonetheless have been asked by the Assembly to give judicial pronouncement on certain of the substantive issues in respect of which it declined to give an answer to Ethiopia and Liberia. Such an opinion would not be legally binding, it is true; and it could be argued that it would take one no further forward. This is not entirely correct, however, and for two reasons. First, the Court has only been asked, in previous Advisory Opinions, questions relating to the system of international supervision of the Mandate — it has confirmed that the Mandate exists, and that the Assembly is entitled to annual reports and the transmission of petitions. The Court has not hitherto been asked to

³⁶ Article 96 of the UN Charter provides: 'The General Assembly or the Security Council may request the International Court of Justice to give an Advisory Opinion on any legal question'.

pronounce upon legal aspects of the Mandate which are not directly linked to the question of UN supervision. A request for legal guidance as to the compatibility of *apartheid* with Article 2 of the Mandate would thus be breaking new ground. Secondly, the Court, while it has confirmed that certain rights and obligations continue to exist under the Mandate, has not been asked to declare that South Africa is in breach of her obligations. (Certain *obiter* pronouncements in this respect have been made by particular Judges, but the Court itself has previously been asked to clarify the law, not to proclaim South Africa in breach of it). Thus a request to the Court to advise whether, in failing to enter reports, transmit petitions, and in introducing *apartheid* into South West Africa, the Union is in breach of its legal obligations, would also be breaking new ground. From the viewpoint of the Afro-Asian states, a clear pronouncement on these questions could be an advantage, for Western political opinion could more easily be mobilised, if the Court advised that South Africa was in breach of her international legal obligations. The legal issues would be clarified and this in itself could be of significance on the political level.

It was extremely unlikely, however, that the Afro-Asian states would want to avail themselves of this method of proceeding. They feel bitter and hostile towards the Court, and their emotional reaction is to have no more part of it. Their suspicion of the judicial process now greatly outweighs the possibility that an Opinion on the substantive merits of the case might have effectively upheld the claims which Ethiopia and Liberia have advanced. This is so, even though the request for an Opinion might come before a Court whose composition had somewhat changed — and which, even if it had not, had in no way rejected (or approved) their substantive claims. Moreover, even those Africans who are prepared to admit privately that they can see certain advantages in asking for an Advisory Opinion feel that their domestic reputation as 'nationalists' does not allow them publicly to embrace this now. It should be added that they are by no means alone in their reactions — the response of many Western persons to the surprising Judgment of the Court has been to denounce any suggestion of further recourse to the Court, and to insist that henceforth things proceed solely on the political level.

It is also widely assumed that to ask for an Advisory Opinion would entail once again a judicial process of years and years. In fact, this would be most unlikely — the Court's record on speediness in respect of Advisory Opinions has been quite impressive (no doubt it has borne in mind the relevance of such Opinions to the annual timetable of the UN); and if the Court were asked to give its Opinion on the basis of evidence already laid before it in the contentious pro-

ceedings of 1960-66, this would probably allow an Opinion to be handed down in a few months. One suspects, however, that the Afro-Asian states are no longer interested in such arguments.

All talk of an Advisory Opinion has been rendered somewhat academic by the resolution passed by the Assembly, however. The Court might well feel that the terms of that resolution were not consistent with a request for an Opinion on questions concerning the continuation of the Mandate and obligations flowing therefrom. The Court would further, it may be thought, be faced with the concept of 'mootness' (as it had been in the *Northern Cameroons Case*, *ICJ Reports*, 1963). It is difficult to disagree with Rosenne's general observation that "A request for an Advisory Opinion on a 'moot' question would undoubtedly raise the issue of propriety in an acute form"³⁷. There is certainly ample evidence that the Court possesses a discretion to refuse to give an Advisory Opinion.³⁸

The Court could, of course, be asked to state whether the Assembly has acted within its competence in adopting resolution 2145 (XXI), and what the legal effect is of that resolution. This would be a perfectly proper question to address to the Court, but political considerations make it highly unlikely that it will be asked.

³⁷ Rosenne, *The Law and Practice of the International Court*, Vol. II, p. 705.

³⁸ For the nature and scope of this discretion, see Rosenne, *op. cit.*, Vol. II, pp. 708-719; and Shibata, *The Power of the International Court to Determine its own Jurisdiction*, pp. 42-47.

STATE SUCCESSION AND PROTECTION OF HUMAN RIGHTS

by

DANIEL MARCHAND*

The accession of a large number of new States to independence since the Second World War is not without precedent in history. At the beginning of the nineteenth century, the period from 1810 to 1830 saw the birth of many new States, constituted by the former Spanish colonies in America which had proclaimed their independence. Later, at the end of the First World War it was Europe's turn to experience the advent of several new independent States. A new situation has, however, been created by reason of the existence of international organisations which have instituted a closely-linked series of obligations, particularly in the field of human rights, which to some extent had been declared applicable to the territory of the new State while it was still a territory administered by a member State of these organisations.

This new situation called for a new set of rules aimed at binding a new member State of an international organisation to continue to guarantee respect for human rights, and thus to continue to apply the international conventions which had previously been declared applicable to its territory by the member State responsible for its international relations; this gave rise to the question of the succession of States to international conventions.

I. STATE SUCCESSION: THE LAW APPLICABLE

The question of the succession of States to international conventions must be carefully distinguished from that of the succession of a new State to membership of an international organisation.

A. Succession to the Membership of an International Organisation

Generally speaking, the admission of a new State to membership of an international organisation was never accepted as automatic, a principle which has been observed for some considerable time past; Czechoslovakia did not succeed Austro-Hungary as a Member of the Universal Postal Union on the dissolution of the Austro-Hungarian Empire in 1919, even though it was acknowledged that the legal system drawn up by the U.P.U. had been ap-

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plied in that country, as an integral part of Austro-Hungary, since 1875; Czechoslovakia was admitted to the U.P.U. as a new State on May 18, 1920. Similarly, the U.P.U. Convention had been applied in Yugoslavia, then Serbia and Montenegro, since 1875. But Yugoslavia was admitted to the Organisation as a new member State on December 24, 1921.

In the United Nations, after the debate following the formation of Pakistan and India, the Sixth Committee considered the question from a general viewpoint on October 6 and 7, 1947, and adopted the following principles, elaborated by the rapporteur, Mr. G. Kaackenbeeck:

"1. As a general rule, it is in accordance with principle to presume that a State which is a Member of the United Nations does not cease to be a Member from the mere fact that its constitution or frontiers have been modified, and to consider the rights and obligations which that State possesses as a Member of the United Nations as ceasing to exist only with its extinction as a legal person internationally recognised as such.

"2. When a new State is created, whatever the territory and the population which compose it, and whether these have or have not been part of a State Member of the United Nations, this new State cannot, under the system provided for by the Charter, claim the status of Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter."¹

Thus a new State cannot become a member of an international organisation simply by State Succession; its admission to membership requires, on the one hand, individual application, and, on the other, the admission of the new member by a decision in its regard, validly taken by the competent organ of the organisation concerned.

B. State Succession to International Conventions

The law applicable to State Succession to international conventions is at present evolving rapidly, since the accession of colonial territories to independence in recent years has frequently raised the question, which is now no longer one of the separation of a political entity, but of evolution towards sovereignty, often by means of intermediate stages of internal autonomy; moreover, the international conventions concerned had been expressly declared applicable to the territory before its independence: in view of the multilateral and technical nature of these conventions, the structure of the modern world depends on their continuity.

The purpose of the present article is not to study the procedures by which an international convention was declared applicable

¹ See O'Connell: *The Law of State Succession*, Cambridge, 1956, and the new revised edition. 1966.

to the territory of a new State by the power which administered it before its accession to independence. For the present purposes it will suffice to recall that "classical" treaties very often contained a colonial clause under which the metropolitan power had discretionary competence to determine whether a convention should be applicable to territories under its authority; in the case of the international organisations, more specific provisions, often of an imperative nature, inserted in their constitutions or in the instruments they draw up, lay an obligation on the metropolitan power to apply in the territories for which it bears responsibility the conventions it ratifies, such ratifications being accompanied by a declaration of reservation, if appropriate. What causes the difficulty, on the accession of the territory to independence, is the fact that, as Professor D. P. O'Connell has stated,² the law concerning State Succession to treaties has never been completely settled.

For several centuries past, jurists have been studying this very important aspect of international relations; in 1773, de Vattel established the following rule:

"The rights and obligations resulting from a real treaty pass to the successors, since public or even personal treaties concluded by a King or any other sovereign empowered to do so are State treaties, binding on the Nation as a whole: real treaties, intended to subsist independently of the person who concluded them, are without doubt binding on the successors."³

Contemporary doctrine is, however, more flexible in its approach:

"In principle, the State being an organised form of communal life, conforming to the specific conception of those who direct the affairs of the State in the light of the characteristics of the organised population, any cession of territory or any succession of public authority entails a change in the political order, a break in that order. Thus a successor State must, in principle, be completely free in the exercise of its functions; this implies that it must have full authority to dissociate itself from the previous behaviour of the State which had exercised territorial competence.

"It must be born in mind, however, that the material bases of the State — territory, population — subsist, and necessarily impose a certain degree of continuity. Moreover, a complete upset in legal relations would lead to an inadmissible state of confusion, irrespective of whether the rights had been acquired from the predecessor State (concession) or whether they had arisen in the relations between private persons.

"An additional point is that States are at present bound by many collective treaties. The successor State will find itself induced to maintain the general system accepted by the predecessor State and which had been applicable to its territory.

² "Independence and Succession to Treaties", in *British Year Book of International Law*, 1962, pp. 84 ff.

³ *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains.*

"This is particularly the case where the aim of collective treaties is not so much to regulate political relations between States, as to ensure the protection of individuals who are about to pass from one sovereignty to another.

"Thus we find quite a number of considerations which tend to favour a degree of continuity when one State replaces another in any given territory".⁴

Since 1960, the International Law Commission of the United Nations has been studying the question and has appointed a sub-committee having as terms of reference to study and determine the present state of the law and practice regarding State Succession, and to prepare a draft instrument on the question, having regard to recent developments in international law in this field.⁵

Three methods of proceeding have so far been envisaged:

1. The *clean slate* method, under which treaties entered into by the former colonial power lose their effect as regards the newly independent State, which retains complete freedom to become a party to whatever treaties it may deem appropriate.
2. The *right of option* method, under which the new State can decide to maintain treaties in force; this may also take the form of maintaining the application of a multilateral treaty subject to the right of denunciation or to a period of reflection, the new State thus reserving to itself the possibility of taking a decision within a certain time concerning conventions to which it ceases to be a party.
3. The method of *succession* of the new State to the international conventions which had been declared applicable to its territory by the power previously administering it. This method may result from treaty arrangements, in the form of a devolution agreement such as that concluded on October 17, 1947 between the United Kingdom and the Provisional Government of Burma:

"all the obligations and responsibilities hitherto incumbent upon the Government of the United Kingdom in virtue of a legally valid international instrument shall henceforth be incumbent upon the Provisional Government of Burma, provided that the said instrument may be regarded as applying to Burma."

No lengthy reflection on this problem is required to appreciate how illogical and unsatisfactory it is, from the viewpoint of the co-

⁴ Mme P. Bastid: "*Cours de droit international public*", Faculty of Law, Paris, in *Les Cours de droit*, 1965-1966, pp. 561 ff.

⁵ See *Yearbook of the International Law Commission*, 1963, Volume I, Minutes of the 15th Session, 702nd Sitting: State and Government Succession: Report of the Sub-Committee presented by Mr. M. Lachs, pp. 205-210.

hesion and proper application of the rules of international law, to offer a new State such a wide range of possible solutions, going from the complete negation of State Succession represented by the clean slate solution – which appears most to respect the sovereignty of the new State – to a solution based on State Succession without any right of option, a solution which affords the best guarantee of the international organisation of States and of the protection of the individuals and interests at stake in the territory of the new State.

International practice has hitherto come to endow this latter argument with a certain amount of force and has taken the view that some treaties entered into by the sovereign predecessor State continue to bind the successor State; such types of treaty include, in particular:

1. Territorial treaties, that is, those which determine the frontier in relation to a third State, those which concern road and other communications, etc. Thus, in the case of the *Preah Vihear Temple* the International Court of Justice⁶ recognised that Cambodia could exercise the rights granted to France by Siam in the 1904 and 1907 treaties respecting the demarcation of the frontier. The Court affirmed the same principle in the *Free Zones* case between France and Switzerland by declaring that France had succeeded to Sardinia in sovereignty over the territory in dispute.
2. Treaties incorporated into municipal law. Thus in 1871, in a matter concerning Alsace-Lorraine, the German Empire was regarded as being bound by the concordat then applicable to all of France; after the retrocession of Alsace-Lorraine to France at the end of the First World War, the concordat continued to be applied in these recovered territories, while it had ceased to apply to French territory as a whole; in fact, the concordat still continues to apply to Alsace-Lorraine.

This latter case is of particular interest because it corresponds to the international conventions which will form the subject of this study, those which have been drawn up by the international organisations in the field of human rights, and which require ratifying States to pass the laws necessary to ensure their effective application.

Thanks to the existence of the human rights conventions which have already been declared applicable to their territory, States, coming to independence and slowly awakening to an awareness of the modern world, find available to them – free from the hesitations and conflicts experienced by others – a system designed for

⁶ I.C.J. Reports, 1962, pp. 6-146.

the protection of human rights; thus, the new States are already equipped to move in the right direction.

All that has already been gained would, however, be lost if the formation of the new States were to result in their applying the clean slate policy; to avoid this, some of the international organisations responsible for the human rights conventions have instituted a practice designed to ensure the transmission to the successor State of the international conventions already applied in its territory.

The legislative structure built up by the international organisations, during the decades preceding the accession to independence of the States in question, is so important that if it had been permitted to collapse with the securing of independence by some 50 States, this would have constituted a disaster which would have taken more than one generation to remedy. This was a consideration which helped to persuade the new States of the need to preserve it. It was all the more important that these conventions be maintained, because they provide specific rights for individuals and also make an important contribution to the social and economic development of the newly independent States.

These States were persuaded that the obligation to co-operate with the international community was to some extent a mark of emancipation rather than of compulsion, for the independence of the new State is in no wise lessened by the substitution of an orderly process of development for the confusion, uncertainty and practical inconvenience resulting from a legal vacuum. The practice evolved in this field in recent years is very illuminating in this regard.

II STATE SUCCESSION: THE PRACTICE

The principal international conventions concerning human rights adopted by the international organizations are:

United Nations Organization:

- Convention on the Prevention and Punishment of the Crime of Genocide, 1948;
- International Convention on the Elimination of all forms of Social Discrimination, 1965;

Council of Europe:

- European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, and Additional Protocol of 1952;
- European Social Charter, 1961.

UNESCO:

- Universal Copyright Convention, 1952;
- Convention against Discrimination in Education, 1960.

Office of the High Commissioner for Refugees:

- Convention relating to the Status of Refugees, 1951.

International Union for the Protection of Literary and Artistic Rights, charged with administering the:

- International Convention for the Protection of Literary and Artistic Rights, adopted at Berne in 1886.

International Red Cross Committee:

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949;
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949;
- Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949.

The International Labour Organisation, all the activities of which, in particular the 125 Conventions adopted between 1919 and 1966, come within the scope of articles 22 and 25 of the Universal Declaration of Human Rights.

Such a measure of achievement requires no comment; and it becomes quite apparent that the need to safeguard the extent to which these conventions had been applied in the territories of the new States before their accession to independence could not be allowed to be eliminated overnight, on the pretext of respecting the classical rules surrounding sovereignty; but that, on the contrary, the rights guaranteed to the peoples of these territories must continue to be upheld. The international organisations follow different practices in this respect, but one can be cited as having developed a truly satisfactory practice: the International Labour Organisation.

A. The Practice Followed by International Organisations other than the International Labour Organisation

1. The practice of the United Nations Secretariat

The practice followed by the United Nations Secretariat does not reveal any elements of an imperative nature; on the accession to independence of a new State, the Secretariat transmits to it a list of the multilateral instruments deposited with the Secretariat which had previously been applied in its territory by the Power responsible for its international relations; at the same time the Secretariat requests the Government of the new State to confirm whether it considers itself bound by these instruments; if such confirmation is not forthcoming the new State will not be listed as a party to the instruments in question.

This practice is also followed by some of the specialised agen-

cies of the United Nations. As has already been mentioned, it is not satisfactory because the excessive latitude allowed to States does not result from the application of a rule of international law but rather from the absence of any rule. For this reason a number of contemporary authors are strongly in favour of a much more rigorous form of State Succession to international conventions.⁷

2. *The Practice of the International Committee of the Red Cross*

The International Committee of the Red Cross, the sponsor of the Geneva Conventions and the guiding force in their development and application, has always held and affirmed the view that a State gaining its independence is bound by a ratification or notification of adhesion given by the predecessor State when the latter was exercising sovereignty over its territory, unless the new State expressly repudiates the undertakings of the former sovereign.

This approach was adopted by the International Committee of the Red Cross, because of the character of the Geneva Conventions, which relate to matters of public and general interest and uphold principles of vital concern to humanity.

However, in order to avoid any possibility of misunderstanding, the International Committee of the Red Cross decided some years ago to invite newly independent States to confirm their participation in the Geneva Conventions by means of a "declaration of continuity", this with a view to drawing the attention of the governments concerned to the obligations incumbent upon them in applying these Conventions. Of the 113 States which are officially parties to the Geneva Conventions, 17 have made such a "declaration of continuity". Some others, which have in effect succeeded to the Conventions, delivered instruments of ratification or adhesion as if they were ratifying or adhering to them for the first time.⁸

This practice, which has undoubtedly yielded satisfactory re-

⁷ See, in particular, the books and articles published by: Professor D. P. O'Connell of the Faculty of Law, Adelaide; Professor Ch. Rousseau of the Faculty of Law, Paris; C. W. Jenks, Senior Deputy Director-General of the International Labour Office; F. Wolf, Legal Adviser, International Labour Office; I. A. Shearer, of the Faculty of Law, Adelaide (in particular "La succession d'Etats et les traités non-localisés", in *Revue générale du Droit international public*, 1964, No. 1 pp. 5-59).

⁸ The following form of "declaration of continuity" may be quoted by way of example:

"I have the honour, on behalf of my government, to inform you as follows: "The four Geneva Conventions of 1949 concerning the protection of victims of war are, in law, applicable in the territory of the Central African Republic by virtue of their ratification by France, which exercised public authority until accession to independence on June 28 1961.

