HUMAN RIGHTS

AND

THREE SPECIAL ASPECTS OF THE RULE OF LAW

IN THE MODERN SOCIETY

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by

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To my wife Dr. Kawser Perveen
and our son Jeehan Fuad,
whose admirable patience and continued support
over the last few years made this research possible.
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Abstract of the Thesis:

"Human Rights and Three Special Aspects of the Rule of Law in the Modern Society"

The principal object of the present research may be seen as an attempt to highlight certain specific and special aspects of the modern concept of the rule of law, particularly in the context of its relevance and pertinence to the contemporary demands and developments in the area of fundamental human rights and freedoms. In this line of thought, three specific areas have been identified that have received considerable attention and importance in the conceptual and normative development in the field of the modern legal edifice of human rights, international and domestic, particularly in the last few decades. These 'special' aspects are to be found-

a. in the concept of human rights in the administration of justice;

b. in the principles and practices relating to human rights in certain exceptional situations commonly called 'states of emergency'; and

c. in the indispensable pertinence and significance of the doctrine of independence and impartiality of the judiciary to these modern features of the rule of law.

While the foundation of these cardinal norms of human rights are to be found in the Universal Declaration of human rights, 1948, they have been given the sanction of binding treaties by incorporating them into subsequent major human rights instruments, particularly the UN's Covenant on Civil and Political Rights as well as the three regional treaties. These legal norms of international human rights law have then been further elaborated by the adoption of a wide range of global, regional and subsidiary instruments in the recent time. Moreover, the importance and urgency of these particular areas of human rights have been reiterated and re-emphasised by the constant devotion and continued efforts of numerous international institutions, organisations and individual scholars by means of studies, survey, research, conferences, seminars, symposia etc. And finally, over the last half a century or so, since the first treaty provision was made in this regard (i.e., the ECHR in 1950), a considerable amount of jurisprudence has been developed in the case law of the monitoring organs in these relevant fields.

Accordingly, this thesis aims at reviewing and researching these contemporary developments with the anticipation of drawing a general as well as critical evaluation of the specific legal regime of human rights in relation to these 'special' aspects of the modern notions of the rule of law.
INTRODUCTION
Much of the general international concern in the recent years in relation to the protection of human rights is a concern with certain specific notions of the 'rule of law', which underlie and inform much of the contemporary thoughts relating to the subject of human rights. Accordingly, for any academic research on the relevance and significance of the modern concept of the rule of law in this particular context requires an in-depth thought of those specific areas that have proven to possess the most potential threats to the observance and proper implementation of the universal and inalienable rights and freedoms of the mankind as they are recognised today. What is thus essential is to look at those relevant fields that have received particular attention in the highly applauded conceptual and normative development that have taken place in the international and domestic legal regime of human rights, particularly in the last few decades. At the same time, similar importance is also needed to be attached to this repeatedly expressed concern and the constant endeavour of various institutions, organisations and individual scholars at the national, regional and global levels in the search for better protection of these rights and freedoms.

Thus, the very assumption of this research emanates from the idea that the rule of law is not solely an attribute of one specific legal system or an obsolete concept from the past. The doctrine, on the contrary, stands as a broad legal concept that embodies certain principles and norms that have a general and timeless application. Thus, from
a technical legal formula concerned with the protection of the individual against arbitrary action of the government, the doctrinal notion of the rule of law rose to symbolise justice in a sense going beyond its purely forensic meaning. In this sense, the concept of individual human rights and freedoms lies at the core of the ideological and moral foundations of the modern concept of the rule of law. This is the notion that has been included as one of the three underlying principles which are instantly recognisable as propositions of modern international human rights law, properly so-called.1 Thus, while the very idea of the rule of law springs from the rights of the individual developed through history, the birth and development of the modern legal edifice of human rights have been inextricably linked with the dynamic and progressive advancement of the doctrine of the rule of law. The relationship between human rights and the rule of law is thus deeply rooted in their birth and growth, which continues to claim an ever increasing importance in the modern society.2

Thus, having found its initial inspiration in this above line of thoughts, the present research identifies three contemporary aspects of the rule of law that demand special consideration by the community of nations in their efforts towards the causes of human rights. A brief introductory approach to the rationale for attaching a 'special' character to these aspects of the rule of law is thus quite desirable at this stage and this task has been sought to be achieved by an attempt to draw an outline

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1 These three principles have been described as -the principle of universal inherence; the principle of inalienability; and the Rule of Law: Paul Sieghart, The International Law of Human Rights (Clarendon Press, Oxford, 1983) p.8.

2 This relationship between human rights and the rule of law will be discussed elaborately in chapter I of this thesis; see especially, pp. 45ff.
of the structural and conceptual framework of the proposed thesis as well as taking a quick glance at the basic contents of each of these core ideas.

Accordingly, these special aspects of the rule of law comprise in three distinct (though virtually correlated) notions of the doctrine, namely-

1. the principles and practices of national and international human rights law pertaining to the administration of criminal justice and their impact on the advancement of fundamental rights and freedoms of the individual;

2. the existing norms and standards of the law of human rights with regard to certain exceptional situations, commonly termed as ‘states of emergency’, and the essential guarantees and other basic standards set forth by the rules of international human rights law in the protection of individuals against potential abuse; and finally,

3. the responsibility of an independent judiciary and an independent legal profession in promoting, monitoring, implementing and protecting these standards and norms in a society under the rule of law.

Accordingly, in addition to a general chapter on the meaning, nature and scope of the doctrine in the present context, the proposed thesis is designed to be structured upon three more separate, but inevitably correlated, chapters, besides of course the present 'introductory' one, and a final 'concluding' chapter at the end.

The first chapter has been dedicated to a brief general inquiry into the meaning, nature and basic features of the doctrinal notions of the rule of law. Within the
scope of this survey has been included the most influential juristic theories that have made important contribution in the exposition and development of the modern concept of the rule of law; the consequences of terminological variations relating to the doctrine in different legal systems and languages, and the extent to which such diversities in the apprehension of the concept restricted the interpretation and application of the doctrine in its much wider post-modern phenomenon; the significance of this dynamic post-modernism from the points of view of the ideological, structural, substantive, methodological, procedural and other related aspects of the doctrine; the conflicts and compromises through which the rule of law came to a somewhat complex terms of cohabitation with the rather orthodox and sensitive notions of 'state sovereignty', particularly in so far as the modern legal edifice of human rights, national or international, is concerned; and finally, the emergence of the doctrine as a 'supra-national' concept in the past few decades with particular reference to the adventurous developments made under the aegis of the United Nations and its different organs, the International Law Association, the International Association of Legal Science, and in particular the International Commission of Jurists.

Chapter II, under the title "Rule of Law and Human Rights in the Administration of Criminal Justice", begins with the basic argument that being an instrument of social control, criminal law relies upon sanctions which by their very nature deprive persons of their life, liberty or other basic rights and freedoms. While these invasions of individual rights are justified by the prime object of criminal law to preserve and maintain social order and integrity and to protect the fundamental
rights of others, the criminal law has often been abused with devastating consequences for individual rights. From the earliest days of the history of social and legal development, tyrannical rulers have abused criminal law and process to perpetuate oppression, and to achieve their individual interests rather than the legitimate aims of an orderly society. Consequently, almost all the major criminal justice systems of the world reveal the historical struggle between those holding the authority and power of the state and those who advocate the supremacy of the rule of law in the administration of justice. As has been aptly remarked, it is thus no wonder that 'in many legal systems, over a variety of legal cultures, it is the criminal process which is the area of law in which human rights have found their most long-standing and traditional application'.

A number of questions naturally follow the above proposition. What do we mean by human rights in the administration of criminal justice? To what extent do basic ideas of human rights apply to persons suspected, accused or convicted of a criminal offence? What rights and freedoms it is so important to guarantee in relation to the substantive penal law as well as the criminal procedure? How and to what extent this very concept of human rights in the administration of criminal justice has been accommodated within the rules of international human rights law today? What role has been played by the relevant monitoring organs established under international human rights treaties in carrying out this process of assimilation? How far the jurisprudence developed by these organs in this area as well as other quasi-judicial

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and non-judicial administrative decisions, rulings and regulations have influenced the pace of this development? Chapter II of this thesis undertakes the task of researching the answers to these and other related questions.

However, it may be noted at this stage that as regards the criminal process and the rule of law, elaborate provisions have been made at different conferences and congresses of the International Commission of Jurists, particularly at the Congresses of Athens of 1955 and of Delhi of 1959, with regard to the fundamental principles of penal law, the rights of the accused in criminal trial, and the basic aspects of the criminal procedure. While attempting a brief review of these related provisions we would put particular emphasis on such important aspects of the subject as: certainty of the criminal law; retrospective legislation; presumption of innocence; arrest and accusation; detention pending trial; preparation and conduct of defence; minimum duties of the prosecution; examination of the accused; trial in public; retrial; legal remedies including appeals; and the modes of punishment. As regards the aspect of personal liberty and the criminal process, the rule of law requires that the power to grant bail is a judicial function which should not be subjected to control by the executive and that the higher court should have the power to release provisionally an accused person who has been denied bail by the lower court.

A series of extensive provisions protecting the above mentioned rights to personal liberty and security against arbitrary and unlawful arrest and detention has been so far incorporated into the major human rights instruments: global, regional and
subsidiary. Reference may, however, be made to the Universal Declaration of Human Rights, 1948\(^5\) (Articles 3 & 9); the American Declaration of the Rights and Duties of Man, 1948\(^6\) (Articles I & XXV); the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950\(^7\) (Article 5); the Fourth Protocol to the European Convention, 1963 (Article 1); the American Convention on Human Rights, 1969\(^8\) (Articles 5 & 7); the African Charter on Human and Peoples Rights, 1981\(^9\) (Articles 6 & 7); and the International Covenant on Civil and Political Rights, 1966\(^10\) (Articles 9[1]-[5], 10[2] & [11]). A brief reference in this context would also be made to some more relevant human rights instruments, particularly those of the United Nations.

Chapter III, under the title 'Rule of Law, States of Emergency and the Protection of Human Rights' proceeds from this common understanding that the protection of the individual from unlawful and excessive interference by the government is one of the foundations of the rule of law. But, on the other hand, the rule of law depends not only on the provision of adequate safeguards against abuse of power by the executive, but also on the existence of effective Government assuming special power and competence in certain situations in order to be able to protect the greater interests of the nation as well as maintaining law and order and of ensuring adequate social and economic conditions of life for the society. A dilemma inherent in this complex process of achieving a balance between these two often conflicting

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\(^5\) Adopted by the General Assembly resolution 217 A(III) of 10 Dec. 1948.

\(^6\) Adopted by the OAS on 2 May 1948.

\(^7\) Adopted by the Council of Europe on 4 Nov. 1950; entered into force on 3 Sept. 1953.

\(^8\) Adopted by the OAS on 22 Nov. 1969; entered into force on 18 July 1978.


requirements of the rule of law is thus obviously visible. And the most important and consequential appearance of this dilemma can be seen in the operation of the traditional customary international law doctrine of ‘necessity’ later applied by the incorporation of the derogation clause in the major international human rights treaties.

Indeed, the geographical diversity, a surprising frequency, and the breadth and extent of the phenomenon of states of emergency in the last few decades posed probably the most severe and complex obstacle on the progressive development and maintenance of the rule of law and the protection of fundamental human rights in modern societies. As observed by the International Commission of Jurists in its well-known 1982 study on the subject: “It is probably no exaggeration to say that at any given time in recent history, a considerable part of humanity has been living under a state of emergency”.11 More recently, a UN study revealed that only between 1985 and 1992 nearly half of the member states of the UN adopted emergency measures in order to deal with crisis situations.12

The proclamation of a state of emergency is thus a matter of most serious concern as it directly affects and may infringe upon a number of most crucial rights and

Another earlier study, published in 1978, stated that at that time at least 30 of the 150 states which composed the community of nations were under a state of emergency; see, Daniel O’Donnell, “States of Exception”, 21 ICJ Review, Dec. 1978, p.52.
12 This list even included countries with long democratic traditions and institutional stability, such as the U.S.A. (in Los Angeles, San Fransisco, Las Vegas, Atlanta, and some other places during April-May 1992); U.K. (in Northern Ireland since 1974; Canada (in the Province of Manitoba in 1989); France (in New Caledonia in 1985 and in Wallis and Futuna in 1986) and so forth; see the fifth annual report and 'list of states which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency', by Mr. Leandro Despouy, UN Doc. E/CN.4/Sub.2/1992/23 (6 July 1992), p.28, para. 14.
freedoms of the individual. Moreover, real danger exists when the citizenry whether by legislative or executive action, or abuse of the judicial process, are made to live as if in a perpetual state of emergency. There is thus a frequent and perhaps understandable link between states of emergency and situations of grave violations of human rights. The most serious violations tend to occur in situations of tension when those in power are, or think they are, threatened by forces which challenge their authority if not the established order of the society.

Article 4 of the International Covenant on Civil and Political Rights recognises the rights of governments "in time of public emergency which threatens the life of the nation" to derogate, with certain exceptions, from their obligations under the Covenant, "to the extent strictly required by the exigencies of the situation". There are, however, similar provisions in the European and American regional human rights treaties (Articles 15 and 27 respectively of these two Conventions). But, unfortunately, there is a tendency for some governments to regard any challenge to their authority as a threat to "the life of the nation", particularly those, which do not provide any lawful means for the transfer of political power and which in consequence are inclined to regard any criticism of the government as an act subversive of public order. These regimes thus often declare a state of emergency or other state of exception, and use their emergency powers to suspend what remain of the basic human rights as well as the procedures for their enforcement. In consequence, there result such inhuman practices as anonymous arrests, secret detentions, disappearances, extra-judicial killings and systematic practices of torture.
While considering these important aspects, particular emphasis will be laid on the existing norms and principles of international human rights law for regulating states’ practices in declaring emergencies and invoking the relevant derogation clause of the treaties. In this process, a separate treatment will be given to the existence and application of relevant provisions found in the established principles of customary international law dealing on the one hand with the question of legitimacy and validity of states of emergency in international law, and on the other, the very concept of human rights during such emergencies. As it is a matter of common knowledge today, there exists a certain legal regime of customary law providing exceptions to the normally applicable obligations of states to respect human rights arising from general international law, such as those based on *force majeure*, state of necessity and self-defence, by precluding the wrongfulness of an act which does not conform to a states’ international obligations.13 This line of inquiry will then proceed to an observation that while some of the most fundamental norms of international human rights law regulating human rights in emergency situations are virtually a direct reflection of certain already recognised rules of customary international law, some of the most basic provisions of international human rights law in this area are themselves emerging or already recognised as norms of customary international law. On this basis, a brief general inquiry will be made into a possible conceptual and normative transposition, in so far as the notions of human rights in states of emergency are concerned, between these two branches of the law of nation in the recent time.

Again, reference will also be made to the observations of a 'study of states of emergency' by the International Commission of Jurists in 1983 (selecting over 15 countries which had experienced states of emergency in the 1960s' and 1970s'). Here, the experts were asked to outline the existing constitutional and legislative provisions governing states of emergency; to describe the circumstances in which emergencies were declared, and for what purposes; the action taken under the state of emergency and the extent to which it complied with the pre-existing legislation; the abuses, if any, which occurred; and the circumstances under which the emergency was terminated or, if such was the case, continued in force after the circumstances which gave rise to the declaration had ceased to exist.

Another important work in the present context deserves equal importance, namely-the Paris Minimum Standards of Human Rights Norms in a State of Emergency. After eight years of extensive study (1976-1984) by its international committee on human rights, the 61st Conference of the International Law Association, held in Paris from 26 August to 1 September, 1984, approved a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation, including sixteen articles setting out the non-derogable rights and freedoms to which individuals remain entitled even during states of emergency.

Finally, reference will also be made to the UN Seminar on Effective Realisation of Civil and Political Rights, Kingston, Jamaica, 1967; the Inter-American Seminar on State Security, Human Rights and Humanitarian Law, 1982; the Siracusa (Sicily)
Chapter IV of the thesis, under the title "Independence of the judiciary and Human Rights", re-emphasises the fact that one of the most important aspects pertaining to the rule of law and the protection of human rights relates to the responsibility of the judiciary and of the legal profession. An independent judiciary is an indispensable pre-requisite of a free society practising the rule of law. Such independence implies, first of all, freedom from interference by the executive or legislature with the exercise of the judicial function. To secure this independence, all customary, traditional or local laws should be administered by the ordinary courts of the land. At the same time, the legal profession should be free from any such or other external interference. A comprehensive, independent and consistent method for the appointment, tenure and removal of the judges should be determined and these matters should not be put exclusively into the hands of the executive or the legislature, or even the judiciary itself alone.

On the other hand, members of the legal profession in any country have, over and above their ordinary duties as citizens, a special duty to seek ways and means of

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securing in their own country the maximum degree of independence of the judiciary. It has been thus aptly observed:

In a changing and independent world, lawyers should give guidance and leadership in the creation of new legal concepts, institution and techniques to enable man to meet the challenge and the dangers of the times and to realise the aspirations of all people.

While discussing these basic requirements of the rule of law reference will be made to a recent UN instrument in this field, namely- the Basic Principles on the Independence of the Judiciary. These principles were adopted in view of the consideration that while the Universal Declaration of Human Rights, the CP Covenant, and the ESC Covenant, and the regional treaties all guarantee the rights of equality before the law, of the presumption of innocence, and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, and whereas frequently there exists a gap between the vision underlying those principles and the actual situation, priorities must first be given to the independence of judges, their role in relation to the system of justice, and to the importance of the selection, training, conduct and status of judges and prosecutors. It may also be noted here that the important role of the judiciary in time of emergency has been emphasised in each of the three sections of the ILAs' Paris Minimum Standards of Human Rights Norms in a State of Emergency, 1984.

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16 It was adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September, 1985 and endorsed by the GA resolutions 40/32 of 29 November, 1985 and 40/146 of 13 December, 1985.
Let us now conclude this introduction with this note that many words have already been uttered with regard to these various important notions of the rule of law over the past years. Numerous studies, research and surveys at different levels have been resulted in a voluminous body of texts, conclusions, declarations and other instruments that crystallise the great devotion and noble efforts of the conscience of mankind towards the causes of the rights and dignity of man under the rule of law.

But yet, the community of nations is about to celebrate the 50th anniversary mark of the Universal Declaration of 1948. The modern legal edifice of human rights has continued its dynamic progress through four event-full decades after the first international congress of the ICJ in Athens in 1955. Revolutionary changes have taken place in the political structure of the world in the recent years and great expectations and hopes have developed at the apparent end of the cold-war era. So many more international instruments have come through the United Nations to revitalise the strength and applicability of universal human rights in a new, reorganised world under the rule of law. International monitoring organs have had the mandate and occasions for making extensive judicial, quasi-judicial and administrative interpretations of these relatively new rules of international law, many of which imposing binding obligations upon the relevant states parties, and thereby developed an admirable and substantive body of jurisprudence in this context. A few words may, therefore, still be searched by way of a reconciliation and review of these scholarly efforts in the context of the later and recent developments in this field. And this is what has been purported to be ventured in the four substantive chapters of this thesis that follow.
CHAPTER : I

Dynamism of the Rule of Law in the Modern Society:

Nature, Scope and Limitations.
I. The concept of the rule of law:

meaning and nature.

One may begin with A. L. Wade as he observes, while describing the divergent notions of its characteristics, that: "The Rule of Law has a number of different meanings and corollaries". And this variety of meanings associated with the rule of law represents a more restricted but varied sense of law than when the general concern is as to the concept or nature of law as such.

First, two often used and closely associated terms should be clarified in the present context, namely - the doctrine of the "rule of law", and the popular legal phrase "rules of law". Obviously, while a rule of law connotes "a statement of what the law prescribes on some particular matter", the term "rules of law" signifies "the body of particular rules comprising a legal system as a whole". Thus, while the rules of law represent the very contents of the existing rules that comprise in a community's legal system, the doctrinal notion called the "rule of law" tends to highlight the underlying characteristics of such a system as a whole. In other words, the rule of law embodies the fundamental principles that focus on the essential features of a climate of legality as well as a collective sense and value of law, justice and legal order in a given society. In this sense, it may be said, the rule of law provides a somewhat permanent, or at least long-term, framework for a particular}

society within which the specific rules of law are formulated, interpreted, enforced, and even repealed or amended over the time.

The constant nucleus of this variety of definitions and meanings of the rule of law can probably be best found in A. V. Dicey's general and influential approach to the subject. According to him, the basis of the doctrine of the rule of law springs from the notion that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary courts.' And that the fundamental requirement of the doctrine is that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.'

In that sense, however, Dicey has contrasted the rule of law with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. Describing how foreign observers of English manners expressed their admiration or astonishment at the governance of the rule, predominance or supremacy of law in that country, Dicey quoted a curious passage from de Tocqueville's writings, which compares the Switzerland and the England

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19 Although originating many centuries earlier, the concept of the rule of law (at least for an English lawyer) is indeed inseparably linked with Dicey's treatment of the subject in his landmark text, first published in 1885; see, E.C.S. Wade (ed.) in his editorial Introduction to Dicey, Introduction to the Law of the Constitution, 10th edn., London, 1960.
21 Dicey has, however, described the rule of law as 'a single expression that includes three distinct but kindred conceptions. Along with the preceding two propositions, he suggested a third and different sense in which he described "the rule of law" or the "predominance of the legal spirit" as "a special attribute of English institutions", using the doctrine as a formula for expressing the fact that in the English law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts, with the ultimate outcome that the constitution is the result of the ordinary law of the land. See, generally, ibid., pp. 183-205.
of 1836 in respect of the spirit which pervades their laws and manners. In his comparative study, de Tocqueville pointed out certain characteristic features of the English legal system which, in turn, best express the contents of Dicey's 'rule of law. These include: liberty of the press, guarantee of individual liberty including freedom from administrative arrest and detention, independence of the courts (including jury trial), guarantee of the political rights of the people including the rights of association and self-government, and the like.

While summing up the meaning of the 'rule of law' that he proposed, Dicey observed that it means, in the first place, the absolute supremacy or predominance of 'regular law' as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Again, it also means equality before the law, or the equal subjection of all cases to the ordinary law of the land administered by the ordinary law courts. This notion of the doctrine thus excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.  

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23 See, Dicey, supra, pp. 202-203. It should, however, be noted here that although the argumentation and conclusions put forward by Dicey have been heavily criticised by many modern writers (see, for instance, Carl Joachim Friedrich, Man and his Government (New York: McGraw-Hill, 1963), pp.439-40; William A. Robson, Justice and Administrative Law (1951); F. A. Hayek, The Road to Serfdom (The University of Chicago Press, 1944); but, cf., Harry W. Jones, The rule of law and the welfare state, in 58 Columbia L. Rev. 149 (1958); also, W. Friedmann, Law and Social Change in Contemporary Britain (1951), ch.13). Dicey's authority in the treatment of the subject is still regarded as the locus classicus- and his emphasis in particular on the rule of law as comprising the absence of arbitrary power, and the subjection of all equally to the ordinary law of the land, is undoubtedly of lasting value.
The primary meaning of the rule of law, as observed by Wade, is that 'everything must be done according to law'. As regards the exercise of executive powers, he implies that acts of a government authority that infringe an individual's liberty must be authorised by an Act of Parliament. This is what he describes as the 'principle of legality' and adds that the demands of the rule of law go further by claiming that government should be conducted 'within a framework of recognised rules and principles which restrict discretionary powers'. Here, as regards the scope and extent of such 'restriction', Wade expressly supports the view of Dicey by attributing a central function to an independent judiciary in upholding the rule of law. He thus writes: "The right to carry a dispute with the government before the ordinary courts, manned by judges of the highest independence, is an important element in the Anglo-American concept of the rule of law."

But, however, these definitions of the rule of law have frequently been criticised as 'unsatisfactory and incomplete' and as one 'fairly representative of the common law tradition'; that the two authors (Dicey and Wade) emphasis upon the role of independent judiciary, and the establishment of laws 'in the ordinary legal manner' contains no specified requirements with respect to their mode of operation, and that their reference is rather limited 'to a well-known, traditional conception of the courts within the English legal system. It is now thus desirable to have reference to

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24 This view of the rule of law very closely resemble the medieval notion that law, whether it be attributed to a supernatural or human source, ought to rule the world. See, Holdsworth, History of English Law, vol. ii, (1923), pp.121, 133, 195, 196 and vol. x (1938), pp. 647-650.
25 Wade, supra note 17 at 23.
26 ibid.
the understanding of the Anglo-American conception of the rule of law in some other important legal languages, particularly those of the Continent.

The term 'rule of law' seems to correspond quite closely to the German terms Rechtssicherheit and Rechtsstaat as well as the Scandinavian terms rettssikkerhet and rettsstat. The Rechtsstaat (the law state) conception of the rule of law has been aptly expressed by Georg Jellinek, a leading nineteenth-century German jurist, thus: "Every legal rule also constitutes a guarantee to the legal subjects that the state is itself under an obligation for as long as the rule remains in force. Before its subjects the state commits itself through the creative legal act- irrespective of how the law originates- to apply and enforce the law".28 Thus, to state in simple words, by a Rechtsstaat is meant that the state comprises an autonomous legal structure, independent of any particular form or political complexion of its government which applies to all aspects of life within the state and which the state is obliged to support.29 For Rudolf Gneist, a state is a Rechtsstaat if it fulfils four conditions: everyone must know exactly his duties; no citizen must bear more burdens than his fellows; private law must carry out the protection of the person and of property insistently, jealously, and energetically in the various spheres of its functioning; and , finally, the relation between citizen and state must be subject to the control of administrative tribunals.30

28Georg Jellinek, Allgemeine Staatslehre (Berlin,1900)p.333, cited in Aubert supra at p.35.
29 For a general treatment of the notion of Rechtsstaat, see Donald Kommers, "The Constitutional Jurisprudence of the Federal Republic of Germany", Durham/London 1989. However, these underlying concepts of the Rechtsstaat later found expression in Germany's present Constitution (the Grundgesetz or Basic Law) promulgated in 1949 (see especially Articles 20(3) & 93); for the English text of the German Constitution, see Amos J. Peaselee, Constitutions of Nations, vol.III (revised 3rd edition), The Hague 1968, 357.
It is thus quite apparent that a self-limitation on the state and a restriction upon the arbitrary and discretionary exertion of public authority have been presumed to be the basic notions of this conception. But, it may be noticed here that while this idea of *Rechtsstaat* did not put particular emphasis on the role of the courts, the later expositions of the concept make specific reference to the role of an independent judicial framework. These views also represent the idea of systematic decentralisation of state-powers from one set of hands into a specific division, defined and based upon law. The core idea is that the relationship of power between those who govern and their subjects should exclusively be regulated by the operation of law and in which the citizens would have direct participation through their elected representatives.31 A double-meaning of the term *Rechtsstaat* may thus be noticed. One has been characterised as formal and refers to the legal ordering and limitation on the uses of governmental power and the controlling power of independent and authoritative courts; the term *Rechtssicherheit*, meaning legal certainty and protection, is thus related to this first sense. The second meaning, on the other hand, relates to a wider conception of social justice.32

This last mentioned ‘social justice’ conception of *Rechtssaat* calls for further attention in the present context. Indeed, the genesis of the ideological fragment called the rule of law (or *Rechtsstaat* etc.) has its roots in the same general human needs and dispositions that have secured an appreciation of law as a byword for preferred and highly valued social arrangements.33 Thus, as observed by Coing,34 the

32 German *Encyclopaedia of the Social Sciences*, vol.8 (Stuttgart, 1964) pp.768-9.
33 Aubert, supra, at 43.
Rechtsstaat represents an attempt to harmonise the demands for individual justice with the necessary enforcement of state authority. More specifically, this entails the need to ensure that all state powers are based upon law and restricted by law to the pursuit of the specific purpose of promoting the interests of the society as a whole. Indeed, the wider conception of the rule of law in the German version of the Rechtsstaat was presented by Fichte nearly two centuries ago. This Rechtsstaat is a far cry from the ‘night-watchman’s state’ that became the typical embodiment of the rule of law. According to this conception, such a state is obliged to ensure (a) that the necessities of life are produced in a quantity proportionate to the number of citizens; and (b) that every one can satisfy his needs through work.

However, although an in-depth jurisprudential inquiry into this wider conception of German Rechtsstaat, i.e. of social justice, has not been intended in this work, it is still relevant to refer to an echo of this notion which can be heard in the resolutions adopted during various meetings of the International Commission of jurists. In these resolutions the rule of law is given such a wide scope that it covers nearly everything associated with the Rechtsstaat conception of ‘social justice’. The following quotation clearly illustrates the point:

The International Commission of Jurists has, since its foundation, been dedicated to the support and advancement throughout the world of those principles of justice which constitute the basis of the Rule of Law. The term ‘Rule of Law’, as defined and interpreted by the various congresses sponsored

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34 Coing, supra, at 211 ff, cited in Aubert, supra, at 36.
35 Fichte, Der geschlossene Handelsstaat (1800).
37 Further reference to these resolutions will however be made at a later part of this chapter.
by the International Commission of Jurists, seeks to emphasise that mere legality is not enough and that the broader conceptions of justice as distinct from positive legal rules are embraced by the term and, indeed, provide its more vital aspect".38

And that:

"the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised."39

As regards the equivalent Scandinavian concept of rettssikkerhet (legal certainty), Andenaes, a leading Norwegian jurist in the field of constitutional law, formulated a dual approach that may be treated as a ground relating to the terminological difference between the 'rule of law' and the rettssikkerhet. He refers, first, to the idea of protection against interference with one's legal rights by other citizens; and, secondly, to the question of protection against the abusive and arbitrary exertion of power by the state itself.40

The principal idea behind the notion of the rettssstat more closely relates to this second meaning of rettssikkerhet, namely- that the constitution and the legal system

38 ICJ, The Dynamic Aspects of the Rule of Law in the Modern Age (Geneva, 1965) at 14.
39 The ICJ Declaration of Delhi (1959) cited in ibid. at 15.
as a whole should protect everybody against arbitrariness in the execution of state power. This point has been more specifically emphasised by Echhoff, another leading Norwegian authority, when he claims, with particular reference to administrative law, that the first condition for *rettssikkerhet* is that 'the administrative agencies are bound by rules when they make decisions affecting physical or juridical persons'.

As regards the formal, procedural aspect of the rule of law, or that of *rettssikkerhet*, particular emphasis have been laid on such requirements as impartiality and independence of the judiciary, defensibility of private interests and judicial review. This aspect is more explicitly stressed upon when Marshall writes: "The rule of law in its English context has (like due process of law and natural justice) been mainly expounded...as a procedural concept'. Underlining this predominance of procedural principles it has been thus argued: 'Legality has to do mainly with how policies and rules are made and applied rather than with their content'. In this line of reasoning it has been observed that 'discretion' is incompatible with the rule of law when it remains essentially judicial rather than administrative. Here one may again notice a strong reliance and emphasis upon the special methodology of judicial adjudication. A similar view may also be found where autonomy of the "legal order", a comparatively narrower concept of law than

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43 In this sense, the term 'legality' has been treated as if it were synonymous with the 'rule of law'; see, Philip Selznick, with the collaboration of Philippe Nonet and Howard M. Vollmer, *Law, Society and Industrial Justice* (New York : Russell Sage Foundation, 1969), p.11.
its other important notions,\textsuperscript{44} has been described to be crucially important; and that such autonomy is to be secured by the existence and effective functioning of specialised judicial institutions. And this is what Mangabeira Unger puts as an approach to his discussion on how the rule of law, a relatively rare phenomenon in human societies, came into being in the modern Western liberal states.

Thus, these repeatedly emphasised procedural and methodological issues, along with such other related (and wider) ideas as the protection of individuals from arbitrary and unlawful exercise of governmental power, equality before the law and democratic representation constitute the essential elements that are focal and appear quite often in any literature on the rule of law.

It is now desirable to turn to some few other theories relating to the contents of the ideas and ideals of the rule of law. In a purely formal, orthodox sense, the rule of law means no more than 'organised public order'. In that sense, any norms based on a hierarchy of orders, even the organised mass murders by the Nazi regime, qualify as law.\textsuperscript{45} Such enunciation of the concept of the rule of law, i.e., as the 'rule of organisation', has been, however, criticised 'as unassailable as it is empty'.\textsuperscript{46}

\textsuperscript{44}A distinction has been made between three concepts of law, namely- customary law, regulatory law and, finally, the legal order- which is described to be closely related to the rule of law; see, Roberto Mangabeira Unger, \textit{Law in Modern Society} (New York: Free Press, 1976) pp. 48 ff.

\textsuperscript{45}cf. Goodhart, \textit{The rule of law and Absolute Sovereignty}, 106 University of Pennsylvania L. Rev. 943 et. seq. (1958). Here Goodhart distinguishes "rule by law" 'which can be the most efficient instrument in the enforcement of tyrannical rule' from "rule under the law", which is the essential foundation of liberty'.

As regards its ideological sense, on the other hand, the rule of law implies the yardstick by which to measure 'good' against 'bad' law. We thus once again turn back to those honorific qualities of the law that have been elaborated and developed into grand theories linked with some conception of natural law. But, again, the difficulty is that to give to the rule of law a 'universally acceptable ideological content is as difficult as to achieve the same for 'natural law'. It has been thus rightly observed that just as natural law philosophy covers the whole spectrum from revolutionary to ultra-conservative ideologies, so the rule of law means to one the absolute integrity of private property, to another the maintenance of private enterprise, free from state control and official regulation, and to another the preservation of the 'right to work' against the power of the unions to determine conditions of labour. While, to some, the rule of law means a minimum of administrative power, even if it entails the sacrifice of good government to others, it means assurance by the state to all of minimum standards of living and security. It is thus clear that other than in a formal sense, we cannot formulate any 'universal content' for the concept of the 'rule of law' which would be equally applicable to Democratic, Fascist, Communist, Socialist or other pro-ideologist states.