"The Government of the Central African Republic nevertheless wishes to confirm by these presents that it is a party to these four Conventions, viz. . . . "I would request you kindly to make the foregoing known to the States which are parties to these Conventions. I have the honour to be, etc. etc."

sults, is nevertheless not sufficiently strict to qualify as an ideal example of the practice to be followed. Such an example is, however to be found in the practice of the International Labour Organisation.

B. The Practice of the International Labour Organisation

The practice followed by the I.L.O. in regard to State Succession to international labour conventions is of such importance as to call for detailed study. Its importance stems from its originality and its great strictness; the I.L.O. is the only international organisation to have made such extensive and unremitting efforts to ensure that the conventions it draws up will continue to be applied by new States to the territories of which they had previously been declared applicable.⁹ These efforts led to the development of a completely general practice, which received such wide support that it has now acquired the force of a custom in international law.¹⁰

1. The Legal Basis for the Practice

The "Explanatory Note" to the *International Labour Code*, 1951¹¹ states:

"In a number of cases Conventions are regarded as binding on Members of the Organisation in virtue of the principle of State Succession . . . In so far as they may involve any qualifications of the ordinary rules in regard to State Succession they tend to suggest that there are special considerations which give international labour conventions a more durable character than treaty engagements of a purely contractual nature."

The Preamble to the Constitution of the International Labour Organisation moreover states: "Whereas universal and lasting peace can be established only if it based upon social justice . . ."

This naturally leads to the conclusion that there should be no regression in the social field and that, consequently, there should

⁹ In accordance with the provisions of article 35 of the Constitution of the I.L.O., which will shortly cease to have effect, being replaced by a paragraph added to article 19, which defines the effects of ratification.

¹⁰ See, in particular: C. W. Jenks: "State Succession in Law-Making Treaties" in *British Year Book of International Law*, 1952; F. Wolf: "L'O.I.T., sa composition et la transformation étatique", in *Comunicazioni e Studi*, 1958; and "Les conventions internationales du travail et la succession d'Etats", in *Annuaire français de droit international*, 1961; D. Marchand: "Les conventions internationales du travail et les Etats nouveaux", doctoral thesis, Paris 1966.

¹¹ The *International Labour Code* is a codification of the standards adopted following tripartite discussions at the International Labour Conference (composed of representatives of Governments, Employers and Workers); it has no binding force but large sections of it have acquired the force of law in the great majority of countries.

be no falling off in the application of international labour conventions.

It may seem surprising that when the Constitution of the I.L.O. was being amended in 1946, no provision was made concerning the admission of new member States to which international labour conventions had already been declared applicable, all the more so, when it could readily be foreseen that this question would arise, since a number of States were already at that time on the point of gaining their independence. No doubt it was considered preferable to allow the rules to evolve progressively and in a flexible manner, on the basis of experience and practice, while ensuring that they tended in the right direction, rather than to lay down at the outset rigid principles concerning a situation the full implications of which were not yet clear. Such rules would no doubt have been badly received at the time and would have adversely affected the entry of new States to the I.L.O., whereas their progressive affirmation, with due concessions being made in the light of particular circumstances, enabled the desired result to be achieved.

The Constitution of the I.L.O. and the Standing Orders of the International Labour Conference contain provisions which, by analogy, reinforce the practice which was being established; these relate to the re-admission of a State which has ceased to be a Member of the Organisation and which had previously ratified conventions. Under these provisions¹², a State which withdraws from the Organisation shall continue to apply the provisions of conventions which it had previously ratified until such time as it is authorised to denounce these conventions and does effectively denounce them; when such State applies for readmission to membership, the Sub-committee which the Conference may appoint to examine the application will state in its report whether the applicant recognizes that the obligations resulting from the conventions continue to be binding.

2. *The Development of Practice*

Paradoxically enough, the practice which is being examined originated on the occasion of the accession to independence of the two States which were not non-metropolitan territories in the meaning of article 35 of the ILO Constitution: Burma and Pakistan.

Burma was separated from India on April 1, 1937 and then administered by the United Kingdom until October 17, 1947. It then applied for admission to membership of the I.L.O. and recognized, "that the obligations resulting from the international labour conventions ratified in respect of Burma by India prior to

¹² Article 1, paragraphs 3 to 6 of the Constitution; article 28, paragraph 7, of the Standing Orders of the Conference.

April 1, 1937 continue to be binding upon the Union of Burma in accordance with the terms thereof." ¹³

The Indian Independence Order of 1947 made Pakistan independent following the division of India into two dominions. Pakistan then became a member of the I.L.O. and recognized, "that the obligations resulting from the international labour conventions ratified by India prior to August 15, 1947 continue to be binding upon Pakistan in accordance with the terms thereof." ¹⁴

This completely new practice was proving satisfactory even at that stage, and Professor D. P. O'Connell could affirm that, if the International Labour Office had adopted a different approach to what was essentially a new problem, the practice followed by the Organisation would now be radically different from what it is.

Seven former non-metropolitan territories were subsequently admitted to membership of the I.L.O. without the question of the international labour conventions applicable before their independence having first been settled. They were: Syria, Philippines, Lebanon, Jordan, Sudan, Kuwait and Israel; Israel publicly justified its stand by declaring that a new State started life free of all obligations and that, even if precedents to the contrary were adduced, they were not applicable to Israel by virtue of the special circumstances in which that State had attained international personality. ¹⁵

State practice then developed a formula which was general in scope, and which States adopted after giving their undertaking to respect the obligations resulting from the Constitution of the Organisation. Thus the Government of Ceylon made it known that it was "prepared to accept the undertakings given on its behalf by the Government of the United Kingdom under the provisions of article 35 of the Constitution of the International Labour Organisation, and consideration will be given at a very early date to the formal ratification of these Conventions by this country". ¹⁶

This declaration of principle was, however, nothing more than an indication that the new States were well disposed towards the conventions, and did not result in any specific obligation on their part. Nevertheless two States saw a specific obligation therein and were willing that the ratifications of the conventions concerned be immediately registered in their names by the Director-General of the I.L.O.: those States were Morocco and Tunisia, in 1956. ¹⁷ In these two cases, former non-metropolitan territories for

¹³ I.L.O.: *Official Bulletin*, Vol. XXXI, No. 3, December 31, 1948, p. 218.

¹⁴ *Ibid.*, Vol. XXX, No. 5, December 31, 1947, p. 335.

¹⁵ S. Rosenne: *Israel et les traités internationaux de la Palestine*, Clunet, 1950, pp. 1140 ff.

¹⁶ I.L.O.: *Official Bulletin*, Vol. XXXI, No. 3, December 31, 1948, p. 223. Indonesia, Viet-Nam and Libya gave a similar undertaking.

¹⁷ *Ibid.*, Vol. XXXIX, 1956, No. 10, pp. 642-647, 680, 685.

the first time fulfilled in an ideal manner the obligation to continue to apply international labour conventions which had been declared applicable to them by the Member State of the I.L.O. responsible for their international relations.

It then became customary to have the formula, by which the new Member State undertook to continue to apply the conventions which had previously been declared applicable to it, followed by a list of the conventions in question. This practice should in no case be interpreted as allowing the new State any latitude as regards including in the list, at its discretion, any particular conventions which it undertakes to continue to apply, with the implication that others might be abandoned; by means of the general formula, the State declares that it will continue to apply the conventions, thus determining the undertaking it enters into, while the list which follows ensures agreement concerning the conventions referred to and thus offers an undoubted advantage as regards evidence of what is involved. This advantage is, however, not the only one resulting from this procedure; while it is true that some conventions present no problem and can simply be taken over by the new State, there are others which give rise to difficulties.

In accordance with article 35, paragraphs 1 to 6, of the Constitution of the I.L.O., conventions could be applied to a non-metropolitan territory with "such modifications as may be necessary to adapt the Convention to local conditions"; these provisions no longer apply when the territory attains independence and becomes a member of the I.L.O., because no reservations can be made when ratifying international labour conventions, the specific provision in the Constitution concerning non-metropolitan territories being an exception to this principle. Consequently, on being admitted to membership of the I.L.O. a new State must decide whether it can renounce such modifications and apply the Convention by availing itself solely of whatever degree of flexibility may be expressly provided for in the text thereof, or whether it will continue to apply it in the same manner as before the attainment of independence, until such time as it is in a position to dispense with the modifications.

Another series of conventions which gave rise to problems was that comprising conventions specially intended for non-metropolitan territories, and consequently more flexible in their drafting. These can be applied by a new State, which, by definition, is no longer a non-metropolitan territory, only during a transitional period, until such time as the State is in a position to ratify the corresponding "metropolitan" convention.

To summarize, three types of conventions are involved: those which the former non-metropolitan territory can, and must, purely and simply continue to apply; those which it will apply by giving a wider undertaking than that previously given in its name (by dis-

pensing with the modifications or ratifying the "metropolitan" convention corresponding to the non-metropolitan one); those in respect of which the *status quo* is maintained, the State undertaking to ratify the convention in full at a later date (if modifications had been reserved), or to ratify the corresponding "metropolitan" convention (in the case of a convention intended for non-metropolitan territories).

Obviously the first type of undertaking will necessarily arise in the case of each new State, the second type will rarely be given, while the third will be frequent. It should be clearly noted that the new State is afforded no possibility of regression in the application of international labour conventions.

As an illustration of this practice, the following is the undertaking given by Guyana on its admission to membership of the I.L.O.¹⁸

"The Government of Guyana recognises that it continues to be bound by the obligations entered into on behalf of the territory of Guyana by the United Kingdom in respect of the following Conventions: (There follows a list of 24 conventions).

"The Government of Guyana undertakes to ratify in full immediately Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, 1948, and to examine immediately the following Conventions, which had hitherto been applied with modifications, to ascertain whether it would be possible to eliminate the circumstances which originally made a modification necessary: (There follows a list of 7 conventions).

"The Government of Guyana undertakes to continue to apply the non-metropolitan Conventions which the United Kingdom had applied hitherto, until it is able to ratify the corresponding 'metropolitan' Conventions".

The Government furthermore undertook to examine, as early as possible, 26 conventions ratified by the United Kingdom on which a decision concerning the territory of Guyana had hitherto been reserved, to determine whether it could remove the conditions which led to the original conclusions that a decision should be reserved. This is the first time that a new State gave such an undertaking and it would be hard to imagine clearer evidence of good will.

Having been developed to such a degree of precision and with provision having been made for all types of conventions, the practice adopted by the I.L.O. would seem to be very satisfactory, since there can be no regression as regards the protection of workers. It operates perfectly in complicated cases involving the fusion and scission of territories, even resulting at times in conventions which

¹⁸ International Labour Conference: *Record of Proceedings* 50th Session, pp. 107 et seq. and pp. 485 et seq.

had been applicable in one part of a new federation being made applicable in the other and vice-versa: the formation of the Federation of Mali, composed of Senegal and Sudan, and its subsequent dissolution; the formation of the Republic of Somalia from British Somaliland and the former Italian trust territory of Somalia; the formation and dissolution of the United Arab Republic, with Egypt and Syria; the Federal Republic of Cameroon, composed of Eastern Cameroon (the former French trust territory of Cameroon) and Western Cameroon (the former British trust territory of Cameroon); Malaysia, formed of the Federated Malay States, Sabah, Sarawak and Singapore, and then the same States without Singapore when it withdrew; Tanzania, comprising Tanganyika and Zanzibar.

The I.L.O. practice regarding State Succession to international labour conventions seemed to be so widely accepted that the First African Regional Conference of the I.L.O., held in Lagos (Nigeria) in 1960, adopted a resolution (No. V) in which this principle was affirmed; these provisions were further re-affirmed by the Second African Regional Conference (Addis Ababa, 1964). Thus when Uganda and Malawi subsequently displayed some reluctance to abide by the general practice, little difficulty was experienced in persuading them to accept it; in the case of Malawi the I.L.O. Committee of Experts on the Application of Conventions and Recommendations examined the question¹⁹; the Conference Committee on the Application of Conventions and Recommendations heard a statement by a representative of Malawi who gave an assurance that his Government proposed to remedy the situation without delay. The representative of the worker members of the Committee welcomed this decision and recalled that:

"The governments of all newly independent countries should realise that they must guarantee for the workers protection at least equal to that which existed prior to independence."²⁰

Thus, there is no doubt that the International Labour Organisation is in a position to impose on a new member State, in the most categorical manner, the obligation to continue to apply the conventions which had previously been declared applicable to it by the member State responsible for its international relations. This obligation results from the general practice evolved over the past 20 years and which is so well established as to constitute a custom of international law which member States are obliged to respect.

¹⁹ I.L.O. Report of the *Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IV), International Labour Conference, 49th Session, Geneva, 1965, pp. 23-24.

²⁰ I.L.O. *Record of Proceedings*, International Labour Conference, 49th Session, Geneva 1965, Appendix V, p. 577.

In this connection it may be mentioned that article 38 of the Statute of the International Court of Justice enumerates the sources of international law, including, in particular, "international custom, as evidence of a general practice accepted as law". In her lectures on international law ²¹, Madame Bastid affirms in this regard:

"A custom may exist even if the existence of a rule has been confirmed by States other than the State directly concerned, and the finding that such a rule exists may be made by authorities other than the State, when it is evident that, in international life, bodies other than States have existence in law or competence to state the law. This is the case of an international judge, of the international organisations, etc."

Conclusion

While the twenty years since the end of the Second World War have been marked by the accession to independence of a large number of States, it is important, if this development is to be beneficial, that the young nations be convinced of the value – in order to safeguard the role which is properly theirs – of the international standards established by the international organisations.

The purpose in not automatically admitting new States to membership of international organisations in virtue of State Succession was to ensure that they were fully aware of the place they were henceforth to occupy in international life; new States were required to make a new application for admission to membership in order that they might knowingly accept the obligations resulting from their new status, which had previously been assumed on their behalf.

The International Labour Organisation adopted a particularly strict attitude as regards respect for the obligations resulting from the Conventions drawn up by it, because in that Organisation individuals (workers and employers) participate in the drafting of legislation aimed at directly protecting individuals, hence there could be no question of leaving it to governments to decide to continue, or not to continue, to assume this social protection. To adopt a strict position at the outset, in a world where the susceptibilities of sovereign States were all the more tender because of their newness, would have been ill-judged; thus the practice which developed was progressively made more exigent until it attained the force of a binding rule of law.

Through this example it has been possible to illustrate how State Succession to international conventions, properly understood, can serve as a guarantee for human rights. Such a precedent fully merits reinforcement by the other international organisations in

²¹ Op. Cit., p. 290.

regard to the conventions they draw up, or which they are charged to administer, and by the new States, which should bring their policy regarding all international conventions concerning human rights into harmony with the policy they have followed in regard to international labour conventions.

INTERNATIONAL COVENANTS ON HUMAN RIGHTS

Editor's Note:

At its twenty-first session on December 16, 1966 the General Assembly adopted the International Covenant on Civil and Political Rights with an Optional Protocol and the International Covenant on Economic, Social and Cultural Rights. The recorded vote on the two Covenants was unanimous; on the Optional Protocol it was 66 in favour, 2 against, with 38 abstentions. In its accompanying resolution 2200 (XXI) B of the same date the General Assembly requested non-governmental organisations to publicize the text of these instruments as widely as possible using every means at their disposal, including all the appropriate media of information.

In pursuance of this request, and in order that they be made known throughout the world, the International Commission publishes the text of the two International Covenants and of the Optional Protocol in the present issue of its Journal.

The adoption of these international instruments is a major event in the field of the international protection of human rights and of the promotion of the Rule of Law.

In publishing these texts, the International Commission of Jurists hopes to make another contribution to the focusing of public attention on constructive steps toward the observance of Human Rights Year, 1968.

**INTERNATIONAL COVENANT ON ECONOMIC,
SOCIAL AND CULTURAL RIGHTS.****Preamble**

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I**Article 1**

1. All peoples have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the United Nations Charter.

PART II**Article 2**

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in this Covenant.

Article 4

The States Parties to the present Covenant recognize that in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person, any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

- (a) Remuneration which provides all workers as a minimum with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; and
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedom of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organisations.

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or of the police, or of the administration of the State.

3. Nothing in this article shall authorize State Parties to the International Labour Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care

and education of dependent children. Marriage must be entered into with the free consent of the intending spouses;

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits;

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; and

(b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools other than those established by the public authorities which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant.

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of those specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by a State Party to the present Covenant it will not be necessary to reproduce that information but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope

of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or as appropriate for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance, any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V**Article 26**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference the Secretary-General of the United Nations shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly and accepted by a two-thirds majority of the States

Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties being still bound by the Provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars;

(a) Signatures, ratifications and accessions under article 26;

(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.**Preamble**

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I**Article 1**

1. All peoples have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the United Nations Charter.

PART II**Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall inform immediately the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III**Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
(b) The preceding sub-paragraph shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
 - (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
 - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

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 recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order ("*ordre public*") or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juveniles otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself, or to confess guilt.

4. In the case of juveniles, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or commission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public

safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary (1) for respect of the rights or reputations of others, (2) for the protection of national security or of public order ("*ordre public*"), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order ("*ordre public*"), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order ("*ordre public*"), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise, to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in the Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as required by his status as a minor, on the part of his family, the society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV**Article 28**

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as "the Committee"). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.
2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election of the Committee other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.
3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant not later than one month before the date of each election.
4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization as well as of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in paragraph 4 of article 30.
2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations who shall then declare the seat of that member to be vacant.
2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.
3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:
 - (a) Twelve members shall constitute a quorum;
 - (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) within one year of the entry into force of the present Covenant for the States Parties concerned and (b) thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may after consultation with the Committee transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports and such general comments as it may consider appropriate to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Cove-

nant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

- (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.
- (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
- (d) The Committee shall hold closed meetings when examining communications under this article.
- (e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in this Covenant.
- (f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.
- (g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.
- (h) The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph (b), submit a report:
 - (i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
 - (ii) If a solution is not reached within the terms of sub-paragraph (e), the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General of the United Nations unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as "the Commission"). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;
- (b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission the members of the Commission concerning whom no agreement was reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under article 41.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.
5. The secretariat provided in accordance with article 36 shall also service the Commissions appointed under this article.
6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.
7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned.

- (a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter.
 - (b) If an amicable solution to the matter on the basis of respect for human rights as recognised in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached.
 - (c) If a solution within the terms of sub-paragraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned as well as its views on the possibilities of amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned.
 - (d) If the Commission's report is submitted under sub-paragraph (c), the States Parties concerned shall, within three months of the receipt of the report, inform the Chairman of the Committee whether or not they accept the contents of the report of the Commission.
8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.
9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned in accordance with paragraph 9 of this article.

Article 43

The members of the Committee and of the *ad hoc* conciliation commission which may be appointed under article 41, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly, through the Economic and Social Council, an annual report on its activities.

PART V**Article 46**

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI**Article 48**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed

amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference the Secretary-General of the United Nations shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties being still bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 48;
- (b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

**OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant") and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as "the Committee") to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant,

Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals, subject to its jurisdiction, claiming to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2

Subject to the provision of Article 1, individuals claiming that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 3

The Committee shall consider inadmissible any communication under this Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

Article 4

1. Subject to the provisions of Article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.
2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.
2. The Committee shall not consider any communication from an individual unless it has ascertained that:
 - (a) The same matter is not being examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meeting when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

Article 6

The Committee shall include in its annual report under Article 45 of the Covenant a summary of its activities under the present Protocol.

Article 7

Pending the achievement of the objectives of General Assembly resolution 1514 (XV) of 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

Article 8

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 9

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 10

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 11

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference the Secretary-General of the United Nations shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties being still bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 12

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General of the United Nations.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under Article 2 before the effective date of denunciation.

Article 13

Irrespective of the notifications made under Article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in Article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under Article 8;
- (b) The date of the entry into force of the present Protocol under Article 9 and the date of the entry into force of any amendments under Article 11;
- (c) Denunciations under Article 12.

Article 14

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in Article 48 of the Covenant.

THE SUPREME COURT OF INDIA

by

PURSHOTTAM TRIKAMDAS*

India is a Federal Republic where the Constitution defines the powers of the Central and the State Governments. The Constitution also makes provision for certain Fundamental Rights, to which all the laws must conform. Apart from the Fundamental Rights, the Legislature may not, in enacting any legislation, transgress beyond the powers given to it by the Constitution. In such a system of government, where the Constitution alone is supreme, the Courts stand as the guardians of the Constitution and the democratic rights of the people against any encroachment by the Legislature or the Executive.

In India, the Supreme Court ¹ is at the apex of a hierarchy of courts. It is not only a Constitutional Court, but is also a final court of appeal and has been given certain other jurisdiction which we shall deal with a little later. Under the Supreme Court are the High Courts of the various States. Below the High Courts are the District and the Subordinate Courts.

Although India is a Federation, we do not have a dual system of courts, one concerned with dealing with State laws and the other with federal laws. The same court deals with both the sets of laws; and even before the lowest court any constitutional question may be raised although no court lower than a High Court can decide it; but it is the Supreme Court which is the final court for deciding any constitutional question.

Historical

Before the establishment of the Supreme Court by the Constitution dated January 26, 1950, as the final court of appeal as well as a court with original and advisory jurisdiction, the Judicial Committee of the Privy Council in England was the final Appellate Court.

By the Government of India Act 1935, a Federal Court was established, in contemplation of the establishment of a federation. The federation never came into existence, but the Federal Court was given the jurisdiction of deciding constitutional questions. The

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¹ In the citation of Supreme Court decisions the following abbreviations have been used in this article: SCR (meaning Supreme Court Reports) and AIR (meaning All-India Reporter dealing with Supreme Court cases).

decision was subject to a further appeal to the Privy Council.

After the Indian Independence Act, which came into force on August 15, 1947, the Constituent Assembly, which acted also as the Legislature, by Act I, 1948, entrusted the Federal Court with the hearing of all civil appeals which would otherwise have gone to the Privy Council, and also provided that the records of such appeals pending before the Privy Council, if not already transmitted, should be transmitted to the Federal Court for disposal. By Act V, 1949, which came into force on October 10, 1949, the jurisdiction of the Privy Council to hear the appeals pending before it was finally abolished, and all such appeals were henceforward to be heard by the Federal Court. Therefore, the Federal Court became the final court of appeal in all matters.

The Supreme Court of India came into existence on January 26, 1950, as already mentioned, the date on which the Constitution itself became operative and all matters pending before the Federal Court were transferred to the Supreme Court.

The Supreme Court, however, was also entrusted with original jurisdiction in certain matters, in addition to the jurisdiction to entertain petitions for the enforcement of Fundamental Rights enshrined in the Constitution and also with advisory jurisdiction. This will be discussed in detail later.

Organisation

Article 124 of the Constitution provides that the Supreme Court would consist of the Chief Justice and not more than seven other judges. Power was given to Parliament (Indian) to prescribe a larger number of Judges. In 1960, Parliament, by Act 17 of 1960, increased the number of judges from seven to thirteen. This was exclusive of the Chief Justice. At present, including the Chief Justice, there are eleven judges. By article 128, the Chief Justice, with the consent of the President of India, has been empowered to request a retired Judge of the Supreme Court or the Federal Court or any person who has held the office of a Judge of a High Court, if otherwise qualified, to sit and act as a Judge of the Supreme Court. Such Judges are called *Ad Hoc* Judges. The sitting Judges of the Federal Court became Judges of the Supreme Court.

Every Judge of the Supreme Court is appointed by the President, and holds office till he has attained the age of sixty-five years. The President appoints the Judges after consultation with such of the Judges of the Supreme Court and the State High Courts as he deems necessary, but in the case of an appointment of a Judge of the Supreme Court, the President is bound to consult the Chief Justice.

It may be mentioned here that the President of India is the Head of the State and its Chief Executive, but he has to act on the

advice of the Ministers and, in the case of the appointment of Judges of the Supreme Court, it is the Home Minister who is the de facto appointing authority.

Qualifications of Judges

No person is qualified for appointment as a Judge of the Supreme Court, unless he is a citizen who has been a Judge of a High Court or two or more High Courts for at least five years, or an advocate of a High Court for at least ten years, or a distinguished jurist. The expression "High Court" includes the High Courts in existence prior to the commencement of the Constitution. Several efforts were made to appoint an advocate to the Bench, but for various reasons only one advocate has accepted this high honour and responsibility. No person who has held the office of Judge of the Supreme Court is entitled to plead or act in any court or before any authority in India. This provision, in some measure, acts as a deterrent to a practising advocate from accepting a seat on the Supreme Court Bench.

Resignation and removal

A Judge may at any time tender his resignation. Even in that case he would be debarred from acting or pleading after his resignation.

No Judge of the Supreme Court can be removed except by an order of the President, passed after the presentation of an address of each House of Parliament (there are two Houses), supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of each House present and voting. Each House must vote in the same session, and the address can be based on the ground of proved misbehaviour or incapacity.

Parliament is also empowered to make laws for regulating the procedure for the presentation of an address and for the investigation and proof of misbehaviour or incapacity. No such law has been made so far, but a Bill is pending before Parliament.

The Judges of the High Court are also appointed by the President, after consultation with the Chief Justice of India and the Governor of the State, which, in practice, means the Chief Minister of the State. They hold office till the age of 62 and are only removable in the manner in which a Judge of the Supreme Court is removable.

Salaries

The Constitution makes provision for the salaries to be paid to the Chief Justice and the other Judges. The salary of the Chief

Justice has been fixed at Rs. 5,000.—² per month and the other Judges at Rs. 4,000.—³

The Constitution also provides for a rent-free residence. Fairly commodious houses with large compounds are provided. The maintenance of the house and the open space is provided by the Government.

The only contingency in which the salaries of the Judges can be reduced is under Article 360, which deals with a proclamation by the President in a financial emergency. Such an emergency has not yet arisen, but if it does arise the President is authorised to issue directions for the reduction of salaries and allowances of various classes of persons including the Judges of the Supreme Court.

Income tax is chargeable on the salaries, and the amount received by a Judge is considered far from adequate even by Indian standards. The pension is negligible and the disqualification against practice is perhaps the main reason for the reluctance of practising advocates to accept the high office.

The pension of a Supreme Court Judge is regulated by an Act of Parliament and depends on his length of service as a Judge of the Supreme Court. If he has been a Judge of the High Court prior to his appointment as a Judge of the Supreme Court, the period during which he served as a Judge of a High Court is also taken into consideration for the purpose of calculating his pension. The highest pension that a Judge of the Supreme Court can earn is Rs. 26,000—⁴ per annum. A Judge does not become entitled to any pension unless he has served for 7 years as a Judge of the Supreme Court. Where he has not completed 7 years' service, he is entitled to a sum of Rs. 7,500⁵ per annum irrespective of the length of service.

Article 121 provides that no discussion regarding the conduct of any Judge of the Supreme Court or of a High Court, in the discharge of his duties, shall take place in Parliament. The Constitution has thus taken care to safeguard the independence of these Judges, so necessary to safeguard the rights of the citizen. It could be confidently asserted that these Judges act without fear or favour in consonance with their oath of office to bear true faith and allegiance to the Constitution and to uphold the sovereignty and integrity of India, and to perform the duties of the High Office without fear or favour, affection or illwill, and to uphold the Constitution and the laws.

The power of appointment of officers and servants of the Supreme Court has been given to the Chief Justice. The Chief

² Prior to recent devaluation \$ 1,000 and now \$ 700.—

³ Prior to recent devaluation \$ 800.— and now \$ 560.—

⁴ Prior to recent devaluation \$ 5,500.— and now \$ 3,750.—

⁵ Prior to recent devaluation \$ 1,500.— and now \$ 1,000.—

Justice is also authorised to make rules regarding the conditions of their service. This would be subject to any law made by the Parliament.

Excepting for this special power, the Chief Justice is *primus inter pares*. He is the administrative head of the court, and it is for him to determine how many divisions will sit at any particular time, and the Judges who will constitute those divisions.

The Chief Justice also has the power to appoint an Arbitrator in respect of certain disputes between the Union Government and the Government of a State under Article 257 (4) and 258 (3).

The Judges have no personal clerks to assist them in summarising briefs and in research as in the United States of America.

Jurisdiction

The Jurisdiction of the Supreme Court extends to the following matters:

WRIT

- (1) Article 32 empowers the Supreme Court to issue Directions, Orders or Writs for the enforcement of Fundamental Rights enumerated in Part III of the Constitution.

ORIGINAL JURISDICTION

- (2) Exclusive Original Jurisdiction in any dispute between the Union and a State or States; between Union and a State or States on one side and a State or States on the other; between States *inter se*. The dispute may involve any question, whether of law or fact, on which the existence or extent of a legal right depends. (Article 131). This jurisdiction does not extend to disputes arising out of a treaty or similar agreement executed before the Constitution came into operation, or one which provides that jurisdiction shall not extend to such a dispute. (Proviso).

APPELLATE JURISDICTION

- (3) Appeals lie to the Supreme Court:
 - a. on Constitutional questions (Article 132),
 - b. in civil including tax matters (Article 133),
 - c. in criminal matters (Article 134),
 - d. if special leave is granted in any matter (Article 136).

ADVISORY JURISDICTION

- (4) Advisory jurisdiction (Article 143). In matters which are referred to the Supreme Court for opinion by the President on any question of law or fact. The President can also refer disputes arising out of any treaty or agreement, etc., to the Supreme Court for its opinion.

**DISPUTES IN
CONNECTION
WITH ELECTION
OF PRESIDENT
OR A
VICE-PRESIDENT**

- (5) The Supreme Court is also entrusted with the power of deciding any dispute in connection with the election of a President or a Vice-President (Article 71).

**REMOVAL OF THE
CHAIRMAN OR
MEMBER OF
PUBLIC SERVICE
COMMISSION**

- (6) Under Article 317, if a Chairman or any other Member of the Public Service Commission is to be removed from his office by the President on the ground of misbehaviour, this can only be done after the Supreme Court, on a reference to it has, on an inquiry held in accordance with the procedure prescribed under Article 145, reported in favour of such removal.

In the light of what has been stated above, it is clear that the Supreme Court is not a mere Constitutional Court of Appeal, but is also an original court and a final Court of Appeal in all matters, civil and criminal.

Under Article 138, Parliament may by law confer further jurisdiction on the Supreme Court.

The law declared by the Supreme Court is binding on all the courts in India (Article 141).

All Constitutional questions must be placed before a Bench of at least five Judges. The other matters may be disposed of by a lesser number, but in practice never less than two. If the Chief Justice thinks fit, he may constitute a larger Bench for decision on any Constitutional question.

The Supreme Court has also been given the power, inter alia, subject to the approval of the President, to make rules for regulating its practice and procedure, and to fix the minimum number of Judges who are to sit for any particular purpose (Article 145).

We shall now deal in detail with the various types of jurisdiction which the Supreme Court possesses.

WRITS

Article 32 of the Constitution:

- (1) The right to move the Supreme Court by appropriate proceedings is guaranteed by this Part (Part III).
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of **habeas corpus, mandamus, prohibition, quo warranto and certiorari**, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
- (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Par-

liament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

- (4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

It is necessary to point out that the jurisdiction to issue directions, orders and writs is confined under Article 32 (1) to the enforcement of the Fundamental Rights enumerated in Part III of the Constitution. The question of violation of the Fundamental Rights arises where a statute itself is violative of such rights. It may happen that while there may be no challenge to the statute itself, an order made under such a statute may be violative of a Fundamental Right. An example might make this clear. Article 14 provides for equality before the law. It is conceivable that in applying a valid statute, discrimination contrary to this Article may take place, and such a discriminatory order would be set aside by the Supreme Court. Such discrimination may also take place in the rules framed under the statute. Any statute, rule, order or notification which violates any Fundamental Right would be struck down by the Supreme Court.

Similar jurisdiction has been conferred on the High Courts of the States under Article 226.

That Article gives to the High Courts jurisdiction to issue directions, orders or writs, for the enforcement of Fundamental Rights. The High Court, however, can give such directions, or make such orders or issue such writs not only for the enforcement of Fundamental Rights, but for any other purpose as well. It will be noticed that the Supreme Court is empowered only in respect of the enforcement of Fundamental Rights; while the High Courts, in addition to this power, can also deal with illegal acts or orders or omissions of the Executive, as well as with rules made under the various statutes, if they are inconsistent with a particular statute itself.

A Constitutional question can also be raised before any court subordinate to the High Court, but power has been given to the High Court under Article 228 to withdraw the case to itself and either dispose of the whole case, or after deciding the constitutional question, return the case to the lower court for disposal on the merits.

The subordinate courts may state the case and refer it to the High Court, where questions relating to the validity of any Act, Ordinance or Regulation or to any provision thereof have to be referred to the High Court, unless they have already been decided by the High Court or by the Supreme Court.

It may be pointed out that Article 32 is contained in Part III

of the Constitution and the right to move the Court is itself a Fundamental Right. Sub-Article 1 also makes it clear that the right to move the Supreme Court itself is guaranteed. (K. K. Kothuni v. State of Madras, AIR 1959 S.C. 725). The Supreme Court has also held in the above case that, if necessary, evidence may be taken in addition to the affidavit in proceedings under Article 32.

Although the right to move the Supreme Court under Article 32 is a fundamental right, in cases where a party chooses to approach a High Court under Article 226, such a party cannot move the Supreme Court after the High Court has decided against him on the merits. He can only go to the Supreme Court by way of an appeal (Daryao v. the State of U.P., 1962 1 SCR 574). If such a party moves the Supreme Court under Article 32 without appealing, the decision of the High Court would bring in a bar of *res judicata*.

The nature of the various writs, mentioned in Articles 32 and 226, may be briefly set out.

Habeas corpus: This is a writ whereby the court can order any authority or even an individual to produce before the court a person alleged to be detained illegally. If the court is satisfied that the detention of a person is under a valid order, the court is not entitled to do anything further in the matter. However, on examining the validity of the order, if the court comes to the conclusion that the order is made under a law which is unconstitutional or *ultra vires*, or is not justified by any law, it orders the person to be set at liberty.

Such a question can arise under the ordinary criminal law, for it is provided by Article 22 that every person who is arrested must be produced before a Magistrate within a period of 24 hours of such arrest and a person not so produced would be entitled to approach the court. It can also arise under the powers given to the Government and to its officers to detain under the Preventive Detention Act. Again, the question of illegal detention may arise when a citizen is illegally being detained by another citizen.

When examining the validity of the detention, the court ordinarily does not look at anything beyond the order itself, which, if it is not invalid on the face of it, is upheld. However, various questions can arise, such as the following: that the order is made under an invalid law or by a person who is not authorised to make the order; or that the order is for an ulterior purpose; or that the order on the face of it goes beyond the objects of the statute.

Mandamus is an order issued to an inferior court or any authority, executive or quasi-judicial, in whom is vested the power to do a particular act or to forbear from doing such an act. This is avail-

able against the Government or its authorised agencies, who can be compelled to perform their statutory duties or to refrain from interfering with the rights of citizens without the authority of law. Under the Constitution, the Government has no immunity, and the remedy is available where the act of Government is *ultra vires* or unconstitutional.

The Writ of Prohibition can only be issued to a subordinate judicial authority or a quasi-judicial officer to refrain from proceeding with any matter before it, if the tribunal is acting without or in excess of jurisdiction, and is in the nature of an injunction which can be issued against an individual or a corporate body or against the Government or any of its officers.

The Writ of Quo Warranto: Broadly stated, the *quo warranto* proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds that office, franchise or liberty; if the enquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of *quo warranto* ousts him from that office. In other words, the procedure, of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that writs can protect the public from usurpers of public office; in some cases, persons not entitled to public office are allowed to hold and remain in office with the connivance of the executive or with its active help. In such cases, if the jurisdiction of the courts to issue a writ of *quo warranto* is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of *quo warranto*, he must satisfy the Court, *inter alia*, that the office in question is a public office and is held by a usurper without legal authority and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not (*University of Mysore v. Govinda Rao*, AIR 1965 S.C. 492).

The Writ of Certiorari can be issued to any subordinate judicial or quasi-judicial authority to send up the record of a particular case for the examination of the legality of an order. Here again, the Court does not arrogate to itself the powers of a Court of Appeal, but is entitled to examine the order of any judicial authority, to find out whether it is without jurisdiction or in excess of jurisdiction or is erroneous on the face of it on any question of law. If it is, the order would be quashed.

The Fundamental Rights, enumerated in Part III may be conveniently referred to now. It is necessary to point out here that the Fundamental Rights, which are guaranteed under the Constitution, apply to citizens and in the case of certain Fundamental Rights to every person in India.