But, however, since one of the requirements of the rule of law relates to the existence of a representative government, and since the present thesis is particularly committed to deal with those aspects of the rule of law that have been developed

47See ante, p.3.
49We have already referred to the basic notions of the Anglo-Saxon concept of the rule of law as understood by Dicey; see ante, p. 19-21.
50An idea that even two centuries ago was viewed by Fichte in his presentation of German Rechtsstaat; see Wolfgang Friedmann, Legal Theory, supra at 163.
over the few recent years marked by some tremendous developments in the world's socio-political scenario, we may make an attempt to narrow down the problem by seeking to establish a meaning of the rule of law as understood in the late twentieth century democratic society.\footnote{Without going for any further attempt to differentiate between various types of democracies or any of the implications of contemporary political philosophy in this regard.} Accordingly, it is at least theoretically undebated that the common denominator to formulate a concept of the rule of law acceptable to modern democratic ideals rests on its three basic foundations of equality, liberty and ultimate control of the government by the people.\footnote{W. Friedmann has elaborately discussed these fundamental notions of the rule of law in modern democratic societies in his \textit{Law in a Changing Society}, supra, pp.501-512. Again, for an important attempt to analyse the meaning of the rule of law, and especially the tension between economic liberties and public interest in contemporary American law, see R. L. Hale, \textit{Freedom Through Law}, (Columbia University Press, 1952). For a briefer analysis of contemporary British developments, see Lord A. T. Denning, \textit{Freedom Under the Law} (Stevens and Sons, 1949).} As regards the principle of justice, the most specific observation still seems to be that of Aristotle when he says: 'justice means the equal treatment of those who are equal before the law'. Secondly, in terms of democratic ideal of justice, liberty means certain rights of personal freedom which must be secured from interference by government. They include legal protection from arbitrary arrest, freedom of opinion and association, of contract, labour and many others. Briefly, they may be subsumed under the two broad categories of the freedom of the person and the freedom of the mind. Lastly, the principle of control by the people means, in a most concise way, that law must ultimately be the responsibility of the elected representatives of the people.\footnote{Friedmann, however, observes that the basic safeguard of this aspect of the rule of law lies in "extra-legal" elements: 'only a society whose members are imbued with their personal sense of responsibility can profit from legal safeguards'. \textit{Law in a Changing Society}, supra, p. 505.}

One particular aspect is significant in these contexts of the rule of law. In the domestic context of the rule of law a major distinction may be drawn between the
"legal" and the "political" issues; "legal" issues are those suitable for adjudication; 
"political" issues are those which are not. In domestic law, a "political" issue, while 
not "justiciable", still falls within the general constitutional framework. It must be 
resolved peaceably and in accordance with law. In international relations, however, 
there is strictly no such constitutional framework. Here, a "political" issue is 
commonly regarded as being unregulated except by political forces. Stated 
otherwise, it appears to lie in the realm of anarchy. The goal of establishing the rule 
of law as the basis of international relations therefore has, as an essential aspect, the 
necessity of bringing matters generally regarded as "political" within a "legal" or 
"constitutional" framework.\(^{54}\) As has been aptly remarked by the Secretary-General 
of the United Nations, the principle of the rule of law "permeates the approach of 
the Charter to international problems far beyond the sphere of competence of the 
court".\(^{55}\) The Charter has been thus seen to be the first major significant step in 
providing for that constitutional framework for a new world order. While 
enumerating the basic notions regulating this new world order, the Charter goes 
beyond those 'legal' issues of an international dispute arising out of violation of a 
bilateral treaty between two states or other international obligations which falls 
within the competence of the International Court of Justice, and embraces a much 
wider and sensitive issues of 'political' character.

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II. Rule of Law and State Sovereignty: The Dual Significance.

"The modern state shows two basic characteristics: the existence of a sphere of sovereignty of the state, and the existence of a sphere of freedom from it." To speak of the 'state' as such, we must conceive of the existence of this sovereignty. At the same time, modern society recognises in the decisive periods of its existence certain fundamental and inherent rights of its members, guaranteeing a certain realm of freedom from the state. Historically and philosophically, this freedom was conceived to exist before the state which in turn developed as the means to its realisation. And with this conception, the medieval natural law was changed into secular human rights, serving as a limitation of the power of the state. The basic idea has been that the conception of such a realm of freedom can only be reached by general norms—whether having the character of a divine or secular, natural or general positive law.

To state very briefly, the natural law approach begins with the assumption that there are natural laws, both theological and metaphysical, which confer certain particular rights upon individual human beings. These rights find their authority either in divine will or in specified metaphysical absolutes. The great historic contribution of the natural law emphasis has been in the affording of this appeal from the realities of 'naked power' to a higher authority which is asserted to require the protection of

individual rights. For many centuries this approach has been an unfailing source of articulated demand and of theoretical justification for human rights.57

However, in the modern period of the development of human rights, starting from the British Bill of Rights of 1688 and the contemporary American Declaration of Independence and the French Declaration,58 a number of new principles were developed which are instantly recognisable as propositions of modern human rights law, properly so-called, namely: the principle of universal inherence; the principle of inalienability; and the Rule of Law.59 An obvious influence of the natural law theories may thus be identified in this development: in part, the ‘Creator’ was still being invoked and some of the rights and freedoms were asserted as ‘self-evident’ truths. A theory of natural law, founded in part on stoic philosophy and the Roman concept of *ius gentium*, was also being revived and developed.60 However, since the end of the eighteenth century, these catalogues have been much expanded and they are now no longer confined to ‘freedoms’ from state intervention but include many rights that can only be realised through positive action by the state. In the post-War period of the current century, with the adoption of the UN Charter and the Universal Declaration of Human Rights setting forth an extensive catalogue of fundamental rights and freedoms, a new standard found a formal expression imposing obligations on governments as to what they may or may not do to

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58 A brief historical antecedents of these developments has been included in Chapter II of this thesis in relation to the subject of human rights in the administration of justice, see pp. 60ff.
60 On this subject, see the section on ‘The Law of Nature and the Rights of Man’ in Lauterpatcht, International Law and Human Rights, pp.73ff; also, in general, F. Castberg, Natural Law and Human Rights: an idea-historical survey.
individuals over whom they are able to exercise state power. Consequently, on the one hand, while the need for standards founded on systems of divine or natural law has disappeared, on the other, a new legal conception gained recognition with the birth and subsequent path-breaking development of modern international human rights law. From this point of view, while the modern legal edifice of human rights cannot be restricted to a phenomenon which is simply another expression of traditional natural law rights, the essential roots of the idea of the genesis of human rights are still to be found in that part of legal philosophy.  

And this realm of the fundamental human rights and freedoms, and the imputation of all acts of state intervention to these 'general norms' constitute what we have so far discussed as the doctrine of the rule of law. Thus, connected with this conflict between sovereignty and human rights is, in legal terminology, the dual notion of law; the political and the material notion. The political notion of the rule of law generally consists in every general norm and every individual command imputable to the state, whether just or unjust, convenient or inconvenient. Every decision of the sovereign state organ is law. Freed from all material qualities, this conception of law is to be found most clearly in the formulation by Hobbes: "Law is a command of that person, whether man or court, whose precept contains in itself the reason of obedience". Between the dominance of law in such a sense, and absolute sovereignty, no antagonism can exist. If law is nothing else than the will of the state

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61Cf., "Human Rights is a twentieth century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man": M. Cranston, What are Human Rights? (London, 1973)) p.1. Thus, as it has been customary to say that just as positive rights are rooted in positive law, natural rights- or human rights- are rooted in natural law, ibid, p.7. On this subject, see also Matthias Herdegen, "Natural Law, Constitutional Values and Human Rights: A Comparative Analysis", 19 HRLJ 1998 (No 2-4) pp. 37-42.

in legal form, then the postulate of the rule of law can offer no limit to the power of the sovereign. 'The rule of the political notion of law and the existence of absolute state sovereignty are in reality only two different expressions for one and the same thing'. And this postulate of absolute sovereignty is antagonistic to the postulate of rule of material laws - i.e., those norms of the state as are compatible with defined ethical postulates, whether be of justice, liberty or equality, or anything else. This notion of law "corresponds" to the conception of law as norms, since the essence of norms is the reasonable principle which it embodies.

The rule of material law cannot, however, be said to exist if- as in the Middle Ages and at the beginning of modern times- the bearers of state power have subscribed to a natural law justification of state sovereignty. Under such circumstances, this would only be realised when this natural law is actually concretised, or when its pre-eminence over positive law is institutionalised; there must also at the same time be a relative unanimity as to the contents of the natural law.

III. The Dynamic Concepts of the Rule of Law : 'emergence of a new era'.

For a long period of time in the early stages of the development of human rights concepts, the phenomenon of recognising such rights was confined to the domestic context (groups, associations, churches and states etc.). Since the beginning of the

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63Franz Neumann, supra, at 45.
post-War era there has been a proliferation of major international instruments alongside the domestic instruments that were born of the collectivist enthusiasm and the lyrical illusions of the nineteenth century. Indeed, the ending of colonial rule, the spread of universal education, rapid scientific progress and transmission of ideas through mass media, swifter transportation and the reaction against arbitrary government and the horrors of war awakened world leaders to the need for concerted action to protect human rights under the rule of law. These are the factors that led to the adoption of the Charter of the United Nations in 1945 and subsequently the Universal Declaration of Human Rights in 1948. These developments, followed by the revolutionary international movements in the emergence of a new legal regime of human rights, is the reflection of a wider phenomenon: the increased concern of people all over the world with the treatment accorded to their fellow human beings in other countries, particularly when that treatment fails to come up to the minimum standards of civilised behaviour. Legal rules are a reflection of social standards and the current interest in the international protection of human rights is the result of a profound change in individual and governmental attitudes.64 These movements thus mark a new era in the development of a wider, revolutionary apprehension of the doctrine of the rule of law.

Within the changing pattern of human relations resulting from progressive social, political, economic, and scientific advancement, the concept of the rule of law thus undergoes an evolutionary process with such adaptation and expansion as is necessary to meet new and challenging circumstances. Although the doctrine of the

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rule of law had already started blooming as the accepted basis of organised modern society by the beginning of the twentieth century, it revealed itself as a dynamic and universal concept only in the middle and the later parts of this century when the vast political, social and economic upheavals that followed the two world wars led to a realisation and its consequent movement for laying down a clearer definition and specific pre-requisites for the universal application of the doctrine. This task was undertaken by means of studies, research, surveys and discussions at congresses, conferences, seminars and colloquia in different parts of the world, under the aegis and sponsorship of a number of international organisations, particularly the United Nations and its different organs, the International Commission of Jurists, the International Law Association and many others, including the numerous national academies and individual scholars, devoted to the causes of human rights and fundamental freedoms in a society under the rule of law.

The following discussion is, however, intended to focus first on an observation of the emergence of the notion of the rule of law as a 'supra-national' concept during the early second half of the present century with particular reference to what may be termed as a twin-effort65 on an international basis in clarifying the content and impact of this new, broader sense of the doctrine. It will then proceed towards a brief narration of the evolution of the dynamic aspects of the rule of law in the later

65The first in a colloquium held at Chicago in September 1957 under the general title of the 'rule of law as Understood in the West', under the auspices of the International Association of Legal Science, and the other, which came as a sequel to the first, and under the same auspices, in a conference in 1958 in Warsaw on the rule of law as understood in Communist countries. They have, in fact, their origin in the legal aspect of a UNESCO plan to promote intellectual contact between Communist and non-Communist countries.
years, particularly through the endeavours of the International Commission of Jurists.

IV. 'Supra-Nationality' of the Rule of Law: 'the ideological conflicts'.

After the second world war, particularly since the late 1950's, there has been a revival of interest in the rule of law, although less as a peculiar feature of English constitutional law than as the common basis of legal ideals and practices which unites or might unite what Art. 38(i)(c) of the Statute of the International Court of Justice calls 'civilised nations'. The rule of law in this new, latest reincarnation has in fact much in common with the general principles of law recognised by civilised nations which
inter alia
Article 38 directs the Court to apply. During this period, the phrase rule of law found its way into at least two major international instruments: one global, and the other regional. Thus, the Universal Declaration of Human Rights of 1948 declares that:

"It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." 

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66 For a detailed discussion on the supra-national aspects of the rule of law, see "The rule of law as a Supra-National Concept", by Norman S. Marsh in Oxford Essays in Jurisprudence (Oxford University Press, 1961, pp. 223-264), ed. by A.G. Guest.

67 As we have already noted, the concept of the rule of law was, for two or three generations (at least since the first publication of Dicey's Law of the Constitution in 1885), regarded by English lawyers as a factual summery of the basic principles of English constitutional law. See supra, p.19-21.

68 Cmnd. 7662, Preamble, 3rd para.
And in a rather vaguer usage the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 speaks of:

"The Governments of European countries which are like minded and have a common heritage of political traditions, ideals, freedom and the rule of law."\(^{69}\)

Twenty years later, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, which was adopted by the General Assembly in 1970, referred to "the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations".\(^{70}\)

As it has been already observed, the conventionally accepted equivalent to the English term 'rule of law' may in the legal terminology of other countries denote a rather different body of ideas or lay emphasis on particular principles or institutions which are unfamiliar to England.\(^{71}\) Thus, 'le principe de la legalite', 'la suprematie de la regle de droit' or 'le regne souverain de la loi' in French speaking, and 'der Rechtsstaat' in German speaking, countries are imperfect translations of the rule of law and 'each tends to divert the attention to a different aspect of the legal system'.\(^{72}\)

In the United States the expression 'rule of law', although not unknown to lawyers, is seldom used, its place being taken by such phrases as 'government under law',

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\(^{69}\)Cmnd. 8969, Preamble, last para.

\(^{70}\)GA Reso. 2625(XXV) of 24 October 1970, GAOR 25th session, Suppl. 28, 121.

\(^{71}\)See pp. 20-27 supra.

\(^{72}\)See the General Report by Prof. C. J. Hamson on the Chicago Colloquium on the rule of law, September, 1957, quoted in Norman S. Marsh, "The rule of law as a Supra-National Concept", supra at 229.
'government of laws and not of men', and even in a broad sense, by 'due process of law'. Furthermore, there is the concept of 'socialist legality' in Communist (in the light of the socio-political changes in the recent years, the word 'former Communist' seems rather appropriate) countries, which is sometimes alternatively translated as the rule of law, although it seems to be generally agreed in Communist and non-communist countries alike that the terms are not interchangeable.

Thus, when international collaboration began to clarify the rule of law in its new, broader sense, it was in these above contexts that the International Association of Legal Science found it convenient to divide its investigations into the rule of law into two parts: the first, in a Colloquium held at Chicago in 1957, devoted to 'The rule of law as Understood in the West'; and the second, in a Conference held in Warsaw in 1958, devoted to the Communist conception of 'socialist legality'.

The most important issues emphasised in the Chicago Colloquium proceeded from the understanding that the rule of law might be ascertained by extracting from the different legal systems under examination those institutions and procedures which are common to all; the values inherent in these common institutions and procedures would be the basic principles of the rule of law. It was particularly suggested that consideration might be given to the extent to which the recognition of basic human rights formed an essential part of the rule of law; and, if these questions were answered affirmatively, what might be the content of such rights. Despite the deliberate intention of the Chicago Colloquium to avoid a dogmatic formulation of the rule of law there appeared to have been a broad measure of agreement that,
however difficult it might be to define, the concept had reality. There was rather less agreement about the actual content of the rule of law. There was general reluctance to identify it with natural law, notwithstanding a widespread feeling that there was much in common between the rule of law and natural law. 'A good case can be made', said one of the participants in the colloquium, 'that the Rule of Law concept and the concept of natural rights are at least paternal twins; I would not foreclose the possibility that they may be identical twins'.

It was, however, generally agreed that, even if the recognition of natural and fundamental rights formed an element in the rule of law, 'it was only one element'. The other two were concerned with the institutions and with the procedures whereby these rights were given effect. It was recognised that judicial control of the executive, as distinguished from the judicial control of the Legislature, was a central feature of the rule of law. The same selective approach was adopted with regard to procedures. Particular attention was directed to the conception of a 'fair hearing', both with regard to the circumstances in which it is demanded by the rule of law and to the minimum conditions of its existence. An independent judge was regarded as an indispensable requisite; 'independence' in this sense was thought to mean primarily independence from the executive and of any personal interest in the outcome in one way or the other of the issue to be tried.

73 ibid. p.233.

74 Although it was pointed out, by Prof. Herlitz of Sweden, that the executive can itself build up traditions and procedures which may protect individual rights in certain cases more efficiently and more cheaply than the ordinary courts.
On the other hand, however, it was observed in a most interesting report on the Warsaw Conference\textsuperscript{75}, if human rights lie at the basis of the non-communist conception of the rule of law, in Communist countries 'a few elemental matters of human dignity', such as a ban on cruel punishments and freedom of private opinion, including religion, seem now to be conceded. On the other hand, freedom of speech and of association are regarded as conditional upon conformity with 'the interests of the workers', and the latter are determined by a system of government in which the only legal party is the effective interpreter of those interests. But, interests may be secured in more than one way. The justification of public welfare may be used to cloak the tyranny of those who know better than the public what is good for them, a danger from which no country is exempt but which is checked in non-communist democracies by insistence on political freedom expressed in electoral machinery and the possibility of a change of government. As far, therefore, as any basis of values underlying the rule of law is concerned, it seems clear that there is a considerable gap between the Western idea of the rule of law, and its nearest equivalent in Communist ideology, the 'socialist legality'. This last mentioned point needs further clarification.

According to the classical, 'pure' Marxist theory of law and state, there could be no room in a communist society for the rule of law in the narrow, formal sense (that is, one that refers to the legal ordering and limitation on the uses of governmental power and the controlling power of independent and authoritative courts), only for social justice.\textsuperscript{76} "Since law is a bourgeois contraption, aimed at the suppression of

\textsuperscript{75}By one of its participants, Dr. A. K. R. Kiralfy, in \textit{International and Comparative Law Quarterly} (1959), vol.8, p. 465.

\textsuperscript{76}See the discussion on this two-fold conception of \textit{Rechtsstaat} earlier in this chapter, pp. 21-26.
the toiling masses, a complete abandonment of law and the withering away of the state was the Utopian ideal."77 However, the actual development of the Soviet and other Marxist states had led to a modification of this above theory by developing the concept of ‘socialist legality’, which by many has been seen as the communist answer to the challenge of the western rule of law.78 In the initial revolutionary stages of emerging Soviet society an anarchist theory of the state and law corresponded to a situation characterised by the relative absence of law and order and frequent changes in governmental policy.79 With the subsequent development of Soviet economy and social structure generally, there was then a natural demand for the certainty of legal rules and the operation of effective enforcement machinery. The recognised brutality and arbitrariness of the Stalin regime fuelled the demand that state power should be exercised according to the demands of ‘socialist legality’. However, what has been purported to be highlighted in this discussion is the fact that even leaving practices aside, one cannot without qualifications equate socialist legality with the rule of law.

Thus, to take an example, it has already been observed that the independence of the judiciary is crucial to the rule of law ideology.80 Quite apart from recruitment procedures, party ties, informal pressures etc., there was a clear and formal breach with this principle in the operation of the concept of socialist legality. One clear illustration of this may be seen in the former Soviet legal systems, as demonstrated

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77 Aubert, supra, at 41.
79 Aubert, supra at 41.
80 See p. 21 supra.
by the powers of the Prokuratura.\textsuperscript{81} Thus, the courts had no authority to review the
constitutionality of legislative enactments and, what may be more significant, the
Prokuratura could subject even plenary decisions of the Supreme Court to review
by the Presidium of the Supreme Soviet. This was certainly an important limitation
upon the independence of the courts.\textsuperscript{82}

In that aspect of the rule of law which is concerned with the execution of the law,
Communist legal theory was considered somewhat closer to non-communist
principles. Nor was there found at every point a formal difference in legal
institutions and procedures. Importance was attached to the conception of judicial
independence, in the sense that a judge should not be influenced by outside
interference in the assessment of facts and in the interpretation of the law.\textsuperscript{83} But,
however, in the legal machinery of control over the administration, there were
observed important differences between Communist and non-communist countries.
The difference did not lie primarily in the non-liability, except in a very limited
number of cases, for instance, of the state in the former U.S.S.R. for illegal acts
committed by its officials; it lied more in the fact that responsibility for the
observance of legality was vested primarily in the Procuracy, which in many cases

\textsuperscript{81} One aspect of the Prokuratura’s function was similar to that of the office of the Attorney-General,
the head of the prosecutorial arm of the government. It also functioned in an Ombudsman capacity.
The Prokuratura was authorised to review administrative decisions. In this respect it represented an
approximation to the western, and especially the American, theory of checks and balances or
countervailing forces, a theory of governmental constraint; see David & Brierly, supra, pp 200ff.
\textsuperscript{82} For a useful reference, see C.T. Reid, The Ombudsman’s Cousin, The Procuracy in Socialist
States (1986); see also the comments of the UN Human Rights Committee as to the role of the
Official Public Prosecutor (SR 131 pr. 19 on Bulgaria) and the Procurator (SR 109 pr. 71, on the
former USSR).
\textsuperscript{83} However, in the Communist system, the judge is admittedly influenced by the Party training and
by the conception, which he presumably shares, of the fundamental purposes of a Communist
society, although it may be said that a judge in a Western country consciously or unconsciously
takes account of the basic assumptions of his own society.
alone could initiate action to compel administrative authorities to carry out the duties imposed upon them by law or to refrain from illegal acts. Moreover, a civil claim against an official by a private person could only be decided jointly with the appropriate criminal proceedings, the taking of which depended on the decision of the Procuracy.84

In the present context, however, one might also point out a visible trend among nations, particularly in the last few decades, of acknowledging their express commitment to the notions of the rule of law in various international treaties and other global and regional instruments, at least as a feature of their domestic legal systems. One specific example of this is to be found among the member states of the Council of Europe the Statute of which expressly acknowledges the rule of law as one of the principles forming the basis of democracy,85 and that every member of the Council must accept the principles of the rule of law.86 A profound illustration in this regard was made by the European Court of Human Rights while describing the rule of law as “one of the features of the common spiritual heritage of the member states of the Council of Europe”.87 Explicit references to the rule of law have also appeared in a number of major OSCE88 documents. Thus, in their opening dedication

84 Yet it would be wrong to find the essential difference between Communist and Western conceptions of the rule of law in the control which the Procuracy enjoyed over the means by which the administrative apparatus is kept within legal bounds. For a general discussion, see, Gsovski, Soviet Civil Law, vol.I, p. 528-534; see also, Loeber, Journal of the International Commission of Jurists, (1957), vol.I, no. 1, p.59.
85 See the preamble to the Statute of the Council of Europe (1949), UN Treaty Series, vol. 87, 103.
86 Article 3 of the Statute, ibid.
87 See the Golder Case (1975), ILR, vol.57, 201. This widely proclaimed characterisation of the doctrine by the Court was based on the reference made in the preamble to the European Convention on Human Rights that the signatory Governments have “a common heritage of political traditions, ideals, freedoms and the rule of law”.
88 The Organisation for Security and Co-operation in Europe (OSCE), which, prior to 1 January 1995, was named the Conference on Security and Co-operation in Europe (CSCE); on this subject, see Rachel Brett, Human Rights and the OSCE, 18 HRQ 1996 (no.3) 668-693.
to the building, consolidation and strengthening of democracy in their respective 
nations, the participating states of the OSCE (then CSCE) process affirmed that 
democracy “has as its foundation respect for the human person and the rule of law” 
and undertook to co-operate “to promote the application of the rule of law” as well 
as basing their need for new institutional structures of the OSCE process in part on 
their “common efforts to consolidate respect for human rights, democracy and the 
rule of law”. They recognised the rule of law as an essential element for ensuring 
respect for human rights, and welcomed their common determination “to build 
democratic societies based on free elections and the rule of law” and “to support and 
advance those principles of justice which form the basis of the rule of law”. They 
clearly expressed the view that the rule of law does not mean merely a formal 
legality which assures regularity and consistency in the achievement and enforcement 
of democratic order, but justice based on the recognition and full acceptance of the 
supreme value of the human personality and guaranteed by institutions providing a 
framework for its fullest expression. What is thus clearly indicated is that the rule 
of law has been addressed as a component of the internal legal order of the OSCE 
states, with a view primarily to the enhanced protection of the human rights and 
fundamental freedoms of individuals.

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V. Rule of Law in a Free, Modern Society: evolution through the
International Commission of Jurists:

The rule of law has been regarded as 'a living concept permeating several branches
of the law and having great practical importance in the life of every human
being'. The idea of clarifying and formulating in a manner acceptable to different
legal systems, operating in varying political, economic and social environments, the
basic elements of the rule of law has been a fundamental purpose of the
International Commission of Jurists. In this sense, however, the rule of law has
been defined as:

"The principles, institutions, and procedures, not always identical, but broadly
similar, which the experience and traditions of lawyers in different countries of
the world, often having themselves varying political structures and economic
background, have shown to be important to protect the individual from
arbitrary government and to enable him to enjoy the dignity of man."

As stated in Art. 4 of its Statute: "The Commission is dedicated to the support and
advancement of those principles of justice which constitute the basis of the rule of

92 The ICJ is a non-governmental organisation devoted to promoting throughout the world the
understanding and observance of the rule of law and the legal protection of human rights. Based in
Geneva, the ICJ has consultative status with the UN Economic and Social Council, UNESCO and
the Council of Europe, and has a network of national sections and affiliated organisations in over
60 countries. For the history, development, activities, organisation etc. of the ICJ, see International
93 Jean-Flavien Lalive, Secretary-General of the International Commission of Jurists, in a Forward to
The rule of law in a Free Society: A Report on the International Congress of Jurists, New Delhi,
1959, by Norman S. Marsh (ICJ, Geneva).
94 Norman S. Marsh, The rule of law in a Free Society, supra, at 313 and 324. For a general
discussion on the subject, see also, The rule of law and Human Rights: Principles and Definitions,
ICJ, Geneva, 1966; The Dynamic Aspects of the rule of law in the Modern Age, ICJ, Geneva,
1965; Norman S. Marsh, The Background to the Congress of New Delhi, in the Journal of the ICJ
law". Its establishment was closely related to the apprehension felt in international legal circles over the denial, after the Second World War, of fundamental rights to individuals in a number of countries. It was recognised from the outset that the notions of the rule of law embraced a broader conception of justice as distinct from the mere application of positive legal rules and indeed, provided its more vital aspect.

The Commission has thus taken the rule of law as a convenient term to summarise a combination on the one hand of certain fundamental ideals concerning the purposes of organised society and, on the other, of practical experience in terms of legal institutions, procedures and traditions, by which these ideals may be given effect. In this sense, the rule of law seems to comprise two distinct but related aspects. The first aspect is to be found in the substantive content of the rule of law as defined in terms of the conception of society which inspires it; and the second is comprised in the legal institutions, procedures and traditions - in a broad sense the procedural machinery- which in the experience of many countries has proved necessary to give practical reality to this conception of the society. At this point, however, we may recall the practical significance of the use of the term "rule of law" in two major international instruments: the Universal Declaration of Human Rights (1948), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). In the former, the phrase is apparently put forward as a method of social organisation necessary if an ultimate resort to force is to be avoided. On the other hand, the nature of the 'rule of law' in the latter is not

95Supra. p. 37.
explained but it seems to be thought of as something separate from political traditions, ideals and freedom. These two interpretation of the rule of law thus virtually resemble the two distinct characteristic aspects of the doctrine: the need for certainty in law,\textsuperscript{96} which is closely associated with the aspect of the 'substantive content' of the doctrine; and the methods and procedures of the legal process or, in other words, the aspect of the 'procedural machinery'.

And these were the ideas underlying the Commissions' first International Congress in Athens in June 1955, which has been commonly treated as the starting-point in the emergence and evolution of the 'new dynamic concept of the rule of law'. Its theme was "to consider what minimum standards are necessary to ensure the just rule of law and the protection of individuals against arbitrary action by the state". It accordingly declared that the rule of law 'springs from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all'.\textsuperscript{97} The Congress thus resolved that these notions of the rule of law, with its certain substantive and procedural requirements, constitute the "minimum conditions of a juridical system in which fundamental rights and human dignity are respected".\textsuperscript{98}

\textsuperscript{96}The association of 'law' with 'certainty' in human relations was known to the Greeks of antiquity who spoke of law as the principle of political association which assign to each citizen his position in society and defines its nature and extent. In 1610 we find indeed an early use of the phrase "rule of law" directly combined with the ideal of 'certainty', when the English House of Commons petitioned King James I that they might be "guided and governed by certain rule of law". See, Norman S. Marsh, \textit{The Background to the Congress of New Delhi}, supra, at 48.


\textsuperscript{98}Congress of Athens, Committee on Public Law, Resolution V; see, ibid. p.5.
The first significant and important step in this development was then taken in January 1959 at the Congress of New Delhi, held under the aegis of the ICJ, recognising that "the rule of law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised". This social content of the rule of law and the recognition of the necessity to make law and find law with due regard to the ever-changing conditions of human existence expands the concept of the rule of law from a limited scope of static notions and approximates it with the "Rule of Life".

The African Conference on the Rule of Law, held in Lagos, Nigeria, in 1961, then recognised that these basic principles underlying the doctrine are universal in their application and that the rule of law can be fully realised only under a system of government established by the will of the people. The Conference examined with particular emphasis the question of human rights and government security in relation to various aspects of criminal and administrative law as well as such important issues as the responsibility of the judiciary and of the legal profession in the protection of the rights of the individual in a society under the rule of law.

99 The Declaration of Delhi, 10 June, 1959; see, ibid. Appendix C, p.66.
100 This excellent comment was made by the Indian Prime Minister Jawaharlal Nehru in his memorable opening speech at the Delhi Congress.
This process of searching for the ideas and ideals of definition and application of the rule of law then received momentum at the International Congress of Jurists, held in Rio de Janeiro (Petropolis) in December, 1962. This Congress considered such problems as how to balance the freedom of the executive to act effectively with the protection of the rights of the individual, and what safeguards should be introduced against the abuse of power by the executive; and on what points emphasis should be placed in the teaching of law so as to ensure the existence of legal profession capable of performing its social function satisfactorily. It has been accordingly emphasised that 'the protection of the individual from unlawful or excessive interference by the government is one of the foundations of the rule of law'.

While all these efforts of the ICJ focused attention on the political, administrative and legal aspects of the rule of law, the Conference of Bangkok, held in February 1965, took an important and, indeed, innovative step by emphasising its social, economic, educational and cultural aspects. The Declaration of Bangkok thus recognised that the rule of law and representative government are often endangered by hunger, poverty and unemployment and that, therefore, lawyers, particularly in a developing society, should commit their skills and techniques to the elimination of these evils. Thus, by laying stress on these novel and dynamic aspects the Bangkok Conference marked a revolutionary progress in the definition and elaboration of the principles underlying the rule of law. But, yet, it was necessary to

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101 Resolution of Rio, ibid., Appendix E, p. 68.
102 Although, even nearly two centuries ago, these wider conceptions of the rule of law were viewed by Fichte in his presentation of German Rechtsstaat, where the state is obliged to ensure that the necessities of life are produced in a quality proportionate to the number of citizens, and that everyone can satisfy his needs through work. See, Wolfgang Friedmann, Legal Theory, supra, at 163.
103 Ibid. Appendix F, p. 69.
examine how these principles could be put into practical effect and more particularly how the average citizen could be made to understand and appreciate the significance of these notions of the rule of law and what they meant to his personal freedom and advancement. This task was then undertaken at the Ceylon Colloquium on the rule of law in February 1966 as a follow-up to the Bangkok Conference. The Colloquium considered such matters as the methods by which the rule of law could be adequately introduced to the average citizen; the problems arising from the nationalisation of property; and the informal and effective means through which the individual could be provided with a prompt redress of his grievances in his dealings with the administration.104

CONCLUSION:

One fact has so far been clearly pointed out- that the task of searching for a universal and unanimous theory defining the meaning, nature and substantive contents of the doctrine of the rule of law is not an easy one. Apart from the complexities arising out of terminological variations in different legal systems and languages, the doctrine has been looked at from an interestingly diverse points of views over the time. These views of course found their essential basis and rationale in the particular legal, cultural, social, political, historical and other similar perspectives of a given society.

However, these diversities in the apprehension and application of the doctrine did not by any means impede the growth and development of the doctrine as a versatile legal concept or lessen its great importance and relevance in establishing a legal culture and social atmosphere where the causes and interests of the ordinary people are ensured better respect and protection. Instead, they have rather enriched the process through which such a development has been carried out, which has today resulted in a somewhat global understanding and acceptance of the doctrine as the most primary requirement in the promotion and protection of the fundamental human rights and freedoms.

As it has been indicated at the beginning of this chapter, the concept of the rule of law relates less to the substantive content of particular rules of law than to the fundamental principles which are characteristic of a legally ordered community and which possesses an appearance of permanent or at least long-term quasi-constitutional framework within which the specific rules of law operate. In that sense, the notions of the doctrine has been viewed in a much broader historical and political perspectives as forming part of the rather complex and wider problem of establishing limits to the potentially absolute power of those exercising authority within a community. One particular point should be noted here that the rule of law in a broad sense imposes responsibility not only on the state but also on other important components of its social and political structure to uphold and promote the essential spirit and pre-requisites of the doctrine. In that sense, a wide conception of the rule of law is threatened not only by the arbitrary and excessive exercise of power by the state, but also by such influential groups as media, industry, political
parties, professional groups (particularly, the legal profession) and so forth. To take an example, it has been observed in the preceding discussion that an integral component of the rule of law concept is the existence of an independent judicial system. Such independence implies not only freedom from undue interference by the executive or the legislature, but also from any adverse influence or interference by political or pressure groups, media etc. However, in view of the fact that the notions of the rule of law in our present work relates to certain specific aspects of human rights in the contemporary society, which to a large extent represent a counterweight to arbitrary exercise of power and the scale upon which to measure the balance between the power of governance and the fundamental rights of the individual, the concerns for ‘rule of law’ in this research are primarily aimed at those major fields of the doctrine which are vulnerable to threats from despotic, arbitrary exercise of state powers resulting in disregard for human rights and freedoms.

The roots of this search for essential legal constraints specifying a counterweight to the arbitrary exercise of power may be traced back to the early notions of natural law as well as throughout the medieval and modern periods of legal development. Even today, the post-modern concept of the rule of law has been fully realised to be one that stands at the cross-roads of law and politics, both within and beyond (at least to a certain significant extent) the national frontiers, and at the beginning of the twenty-first century one might aptly point out that a global acceptance of the need for substantive legal and political restraints upon the absolute freedom of action of

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105 These aspects of the independence and impartiality of the judiciary and the legal profession is the subject of Chapter IV of this thesis.
states has been one of the most significant features of this post-modernism. One particularly important consequence of this achievement is to be found in the fact that the increased world-wide concern with human rights and the remarkably positive and courageous development in ensuring better protection of these rights and freedoms of man in the last few decades have eroded the "domestic jurisdiction" shield behind which states used to be able to shelter.\(^\text{106}\)

However, what has been particularly sought to be emphasised in the preceding pages is the fact that it is an indispensable requirement of the modern notion of the rule of law that the substantive contents of the law itself must be consistent with the fundamental notions of justice as well as the changing needs of the society and its members whose rights, freedoms and other interests form the subject matter of such law. This is true of the doctrine both in the context of municipal as well as international law. Thus, while these norms of justice are to be found in the historical, cultural, social and political perspectives of a given society, regard must also be had to the fundamental norms of equity and justice established by the rules of international law based upon a common understanding and realisation of contemporary needs.\(^\text{107}\) And this is what can be described as the roll-on point of this proposed thesis that an essential feature of the twenty-first century notion of the rule of law is the need for the law and its application to be in compliance with the

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\(^{106}\) The other most notable consequence is to be fund in the fact that resort to armed force for the settlement of international issues has come to be no longer an internationally acceptable legitimate option for states.

\(^{107}\) Thus, for instance, to borrow the language of the UN Charter, the relations between states must be regulated within a long-term framework which ensures that the international community is so ordered that the rules of international law are applied "in accordance with the principles of justice", see the UN Charter, Art. 1, para. 1, Documents of the UN Conference on International Organisation, San Fransisco, 1945, vol.15, London, 1945, 335; see also the Preamble to the Charter.
basic norms of justice including those developed at the international level, in particular— the norms of international human rights and humanitarian law.108

Finally, to conclude this very basic and general inquiry of the subject it may now be said that the roots of the genesis of the rule of law ideology may be found in the same general human needs and dispositions that have secured an appreciation of law as a byword for preferred and highly valued social arrangements. It may conveniently be treated as "an all-encompassing system" that seems to answer (albeit in a very specific and restricted way) to the need for certainty, predictability, order and safety. In that sense, law and its specific ideological component, the doctrine of the rule of law, constitute a comprehensive intellectual structure and method that arise in response to a widespread human need and demand for social stability and security.

108 And this is how the present work carefully avoids the question of the existence or the operation of an international counterpart of the doctrine, which has not been included within the scope or mandate of this research. However, among the most authoritative works concerned expressly with that question, see Ann van Wynnen Thomas/ A.J. Thomas, A World rule of law: Prospects and Problems”, Dallas, 1975; Julius Stone, “The International Court and World Crisis”, Geneva, 1962 (Chap.1); Wilfred Jenks, The Prospects of International Adjudication, London, 1964, Chap.14(“The rule of law in World Affairs”); Sir Hersch Lauterpacht, The Function of Law in the International Community, Henden, 1966, Ch. XX (“The ‘Specific’ Character of International Law and the rule of law”); Sir Geoffrey Howe, The Rule of International Law in World Affairs, 33 ICLQ 1984, p.739; Sir Arthur Watts, The International rule of law, 36 German Y.B.Int’l Law 1993 (Duncker & Humblot, Berlin, 1994)pp. 15-45.
Chapter: II

Rule of Law
and
Human Rights in the Administration of Criminal Justice.
I. INTRODUCTION:

In its most traditional sense, the notion of human rights may be seen as the essential mode of protection for individuals against the arbitrary, excessive and unlawful exercise of power by the state. With the rapid development and growth of human rights ideas, particularly in the past few decades, this negative approach has been supplemented by a more modern and positive sense in which human rights recourse is a form of argument for action by the state to promote and protect the interests of its subjects who hold these rights.

Thus, both in its traditional and modern sense, the administration of justice is an obvious area for the notion of human rights to play a most crucial and important role for this is where the fundamental rights of the individual stand most vulnerable to threats posed by the state in the exercise of its power. This is the area that most directly concerns the oldest notion of human rights, namely-'the right to live and be free' and embraces its such fundamental aspects as the protection of life, liberty and dignity of the human person, the principles of equality and non-discrimination, prohibition of torture and inhuman treatment, the doctrine of fair trial, control of arbitrary detentions and so on.

When we think of the concept of human rights in the administration of criminal justice, we at least have two pictures in front of us. There is first of all a natural tendency to think in terms of an innocent person, who has been falsely put into the criminal process and has been denied the opportunity of clearing himself because of some prejudice, cynicism, ruthlessness, a deliberate victimisation or a personal spite. This concept brings together the norms that aim to protect innocent persons against abusive use of the criminal justice system by the state or even by individuals.
But, on the other hand, the fundamental purpose of the criminal justice system also includes the promotion of the rule of law by bringing about offenders to justice. An effective administration of criminal justice means that no one will be wrongly arrested, accused, tried, convicted or punished, and also that one who is justly found in the criminal process does not escape justice by any means whatsoever. What is all important for a definitional purpose is to bear in mind that the mere fact that a person has been suspected, accused or even convicted of an offence does not exclude him from the 'human' species or deprive him of all the fundamental rights and dignity of a human person. His guilt or innocence is the matter that is to be decided by the court, but the machinery of criminal justice as a whole must resemble the fact that while an entry into the criminal process may deprive a person of a number of fundamental rights and freedoms (e.g., the right to liberty), it also creates a number of 'special rights' on the part of such person. These special rights and freedoms established by the rules of international human rights law for the protection, against abuse, injustice and exploitation, of a suspected, accused, arrested, convicted or even sentenced person are generally what may be termed as the human rights in the administration of criminal justice.

However, stated in a simple way, the above concept proceeds from an assumption that the maintenance of human rights cannot be divorced from the criminal law itself, nor from the treatment of persons who find themselves in the process of criminal justice. As has been aptly remarked:

The history of liberty has largely been the history of observance of procedural safeguards. The protection of the criminal process is the ultimate safeguard for individual freedom and dignity against injustice and oppression.109

Nearly two and a half centuries ago, it was observed by an European writer in an essay on crimes and punishments: 110

.....But very few persons have studied and fought against the cruelty of punishments and the irregularities of criminal procedures, a part of legislation that is as fundamental as it is widely neglected in almost all of Europe. Very few persons have undertaken to demolish the accumulated errors of centuries by rising to general principles, curbing, at least, with the sole force that acknowledged truths possess, the unbounded course of ill-directed power which has continually produced a long and authorised example of the most cold-blooded barbarity. Add yet the groans of the weak sacrificed to cruel ignorance and to opulent indolence; the barbarous torments, multiplied with lavish and useless severity, for crimes either not proved or wholly imaginary; the filth and horrors of a prison, intensified by that cruellest tormentor of the miserable uncertainty- all these ought to have roused that breed of magistrates who direct the opinion of man......

But, however, the urgency of these guarantees in the administration of criminal justice found an active expression in the later stages of legal development throughout the world, although the particular momentum in this movement was achieved in the twentieth century with the emergence and growth of international human rights law. Thus, since the Universal Declaration of Human Rights, a number of international instruments, both at the global as well as regional levels, has been brought into existence to supplement, expand and strengthen the Declaration proclaiming the right to equality before law, the right to a fair and public hearing, to presumption of innocence, freedom from torture and cruel or inhuman treatment or punishment, freedom from arbitrary arrest, detention or exile, or the freedom from retroactive

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penal sanctions. Reference to the relevant provisions of these instruments will be made frequently in the following discussion while dealing with the specific issues of the rule of law in the context of the administration of justice.

It is, however, important to note at this introductory stage that one inherent difficulty in researching answers to the complex issues relating to the present subject lies in the fact that national legal systems differ widely as regards their criminal justice systems. Consequently, in this context, the concept of basic rights and freedoms tends to find a diverse expression in different domestic jurisdictions, which have structural, substantive and procedural differences between themselves. However, it is not within the purpose of this work to inquire into these diversity and differences. It rather purports to look at the issue through the meaning attached to this concept by the universally accepted norms of international human rights law. In other words, the mandate here is to inquire into the rights and freedoms which have been accepted by the members of the global community as the minimum guarantees required to be protected in the administration of criminal justice by the 'world rule of law'.

II. Background of development of the concept: Historical antecedents.

The importance of the notions of free access, equality and fairness in the administration of justice has long been recognised in different legal systems, although not all have stressed the elaboration and formal statement of the necessary

111 Reference to these different Articles of the Declaration will be made in the relevant parts of the present chapter.
112 This expression was used by William J. Brennan Jr., in International Due Process and the Law, 48 Virginia L. R. (1962), p. 1258.
guarantees and some have failed to provide the necessary judicial organisation or procedures.\textsuperscript{113} Even in the seventh century, the right to access to tribunals received recognition in the provisions of a legal code\textsuperscript{114} that the judge should be "easy of access to the citizens and common people" and that "If anyone should file a complaint against another before a judge, and the latter should refuse to hear him, or deny him the use of his seal, or under different pretexts, should delay the trial of his cause, not permitting it to be heard, through favour to a client or a friend, and the plaintiff can prove this by witnesses, the judge shall give to him to whom he has refused a hearing, as compensation for his trouble, a sum equal to that which the plaintiff would have received from his adversary by due course of law."\textsuperscript{115}

The genesis of the modern concept of human rights in the administration of justice can also be traced back to the great words of the Magna Carta of 1215 :"To no man will we sell, to no man will we deny or delay, right or justice"\textsuperscript{116} and that "No sheriff, constable, coroners, or others of our bailiffs, [that is Royal Officers] shall hold pleas of our Crown [that is, criminal trials]."\textsuperscript{117} This right of everyone to access to

\textsuperscript{113}For a general discussion on how the two major legal systems, namely- the common law and the civil law, made a substantial contribution to the development of these concepts and greatly influenced their growth in the modern world, see "The Study of Equality in the Administration of Justice" (Chap.I, pp.12-22), submitted to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities by its Special Rapporteur Mr. Mohammed Ahmed Abu Rannat, UN Doc. E/CN.4/Sub.2/296 (10 June 1969).

\textsuperscript{114}Book I, title I, Chap.V of the Visigothic Code (or Forum Judicium), a compilation of laws dating from the mid-seventh century A.D., which, as the Fuero Juzgo, later influenced many of the national legal systems which originated from Spanish law.

\textsuperscript{115}Ibid, Chap.XVIII of book II, Title I.

\textsuperscript{116}Chapter 40. In Ch.29 in the version confirmed by King Edward I in 1297, these words appeared as : "We will sell to no man, we will not deny or defer to any man either justice or right", see, 6 Halsbury's Statutes (3rd edn.)401.

\textsuperscript{117}Chapter 24 in the original version; see Mckenzie, Magna Carta.
tribunals was given the sanction of the criminal law in France by the Napoleonic Code, which made punishable as the crime of "denial of justice" the refusal of any judge to arrive at a decision "under pretext of the silence, obscurity or insufficiency of the law".

Another right which gained recognition over the course of time, and later became the most central notion of the modern doctrine of the rule of law, was the right to be tried by the ordinary courts of the land. Indeed, one of the main abuses that led to the French revolution of 1789 was the appointment under the *ancien régime*, at the King's pleasure, of special judges for a trial of a single case or even of a single person or a group of persons. In this regard, however, the English Petition of Right of 1628 provided against the trial of alleged offenders by the martial law used in armies in time of war and the Habeas Corpus Act of 1640, abolishing the Star Chamber and other courts of similar jurisdiction based on the royal prerogative, provided that the King and his Privy Council were to have no jurisdiction in matters of criminal or civil law and that such matters "ought to be tried and determined in the ordinary courts of justice and by the ordinary course of the law".

Recalling two earlier enactments, the petition of right of 1628 made extensive provisions regarding rights and freedoms in the administration of justice. The first is the provision contained in chapter 39 of the Magna Carta (1215)\(^{118}\), in which the King promised that "no free man (*nullus liber homo*)\(^{119}\) shall be taken or imprisoned or deprived of his freehold or his liberties or free customs or outlawed or exiled or in any manner destroyed, nor shall we come upon him or send against him, except by

\(^{118}\)Magna Carta of 15 June 1215, *Statutes of the Realm* 6-7 (1810).

\(^{119}\)This protection of the Charter provided to the members of the feudal class, the earls and barons, by using the term "freeman" was subsequently extended to "all man" during the reign of Edward III (1327-77); see, J. Van Der Vyver, *Seven Lectures on Human Rights* 83 (1976).
legal judgement of his peers and by the law of the land (*per legem terrae*)".\(^{120}\) And then, recognising another statutory provision of 1354\(^{121}\), stipulated that "no man, of what state or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law." In another celebrated English text, the Bill of Rights of 1689, it was proclaimed that "excessive bail ought not to be required".

The concepts of equality, non-discrimination and fairness in the operation of the law and legal machinery underlie the entire text of the French Declaration of the Rights of Man and of the Citizen of 1789 which later became the Preamble to the French Constitution of 1791. It thus categorically proclaimed that "men are born and remain......equal in respect of rights" (Art.1) and that the law "should be the same for all, whether it protects or punishes" (Art.6). Indeed, twenty years before the French Declaration, a different scheme and different procedural norms were developed by the *Ordonnance Criminelle* of 1670. The French system, which later greatly influenced the legal development of the rest of the continental Europe, exalted the dual role of the *juge d'instruction*, to uphold the law and protect the citizenry, including the rights of the accused.\(^{122}\) Art.7 of the Declaration then proclaimed :"no one shall be accused, arrested or imprisoned save in the cases determined by law, and according to the forms which it has prescribed....."And from these words thus

\(^{120}\) See, J. Holt, "Magna Carta and the Idea of Liberty" (1972). It may be noted that Coke, in part 2 of his *Institutes*, equated the term "by the law of the land" with "due process of law". See, E. Grisworld, "The Fifth Amendment Today" 34 (1955); also, Haji N. A. Noor Muhammed, supra, p.139

\(^{121}\) Pronounced by King Edward III reaffirming the provisions of the Magna Carta.

\(^{122}\) Although this development in the French legal structure was intended to prevent abuses of the legal process in the administration of justice, such abuses of power still continued. Finally, the French Declaration was proclaimed in 1789 providing for the historical protection of individual rights.
emanated the principle embodied in Art.4 of chap.V of the French Constitution of 1791 that no man may be removed from the judge to whom pre-established law assigns him.\textsuperscript{123} Art.9 of the Declaration, which is of particular relevance to the concept of fair trial in criminal cases, stated that "every man being counted innocent until he has been convicted" and also that the application of excessive rigour at the time of his arrest should be prohibited.

Another important milestone in this process of development is the United States Constitution of 1787 and the US Bill of Rights of 1791\textsuperscript{124} which, primarily inspired by the French Declaration, later served as a model for many other modern constitutions. Indeed, both of these landmark instruments made explicit reference to such basic aspects which have by now been established as the most central notions of the rules of international human rights law pertaining to the administration of criminal justice. The Bill thus specifically declared that "No person......shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law",\textsuperscript{125} and that "Excessive bail shall not be required...."\textsuperscript{126} As regards the rights of the accused the Bill provides:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury......previously ascertained by law, and to be

\textsuperscript{123}It may be noted that this principle received explicit and unqualified expression in Art.53 of the revised Constitutional Charter of France of 1830 : "No one shall be removed from his natural judges". As regards the right to public hearing, Art.64 of the Constitutional Charter of 1814 provided that "Criminal proceedings shall be public, unless such publicity would endanger order and morality; and where this is the case, the court shall make it known by a formal ruling".

\textsuperscript{124}The US Bill of Rights consists of the first ten amendments to the Constitution, all adopted in 1791.

\textsuperscript{125}The fifth amendment.

\textsuperscript{126}The eighth amendment.
informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence."

These fundamental principles then found expression in the fourteenth amendment to the US Constitution, ratified in 1868, that "nor shall any State [of the United States] deprive any person of life, liberty or property, without due process of law..." and thereby requiring the observance of the rights and guarantees contained in the Bill of Rights of 1791, notably the protection of the fifth amendment against self-incrimination and the provisions of the sixth amendment concerning the right to counsel, speedy trial¹²⁷ and the right of an accused to be confronted by the witnesses against him. And thus, through this process, the concept of 'due process of law' has eventually received a considerable modern definition.

However, the most significant part of the development of this concept pertains to the adoption of this fundamental principle in the Universal Declaration of Human Rights in 1948 and, later, in the elaboration of this doctrine in subsequent human rights instruments, particularly by giving it the sanction of positive legal norm under the International Covenant on Civil and Political Rights of 1966. What is important to note in this connection is that, while in its early stages the due process concept was confined to notions of procedural safeguards, today the concept embodies a dual significance. Thus, while it includes procedural due process, a body of legal precepts and supporting institutions which require certain procedure and respect for certain values, especially (but not exclusively) in the application of the criminal law, it also

¹²⁷ As regards the right to speedy trial, it may be noted that recognition of this right may even be traced back in the seventh century Visigothic Code which acknowledged the need to avoid delay in legal proceedings, especially in view of the burden placed thereby on poor persons (book I, title I, chap. IV), as well as in the early thirteenth century Magna Carta which undertook to delay to no man right or justice (Chap. 40).
III. The Concept of "Equality and Non-Discrimination" in the Administration of Justice:

A. Grounds of discrimination in the administration of justice:

It is quite understandable to mention at the beginning that discriminatory attitudes, policies and practices at the various levels in the administration of criminal justice pose an imminent threat to the fundamental rights and freedoms of the individual. To state very briefly, the most direct and immediate implication of such discriminatory treatment is that as a result of such treatment it becomes highly probable that individuals or groups against whom such discriminations operate are - (a) more likely to be scrutinised and therefore to be observed in any violation of the law; (b) more likely to be arrested if discovered under suspicious circumstances; (c) more likely to spend the time between arrest and trial in jail; (d) more likely to be subjected to torture or inhuman treatment; (e) more likely to be held on detention pending or without trial; (f) more likely to be found guilty; and (g) more likely to receive harsher punishment. However, before we tend to observe the norms of international human rights law presently in force in this field, it is desirable to have a brief reference to the most commonly practised grounds of selective and discriminatory application of
the criminal and penal laws and the consequences that essentially follow on the rights
and freedoms of the individual.

Firstly, if we take up the case of the institutional structure of the judiciary and the
legal profession, which provides the essential framework within which to promote
and protect the rights and interests of the individual, discriminatory treatment may be
found in connection with the appointment of judges, juries or assessors in that
persons of a certain racial, ethnic, linguistic or other origin or identity may be
excluded or less preferred. It's not long ago that the Negroes in some States of the
United States were excluded from juries on account of their race, there being a large
amount of unregulated discretion in the preparation of lists of possible jurors. As it
was pointed out in the UN Sub-Commission on the Prevention of Discrimination and
the Protection of Minorities, the exclusion of persons of certain races from the
legal profession may result in inequality in the administration of justice, since access
to the profession governs the whole judicial system in many countries.

Discrimination may be shown by the prosecuting authorities who may be more
energetic in bringing to court suspected criminals of a certain race or colour or those
belonging to a certain group or class. As has been pointed out in one report of the
UN Sub-Commission, cases of discrimination of this nature may be found in many
countries where the authorities have decided whether or not to bring criminal
charges on the basis of the religious, ethnic, economic or other group to which he
belonged. Discrimination may also operate in the allocation of cases to judges or
benches of a court if any of several judges or benches may be assigned equally
legally, to hear a specific case.

128 See, UN Doc. E/CN.4/Sub.2/SR.485, p.9
129 See, UN Doc. E/CN.4/Sub.2/SR.460, p.4
Another *de facto* ground of discrimination in the administration of criminal justice may be seen to arise in relation to premature publicity concerning criminal trials, especially trials by jury. Such publicity, when critical of the accused, at any stage of criminal proceedings, undermines his enjoyment of the right to a fair hearing, and this is probably particularly true of accused persons belonging to certain racial, ethnic, linguistic or other groups against whom prejudice exists in the community in whose midst trial is being held or will be held. Again, as a result of the prejudice certain groups may be excluded from being recognised as competent witnesses in the judicial process. As observed in the UN Sub-Commission,\(^{131}\) "bad character" is often used as a pretext for not hearing witnesses belonging to certain ethnic, religious, linguistic or other groups, or for not taking their testimony into account.\(^{132}\) Such discrimination may also be demonstrated in the meting out of criminal punishment, since the judicial authorities often have some discretion in deciding upon the type and degree of punishment to be awarded after conviction for an offence.

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\(^{131}\)See, UN Doc. E/CN.4/Sub.2/SR.460, p.4.

\(^{132}\) Examples of discriminatory attitudes and practices in the administration of justice on such grounds as race, ethnicity, religion etc. may be found even in the very recent time in different jurisdictions. During the apartheid regime in South Africa, all judges, magistrates and Bantu commissioners were white. Its not long ago that in some states of the United States, ‘Negroes’ were excluded from juries on account of their race, there being a large element of unregulated discretion in the preparation of lists of possible jurors. There, as in many other countries, the qualifications required for admittance to the judicial proceedings are excessively vague which, combined with the allocation of wide discretion on the part of the authorities, could result in the application of ‘a subjective standard of personal character’. These standards include such features as ‘suitability’, ‘fitness’, ‘good reputation’, ‘respectability’, ‘good character’, ‘good conduct’, ‘honesty’, ‘morality’ etc. If these subjective standards are applied in the midst of a community or a legal system where prejudice already exists against certain ethnic, racial, religious or other groups, there is a great danger of *de facto* discrimination to operate against members of such groups when they come to judicial proceedings either as an accused, a witness or a juror etc. See, “Study of Equality in the Administration of Justice” by UN Special Rapporteur Mohammed Ahmed Abu Rannat, supra, at esp. 36ff. For a useful reference to the ideologies and beliefs which contribute or lead to such prejudicial and discriminatory practices against different ethnic and racial groups in the administration of justice, see “Study of discriminatory treatment of members of racial, ethnic, religious or linguistic groups at the various levels in the administration of criminal justice......”, by UN Special Rapporteur Justice Abu Sayeed Chowdhury, UN Doc. E/CN.4/Sub.2/L.766 (16 July 1981).
Discriminatory consequences may also be found in the provision of law distributing jurisdiction among types of courts by a state, since the guarantee accorded to the individual may not be the same in all courts. One of the possibilities in this regard may be seen in the authorisation of the trials of civilians by military tribunals, in most cases for offences of a political character. Again, it is in relation to trials for political offences that departures are most often made from the principle that everyone has a right to be tried by his natural judge; special courts have from time to time been set up on an ad hoc basis in various countries to try such offences, especially in conditions of political turmoil. Such establishment of a special court to try one person or a group of persons is to be regarded with the gravest suspicion. Even the establishment of special courts having continuous jurisdiction over crimes against the security of the state may carry with it the possibility of discrimination on political grounds.

B. Principle of Non-Discrimination:

The pretext for most of the worst violations of human rights that have been perpetrated in the world's history has been, in one way or the other, discrimination founded on the basis of sex, colour, race, religion, political opinion, or ethnic or linguistic origin. Today, probably the most primary notion of the modern international canon of human rights has been that it categorically outlaws the treatment of any human person on the basis of any such or other similar grounds in so far as his fundamental and inherent rights and freedoms are concerned. In respect of these rights and freedoms it has been specifically required that all members


134As regards the legitimacy to differentiate, in respect of 'ordinary' rights as distinguished from 'human' rights, between different individuals in different circumstances, see, for instance, Paul Sieghart, “The International Law of Human Rights”, supra. at 17 & 75.
of the human society must be treated with complete equality and that no particular circumstances, features or characteristics attaching to any individual can affect his entitlement to them, whether in degree or in kind. This notion of equality and non-discrimination is so central to the concept of fundamental human rights that all the major international human rights instruments (except the European Social Charter) make provisions regarding it in an Article of general application.

The Charter of the United Nations requires its member States to promote fundamental human rights and freedoms "without distinction as to race, sex, language, or religion" (Art.56) and almost all the countries of the world today incorporate a similar provision of equality and non-discrimination in their national constitutions. The inherent dignity and the "equal and inalienable rights of all members of the human family" have been recognised in the opening lines of the Universal Declaration of Human Rights of 1948 as "the foundation of freedom, justice and peace in the world". As has been aptly remarked by Sir Hersch Lauterpatch, the claim to equality "is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties."

As observed by the International Court of Justice in its Advisory Opinion of 1971 on Namibia:...To establish...and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent, or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the [UN] Charter".

The principle of equality and non-discrimination, a general principle of elementary justice applicable to all human rights, meaning that 'whatever level may be reached in


the realisation of those rights in a particular country or territory, should apply to every individual residing there without discrimination of any kind, has been proclaimed in Art.2 of the Universal Declaration of Human Rights in these words:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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.

Art.II of the American Declaration of the Rights and Duties of Man (1948) provides that all persons have the rights and duties established in that Declaration, without distinction as to race, sex, language, creed or any other factor. Art.9 of the UNESCO Declaration on Race and Racial Prejudice (1978) reaffirms that "the principle of the equality in dignity and rights of all human beings and all peoples, irrespective of race, colour and origin, is a generally accepted and recognised principle of international law".

Equality and non-discrimination constitute the dominant single theme of the Civil and Political Covenant of 1966. Its Preamble proclaims "the equal and inalienable rights of all members of the human family". By Art.2(1), a state undertakes to respect and ensure the rights recognised by the Covenant "to all individuals within its territory and subject to its jurisdiction......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." Similar treaty provisions regarding equality


138Adopted by UNESCO General Conference (20th session), 27 Nov. 1978.

139For a fuller treatment of the implications of the principles of equality and non-discrimination contained in that Covenant, see B. G. Ramcharan, Equality and Non-Discrimination", in Louis Henkin (ed.), The International Bill of Rights, supra, pp. 246-270.

Beside these major global and regional declarations and treaties, five subsidiary instruments now in force are concerned exclusively with questions of discrimination and at least two of them contains provisions regarding non-discrimination and equality of treatment having direct implications in the field of administration of criminal justice. Thus, under Art.5 of the Convention on the Elimination of all Forms of Racial Discrimination the states Parties undertake 'to guarantee the right of everyone without distinction as to race, colour, national or ethnic origin, to equality before the law in the enjoyment of a long list of what are in fact the rights declared in the major international human rights instruments with the addition of a few other rights, notably the right to protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institutions. It may also be noted here that two years before the adoption of this Convention, the UN General Assembly adopted the Declaration on

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the Elimination of All Forms of Racial Discrimination which, in its Art.7, proclaimed the principle that "Everyone has the right to equality before the Law and to equal justice under the law", and that "Everyone shall have the right to an effective remedy and protection against discrimination ......." Provisions relevant to equality and non-discrimination in the administration of justice may also be found in the International Convention on the Suppression and Punishment of the Crime of Apartheid.

C. Equality Before the Law:

The concept of equality before the law may be traced back at least as far as the French Declaration of the Rights of Man and Citizen (déclaration des droits de l'homme et du citoyen) of 1789, the first major text to declare it as a fundamental human right, which asserted in its Art.7 that the law 'should be the same for all, whether it protects or punishes', and that all were 'equal in its sight'. Another related concept, namely- 'equal protection of law'- found expression in the Fourteenth Amendment to the US Constitution, passed in 1868 in connection with the abolition of slavery in the aftermath of the American civil war, which forbids each of the States to 'deny to any person within its jurisdiction the equal protection of the laws'.

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141 Proclaimed by GA reso. 1904 (XVIII) of 20 Nov. 1963.

142 Summarising the meaning and effect of this provision it has been observed that "[T]he guarantee of the equal protection of the laws means the protection of equal laws" [Yick Wo V. Hopkins 118 US 356 at 369; Southern Railway Co. V. Greene 216 US 400] and that the 'inhibition of the amendment ....... was designed to prevent any person or class from being singled out as a special subject for discrimination and hostile legislation' [Gulf C. & S.F.R. Co. V. Ellis, 163 US 150]. See, Willis, Constitutional Law (1st edn.), p.579.
However, stating the general principle in this regard, Art. 7 of the Universal Declaration proclaims that 'all are equal before the law and are entitled without any discrimination to equal protection of the law'. This principle has also been expressed in Art.II of the American Declaration that 'all persons are equal before the law'. However, this general principle of universal validity was later given the force of a treaty law by incorporating them in most of the major global and regional instruments. Thus, Art. 14(1) of the CP Covenant provides that 'all persons shall be equal before the courts and tribunals'. Art.26 of the Covenant proclaims equality before the law and requires the equal protection of the law without discrimination. The law must prohibit and provide effective protection against discrimination (Art.26), and any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited (Art.20). Thus, in effect, Art.26 along with Arts.2(1), 3, 14(1) and 20 of the Covenant set forth five related principles: the principle of equal enjoyment of rights; the general principle of equality and the corollary principle of equality between men and women; the principle of equality before the law and equality before the courts; the principle of equal protection of the law; and the principle of non-discrimination. The principle of equal protection of the law has also been contained in Art.24 of the American Convention on Human Rights as well as Art.3 of the African Charter on Human and Peoples' Rights.

In 1970, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted Principles of Equality in the Administration of Justice which may be relevant in interpreting the scope of the equality before the law and equal protection of the law contained in the existing international human rights instruments mentioned above. These include non-discrimination on the grounds indicated in "equal access to the judiciary and the legal profession" and in the enjoyment of the
basic elements of a fair, prompt, and public trial before a competent, independent and impartial tribunal, with a right to appeal.

IV. The Right to a Fair Trial:

A. International Fair Trial Norms: Principal Sources.

The right to a fair trial has been an important norm of international human rights law for at least the last fifty years. Since the adoption of the Universal Declaration of Human Rights in 1948, international norms and standards pertaining to this right have been increasingly embodied in a wide range of human rights instruments. Moreover, a substantial body of jurisprudence has been developed by a number of concerned machinery, notably- the Human Rights Committee of the United Nations and the European and American Commissions and Courts of Human Rights, elaborating and construing the meaning, contents and scope of this right. Although a close observation of these provisions indicates that the term 'fair trial' has been used in its broadest sense to embrace both criminal and civil proceedings, the principal attention of the present work will be focused on the implications of the right in the administration of criminal justice. It should, however, be noted that the international norms and standards relating to the right to a fair trial establish certain 'general principles of elementary justice' which can be applied in any court- whether it be an ordinary court of law, civil or criminal, an emergency court, a military tribunal, a juvenile court and so on. If these principles are not observed in accordance with a modern concept of justice, the trial cannot be fair.
Art. 10 of the Universal Declaration\textsuperscript{143} provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". It also provides in Art.11(1), for the protection of the rights of an accused person, "to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Similar provisions have also been made in the American Declaration of the Rights and Duties of Man, 1948\textsuperscript{144} which, in its Art.XXVI, provides that 'every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws', and includes a number of other Articles containing provisions relevant to the right to a fair trial. These provisions of the Universal Declaration as well as the American Declaration have then been substantially amplified in the form of binding treaties, both at the global and the regional levels.

\textbf{i. Treaty Provisions on the Right to a Fair Trial:}

Art.14 of the International Covenant on Civil and Political Rights recognises the right of everyone to "a fair trial and public hearing by a competent, independent and impartial tribunal established by law." Almost identical provisions have also been made in all the three regional human rights treaties. Thus, Art.6 of the European

\textsuperscript{143}Which, though not an international treaty as such, has now been widely recognised as an important source of customary international law.

It may also be noted that some of these principles contained in various instruments of universal validity can be considered as 'general principles of law' as mentioned in para.1(c) of Art.38 of the Statute of the International Court of Justice.

\textsuperscript{144}O.A.S. reso.XXX, adopted by the Ninth International Conference of American States, Bogota (1948).
Convention on Human Rights provides: "In the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Art.8 of the American Convention on Human Rights, under the title of 'Right to a fair trial', recognises the right of every person "to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature". Similarly, the African Charter on Human and Peoples’ Rights, in its Art.7, provides for the right of every individual to have his cause heard including the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.

Beside these general fair trial norms contained in the CP Covenant and the three regional treaties, provisions relevant to the right to a fair trial may also be found in some other international human rights treaties. Thus, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment provides in Art.15 "that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings. Also, Art.7 guarantees fair treatment at all stages of the proceedings brought against a person charged with having engaged in or attempted torture. Again, common Art.3 of the four Geneva Conventions for the Protection of Victims of War of 1949 And Art.6 of the Additional Protocol II of 1977 contain fair trial guarantees for times of non-international armed conflict. Arts.96 and 99-108 of the Third Geneva Convention prescribe the rights of prisoners of war in judicial proceedings essentially creating a fair trial standard. Arts.54, 64-74, and 117-126 of the Fourth Geneva Convention contain provisions relating to the right to fair trial in occupied territories. Additional Protocol I (Art.75) extends fair trial guarantees in an international armed conflict to
all persons including those arrested for actions relating to the conflict. Also, the Convention on the Rights of the Child, which came into force on 2 September 1990, contains several provisions relevant to the right to a fair trial for children.

ii. Instruments other than 'treaties' containing provisions relevant to the right to a fair trial:

In the recent years, provisions relevant to the right to fair trial have been contained in a number of subsidiary instruments, particularly those of the United Nations, dealing with certain specific aspects of the administration of criminal justice considered to be of great importance and implication in the observance of this right. Although reference to the substantive provisions of these instruments will be made elsewhere in the present chapter, it is still desirable to have a brief reference to some of the most relevant provisions of these instruments pertaining to the right to a fair trial.

i) Thus, the Code of Conduct for Law Enforcement Officials (1979) requires in Art. 2 that law enforcement officials respect and protect the human rights of all persons, which would apparently include the right to a fair trial.

ii) The Basic Principles on the Independence of the Judiciary (1985) help assure the right to a fair trial by preserving the independence and impartiality of the judiciary.

iii) Art. 14(1) of the UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") of 1985 contain provisions for a "fair and just trial" relating to juvenile offences.


146 See also, the report of the UN Regional Symposium on the Role of the Police in the Protection of Human Rights, held at the Hague 14-25 April 1980 (ST/HR/SER.A/6).