Part III of the Constitution, which contains the Fundamental Rights, incorporates several of the rights enumerated in the Universal Declaration of Human Rights. Although couched in different language, in substance Articles 1 to 9, 11 (2), 13 (1), 17, 18, 19 and 20 of the Universal Declaration of Human Rights are to be found in Part III of the Indian Constitution. Regarding Articles 10, 11 (1) and 12, similar provisions are to be found in the appropriate laws in India. The courts in India do not enforce the rights enumerated in the Universal Declaration *proprio vigore*, nor do the courts enforce any of the provisions contained in any international Convention or Treaty *suo motu*. These can only be enforced in India if there is appropriate legislation making them enforceable.

All the laws in force at the date of the commencement of the Constitution remained in force subject to the provisions of the Constitution (Article 372). Article 13, however, declared that such laws in so far as they were inconsistent with Part II, would, to the extent of such inconsistency, be void. The same Article defines law as including any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law. Several pre-Constitution laws have, to the extent of such inconsistency, been struck down.

The same Article prohibits the making of a law that takes away or abridges the rights conferred by Part III and declares such a law to be void to the extent of the inconsistency. On numerous occasions, the Supreme Court has declared such laws to be void. The Court can also set aside an executive order, made under a valid law if, in the making of the order, the Constitutional rights of a citizen have been infringed.

Article 14 of the Constitution lays down that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

It is necessary to observe here that none of the Fundamental Rights can be construed as absolute. The Court has to interpret them in a manner that is consistent with the purpose and the spirit of the Legislature. Bearing this in mind, the Supreme Court has held that where there is a similar class of persons or things, such a class stands apart and legislation dealing with it would not be considered discriminatory. Such a classification is founded on intelligible differentia and the differentia must have a rational relation to the object of the legislation. "The classification may be founded on different

bases; namely geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration." (*Budhan Choudhury v. The State of Bihar*, 1955 1 SCR 1045). The court has also held that even though a law may be valid, there can be procedural discrimination, if dissimilar procedure is either provided for or in fact followed between members of the same class. A few instances of classification would make this clear. Legislation dealing with labour may be confined to a particular industry; control of a particular article or articles which are essential to the life of a community; import and export duties on various articles may vary and some articles may be totally exempt; legislation controlling a particular trade or industry, taxation laws, etc. would be valid if they fall within the criteria laid down by the Supreme Court. The mere possibility of discrimination between the members of a class would not render the law invalid, but if it is shown that there has in fact been discrimination, the court will intervene.

Under this Article, the court has had to consider laws which affect a single individual. The court held that even a single individual can be a class by himself and such classification would be valid. (*Board of Trustees v. State of Delhi*, AIR 1962 SC 458).

Again, a law affecting an individual may be struck down as discriminatory if the law is colourable legislation, apparently general in its effect, but intended to affect that individual in a hostile manner. (*Ameerunnissa v. Mahboob Begum*, AIR 1953 SC 91 and *K. K. Kotchuni v. State of Madras*, AIR 1960 SC 1080).

Article 15 (1) lays down that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. The same Article, however makes special provision for the benefit of women as well as of under-privileged classes.

Article 16 provides for the equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Article 17 abolishes untouchability, and its practice can be punished by law. Untouchability is a canker which has plagued India for countless centuries. While this law abolishes its practice, it is not possible to affirm that untouchability has ceased to exist. Social practices die hard, particularly in the rural areas. It does not hit the eye in cities; but even there, there are sometimes separate districts or quarters for untouchables except, of course, such of them as are professional people or persons holding higher government office.

Article 19 guarantees to citizens the rights to freedom of speech and expression; peaceful assembly without arms; for association and unions; free movement throughout India; to reside and settle anywhere in India; to acquire hold and dispose of property

and practise any profession, occupation, trade or business.

Again, these rights, as is to be expected, are not absolute and are, as may be appropriate in each case, subject to reasonable restrictions in the interests of the sovereignty and security of the State, public order, decency, morality or public interest. It is for the court to determine the reasonableness of the restriction, taking into consideration all the surrounding circumstances.

In view of the fact that this Article guarantees several important rights, it has been the one most resorted to, and the Supreme Court in appropriate cases has struck down laws, rules and orders which violated or infringed these rights. Where, however, the exercise of a right is against public policy, the courts will not protect it. It has been held that gambling, the keeping of brothels, the counterfeiting of currency, piracy of copyright or of patent rights cannot be justified on grounds of exercising one's trade, profession, occupation or business.

Article 20 prohibits the creation of retrospective criminal liability and gives protection against double jeopardy or self-incrimination.

Dealing with this article, it has been held that, while an accused person may not be compelled to produce documents which might incriminate him, such documents may be seized under a search warrant. (*M. P. Sharma v. Satish Chandra*, 1954 SCR 1077).

It has also been held that asking an accused person to give specimen handwriting does not contravene this Article. (*State of Bombay v. Kathi Kalu*, 1962 3 SCR 10).

Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The words "procedure established by law" and "without the authority of law" are to be found in several articles of the Constitution. These expressions have a connotation narrower than that of the U.S.A. doctrine of the "due process of law".

If a law is within the competence of Parliament or the State Legislature, it can not be struck down for not being in accordance with due process of law. Such a law, however, is subject to the various limitations to be found in the Constitution itself. The Constitution has provided many safeguards against arbitrary legislation and the exercise of arbitrary and uncontrolled power by the Executive.

A law within such competence may yet be unconstitutional as being violative of a Fundamental Right. If it is not so violative, the courts will uphold it. It may, however, be an invalid law if it is a piece of colourable legislation — a law on the face of it pretending to achieve a particular object, while it intends to achieve something entirely different.

There are numerous administrative and other tribunals which

deal with matters in which rights of citizens are affected. In such matters, the Supreme Court requires a speaking order and, if such order contains an error of law apparent on the face of the record, it can be struck down by way of a writ of certiorari. Again, the Supreme Court has held that the party whose legal rights are to be affected must be heard. Such hearing need not necessarily be a personal hearing. It may be by a memorandum in writing, depending on the procedure in the statute creating such a Tribunal. If a party is not given an opportunity of being heard, the Supreme Court sets aside such an order as being contrary to the principles of natural justice.

Article 22 (1) lays down that no person who is arrested shall be detained in custody, nor shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Although an accused person is given the right to consult a legal practitioner of his choice, no case so far has come up before the Supreme Court in which questions have been raised as to the meaning of 'consultation' or to the stage at which one becomes entitled to the exercise of this right. The Article on the face of it does not say that the accused person should be informed of his right to consult a lawyer. In practice, few persons are aware of this important right, and very often a lawyer comes into the picture at a much later stage of a trial.

Article 22 (2) provides for the production of any person arrested before a Magistrate within 24 hours of his arrest. If a person is not so produced, he can approach the Supreme Court for a writ of Habeas Corpus.

Article 22 (2) is not available to an enemy agent or to a person who is arrested or detained under any law providing for Preventive Detention.

Although Article 22 is in Part III of the Constitution, the same Article authorises the Parliament as well as the State Legislatures to provide for Preventive Detention. The Article, however, lays down certain safeguards. The safeguards provide that no person may be detained for more than 3 months, unless an Advisory Board, consisting of persons who are qualified to be appointed as Judges of a High Court, has reported, before that period, that in its opinion there is sufficient cause for such detention.

The Constitution does not prescribe any maximum limit for which a person may be detained, but the Preventive Detention Act provides for a maximum period of one year. Article 22 also lays down that laws relating to preventive detention must provide that the person detained must be informed, soon after his detention, of the grounds on which he has been detained, so that he may have the opportunity of making his representations to the Advisory Board. They must prescribe the circumstances and the class of cases wherein

a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board.

The law of Preventive Detention provides for detention only where the Government or the officer empowered to make a detention order is satisfied that the facts justify the detention. Although the number of persons so detained has at no particular time been very large, many cases have come before the Supreme Court. In considering these cases, the Supreme Court has held that although it cannot sit in judgment on the question of satisfaction, it can examine the order to find out if it is strictly in accordance with the law. The Court has held that where there is any delay in informing the person detained of the grounds, as required by the Constitution, or where the grounds furnished are such that no representations against the detention can reasonably be made, it can set aside the order of detention. The court can also consider whether the order on the face of it is based on grounds extraneous to the law; and, if so, can set aside the order. It can also examine whether the person making the order has authority to do so.

Articles 25 and 26 deal with the freedom of conscience and the right freely to profess, practise and propagate religion and the freedom to manage religious affairs. These Articles apply to all persons in India.

Article 27 provides that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article 28 (1) lays down that no religious instruction shall be provided in any educational institution wholly maintained out of State funds.

Article 28 (2) lays down that nothing in 28 (1) shall apply to any educational institution which is administered by the State, but has been established under an endowment or trust which requires that religious instruction shall be imparted in such institution.

Article 28 (3) lays down that no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in religious worship that may be conducted in such institution or in premises attached thereto, unless such person or, if he is a minor, his guardian has given his consent thereto.

These Articles emphasise the secular nature of the Indian Constitution.

Articles 29 and 30 deal with the cultural and educational rights of minorities.

Article 31 deals with property rights; this Article applies to all persons. It is not necessary to go into detail regarding these rights beyond stating that ordinarily no property can be acquired or

requisitioned by the State except for a public purpose. Any law providing for acquisition or requisition must either set out the compensation to be provided, or the principles on which such compensation is to be worked out. Although the Article states that no such law shall be called in question in any court on the ground that compensation provided by law is not adequate, the Supreme Court has held that it will examine the law to find out if the provisions regarding compensation are illusory. If they are not, the court will not interfere on the question of the quantum in determining whether the compensation provided is a just equivalent of what the owner has been deprived of. (P. Vardavelu 1965 1 SCR 614).

It is also necessary to mention that where the law does not provide for the transfer of ownership or possession of property to the State, such a law is not deemed to be a law for compulsory acquisition or requisition notwithstanding that it deprives a person of his property.

An exception to this Article is to be found in Article 31A. This Article deals with the acquisition by the State of an estate or rights therein or the extinguishment or modification of such rights. This Article also enables the State to take over the management of property.

Fundamental Rights and Emergency

Article 352 gives the power to the President to proclaim an emergency in circumstances when the security of India or any part of the territory is threatened, whether by war or external aggression or internal disturbance.

By article 358, the fetter on legislation under Article 19 is removed, and any law can be made notwithstanding the Fundamental Rights set out in that Article. In these circumstances, the Court would be unable to test a law infringing Article 19, to find out if the law imposed a reasonable restriction on the particular right with which the law was concerned.

Article 359 gives the power to the President to make an order declaring that the right to move any court for the enforcement of any of the rights in Part III, as may be mentioned in the order, and all proceedings pending in court for the enforcement of such rights, would remain suspended during the period that the proclamation is in force. On the proclamation of emergency in November 1962, the fetter of Article 19 was removed and the President, by a separate order under Article 359, declared that the right to move any court by reason of Articles 14, 21 and 22 shall remain suspended, as also all the pending proceedings. This, however, is confined to orders made under the Defence of India Act or Rules.

After the declaration of Emergency and an Order by the Presi-

dent under Article 359, the Defence of India Act and the Rules came into existence. Under Rule 30, provision has been made for Preventive Detention. In view, however, of the Order under Article 359, the safeguards, provided in Article 22 (4) to (7) do not apply to this law. Notwithstanding the fact that the right to move any court for the enforcement of the right under Article 22 has been suspended, the Supreme Court held that in the case of an order of detention under the Defence of India Rules, the court is still entitled to examine the order to determine its validity and whether the person making such an order is authorised to do so. The court can also set aside the order as being extraneous to the powers conferred by the Defence of India Rules or being in excess of such powers.

Directive principles of the Constitution

Apart from these Fundamental Rights, which are justiciable, Part IV of the Constitution enumerates certain Directive Principles of State Policy. These concern social and economic rights which by their very nature are difficult to be included in Fundamental Rights, which can be enforced in a Court of Law. The Supreme Court has held that any law made to give effect to any of these principles must necessarily conform to the Fundamental Rights.

Exclusive original jurisdiction (Article 131)

Although India is a federation, so far no case appears to have come up before the Supreme Court for the adjudication of a dispute between the Central Government and a State, or between States *inter se*. Where its jurisdiction was invoked by a ruler of a former principality, it was held that the proviso to Article 131 (6) was a bar to the exercise of such jurisdiction.

The rules made by the Supreme Court provide that evidence may be taken in court at the hearing. A suit under this Article would, under the rules, be heard in all respects like an Original Suit in any trial court.

Appellate jurisdiction

Article 132 (1) provides for an appeal from a High Court to the Supreme Court in civil, criminal or other proceedings, if the High Court certifies that the case involves a substantial constitutional question.

Article 132 (2) provides that if the High Court has refused a certificate, a special leave to appeal may be granted by the Supreme Court.

Article 132 (3) provides that in either of the previous cases, an appeal lies on the ground raised and with the leave of the Court on any other ground.

Article 133 deals with appeals in civil cases. In civil cases where the valuation of the subject matter in dispute is Rs. 20,000/- and above, an appeal lies to the Supreme Court from the decision of a High Court. -

- (1) where the High Court has reversed the decision of the lower court, as a matter of right;
- (2) where the High Court has affirmed the decision of the lower court: but only if the High Court certifies that a substantial question of law is involved in the Appeal;

A certificate can also be granted by the High Court, irrespective of valuation, if the case is otherwise a fit one for appeal to the Supreme Court.

Article 133 (2). Any party appealing to the Supreme Court, under the foregoing provisions, may urge, as one of the grounds in such an appeal, that a substantial question of law as to the interpretation of the Constitution has been wrongly decided.

Ordinarily, a party would be confined to the points raised and argued before the High Court; but if a point of law arises out of the pleadings and no new facts are involved, the Supreme Court may permit it to be raised.

The Supreme Court does not ordinarily disturb findings of fact, unless it is satisfied that an important piece of evidence has either been disregarded or has been misinterpreted.

Article 134 deals with appeals in criminal matters. A criminal appeal lies if an order of acquittal has been reversed and the accused person has been sentenced to death, or if a sentence of death has been imposed in a case which the High Court has withdrawn to itself for trial from a lower court, or where the High Court certifies that the case is a fit one for appeal to the Supreme Court. Under the same Article, Parliament, by law, is authorised to confer further powers on the Supreme Court to entertain appeals in criminal proceedings, but no such law has so far been passed.

It is necessary to point out that under the Indian Law, if a person is acquitted by the Court of the first instance, the Government can appeal to the High Court and even to the Supreme Court against the order of acquittal. Similarly, a person convicted by the court of first instance can appeal to the High Court and finally to the Supreme Court. The right to appeal to the Supreme Court is only given to a person who has been given a death sentence in the circumstances set out above. In all other cases, a criminal appeal can only come before the Supreme Court under a certificate from the High Court or by special leave.

In criminal appeals also, the Supreme Court ordinarily does not go behind the finding of fact by the High Court, although in an

appropriate case, where the finding is based on the omission to consider an important piece of evidence or on a misconstruction of such evidence, it does so.

Under Article 136, the Supreme Court may, by special leave, entertain an appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal.

This is the wide residuary power which the court has frequently exercised in matters, which, it considers, require examination in the interest of justice. Here again, ordinarily, the court does not go behind the finding of fact of the lower court.

It is under this Article that the court entertains appeals from tribunals against whose orders there can be no appeal in the High Court.

Under this Article, the Supreme Court cannot entertain an appeal from any court or tribunal constituted in relation to the armed forces. It is, however, open to the court to entertain an appeal if such tribunal had no jurisdiction whatsoever to try the offender.

Reference: Article 143

So far, there have been few references by the President under Article 143. The first of these related to the scope and effect of delegated legislation. The Supreme Court held that Parliament must retain in its hands essential legislative functions, which consist in declaring legislative policy and standards. What can be delegated is the task of subordinate legislation, which by its very nature is ancillary to the empowering statute. Provided the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case. (In re The Delhi Laws Act 1912, etc. 1951 SCR 747 and Rajnarain Singh v. the Chairman, the Patna Administrative Committee, 1951 SCR 219).

It is under this Article that a reference was made by the President in connection with an agreement relating to the exchange of enclaves between India and Pakistan. This was entertained under the latter part of Article 143, whereby a dispute arising out of any treaty or agreement may be referred to the Supreme Court. (The President of India U/Art. 143 (1), 1960 SC 845, Berubari Union).

Under this Article, the President is entitled to refer a question of law or fact which has arisen or is likely to arise, if it is a matter of public importance. The President can even refer a pending Bill for the opinion of the Supreme Court.

Article 194 (3) deals with the powers, privileges and immuni-

ties of a Legislature of a State. There is a similar Article regarding Parliament (Article 105 (3)). The Legislature of the State of U.P. sentenced 'A' for contempt of the House. 'A' approached the High Court for a writ of Habeas Corpus, under Article 226, on the ground that his committal for contempt was illegal and infringed his fundamental rights. Thereupon, the Legislature summoned to its bar the Judges of the High Court who had issued the Rule and the lawyers who were appearing for 'A', on the ground that in interfering with the decision of the Legislature regarding its privilege, the Judges and the lawyers had been guilty of contempt.

In order to resolve this conflict, the President referred the question to the Supreme Court under Article 143. The Supreme Court held that, in a case arising out of a contempt alleged to have been committed by a citizen who is not a member of the House of Legislature, outside the four-walls of the legislative chamber, a Judge of a High Court can entertain and deal with a petition challenging any order or decision of a Legislature imposing a penalty on the Petitioner or the issuing of a process against the Petitioner for its contempt or for infringement of its privileges and immunities. The Supreme Court also held that a Judge who passes an order on such petition, does not commit contempt of the Legislature; and the Legislature is not competent to take proceedings against such a Judge in the exercise and enforcement of its powers, privileges and immunities.

In the enforcement of fundamental rights, guaranteed to the citizens, the legal profession plays a vital role; and so, just as the right of the Judicature to deal with the matters brought before them, under Article 226 or 32 cannot be subjected to the powers and privileges of the House of Legislature under Article 194 (3), so the rights of the citizens to move the Judicature and the rights of the Bar to assist in the administration of justice must remain uncontrolled by Article 194 (3). That is one integrated scheme for enforcing the fundamental rights and for sustaining the Rule of Law in this country. Therefore, the right to punish a citizen for contempt on a general warrant, which the House of Legislature claims to be an integral part of its powers or privileges, is inconsistent with the material provisions of the Constitution and cannot be deemed to have been included under the latter part of Article 194 (3) (Re: Special Reference No. 1 of 1964: AIR 1965 SC 745).