More recently, the UN Rules for the Protection of Juveniles Deprived of their Liberty (1990)\textsuperscript{149} also contains provisions relevant to the fair trial of "juveniles under arrest or awaiting trial"[Rules 17-18].

iv) The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989)\textsuperscript{150} require the "thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions". To that end, there are several principles relevant to the right to a fair trial including Principle 10 which indicates that the investigative authority shall have the power to oblige witnesses to appear and testify.

v) The Standard Minimum Rules for the Treatment of Prisoners (1977)\textsuperscript{151} contain several provisions which are relevant to the right to a fair trial, including the right to receive visits from a legal adviser (Art.93) within sight but not within the hearing of prison officials. Similar provisions have also been made in the UN's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).\textsuperscript{152}

\textsuperscript{148}Recommended for adoption by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and adopted by GA reso.40/33 of 29 Nov 1985.

\textsuperscript{149}Recommended for adoption by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held at Havana from 27 August to 7 Sept. 1990 and adopted by GA reso.45/113 of 14 Dec 1990.

\textsuperscript{150}Adopted by the ECOSOC on 24 May 1989.

\textsuperscript{151}Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the ECOSOC by its resolutions 663c (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

\textsuperscript{152}Adopted by GA reso. 43/173 of 9 Dec 1988.
vi) The UN Basic Principles on the Role of Lawyers, Guidelines on the Role of Prosecutors, Principles on Pre-Trial Detention, and Rules for the Protection of Juveniles Deprived of their Liberty\textsuperscript{153}, \textit{inter alia}, set forth certain standards and norms which are directly relevant to the right to a fair trial. Thus, for instance, the Guidelines on the Role of Prosecutors require that prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system (Art. 12).

vii) Reference may also be made to the international fair trial standards developed within the human rights structure of the Conference on Security and Co-operation in Europe (CSCE). Thus, the 1989 Concluding Document of the Vienna Follow-up Meeting of the CSCE, issued on 17 Jan 1989, indicates that the participants will "ensure effective remedies....to those who claim that their human rights.....have been violated." These remedies include "the right of the individual to appeal to executive, legislative, judicial or administrative organs; the right to fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice; [and] the right to be promptly and officially informed of the decision to be taken on any appeal including the legal grounds on which this decision is based."

In June 1990, the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE adopted a document containing several provisions relating to the right to a fair trial, including the right to a fair and public hearing by a competent, independent and impartial tribunal, right to defence, no charge, trial or conviction for an offence which has not been provided for by a law defining the elements of the offence with clarity and precision; and the presumption of innocence.

\textsuperscript{153}Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug-7 Sep 1990; see, UN Doc. A/CONF. 144/28.
The Charter of Paris for a New Europe issued in Nov 1990 pursuant to a meeting of the CSCE states that everyone has the right "to know and act upon his rights [and] to fair and public trial if charged with an offence...." The Charter also provides, "we will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights."

The Concluding Document of the Moscow Meeting of the CSCE in 1991 stated that the Participating states "will respect the internationally recognised standards that relate to the independence of the judges and legal practitioners....which, inter alia, provide for (i) prohibiting improper influence on judges....[and] (v) guaranteeing tenure and appropriate conditions of service....." The participating states also agreed that a state of public emergency 'may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognised human rights and fundamental freedoms.' It also contains several significant protections for persons deprived of their liberty.

viii) The 19th Islamic Conference of Foreign Ministers in Cairo adopted the Cairo Declaration on Human Rights in Islam on 5 August 1990. Art.19 of the Declaration provides for equality of all individuals before the law, the rights to a judicial remedy for each person, individual penal responsibility, no penalties except as prescribed by Shariah, the presumption of innocence, and an honest trial in which the rights of defence are fully guaranteed. Art.20 forbids arrests, restraints on liberty, exile or punishment without legitimate reasons.

ix) On 2 December 1990, a group of scholars convened by the Institute of Human Rights, Abo Akademi University, in Turku/Abo, Finland adopted a Declaration of

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154 The 38 participating states of the CSCE met in Moscow from 20 Sep. to 4 Oct. 1991.

Minimum Humanitarian Standards,\textsuperscript{156} which are applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances. Art.9 of that Declaration delineates "judicial guarantees which are recognised as indispensable by the community of nations" in criminal cases, including the right to be informed without delay of charges, trial within a reasonable time in the presence of the accused, all necessary rights and means of defence, individual penal responsibility, the presumption of innocence, no compulsory self-incrimination, no double jeopardy and no criminal responsibility in the absence of a law defining the offence applicable at the time it was committed. Art.11 affords "judicial guarantees" in regard to the imposition of security measures of assigned residence, internment or administrative detention for security reasons. Art.4 guarantees "the right to an effective remedy, including habeas corpus......as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty."

x)The Arab-African Seminar on Criminal Justice and Penal Reform (1991)\textsuperscript{157} recommended that no person should be subjected to detention garde a vue for more than 24 hours; that any person placed in detention should immediately be permitted to contact his/her family and doctor; that interrogations should take place in the presence of a lawyer who may consult his/her client in private; that detention garde a vue should be permitted only in locations prescribed by law; that persons under such detention should not be subjected to pressure to incriminate themselves; that no one should be subjected to torture, arbitrary arrest or preventive detention for his beliefs

\textsuperscript{156}\textsuperscript{See, UN Doc. E/CN.4/Sub.2/1991/55.}

\textsuperscript{157}\textsuperscript{Representatives of non-governmental organisations met in Tunis from 29 November to 2 December 1991 for this Seminar, held under the auspices of the Centre for Human Rights, the Tunisian League for Human Rights, Penal Reform International and the Arab Institute of Human Rights.}
or religious convictions; that provisional detention should not be imposed as a sanction; and that public authorities should not make contact with persons in provisional detention prior to their appearance in court. The Seminar also made several other recommendations in regard to the independence of the judiciary, the rights of the defence, penal reform and other related issues.

B. Basic Elements of the Right to a Fair Trial:

It is possible to separate the fair trial concept into its most essential elements relating to each phase of the criminal proceedings. Although, in its most strictest sense, the trial does not include the arrest, interrogation and treatment during detention, certain 'guarantees' during the pre-trial stages are indispensable for a fair, equitable criminal proceeding and hence considered as the essential pre-requisite of a fair trial. These include, among others, protection against arbitrary arrest and detention; right to be informed of the reasons for arrest and of any criminal charge; right to be brought promptly to the judicial authority; and the right to trial within a reasonable time or release. However, since each of these rights and freedoms are established as independent and separate rights in themselves in the administration of criminal justice, a separate treatment of those rights and freedoms are more preferable in our present context. In the following paragraphs, however, the most relevant and essential components of the concept of fair trial, as it is understood today in the legal language of international human rights law, have been examined.

i. Equality of Parties ("Equality of Arms"):

The right of all persons to be equal before the courts, the starting point of the concept of a fair trial, requires that the prosecution and defence be treated equally in a criminal trial. The court cannot act in a way which gives the prosecution an
advantage over the defence. The principle of equality of arms (*egalité des armes*) is thus an inherent element of a fair trial, imposing procedural equality between the accused and the public prosecutor.\textsuperscript{158} In other words, the principle implies that the accused must be given a full and equal opportunity in the proceedings, and must be assured of his right to be tried in his presence and to defend himself either in person, or through legal assistance of his own choosing. Indeed, the right of all parties to participate fully in the proceedings constitute a general principle of law and provides a significant safeguard for a fair trial.\textsuperscript{159} 

The following rights and guarantees may, however, be considered as closely related and indeed the integral parts of the element of 'equality of arms' for ensuring a fair trial.

\textbf{a. Right to examine witnesses :}

One of the procedural safeguards closely related to the right of 'full and equal participation' is the right of each of the parties concerned to present evidence and their evaluation including the examination and cross-examination of witnesses before the court. The CP Covenant as well as the regional Conventions on human rights make provisions confirming the existence of this standard for ensuring a fair trial. Thus, Art.14(3)(e) of the Covenant provides for the right of everyone charged with a criminal offence "to examine, or have examined, the witnesses against him and to

\textsuperscript{158}See the decision of the Committee of Ministers of the Council of Europe, Resolution relating to the cases of Ofner and Hopfinger (5 Apr. 1963), 6 Y.B. 708, 710.

\textsuperscript{159} See the comments of the UN Human Rights Committee in Robinson V. Jamaica, Report of the HR Committee, Official Records of the General Assembly (ORGA), Forty-third session, Supplement No. 40(A/43/40), annex VII C. See also the Bönisch case before the European Court of Human Rights, 92 Series A (6 May 1985).
obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."\textsuperscript{160}

In the present context, the Inter-American Court of Human Rights observed that when the accused is detained and is unaware of the charges, is ignorant of what the witnesses have said and the investigation, trial and sentencing are held without his presence, his right to examine witnesses and to present his defence are seriously impaired.\textsuperscript{161} In another case the Inter-American Commission noted that creation of an environment of fear, to the extent that the defence is afraid to present witnesses "to contradict accusations made by the State" seriously prejudices the defendant's right to defence.\textsuperscript{162}

The European Court has, however, noted that only exceptional circumstances would lead to a finding that failure to hear witness violated the accused's right under Art.6(3)(d) of the European Convention, although it did not specify what would constitute such "exceptional circumstances".\textsuperscript{163} In another case, the European Commission suggested that unless an applicant could demonstrate that a witness for the defence could have disproved charges against the defendant, there would be no violation of Art.6(3)(d).\textsuperscript{164}

\textsuperscript{160} For similar provisions in the regional treaties, see Art.6(3)(d) of the European Convention and Art.8(2)(f) of the American Convention.


\textsuperscript{163} See Bricmont case, 158 Series A 31, para.89 (7 July 1989).

\textsuperscript{164} Hopfinger v. Austria, 3 Y.B. 370 (19 Dec. 1960); See also, X. v. United Kingdom, 43 Coll. Dec. 151 (6 Apr 1973); also, Isgrò case, 194-A Series A (19 Feb 1991); see also, Asch case, 203 Series A (26 Apr 1991). In this context, see also the comments of the UN HR Committee in Pratt and
The Question of ‘anonymous witnesses’:

One closely related question to be considered here is whether the use of anonymous witnesses denies an accused the right to a fair trial. In this regard, the European Court has recently indicated that the use of anonymous witnesses is inconsistent with the right to a fair trial: “The Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. However, the subsequent use of their statements by the trial court to find a conviction is another matter.”

Very recently, the International Criminal Tribunal for the Former Yugoslavia made some interesting observation regarding the use of anonymous witnesses. Thus, the Trial Chamber of the Tribunal noted that:

“......the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. The balancing of these interests is inherent in the notion of a ‘fair trial’. A fair trial means not only fair treatment to the defendant but also to the Prosecution and to the witnesses.”

Morgan v. Jamaica, Report of the HR Committee, ORGA, Forty-Fourth session (A/44/40), annex X.F. (right to call and examine witnesses may be waived by counsel).

165 Windisch case, 186 Series A, para.30 (27 Sep 1990); see also, Kostovski case, 166 Series A (20 Nov 1989); Delta case, 191 Series A 15 (19 Dec, 1990).


The Tribunal thus identified five criteria in determining whether anonymity should be granted in a particular case which may serve as a guideline in the present context. These are:

i) the existence of a real fear for the safety of the witness or his family;

ii) the testimony must be important enough to the Prosecutor’s case to make it unfair to compel him to proceed without it;

iii) there must be no prima facie evidence that the witness is untrustworthy;

iv) there’s no effective protection programme for the witness or his family; and

v) the measures taken are strictly necessary.

b. Trial in absentia:

In certain circumstances it is possible that a case may be heard in the absence of one or more of the parties concerned and a decision or judgement may even be announced in absentia. In a criminal case, an accused may be tried in his absence when he fails to appear before court for trial within a specified time, or he may even be removed if his misconduct hinders the proceedings. Even in the international courts a few cases may be found where trials were conducted in absentia; one

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168 Tadic Protection Measures Decisions, at reg. pg. no. 5052.
169 There are statistics from the United States indicating that one in every ten murders committed in the United States had something to do with witnesses; either the person was killed in order to prevent him from witnessing, or in revenge for the fact that he did witness. See, Henry Schermers, The Right to a Fair Trial under the European Convention on Human Rights, in Robert Blackburn & John Taylor (eds), Human Rights for the 1990s : Legal, Political and Ethical Issues (Mansell, London, 1991), p.65.
example is the well-known trial of Martin Bormann before the Nuremberg Tribunal.\textsuperscript{170}

Accordingly, the right to be present at trial and the right to a public trial does not forbid all proceedings \textit{in absentia}. As observed by the UN HR Committee, proceedings \textit{in absentia} may be permissible in the proper administration of justice, for example, when the accused has been informed of the proceedings sufficiently in advance but he declines the right to be present. The Committee, however, emphasised that a valid judgement \textit{in absentia} requires that steps be taken to inform the accused beforehand about the proceedings requesting his presence specifying the date and place of the trial.\textsuperscript{171}

The European Court of Human Rights, on the other hand, observed that even if a state allows trial by default, this procedure would not justify "[a] complete and irreparable loss of the entitlement to take part in the hearing." A person "charged with a criminal offence" should, once he become aware of the proceedings, be able "to obtain......a fresh determination of the merits of the charge". Furthermore, a person "charged with a criminal offence" and subjected to trial by default "must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to \textit{force majeure}.\textsuperscript{172}

\textbf{C. Right to Defence :}

\begin{footnotesize}
\textsuperscript{170} For a useful reference to the Nuremberg trial, see, David Luban, "Legal Modernism" 335-78 (1994); also, Steven Fogelson, "The Nuremberg Legacy: An Unfulfilled Promise, 63 S.Cal.L.Rev. (1990).


\textsuperscript{172} Colozza case, 89 Series A 14, para.30 (12 Feb 1985) ((the state claimed that they had not been able to find the applicant); see also, Rubinat case, 89 Series A (12 Feb 1985).
\end{footnotesize}
One of the most important features of the concept of 'equality of parties' relates to what is popularly called as the 'right to defence'. Art.11(1) of the Universal Declaration of Human Rights provides that the accused in a criminal case must have "all the guarantees necessary for his defence". It is now an established rule of international human rights law that the accused must have adequate time and facilities for the preparation of his defence. The principal purpose of this rule is to protect the accused against a hasty trial in which he does not have access to all the documents in the case under the same conditions as the prosecution. As observed by the UN Human Rights Committee, to guarantee the accused's right to defence, he must be given "access to documents and other evidence which the accused requires to prepare his case". A similar observation was made by the Inter-American Commission of Human Rights that an accused must be allowed sufficient time equally with the prosecution at his trial.

Again, in order to determine whether the right to defence of an accused in a criminal trial has been properly respected, account must be taken of the nature of the proceedings, the factual circumstances of the case and "the general situation of the defence". The European Commission has interpreted "adequate facilities" as

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173 See, Art. 14(3)(b) of the CP Covenant; Art.6(3)(b) of the European Convention; Art.8(2)(c) of the American Convention; and Art.7(1)(c) of the African Charter.


175 Thus, where the defence counsel had only eight days to submit evidence to the court and the prosecutor had as much time as he needed, the trial violated the defendant's right to defence. See, Report on the Situation of Human Rights in the Republic of Nicaragua, Inter-American C.H.R., 105, OEA/Ser.L/VII.53, doc.25 (1981).

facilities which "assist or may assist [the accused] in the preparation of his defence".177

A question may, however, arise whether it is essential to establish any prejudice suffered by the accused by reason of denial of his right to defence. In this regard, although the European Commission previously took into account the absence of prejudice from any inadequacies of time or facilities for the defence, the European Court has observed in some more recent cases that a person can be a victim of a violation of the European Convention even without suffering any prejudice.178

It is also relevant to note here that the state may put reasonable restrictions on access to prosecution files, for example, because of concerns of national security.179

But, in so far as the protection of the accused is concerned, what is of utmost importance is to ensure that such imposition of restrictions has not been left to the unfettered discretion of the state. Accordingly, the authority to classify information as 'secret' should be subjected to certain restrictions and be regulated by the ordinary courts.180


180 The Inter-American Commission of Human Rights observed that granting the armed forces and police broad power to provide or withhold evidence within its jurisdiction from civilian courts blocks the proper functioning of the judicial system; Status of Human Rights in Chile, Inter-Am. C.H.R., 287, OEA/Ser.L/V/II.74, doc.10, rev.1 (1988); see also, Case 10. 180, Inter-Am. C.H.R., 237, 240, 250, OEA/Ser.L/V/II.79, doc.12, rev.1 (1991).
d. Right to Counsel:

One of the most important requirements of the accused's right to defence, and in fact an integral part of the concept of a fair trial, is his 'right to counsel'. The International Covenant on Civil and Political Rights, in its Art.14(3)(b) & (c), provides for a number of provisions as "minimum guarantees" relating to this right. These include:

a) the right of the accused "to communicate with counsel of his own choosing";

b) the right "to defend himself in person or through legal assistance of his own choosing";

c) the right "to be informed, if he does not have legal assistance, of this right";

d) the right "to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment...if he does not have sufficient means to pay for it".

Similar provisions regarding this right as an essential pre-requisite for ensuring a fair trial have also been made in all the three regional human rights treaties.\(^{181}\)

In its general comments to Art.14 of the CP Covenant the HR Committee indicates that the provisions of that Article affords the accused a number of guarantees in regard to the right to counsel including\(^{182}\).

\(^{181}\)See, Art.6(3)(c) of the Euro. Convention; Art.8(2)(2) of the American Convention; and Art.7(1)(c) of the African Charter.

However, reference to some other human rights instruments and case-law of the monitoring organs in the present context will be made in the relevant discussion under chapter IV of this thesis (on the independence and impartiality of the Judiciary).
a) the opportunity to engage and communicate with counsel;

b) when the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer;

c) counsel is required to communicate with the accused in conditions giving full respect for the confidentiality of their communications;

d) lawyers should be able to counsel and represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter;

e) the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair.

The European Court, however, considered several factors when determining whether the "interests of justice" require that the applicant should receive free legal assistance. Consideration has been given to the seriousness of the offence of which the applicant was accused, the severity of the sentence which he risked and the complexity of the case as a whole.183 Thus, among the major treaties making provisions for free legal aid to an accused, the CP Covenant and the European Convention seems to adopt the most restricted approach by limiting such aids only to cases 'when the interests of justice so require' and the accused 'has not sufficient means to pay' for it. The American Convention, in comparison, declares an


183 See, Quaranta case, 205 Series A (24 May 1991).
'inalienable' right to assistance by counsel provided by the state - paid or not as the
domestic law provides - whenever the accused fails to defend himself or to engage
his own lawyer.

Again, where legal representation is provided for an accused, it is not enough that
the person is qualified to represent and defend the accused but also he must actually
advocate in favour of the accused.¹⁸⁴ The right to counsel should therefore be
interpreted in a broad sense creating an obligation on the part of the state concerned
to see that the appointed counsel is carrying out his duties and may, if necessary,
supervise or replace him, or cause him to fulfil his duties adequately.¹⁸⁵

ii. Characteristics of the Tribunal:

The second essential element of a fair trial relates to the required characteristics of
the tribunal where the trial of an accused charged with a criminal offence is to be
conducted. Art.10 of the Universal Declaration thus provides the general principle
that everyone is entitled to a fair hearing 'by an independent and impartial tribunal'.
Art.XXVI of the American Declaration of Human Rights also entitles the accused to
an 'impartial' hearing. These principles have now been elaborated and amplified by all
the major human rights treaties, rendering an independent, impartial and competent
tribunal indispensable for a fair trial.¹⁸⁶

¹⁸⁴ See the Report of the UN HR Committee in Estrella v. Uruguay, ORGA, Thirty-eight session
(A/39/40), annex XIII.

¹⁸⁵ See the observation of the European Commission in Appl. No. 9127/80, 2 Strasbourg Digest of

¹⁸⁶ See, Art.14(1) of the CP Covenant; Art.6(1) of the European Convention; Art.8(1) of the
American Convention; and Art.7(1) of the African Charter.
Indeed, the independence of the tribunal as such, or more broadly of the judiciary as a whole, is probably the most important notion of the concept of the rule of law in the modern society in the promotion and protection of the rights and freedoms of the individual. This character of the tribunal has been categorically emphasised by the fair trial articles of the major human rights treaties. Again, a tribunal hearing a case should not only be independent but impartial as well. Of the three essential characteristics of a tribunal, the 'impartiality' character is the only element that has been specifically mentioned in the fair trial articles of all the four major regional treaties. Impartiality in this connection means that a tribunal will base its opinion only on objective arguments, and that it will not allow itself to be influenced by subjective arguments and personal emotions.

However, it may be noted at this stage that the 'independent and impartial' character of the judiciary forms one of the three 'special' aspects of the rule of law under the argumentation of the present research, and chapter IV of this thesis (on the independence and impartiality of the judiciary and the legal profession) has been specifically designed to make an in-depth inquiry into that aspect.

iii). Public Trial:

It is of utmost importance for ensuring a fair trial that the trial be conducted in public. All the major human rights treaties contains explicit reference to this element thus making it an integral part of the concept of fair trial. The principal object of this requirement is that the public character of the proceedings protects the

\(^{187}\)Except the African Charter which does not make any specific reference to 'independence' under Art.7.

\(^{188}\)Except the African Charter, which does not make any specific reference to the public character of the trial.
accused against the administration of justice in secret with no public scrutiny and thus, provides a safeguard against abuse by the prosecution or arbitrary action by the court and also serves the purpose of maintaining confidence in the courts.

The right to a public trial is not, however, an exclusive, unlimited right and it is important to interpret this right with due regard to the limits and boundaries for its application. Thus, for instance, the right to a fair trial does not require the courts to publicise a case before trial nor to make lists available of cases that the court will hear.\footnote{Appl. No. 8512/79, 2 Digest of Strasbourg Case Law 426, 444 (2 Oct 1979).} Again, while requiring a criminal trial to be in public, international human rights instruments have themselves made certain restrictive provisions limiting the scope of application of this requirement.

Thus, Art.14(1) of the CP Covenant provides that the press and the public may be excluded from all or part of a trial for reasons of morals, public order (\textit{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 interest of justice. It, however, requires that any judgement rendered in a criminal case or in a suit at law shall be made public.

Similar provisions have also been made in the European and American Conventions on Human Rights. While Art.6(1) of the European Convention includes two additional grounds, namely- "interests of juveniles" and "the protection of the private life of the parties" for restricting the application of the right to a public hearing, Art.8(5) of the American Convention simply requires that criminal proceedings shall be public, except in so far as may be necessary to "protect the interest of justice".

The UN Human Rights Committee has, however, noted that a public hearing cannot exclude members of the press or limit the attendance to only a particular category of
persons. The various "exceptional circumstances" as specified in the Covenant and the Conventions should therefore be restrictively construed so as to preserve the right to a public trial.

The European Court has accepted application of the "public order" exception when allowing national authorities to exclude the public from disciplinary proceedings in a prison on grounds of security problems and the possible propagation of malicious allegations, which would impose a "disproportionate burden on the authorities of the State", if the trial is to be held in public. In the interests of juveniles the European Commission has allowed closed proceedings in a case that involved sexual offences committed against minors. On the other hand, application of the "interest of justice" exception has been left within the "margin of appreciation" which is ordinarily afforded to domestic authorities.

The Inter-American Commission observed that secret proceedings of a military tribunal trying army personnel for the death and serious injury of two citizens denied the victims due process of law. The secrecy made it virtually impossible for the

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191 See, e.g., Estrella v. Uruguay, supra, annex XII (trial in camera violated the right where the state failed to provide reasons for not conducting a public trial); also, Van Meurs v. the Netherlands, Report op. cit., Forty-fifth session (A/45/40), vol.II, annex IX.F.


193 1913/63 v. Austria, 2 Digest of Strasbourg Case Law 438 (30 Apr 1965).

194 See the Axen case, 57 Series B 24-25. An example of the application of this exception is the case where the Euro. Comm. accepted closed hearing in the protection of a very nervous witness, see X. v. Norway, 35 Coll. Dec. 37, 50 (16 July 1970); see also, the observation of the European Court in Hakansson and Sturesson case, 171 Series A (21 Feb 1990) (discretion of domestic courts in deciding upon the waiver of the right to public trial); also H. v. Belgium, 127 Series A 36 (30 Nov 1987);
victim's lawyers to gain access to basic elements of the trial and allowed military authorities to control the evidence submitted. The Commission held that these military judicial proceedings abused the recourse to secrecy.195

iv. "Minimum Guarantees" for a Fair Trial:

As long ago as 1791, the fifth and sixth Amendments to the US Bill of Rights incorporated a number of safeguards in the administration of criminal justice specifying the fundamental rights and freedoms of the individual, viz.-

V. [No person shall be] subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself......

VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.......and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.'

Today, these safeguards together with some others have been categorically declared by the major human rights treaties as the 'minimum guarantees' or 'minimum rights' to be accorded to an accused in the administration of criminal justice. Without enumerating specifically what these guarantees or rights are, the Universal


In another case the Commission found that the failure to publicise Special Court trials in the plenary stage violated the right to a public hearing, Guatemala Report 1983 at 91.
Declaration of 1948 stipulated that an accused on trial must have had 'all the guarantees necessary for his defence'.\textsuperscript{196} This task was later carried out by all most all the major treaties by setting out lists of such guarantees or rights to which a person charged with a criminal offence is entitled. It may, however, be noted that a number of such minimum rights or guarantees for ensuring a fair trial has already been given separate treatment in relation to the element of 'Equality of Parties' in the preceding discussion.\textsuperscript{197}

In the following sections a brief inquiry will be made into the principal provisions regarding the other important rights and guarantees termed to be "minimum' for a fair criminal trial.

\begin{itemize}
  \item[(a)] \textbf{Right to Notice}:
  \end{itemize}

The minimum guarantee or right of the accused with regard to notice is to "be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".\textsuperscript{198} The Human Rights Committee observed that "the right to be informed of the charge 'promptly' requires that information be given as soon as the charge is first made by a competent authority". In the opinion of the Committee, this right must arise when in the course of an investigation "a court or an authority of the prosecution decides to take procedural steps against a person

\textsuperscript{196}Art.11(1); the American Declaration does not, however, make any comparable provision.

\textsuperscript{197}Namely- the right to adequate time and facilities for the preparation of defence and to counsel of one's own choosing; the right to examine witnesses; and the right to be present and to participate in the proceedings.

\textsuperscript{198}Art.14(3)(a) of the CP Covenant; similar provisions have also been made in Art.6(3)(a) ECHR and Art.8(2)(b) AmCHR.
suspected of a crime or publicly names him as such". In this regard, the European Commission has interpreted "cause" of the accusation to be the material facts which form the basis of the accusation. The "nature" of the accusation, on the other hand, refers to the legal character or classification of the material facts.

The right to notice is among the guarantees commonly protected by all the major relevant treaties. But it may be noticed that whereas the CP Covenant and the European Convention both require that such notification must be made 'promptly' 'in a language which he understands', the American Convention does not make any such requirement and requires a 'prior' instead of 'prompt' notification. Again, the provisions of the Covenant or the Conventions relating to the right to notice do not require authorities to translate the charges into the language the defendant understands. The European Court thus rightly acknowledged that a defendant who does not speak the court's language is put at a disadvantage if he is "not also provided with a written translation of the indictment in a language he or she understands".

(b) Right to prompt trial:

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200 See, X. v. Belgium, supra; also, Ofner v. Austria, supra.

201 E.g., see the comments of the European Commission in X. v. Austria, 2 Dec. and Rep. 68 (1973).

It is an essential pre-requisite for a fair trial that a person charged with a criminal offence be tried within a reasonable time. This right of the accused has been categorically included in the list of minimum guarantees or rights enumerated by all the four major treaties.\textsuperscript{203} Thus, the European Court has declared that the European Convention "stresses the importance of administering justice without delays which might jeopardise its effectiveness and credibility".\textsuperscript{204} With regard to the right to prompt trial the Human Rights Committee has stated in its General Comment: "This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered". The trial must proceed without "undue delay" at all stages including the appeal or review.\textsuperscript{205}

As regards the question as to when the time period begins and comes to an end in order to determine the reasonableness of the length of the trial, the European court has observed that this period begins at the "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", and this definition also "corresponds to the test whether the situation of the

\textsuperscript{203}See, Art.14(3)(c) of the CP Covenant; Art.6(1) of the European Convention; Art.8(1) of the American Convention; and Art. 7(1)(d) of the African Charter. Also, Art.XXIV of the American Declaration recognises every person's right to submit respectful petition to a competent authority and the right to obtain a prompt decision. It may, however, be noticed here that whereas the three regional treaties apply this provision to all trials, the CP Covenant confines its application only to criminal trials.

\textsuperscript{204}Moreira de Azevedo case, 189 Series A 19, para.74 (23 Oct 1990).

In a more recent case the European Court found violation of Art. 6(1) of the ECHR where the proceedings started in 1981 and ended in 1995: Mitap et. al. v. Turkey, E.Ct.H.Rs., judgement of 25 March 1996 (No. 6/1995/512/595-596).

[suspect] has been affected". At the moment at which the accused becomes certain of his or her legal position. In other words, the period lasts at least until acquittal, dismissal or conviction, or until the sentence becomes definite.

In determining what is a 'reasonable time', each case must be examined individually and the length of time must be judged not in its abstract but on the basis of particular facts and circumstances existing in each case. The European Court and Commission while applying the test of 'particular circumstances' have focused on a number of criteria including the complexity of the case, the conduct of the applicant, the conduct of the authorities, and the interest of the applicant being at stake in the proceedings.

(c) Freedom from self-incrimination:

The right against self-incrimination, which may be traced for its roots in the English common law, has been considered as "one of the great landmarks in man's struggle

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207 Eckle case, supra.

208 See, for instance, Neumeister case, supra; Union Alimentaria Sanders SA case, 157 Series A (7 July 1989); Buchholz case, 42 Series A (6 May 1981); and Bock case, 150 Series A (29 March 1983). See also, Wemhoff v. FRG (2122/64)Judgement: 1 EHRR 55; Ringeisen v. Austria (2614/65)Report: 19 March 1970, Judgement: 1 EHRR 455; (period to be counted from the day of the applicant's arrest)Dr. X. v. Austria (2278/64)CD 24, 8; Haase v. FRG (7412/76)DR 11, 78; Hätti v. FRG (6181/73) Report: DR 6, 22. Similar tests have also been applied by the Inter-American Commission, see, e.g., Case 10-037, Inter-Am. C.H.R., 36 OEA/Ser.P/AG/doc.2518/89 (1989).
to make himself civilised". This right has been included within the list of minimum guarantees under the international Covenant on Civil and Political Rights and the American Convention on Human Rights.\textsuperscript{210} Art.14(3)(g) of the CP Covenant thus categorically requires that no one shall be compelled to testify against himself or to confess guilt. It is important to note that in upholding this right, the provisions against torture and ill-treatment during detention must be given proper consideration.\textsuperscript{211} The HR Committee thus specifically observes that the law should require that “evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.”\textsuperscript{212}

Similarly, Art.8(2)(g) of the American Convention guarantees the accused the right not to be compelled to be a witness against himself or to plead guilty. Art. 8(3) provides that a confession of guilt by the accused shall be valid only if it is made without coercion of any kind. The Inter-American Commission thus observed that this right of an accused is violated when a confession is obtained during a thirty-day


\textsuperscript{210}No comparable specific reference to this right has been made under the European Convention or the African Charter.

\textsuperscript{211}See, e.g., Conteris v. Uruguay, Report of the HR Committee, ORGA, Fortieth session (A/40/40), annex XI.

\textsuperscript{212}ORGA, Thirty-ninth session, Supp. No. 40, para.146, (A/39/40), 1984. In this connection see the provisions contained in Art. 15 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment which closely reflects the above interpretation; similar provisions may also be found in Common Article 3 of the Geneva Conventions and in Art.32 of the Fourth Geneva Convention.
incommunicado detention, or when the defendant before a special court is required to give a categorical answer to all the charges against him.

(d) Right to an Interpreter:

It is also a minimum guarantee or right of an accused for ensuring a fair trial that he must be provided with free assistance of an interpreter if he does not understand the language of the court. This right applies to all stages of the proceedings, including the pre-trial proceedings as well as the appellate stages.

It should be noted that the right to free interpreter does not entitle an accused on trial to express himself before the court or to have the proceedings conducted in the language which he normally speaks or speaks with most ease, such as his mother tongue, if such person is sufficiently proficient in the court's language.

v. The Right to Presumption of Innocence:

Although, in its widest sense, the doctrine of presumption of innocence gives rise to an independent right in itself applicable in all stages of the administration of criminal

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215 Provisions in this regard have been made under Art.14(3)(f) of the CP Covenant; Art.6(3)(e) of the European Convention; and Art.8(2)(a) of the American Convention.

216 Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, supra; see also the observation of the European Court in the Kamasinski case, supra.

217 See the comments of the HR Committee in Guesdon v. France, Report of the HR Committee, ORGA, Forty-fifth session (A/45/40), vol.II, annex IX.G.
justice, it holds its greatest importance and is directly relevant in the trial processes of an accused and hence should be considered as an essential element of the concept of fair trial.

The doctrine of the presumption of innocence has been recognised as 'a central safeguard against the exercise of arbitrary power by public authorities' from at least 1789 when Art.9 of the French Declaration proclaimed that 'Every man being counted innocent until convicted...'. Art.11(1) of the Universal Declaration of Human Rights protects the right of an accused held on a criminal trial "to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". Similar provision has also been made in Art.XXVI of the American Declaration of Human Rights which provides that every accused person 'is presumed to be innocent until proved guilty'. These provisions regarding the right of presumption of innocence have now been established as the positive legal norms of international human rights law by incorporating them into the CP Covenant as well as the three regional treaties. Explaining the provisions regarding this right of an accused, the HR Committee has stated that during trial the presumption of innocence operates by placing the burden of proof on the prosecution and by giving the accused the benefit of doubt. The Committee has commented, "No guilt can be presumed until the charge has been proved beyond reasonable doubt........It is therefore the duty of all public authorities to refrain from prejudging the outcome of a trial." The Inter-American Commission observed in this regard that reversal of the burden of proof and placing

\[218\] See, Paul Sieghart, The International Law of Human Rights, supra, at .296.

\[219\] See, Art.14(2) CP Covenant; Art.6(2) European Convention; Art.8(2) American Convention; and Art.7(1)(b) African Charter.

the burden on the defendant to prove that he is not guilty violates the right to be presumed innocent until proven guilty.221

In determining the scope of this right, the European Commission has stated that the presumption of innocence deals only with the proof of guilt and not with the kind or level of punishment222 Again, suspects have the right to be presumed innocent not only during the trial itself but also preceding the trial and thus the presumption is binding for the judge presiding over the suspect's trial as well as any other public officials that might deal with the case in any way.223

vi. Other Elements:

Apart from the above elements, a number of other procedural and substantive rights and guarantees may be considered as integral parts of the concept of a fair trial and it is desirable to refer to some of these elements in the present context.

a] The Right to Appeal:


222 Thus, for instance, when a domestic court decides upon what penalty to impose, it may take into consideration factors relating to the individual's personality. See, Engel and Others v. the Netherlands, 22 Series A, 83-84(8 June 1986) at 38 para.90.

An element of great importance for ensuring a fair trial is the right of a person convicted of a crime to appeal the judgement to a higher court of law. Art.14(5) of the CP Covenant provides that everyone convicted of a crime shall have the right to his conviction or sentence being reviewed by a higher tribunal according to law. Art.8(2)(h) of the American Convention includes this right to appeal within the list of 'minimum guarantees' for a fair trial. The African Charter, in its Art.7, provides for "the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force". Although the European Convention does not make any specific provision regarding the right to appeal as an essential condition for a fair trial, it is clearly the intention of the Convention that the right to 'a fair and public hearing' would include a right to appeal. While dealing with this issue, the European Court in a number of cases established the principle that the protection afforded by Art.6 regarding a fair trial does not cease with the decision of the court of first instance. The underlying principle is obviously that the right to due process of law requires full judicial observance of all rights, not only during investigation and trial at the lower court but in all stages of appeal or review.

b] Freedom from Double-Jeopardy (non bis in idem) :

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The doctrine of *non bis in idem* derives from the principle that once the verdict in a criminal proceeding admits of no further appeal, the person concerned cannot be prosecuted for the same act again by a criminal court since this would represent violation of the *res judicata*, there being an identical subject, an identical case and identical parties.

Recognising this principle in explicit terms, Art.14(7) of the CP Covenant provides that a person may not be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law. Similar provisions have also been made by the American Convention of Human Rights which in its Art.8(4) provides: "An accused person acquitted by a non-appealable judgement shall not be subjected to a new trial for the same cause." No comparable provision has, however, been made either in the European Convention or the African Charter. It may also be noticed here that while Art.17(7) of the CP Covenant provides protection against double jeopardy in the case of both final convictions and acquittals, Art.8(4) of the American Convention applies this protection only in the case of final acquittals.

With regard to the fact that the European Convention omits to guarantee application of the *non bis in idem* principle as a recognised and protected right, a few points are important to be noted here. There are various systems of law in Europe and the Community, containing provisions based on the *non bis in idem* principle. But, at the same time, this principle lays the basis for various conventions of the Council of Europe, including the European Convention on Extradition of 1957, the

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227 These instruments have, however, so far only been ratified by a small number of the member States of the Council of Europe.
European Convention on the international validity of criminal judgements of 28 May 1970,\textsuperscript{229} and the European Convention on the transfer of proceedings in criminal matters.\textsuperscript{230} Moreover, the European Parliament has pointed out that, according to the jurisprudence of the Court of Justice of the European Communities in the sphere of protection of basic rights, the Community law recognises the principle of \textit{non bis in idem} as an integral part of the system of general legal principles guided by the constitutional traditions common to the member states and that therefore no exceptions may be made to the application of this principle.\textsuperscript{231}

However, one interesting point to be noticed here is that the European Court of Justice seems to adopt a much broader approach with regard to the application of the principle than the view of the HR Committee which, in interpreting Art.14(7) of the

\textsuperscript{228}Art.9 of the Convention provides that extradition shall not be granted if final judgement has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested.

\textsuperscript{229}Art.53 of the Convention states a general principle that a person on whom a criminal sentence has been passed, may, for the same act, neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another contracting state if he was acquitted or if the sanction imposed has been completely enforced or is being enforced or he has been granted a pardon or an amnesty or the sanction can no longer be enforced because of lapse of time. The same applies if the court has convicted the offender without imposing a sanction.

\textsuperscript{230}Arts. 35 to 37 of this Convention, which came into force on 30 March 1978, contains \textit{non bis in idem} rules identical to those contained in the Convention on the international validity of criminal judgements.


CP Covenant, observed that the Article prohibits only double jeopardy for an offence adjudicated in a given state and consequently, an individual may be tried in two separate states for the same offence. 232

[c] Freedom from *ex post facto* Penal Laws:

Art.8 of the French Declaration of 1789 provided that 'no one ought to be punished but by virtue of a law promulgated before the offence'. This principle was contained in the US Constitution even before the passage in 1791 of the ten Amendments constituting the US Bill of Rights, stating that 'no Bill of Attainder or *ex post facto* law shall be passed'. The object of the principle is that no one should be prejudiced for any conduct by changes in the domestic laws of a state, such as by creating new offences or imposing heavier penalties, after that conduct has occurred.

Recognising the principle the Universal Declaration of Human Rights declares that individuals cannot be held guilty under *ex post facto* laws and must not be subjected to heavier penalties.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

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232 A. P. v. Italy, Report of the HR Committee, ORGA, Forty-third session (A/43/40), annex.VIII.A. In this context, an interesting provision has been made in the Statutes of the Yugoslav Tribunal (Art. 10) that the principle only bars subsequent prosecution before national courts, following a conviction or acquittal by the International Tribunal. But it does not bar a subsequent prosecution before the Tribunal, if the act for which the person was accused before the national court was characterised as an ordinary crime, or where the national court proceedings were not impartial, independent or, were otherwise designed to shield the accused from international criminal responsibility; for a useful reference to the Tribunal, see, “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991: Basic Documents”, UN Pub. Sales No. E/F/95.III.P.1.
penalty be imposed than the one that was applicable at the time the penal
offence was committed.\(^{233}\)

The American Declaration of Human Rights also recognises these provisions
regarding freedom from *ex post facto* penal laws when it provides under Art.XXVI
that every person accused of an offence has the right "to be tried by courts......in
accordance with pre-existing laws...." These provisions have then been substantially
amplified by embodying them in the CP Covenant as well as in all the three major
regional human rights treaties.\(^{234}\) Additionally, the CP Covenant and the American
Convention recognises the right to benefit by a provision in the law made subsequent
to the commission of the offence which imposes a lighter penalty.

The first part of these guarantees, namely- freedom from retroactive application of
criminal law, embodies the principle *nullum crimen sine lege*. A corollary to this
principle is that a law which has been abrogated cannot form the basis of a criminal
conviction if the acts were committed after the abrogation had taken effect, because
a conviction in those circumstances would relate to an act or omission which did not
constitute a criminal offence under national law at the time when it was committed. It
is thus an implied but obvious requirement of international human rights norms in this
regard that no distinction should be made between an act or omission which 'no
longer constituted' a criminal offence, and an act or omission which 'did not yet'
constitute one. For this purpose, it is immaterial whether the abrogation of a criminal
law be express or implicit provided that the latter form of abrogation exists in the
domestic legal system of the state concerned.\(^{235}\)

\(^{233}\)Art.11(2) of the Universal Declaration.

\(^{234}\)See, Art.15(1) of the CP Covenant; Art.7(1) of the European Convention; Art.9 of the American
Convention; and Art.7(2) of the African Charter.

\(^{235}\)See the observation of the European Commission in X. v. FRG (1169/61)CD 13, 1; X. v.
Netherlands (7721/76)DR 11, 209.
The second part of these provisions, regarding prohibition against heavier penalty and provision for benefiting from subsequent legislation for lighter penalty, raises a question whether it contradicts the basic assumption that a penalty should be that which was authorised by the law in force at the time of its imposition. "The trend in modern criminal law, however, is to allow a person to enjoy the benefit of supervening lighter penalties."\(^{236}\) Since the laws imposing new and lighter penalties are the concrete expression of some change in the community toward the offence in question, it would appear proper to allow the offenders to enjoy the benefit arising there from.\(^{237}\)

V. FREEDOM FROM ARBITRARY ARREST AND DETENTION:

One significant dimension of the right to personal liberty, one of the most fundamental of all human rights, and the area that reveals the most consistent

\(^{236}\)Haji N. A. Noor Muhammad, supra, p.164.

\(^{237}\)See, 10 GAOR Annexes, UN Doc. A/2929 (1955)esp. para.95.


It is, however, a surprising fact that despite the growth in the number of cases which have reached the European Court of Human Rights in recent years, until the first case of Kokkinakis v. Greece (E.Ct.H.Rs. 1993, Series A, No. 260-A) Article 7 of the ECHR remained one of the Articles of the Convention that had not been subject of consideration in any cases before it. See, Ralph Beddard, "The Rights of the “Criminal” under Article 7 ECHR”, 21 E.L.Review (1996)pp. 3-13.
violation of these rights throughout the history of mankind, is freedom from arbitrary
arrest and detention. "Protection against arbitrary arrest and detention is clearly the
central feature of any system of guarantees of the liberty of the individual".238 The
concept of personal liberty, particularly in the context of freedom from arbitrary
arrest and detention, was recognised in a number of early European documents,
including the Magna Carta, the Petition of Rights and the Habeas Corpus Acts of
England, and the French Declaration of the Rights and Duties of Man and the
Citizen. These historical documents not only represented one of the first important
steps towards the recognition of the right to freedom from arbitrary arrest and
detention, but also formed the foundation upon which the provisions in this regard in
the modern human rights instruments rest today.239

The Universal Declaration of Human Rights thus lays down the general principle by
providing in its Art.3 that "[e]veryone has the right to life, liberty and security of
person", and in Art.9 that "[n]o one shall be subjected to arbitrary arrest, detention
or exile." Similarly, Art.XXV of the American Declaration guarantees that any
person deprived of his liberty has the right to have the legality of the detention
promptly reviewed by a court and prohibits detention except according to procedures
established by pre-existing law. These provisions of the Declarations have now been
given the force of treaty law by incorporating them into the CP Covenant as well as
the three regional human rights treaties. Accordingly, Art.9(1) of the CP Covenant
prohibits "arbitrary arrest or detention" and declares that any arrest or detention must
be "on such grounds and in accordance with such procedures as are established by
law". Similar provisions as those in Art.9 of the CP Covenant have been made under
Art.5 of the European Convention, Art.7 of the American Convention and Art.6 of

238F. Jacobs, supra, p.75.

239For a general discussion on the historical antecedents of this concept, see, Laurent Marcoux, Jr.,
Protection from Arbitrary Arrest and Detention under International Law, in Boston College

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the African Charter. Additionally, while Art.9(1) of the Covenant requires that no one shall be deprived of his liberty by arrest or detention "except on such grounds......as are established by law", Art.5(1) of the European Convention specifically provides for six cases which may be taken as the only legal grounds for depriving a person of his liberty. These are:

i) the lawful detention of a person after conviction by a competent court;

ii) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

iii) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

iv) the detention of a minor by lawful order for the purpose of bringing him before the competent legal authority;

v) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

vi) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Very briefly, what have been required under the European Convention are three successive conditions to be satisfied in each and every case of arrest and detention, namely- a substantive legal basis, a procedure prescribed by law and one of the
specific grounds set out in Art.5(1)(a) to (f) of the Convention. Moreover, in one of its most significant judgement in this regard, the European Court made quite clear that any deprivation of liberty must in all cases be accompanied by effective judicial legal protection. Again, as expressly stated by the European Court, these special situations in which arrest and detention are permissible must be taken as an exhaustive list.

While providing for the right to freedom from arbitrary arrest and detention, the relevant international treaties enumerate a number of formal guarantees for persons who have been deprived of their liberty. Art.9(2) of the CP Covenant thus protects anyone arrested or detained notwithstanding the nature of the charge, and provides that 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 charge against him." Art.9(3) then requires that everyone arrested or detained on a criminal charge "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". The Human Rights Committee in its General Comment on this provision recognises that more precise time limits are to be set by states but "delays must not exceed a few days."


Similar provisions have, however, been made under paras. (2) to (5) of Art.5 of the European Convention.

a. Right to judicial review of the legality of arrests and detention:

"Habeas Corpus" and "Amparo"

Habeas corpus, the "great writ", is often described as the "bulwark of individual freedom".244 The most central notion of this remedy is that it is a key to the protection of all other human liberties. It allows detainees to pursue a prompt judicial challenge of the lawfulness of their detention. It thus affords a two-fold protection to persons deprived of their liberty: first, the personal freedom of the detainee is protected through having the legality of the detention determined; and secondly, the life and physical integrity of the detainee is protected through the procedure of being brought before a judge.

The writ of amparo, on the other hand, is a Latin American writ enabling a claimant to seek protection from any governmental infringement of rights and duties. The scope of amparo is thus much wider than that of the habeas corpus. While amparo can be used to challenge illegal detention, like the writ of habeas corpus, it can also be used as a remedy against violation of other basic rights and freedoms. In other words, the writ of amparo includes habeas corpus as one of its components, although in some cases habeas corpus functions as an independent remedy.

The concept of the judicial review of detention can be traced as far back as the Roman times and can be seen in different forms throughout the legal history. Among the later developments of the writ of habeas corpus, we may refer to the Habeas Corpus Acts of England in 1640 and 1679, which codified and to some extent

perfected this ancient remedy. These Acts enabled a citizen to employ a habeas corpus proceeding to challenge detention by the King and Council. This writ was then eventually accepted by the British common law system as the standard procedure by which the legality of any imprisonment could be tested.

The writ of amparo, on the other hand, is comparatively a later development. As to the origin and meaning of the term 'amparo' at least three different arguments may be found. Firstly, the term was used as a synonym for "remedy" or means of challenging judicial decisions. It first appeared in a compilation, named as the Siete Partidas, ordered by Alfonso the Wise (1221-84), and greatly influenced the laws of the Spanish American colonies. Secondly, the term "amparo" was utilised to designate a kind of injunction which in the majority of cases, according to Spanish law, would lie to protect real property rights; on occasion, however, it was employed to safeguard personal rights as well. Finally, the third meaning of the amparo relates to its role as a procedural instrument for securing the rights of the individual.

However, although the amparo provisions, contained in most major human rights instruments, provide a simple remedy to protect individuals against abusive acts of any authority, the writ has been applied in Latin America much more widely. We may refer, for instance, to two basic categories of the Latin American amparo. First, the writ of amparo has been used by the majority of Latin American jurisdictions to safeguard all human rights established in their respective national constitutions, with

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245 For an account of the early history of the writ of habeas corpus, see Cohen, Some Considerations on the Origins of Habeas Corpus, 16 Can. B. Rev. 92(1938); also, Jenks, The Story of Habeas Corpus, 18 L. Q. Rev.64 (1902).

246 Describing the significance of these Acts Dicey observed that "the Habeas Corpus Acts were for practical purposes worth a hundred constitutional articles guaranteeing individual liberty", A. Dicey, Introduction to the Study of the Law of the Constitution(10th ed. 1965), p.199.

the exception of personal liberty, which is protected by the writ of habeas corpus. In a few jurisdictions, such as Nicaragua, Honduras and Guatemala, the amparo may also be employed to challenge the constitutionality of laws. On the other hand, however, the right of individuals to a writ of habeas corpus has been recognised by a great number of national constitutions throughout the world and provisions equivalent to this writ have been incorporated into some of the major international instruments on human rights.

b. Sources of international Amparo and Habeas Corpus norms:

i. Amparo:

The process of recognising the writ of amparo as a positive rule of international human rights law began with Art.XVIII of the American Declaration of the Rights and Duties of Man in 1948, which declares:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

In the same year, a similar provision was incorporated into Art.8 of the Universal Declaration of Human Rights:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by the law.

248 However, the effect of a declaration of unconstitutionality is limited to the litigants of that particular case, see ibid, at 366.
These provisions were then implemented as treaty rules by most of the major international human rights treaties. Thus, Art.2(3) of the CP Covenant imposes the obligation on its States Parties to ensure:

a] that persons whose rights and freedoms set out in that Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b] that the right to such remedy must be determined by competent judicial, administrative, legislative or other authorities provided for by the particular legal system and that possibilities of judicial remedy will be developed; and

c] that the competent authorities shall enforce such remedies when granted.

Unique to the Inter-American system is the provision of amparo, which incorporates the habeas corpus right in some cases. Art.25(1) of the American Convention sets forth the procedural institution of amparo, which is "a simple and prompt recourse before a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties". Art.25(2) of the Convention then contains provisions identical to those under Art.2(3) of the CP Covenant.

Recognition of amparo rights may also be found in Art.13 of the European Convention which provides for everyone whose rights and freedoms as set forth in that Convention are violated to have "an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Although the European Convention is less elaborate in containing provisions equivalent to amparo, it appears that the words "effective remedy" have been intended to receive a broad interpretation with the effect that protection of
amparo rights has been ensured to a similar extent as those, e.g., under Art.2(3) of the CP Covenant. The African Charter, however, does not make any express provisions in this regard, although Art.26 of the Charter creates a duty on the part of the States Parties to "allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed" by the Charter. Also, Art.7(1)(a) of the Charter can be read to provide relief against violations of fundamental rights: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by Conventions, laws, regulations and customs in force."

**Habeas Corpus:**

Art.9(4) of the CP Covenant expressly provides for provisions recognising the right to a writ of habeas corpus. It reads:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.²⁴⁹

Similar provisions have also been made under Art.5(4) of the European Convention and Art.7(6) of the American Convention. Art.7(6) of the American Convention additionally provides that: "In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in

²⁴⁹ In the earlier drafts of the Covenant, Art.9(4) included the words "in the nature of habeas corpus", which were later deleted to allow states the freedom to fashion remedies through their own legal systems.
his behalf is entitled to seek these remedies." Art.XXV of the American Declaration guarantees that any person deprived of his liberty has the right to have the legality of the detention promptly reviewed by a court and prohibits detention except according to procedures established by pre-existing law.

An effective remedy in the nature of habeas corpus can also be inferred from Art.6 of the African Charter which protects the right to liberty and security of person and provides that "No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Similarly, as noted earlier, Art.7(1)(a) of the Charter provides relief against violations of fundamental rights, such as freedom from arbitrary deprivation of liberty.

A habeas corpus provision may also be found in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, requiring that any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.\(^{250}\)

A question may, however, arise as to the meaning of the terms 'court', 'prompt' judicial review or remedies 'without delay' etc. with regard to the above provisions and a degree of disagreement between international human rights monitoring bodies in the interpretation of these terms may be observed here. Thus the European Court seems to apply a rather liberal interpretation of the requirements of the term 'court' in this regard. As a basic test it adopts the view that the authority in question must possess a judicial character, independent of the executive and the parties; must have jurisdiction to control all aspects of the decision to detain whether relating to fact or law; and must have power to release the detainee if needed. Accordingly, unlike the

\(^{250}\) See, Principal 4; see also Principle 11.
attitude of the HR Committee in this respect, in the opinion of the European Court military tribunals, even with military personnel, may be sufficiently independent to be considered a "court".

Again, the Human Rights Committee seems to hold the similar restrictive attitude towards the issue of delay in habeas corpus proceedings. The Committee held that a seven-day detention with no opportunity to challenge the detention before a court violated Art.9(4) of the CP Covenant.

c. Rights relating to conditions of detention:

251 See, Vuolanne v. Finland, Report of the HR Committee, ORGA, Forty-Fourth session (A/44/40), annex. X.J. (only a ‘court of law’, and not a military tribunal, can determine the legality of detentions).


On the other hand, in interpreting the habeas corpus provisions, the Inter-American Commission has apparently not defined the precise period which would qualify as a "prompt" review of a person's loss of liberty although the Commission called a five-day delay in responding to habeas corpus writ "very long", see case 7864, Inter-Am. CHR, 65, 72, OEA/Ser.L/V/II.71, doc.9 rev.1 (1987) and found a law authorising a 15-day detention without judicial review to be violation of a detainees rights, see, Status of Human Rights in El Salvador, Inter-Am. CHR, 154, OEA/Ser.L/V/II.68, doc.8 rev.1 (1986). The Commission, however, expressly prohibits indefinite pre-trial detention and holds that failing to set a time-limit for the release of a prisoner held without charge or for announcing the nature of the accusations violates the detainees rights; see, Report on the Situation of Human Rights in Paraguay, Inter-Am. CHR, 53, OEA/Ser.L/V/II.43, doc.13 (1978).
Almost all the major treaties make some specific provision regarding the treatment of persons who have been deprived of their liberty in the course of the administration of justice. Thus, Art.10(1) of the CP Covenant requires that such persons 'shall be treated with humanity and with respect for the inherent dignity of the human person'. Art.10(2) then provides that save in exceptional circumstances, accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; particular attention has also been paid to accused juveniles in custody requiring that they shall be separated from adults and brought as speedily as possible for adjudication. Almost identical provisions have been made under Art.5 of the American Convention on Human Rights.

Unlike the CP Covenant or the American Convention, however, neither the European Convention nor the African Charter contains any specific provision on the treatment of detained persons. Their respective monitoring organs have, therefore, no jurisdiction as such to examine the conditions of detention except in so far as they involve a breach of a right generally guaranteed elsewhere: for instance, as in the European Convention, Art.3 containing protection against torture and inhuman or degrading treatment; Art.4 as regards the obligation to work; Art.8 relating to private and family life and correspondence; Art.9 with regard to the freedom of religion; Art.10 as regards freedom of expression and receiving and imparting information; Art.12 in connection with marriage in prison; Art.1 of the First Protocol, the right to peaceful enjoyment of one's possessions; Art.2 of the same Protocol relating to the right to education; and finally Art.3, the right to participate in free elections. Thus, for instance, discrimination in the conditions of detention could be contrary to Art.14 combined with Art.5 of the European Convention. A relatively large number of decisions by the organs of the European Convention are,

254 Commenting on this provision the UN HR Committee noted that the separation of juveniles from adults in detention is an "unconditional requirement of the Covenant."); CCPR/C/21/Add.1, para.6, 1982.
however, to be found on these various provisions and their application to prisoners.\footnote{255}

Two bodies of detailed international Rules for the treatment of Prisoners have been so far adopted by the UN and the Council of Europe, namely- the Standard Minimum Rules for the Treatment of Prisoners,\footnote{256} and the European Prison Rules.\footnote{257}

Thus, for instance, an illustrative echo of the positive legal norms under Art.10 of the CP Covenant as stated above (relating to the treatment of detainees) can be found in one of the Guiding Principles of the Standard Minimum Rules for the Treatment of Prisoners: "Imprisonment and other measures which result in cutting off an offender from the outside world are, by the deprivation of liberty, a punishment in themselves. Therefore, the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation. The regime of the institute should seek to minimise any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings."\footnote{258}

\footnote{255}{For a useful reference to the collection of these decisions, see the Council of Europe's Human Rights File No.5, Conditions of Detention and the European Convention on Human Rights and Fundamental Freedoms, Strasbourg 1981, DDH (81)2.}

\footnote{256}{Adopted by the first UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and endorsed by the ECOSOC resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. For a useful reference to this and other relevant instruments, see UN Doc. E/CN.4/Sub.2/1991/26 (20 June 1991). For the relevant provisions refer particularly to Rules 84-93 of the instrument.}

\footnote{257}{Adopted first by the Committee of Ministers of the Council of Europe in 1973; the current revised version has, however, been adopted on 12 Feb. 1987 by Recommendation No.R(87)B of the Committee of Ministers. See particularly Rules 91-98 of the Prison Rules.}

\footnote{258}{Rule 58 of the Guiding Principles.}
Again, although these above Rules have no binding legal status, they have been said to express 'what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'.

Probably the far reaching standards governing the practice of arrest and detention and the treatment of persons under custody has so far been the UN's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. These Principles require that all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person (Principle 1) and that arrest, detention or imprisonment "shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorised for that purpose" (Principle 2). The Principles set out detailed provisions regarding the protection of detained or imprisoned persons, including prohibition against any restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment (Pr.3); application of these Principles without any discrimination of any kind (Pr.5); prohibition against torture or inhuman treatment or punishment (Pr.6); treatment of detainees in accordance to their unconvicted status (Pr.8); right to be informed of reason for arrest and of any charges against him (Pr.10); and right to prompt judicial review (Pr.11).

In 1990, the UN General Assembly adopted the Basic Principles for the Treatment of Prisoners, enumerating certain important provisions including the treatment of all

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261 Recommended for adoption by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Havana from 27 August to 7 Sept 1990 and by GA resolution 45/111 of 14 Dec 1990. These Principles have, however, been intended to remove the obstacles of various kinds in the full implementation of the Standard Minimum Rules.
persons with respect due to their inherent dignity and value as human beings (Principle 1) without any discrimination of any kind (Principle 2), and declare that except for those limitations that are demonstratively necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and all other relevant international instruments (Principle 5).

VI. Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Administration of Justice:

The right of a suspected, detained, accused or convicted person to freedom from torture or other forms of cruel, inhuman or degrading treatment or punishment forms a very significant part of the concept of human rights in the administration of justice. In its different forms, torture has always been practised in almost every part of the world and in every phase of its history, in particular as a method to obtain evidence for judicial proceedings. The practice of torture existed in almost all the legal systems as a "routine element" of criminal procedure. This picture was aptly drawn when an eighteenth Century legal philosopher wrote:

A cruelty consecrated by the practice of most nations is torture of the accused during his trial, either to make him confess the crime or to clear up contradictory statements, or to discover accomplices, to purge him of infamy in some

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metaphysical and incomprehensible way, or, finally, to discover other crimes of which he might be guilty but of which he is not accused.\(^{264}\)

The first major words of legal prohibition against torture and other cruel punishments appeared in the English Bill of Rights of 1688 declaring that 'cruel and unusual punishment ought not to be inflicted'. Then, a century later, the French Declaration of 1789 provided that 'the law should impose only such penalties as are absolutely and evidently necessary'. Similarly, the almost simultaneous Bill of Rights in America reverted to the English precedent, providing that 'cruel and unusual punishments' should not be inflicted.\(^{265}\) Since then, these provisions have been reflected in many national constitutions and this trend has been substantially intensified when the Universal Declaration of Human Rights came to serve as a model for many later modern constitutions.

However, from the very beginning of its development, international human rights law devoted a particular attention to this most fundamental right of the individual. Thus, in 1948, the Universal Declaration proclaimed in its Art.5 the basic principle that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This general principle has now been elaborated and amplified by a great number of treaty provisions and other instruments,\(^{266}\) including the CP Covenant (Art.7),\(^ {267}\) the European Convention (Art.3), the American Convention (Art.5), the

\(^{264}\) Cesare Beccaria, Essay on Crimes and Punishments (1764) in W. Laqueur & B. Rubin (eds), The Human Rights Reader, supra, at 78.

\(^{265}\) See the Eighth Amendment to the US Constitution (1791).

\(^{266}\) Provisions regarding the treatment of detainees which also include freedom from torture and other cruel treatment etc. have already been referred to above under the head 'conditions of detention'.

\(^{267}\) Stating first the 'general principle', Art.7 then adds: "In particular, no one shall be subjected without his free consent to medical or scientific experimentation."
African Charter (Art.5),\textsuperscript{268} the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Arts.2-4),\textsuperscript{269} and the Geneva Conventions of 1949 (Common Art. 3 and several other provisions).

The American instruments may be seen as unique in the wording of their provisions in this regard. Art.5 of the Convention, for instance, guarantees the 'physical, mental and moral integrity' of the individual while prohibiting torture and other cruel, inhuman or degrading treatment. Art.XXV of the American Declaration guarantees every person the right to humane treatment during the time he is in custody. Art.XXVI prohibits cruel, infamous or unusual punishment. This provision is unique in the sense that it makes no specific mention of 'torture' and uses the term 'infamous' and 'unusual', and also omits the expression 'treatment'.

The UN Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\textsuperscript{270} not only condemned but for the first time authoritatively defined both 'torture' and 'cruel, inhuman or degrading treatment or punishment'.\textsuperscript{271} In Art.2 of the Declaration any

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268 Art.5 of the Charter reads:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly......torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.
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271 Art.I(1) of the Declaration thus defines 'torture' as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has
\end{quote}
act of torture, or other cruel, inhuman or degrading treatment or punishment is declared to be a violation of the UN Charter. The Declaration denies states the right to permit or tolerate torture etc., even in cases of national emergency (Art.3). It calls upon states to institute effective measures to prevent the use of torture (Art.4) and to subject interrogation methods to general review (Art.6). Moreover, states should prohibit articles of torture by criminal law (Art.7). The training of law enforcement personnel should stress the condemnation of torture and ill-treatment (Arts. 5 & 11). Confessions obtained in such a manner may not be used as evidence (Art.12). The Declaration on Torture has now been given the sanction of a binding treaty by incorporating these international standards into the 1984 UN Convention against Torture.

Again, the Convention against Torture contains limited number of provisions which apply both to torture and to other acts of cruel, inhuman or degrading treatment or punishment. To mention but a few of them here, the Convention creates an obligation on the States Parties to prevent any such acts in any territory under its jurisdiction [Arts.2(1) & 16(1)]; to include the prohibition of all such acts in the rules of instructions issued with regard to the duties and functions of both civil and military law enforcement personnel as well as medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment [Art.10(2)]; to keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons under arrest, committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

For an interesting discussion on the scope and extent of this definition (which was, later, virtually adopted by the 1984 Convention against Torture), see Ahcene Boulesbaa, “Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the UN Convention against Torture”, 5 Florida Int.L.J.( Summer 1990) No.3, pp.293-326.
detention or imprisonment, with a view to preventing torture or any other acts of cruel, inhuman or degrading treatment or punishment [Art.11]; and to ensure prompt and impartial investigation of any alleged violation [Arts. 12 & 13]. As regards statements obtained by torture, the Convention categorically mentions that no such statements can be used as evidence in any criminal proceedings [Art.15]

At the regional level, the Inter-American Convention to Prevent and Punish Torture also requires states to take effective measures to prevent torture, to ensure that the prohibition against torture is included in the training of law enforcement personnel and other officials and to carry out proper investigations of all allegations of torture including bringing the perpetrators to justice and providing redress and compensation to the victims. The Council of Europe has also adopted an European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987 which established a Committee of a non-judicial and preventive character with a mandate to visit and 'examine the treatment of persons deprived of their liberty with a view to strengthening....the protection of such persons from torture and from inhuman or degrading treatment or punishment' [Art. 1].

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272 It may, however, be noted that although Articles 10-13 only refer to torture, Art.16(1) of the Convention provides that the obligations contained in these Articles also apply to other forms of cruel, inhuman or degrading treatment or punishment.

273 See also Principle 27 read with Principles 21, 24 &25 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.


As we have already noted earlier, the most detailed provisions regarding the treatment of detainees, particularly the unconvicted prisoners have been made in the UN Standard Minimum Rules and the European Prison Rules. These Rules include detailed directions for the maintenance of discipline, applicable to prisoners under sentence as well as prisoners awaiting trial and persons arrested or detained without charge.

Art.5 of the Code of Conduct for Law Enforcement Officials provides that no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

The UN Principles of Medical Ethics relevant to the role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment lays down a number of principles relevant to the role of health personnel in promoting and protecting the rights of persons under detention or imprisonment to be free from torture and other inhuman treatment. These Principles thus categorically declare it

277 Respectively under Rules 84-93 and 91-98.

278 Adopted by the UN General Assembly on 17 Dec. 1979 by reso. 34/169.


280 In this context reference may also be made to the Declaration of Tokyo of the World Medical Association, containing the Guidelines for Medical Doctors concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment, adopted by the twenty-ninth World Medical Assembly, held at Tokyo in Oct. 1975, which made a number of similar provisions.
to be an offence for health personnel to engage, actively or passively, in acts which constitute participation or complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment [Principle 2], and prohibits them from applying their knowledge and skills to assist in the interrogation of prisoners and detainees in a manner that may adversely affect their physical or mental health [Principle 4].

Interpreting the provisions regarding torture in the CP Covenant the Human Rights Committee has pointed out a number of treatments that may violate Arts. 7 & 10 of the Convention. These include: prolonged judicial proceedings, especially in capital cases; inadequate medical care; subjecting detainees or prisoners to compulsory medical experimentation; prolonged incommunicado detention; arbitrary restrictions on communication with family and friends, and so forth. The Inter-American Commission also emphasised on these grounds as the possible cases of violation of Art.5 of the American Convention and added a few more including- subjecting a person to Government actions which seriously harm his reputation or place a detainee in a prison which is overcrowded, filthy and primitive.

VII. 'Right to Life' in the administration of justice:


Summary Execution and Death Penalty:

The right to life has often been described as that area of international human rights law that poses the gravest and most urgent challenges to its most emphasised and pressing concern in protecting the life of every human being from unwarranted deprivation. The very concept of human rights in the administration of justice embraces not only the pre-trial and trial stages of criminal proceedings, but also its post-conviction stages. Thus, a person convicted of a criminal offence is still entitled to the right to freedom from cruel or other inhuman treatment or prohibited punishment. This right implies both the substantive and procedural aspects of penalties imposed for conviction of a crime. Thus, any punishment imposed in the criminal process must not be one prohibited by the relevant norms of international human rights instruments, or be carried out in a manner that is inhuman or degrading. And secondly, imposition of penal sanctions, particularly capital punishment, must be strictly in accordance with the established minimum procedural standards set forth in these instruments. Apart from this particular aspect of capital sentencing, there is another area where the right to life is threatened in the administration of justice, namely- the unlawful or excessive use of force by law enforcement officials. This approach to the right to life is of course a limited, specific and narrow one. However, in so far as the purpose of this research is concerned, the following inquiry will be limited only to this traditional 'restricted' approach of the right to life.283 This

283 The modern dynamic approach of the right to life is based on the argument that the scope of the right transcends its traditional 'restrictive' ambit of safeguards against arbitrary killing and includes such broad areas as the assurance of satisfaction of survival requirements in the area of food and health including reduction of infant mortality and increasing life expectancy, esp. by adopting measures to eliminate famine, malnutrition and epidemics, wars, use of thermo-nuclear weapons and so forth.
approach basically concerns such violations of the right as through arbitrary and summary executions, torture, enforced and involuntary disappearances, discriminatory rates of capital punishment imposed against members of minority or disadvantaged groups and so forth.

i. SUMMARY EXECUTIONS:

Generally speaking, summary execution is the practice of imposing and carrying out the death penalty in a manner which disregards the rules of natural justice or the due process of law. The proceedings leading to the execution may have a semblance of legality, but they fall far short of the minimum standard of procedural justice as recognised under the international human rights instruments.