Article 141 provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

The Supreme Court, however, has held that it can reopen its own earlier decisions if it is satisfied that they need reconsideration. And, in fact, the Supreme Court has, on several occasions, reconsidered its own decisions. In the case of such reconsideration, the

number of Judges who constitute the Bench is larger than the one whose decision is being considered. As the Supreme Court said, there is nothing in our Constitution which prevents the Supreme Court from departing from a previous decision, if it is convinced of its error and its baneful effect on the general interests of the public. Article 141, which lays down that the law declared by the Supreme Court shall be binding on all courts within the territory of India, quite obviously refers to courts other than the Supreme Court.

The Supreme Court should not lightly dissent from one of its previous pronouncements. Its power of review, which undoubtedly exists, must be exercised with due care and caution and only in the public interest.

If on a re-examination of the question it comes to the conclusion, that the previous majority decision was plainly erroneous, then it will be its duty to say so and not to perpetuate its mistake, even when one learned Judge, who was a party to the previous decision, considers it incorrect on further reflection. It should do so all the more readily, when its decision is on a constitutional question and its erroneous decision has imposed an illegal tax burden on the consumer public or has otherwise given rise to public inconvenience or hardship, for it is by no means easy to amend the Constitution.

The doctrine of *stare decisis* has hardly any application to an isolated and stray decision of the court very recently made and not followed by a series of decisions based thereon. In any case, the doctrine of *stare decisis* is not an inflexible rule of law and cannot be permitted to perpetuate errors of the Supreme Court to the detriment of the general public or a considerable section thereof. (Bengal Immunity Co. v. State of Bihar, 1955 2 SCR 603).

In considering the point as to how far the previous decisions should be allowed to stand, the Supreme Court said that when it decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India; and so, it must be its constant endeavour and concern to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this court of its power to review its earlier decisions may incidentally tend to make the law uncertain and introduce confusion. That is not to say that if on a subsequent occasion, the court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the court must be satisfied, with a fair amount of unanimity amongst its members, that its revision is fully justified. (The Keshav Mills Co. Ltd. v. The Commissioner of Income tax, Bombay North, Ahmedabad).

The effect of the declaration of any statute as unconstitutional has been stated in the following manner.

The clear enactment of Article 141 of the Constitution leaves

no scope in India for the application of the American doctrine that "the declaration by a court of unconstitutionality of a statute which is in conflict with the Constitution affects the parties only and there is no judgment against the statute and it does not strike the statute from the statute book".

In India, on the other hand, once a law has been struck down as unconstitutional by the Supreme Court, no notice can be taken of it by any court, because after it has been declared unconstitutional, it is no longer law and is null and void. (*Behram Khurshed Pesikaka v. The State of Bombay*, 1955 (1) SCR 613).

Once a law has been declared unconstitutional or otherwise *ultra vires*, a party who has made any payment by way of tax under the statute, becomes entitled to recover it, provided his claim is within the period of limitation.

Article 142 (1). The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and a decree so passed or order so made shall be enforceable throughout the territory of India, in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

142 (2). Subject to the provisions of a law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make an order for the purpose of securing the attendance of a person, the discovery or production of documents, or the investigation or punishment of contempt of itself.

Article 144 provides for the carrying out of the decisions of the Supreme Court and is in the following terms:

"All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court".

Exclusion of jurisdiction

Although the Supreme Court has, as has been pointed out above, been given the widest jurisdiction, there are certain matters which are excluded from the jurisdiction of all courts.

Article 361 (1) deals with the immunity of the President or the Governor from any civil or criminal proceedings, regarding matters done in exercise and performance of the powers and the duties of the office, or for any act done or purported to be done in the exercise and performance of those powers and duties.

The same Article also provides that no criminal proceedings

whatsoever shall be instituted or continued against the President or the Governor of a State in any court during his term of office, and that no process for the arrest or imprisonment of President or Governor of a State should issue from any Court during his term of office.

Article 363 (1). The Supreme Court has also no jurisdiction, subject to Article 143, in respect of any dispute arising out of a provision of a treaty, agreement, covenant, engagement, *sanad* or similar instrument entered into or executed by a Ruler of an Indian State before the commencement of the Constitution.

The Supreme Court is the highest court in India with various types of jurisdiction. No statute can bar this jurisdiction by making a provision that the decision of a particular tribunal shall be final and that no civil court can entertain an appeal from such a decision. In such cases, the Supreme Court, either under Article 136 or by means of its writ jurisdiction, can, in appropriate cases, deal with the matter where the rights of citizen are concerned.

Note: Since the writing of this article, the Supreme Court has in a very important case decided that the citizen has the right to a passport for travel outside his country. This Decision was rendered under Article 21 of the Constitution. In interpreting this Article, the Court held that the words "personal liberty" would include travel outside the country (*Satwant Singh Sawhney v. The Government of India*, delivered on April 10, 1967). Earlier, the Court construing the same words of the Article had decided that they included the right of the citizen to privacy (*Kharak Singh v. The State of U.P. and Others*, 1964, 1 SCR 332).

In another case (*Golak Nath v. State of Punjab*, delivered on February 27, 1967) it was held that, in interpreting Article 13 of the Constitution, Parliament was not entitled to amend any of the rights enumerated in Part III of the Constitution dealing with fundamental rights.

DIGEST OF JUDICIAL DECISIONS

by

SUPERIOR COURTS OF DIFFERENT COUNTRIES

on

ASPECTS OF THE RULE OF LAW

Compiled and Annotated

by

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Conseil d'Etat of France**DUTY TO COMPLY WITH RULES OF NATURAL JUSTICE
IN HOLDING INQUIRIES****DAVIN v. THE PRINCIPAL OF THE GAP SCHOOL FOR GIRLS***(Recueil Lebon, 1966, p.60)*

Right to education - rights of a minor - letter by principal to parent requesting him not to send his child back to school - no reasons for the exclusion given in the letter - such letter is tantamount to a dismissal of the minor and constitutes a grave step for a teaching institution to take against one of its students - such a measure cannot be taken without first informing the parents or guardians of the child of the proposed action so that they may have an opportunity of making their own representations and observations-violation of rules of natural justice if parents or guardians not given such an opportunity.

Decided on January 6, 1966.

By a letter dated December 19, 1962, the Principal of the Gap Secondary School for Girls informed Mr. Davin, the father of one of the students at the school, that "It is regretted that it will not be possible for us to have your daughter, Ann-Marie Davin, back as a student when the school re-opens on January 4, 1963. I therefore request you to be kind enough not to send Anne-Marie back to school in January".

Mr. Davin challenged the right of the Principal to prevent his daughter from returning to school without disclosing a good and valid reason for doing so.

The Conseil d'Etat, before which the matter came up ultimately for decision, observed that the Principal's letter amounted to a dismissal of the student in question and was a very grave measure for a teaching institution to take against one of its students. It held that such a decision could not be taken in regard to a student without his legal representatives being informed of the proposed measure sufficiently early to enable them to make their own observations and representations.

The Judicial Committee of the Privy Council
(on Appeal from the Supreme Court of Ceylon)

**DUTY OF MINISTER HOLDING INQUIRY TO COMPLY
WITH RULES OF NATURAL JUSTICE****TRUSTEES OF MARADANA MOSQUE v. THE MINISTER OF
EDUCATION AND ANOTHER**

(The Ceylon Law Society Journal, Vol. VIII, pp. 59-64)

An Act of 1961 imposed on the proprietor of a private school unaided by Government an obligation to pay every teacher his month's salary by a certain date-such proprietor had also to satisfy the Director of Education that necessary funds to conduct and maintain the school were available - Act also empowered Director to take over management of an unaided school if he were satisfied that the school was being administered in contravention of the Act - Management of Zahira College, an unaided school, had failed to pay teachers' salaries for July 1961 by the required date - management asked to show cause why school should not be taken over for Director-management - management answered that July salaries would be paid by August 18 and subsequent salaries would be paid in time - yet Minister made order taking over school - Minister, in making that order, was acting in a judicial or quasi judicial capacity - he was therefore under a duty to observe the rules of natural justice - this he failed to do in that he did not afford Management an opportunity of satisfying him that the necessary funds were available to run the school - Minister had erroneously considered that a single breach of the Act constituted a sufficient foundation for a takeover order without further inquiry - he had considered only whether a breach had been committed and not whether school was being run in contravention of the Act.

Before Lord Reid, Lord Morris of Borth-Y-Gest, Lord Pearce, Lord Upjohn and Lord Pearson.

Decided on January 19, 1966.

The Assisted Schools and Training Colleges (Special Provisions) Act of 1960 gave to the proprietors of schools assisted by the Government the option of handing the schools over to the Government or carrying on the schools without government aid. The appellants, who as trustees of the Maradana Mosque were charged with the administration of Zahira College, elected to run that College as a private unaided school.

A supplementary Act passed in 1961 provided as follows:

Section 6. The proprietor of any school which, by virtue of election made under Section 5, is an unaided school -

i) shall pay to every teacher and employee who is on the staff of such school the salary and allowance due to such teacher or employee in respect of any month not later than the 10th day of the subsequent month;

.....

k) shall satisfy the Director that necessary funds to conduct and maintain the school will be available and shall conduct such school to the satisfaction of the Director;

.....

Section 11. Where the Minister is satisfied after consultation with the Director that any school which, by virtue of the provisions of this Act, is being administered as an unaided school, is being so administered in contravention of any of the provisions of this Act or any regulations or orders made thereunder or of any other written law applicable in the case of such school, the Minister may, by Order published in the Gazette, declare that, with effect from such date as shall be specified in the Order – (i) such school shall cease to be an unaided school, (ii) such school shall be deemed for all purposes to be an assisted school, and (iii) the Director shall be the Manager of such school.

The Management of Zahira College had failed to pay most of the salaries for July by the 10th August 1961. On the 11th August, the teachers complained to the Director of the non-payment of their salaries. On the same day, the Director sent to the appellants a formal complaint that it had been brought to his notice that they had failed so far to pay the salaries of the teachers for the month of July 1961 and that they had thereby contravened Section 6(i) and required them to show cause on or before the 18th August 1961 why Zahira College should not be taken over for Director-management. The Director did not invite the appellants to satisfy him that “necessary funds to conduct and maintain the school will be available”.

The appellants, in a letter of 15th August, showed cause as requested. They said, “With reference to your letter of the 11th instant, I write to inform you that owing to a certain misunderstanding the salaries of all the teachers of the College were not paid by the 10th instant. I am making arrangements to pay the salaries of the remainder of the teachers by the 18th instant. The salaries of the teachers for August 1961 and the subsequent months will be paid by the 10th of the subsequent month.”

The appellants were able to provide the necessary funds and on the 18th August the unpaid teachers were offered their salaries, but they refused to accept them from the appellants.

On the 21st August the Minister made an order that the school should be taken over for Director-management with effect from the 21st August as Section 6(i) had been violated.

The appellants contended that the Minister in making the first Order was acting in a judicial or quasi-judicial capacity and was under a duty to observe the rules of natural justice; this he failed to do in that he did not afford the appellants an opportunity of answering the charge against them.

Further, it was contended that the Minister acted in excess of his jurisdiction, in that he failed to make the decisions which were the requisite foundations for an Order under Section 11. Passages from a broadcast statement by the Minister were relied upon as showing that, in the view of the Minister, as soon as single breach of any of the provisions of Section 6 had been proved, he had no discretion to exercise and was bound to make the Order.

The Supreme Court of Ceylon refused the appellants' application on two grounds: first, that *certiorari* only lies to question and quash a judicial act and the act in question, even if unjustified, was purely ministerial; second, that the Minister was acting *intra vires* since one flagrant act of contravention satisfied the condition of “being administered in contravention”.

In reversing the judgment of the Supreme Court, the Privy Council observed:

"With all respect to the learned Judge, it is not correct to regard the Minister's act as purely ministerial. He was acting in a judicial or quasi-judicial capacity in satisfying himself whether there had been a contravention. And until he was so satisfied, he had no jurisdiction to make the Order. He must therefore in satisfying himself on that point observe the rules of natural justice. He must give the appellants notice of what was charged against them and allow them to make representations in answer.

"In respect of the complaint under Section 6(i), it cannot be said that the appellants were denied an opportunity of stating their case.

"They had, however, no notification that any complaint was being made under Section 6(k) which is a different and, in this case, more far-reaching matter. If, therefore, an imputed failure under Section 6(k) can be shown to have played a material part in the Minister's decision, the appellants were not fairly treated. That it played a material part is brought out by the text of the Minister's broadcast statement.

"When an applicant is applying to quash an Order on the ground that there was an infringement of the rules of natural justice, he is not confined to the face of the record. He may establish his case from other reliable evidence. In their Lordships' view it is sufficiently established by the government paper that the Minister in making the Order was largely influenced by the alleged contravention of which the appellants had no notice.

... "In the present case their Lordships cannot assume that the appellants had no means to satisfy the provisions of 6(k).

"It may be that, if challenged under 6(k), the appellants would have made funds available to the school for its maintenance. If indeed no funds were available, it seems hardly likely that this appeal would have been launched, since its success would in that case be followed immediately by a fresh Order based on a contravention of 6(k).

"The second argument is also valid in their Lordships' opinion. Before the Minister had jurisdiction to make the Order he must be satisfied that 'any school... *is* being administered in contravention of any of the provisions of this Act.' The present tense is clear. It would have been easy to say 'has been administered' or 'in the administration of the school any breach of any of the provisions of this Act has been committed', if such was the intention of the legislature. But for reasons which common sense may easily supply, it was enacted that the Minister should concern himself with the present conduct of the school, not the past, when making the Order. This does not mean, of course, that a school may habitually misconduct itself and yet repeatedly save itself from any Order of the Minister by correcting its faults as soon as they are called to its attention. Such behaviour might well bring it within the words '*is* being administered'. But in the present case no such situation arose. The evidence shows that before July 1961 payment of salaries had always been punctual. Although on this occasion the salaries were not paid by 10th August, the appellants promised to pay them by 18th August. This promise they fulfilled. Moreover a promise was made that all payments would in future be made by the due date. There was therefore no ground on which the Minister could be 'satisfied' at the time of making the Order. He failed to consider

the right question. He considered only whether a breach had been committed, and not whether the school was at the time of his Order being carried on in contravention of any of the provisions of the Act. Thus he had no jurisdiction to make the Order at the date on which he made it.

"The appellants have shown by their first and second arguments that the Minister made the Order without giving the appellant a fair hearing under 6(k) and without jurisdiction. Therefore this appeal succeeds."

Court of Appeal (Civil Division) of England

ADVOCATE A MINISTER OF JUSTICE EQUALLY WITH THE JUDGE

RONDEL v. WORSLEY

Barrister immune from actions for negligence in the conduct of his client's case - such immunity necessary for reasons of public policy - also necessary to enable him to do his duty fearlessly and independently and to prevent him being harassed by vexatious actions - the immunity is similar to that of a judge - as an advocate a barrister is a minister of justice equally with the judge - mistake to suppose that he is the mouthpiece of his client to say what he wants or his tool to do what he directs - he owes allegiance to a higher cause - he must not consciously mis-state the facts nor knowingly conceal the truth - despite his undoubted duty to his client, he must sometimes disregard his client's most specific instructions if they conflict with his duty to Court - all the above principles apply not only to Criminal but to Civil cases as well - the position of a solicitor is quite different as he is under contractual obligation to take care.

Before the Master of the Rolls, Lord Justice Danckwerts and Lord Justice Salmon.

Decided on October 20, 1966.

On May 28, 1959, the plaintiff was tried by jury on a criminal charge and was defended by the defendant, a barrister. The plaintiff was convicted. He applied for leave to appeal, which was refused. After his release at the end of his sentence, he issued a writ against the defendant claiming "damages for professional negligence". His statement of claim alleged that the defendant was negligent in the conduct of his case and that in consequence of that negligence he, the plaintiff, was wrongly convicted, and sentenced to 18 months' imprisonment.

The Master of the Rolls, who delivered the judgment, said that the question was whether an action did lie against a barrister for negligence in the conduct of a case. There was, in his view, a sure ground on which to

rest the immunity of a barrister, at least so far as concerned his conduct of a case in Court. It was to enable him to do his duty fearlessly and independently, as he ought; and to prevent his being harassed by vexatious actions such as the present case. It was like the ground on which a Judge could not be sued for an act done in his judicial capacity, however corrupt; on which a witness could not be sued for what he said in evidence, however perjured; and on which an advocate could not be sued for slander for what he said in Court, however malicious. As an advocate, a barrister was a minister of justice equally with the Judge. It was a mistake to suppose that he was the mouthpiece of his client to say what he wanted, or his tool to do what he directed. The barrister was none of these things. He owed allegiance to a higher cause. He must not consciously mis-state the facts, nor knowingly conceal the truth, nor unjustly make a charge of fraud without evidence to support it. He must produce all the relevant authorities, even those against him. He must see that his client, if ordered, disclosed the relevant documents, even those fatal to his case. He must disregard the most specific instructions of his client, if they conflicted with his duty to the Court.

Another ground of public policy was this: If a barrister could be sued for negligence, it would mean a re-trial of the original case. In this very case Rondel had already put his complaint against his counsel before the Court of Criminal Appeal and they had rejected it. Was he to be allowed to canvass his guilt or innocence again in a civil court and try the case afresh in an action against his own counsel? The spectacle of a man, found affirmatively to be guilty, recovering damages on the footing that he was innocent, should not be allowed. Otherwise every convicted prisoner who blamed his counsel could at once bring an action for negligence. Rather than open the door to him, his Lordship would bolt it.

The position of a solicitor was quite different. He was not bound to act for anyone who asked him; he could pick and choose; and he could sue for his fees. He could, and did, make a contract with every client who employed him. He was under a contractual duty to use care. If he was negligent he could be sued – but in contract, not in tort.

Finally, the principles stated in his Lordship's judgment applied not only to the conduct of a *criminal* but also of a *civil* case, and to the preparatory work, in which his Lordship included not only the pleadings and advice on evidence, but also the opinion given before action brought.

The principles were of particular importance in legal aid cases, where the barrister was asked to give advice on the chances of success, with the object that his opinion should go before the legal aid committee to see whether the taxpayer's money should be spent on it. He was engaged to conduct the litigation on behalf of the assisted person, with a trust that he would not abuse it at the taxpayer's expense. He must be able to do that fearlessly and independently without being oppressed by the fear of an action for negligence.