Two closely related, and often used in conjunction with each other, concepts are "arbitrary execution" and "extra-legal execution". Whereas the former may be described as the arbitrary deprivation of life as a result of the killing of persons carried out by the order of a Government or with its complicity or tolerance or acquiescence without any judicial or legal process, the later generally refers to killings committed outside the judicial or legal process, and at the same time, illegal under relevant national and international laws.\textsuperscript{284} However, since our present work is concerned with the rights and freedoms arising in the administration of justice, which necessarily imply the involvement of a judicial or related legal process, our attention would be basically confined here to the concept of "summary executions".

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Thus, first of all, the question that essentially arises here is that what are the features and circumstances surrounding summary executions that tend to result in the most common violations of the right to life in the administration of justice. The UN Human Rights Committee undertook a study on this subject by a survey and the Report of the study\textsuperscript{285} indicated a number of general patterns of the practice of summary executions. In the present context, however, it is relevant to refer to some of those findings. Accordingly, the most common and serious form of summary executions is that where the sentence is pronounced by a special court, often termed as a 'peoples' court', 'revolutionary court', 'military tribunal' and the like, which in almost all cases not bound by the ordinary rules of procedure. In most cases, such courts sit \textit{in camera}, and emerges only to announce the sentence or the fact that it has already been carried out. An extreme form of the practice of summary execution is the parading of accused persons at mass rallies at which the crowds are incited to call for the immediate execution of the 'traitors' or 'counter-revolutionaries'.\textsuperscript{286} The UN Report mentioned a few other instances where the imposition, pronouncement or carrying out of a death sentence may amount to a summary execution, notably-

a) where executions are carried out without allowing time to appeal to a higher court or to seek pardon or commutation of the sentence;

b) where trials are held in secret in many cases, even without allowing close family members to attend;

c) where the accused is not given any opportunity to defend himself in trials nor is represented by his legal attorney;

\textsuperscript{285}ibid.

\textsuperscript{286}For instance, seven members of the \textit{Resistencia Nacional Mocambican} were publicly executed in Mozambique in January 1983 after being publicly questioned at a public rally at which 'the public demanded' their execution; see, Amnesty Action (news paper), March 1983 at 3.
d) where the accused is not given any opportunity to consult with his legal attorney before trial;

e) where the courts lack qualified judges to preside over trials and are not independent;

f) where death sentences are delivered for acts or omissions which did not constitute capital or any criminal offence at the time of their commission.

Although not amounting to summary execution as such, and rather amounting to arbitrary execution, the killing of people under detention often after torture, is another consistent pattern of the gross violation of the right to life relevant in the administration of justice.

**ii. Law Enforcement Abuses of Power**

Law enforcement agents in most countries of the world are provided with weapons and powers to ensure that they can perform their duties effectively. For example, they are empowered to arrest or to physically restrain suspected offenders to ensure that such suspects will be available in court on the day and time of their trial, or that they do not hamper on-going investigations into alleged offences by tampering with crucial evidence or by interfering with prospective prosecution witnesses. In course of doing so, an arresting officer is usually authorised to use force as is usually necessary to effect the arrest. Other examples may be set in the cases of preventing the escape of persons in lawful custody, quelling riots or disbanding unlawful assemblies etc. These laws, however, attempts to harmonise the public's interest in effective law enforcement on the one hand, and the suspect's right to personal integrity and life on the other. But, too often and in too many parts of the world the balance is tipped on the side of law enforcement to the total disregard of the individual's rights. Excessive force, often lethal, is employed by police and other law
enforcement agents in carrying out their duties, resulting in many cases in the death of innocent people. Even if where such unreasonable and excessive use of force causes death of a person who really committed an act apparently constituting an offence, it still offends against a cardinal rule of natural justice or the due process of law that no one may be punished unheard. Moreover, by killing a suspect in summary fashion by the excessive use of force, the officer concerned constitutes himself into a prosecutor, witness, judge and executor - all in one, which is 'monstrosity'. These killings are more arbitrary when the authorities fail to bring recalcitrant law enforcement officials to justice. \(^{287}\)

With a view to setting a body of international standards for determining the permissible and required conduct of the law enforcement officials, the UN General Assembly adopted a Code of Conduct for Law Enforcement Officials. \(^{288}\) The Code accordingly requires that all law enforcement officials shall respect and protect human dignity and the human rights of all persons in the performance of their duty (Art.2); that they may use force only when strictly necessary and to the extent required for the performance of their duty (Art.3); that they may not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment (Art.5); and that they shall ensure the full protection of the health of persons in their custody (Art.6). In this context, reference may also be made to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, \(^{289}\) which requires that whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall exercise restraint in such use, minimise damage and injury.

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and respect and preserve human life (Principle 5). These Principles further provide that law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a serious crime involving grave threat to life, to arrest a person presenting such a danger or resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives (Principle 9). They also prohibit law enforcement officials from using force on persons in custody or detention, except when "strictly necessary" for the maintenance of security and order within the institution, or when personal safety is threatened (Principle 15).

A similar formulation was, however, already made in the European Convention which, under Art.2(2), provides that deprivation of life shall not be regarded as inflicted in contravention of that Article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection.

iii. CAPITAL PUNISHMENT:

From the earliest days of the development of the rule of law and the administration of justice, capital punishment or death penalty has been meted out to persons convicted of serious crimes, especially murder, treason or other heinous offences against public order. Many schools of thought have since then been developed for and against the grounds that tend to justify the imposition of this punishment and
vice versa. To mention but a few of such arguments favouring capital punishment, there are the grounds that for particularly reprehensible crimes such as murder, death is the only appropriate penalty; that it serves the purpose of deterrence in the mind of would be criminals; and that in a long run it serves to protect the society at large from those who commit certain grave offences. On the other hand, arguments against death penalty includes such grounds as that execution itself is an act of violence, and that violence tend to provoke violence; that the imposition and infliction of the death sentence is brutalising to all who are involved in the process; that it has not been shown to have a more deterrent effect than, say, a long term of imprisonment; that it is an inhuman and degrading punishment; that it paves the way for abusing imposition of death penalty as well as other extra-judicial killings and unexplained disappearances; that it is frequently used as an instrument of repression against opposition, racial, ethnic, religious and other under-privileged groups; and that unlike other forms of punishment such as custodial sentences, execution is irrevocable and may be inflicted on the innocent.\textsuperscript{290}

It is not, however, within the scope of our present work to make an inquiry into these different schools of thought for and against capital punishment, or to propose a solution to these long-debated issues. It is rather intended here to review the existing norms of international human rights law regarding the imposition of death penalty in the administration of criminal justice.

The provisions of Art.3 of the Universal Declaration protecting the right to life surely cannot be construed to proscribe capital punishment.\textsuperscript{291} Moreover, Art.6 of the CP Covenant clearly contemplates the continued use by states of death penalty,


\textsuperscript{291}Nearly all the states voting for the Universal Declaration in 1948 countenanced it, as most states still do.
laying down six limitations on its imposition, as discussed below, stating categorically that nothing in that Article 'shall be invoked to delay or prevent the abolition of capital punishment by any State Party 'to that Covenant. While the intention of this provision seems to be that it would dispel any impression that mention of capital punishment in the Article supported or was intended to perpetuate it, it also probably implies that abolition of death penalty is the Covenant's ultimate desideratum and goal. In this regard, the CP Covenant thus 'reflects a more liberal spirit than the European Convention', although it is not as progressive as the American Convention which, in addition to setting forth several limitations on the imposition of death penalty, specifically provides that capital punishment 'shall not be extended to crimes to which it does not presently apply' and furthermore 'shall not be re-established in states that have abolished it'. Putting these provisions altogether, one may thus rightfully note 'a trend toward the abolition of capital punishment'. It should, however, be noted here that although the European Convention does not expressly mention anything about the abolition of death penalty, the Council of Europe has adopted a Sixth Optional Protocol to the European Convention which, in its Art.1, abolishes the death penalty in peace time.

292 Art.6(6) of the CP Covenant.


294 Art.4(2) & (3) of the American Convention. Paragraph (4) of Art.4 of the Convention contains another unique proviso that 'In no case shall capital punishment be inflicted for political offences or related common crimes', a provision which does not have any counterpart at the international level.


296 The text of the draft Protocol was adopted by the Committee of Ministers at its 354th meeting (6-10 Dec. 1982) and has been opened to signature by Member States of the Council of Europe on 28
iv. Controls on the Imposition of Death Penalty:

The death penalty must be imposed subject to the standards of controls developed by the international human rights instruments. The first control, contained in Art.6 of the CP Covenant, requires that it may be imposed only for the 'most serious crimes'. The Covenant is, however, silent on what these 'most serious crimes' are and the use of this phrase really stands for being objected as a vague formulation since the concept of serious crimes markedly differ from one country to another. In the absence of a universally accepted code of morality, the Covenant left it to each state, guided by its national values and the social and cultural outlook, to determine for itself what the most serious crimes were. It is, however, still possible to deduce some relevant and useful considerations from this 'vague' formulation of the phrase used in the Covenant.

Obviously, what is of great importance here is the interpretation of two separate terms used in the phrase, i.e., the word 'crime' and its qualifying adjective 'most serious'. As far as the 'seriousness' is concerned one must admit that due to lack

April 1983; Council of Europe Doc. H(83)3 Explanatory Report p.5. The Protocol entered into force on 1 March 1985. For a recent evaluation of the provisions of that Protocol, see Report on the Abolition of the Death Penalty in Europe (Committee on Legal Affairs and Human Rights, rapporteur: Mrs. Wohlwend) of 25 June 1996, Parliamentary Assembly Document 7589. Also, on 25 May 1998, the Council of Europe has adopted a Declaration (including guidelines to EU policy towards third countries) regarding the death penalty which states that the objective to work towards the universal abolition of the death penalty is a 'strongly held policy now agreed by all EU Member States', see 16 NQHR (No. 3) 1998 at 381.

297See, the objections raised in this regard in the course of the drafting of Art.6 in the Third Committee of the UN General Assembly, Tenth Session, Draft International Covenants on Human Rights, Annotations prepared by the Secretary General, UN Doc. A/2929, p.84, para.6.
of international standards in this regard, states enjoy a complete freedom in qualifying a crime as 'serious' or 'most serious'. Nevertheless, it is clear from the interpretation of the term by the Human Rights Committee that the clause 'most serious crimes' must be read restrictively to mean that the death penalty should be 'a quite exceptional measure'. Moreover, in no event should the death penalty be imposed for crimes of property, economic crimes, political crimes or in general for offences not involving the use of force. Also, a similarly narrow interpretation must be applied to the term "most serious crime" in Art. 2(1) of the Second Optional Protocol which allows for reservations to the abolition of capital punishment in time of war.

On the contrary, states are not entirely free in qualifying a certain behaviour a 'crime'. It would be impossible for any state to make the exercise of a right protected under the Covenant a capital offence. Art. 6 stipulates that the law imposing capital punishment should not be 'contrary to the provisions' of the Covenant. If, e.g., the law makes it a capital offence 'to manifest one's religion or belief....' thus violating Art. 18 of the Covenant, it is unlawful under Art. 6, para.2.

However, in view of the fact that the range of capitally punishable offences is growing wider every year and, consequently, the 'most serious crimes' formula has proved to be ineffectual as a check on the state's proneness to resort to capital punishment, the UN General Assembly resorted to devise an alternative approach. This approach calls for the progressive restriction of the number of offences for

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299 Cf. the references to the comments made by Committee members in studying State reports, in Dinstein, "The Right to Life, Physical Integrity and Liberty", in Henkin, supra note 3, at 118.
300 Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) at 118.
301 See, R. Sapienza, 'International Legal Standards on Capital Punishment', in B.G. Ramcharan, supra, at 286.
which capital punishment may be imposed. In 1984, the UN Economic and Social Council endorsed the "Safeguards guaranteeing protection of the rights of those facing the death penalty" which articulated almost all the provisions contained in the CP Covenant with regard to capital punishment. However, while restricting the imposition of capital punishment only to the 'most serious crimes', Art.1 of these Safeguards adds that "it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."

Another important control under Art.6 of the Covenant on the operation of capital punishment in the administration of justice requires that the sentence of execution be imposed 'in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant'. This clause thus reiterates the *nullum crimen, nulla poena sine lege* principle, contained in Art.15 of the Covenant with the result that the law providing for capital punishment should not be retroactive. Similarly, Art.2(2) of the European Convention provides that capital punishment must follow 'one's conviction for a crime for which this penalty is provided by law'. This provision, read with Art.7 of the same Convention containing a formulation of the principle of non-retroactivity of criminal law, can thus be easily understood to imply that capital punishment must be imposed in accordance with law, and law in force at the moment of the commission of the crime.

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Art. 6 of the CP Covenant categorically requires that the death penalty 'can only be carried out pursuant to a final judgement rendered by a competent court' and thereby makes an explicit reference to the procedural guarantees of a fair trial enshrined in Art. 14 of the Covenant. One significant implication here is that this reference in Art. 6 makes it clear that even in times of emergency a death penalty can only be carried out pursuant to final judgement being the result of a fair trial.\textsuperscript{306} Similar provision has also been made in the European Convention which, under Art. 2(1), requires that a death penalty can only be carried out 'in the execution of a sentence of a court'. This formulation clearly refers to fair trial guarantees provided for in Art. 6 of that Convention, and therefore it would be unlawful under Art. 2(1) to impose capital punishment after a trial not satisfying the conditions required under Art. 6. In so far as the times of war and armed conflicts are concerned, Art. 3 common to the four Geneva Conventions of 1949 prohibit the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

It has been emphasised by the UN Economic and Social Council that in cases where a death penalty may be imposed, the accused should be provided 'adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases'.\textsuperscript{307} In the opinion of the Human Rights Committee, cases involving a death sentence clearly require legal assistance to be assigned to the

\textsuperscript{306} Although it may be noted that Art. 14 is not included in the list of non-derogable articles in Art. 4 of the CP Covenant; see the Wako Report, supra, p. 14, para. 59.

accused to defend him "in the interests of justice". The Committee also maintained that in capital cases legal assistance must be provided in ways that adequately and effectively ensure justice.

With respect to pardon the CP Covenant provides that 'anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or the commutation of the sentence of death may be granted in all cases'; similar provisions have also been made in the American Convention on Human Rights. In this regard, the UN General Assembly, in addition to prohibiting the execution of convicted capital offenders before the termination of the procedures for appeal and pardon, calls upon Governments to fix time-limits before the expiry of which no death sentence would be carried out. Such time-limits are provided for under Art.101 of the Geneva Convention relative to the Treatment of Prisoners of War, which prohibits the execution of a prisoner of war sentenced to death before the expiration of a period of at least six months from the date when the Protecting Power receives the detailed communication from the Detaining Power. As observed by one writer:

Although the laws of many states provide that a death sentence should not be carried out until it has been confirmed in writing by the head of state, a time-limit would be an additional safeguard. It would give the international

308 See, Robinson v. Jamaica, Report of the HR Committee, ORGA, Forty-fourth session (A/44/40), annex X.H.


310 Art.6(4).

311 Art.4(6).
community at large, or international or non-governmental organs as well as influential individuals such as the UN Secretary General, political as well as religious leaders from outside the country concerned to intercede with the authorities for the sparing of a convicted capital offender. Many lives have in the past been saved this way.312

In so far as the age limits are concerned, both the CP Covenant and the American Convention prohibit the imposition of the death sentence on persons below the age of eighteen years at the time of the offence, the Convention adding persons above the age of seventy years. They also prohibit the carrying out of the sentence on pregnant women in an attempt to save the life of the unborn child. One particular question may be of interest here. Can a death penalty be lawfully imposed on a person who had committed the capital offence while he was under eighteen years old, but has been arrested or convicted after that age?313 The most acceptable view in this regard seems to be that since the legal wording of the relevant articles speaks of 'crimes committed', the offender should still remain unpunishable by capital sentence for an offence committed when he was under eighteen, even though the conviction takes place after that age limit.314 A similar question may also be asked with regard to the execution of capital sentence on pregnant women. It seems quite unclear if the formulation of this limitation by the treaty provisions prohibited the carrying out of


313The US Supreme Court in a relatively recent case held that capital punishment on an individual for a crime committed at seventeen years of age does not constitute 'cruel and unusual' punishment under the Eighth Amendment to the US Constitution, Stanford v. Kentucky, 109 S.C. 2969 (1989); see also the observation of the UN Sub-Commission in this regard, in the Report on the 41st Session of the UN Sub-Commission on Prevention of Discrimination and the Protection of Minorities, by Robin M. Maher and David Weissbrodt in HRQuarterly, vol.12 (1990), p.319.

capital punishment on a pregnant woman even after the baby was delivered, or simply postponed execution until after childbirth. Different reasoning have been put forward in support of both these interpretations. It has been argued that if the purpose of the prohibition is to prevent killing of an innocent baby, the woman can be executed when the child is already born. On the contrary, another school of thought preferred the view that a woman having dependent children must be kept in life to bring them up and refers to other relevant international instruments which adopted this approach. These include: Art.76(3) of the Additional Protocol No.1 to the Geneva Conventions of 1949, which prohibits the execution of 'mothers having dependent infants' and Art.6(4) of Protocol No.2 which precludes the execution of 'mother of young children'. However, despite these contrary but strong arguments, the interpretation of the prohibition on the execution of death penalty on pregnant women still remains largely unclear.

VIII. Specific Rights of Juveniles in the Administration of Justice:

It is an essential requirement of the rule of law that special provisions should be made for the treatment of juvenile persons who find themselves in the process of the administration of justice. Modern human rights instruments thus proceed to provide certain specific rights and protections, both substantive as well as procedural, for the juvenile in this regard.

315 See, ORGA 12th session, UN Doc. A/3764, p.36, para.117.

316 See, Dinstein, supra. at 117; Sapienza, supra. at 288.
Thus, in addition to requiring separate treatment of accused juveniles in custody or detention as already referred to in the preceding discussion, the CP Covenant also requires that special procedures be used for juveniles "that will take account of their age and the desirability of promoting their rehabilitation". Such procedures must grant "at least the same guarantees and protections" as provided for the adults under Art.14 of the CP Covenant.

The UN Standard Minimum Rules for the Administration of Justice ("The Beijing Rules"), set forth a detailed standard of rights for juvenile offenders. These standards provide for a distinct system to administer juvenile justice, a set of laws, rules and provisions specifically applicable to juvenile offenders. These Rules accordingly require the existence of appropriate scope for discretion at all stages of proceedings and at the different levels of juvenile justice administration.; a juvenile's right to a fair and just trial; the right to privacy; immediate notification of a juvenile's parents or guardians or if not possible, notification within the shortest time possible. It has also been emphasised that detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time; that capital punishment shall not be imposed for any crime committed by juveniles and that juveniles shall not be subjected to corporal punishment; and that placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

317 Art.10(2) of the CP Covenant; also Art.5 of the American Convention.

318 Art.14(4) of the Covenant.


320 Adopted by the GA reso. 40/33 of 29 Nov. 1985.
The UN Rules for the Protection of Juveniles Deprived of their Liberty\textsuperscript{321} were adopted with the intention of establishing minimum standards for the protection of juveniles deprived of their liberty. These rules thus require that the juvenile justice system should uphold the rights and promote the physical and mental well-being of juveniles. Reinforcing the provisions of the "Beijing Rules", the 1990 UN Rules provide that detention before trial shall be avoided to the extent possible and limited to exceptional circumstances.\textsuperscript{322}

\textbf{IX. Right to Compensation for Miscarriage of Justice:}

It is now an established international norm of the law of human rights in the administration of justice that an accused has a right to compensation for miscarriage of justice. Art.14(6) of the CP Covenant provides that where there has been a miscarriage of justice and a previous conviction has been reversed, the person who has suffered punishment is entitled to compensation if the reversal was not due to the convicted person's own non-disclosure. Moreover, Art.9(5) of the Convention provides that anyone arrested or detained unlawfully has the "enforceable right to compensation". The scope of the provision under Art.14(6) is very wide and the right to compensation covers not only the cases of reversal of conviction but also where a convicted person has been subsequently pardoned, provided that the following conditions have been fulfilled:

\textsuperscript{321}\textsuperscript{321}Recommended for adoption by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held at Havana from 27August-7Sept. 1990 and adopted by the GA reso. 45/113 of 14 Dec. 1990.

\textsuperscript{322}\textsuperscript{322}Art.17 of the Rules; for reference to the texts of these two UN instruments, see UN Doc. E/CN.4/Sub.2/1991/26 (20 June 1991), pp.42-79.
a) that there has been a conviction for a criminal offence by a final decision of the tribunal;

b) that the conviction has been subsequently reversed or the convicted person has been pardoned due to a new or newly discovered fact;\(^\text{323}\)

c) that such fact shows "conclusively" that there has been a miscarriage of justice;

d) that such person has suffered punishment as a result of such conviction; and

e) that the non-disclosure of the unknown fact in time is not attributable to him, either wholly or in part.

Among the regional human rights treaties, specific provisions regarding the right to compensation has only been made in the American Convention on Human Rights. Art. 10 of that Convention provides any person with the right to be compensated in accordance with the law in the event that such person has been sentenced by a final judgement through a miscarriage of justice. It may be noticed here that among these two treaties making provisions regarding the right to compensation, the CP Covenant adopts a restricted approach by limiting its application only to cases where the miscarriage has been 'conclusively' established by a 'new or newly discovered fact'. The CP Covenant also deprives the victim of the right to compensation if he is himself responsible for the non-disclosure, in sufficient time, of the unknown fact, the burden of establishing this being on the state concerned.

Again, while only the CP Covenant and the American Convention make express provisions regarding compensation for miscarry of justice in general, a specific clause has been included in the CP Covenant and the European Convention creating an enforceable right to compensation for persons who have been the victim of

\(^{323}\) See, e.g., Muhonen v. Finland, Report of the HRrCommittee, ORGA, Fortieth session, (A/40/40), annex.VII.
unlawful arrest or detention\textsuperscript{324} or have been arrested or detained in violation of any of the provisions of Art.5 of the European Convention.\textsuperscript{325} A limited approach has also been adopted by Principle 35 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides that 'damage incurred because of acts or omissions by a public official contrary to the rights contained in these Principles shall be compensated according to the applicable rules on liability provided by domestic law'.

However, it may be noted that although the American Convention contains no such comparable provision, it does, in Art.63, confer on the Inter-American Court the possibility to rule that 'fair compensation' should be paid to an injured party when the court has found a violation of the rights and freedoms protected by the American Convention. A similar provision may also be found in Art.50 of the European Convention and an overlapping between this provision and those under Art.5(5) may be noticed here. These two Articles, although both dealing with questions of compensation under the Convention, have been placed on different levels. Thus, Art.5(5) lays down a substantive rule guaranteeing an individual right, the observance of which is obligatory in the first instance for the state party concerned. Art.50, on the other hand, lays down a rule of competence, authorising the European Court expressly to afford the "injured party" just satisfaction subject to certain conditions. It does not, however, follow from the above fact that the Court cannot apply Art.50 when it finds a breach of any of the provisions under Art.5; what follows, and no more, is that in the exercise of the wide competence conferred upon

\textsuperscript{324} Art.9(5), CP Covenant.

\textsuperscript{325} Art.5(5) of the European Convention.
it by Art.50, the Court must take into consideration, *inter alia*, the rule of substance contained in Art.5(5).\(^{326}\)

**CONCLUSION:**

One of the unique characteristics of the CP Covenant amongst the international human rights instruments is the inclusion of the statement in its Art.14, the Article that contains the right to fair trial, that "All persons shall be equal before the courts and tribunals", although the doctrine of equality before the law has already been included in another Article (i.e., Art. 26). In this way, the Covenant re-emphasises the great importance of the doctrine in the context of judicial and other proceedings in the administration of justice in order to prohibit arbitrary distinctions based on such qualities as race, religion, political opinion etc.\(^{327}\)

On the other hand, unlike the other major human rights instruments, the European Convention does not include any specific provision on the general principle of equality before the law. The Convention, instead, requires in Art.14 that the enjoyment of the rights and freedoms set forth in the Convention "shall be secured without discrimination on any ground such as race, sex, colour, language........" One of the most important consequences of this is that under the European Convention, an individual cannot normally claim a general violation of the right not to be discriminated against\(^{328}\): the alleged discrimination must attach to a specific

\(^{326}\)See the observation of the European Court in Neumeister case, judgement of 7 May 1974, paras. 30-31.

\(^{327}\)In this regard, see the General Comment of the UN HR Committee, No.13(21) [Art.14] in Report of the HRC, ORGA, Thirty-ninth session, Supp. No.40 (A/39/40), 1984, annex VI.

\(^{328}\)It may be noted here that at the drafting stage of Protocol No.4 the Consultative Assembly had advocated the inclusion of a general provision to the effect that 'all persons are equal before the law'. However, this proposal was deleted from the draft by the Committee of Experts on the ground of arguments which, weighed against the importance of the elimination of discrimination, cannot be
substantive right set forth in the Convention and a claim for 'cause and effect relationship' must be established between the violation and the discrimination.\textsuperscript{329}

Thus, in the above context, the European Convention lags behind the developments at the global level where elimination of discrimination has received a great deal of attention.\textsuperscript{330} Although an addition to the Convention in this respect has not as yet been realised, it may be noted that a draft additional Protocol to that effect is at present being prepared by a group of governmental experts.\textsuperscript{331} Thus, in the absence of any treaty provisions thus far in this respect, the developments that have taken place in the case-law with respect to Art. 14 are of all the greater importance.\textsuperscript{332}

However, from a close observation of the case-law of the Convention organs it may be noted that Art. 14 is gradually attaining the character of an autonomous, though complementary, guarantee in relation to the rights and freedoms protected in the European Convention.\textsuperscript{333}

considered very convincing and which are contradicted more or less by the later case-law of the Convention organs. See Council of Europe, Explanatory Reports on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms, H (71)11, pp. 52-53.


\textsuperscript{330} Examples are: the 1952 UN Convention on the Political Rights of Women; the 1951 and 1958 Conventions of the ILO on Equal Remuneration and on Discrimination in Employment and Occupation respectively; the 1960 UNESCO Convention against Discrimination in Education; the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination; the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women; and of course the 1966 UN Covenant on Civil and Political Rights(ie, Art. 26.


\textsuperscript{332} It has, however, been observed that the case law of the Commission and the Court presents 'a rather complex picture because of the necessary relationship between Art. 14 and the other substantive Convention provisions and because of the inherent complex nature of questions related to non-discrimination and equality', van Dijk & van Hoof, supra, at 711.

\textsuperscript{333} For a general observation of the cases reviewed by the European Commission and the Court in which Arts. 6 & 14 of the Convention have been invoked in the context of the administration of criminal justice, see, e.g., Appl. 808/60, ISOP v. Austria, Y.B. V (1962), p.108(124) ['since the right to a fair hearing of Art. 6(1) has not been violated, Art. 14 cannot be applicable]; the case of
Another notable uniqueness of the CP Covenant is that it is the only international human rights instrument that explicitly establishes, in its Art.14(3)(d), the right of an accused to be tried in his presence as well as "to be informed, if he does not have legal assistance, of this right." However, although the European Convention does not expressly mention this right, the European Court and Commission have reviewed several cases where the issue of trial in presence of the accused or trial in absentia has been directly raised. It may be briefly noted here that although in the very recent time the statutes of the tribunals for the former Yugoslavia and Rwanda does not expressly permit a trial in absentia, for practical reasons such a trial cannot be absolutely prohibited.

A question may, however, arise as to the relationship of an accused's right to counsel to his another closely related right to adequate time and facilities for the preparation of his defence. It is for quite obvious reasons that while interpreting the accused's


335 Supra.
338 In this regard, see, e.g., Kai Ambos, “Establishing an International Criminal Court and an International Criminal Code: Observation from an International Criminal Law Viewpoint”, 7 EJIL (1996) No. 4, 519-544.
minimum guarantee regarding his right to defence, these virtually correlated rights should therefore be taken together which essentially require that the accused must be able to communicate with his counsel in conditions that ensure full respect for the confidentiality of such communications. This requirement is more explicitly embodied in the American Convention which provides that the accused must be able "to communicate freely and privately with his counsel". The European Convention or the African Charter does not, however, make any explicit provision regarding the right to communicate with counsel, although such a right together with the principle of confidentiality have been developed through the European Commission and the Court of Human Rights.

With regard to the important right to 'prompt trial' discussed above, one may rightly point out that although the right of an 'arrested person' to be brought promptly before a judge and the right of an 'accused person' to be tried within a reasonable time are two distinct rights relating to two different stages of the criminal proceedings, there exists an obvious close link and interdependency between them. However, it is not always an easy task to draw a clear dividing line between these two provisions. While the main purpose of the former, i.e., the right of a detainee to a prompt trial, is to ensure that a detained person is not held in custody for an unreasonably long period without being tried, and thus primarily aims at the period of his being arrested until he is brought to the court for trial. Of course, the period still continues; but here the provisions of these two rights are absolutely merged

339 Art.8(2)(d).

340 The Strasbourg case-law has established the right to communicate with counsel in a number of cases which in most instances involved prisoners wishing to pursue civil action against the prison authorities. See, for instance, the Golder case, Judgement of 21 Feb. 1975, A.18; and the Byrne, Mcfadden, Mccluskey, and McLarson case, Commission Report of 3 Dec. 1985. On the other hand, however, the principle of confidential communication has been developed in a number of cases involving criminal proceedings; see, e.g., the Campbell and Fell case, supra.
together. On the other hand, right to prompt trial as a guarantee for a fair trial prima
facie entails a much broader spectrum in the administration of criminal justice. From
the very beginning, this concept of a prompt trial aims as its prime object at the
commencement, continuance and ending by final judgement of a trial of a person
who may or may not have been detained.

However, what is most important to note in the above context is that on the basis of
the idea that detention imposes a greater infringement upon the individual's right than
having a case pending in a lengthy trial process, the requirement of 'reasonable time'
should be interpreted more restrictively in relation to detention than the trial itself.
Stated in a simple way, a long delay in trial proceedings may be reasonable and
justified due to, e.g., the complexity of the case, but that may not justify a continued
detention.

It is indeed a cardinal principle of law that justice not only must be done but also
must manifestly appear to be done. As one English judge observes:

"If the way that courts behave cannot be hidden from the public ear and eye, this
provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the
public confidence in the administration of justice".341

But, at the same time, from this right of an accused to a public trial emanates a
corollary which may be expressed by saying that the accused has the right to be tried
in public, but should not be tried by the public. Premature press coverage of judicial
proceedings as an exercise of freedom of speech should not be confused with liberty
to endanger a fair trial by public discussion of the issues before they are even heard
or decided in the court. Again, this principle of public trial has to be 'balanced with
other mandated interests' in the administration of justice, such as the duty to protect
victims and witnesses etc.342

342 Thus, see the observation of the Trial Chamber of the Yugoslavia Tribunal in Prosecutor V.
Tadic, supra, at reg. pg. no. 5062.
However, it has been observed above that among the principal instruments, the CP Covenant [Art.14] and the European Convention [Art.6] make extensive provisions, most of them in common terms, regarding the limitations to the requirement of a 'public trial' in the administration of criminal justice. On the other hand, whereas the American Convention [Art.8(5)] limits itself by requiring that criminal proceedings shall be public except in so far as may be necessary to "protect the interests of justice", the African Charter does not make any express provision in this regard. The wide range of exceptions contained in Art.14(1) of the CP Covenant and Art.6(1) of the European Convention have, however, been criticised as 'so large and loosely expressed as to cover almost any denial of public hearing' and that this broad limitation clause (with respect to the European Convention) makes it doubtful 'whether the requirement of public hearing under the Convention is likely in practice to yield much protection'.

It has been observed that while the CP Covenant [Art.14(3)(g)] and the American Convention [Art.8(2)(g)] express establish a right to freedom from self-incrimination, neither the European Convention nor the African Charter includes any provision protecting this fundamental right of an accused. Moreover, except an indirect approach by the European Court in a recent case, the case-law of the


Art.8 of the American Convention, although much briefer, may also be criticised on the same ground since it sanctions non-public criminal proceedings whenever 'necessary to protect the interests of justice'.

344 Under the American Convention, "the right not to be compelled to be a witness against himself or to plead guilty" under Art.8(2)(g) has been reinforced by para.(3) of that Article which provides that a confession of guilt by the accused "shall be valid only if it is made without coercion of any kind".

345 The Kamasinski case, supra., para.95, where the Court noted that a provision in the Austrian criminal law authorising the trial judge to question the defendant, a practice common to many
European Convention has not yet addressed the issue. One related aspect to be noted here is that the protection of fair trial as embodied in international human rights instruments applies only to persons who have been accused of an offence. Consequently, no provision has been made as to whether a witness in a trial can refuse to testify on the ground that the testimony might lead to his being charged, tried and convicted.

With regard to freedom from arbitrary arrest and detention it has been observed that although the CP Covenant as well as the three regional treaties bring the freedom from arbitrary arrest or detention within the bounds of the right to liberty, the Universal Declaration puts special emphasis on the prohibition of arbitrary arrest and detention by devoting a separate article (Art.9) to it rather than treating it as a mere part of the right to liberty contained in Art.3, and thus demonstrating its intention to establish it as an independent human right.

Another important aspect to be noted in the present context is that the term "arbitrary arrests" should be understood as distinct from "illegal arrests". Whereas an "illegal arrest" may be found open to fall into the category of arbitrary arrests, an "arbitrary arrest" need not necessarily be illegal.346 Thus, by using the term "arbitrary" rather than 'unlawful' or 'unjust' in imposing prohibition on arrests and detentions, modern human rights treaties have adopted a broader approach to this basic right of the individual in the administration of justice.347 Consequently, it is not

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346 As these two terms were defined in a UN seminar, "illegal arrest" means 'curtailment, not authorised by law, either statutory or customary, of an individuals freedom of movement'. "Arbitrary arrest", on the other hand, means 'an arrest authorised by a law which fails adequately to protect human rights because either (a)the legal right to arrest has been too widely defined, or (b) the means, circumstances or physical force attendant on the arrest exceed the reasonable requirements of effecting arrest'; see, the UN Seminar on the Protection of Human Rights in Criminal Law and Procedure, Baguio City, The Philippines, 17-28 Feb. 1958, UN/NY 1958, ST/TAA/HR2.