The test his Lordship would apply was this: Did the public interest require that a barrister should now be made liable for negligence? His Lordship did not think that it did. The rule for centuries had been that he was not. Every solicitor knew it and engaged him on that footing. The Court should not depart from the usage of the profession so long

established and so well settled unless sufficient grounds were shown. None had been. The rule still stood. The appeal should be dismissed.

The Court held that the established rule that a barrister was immune from actions for negligence in and about the conduct of his client's case in Court should be upheld; and, by a majority, Lord Justice Salmon demurring, held that that immunity extended to work done in Chambers and not directly connected with a cause in Court.

Court of Appeal (Civil Division) of England

IMMUNITY OF ADVOCATE FROM ACTIONS FOR NEGLIGENCE

RONDEL v. WORSLEY

(See above)

German Federal Court

FREEDOM FROM WRONGFUL DETENTION UNDER EUROPEAN CONVENTION OF HUMAN RIGHTS

ZIMMERMANN v. THE FEDERAL REPUBLIC OF GERMANY

(Ref. III ZR 70/64)

Government of the Federal Republic of Germany a signatory to the European Convention of Human Rights - that Government claimed legal sovereignty over the whole of Germany - however it had no de facto sovereignty over territory administered by the Government of East Germany - plaintiff had been imprisoned by the East German Government for making speech critical of the Government - he later fled to West Germany where he claimed damages from the Federal Republic on the basis of the European Convention of Human Rights - although the Convention gave a subject the right to claim damages for wrongful detention, the plaintiff could not claim such damages from the Federal Republic as it had no de facto sovereignty over East Germany.

Reported in Entscheidungen des Bundesgerichtshofs in Zivilsachen vol. 15 No. 6, pp. 46—58.

Decided on January 10, 1966.

On the occasion of the Berlin uprising on June 17, 1953, the plaintiff, who was then living in East Germany, made a speech demanding the resig-

nation of the Government. As a consequence, he was sentenced to 6 years imprisonment for endangering the security of the State.

In 1959 the plaintiff fled to West Germany. There, he initiated proceedings against the Government of the Federal Republic of Germany claiming damages by way of compensation for his imprisonment, basing his claim on the European Convention of Human Rights. He pleaded that the defendant Government claimed and always had legal sovereignty over the territory of Eastern Germany and argued that the rights under the European Convention of Human Rights accrued to the benefit of all persons subject to the sovereignty of the States which were parties to that Convention. He asserted that he, as a German subject, was always one such person.

The Federal Supreme Court held that the plaintiff could not successfully make a claim under the European Convention, because the actions of the East German authorities could not be attributed to the Federal Republic. The Court took the view that Article 1 of the Convention, which guaranteed the rights protected to persons under the sovereignty of a contracting State, was applicable only to the *de facto* area of sovereignty of the contracting State, and that it was only by reason of *de facto* sovereignty that such a State could be expected to undertake such guarantees as the Convention provided for.

In its judgment the Court observed that Article 5 (5) of the European Convention, which on ratification became part of internal German Law, gave the plaintiff a direct right to claim damages for wrongful detention, but that it did not give him in the circumstances of this case any right to claim damages against the defendant Government, which could not be held liable under the Convention for sovereign acts of the authorities in East Germany.

Commenting further on Article 5, the Court said that it related only to infringements of personal freedom by the public authorities and that therefore the right to recover damages under Article 5 (5) related only to infringements in breach of the Convention by the public authorities. It was clear that the public authorities could be held vicariously liable only for acts of those officials over whom they had influence and control.

European Commission of Human Rights

RIGHTS OF THE DEFENCE

BOECKMANS v. THE GOVERNMENT OF BELGIUM

(Petition 1727/62)

President of the Court of Appeal of Belgium characterises the defence as "improbable", "scandalous", "false", "ignoble" and "repugnant" before the Court had examined the merits of the defence – he further warns the accused that if he does not abandon his proposed line of defence the Court would consider increasing his original sentence – President's preliminary remarks affected the impartiality

of the hearing – they were inconsistent with the European Convention of Human Rights and had prejudiced the accused's case – defence counsel has the right to put forward his client's defence without hindrance, embarrassment or prejudgment of its merits – in the circumstances accused should be paid compensation by the State, account being taken of his legal expenses.

Members of the Sub-Commission: S. Petren (President), Beaufort, Sørensen, Fawcett Maguire, Welter and Balta.

Adopted on February 17, 1965.

The petitioner, Boeckmans, a Belgian citizen, had been sentenced to a term of imprisonment for stealing valuables from a lady (aged almost eighty). His defence had been that she had given most of the goods to him in consideration of his being her lover.

In his report, at the commencement of proceedings before the Court of Appeal of Belgium, the Appeals President characterised the defence as "improbable", "scandalous", "false", "ignoble" and "repugnant", observations which were made before the Court had examined the merits of the defence. He further warned Boeckmans that if he did not abandon this defence, the Court would consider increasing his original sentence, Boeckmans' counsel took the position that the President had already expressed an opinion on the trial, and refused to develop their case.

The Court in its final judgment, declared the defence highly improbable and injurious, scandalous and also irrelevant (since the accused had admitted that at least part of the goods were not his) and enhanced the sentence.

Boeckmans appealed to the *Cour de Cassation* alleging an infringement of his right to a fair hearing, and an interference with the freedom of members of the bar in their conduct of the defence. His appeal was dismissed.

The European Commission held that Boeckmans' petition was admissible and set up a Sub-Commission which adopted the "friendly settlement" procedure of Article 28(b) of the European Convention on Human Rights, and discussed the matter with Boeckmans and with his government. The parties finally agreed that the President's remarks had been such as to affect the rights of the defence, were inconsistent with article 6(1) of the Convention which guaranteed the right to a fair hearing and had prejudiced the petitioner's case; they further agreed that compensation should be given to Boeckmans, account being taken of his expenses before the *Cour de Cassation* and the European Commission.

The terms of the settlement were approved by the Sub-Commission.

**Court of Appeal for Eastern Africa
holden at Kampala**

FREEDOM OF MOVEMENT

IBINGIRA AND OTHERS v. THE GOVERNMENT OF UGANDA

(Criminal Appeal No. 63 of 1966)

Constitution of Uganda guarantees personal liberty and freedom of movement – laws inconsistent with such guarantees void – The Deportation Ordinance which purports to empower deportation of any person from one part of Uganda to another and denies right of appeal from orders of deportation is therefore void – restrictions on the movement of citizens of Uganda can only be imposed by an order of Court made in the interest of defence, public safety or public order or in consequence of a sentence passed by Court in a criminal case.

Before de Lestang, Actg. President, Spry, Actg. Vice-President and Law J. A.
Judgment of the Court delivered by Spry, Actg. Vice-President.

Decided on July 14, 1966.

This was an appeal from an order of the High Court of Uganda dismissing an application for a writ of *habeas corpus*. The question at issue was whether a Statute entitled "The Deportation Ordinance" (an Ordinance of 1908) should be declared void as being inconsistent with the provisions of the 1962 Constitution of Uganda relating to fundamental rights and freedoms.

The Deportation Ordinance empowered the deportation of any person from one part of Uganda to another. There was no right of appeal from an order of deportation and an order remained in force until varied or rescinded. So long as an order remained in force, the deportee could not leave the part of Uganda to which he had been deported and he could be subjected to various other restrictions.

The main arguments before the High Court and before the Court of Appeal for Eastern Africa were based on Sections 19 and 28 of the 1962 Constitution, the relevant parts of which read as follows:

19. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say –

.....

(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Uganda or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Uganda in which, in consequence of any such order, his presence would otherwise be unlawful.

.....
28. (1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Uganda, the right to reside in any part of Uganda, the right to enter Uganda and immunity from expulsion from Uganda.

(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) for the imposition of restrictions, by order of a court, that are reasonably required in the interests of defence, public safety or public order on the movement or residence within Uganda of any person;

(b) for the imposition of restrictions, by order of a court, on the movements or residence within Uganda of any person either in consequence of his having been found guilty of a criminal offence under the law of Uganda or for the purpose of ensuring that he appears before a court at a later date for trial of such criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or other lawful removal from Uganda;

(c) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health on the movement or residence within Uganda of persons generally, or any class of persons, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;

(d) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Uganda;

(e) for the imposition of restrictions on the acquisition or use by any person of land or other property in Uganda;

(f) for the imposition of restrictions upon the movement or residence within Uganda of public officers; or

(g) for the removal of a person from Uganda to be tried outside Uganda for a criminal offence or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law of Uganda of which he has been convicted.

(4) If any person whose freedom of movement has been restricted by the order of a court by virtue of such a provision as is referred to in subsection (3) (a) of this section so requests at any time during the period of that restriction not earlier than six months after the order was made or six months after he last made such request, as the case may be, his case shall be reviewed by that court, or, if it is so provided by law, by an independent and impartial tribunal presided over by a person appointed by the Chief Justice.

(5) On any review by a court or a tribunal, in pursuance of subsection (4) of this section, of the case of any person whose freedom

of movement has been restricted, the court or tribunal may, subject to the provisions of any law, make such order for the continuation or termination of the restriction as it may consider necessary or expedient.

That the provisions of the Constitution should prevail over any law which is inconsistent with them is provided for by the very first Article of the Constitution which declares that:

1. This Constitution is the supreme law of Uganda and, subject to the provisions of sections 5 and 6 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

At the time when this application for a writ of *habeas corpus* came up before the High Court of Uganda, the five appellants were being held in custody pending a decision by the Minister as to whether or not deportation orders should be made in respect of them under the Deportation Ordinance and no deportation order had yet been made. The High Court, in refusing the application on the ground that the appellants were being lawfully detained, observed:

"We do not doubt that the Deportation Ordinance could, in certain circumstances, lend itself to abuse and is unsatisfactory in some respects, but we are of the opinion that the Deportation Ordinance falls squarely within the provisions of paragraph (j) of subsection (1) of section 19 of the Constitution, and does not infringe any other relevant provision of the Constitution. We therefore hold that neither the Deportation Ordinance nor any material part thereof is void as being inconsistent with any of the provisions of the Constitution."

The appellants appealed against this judgment to the Court of Appeal for Eastern Africa and at the time of the hearing of the appeal, deportation orders under the Deportation Ordinance had been made by the Minister in respect of each of them.

The Court of Appeal for Eastern Africa allowed the appeal with costs and held that paragraphs (a) and (b) of subsection 3 of section 28 of the Constitution permitted legislation providing for restriction of movement of citizens of Uganda only where such restrictions were imposed in pursuance of orders made by courts of law. In so holding, the Court observed that all that section 19 (1) (j) did was to provide that lawful orders made under a Statute restricting freedom of movement did not constitute violations of the right of personal liberty. To decide whether such a Statute accorded with the Constitution, it was, however, necessary to look at the appropriate section of the Constitution, which was clearly section 28. The Deportation Ordinance as it stood did not fall within any paragraph of section 28(3) and, therefore, at least so far as it purported to affect citizens of Uganda, it contravened section 28 and was in violation of the right of freedom of movement. If that were so, it followed that, at least to that extent, it was abrogated by the coming into force of the Constitution, immediately before October 9, 1962. It followed necessarily that no lawful order could be made against a citizen of Uganda under the Ordinance and, since any order that might be made would be unlawful, paragraph (j) of section 19(1) could have no application.

German Federal Constitutional Court**FREEDOM OF POLITICAL ACTIVITY****APPLICATION OF THE GOVERNMENT OF HESSEN
RE BUDGET LAW FOR 1965**

(Ref. 2 BvE 1/65)

A Budget Law provided that funds be made available to political parties for the political education of the German people – such State contribution to party funds for their general activities in the field of political education and in the formation of public opinion held to be unconstitutional – the constitutionally guaranteed freedom of expression includes the fundamental right to freedom of political activity – this freedom of political activity guarantees freedom in the formation of the will and opinions of the people, which in their turn influence the will of the State through parliamentary elections – in a democracy the formation of the will of the State organs must be brought about by the people – the government must not interfere in its formation – however, since political parties play an essential part in the holding of elections which are essential to democracy, payment to parties of reasonably necessary election costs is constitutionally justifiable, provided the principle of party freedom is respected.

See also Entscheidungen des Bundesverfassungsgerichts Vol. 20, No. 12, pp. 134–144.

Decided on July 19, 1966.

Article 21 of the German Federal Constitution provides that political parties should co-operate in the formation of the political will of the people.

By paragraph 1 of the Budget Law for 1965 it was provided that federal money amounting to 5 million marks should be made available for "contributions to the political parties for their work of political education". The explanatory memorandum stated that "These funds are meant to assist the parties in the carrying out of their task of co-operating in the political education of the German people." Similar provisions had been made in the federal budget every year since 1959, and the funds were distributed to the parties in proportion to their strength in the Federal Parliament.

The Court held:

1. that State contributions to party funds for the purposes of their general activities in the field of political education and formation of opinion were unconstitutional.

2. that the payment from State funds of the reasonably necessary costs of an election campaign to the parties which had co-operated in the formation of the political will of the people primarily through participation in parliamentary elections was constitutional.

Among its reasons, it stated that the constitutionally guaranteed freedom of expression included the fundamental right to freedom of political activity, which guaranteed that there would be freedom in the formation of the will and opinions of the people, which in their turn influenced the will of the State through parliamentary elections.

"The will of the people and the will of the State are in many respects closely linked. But in a democracy the formation of the will of the State organs must be brought about by the people, and it must not be the government which forms the will of the people. The State organs only come into existence as a result of the working of the political will of the people, which culminates in elections. This means that the State organs are strictly prohibited from taking any part in the process of the formation of the will and opinion of the people. This principle applies particularly to the relationship between State organs and political parties.

"Nonetheless, since parties play an essential part in the holding of elections, and in doing so fulfil an obligation imposed upon them by Article 21 of the Constitution, the payment to the parties of the reasonably necessary costs of an election campaign is constitutionally justifiable, so long as the principles of party freedom and equality of opportunity are respected."

German Federal Constitutional Court

RIGHT OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

(Ref. IBvL 21/60)

REFERENCE BY ADMINISTRATIVE COURT OF SCHLESWIG- HOLSTEIN ON CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

Right to object to military service on grounds of conscience – such right extends only to those whose conscience forbids them to bear arms in any circumstances and not to those refusing to take part in particular wars, or wars against particular opponents – in the latter case the objection is not against military service in arms but against the political decision to use military force in a particular situation.

Decided on December 20, 1960.

Article 4, paragraph 3 of the Constitution of the Federal Republic of Germany provides:

No-one may be compelled against his conscience to perform military service in arms. A law shall establish detailed provisions.

The German Law of July 21, 1956, detailing the provisions relating to military service states in Article 25 that:

A person who on grounds of conscience is opposed to participation in any utilisation of arms between States and for that reason refuses to perform military service in arms, shall, in place of military service, perform substitute civilian service outside the armed forces. He may on

his application be called up for unarmed service in the armed forces.

The plaintiff, when called up for military service, applied for recognition as a conscientious objector on the ground that his conscience prohibited him from performing military service in a divided Germany, since he must reckon with the possibility that he might one day be ordered to shoot at fellow Germans. He was, however, prepared to perform military service in a free, united Germany.

He alleged that Article 25 of the Law relating to military service, to the extent that it only recognized conscientious objection to all wars, and not to a specific war, was inconsistent with Article 4 paragraph 3 of the Constitution and therefore void.

The Court held that on a true interpretation of Article 4 paragraph 3, it applies only to those whose conscience forbids them to bear arms in any circumstances, and not to those who merely refuse to take part in particular wars, or wars against particular opponents, or wars in particular historical circumstances, or wars with particular weapons. "In such cases, the objection is not against 'military service in arms' but against the political decision to use military power either at all or in a particular form or for particular political or military ends. Since the objector does not reject killing in war as such, but only killing of this opponent in this war or with these weapons, he lacks the inner conviction that is the only constitutional justification for freeing him from the obligation to perform military service." The plaintiff could not therefore be recognized as a conscientious objector.

Conseil d'Etat of France

RIGHT TO EDUCATION

DAVIN v. THE PRINCIPAL OF THE GAP SCHOOL FOR GIRLS

(Recueil Lebon, 1966, p. 60)

(See p. 107 above)

Conseil d'Etat of France

RIGHT TO PERSONAL FREEDOM

MINISTER OF THE INTERIOR v. MONY

(Recueil Dalloz Sirey, 1966, 30e cahier, p.504)

Right of the individual to personal freedom - administrative orders by a competent authority restricting such personal freedom should be based on good grounds - Administrative Tribunal enjoys the power to examine the reasons on which orders of

administrative detention or house arrest are based - where the reasons are vague or the order is based on facts which are materially incorrect, the Administrative Tribunal has the power to declare the order in question void.

Decided on April 22, 1966.

A presidential decision of April 24, 1961, read together with another such decision of September 29, 1961, empowered the Minister of the Interior, acting administratively, to order the detention of a person or the relegation of a person to house arrest without giving the person concerned the reasons for his order in cases where the Minister was satisfied that the person in question was committing acts or conducting himself in a manner which was detrimental to the safety of the State.

But if the order of the Minister of the Interior is seriously contested in the Administrative Tribunal by the person against whom the order is made, the Judge can and must call for and examine the reasons on which the Minister's order is based and can declare the order void when it is based on facts which are materially incorrect.

In this case the Minister of the Interior limited himself to stating that M. Mony had been arrested because he was in contact with certain secret societies which were being used by the O.A.S. for distributing pamphlets and committing certain illegal acts, but he had given no clear indication as to the communication which M. Mony had with these secret societies or even as to what these secret societies were.

The Administrative Tribunal, having declared the order in question null and void, the Minister of the Interior appealed to the Conseil d'Etat against the decision of the Administrative Tribunal. The Conseil d'Etat, in affirming the decision of the Administrative Tribunal and dismissing the appeal of the Minister, observed that even before the Conseil d'Etat the Minister restricted himself to the vague and general reasons which he had given before the Administrative Tribunal. As against this, Mony had produced a volume of evidence in support of his denials, which evidence the Minister was unable to refute. It had therefore to be considered that the contested order was based upon facts which lacked precision and which were materially incorrect and the order could not be allowed to stand.