347 For a general discussion, see Hassan, The Word "Arbitrary" as Used in the Universal Declaration of Human Rights : "Illegal" or "Unjust"?, 10 Harv. Int'l L. J. 225, 230 (1969); also, Laurent
enough for a state to show that an arrest or detention is on grounds and in accordance with procedures established by law, but also that the contents and purpose of such law is in conformity with the general principles of international human rights law, particularly with regard to the right to liberty and security of person.

In contrast, however, a "limitationist" approach has been adopted in this context by the European Convention on Human Rights. The Convention actually omits to include the word 'arbitrary' altogether in Art.5(1) while providing protection for the right to liberty of person. Thus, at least theoretically, the European Convention provides a substantially lower standard of protection in this regard than do the other global and regional instruments, because the word "lawful" qualifies all the limitations to the right to personal liberty under Art.5 of the Convention.

However, notwithstanding the above proposition, the European Court has stated that "in a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as "lawful"." Moreover, the European bodies seem to claim a much extensive authority in this regard than, for instance, the UN Human Rights Committee.

With regard to freedom from 'torture and other cruel, inhuman or degrading treatment or punishment' in the administration of justice one might rightly notice that while the term "punishment" implies that an offence has been committed, the term "treatment" has no particular reference to crime or punishment. Again, while the fact that a person has been convicted of a crime does not mean that he can be subjected

Marcoux, Jr., Protection from Arbitrary Arrest and Detention under International Law, supra.


350The European Court has even stated that where national authorities are afforded a certain discretion under the law, it is for the European Court 'to review under the Convention the decisions of those authorities', Winterwerp case, op. cit.
to a "treatment" otherwise contrary to the relevant provisions of international human rights law, a state cannot administer as "treatment" which could not be imposed as punishment for a crime.

Again, the term "torture" may be given a separate legal treatment by distinguishing it from "cruel, inhuman or degrading treatment and punishment". Indeed, a scale of aggravation in suffering has been implied in the expression as a whole which commencing with degradation, mounts to inhumanity and cruelty\(^{351}\) and ultimately attains the level of torture.\(^{352}\)

"Both historically and in modern times, disproportionate or excessive punishment has been recognised as improper".\(^{353}\) Inspired by the first case to come before the European Court of Human Rights,\(^{354}\) it was observed in one of the earliest discussions of human rights and penology, ".....the punishments prescribed by the criminal law and applied in fact should be humane and proportionate to the gravity of the offence."\(^{355}\)

It has, however, been observed that the restrictive attitude regarding the imposition of death penalty in the administration of criminal justice is given prominence and is articulated in all the major international human rights instruments. Thus, as regards

\(^{351}\)It may, however, be noted that among the major instruments, the European Convention omits the term 'cruel', although, as observed by Robertson, this omission attaches no importance since 'the sense of "cruel" is equally covered by "inhuman"; see, Human Rights in Europe, supra, p.38.


\(^{353}\)Haji N. A. N. Muhammad, supra., p.162

\(^{354}\)Lawless v. Ireland (Merits) 1961 Series A No.3; EHRR 15.

the imposition of capital punishment the established rule of international human
rights law today is that in countries which have not yet abolished death penalty,356 a
sentence of execution can only be passed and carried out in accordance with clear,
pre-existing law fulfilling all the requirements set forth in the relevant international
instruments.357 Moreover, While formulating its criminal sentencing scheme, each
individual state should therefore strictly comply with the limits and boundaries of
international human rights norms, that must be carefully observed and applied by the
judiciary as the sine qua non of capital punishment, the essential element of a capital
sentencing trial.

Finally, it has been noted that the right to compensation for miscarriage of justice has
now been established as an enforceable human right of an individual in the
administration of justice. However, although among the major international treaties
the European Convention and the African Charter does not make any specific
provision regarding this right in a particular article, the right to be compensated for
miscarriage of justice may still be inferred from the general 'effective remedy' articles
of those treaties.358 Again, although the African Charter does not include an 'effective
remedy' clause as such, such a provision may still be found to have been implied in
the wording of Art.26 of the Charter, providing for an obligation on the States
Parties to guarantee an independent judiciary and to allow the establishment and
improvement of appropriate national institutions for the 'promotion and protection of
the rights and freedoms guaranteed' by the Charter.

356 For a recent interesting case in this connection, see, The State V. Makwanyane and Mchunu,
Constitutional Court of the Republic of South Africa, Johannesburg, Case No. CCT/3/94,
Judgement of 6 June 1995, reprinted in 16 HRLJ 1995 (Nos. 4-6) at 154 (death sentence declared
inconsistent with South Africa's new Constitution).

357 For an interesting and useful observation with regard to the procedural guarantees in capital
sentencing trial and the importance for bringing domestic laws and practices into compliance with
relevant international human rights standards, see International Commission of Jurists, "Report of a
Mission Concerning the Administration of the Death Penalty in the United States" (Part:I), 19 HRQ

358 In this context see the 'Seminar on the Right to Restitution, Compensation and Rehabilitation
for Victims of Gross Violation of Human Rights and Fundamental Freedoms', Maastricht, 11-15
March 1992 (SIM Special No.12, University of Limburg, Maastricht, 1992).
CHAPTER: III

Rule of Law,
States of Emergency
and
The Protection of Human Rights
INTRODUCTION:

It is a well established doctrine of the international law of human rights today that it is precisely in times of disturbance and danger caused by exceptional situations such as economic crisis or natural disaster, social or legal disorder, or political tensions that the most fundamental rights and freedoms of the individual assume their greatest importance. In such situations, States tend to resort to arbitrary powers as the most convenient and expeditious way to quell a disturbance, by using exceptional measures and derogating from fundamental guarantees accorded to its subjects. Experience shows us that most of the gravest violations of human rights in different parts of the world in the past few decades have taken place during the existence of an emergency situation. Different regimes frequently used this excuse in denying application of fundamental rights and taking derogating measures which are excessive and in violation of the rules of international human rights law.

It has been, therefore, an essential requirement of the modern doctrine of the rule of law that the fundamental human rights be protected by a certain pre-existing norms of law specifying the standards regarding, on the one hand, their applicability in exceptional circumstances; and on the other, the most fundamental guarantees that must remain non-suspendable in such or any other situations whatsoever. However, in so far as the international human rights treaties are concerned, one important attempt in solving this problem has been made by inserting a 'derogation clause' in the major treaties.359

359Namely, the International Covenant on Civil and Political Rights, 1966 (CP Covenant), Art. 4; the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR), Art. 15; and the Inter-American Convention on Human Rights, 1969 (ACHR), Art. 27. The African Charter does not, however, contain any derogation clause.
But, however, the problem of establishing a universal legal regime in the present context could not be achieved by the derogation clause of the international treaties for a number of reasons, at least two of them should be referred to at this introductory stage. First, that nearly half of the states of the community of nations are not yet parties to international human rights treaties and, hence, not even as such bound by the standards set forth in them. This has inevitably created a grave uncertainty in general international law concerning human rights standards to be applied during emergency situations. And secondly, the absence of any derogation clause in some human rights treaties, namely, the African Charter and some ILO Conventions, has also created some ambiguity in this area.

However, the object of the present part of this study is firstly, to research the meaning, nature and scope of the concept of the states of emergency as a legal institution in international law, with particular reference to the special attributes attached to this concept in the recent times in so far as the modern principles of the rule of law and human rights are concerned; and secondly, to inquire into the legal principles of international law as it stands today regulating human rights standards in states of emergency. For this two-fold purpose it is important to categorise and define the various kinds of emergency situations and thereby examine the adverse effects that such situations entail on fundamental human rights and the rule of law. The obvious aim in this process would be a brief comparative analysis of treaty-based standards applicable to states of emergency and the continued efforts at the international level in the elaboration of non-treaty-based soft laws and other guidelines in the recent time to protect those whose basic rights have been rendered vulnerable in such situations. While it is important to observe how all these efforts have been confronted with the gaps and deficiencies in the relevant existing law, a quick examination of the effectiveness of various treaty implementation bodies and other institutions in monitoring states of emergency would also be desirable.

Again, and particularly for this second line of research stated above, it seems to be of equal importance to examine the relevant norms and principles in general public
international law, in particular the question if some of the principles as contained in the derogation clause have now become part of customary international law which is to be applied to all States regardless of their membership to any particular treaty. The obvious presumption of the research is that if it is now an established fact that there exists in general international law a number of principles imposing certain human rights obligations on States in emergencies, and that if again these principles closely resemble or correspond with some of the norms contained in the derogation clause of the treaties, it is possible to identify a consistent pattern of interaction or transposition between these two branches of principles of modern international law. This may lead us to important conclusions with regard to the consequence of any such relationships in the regulation of fundamental human rights and the rule of law during states of emergency in international law as a whole.


A. Terminological Problems:

It may be noted at the outset that different terminologies have been used to describe the emergency situation, such as - public emergency, state of siège, situations of exception, suspension of guarantees, national emergencies, emergency powers, état d'urgence etc.

The concept of "public emergency" is of relatively recent date, introduced to eliminate, where possible, from legal instruments the "state of war" which has not existed in international law since the Second World War. It also seems to aim at replacing the traditional term "state of siege".360

The expression "public emergency" in international law is understood as a generic term referring to a variety of legal phenomena in different legal systems in order to identify certain exceptional situations involving public danger or national security etc. and thereby permitting the relevant governments in question to exercise emergency or crisis powers to overcome such situations. It thus tends to cover the status of different regimes known as states of emergency, of siege, of alert, of prevention of internal war, of suspension of guarantees, of martial law, of special powers and so forth.361

To find a most appropriate term that would denote the phenomenon of the existence of an emergency situation in a state is an utterly complex and difficult task. One would find this difficulty worse while considering the legal implications of such situations in the two major legal systems, viz., the civil law and the common law systems as well as the wide variety of these situations in terms of gravity, length or format etc. One example of such difficulty is the use of the term 'states of exception' which may be readily criticised as being too general a term describing the fact that exceptions have been made to the normal legal regime under which rights and the rule of law are protected to a higher degree. It is, therefore, particularly descriptive of the formal legal aspect of the situation more aptly applying to a de jure emergency or emergencies under the civil law systems and not the more complex de facto situations of crisis or the crisis situations under the common law systems.362

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Among other studies in this area, see the UN's "Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency", by Nicole Questiaux, supra, esp. pp.22-28. For an early study on the subject (providing important reference to the evolution of emergency powers in the common law countries of the U.K. and the U.S.A. and a
Again, the drawback of the use of the term 'derogation' may be found in its inherently limited scope of application. Since the term implies the existence of a certain human rights treaty whose provisions are being supplemented by a state Party due to the occurrence of a particular situation, application of the term is still far from universal.

On the other hand, both the terms 'state of emergency' and 'state of siege' have been criticised as being used as a generic term having a technical legal meaning in certain civil law systems. Moreover, in so far as the gravity of the situation is concerned, state of emergency conveys a lesser gravity than state of siege.

There is also a tendency of distinguishing a 'state of siege' from a 'martial law' in that whereas in the civil law concept of state of siege the powers of the military authorities are somewhat precisely defined in advance and thus conveys a more 'certain' nature, the common law concept of martial rule is rather provisional in character and thus more flexible.364

One useful distinction has been made between 'states of exception' and 'réégimes of exception', where the former is defined as "extraordinary modes of governing provided for by the laws of the country and subject to such laws for their declaration and implementation", while the latter as "de facto situations of a purely political nature".365 Deriving its importance from the fundamental principle laid down in the Universal Declaration of Human Rights that all restrictions on human rights, including emergency measures, must be compatible with the requirements of a contrast of two civil law systems, Weimar Germany and France), see, C. Rossiter, Constitutional Dictatorship: Crisis Governments in the Modern Democracies 12 (1948).


See, Fairman, The Law of Martial Rule (2nd edn., 1943) at 47. However, a contemporary scholar seems to disagree with this line of argument holding that these two expressions are the "two edges to the same sword, and in action they can hardly be distinguished", see, C. Rossiter, Constitutional Dictatorship (1948) at 9. For a brief discussion on this comparison, see, Chowdhury, S. R., p.13. 364

Réégimes of exception thus implies a more severe situation where a declaration of a state of exception accompanies intervention in government which cannot be justified in terms of the constitution or previously established laws. See, ICJ, "States of Emergency", supra, at pp. 311-312, 315 & 317.
democratic society and not aimed at the destruction of any such rights', another distinction can be made between regimes of transition having democratic goals and regimes of transition having authoritarian goals.\textsuperscript{365}

However, for matters of convenience, and considering the widespread understanding of the term at the international level, the present study would refer to the term 'states of emergency'.

B. 'States of Emergency': what is meant.

In almost all systems of municipal law, states of emergency has been recognised as a "legal institution" justifying derogation from human rights standards. Its historical origin may even be found in the Roman time, particularly in the nomination of a 'dictator' in exceptional circumstances of external attack or internal rebellion.\textsuperscript{366}

Black's Law Dictionary\textsuperscript{367} defines the term "emergency" as a "sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency, pressing necessity". It has also been defined as a "political term, to describe a condition approximating to that of war".\textsuperscript{368} These definitions thus essentially imply an exceptional situation, markedly different from those which may be described as "normal" or "ordinary", arising out of certain conditions of temporary nature, placing the state institutions in a precarious position and thereby creating a degree of justification in favour of the authorities concerned in suspending the application of certain principles that guarantee individual rights and freedoms.

\textsuperscript{365}See, Art. 30 UDHR, Art. 5(1) ICCPR, Art.17 ECHR; compare Art.29(a) ACHR; see also, ICJ, "States of Emergency", at 315 & 317.


Although criticised for its 'over-simplicity', a workable definition of public emergency may be found in a UN study describing it as certain exceptional circumstance involving 'a crisis situation affecting the population as a whole and constituting a threat to the organised existence of the community which forms the basis of the State'. In a similar line of understanding another definition describes an 'emergency situation' as one which results from temporary conditions placing the institutions of the state in a precarious position and thus leads the authorities 'to feel justified in suspending the application of certain principles'.

A useful basic definition of a public emergency has been provided by the European Court of Human Rights describing it as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".

However, a precise definition of the modern concept of emergency poses an important problem in the legal regulation of human rights during states of emergency. Municipal laws, naturally, lay down a wide list of grounds for declaring an emergency, many of which do not really represent a 'grave threat to the life of the nation'. Question arises how far these grounds as determined by municipal laws can be justified in international law. It is, therefore, important to see how the texts of the three major human rights treaties define the concept of emergency and also whether this theoretical definition has been accepted and applied as such by international monitoring bodies in the construction of their jurisprudence in this field. This study would then eventually lead to the enumeration of specific grounds which have been established by international human rights law as valid for invoking the derogation clause during 'states of emergency'.

370Questiaux, para.23.
373For a list of such grounds drawn by a UN study, see "Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention and Exile", p. 257, UN Doc. E/CN.4/826 (5 Jan 1962).
C. Effects of States of Emergency on Human Rights:

As it has been a matter of common knowledge today, the effects of a state of emergency on the rule of law and in particular on the human rights of individuals have been proved to be utterly horrendous throughout the world. The different kinds of human rights which tend to be in danger during states of emergency can be summarised by way of observing three major effects of emergencies, namely:

(i) that vital changes take place in the allocation of powers within the government;
(ii) that the most fundamental rights of individuals are more frequently invaded; and
(iii) that stricter and greater restrictions are imposed on the enjoyment of other human rights.

Firstly, as a result of an emergency in most of the instances, governmental power is concentrated in the executive and the legislature is either removed from its normal role or simply dissolved. Even though in some instances, particularly in the commonwealth countries, the legislature remains in session and go through normal elections, the executive still exercises direct or indirect influence and control on its activities and in most cases extensive legislative power is delegated to administrative officials.

The effect of the emergency upon the judiciary has also been proved to be profound, leading to the establishment of special courts and tribunals, trial of civilians by such or other military courts, extension of retroactive jurisdiction to such bodies, suspension of the writs of habeas corpus or amparo, secret or in camera trials, serious delays in conducting the proceedings, grossly unfair procedures, harsher sentences, appointment of military or other personnel as judges, prosecutors and defence counsel who are not trained as judicial officers, creation of a climate of fear (such as by mass dismissal of judges) leading to judicial timidity and ineffectiveness and so forth. Emphasising the great importance of an independent judiciary in this regard, the ICJ thus aptly remarked that 'a subservient judiciary cannot be relied
upon to accomplish the difficult task of protecting human rights and the rule of law during an emergency. 374

Secondly, emergencies frequently entail deprivation of the most fundamental rights of the population, those which supposedly can never be suspended even in time of public emergency threatening the life of the nation. Among such rights proved to be particularly vulnerable in many instances of emergencies throughout the world are included arbitrary deprivation of life by excessive use of force by the police, security forces and other similar authorities as well as clandestine agents of the regime, summary executions etc., torture, incommunicado detention, secret trials and so forth. As has been aptly observed in one UN study, "the most serious violations of the human rights of detainees occur most frequently during states of emergency, states of seige or situations of internal or international armed conflict. Unlawful detention, torture, political assassinations, summary executions, and the enforced or involuntary disappearance of persons in particular are frequently connected with the exceptional powers granted under emergency measures to the security forces, the police or the army. Such abuses are encouraged by the fact that, during a period of emergency, restrictions are imposed on certain essential rights". 375

It should be noted here that the principal objective of recognising a concept of public emergency in international law was to provide for certain reasonable limits upon the anticipated restrictions of individual rights that such emergencies would entail. A UN survey on the rights that are most derogated from by governments during emergencies found the rights to liberty and security of the person, liberty of movement, protection of privacy, freedom of expression and opinion, and the right of peaceful assembly. 376 However, cautioning on any overemphasis by certain writers on the effects of emergencies on only the individual rights, the International Commission of Jurists stressed on considering also the impact of states of emergency on the society at large, affecting such rights as trade union rights, freedom of

opinion, freedom of expression, freedom of association, the right to access to information and ideas, right to an education, right to participate in public affairs etc. as well as other collective and peoples' rights such as the right to development and the right to self-determination.\textsuperscript{377}

D. ‘States of Emergency’ under the derogation clause:

It should be noted at the outset that neither the Universal Declaration of Human Rights nor the American Declaration of the Rights and Duties of Man contains any provisions regarding derogation, nor do they say anything about states of 'war', 'public emergencies', or any other exceptional circumstances when a Government might be authorised in suspending the fundamental human rights and freedoms, or at least some of them, during such situations. These provisions have been contained in the International Covenant on Civil and Political Rights and the European and American Conventions specifying the conditions and circumstances that authorise a Government to take derogation measure. These instruments also enumerate a few rights and freedoms which must remain non-derogable at any time whatsoever. As noted at the beginning of this chapter, the African Charter does not contain any provisions for derogation.

Art.4 of the Covenant thus provides that in situations threatening the life of the nation a Government may suspend fundamental rights and freedoms protected under the Covenant as long as i) the exigencies of the situation strictly require such a suspension, ii) the suspension does not conflict with the nations other international obligations, and iii) the Government informs the UN Secretary General immediately. The only rights that are not subject to suspension in this situation are those specified in that Article including freedom from discrimination based on race, colour, sex, language, religion or social origin; freedom from arbitrary killing; freedom from torture or other cruel, inhuman or degrading treatment or punishment; imprisonment for debt; retroactive penal laws; and the right to recognition as a person before the law.

\textsuperscript{377}ICJ, States of Emergency, supra, 417-424.
It may be observed that among the three treaties that contain a derogation clause, the wording of the CP Covenant and the ECHR is more similar. Thus, while the Covenant refers to a 'public emergency which threatens the life of the nation', the ECHR refers to a 'war or other public emergency threatening the life of the nation'.378 It may, however, be noted in this context that under the general principles of international law in time of war, States are not strictly bound by conventional obligations unless the conventions contain provisions to the contrary.379 Another point to be noted here is that the drafters of both the treaties preferred to adopt a broad term, 'public emergency', which in principle embraces several situations, instead of enumerating particular kind of circumstances. The expression has then been further qualified by adding the phrase "which threatens the life of the nation", mainly in order to require that the situations justifying the declaration of emergency should be really exceptional affecting the whole nation and thus removing the risk of derogation in situations of lesser importance.380 One may also notice that the treaties have used the term 'nation' instead of some other narrower expression, such as 'people', considering the possibility of some doubt as to whether it denoted, e.g., all the people or just a part of them.381

378 Interestingly, the ECHR borrowed the text from the draft of the Covenant which originally contained the word "war"; the UN Commission later suppressed the mention of "war", mainly because it was felt 'that the Covenant should not envisage, even by implication, the possibility of war, as the UN was established with the object of preventing war'; see UN Doc. A/2929, p. 67, para. 39, E/CN.4/SR. 330, 1 July 1952.
380 A/2929, p. 66, para. 39.
381 E/CN.4/SR.330, p. 14

It has, however, been pointed out that two relevant situations may arise in the present context (see Jaime Oraa, Human Rights in States of Emergency, pp. 28-9).

The first, where an emergency is declared in one part of the territory, but affecting the whole nation, seems to raise no major legal problems (such as terrorist activities or natural disaster in one part of the State affecting the whole nation). In her study Mme Questiaux thus noted that an emergency must affect the whole nation and either 'the whole of the territory or certain parts thereof'. See N. Questiaux, "Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency", UN Doc. E/CN.4/sub.2/1982/15
The ACHR, however, reads slightly differently from the Covenant and the ECHR by authorising a state to derogate from its obligations under the Convention in "times of war, public danger, or other emergency that threatens the independence or security of that state, provided such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion or social origin. Art.27 does not, however, authorise the suspension of several significant rights and freedoms including the right to life; right to humane treatment; freedom from ex post facto laws; "or of the judicial guarantees essential for the protection of such rights". These last mentioned "judicial guarantees" deserve particular consideration in determining the scope of derogation under Art.27 of the American Convention and we will have occasions to focus further attention to this important question in the following discussion.

E. A brief comparison between the three derogation clauses:


The second situation, however, poses some problems, where an emergency is declared in one part of the territory affecting only that part of the nation. For instance, we may think of grave disturbances of public order taking place in a dependent territory of a State which do not affect the nation as a whole, e.g., the derogations made by the UK Government from 1955 onwards under the ECHR). Interestingly enough, no State ever contested such a practice, although it is hard to believe that an emergency in British Guiana in 1955 'owing to a dangerous crisis in public order and in the economic life of the territory' affected the whole of the UK population; see, YBECHR 1 (1957) 48. Moreover, the International Law Association in one of its reports states that an emergency in a part of a territory and affecting only the population established there is also accepted as a legitimate emergency situation; ILA Paris Report (1984) p. 58. See also, the Siracusa Principles in 7 HRQ (1985) p. 39.

However, the above line of reasoning very much seems to go too far in generalising the situation and leaves some open doors for abuse by governments of the emergency provisions.

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First of all, it is interesting to notice that while all these three sets of provisions proceed in almost a parallel direction, they clearly deviate from each other in several respects, particularly as regards the occasions for, and extent of, such derogation.

a) Occasion for derogation:

Firstly, as regards the occasions for derogation, the CP Covenant as well as the European Convention use the expression 'public emergency which threatens the life of the nation'; the American Convention instead speaks of 'public danger, or other emergency that threatens the independence or security of a State Party'. Consequently, question may arise as to the occurrence of natural calamities like floods, earthquakes etc. which do not necessarily pose a threat to the independence or the internal or external security of the State, but still give rise to a 'public danger'. However, a clear answer to such a question could probably be found in an amendment made at the San José Conference by El Salvador recognising that such natural calamities should justify the declaration of an emergency.\textsuperscript{382}

Again, the CP Covenant also differs from the two regional treaties in two important respects; unlike the regional Conventions, it does not mention 'war' as an occasion for derogation; and it alone requires the existence of the public emergency to be 'officially proclaimed'. However, as it will be observed later in this chapter, the effect of the absence in the European and the American Conventions of any express requirement of official proclamation for the validity of the derogation is not quite clear.

b) Scope of application:

The kind of emergency envisaged in the ACHR is one which threatens the independence or security of the State. The ACHR thus clearly adopted a wider and less restrictive category of situations that may justify an emergency.\textsuperscript{383} Since one should not ignore the fact that in the past three or four decades states of emergency

\textsuperscript{382}See, Burgenthal and Norris (eds.), The Inter-American System, Minutes of the 14th Session, 17 Nov 1969, vol. i, booklet 12, p.135.

have been frequently declared by many Latin American countries resulting in gross violation of human rights, it is of practical importance to make an effort at drawing a precise clarification of the expression used in the ACHR. Although the official records of the San José Conference do not give us any clear indication as to the meaning of the expression, what is still clear is that the Conference established an international standard which requires that a situation must be of a certain gravity in order to justify derogations from human rights.  

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c) Extent of Measures:

While all the three treaties limit the extent of derogation measures to those 'strictly required by the exigencies of the situation', the American Convention alone also limits, by the same test, the period of time during which these measures may remain in force. Another very important requirement under all these treaties is that the derogation measures must not entail breaches of the States Parties' other obligations under international law. The most significant of this last mentioned requirement is that a state which is party to one of the regional treaties as well as the CP Covenant is bound to comply with all the requirements of the Covenant while making a derogation under the regional treaty. Thus, for instance, such a state while derogating under Art.15 of the European Convention must also abide by the official proclamation requirement or provisions prohibiting derogation measures involving discrimination on the grounds specified in Art.4(1) of the CP Covenant (and not in the European Convention) and creating an obligation for that state under international law.
G. "Derogation" and other "Limitations": An Important Distinction.

It's very interesting to notice here that while the human rights treaties adopted a general derogation clause operative only in time of public emergency, they also contained some other permissible ‘limitations’ to the application of certain specific rights enumerated therein.\(^{385}\) Although the grounds authorising derogation stated in the treaties resemble at least one of the circumstances for permissible limitations, viz.- “national security”, derogations and limitations differ in a range of aspects such as to their respective character, scope, relevant circumstances and the extent and methods of application.\(^{386}\) However, the following points may be noted here that clearly distinguish these two categories of restrictive provisions:

i) First, as to the situation justifying the operation of the clause, a limitation clause authorises restrictions on human rights on several grounds, such as public order, national security, public health or moral etc., in what can be called 'normal situations' or 'peace time', i.e., in the 'daily life of the State'; the derogation clause, on the other hand, operates in exceptional situations, i.e., in public emergencies threatening the life of the nation;

ii) Secondly, as far as the extent of the right affected is concerned, the limitation clauses affect only the specific rights concerned, i.e., those expressly “provided by law”; the derogation clause on the other hand could affect all the rights in the treaty, except those expressly made non-derogable;

iii) As with the very nature of the emergency itself, derogations from human rights are clearly intended to have only a temporary character; limitations, in contrast, can be permanent;

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\(^{385}\) Such limitation provisions can be found in these articles:

i) the Covenant on Economic, Social and Cultural Rights: Article 8(1) (a) & (c);

ii) the CP Covenant: Articles 12(3), 14(1), 18(3), 19(3), 21 & 22(2);

iii) the ECHR: Articles 6(1), 8(2), 9(2), 10(2), Protocol No. 1 & Protocol No. 4, Art. 2(3);

iv) the ACHR: Articles 12(3), 13(2)(b), 15 and 16(2).

iv) While certain rights under the treaties are not subject to derogations, such rights may still be expressly made subject to possible limitations.\(^{387}\)

v) While provisions authorising states to derogate from certain guaranteed rights have been made in one single general article (commonly known as the derogation article or clause), the limitation provisions in the treaties are scattered, with specific provisions—generally identical, but with some variation—applicable to particular freedoms or rights.\(^{388}\)

vi) Finally, unlike in the case of invoking the derogation clause, and in so far as international accountability is concerned, the operation of the limitation clause does not require any special declaration by the State.

H. Interpretation of the concept of "emergency" by the monitoring organs:

The European Court and the Commission on Human Rights have produced an interesting and useful jurisprudence on the derogation clause (art. 15) of the ECHR. Two of its cases, namely, the Lawless case (1961) and the Greek case (1969) are directly relevant to the meaning and nature of the concept of 'states of emergency'.\(^{389}\)

In the Lawless case, the Court (unanimously) and the majority of the Commission supported a workable and flexible standard of the concept of 'public emergency threatening the life of the nation', and not an extremely restrictive one. The majority of the Commission held that the expression had 'a natural and ordinary meaning', and

\(^{387}\) For example, Art. 18 of the CP Covenant (freedom of thought, conscience and religion) cannot be derogated from under Art. 4 of the Covenant, while such rights are still subject to limitations on other grounds in other circumstances.

\(^{388}\) The UDHR being the only global human rights instrument (although not a treaty) that concentrates limitations upon rights and freedoms in a single provision. Article 29 (2) of the Declaration thus reads:

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

\(^{389}\) Other relevant cases are: the First Cyprus case (1956-7); the Ireland v. UK case (1978); the Cyprus v. Turkey case (three applications following the invasion of the island in 1974); and the France.......v. Turkey case (1982).
referred to 'a situation of exceptional and imminent danger or crisis affecting the
general public, as distinct from particular groups, and constituting a threat to the
organised life of the community which composes the State in question'. The Court
agreed with this construction. The minority, however, emphasised that the
emergency and the threat should be truly exceptional, such as one which is 'as
exceptional a nature as war' or 'an extremely grave one and it must threaten the very
life of the nation, in other words its very existence as such'. The majority members,
however, rejected this construction of the concept of emergency as radical and
extreme.390

In the Greek case,391 on the other hand, the Commission took a very strong stand by
demanding strong proof of the actual emergency (i.e., an objective test), declaring
that the burden of proof lay on the respondent government, even though they
possessed a measure of discretion in assessing the situation. It thus seems as if the
Commission applied a stronger standard of proof in this case than in the Lawless
case (where the presumption was in favour of the government and the margin of
appreciation quite broader).392

However, these above principles developed in the Lawless and the Greek cases have
been applied by the Court and the Commission in a number of subsequent cases on
this topic. Thus, among the more recent cases, the European Court applied the tests
of proportionality, imminent danger and margin of appreciation in Brannigan and
McBride v. U.K.,393 and adopted identical tests in determining the validity of the
declaration of emergency by the U.K. Government, the measures taken and
compliance with the procedural aspects of the declaration of emergency.

390 See, the Lawless case, Euro. Court of HR, Ser.A: Judgements (1 July 1961); Ser.B: Pleadings
(1960-61).
392 However, the majority of the Commission in the Greek case were not satisfied that there existed a
public emergency threatening the life of the Greek nation.
393 Series A, vol. 258-B (Judgement of 28 May 1993). See also, Brogan and Others v. U.K., Series
The UN HR Committee has expressed its view on the concept of emergency and in some particular cases has given its opinion on the existence of a true emergency both in reviewing States' reports and under the Optional Protocol. It has thus explicitly required in its 'general comment' that the emergency must be of an exceptional nature attaining a degree of gravity. One example where the Committee had taken a strong stand was the emergencies declared by the Chilean government. Moreover, under the Optional Protocol mechanism, the Committee has established a sound policy that it is not enough to claim the existence of an emergency if the real extent of such an exceptional threat is not shown through the presentation of sufficient information and facts.

Another important feature of the concept of emergency as developed in the practice of the HR Committee is that the notion of public emergencies is inherently of a 'temporary nature' and that art. 4 of the Covenant must not be taken towards the "institutionalisation of states of emergency".

The IACHR seems to follow the same pattern of interpretation with its European and UN counterparts regarding the concept of 'public emergency that threatens the independence and security of the State', reaffirming that derogations under art. 27 of the ACHR are only legitimate in exceptional circumstances and for a temporary period of time. These exceptional circumstances, which may be described as social and political struggle, serious disturbances of public order, internal commotion and external attack, war and public disasters, should in any case represent a 'real threat to the public or to the security of the State'. It described a state of emergency as 'an

395 In the Grille Motta case, for instance, the Committee stated that art. 4 of the Covenant 'does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submission of fact or law to justify such derogations. See the Grille Motta case, Communication No. R. 2/11, Adoption of Views; 29 July 1980, in A/35/40, p. 136, para. 15. See also, the Landinelli case, Comm. No. R. 8/34, Adoption of Views, 8 Apr 1981, in A/36/40.
II. What constitutes a valid 'state of emergency'?
The Essential Pre-requisites under the derogation clause:

A quick look at the provisions contained in the derogation clause of the human rights treaties indicates that a number of substantive and procedural conditions must be fulfilled in order for a State to invoke the clause on the basis of a valid 'state of emergency'. A brief examination of these essential requirements is, however, desirable in the present context.

A. The Principle of Proclamation.

The derogation clause of the CP Covenant establishes as a pre-requisite for its valid operation the 'official proclamation' of the state of emergency. A formal declaration of emergency containing a clear account of all the exceptional measures taken provides an important element of publicity for those under the States' jurisdiction who require to know the exact extent of the limitations of their rights and the alteration in the distribution of powers among the organs of the State. Another important object of this requirement is to reduce the incidence of de facto states of emergency, obliging States to fulfil their obligations under municipal law which usually contains clear and strict conditions on the declaration of the emergency, both substantive (e.g., that the emergency cannot be declared except in exceptional cases involving a grave danger to the State) and procedural (e.g., that the consent of the Parliament must be obtained if the emergency has been declared by the State).

398 See, IA Court HR, Advisory Opinion, 'Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) of the ACHR)' (30 June 1987), para. 19.
399 Art. 4(1). The other two treaties do not, however, contain any explicit requirement of proclamation.
But the problem that arises in this context is how far international monitoring organs should go in assessing such requirements of compliance with municipal law by the states. Should they declare emergencies in contravention of municipal law null and void? What about a government that seizes power illegally and declares state of emergency against domestic law? Or changes the municipal law and declares the emergency according to this new legality?