Supreme Court of India

RIGHT TO PROPERTY

VAJRAVELU MUDALIAR v. THE SPECIAL DEPUTY COLLECTOR FOR LAND ACQUISITION, WEST MADRAS

(All India Reports 1965, Supreme Court, p. 1017)

Right of owner to fair compensation on the acquisition or requisition of his land for a public purpose - the Indian Supreme Court had held that such com-

compensation should be a "just equivalent" of what the owner had been deprived of and that the principles of determining compensation must be the principles for ascertaining such "just equivalent" - a Constitutional Amendment of 1954 removed the right of the Courts to examine the adequacy of the compensation - effect of this Amendment on earlier decisions of the Courts defining compensation - scope of judicial power of review after the Amendment - present position is that neither the principles prescribing the "just equivalent" nor the "just equivalent" itself can be questioned in Court on grounds of inadequacy - but yet the Courts felt that if the compensation was illusory or the principles prescribed for determining it were irrelevant, it could be said that the Legislature had committed a fraud on power - the law in question should therefore be considered bad.

Before Subba Rao, Wanchoo, Hidayatullah, Raghubai Dayal and Sikri JJ.

Decided on October 5, 1964.

Article 31(2) of the Constitution of India originally ran thus:

No property, movable or immovable, including any interest in any business, or in any company owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

By the Constitution (Fourth Amendment) Act 1955 the above Sub-Section of the Indian Constitution was amended to read as follows:

No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

Prior to the Amendment, the Supreme Court of India had in several cases interpreted "compensation", as appearing in the original Sub-Section, to mean a "just equivalent" of what the owner had been deprived of and "principles" to mean principles for ascertaining the "just equivalent".

In this case the Supreme Court of India had to interpret Article 31(2) and the scope of the judicial power to scrutinize the quantum of compensation and the principles applied in determining compensation in the light of the Amendment which declared that no law providing for the compulsory acquisition or requisition of property for a public purpose shall

be called in question in any Court on the ground that the compensation provided by that law is inadequate.

In dealing with the case before it the Supreme Court observed as follows:

"The expressions 'compensation' and 'principles' in Article 31(2) before the Constitution (Fourth Amendment) Act, 1955, have received an authoritative interpretation by the Supreme Court and it must be presumed that Parliament did not intend to depart from the meaning given by the Court to the said expressions, namely that 'compensation' was a 'just equivalent' of what the owner had been deprived of and the 'principles' were only principles for ascertaining the 'just equivalent'.

"Under Article 31(2) as amended by the Constitution (Fourth Amendment) Act, neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. But, if the compensation is illusory or if the principles prescribed are not relevant to the property acquired or to the value of the property at or about the time it is acquired, it can be said that the legislature committed a fraud on power and, therefore, the law is bad. It is a use of the protection of Article 31 in a manner which the Article hardly intended."

Supreme Court of India

RIGHT TO PROPERTY

UNION OF INDIA v. METAL CORPORATION OF INDIA LTD. AND OTHERS

Indian Constitution provides that no property could be acquired compulsorily by the State except on payment of compensation - any law providing for compulsory acquisition must also provide for the payment of a just equivalent to party affected - alternatively, it should lay down principles for computation of the just equivalent - if principles prescribed for such computation vitiate calculation of a just equivalent for any part of an acquired undertaking, the total compensation would not be a just equivalent - law in question is therefore rendered unconstitutional.

Before Chief Justice Subba Rao and Mr. Justice Shelat.

Decided on September 5, 1966.

An Act entitled the "Metal Corporation of India Acquisition of Undertaking Act, 1965" was passed with a view to acquiring in the public interest a business undertaking of the Metal Corporation of India. The Act provided for the payment of compensation to the owners computed on the

principles that compensation for unused machinery in good condition would be calculated on the basis of cost incurred by the corporation for acquiring it, and that for used plant and machinery it would be paid on the basis of the written down value as determined under the provisions of the Indian Income Tax Act.

On a petition by the Corporation the High Court of the Punjab gave judgment in favour of the Corporation holding that the Act in question was unconstitutional and void, and restraining the government from acquiring the Corporation in pursuance of the enactment.

The Government of India appealed against the judgment of the High Court of the Punjab to the Supreme Court of India. The Supreme Court of India upheld the judgment of the High Court and dismissed the appeal.

The Chief Justice, giving the judgment of the Court, said that under Article 31 of the Constitution no property could be acquired compulsorily by the State except under a law providing for the payment of compensation for the property acquired. The law to justify itself must provide for the payment of a just equivalent or lay down principles for computation which would lead to the same result. If any of the principles prescribed vitiated the calculation of a just equivalent for any part of the undertaking, then the total compensation would not be a just equivalent. In such a case the law in question would be unconstitutional.

Cour de Cassation of France

RIGHT TO SECRECY OF CORRESPONDENCE

SOCIETE LYONNAISE DES EAUX AND OTHERS v. BENOIST-MECHIN

(Recueil Dalloz Sirey - 1966, p. 356)

Letters to author of a book alleging that the book was fanciful, offensive and inaccurate - author replies to these letters - texts of the letters are subsequently published in a pamphlet attacking the book - a person has the right to secrecy of his correspondence - such correspondence is confidential in character and cannot be published without the prior consent of both the sender and the addressee.

Decided on October 26, 1965.

In a book entitled "Un Printemps Arabe", published in March 1959 M. Benoist-Mechin described searches begun in Saudi Arabia for sources of water, and work started on a water supply scheme for Ryadh, the capital of Saudi Arabia. After the publication of this book, the plaintiff received two letters, one dated May 25, 1959 from M. Karpoff, a geologist, and the other dated October 27, 1959 from M. Bonfils, the Director-General of the defendant company, complaining that the plaintiff's narration of certain facts in his book was "fanciful and offensive". The plaintiff replied to these

letters on June 11 and November 18, 1959 respectively. In May 1960 the defendant company published and circulated a pamphlet entitled "A Follow-up to M. Benoist-Mechin's 'Printemps arabe'" which not only contained answers to certain statements made in the book, but also reproduced the texts of the two letters already referred to and the plaintiff's replies.

The plaintiff had filed action against the defendant company, M. Karpoff and M. Bonfils claiming damages from them on account of the prejudice caused to him by the publication of the said pamphlet, which he alleged had discredited him in the eyes of his readers. In this action he pleaded that neither his correspondents nor the *Société lyonnaise des eaux et de l'éclairage* had any right to publish his correspondence without his authorization.

The Court of Appeal of Paris gave judgment in the plaintiff's favour. The defendants appealed against that judgment to the Cour de Cassation, claiming that the plaintiff could not object to the publication of the letters in question in the name of an alleged right of secrecy, particularly as the conflict arose from the publication of a book in which the author had injured the personality of the defendants-appellants, and as the author had recognized in his letters that he had been badly or insufficiently informed and was prepared to undertake either in later editions or in a new book to rectify any mistakes he had made.

The Cour de Cassation dismissed the appeal and upheld the judgment of the Court of Appeal of Paris, recognizing the addressee's right to claim secrecy in respect of his correspondence particularly when, as in the instant case, the integrity and capacity of the addressee as a writer were seriously questioned under circumstances in which he was not in a position to defend himself. The Court also recognized the confidential character of the letters in question and held that their contents could not be disclosed to third parties without the consent of both the sender and the addressee.

Supreme Court of India

INDEPENDENCE OF THE JUDICIARY

JUDGE X. v. THE STATE OF UTTAR PRADESH

Appointment of District Judges - Indian Constitution enjoins the Governor of a State to make such appointments in consultation with the High Court of that State - under the Higher Judicial Service Rules of the State of Uttar Pradesh, the Governor used to submit the recommendations of the Selection Committee to the High Court for its approval - the High Court could not scrutinize the applications which had been screened by the Selection Committee - selections were made from officials in the Judicial as well as the Executive Service - Uttar Pradesh Higher Judicial Service Rules declared unconstitutional as being violative of Article 233 of the Constitution - the expression 'Service' in Article 233 must be interpreted to mean the 'Judicial Service' -

the Governor therefore was not competent to appoint any person from any service in the State as a District Judge – unreasonable to attribute to the framers of the Constitution, who had so carefully provided for the independence of the Judiciary, an intention to destroy that independence by an indirect method – recruitment from the Executive Branch of District Judges detrimental to the good name of the Judiciary – High Court should be actively consulted in the matter of judicial appointments and should not be reduced to the position of a transmitting authority of a list of suitable candidates prepared by a Selection Committee.

Before Hidayatullah, Sikri, Ramaswamy and Shelat JJ.

Decided on August 12, 1966.

Article 233 of the Constitution of India reads as follows:

233 (1). Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2). A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

The proceedings were commenced by an aggrieved District Judge who petitioned the High Court of Allahabad challenging the constitutionality of the Uttar Pradesh Higher Judicial Service Rules on the ground that these Rules, insofar as they permitted the Governor of the State to appoint any person from any service in the State as a District Judge, were in conflict with Article 233 of the Constitution.

The High Court of Allahabad dismissed the petition, whereupon the petitioner appealed to the Supreme Court. The Supreme Court allowed the appeal, set aside the order of the High Court of Allahabad and issued a writ of *mandamus* to the State's Government not to make any appointment by direct recruitment to the Higher Judicial Service in the State in pursuance of the selections made under the Uttar Pradesh Higher Judicial Service Rules. The Supreme Court also held that the appointments made under these Rules were illegal. It emphasized that under Article 233 of the Constitution, a 'duty' was enjoined on the Governor to make the appointment of District Judges in consultation with the High Court concerned.

Commenting on the Uttar Pradesh Higher Judicial Service Rules, the Constitutional Bench of the Supreme Court said that it was "clear" from these rules that the High Court (in the matter of recruitment of Judges) was "practically reduced to the position of a transmitting authority" of the list of suitable candidates for appointments prepared by a selection committee.

The only direction left to the High Court in this regard, the Supreme Court observed, was to refuse to recommend for appointment all or some of the persons included in the list sent to it by the selection committee.

The Supreme Court added that, according to rules, the High Court could not scrutinize the other applications which were screened by the selection committee. "It could not recommend for appointment persons not found in the list."

The Supreme Court also ruled that the Governor was not competent to appoint any person from any service in the State as a District Judge.

The expression 'Service' occurring in Clause 2 of Article 233 was interpreted by the Court as the 'Judicial Service'. On this interpretation the Court said that the Governor could not appoint officers belonging to the Executive Branch of the Government even though they performed certain revenue and magisterial functions as District Judges.

In the course of its judgment, the Supreme Court, tracing the history relating to the recruitment of District Judges, observed that, after attainment of independence, District Judges were recruited only from either the Judiciary or from the Bar and that there had been no case of a member of the Executive having been appointed as a District Judge subsequent to independence. If that was the factual position at the time the Constitution came into force, the Court continued, it was unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the Judiciary, an intention to destroy the same by an indirect method (as was suggested by counsel for the State of Uttar Pradesh in his argument that the Governor could appoint any person from any service in the State as a District Judge).

In this context, the Supreme Court asked, "What can be more deleterious to the good name of the Judiciary than to permit, at the legal level, District Judges being recruited from the Executive department?"

Federal Court of Appeal of Malaysia

WHEN COURT JUSTIFIED IN NOT FOLLOWING ITS OWN DECISION

OOI HEE KOI AND OOI WAN YUI v. THE PUBLIC PROSECUTOR

(K.L. - Federal Court Criminal Appeals Nos. X.9 and X.12 of 1966)

(See also 1966, 2 Malayan Law Journal p.183)

In criminal matters where life and liberty are at stake Court will not hesitate to reject even a recent decision of its own, if satisfied that all relevant considerations and historical circumstances were not before it in the earlier case - mere birth in Malaysia does not per se establish allegiance to His Majesty the Yang di-Pertuan Agong - in the absence of proof of allegiance, appellants who were charged, inter alia, with consorting with members of Indonesian armed forces, should be treated as prisoners of war - they were therefore entitled to the benefit of the Geneva Conventions.

Before Barakbah (Lord President), Ong Hock Thye F. J. and Ismail Khan J.

Judgment of the Court delivered by Ong Hock Thye F. J.

Decided on July 12, 1966.

Ooi Hee Koi, the appellant in Appeal No. X.9, was charged under the Internal Security Act, 1960 with having been in possession of a fire-arm, with having been in possession of ammunition and with having consorted with members of the Indonesian armed forces. He pleaded guilty to the third charge but claimed trial on the other charges. Ooi Wan Yui, the appellant in Appeal No. X.12, was charged with similar offences and claimed trial in respect of all the charges against him.

The material evidence in both cases was very much the same. They were members of an armed force of paratroopers who were air-dropped over Labis area in Johore in the early hours of September 2, 1964. On the person of Ooi Hee Koi was found his identity card, No. 3019104, which indicated that his place of birth was "China" and that he was "a citizen of the Federation of Malaya". Ooi Hee Koi in his statement to a police officer said, *inter alia*, that he had come over from China with his parents at the age of 2 to reside in Pontian, Johore. Ooi Wan Yui was not in possession of any identity card and no evidence was given as to the kind of card issued to him under the National Registration Act, 1959. In his cautioned statement Ooi Wan Yui said *inter alia* that he was born in China and that in 1948 when he was 12 his father brought him to Malaya.

After trial the accused were convicted on all the charges. They appealed to the Federal Court of Appeal against their convictions and it was contended on their behalf that they were and should be treated as "prisoners of war" as defined in article 4 of the Third Schedule to the Geneva Conventions Act, 1962, and as such they should be entitled to all the benefits of those Conventions.

In allowing the appeals and quashing the convictions the Federal Court of Appeal held:

1. The question of Ooi Hee Koi's allegiance could not be resolved by the mere production of his identity card (which stated that he was born in China and that he was a citizen of the Federation of Malaya), because unlike a passport an identity card does not confer rights but imposes obligations. Proof of the truth of the allegation as to this appellant's status rested on the prosecution. The prosecution offered no such proof, notwithstanding that both in the identity card and the cautioned statement the appellant's place of birth was evident. This appellant was therefore a prisoner of war and was entitled to the benefit of the Geneva Conventions.

2. In the case of Ooi Wan Yui, the prosecution had failed to prove that he was a person owing allegiance at any relevant time to His Majesty the Yang di-Pertuan Agong; consequently he should have been held to be a prisoner of war and was also entitled to the benefit of the Geneva Conventions.

In arriving at its decision, the Federal Court of Appeal addressed its mind to the fact that that very Court had come to a different conclusion in an earlier case where the facts were similar, but took the view that, having regard to all the circumstances, the Court was justified in disregarding its previous decision.

Having analysed the facts and the law, Ong Hock Thye F. J. concluded the judgment of the Court thus:

"In arriving at this decision we are not unaware that it runs counter to the previous decision of this court. Nevertheless, we do so without qualms. As Sir Carleton Allen says at p. 245 of *Law in the Making* (6th Ed.), 'The case of *Gideon Nkambule v. R.*¹ makes it clear that in criminal matters at least, where life and liberty are at stake, the Privy Council will not hesitate to reject even a recent decision of its own, if it is satisfied that all relevant considerations and historical circumstances were not before the court in the earlier case.' We would not hesitate to follow the same principle."

Supreme Court of the United States of America

DISCRIMINATORY LEGISLATION AGAINST DESIGNATED PERSONS OR GROUPS

UNITED STATES v. BROWN

(Ref. 381 U.S., p.437)

Legislation imposing disabilities on designated persons or groups - such legislation is void as it violates Article 1, Section 9 of the Constitution which prohibits the passing of bills of attainder - statute which inflicts a deprivation upon named or described persons or groups constitutes a bill of attainder whether its aim is retributive or preventive.

Opinion of the Court delivered by Chief Justice Warren.

Decided on July 7, 1965.

The respondent was convicted under Section 504 of the "Labor-Management Reporting and Disclosure Act of 1959" which makes it a crime for a person who belongs to the Communist Party or who has been a member thereof during the preceding 5 years to serve as a member of the executive board of a labour organization. He appealed to the Court of Appeals, which reversed the decision. The Government in turn appealed against the reversal to the Supreme Court of the United States.

In the hearing before the Supreme Court the respondent urged, in addition to the grounds relied on by the Court of Appeals, that the statute under which he was convicted was a bill of attainder, and therefore violated Article 1, Section 9, cl. 3 of the Constitution which states that "No bill of attainder or *ex post facto* law shall be passed by the Congress".

The Supreme Court, in affirming the decision of the Court of Appeals, held:

1. The Bill of Attainder Clause, Art. 1, Section 9, cl. 3, was intended

1. 1950 A.C. p. 379.

to implement the separation of powers among the three branches of the Government by guarding against the legislative exercise of judicial power.

2. The Bill of Attainder Clause must be liberally construed in the light of its purpose of preventing the imposition of legislative disabilities on designated persons or groups.

3. In designating Communist Party members as persons who cannot hold union office, Congress had exceeded its Commerce Clause power to enact generally applicable legislation disqualifying from positions affecting inter-state commerce persons who may use such positions to cause political strikes.

4. Section 504 is distinguishable from such conflict-of-interest statutes as Para. 32 of the Banking Act, where Congress was legislating with respect to general characteristics rather than with respect to the members of a specific group.

5. The designation of Communist Party membership cannot be justified as an alternative "shorthand" expression for the characteristics which render men likely to incite political strikes.

6. A statute which inflicts a deprivation upon named or described persons or groups constitutes a bill of attainder, whether its aim is retributive - punishing past acts - or preventive - discouraging future conduct.

7. The legislative specification of those to whom the enacted sanction is to apply invalidates a provision as a bill of attainder whether the individuals are designated by name or by description.

Editor's Note

A Bill of Attainder, as originally understood, was a legislative act aimed at a particular person declaring him guilty of an offence, usually a political one of a rather unsubstantial kind, and inflicting a punishment on him, although he may have had no opportunity to defend himself.

German Federal Constitutional Court

FREEDOM OF THE PRESS

SPIEGELVERLAG RUDOLF AUGSTEIN GmbH & CO. KG v. FEDERAL REPUBLIC OF GERMANY

(Ref. 1 BvR 586/62, 610/63 and 512/64)

A free Press is a vital requisite of a free State - in particular, free, regularly published political journals and newspapers are essential in a democratic society - a citizen called upon to make political decisions must be comprehensively informed and know the different opinions which he has to weigh up against each other - it is the Press that keeps this dialogue alive and works as a directive force in public debate - the legal position of the Press, which is in some respects a privileged one, is given to it by reason of the role it has to play and not as a personal privilege - there can be conflicts between the freedom of the Press and other legal interests protected by the

Constitution – it is the duty of the Press to respect the legal interests of others such as the general public – these interests are as important as the freedom of the Press.

See also Entscheidungen des Bundesverfassungsgerichts Vol. 20, No. 15, pp. 162–224.

Decided on August 5, 1966.

In the autumn of 1962, the Procurator-General, acting on behalf of the respondent, commenced investigations against the complainants in connection with suspected treason arising out of an article published in the magazine "Der Spiegel". In the course of those investigations search orders and arrest warrants were issued on the application of the Procurator-General. Searches were carried out in the complainants' offices, which started at night and continued for some days. Three of the editorial staff of "Der Spiegel" were eventually arrested and detained in custody for a period and a large quantity of material was seized.

The complainants alleged that these measures were unconstitutional in that they infringed Article 5 of the Constitution relating to freedom of expression and in particular the freedom of the Press, Art. 13 relating to the inviolability of private premises and requiring a judicial order for a search, and Art. 14 guaranteeing inviolability of property.

The Court was equally divided on whether the measures taken were unconstitutional. As a majority was necessary for a finding in the complainants' favour, the action failed. This case is, however, important in view of the general observations which the Court made in regard to the need for a free Press in a modern democracy and its responsibility towards State and citizen.

In its judgment delivered on August 5, 1966 the Court stated that it took the following general considerations as the basis for its decision:

"1. A free Press, which is neither directed by the Executive nor subjected to censorship, is a vital element in a free State; in particular a free, regularly published, political Press is essential in a modern democracy. The citizen, called upon to make political decisions, must be comprehensively informed, know the opinions of others, and be able to weigh them up against each other. The Press keeps this dialogue alive, it provides the information, adopts its own point of view and thus works as a directive-giving force to the public debate. It stands as a permanent means of communication and control between the people and their elected representatives in Parliament and Government. This function of the free Press in a democratic State corresponds with its legal position under the Constitution. The independence of the Press guaranteed by Article 5 comprehends all aspects from the acquisition of information to the dissemination of views and opinions. One aspect of the freedom of the Press is thus a certain degree of protection for the relationship of confidence between the Press and private informants.

"For the solution of conflicts between the freedom of the Press and other legal interests protected by the Constitution, the latter looks to the general legal order, of which the Press forms a part. Legal interests of others, such as of the general public, that are of at least equal value as

the freedom of the Press, must also be respected by the latter. The legal position of the Press, which is in some respects a privileged one, is given to it by reason of the role it has to play and only in connection with that role, not as a personal privilege. In order to protect the freedom of the Press from a watering-down by other legislation, the interpretation of ordinary legislation must always be weighed against the basic values of Press freedom.

"2. The provisions relating to treason are general laws within the meaning of Article 5(2) of the Constitution.... Threats to the safety of a State arising from a publication must be weighed against the need to be informed of important developments even in the field of defence policy.

"The provisions relating to compulsory measures in connection with criminal proceedings, which may be ordered by a Court or other competent authority in the exercise of its discretion, must also always be applied with continual regard for the basic right of Press freedom. Particular reticence is recommended in connection with the search of the premises of press enterprises, so that the confidential relationship between the Press and its informants shall not be endangered...."

Supreme Court of the United States of America

ADMISSIBILITY OF CONFESSION

DAVIS v. NORTH CAROLINA

(384 U.S. 737 - 1966)

Accused, who was in police custody in a detention cell for 16 days, interrogated intermittently by the police - not advised of his rights - he finally confesses to the crime - failure to advise an accused of his right to remain silent or of his right to counsel is a significant factor in determining the voluntariness of his confessions - another significant factor is that no-one other than the police spoke to accused during his 16 days detention and interrogation - Court's duty to examine the entire record and make an independent determination on the issue of voluntariness.

Opinion of the Court by Chief Justice Warren and announced by Mr. Justice Brennan.

Decided on June 20, 1966.

The accused, an impoverished Negro of low mental capacity, was taken into custody by the police in connection with a murder investigation and kept in a detention cell for 16 days, where he had no communication with anyone save the police who interrogated him intermittently each day. He finally confessed to the crime. There was no indication in the record that the police had advised him of his rights till after his confessions. At the trial, despite counsel's objections to the confessions on the ground that they were involuntary, a written confession and testimony of an oral confession were led in evidence. The accused was found guilty and sentenced to

death and his conviction was affirmed by the Supreme Court of North Carolina. The Federal District Court refused a writ of *habeas corpus*, but the Court of Appeals reversed that decision and sent the case back to the District Court for a hearing on the question of the voluntariness of the confessions. The District Court, after hearing evidence, held that the confessions were voluntary and the Court of Appeals affirmed this finding. On an application to the Federal Supreme Court for a writ of *certiorari* the Supreme Court held that the confessions were the involuntary end product of coercive influences and thus constitutionally inadmissible in evidence. In so holding the Supreme Court made the following points:

1. The fact that a defendant was not advised of his right to remain silent or of his right to counsel at the outset of interrogation is a significant factor in considering the voluntariness of statements made by him in the course of the interrogation.
2. The fact that no-one other than the police spoke to the accused during his 16 days' detention and interrogation is a significant factor in determining voluntariness.
3. Evidence of extended interrogation in a coercive atmosphere, as here, has often resulted in a finding of involuntariness by the Supreme Court.
4. It is the Court's duty to examine the entire record and make an independent determination of the ultimate issue of voluntariness.

Cour de Cassation (Criminal) of Switzerland

FACTORS TO BE CONSIDERED IN PASSING SENTENCE

J. v. LE TRIBUNAL DE POLICE CORRECTIONNELLE OF LAUSANNE

(Journal des Tribunaux, Lausanne, III Droit cantonal

No. 2, September 1966, p. 45)

Period spent on remand or under preventive detention does not constitute a penalty - however such period, to the extent that the prisoner himself has not by his conduct been the cause of it or of its prolongation, is deductible from the period of sentence passed - where the investigations have been protracted and other circumstances justified it, it is just and proper that a proportion of the period of remand should be deducted from the sentence.

Decided on February 28, 1966.

J. was charged before the *Tribunal de Police Correctionnelle* of the District of Lausanne on several counts and convicted on January 21, 1966. The Tribunal sentenced him to 3 1/2 years imprisonment and deprived him of his civil rights for a period of 10 years. He was also condemned to pay 3/5ths of the costs of the proceedings.

J. applied for a declaration of invalidity or, alternatively, for a revision

of the sentence to the *Cour de Cassation* urging that when he was sentenced on January 21, 1966, he had already spent 781 days on remand and that the Court had failed to take this period of detention into account when passing sentence on him. He claimed that the Tribunal, by sentencing him to 3 1/2 years imprisonment and refusing to deduct the 781 days already served, had in effect sentenced him to more than 5 1/2 years imprisonment and had thus exceeded its jurisdiction in the matter of sentence which was limited in the case of this tribunal to 4 years imprisonment under Article 14(2) of the Code of Criminal Procedure (of the Canton of Vaud).

The *Cour de Cassation* rejected the argument that the Tribunal had in effect imposed a term of more than 4 years imprisonment and had therefore exceeded its jurisdiction and held that detention on remand or preventive detention were not penalties and that therefore time spent on such detention does not form part of the period of the sentence. It therefore refused to declare J.'s sentence invalid.

However, the Court granted J.'s alternative application for revision of the sentence, on the grounds of the wrongful application of Art. 69 of the Swiss Criminal Code (which requires the deduction of the period of detention "to the extent that the prisoner has not, by his conduct after the offence, himself been the cause of his detention or of its prolongation"). Taking into account the length of the investigation and the circumstances as a whole, the Court considered that a good portion of the period of detention should be deducted from the period of sentence, and fixed such deductible period *ex aequo et bono* at 2/3rds of the period of detention that he had served, namely 522 days out of the total of 781. The *Cour de Cassation* therefore altered the sentence of the Lower Court to three and a half years' imprisonment, less 522 days spent on remand. The State was directed to pay the costs of the proceedings before the *Cour de Cassation*.

Supreme Court of the United States of America

PRIVILEGE AGAINST SELF-INCRIMINATION

MIRANDA v. ARIZONA

(384 U.S. 436 - 1966)

Defendants while in police custody were questioned by police officers in a room which cut them off from the outside world - no full and effective warning of defendants' rights given at the outset of the interrogations - statements, whether exculpatory or inculpatory, stemming from questioning by law officers after a person has been taken into custody cannot be used in evidence unless the person in custody has first been clearly informed that he has the right to remain silent and that anything he says will be used against him in court - he must also be informed of his right to consult with a lawyer and have the

lawyer with him during the interrogation - failure to observe these safeguards before interrogating a person in custody amounts to a violation of the Fifth Amendment privilege against self-incrimination.

Judgment of the Court delivered by Chief Justice Warren.

Decided on June 13, 1966.

The defendants while in police custody were questioned by police officers, detectives and a prosecuting attorney in a room in which they were cut off from the outside world. None of the defendants was given a full and effective warning of his rights at the outset to the interrogation process. Their oral admissions and, in the case of some of them, signed statements as well were admitted at their trials. The defendants were all convicted. Those defendants whose convictions were affirmed in appeal by the Supreme Court of Arizona applied to the Supreme Court of the United States for Writs of *Certiorari* against the Supreme Court of Arizona. In allowing the applications, the Supreme Court of the United States held that:

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates that procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination had been employed.

2. The atmosphere and environment of *incommunicado* interrogation as it exists today is inherently intimidating and tends to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

3. The privilege against self-incrimination is the essential mainstay of the adversary system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial interrogation as well as in the courts or during the course of other official investigations.

4. In the absence of other effective measures, the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.

5. If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present.

6. Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel.

7. Where the individual answers some questions during in-custody interrogation, he has not waived his privilege and may invoke his right to remain silent thereafter.

8. The warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant.

9. In each of these cases the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination.

In the course of the judgment Chief Justice Warren observed:

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest.

"The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process . . .

"The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and, if coercion is nevertheless exercised, the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at the trial . . ."

Cour de Cassation of Belgium

RIGHT OF ACCUSED TO BE INFORMED OF FACTORS URGED AGAINST HIM

REYNAERTS v. GHAYE

(Pasicrisie Belge, January 1966, pp. 86 and 87)

Accused entitled to information of the charge against him and the aggravating circumstances, if any, relied on by the prosecution - in the absence of notice that the prosecution relied on an aggravating circumstance, accused cannot prepare his defence in regard to it - aggravating circumstance brought to the notice of Appeal Court which enhances the sentence - such enhancement of sentence constitutes a violation of defendants rights under Article 97 of the Constitution - Appeal Tribunal Court cannot enhance sentence on the basis of a factor not even mentioned in the original complaint.

Court presided over by M. van Beirs.
Decided on September 20, 1965.

The accused was charged with several violations of the highway code. He was found guilty by the Tribunal and sentenced.

The prosecutor appealed against the sentence to the *Tribunal Correctionnel* of Liège which enhanced the sentence passed at the trial on the ground that there existed an aggravating circumstance in regard to the offences committed by the accused, namely that the offences were committed at night. But the accused had not been informed at the trial that the prosecution was relying on this aggravating circumstance.

The accused appealed against the decision of the *Tribunal Correctionnel* of Liège to the *Cour de Cassation* of Belgium which held that, as the accused had not been given notice of the aggravating circumstance alleged against him, he had not been in a position to prepare his defence on that matter at the trial. There had therefore been a miscarriage of justice and a violation of Article 97 of the Belgian Constitution, which states that every judgment shall be pronounced in open Court and the reasons therefor stated. In the circumstances it was illegal for the appellate Court to pronounce a more severe sentence on the accused than that which had been pronounced on him at the trial.

Supreme Court of Ceylon

RIGHT OF ACCUSED TO COUNSEL OF HIS CHOICE

PREMARATNE v. GUNARATNA, INSPECTOR OF POLICE

(S.C. 1393 of 1964 – M. C. Anuradhapura 2985)

An accused in a criminal case has a right to be defended by a lawyer of his choice – this right is one ingrained in the Rule of Law, which is recognized in the criminal procedure of most civilized countries – accused had been on remand in connection with another case between the date of charge and date of trial in this case and had therefore no opportunity to retain counsel – he applied for a postponement to enable him to do so – the refusal of the application had the effect of denying him the right to counsel of his choice.

Before Mr. Justice T. S. Fernando.
Decided on March 19, 1965.

The accused-appellant was charged on October 19, 1964 with having committed an offence on June 24, 1964. On October 19 he pleaded 'not guilty' and the magistrate fixed the trial for October 24. The record made on October 19 stated: 'Accused to be on same bail'.

On October 24, 1964 the appellant appeared in person without any pleader and the prosecution had the assistance of a lawyer. The appellant thereupon begged that a postponement be granted as he had not been able

to get ready for trial that day. The learned Magistrate, recording that the appellant had had ample time to get ready for trial, refused a postponement, proceeded to trial and convicted the appellant that very day.

The record showed that the appellant did not put a single question in cross-examination to any of the witnesses for the prosecution and did not give any evidence on his own behalf at the end of the case for the prosecution.

In appeal, counsel for the accused-appellant brought to the notice of Court the record in another case from which it appeared that the accused had been arrested on October 19, 1964, in connection with another charge and had been ordered to be remanded till October 26, 1964, and submitted that in the circumstances the accused had not had sufficient opportunity to make arrangements to retain a lawyer. He further submitted that the Magistrate had made the observation that the accused had had ample time to get ready for trial in the erroneous belief that he had been on bail. That the accused was in fact on remand in connection with another charge had not been brought to his notice.

Mr. Justice Fernando allowed the appeal, quashed the conviction and sentence and ordered a fresh trial before another magistrate. In doing so, he made the following observations:

"From a perusal of the record in the other case it is quite apparent to me that the appellant was on remand from October 19, 1964 till October 26, 1964 except when his presence was necessary in court for some time on October 19 and October 24 in connection with the plea and the trial respectively in the present case. When the learned Magistrate recorded on October 24, 1964 that the appellant had had ample time to get ready for the trial he probably had in mind the entry of October 19 that the appellant could stand out 'on the same bail'. It is quite obvious that his attention was not directed to the circumstance that, while the appellant was permitted to stand out on bail already furnished in the present case, he had been refused bail in another case and was consequently in the custody of the Fiscal.

"The right of a person who is accused of a criminal offence to be defended by a lawyer of his choice is one now ingrained in the Rule of Law which is recognized in the law of criminal procedure of most civilized countries and is one expressly recognized by section 287 of our Criminal Procedure Code which enacts that 'every person accused before any criminal court may of right be defended by a pleader'. Although the learned Magistrate did not expressly deny the appellant that right, it is apparent to me that, in the erroneous belief that the appellant was on bail between October 19 and October 24, his decision to go on with the trial had the same unfortunate effect."

Supreme Court of the United States of America
RIGHT TO COUNSEL — INCRIMINATING STATEMENTS
MADE IN HIS ABSENCE

MIRANDA v. ARIZONA

(384 U. S. 436 — 1966)

(See pp. 135-137 above)

Supreme Court of the United States of America
RIGHT TO COUNSEL AT POLICE INTERROGATION

DAVIS v. NORTH CAROLINA

(384 U.S. 737 - 1966)
(See pp. 133-134 above)

European Commission of Human Rights
RIGHTS OF THE DEFENCE

BOECKMANS v. THE GOVERNMENT OF BELGIUM

(Petition 1727/62)
(See pp. 114-115 above)

Supreme Court of the United States of America
RIGHT TO FAIR TRIAL

SHEPPARD v. MAXWELL, WARDEN

(384 U.S. 333 - 1966)

Massive, prejudicial, virulent and incriminating pre-trial publicity given to a person accused of murder and to the facts of his case in newspapers, on the radio and on television - the publicity had the effect of making the case notorious - it prevented the accused from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment.

Opinion of the Court delivered by Mr. Justice Clark.
Decided on June 6, 1966.

The accused's wife was clubbed to death on July 4, 1954. From the outset officials focused suspicion on the accused, who was arrested on a murder charge on July 30 and indicted on August 17. His trial began on October 18 and terminated with his conviction on December 21, 1954. During the entire pre-trial period virulent and incriminating publicity about the accused and the murder made the case notorious, and the news media frequently aired charges and countercharges besides those for which the petitioner was tried. Three months before trial he was examined for more than five hours without counsel in a televised three-day inquest conducted before an audience of several hundred spectators. Over three weeks before trial the newspapers published the names and addresses of prospective jurors resulting in their receiving letters and telephone calls about the case. The trial began two weeks before a hotly contested election at which the chief

prosecutor and the trial judge were candidates for judgeships. Newsmen were allowed to take over almost the entire small courtroom. Several reporters were assigned seats by the Court within the bar and in close proximity to the jury and counsel, precluding privacy between the accused and his counsel, and their movements in the courtroom caused frequent confusion and disrupted the trial. A broadcasting station was assigned space next to the jury room. Before the jurors began deliberations they were not sequestered and had access to all news media, though the court directed the jurors not to expose themselves to comment on the case. Though sequestered during the five days and four nights of their deliberations, the jurors were allowed to make inadequately supervised telephone calls during that period. Much of the publicity involved incriminating matter not introduced at the trial, and the jurors were rocketed into the role of celebrities. At least some of the publicity deluge reached the jurors. At the very inception of the proceedings and later, the trial judge announced that neither he nor anyone else could restrict the prejudicial news accounts and failed to take effective measures against the massive publicity which continued throughout the trial.

The accused filed a *habeas corpus* petition contending that he had not received a fair trial. The District Court granted the petition but the Court of Appeal reversed the decision of the District Court. The accused then applied to the Supreme Court of the United States for a writ of *certiorari* on the Court of Appeals. In granting the writ and sending the case back to the District Court with instructions to release the accused from custody unless he was tried again within a reasonable time, the Supreme Court held:

1. The massive, pervasive, and prejudicial publicity attending accused's prosecution prevented him from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment.

2. Though freedom of discussion should be given the widest range compatible with the fair and orderly administration of justice, it must not be allowed to divert a trial from its purpose of adjudicating controversies according to legal procedures based on evidence received only in open court.

3. Actual prejudice to the accused need not be shown if, as in *Estes v. Texas*, 381 U.S. 532¹, and even more so as in this case, the totality of the circumstances raises the probability of prejudice.

4. The trial court failed to invoke procedures which would have guaranteed a fair trial to the accused, such as stricter control of the use of the courtroom by newsmen, limiting their number, and more close supervision of their courtroom conduct. The court should also have isolated the witnesses, controlled the release of information and gossip to the press by police officers, witnesses, and counsel, and proscribed extra-judicial statements by any lawyer, witness, party, or court official divulging prejudicial matters.

¹ See Digest of Judicial Decisions *Journal* of the International Commission of Jurists, Vol. VII, No. 1, p. 159.

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