However, these above questions take us back to what may be called as the most important limitation of international human rights law as a whole since it is quite obvious that international bodies would not in any case enter into the question of the status of a government under its municipal law.\textsuperscript{400} But, even in the case where the government in power does not change the law and declares the emergency against it, it still remains "undesirable" for the international bodies to enter into a long examination of whether or not the declaration was lawful under municipal law.\textsuperscript{401}

One important question that naturally arises in this connection relates to the absence of the proclamation requirement in the two regional treaties that contain a derogation clause. However, although neither the ECHR nor the ACHR explicitly mentions any requirement of 'official proclamation' of the emergency, it is clear from both the European Commission and Court and the IACHR that some form of proclamation is required.\textsuperscript{402} But it seems from the practice of the European Commission that the

\textsuperscript{400} Thus, for instance, in the Greek case the European Commission did not contest the fact that the proclamation of emergency by the revolutionary government was not in accordance with the Greek Constitution, the military junta in power having altered the normal provisions of the Constitution in proclaiming the emergency.

\textsuperscript{401} In fact, neither the HR Committee nor any other international monitoring body has so far found a declaration null and void according to the derogation clause just because it was declared in contravention of the municipal law.

\textsuperscript{402} The European Commission in the Cyprus case found that 'in any case, art.15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency and that, where no such act has been proclaimed.......art. 15 cannot apply'. Cyprus case, Report of the Commission (1976) EHRR 4 (1979) 556.
emphasis of the Commission is on the publicity aspect of the proclamation that an
emergency situation exists requiring derogation from normal standards, unlike the
intention of the drafters of the Covenant requiring official proclamation in
compliance with all the conditions of municipal law. In the contrary, the IACHR in
one case considered that the declaration of the emergency violated the relevant
provisions of the national Constitution, thus indicating that the requirement of
proclamation should be taken to serve the purpose of both publicity as well as
legitimacy under municipal law.

Another important issue relating to the principle of proclamation, and on which the
derogation clause of the treaties remains silent, is the question as to which organ of
the State is competent and justified to proclaim the state of emergency. However,
this issue has attracted serious attention of a number of UN Seminars leading to
important conclusions, most of which have been based on the legislation of States.
Thus, it has been observed that the requirement of the rule of law regarding the
competency to declare an emergency is that such a declaration by 'any authority
other than the democratically constituted political organs' (i.e., the executive and the
legislature) is a clear departure from the established norms of international law. As
noted in the UN study, no really democratic system can entrust to military or police
officers the power to proclaim an emergency without violating the rule of law.

The IACCommHR also implied the requirement of some act of proclamation of the emergency in the
the ACHR does not explicitly refer to the principle of proclamation, see the 1968 IACHR

403 See, e.g., the Cyprus case, Mr. Sperduti's dissenting opinion, joined by Mr. Trechsel, p. 563. In
the Lawless case the European Court found that art.15 'doesn't oblige the State concerned to
promulgate the notice of derogation within the framework of its municipal law', Lawless case, Ser.
A: Judgement, p. 482, paras. 44-5. See also the comments by J. Fawcett on this point in "The
same issue was also raised in the Ireland v. UK case (1972) ECHR, Collection of Decisions (46


406 See, Daes, supra, at 193, para. 64.
Accordingly, except in cases of emergencies declared by the executive because it is in a better position to take an immediate decision or that the legislature is not able to act 'with the necessary speed' etc., it is the legislature which should hold the authority to declare an emergency through a special and expeditious procedure, or to confirm an emergency declared by the executive (or ratify, modify or revoke it) within a prescribed period of time.407

B. The Doctrine of Notification.

The derogation clause under all the three treaties contain the requirement of notifying other States parties to the treaty about the measures taken, the reasons thereof, and the dates at which the derogation terminates.408 It is quite clear that derogation from human rights obligations during states of emergency is a very important measure and the States parties have the right to be informed about the exact situation of the derogating State in order to be able to exercise their own rights, such as to present an inter-State complaint if the applicant believes that the derogating State has violated the standard set forth in the treaty. In other words, since the main aim of the derogation clause is to avoid abuses in emergencies, States undertake the commitment to adopt the decision involving derogations 'in public'.

The requirement of notification, as that of proclamation, also operates as a restraint on the derogating State so that it should think carefully, about which measures are 'strictly necessary' to overcome the exceptional situation. Such notices also keep the monitoring bodies duly informed about the situation so that they can exercise their own jurisdiction under the different procedures (such as when receiving inter-State complaints or individual communications, or when exercising jurisdiction under the reporting procedures). The notification requirement stresses the international accountability introduced by the derogation clause in situations of emergency. It has


408 Art. 4(3) CP Covenant; art. 15(3) ECHR; and art. 27(3) ACHR.
been thus aptly remarked at the UN that the derogation clause set forth 'a new principle in international law - that of the responsibility of States towards the members of the community of nations for any measures derogating from human rights and fundamental freedoms'.

Although the derogation clause does not as such refer to any specific form of notification, certain elements have been required to be present by the monitoring bodies of the human rights treaties.

(a) As to the time of notification:

The CP Covenant and the ACHR both expressly require the notice to be sent "immediately"; the European organs also consider it to be a necessary element. In other words, what is essentially required is that the notice of derogation must be within a 'reasonable' time, setting forth all the necessary information (and not just part of it) regarding the measures taken.

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410 That the notice should be sent 'without any avoidable delay'; see, the Lawless case, Ser. B: Report of the Commission, para. 80; also, the Greek case, Report of the Commission, para. 78.

411 The international bodies have objectively interpreted the 'reasonableness' of such notices; thus, for instance, in the Lawless case the Irish notice sent 12 days after suspension of guarantees (Lawless case, Ser. A: Judgement, p. 61, para. 47), or the three UK notices (in Ireland v. UK, E.Court.HR, Ser.A: p. 84, para.223.) sent eleven and eight days after derogation and 43 days after approval of the Terrorist Order by the House of Commons (11 Dec 1972) were considered to be reasonable.

On the other hand, the UN HR Committee found in reviewing the Columbia Report that the notice by Columbia four years after the derogation failed to comply with art. 4(3) of the Covenant; see YBHRCommittee (1979-80), vol.I, p. 370, para. 35 and p. 374, para. 18.

Similarly, the IACHR also found that Guatemala, by sending its notice of derogation nine months after the proclamation of the emergency, did not comply with the notification requirement of art. 27(3) of the ACHR; see, IACHR, Report on Guatemala, 1983, p. 33, para.6.

412 Thus, the Greek notices, the first sent within one month of the declaration of emergency with incomplete information and the other containing the reasons for derogation sent after six months of such derogation were not accepted by the European Commission as complying with the time
(b) As to the contents of the notice:

First of all, the notice must indicate the provisions which the State has derogated from. The HR Committee, under the Optional Protocol, has consistently held that a State cannot lawfully rely on the right of derogation from one article of the Covenant if the notice of derogation, or the information under that procedure, does not state that it is going to do so. The derogating State must also indicate the reasons for derogation, so as to enable other States parties to understand the real situation in that country and to assess the need for such derogations. Moreover, States under the European system should also explain the reason for all the measures taken.413 Again, the derogating State should also make a further communication regarding any extension of the emergency,414 or of the date on which it has terminated the derogations and from which the provisions of the treaty are again fully in force.

**Effect of the failure to comply with the notification requirement:**

One can think of two situations in this context: first, a total failure to meet the notification requirement, and second, a partial failure.

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One may, however, argue that the wording of the principle of notification in the European Convention establishes a higher standard than the one in the other two treaties. Under that Convention, States must keep the Secretary-General of the Council of Europe 'fully informed' of all the measures taken. It has thus become part of the notification requirement to enclose relevant legislative and administrative decrees relating to the emergency.

414 This was the position of the IACHR in the case of El Salvador, IACHR, Annual Report, 1984-5, p.141.
The first situation is obviously more serious and there is no doubt that, in principle, a State which does not notify could lose the right of derogation.\footnote{See, e.g., the Lawless case, Report of the Commission, pp. 72-3, para. 80.} But the important question is does such a State automatically lose its right to derogate, or there can be certain situations in which it does not lose it and therefore the international bodies could apply the derogation clause \textit{ex officio}.

Although this issue was raised before the European Commission in the Lawless and the Greek cases (namely, whether a failure to comply with the notification requirement would attract the sanction of nullity of the derogation) and later more directly in the Cyprus case,\footnote{Cyprus case, Report of the Commission (1976), EHRR 4(1982), 482 ff.} the Commission carefully avoided any direct ruling on the issue and restricted itself to reiterating the great importance of the notification as well as the proclamation requirements under art. 15 of the ECHR.

The IACHR, on the contrary, acted differently by asking the new military government in Bolivia for information about the legal provisions enacted by them after the \textit{coup d'état} which could affect the observance of human rights and which had suspended the obligations that Bolivia undertook according to the ACHR.\footnote{See, IACHR, Report on Bolivia, 1981. The military government suspended constitutional guarantees but did not send any notice of derogation to the Secretary-General of the OAS as required by art. 27(3) of the ACHR.} The Commission in its report applied to Bolivia the standards of the derogation clause despite the absence of notification and the Government's continuing denial of any suspension of human rights.

On the other hand, the UN HR Committee has generally been quite cautious about the consequence of a failure to notify and about the possibility of applying the derogation clause \textit{ex officio}. Under its reporting procedure, the Committee has consistently pointed out that if a State has not declared and notified the state of emergency, it cannot take into account the difficulties of a possible emergency situation in order to apply the derogation clause; in other words such States should
be held accountable under the normal standards of the Covenant.418 Similarly, under the Optional Protocol, the Committee has held that a State cannot rely on the right of derogation if it does not provide enough information through either the notice of derogation or the proceedings under the Optional Protocol.419

However, where the failure to notify is only 'partial', the international bodies have not so far established any clear ruling, although the European Commission in the Lawless case refused to declare as a matter of principle that a failure to meet the formal requirements of the notification procedure can never attract the sanction of nullity. It may, however, be said in this short scope of discussion that the most acceptable view seems to be that the duty to furnish timely and complete information is an autonomous obligation of the derogation clause, and that failure to provide this information cannot normally deprive the derogating State of its right of derogation.

C. The Principle of Non-Derogability of most Fundamental Rights:

The principle of 'non-derogability' of fundamental rights is one of the most important principles in the regulation of human rights in states of emergency contained in the derogation clause of the three human rights treaties. The core aspect of this principle is that even in situations threatening the life of the nation, there are some rights which can never be suspended. This principle thus clearly establishes an important limitation on the right of States to take measures derogating from human rights standards during states of emergency.

It may be noticed in the beginning that the three human rights treaties contain different lists of non-derogable rights. Thus, art. 15(2) of the European Convention has four rights; art. 4(2) of the CP Covenant has seven; and art. 27(2) of the

American Convention has eleven (it also entrenches the judicial guarantees essential for the protection of these non-derogable rights).

The 'four common rights' which have been included in the list of non-derogable rights of all the three treaties are: right to life; right to be free from torture and other inhuman and degrading treatment or punishment; right to be free from slavery or servitude; and the principle of non-retroactivity of penal laws. These rights, which are popularly called as to constitute the 'irreducible core' of human rights, have now been widely recognised as not only part of customary international law but also as norms of ius cogens.420

Both the CP Covenant and the ACHR make the right to be recognised as a person before the law as non-derogable,421 although they do not seem to have any direct relation with emergencies. It may be noted that no corresponding provision can be found in the European Convention and the Council of Europe probably rightly considered it unnecessary to introduce such a provision on the ground that its contents could be deduced from other articles of the Convention, especially articles 4, 6 and 14.422 Another non-derogable right under the CP Covenant which is very unlikely to be derogated from in a state of emergency is the right to be free from imprisonment merely on the ground of inability to fulfil a contractual obligation.423 The other two treaties, although they contain this right,424 have not made it non-derogable. Similarly, the ACHR declares a number of other rights as non-derogable, namely, the right to marry and to build a family (art. 17), the right of the child to be protected (art. 19), the right to a name (art. 18), and the right to nationality (art. 20).

420See, Questiaux Study, supra, p. 19.
421Art. 16 CP Covenant; art. 3 ACHR.
423Art. 11, CP Covenant.
424Art. 7(7) ACHR; art. 1 of the Fourth Protocol of the ECHR.
Two other rights which may affect the security of the State are made non-derogable: the first, made non-derogable under both the CP Covenant and the ACHR, is the right of freedom of conscience and religion; and the second, made non-derogable only under the American Convention, is the right to participate in the government. However, as regards the right of freedom of conscience and religion, both the treaties contain a 'limitation clause' under the same article and the wide scope of the limitation clause could virtually have the same effect as that of the derogation clause under certain conditions. Similarly, in practice, the two main measures taken by States during states of emergency relating to the right to participate in government are - the suspension of political rights by delaying general elections and the imposition of restrictions in the access to public services, both of which might adversely affect the effectiveness of this non-derogable right under the American Convention.

i) Derogability of certain 'non-listed' provisions:

It is important to examine the provisions in the human rights treaties which are not expressly included in the list of non-derogable rights but still cannot in fact be derogated from. Such provisions include: those related to the exercise of non-derogable rights; those that contain general exceptions; and those related to the machinery of implementation.

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425 Art. 18(1) CP Covenant; art. 12(1) ACHR.
426 Art. 23 ACHR; similar provisions may be found in art. 25 of the CP Covenant and art. 3 of the First Protocol of the ECHR - both being derogable.
427 That is art. 18(3) CP Covenant; and art. 12(3) ACHR, authorising restrictions of the right when necessary to protect public safety, order, health, morals, or the rights or freedoms of others.
428 For instance, the IACHR in its 1981 Report on Nicaragua takes into account that due to the state of emergency, the Government postponed the elections until 1985, and did not consider that this fact was per se against art. 27(2) in conjunction with art. 20, but only that 'the date proposed for calling the elections was too far off'. Report on Nicaragua, 1981, p. 139. For a similar illustration, see also the Landinelli case, supra.
Two basic principles relating to the enjoyment of fundamental rights, namely, the right to an effective remedy before domestic courts in the case of violation of the rights and freedoms,\(^{429}\) and the right to enjoy those rights without discrimination,\(^ {430}\) are applicable to all the rights set forth in the treaties and, therefore, when applied to the non-derogable rights during states of emergency, they are themselves entrenched from derogation. Moreover, the American Convention in art. 27(2) expressly prohibits the derogation of 'the judicial guarantees essential for the protection of such rights'.

Secondly, the provisions containing general exceptions under the treaties are as follows:

a) the prohibition preventing the State from engaging in any activity aimed at destroying or limiting to a greater extent than is provided the rights and freedoms recognised in the treaties;\(^ {431}\)

b) the prohibition on applying permitted restrictions for any purpose other than the one prescribed by the treaties;\(^ {432}\)

c) the prohibition on using the treaties as an excuse for limiting or derogating from the human rights recognised in municipal law or in other treaties;\(^ {433}\)

Now, the derogation clause allows a State to derogate from its obligations under the treaty, which also include those contained in the general exception clauses above.

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\(^{429}\) Art. 2(3) CP Covenant; art. 13 ECHR; art. 25 ACHR.

\(^{430}\) Art. 26 CP Covenant; art. 14 ECHR; art. 24 ACHR.

\(^{431}\) See, art. 5(1) CP Covenant; art. 17 ECHR; art. 29(a) ACHR.

\(^{432}\) See art. 18 CP Covenant and art. 30 ACHR; the ECHR does not, however, contain an express provision on this principle.

\(^{433}\) Art. 5(2) CP Covenant; art. 60 ECHR; art. 29(b) ACHR.

One good example of this clause is, however, the Belgian public law, under which emergency measures derogating from fundamental rights cannot be taken except in time of war; therefore, art. 15 could not be interpreted as conferring on the organs of the Belgian State the right to take measures of derogation in any emergency threatening the life of the nation other than in time of war; see, J. Velu, "The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communication", in A. H. Robertson (ed.), Privacy and Human Rights (Manchester, 1973), p. 68.
The crucial question then arises which of these clauses should be given the priority. A logical conclusion is of course to give the primacy to the general exception clauses which would also mean that such clauses should be treated as non-derogable in states of emergency.434

Finally, as regards the provisions relating to the machinery of implementation of the treaties, namely, inter-State applications, the right to individual petition, and the reporting procedure under the UN Covenant, it is quite clear that to allow States to derogate from such provisions,435 would in fact defeat the principal objective of the systems of guarantees established in the human rights treaties.436 However, there has been so far no indication that the States parties to the treaties have ever attempted to claim the right to derogate from the implementation provisions.

ii) Practice of Monitoring organs with regard to ‘fair trial’ and ‘due process’ rights:

Experience shows that gross violation of fundamental rights including the non-derogable ones (and in particular during state of emergency) such as the right to life or freedom from torture, has been made possible very often because of the lack of guarantees against arbitrary detention and the derogation of all provisions of due process. This fact, together with the evolving nature of international human rights law in the recent time have provoked the popular proposal that at least some of the most fundamental guarantees against arbitrary detention and some minimum rights of due process should be made non-derogable.

434 See, for instance, the Greek case, Opinion of the European Commission on HR in YBECHR 12 (1969)111-12, para. 221-225; see also the Lawless case, European Court of HR, Ser.A: judgements, p. 59, para. 38.

435 Especially the provisions relating to individual petition and inter-State complaints.

436 In this context, see the argument of the Uruguayan representative during the travaux préparatoires of the UN Covenant, A/2929, para.45.
In the Lawless and the Ireland v. UK cases, the European organs pointed out that these two rights of the European Convention (respectively under arts. 5 & 6) were, after the four non-derogable rights under art. 15, the most important rights of the Convention and, therefore, their derogation should be subjected to the strictest control and to some fundamental safeguards against possible abuses. Moreover, all the major studies on human rights in states of emergency as well as the practice of the international monitoring organs, while pointing to the importance of the non-derogability of some fundamental guarantees relating to administrative detention in public emergencies, have produced several standards to protect human beings in emergencies in particular cases.437

The practice of the HR Committee in a number of cases (notwithstanding the absence, as yet, of any direct opinion being expressed) clearly indicate that some of such guarantees are treated as non-derogable in public emergencies. The Commission, while adopting its views under the Optional Protocol in a number of cases from Uruguay, did not accept the existence of an emergency as a general justification to derogate from certain due process guarantees and found clear violation of almost all the rights contained in art.14 of the Covenant. The Committee expressly required that the Government should comply with a high standard of proof in order to show that those derogation measures were strictly required by the existing situation. All these, however, underline the importance attached by the HR Committee to these guarantees even in times of emergency.438

The practice under the American Convention in this regard appears to have taken a stronger view. The Inter-American Court has clearly expressed that the due process

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437For a general reference to such standards, see in particular the Questiaux study; The ICJ: States of Emergency..., ILA Paris Report (1984); Kingston Seminar; and the Siracusa Principles.

rights contained in art.8 of the ACHR, especially the habeas corpus and amparo, are therefore non-derogable in emergencies under art. 27(2), since they are the "essential guarantees" necessary to protect other non-derogable rights.439 Similarly, the practice of the IACHR also reaffirms the extraordinary importance of these fundamental guarantees of fair trial and due process and accordingly considers that 'certain fundamental rights can never be suspended as in the case, among others, of the right to life, the right to personal safety, or the right to due process'.440 The Commission has not, however, answered the question of which of these due process rights are non-derogable in emergencies and does not explain why some measures of derogation from these standards were not legitimate in exceptional situations.441

Thus, to state it briefly, the IACHR considers that the standards of due process, or at least most of them, are non-derogable even in emergencies, applicable both to the States parties under art.8 of the ACHR as well as to States non-parties but to which the American Declaration on Human Rights (particularly arts. 18 & 26) applies.442 The Commission particularly stresses the importance of an independent judiciary for the protection of human rights in states of emergency and strongly criticises the introduction of military and special courts during such emergencies, lacking independence, impartiality and the fundamental guarantees of due process.443

439 IACourtHR, advisory opinion, 'Judicial Guarantees', para. 30.
As we have already mentioned, the African Charter does not contain a provision allowing states to derogate from their obligations under the treaty in times of public emergency. Apparently, therefore, derogations from the fundamental human rights and freedoms would not be permitted under the African Charter. One possibility may, however, be that the African Charter's use of broadly-worded limitation clauses in several provisions made it unnecessary for the Charter to include the concept of derogation. But, still, even if we proceed from such an argument, Art.7 of the Charter while enumerating the right to fair trial as well as certain other rights relevant to the administration of justice does not contain any restrictive provisions limiting the applications of those rights and freedoms. A general proposition may, therefore, be made that the intention of the African Charter is that the right to a fair trial would be a non-derogable right at any time whatsoever.

Another important source of international fair trial norms is the Geneva Conventions of 1949 and their two Additional Protocols containing fair trial guarantees during armed conflicts, both international and non-international. It is important to note here that the Conventions and the Protocols assure the right to a fair trial even during periods of armed conflict. Thus, for instance, Art.129 of the Third Geneva Convention relating to the treatment of the prisoners of war states: "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Art.105." Art.105 includes the right to counsel, the calling of witnesses, the services of an interpreter when needed, the advising of these rights in due time before trial, the right to have competent counsel appointed for the accused, necessary time for the preparation of the defence, right to consult with counsel, right to be notified of the particulars of charges, and the right to have observers from the protecting Government present, unless there are exceptional circumstances. Art.130 of the Third Geneva Convention makes "depriving a prisoner of war of the rights of fair and regular trial" a "grave breach". Thus, at least in times of international armed conflict, these above mentioned provisions appear to make the right to a fair trial a non-derogable right.

Again, as to non-international armed conflicts, Common Article 3 of the four Geneva Conventions prohibits a party to such a conflict from "the passing of sentences and
the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples". Although Common Art.3 does not specify these "judicial guarantees" it may be presumed that these are similar to the safeguards identified by Art.105 of the Third Geneva Convention. Similarly, Art.6 of the Additional Protocol II to the Geneva Conventions sets forth a number of fair trial standards applicable to non-international armed conflicts including the right to prior notification of charges, necessary rights and means of defence, presumption of innocence, right to be present at trial, freedom from self-incrimination and retroactive penal laws, right to benefit from lighter penalties and restrictions on capital sentences.

Again, the writ of habeas corpus is not specifically included among the derogable rights under Art.4 of the CP Covenant, Art.15 of the European Convention or Art.27 of the American Convention. The Inter-American Court decided in 1987 that amparo and habeas corpus should be non-derogable. It held- in two Advisory Opinions- that the legal remedies guaranteed in Art.7(6) and 25(1) of the American Convention may not be suspended, even in emergency situations, because they are among the "judicial guarantees essential" to protect the rights whose suspension Art.27(2) prohibits. The Court observed that habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret, and in protecting against torture or other cruel, inhuman or degrading treatment or punishment. It also emphasised that the judicial nature of the guarantees implies the active involvement of an independent and impartial body having the power to pass on the lawfulness of measures adopted in a state of emergency.

As regards the freedom from torture, another most important right in the administration of criminal justice, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides : "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political

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instability or any other public emergency, may be invoked as a justification of torture." It is thus obvious that the Convention against Torture expressly prohibits derogation and indicates that an accused person possesses a non-derogable right to be free from torture at all times during the criminal process, including interrogation, detention, trial, sentencing and punishment. Moreover, it would be very difficult today to contend that torture, at the very least, does not constitute a violation of customary international law and "it may even have acquired the lineament of a peremptory norm of general international law, i.e., jus cogens."

**iii) An assessment of the question of reservations to non-derogable rights:**

The first question that arises is whether a reservation to a non-derogable right can be held valid. It is quite clear that due to the extraordinary importance of the principle of non-derogability of certain rights, it would be prima facie against the spirit of the human rights treaties to make reservations to such rights. In other words, it seems reasonable to assume in principle that if derogations are not permitted from these rights, reservations should not be permitted either.

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445 Art.2(2).

446 Dinstein, The Right to Life, Physical Integrity and Liberty, supra, p.122.

Today, it has been a commonly accepted view of international lawyers that the prohibition of torture has developed into a rule of customary international law applying equally to all states which are not even parties to any of the relevant international treaties, universal or regional. This universally valid rule has been thus considered to be a peremptory norm as defined in Art.53 of the Vienna Convention on the Law of Treaties of 1969, which states that "a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See, H. Burger & H. Danelius, The UN Convention against Torture, supra, p.12.

One important principle with regard to the reservation of non-derogable rights has been established by the IACourtHR. By virtue of art.75 of the ACHR, the regime of reservation should be interpreted according to the Vienna Convention on the Law of Treaties; accordingly, reservations are valid provided that they are not incompatible with the purpose and object of the treaty. The Court, however, further added that the situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right of its basic purpose.

The CP Covenant does not, however, contain any clause on reservations. It seems that the intention of the parties was to abide by the rules adopted at that time by the International Law Commission in the drafting of the Law of the Treaties Convention. On the other hand, art. 64 of the ECHR, dealing with reservations, establishes a more restricted regime in the sense that, while it prohibits reservations of a general character, it allows reservations to any particular provision of the Convention to the extent that any law in force in the territory of the reserving State Party is not in conformity with the provision at the time of signing or ratifying the Convention. However, the European Court has confirmed in the Belilos case that art.64 expressly prohibited reservation of a general character and prohibited by implication those which were incompatible with the Convention.

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448 See, IACourtHR, advisory opinion of 24 Sept 1982, 'The Effect of Reservations on the Entry into Force of the American Convention (arts. 74 & 75)', para. 35.
449 Art. 20(1), Vienna Convention.
450 See, IACourtHR, advisory opinion of 8 Sept 1987, 'Reservations', para.61.
451 See the Report of the Third Committee to the GA (1966), A/6546, paras. 142-3; see also the application of this test by the HR Committee in the case of Trinidad and Tobago with express reference to art. 19(c) of the Vienna Convention, UNGAOR, A/40/40 (1985), p. 22, para. 112; see also, 'Reservations' to the Genocide Convention, ICJ Reports (1951).
In a nutshell, it is thus quite obvious that reservations of a general character to the whole principle of non-derogable rights established in the derogation clause are not compatible with the object and purpose of the treaty.

III. The Essential Requirements of a Valid Derogation in States of Emergency:

The derogation clause of the three major treaties establishes three substantive conditions for taking measures derogating from human rights standards in situations of emergency. Accordingly, the right of the State to take such measures has been conditioned by:

i) the Principle of Proportionality, i.e., the measures must be strictly required by the exigencies of the situation;

ii) the Principle of Non-Discrimination, i.e., that the measures must not involve any discrimination; and

iii) the Principle of Consistency, i.e., that the measures should not be inconsistent with the States' other obligations under international law.

These conditions, however, give rise to some difficulties and complicacies in the assessment of a valid derogation which, in the present context, ask for some closer attention.

A. The Principle of Proportionality:  


The Principle of Proportionality, which has been widely recognised as to constitute a
general principle of international law, is an important doctrine of modern human
rights law. From the beginning of the development of human rights and the modern
concept of the rule of law, it has been one of the main legal principles applied to
determine the legality of States' interference in individual rights and freedoms. One
lucid illustration of such application is to be found in the legal regime of the
derogation clause where the principle of proportionality has been employed as the
main substantive criterion to assess the legality of the derogation measures taken by
States in situations of emergency. The derogation clause of the treaties thus
stipulates that derogations from the obligations of the treaties are allowed 'to the
extent (and for the period of time) strictly required by the exigencies of the
situation'.

Since the First Cyprus case, the European organs have always declared themselves to
be competent to exercise the fulfilment of this substantive condition of requirement
of derogation. The application of the principle was one of the main issues in the
Lawless case and the Ireland v. UK case. In the latter, the European Court observed
that it was in the first place on the State party concerned to determine how far it is
necessary to go in attempting to overcome the emergency. Thus, in this line of
interpretation, art.15(1) leaves the governments with a wide margin of appreciation

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454 For a brief history of the notion of proportionality and its evolution in domestic and international
law, see J. Delbruck, 'Proportionality' in R. Bernhardt (ed.), Encyclopaedia of Public International

455 This requirement is expressly mentioned only in the ACHR. See, for instance, IACHR,
Nicaragua-Miskitos case, p.117.

456 Two theoretical bases have been suggested as forming the foundation of the principle in the
derogation clause: the first is derived from the principles laid down in articles 29(2) of the UDHR,
5(1) of the CP Covenant, and 17 of the ECHR, embodying a fundamental theory of limitation and
implying that the extent of every limitation or derogation should be strictly proportionate to the
need of defending the higher interest of the society; the second can be found in the principle of self-
defence in international law. See, ILA Paris Report (1984), p.66, para.5; also Questiaux study,
para.60.

457 First Cyprus case, p.176.
although, however, this discretionary power of the State is not unlimited and is subject to supervision by the Convention organs.\textsuperscript{458}

The jurisprudence of the monitoring organs, particularly those of the European Court and the Commission, have established some general principles on the application of the principle of proportionality.\textsuperscript{459} Thus, it has been emphasised that 'the severity of the counter-measures must be proportionate to the gravity of the threat' and that 'measures which may be validly resorted in time of war should not be taken when the situation bears no resemblance to a state of war'.\textsuperscript{460} The legitimacy of taking derogation measures arises only when the ordinary provisions of the law and the limitations provisions are not enough to deal with the situation.\textsuperscript{461} There must also exist what may be termed as a 'qualitative proportionality'; in other words, there must be a link between the facts of the emergency and the measures taken.\textsuperscript{462} The European organs in their assessment of proportionality also took account of the manners in which the derogation measures have been applied in practice\textsuperscript{463} and also the need for and proportion of the suspension of some of the guarantees linked with

\textsuperscript{458}See, Ireland v. UK, Ser.A: Judgement of the Court, para.207.

\textsuperscript{459} It may, however, be noted that although the UN HR Committee follows a very similar pattern with the European organs in applying the principle of proportionality while reviewing states' reports and in the proceedings under the Optional Protocol, the Committee has been unable in many cases to give an opinion (under the review procedure) on the merits of those cases due mainly to the lack of detail information provided by the parties concerned about the prevailing situation and the measures taken. In any case, however, the Committees competence to assess states' compliance with the principle of proportionality has not so far been challenged by any state.

\textsuperscript{460}Lawless case, Ser.B: Report of the Commission, pp.143 & 156. This principle was also applied by the UN HR Committee in reviewing the Report of Nicaragua in 1981, see A/38/40 (1983), p.55, para.244 and CCPR/C/SR.420. It was also applied while reviewing the UK Report, see, A/34/40 (1979), p. 55, para.235. See also, IACHR, Report on Chile, 1985; also, Report on Paraguay, 1987.

\textsuperscript{461}Lawless case, Ser.A: Judgement of the Court, para.36. Also, Report of Uruguay, CCPR/C/SR.357, p.5, opinion of Mr. Tomuschat.

\textsuperscript{462}Ireland v. UK, Ser.B: Report of the Commission, p.119. The HR Committee found that this is logically inherent in the derogation clause and that the suspension of political rights in a state of emergency (in that case by Peru) due to a natural disaster does not establish any such link. See, A/38/40 (1983), p.60, para.283.

\textsuperscript{463}See also the comment by Mr. Bouziri in the UN HR Committee while reviewing the report of Afghanistan, CCPR/C/SR.604 (1985), p. 13, para.18.
the derogated right, for instance, the guarantee of habeas corpus linked with administrative detention.464

Moreover, while assessing the proportionality of the derogation measures, the monitoring organs should analyse the other less grave alternatives available to the government to deal with the existing situation.465 Special importance should also be attached to the necessary safeguards taken by governments in order to avoid abuses.466 In the assessment of the proportionality, account must be taken not only of the nature of the threat, but also of its intensity at a given moment and the proportionality of the measures should be assessed according to the variations in the intensity.467 Again, as with the very nature of a state of emergency itself, all measures of derogation are temporary and justified as long as the emergency lasts.468 Finally, along with a margin of appreciation, concepts like good faith and reasonableness on the part of the government play an important role in the assessment of the legality and proportionality of the measures taken.

B. The Principle of Non-Discrimination.

Another important substantive condition for the derogation of rights in states of emergency is that the measures taken must not involve discrimination on the grounds of race, colour, sex, language, religion or social origin.469 It may be noticed here that

464 See, Ireland v. UK, Ser.A: Judgement of the Court, paras.211, 215-21; Ser.B: Report of the Commission, pp. 122-6. Also, IACourtHR, advisory opinion on 'Habeas Corpus', para.21
465 Thus, for instance, in the Lawless case, the Commission analysed the alternatives to detention without trial, namely, trial by ordinary courts, Special Criminal Courts, Military Courts or Tribunals, and also the closing of the border, Lawless case, Ser.B: Report of the Commission, pp. 102-55.
467 See the Greek case, Report of the Commission (1969), opinion of Mr. Eustathiadis, pp. 104-10. Also, IACourtHR, advisory opinion on 'Habeas Corpus', para.22.
468 See, for instance, the HR Committee, General Comment 5/13, in CCPR/C/SR.21, p.5, para.3.
469 This condition is contained in the derogation clause of the CP Covenant [art. 4(1)] and the ACHR [art. 27(1)], but not in the ECHR.
the derogation clause of the Covenant and the American Convention contains a lesser number of grounds of discrimination than, e.g., the UN Covenant which, additionally, include political or other opinions, national origin, property, and birth or other status.\textsuperscript{470}

Again, the inclusion of the word 'solely' in the derogation clause of the CP Covenant in relation to discrimination may pose serious problems in some cases.\textsuperscript{471} One may thus tend to interpret this provision in a way that it may be possible to take discriminatory measures even on the grounds expressly prohibited in the derogation clause, provided that they are not 'solely' discriminatory but rather relate to other legitimate reasons (e.g., security reasons or military necessity etc.). Such an interpretation would considerably weaken the strength of non-discrimination provision under the derogation clause and may have important consequences on fundamental rights during states of emergency.

Although the principle of non-discrimination and equality before the law constitute one of the most fundamental norms of the concept of modern human rights law, these provisions in the human rights treaties have not been included in the list of non-derogable rights and this indeed renders the extent, scope and nature of the principle far from clear. A number of States practice clearly illustrate this ambiguity.\textsuperscript{472}

\textsuperscript{470} Arts. 2(1) and 26 of the CP Covenant; see also, art.14 ACHR, art.1(1) ECHR, and art.2(2) UDHR. The main reason for such omission seems to be that it was thought that in some cases, legitimate restrictions on those grounds could be imposed in states of emergency; see UN Doc. A/2929, para.44.

\textsuperscript{471} Following the debate with regard to the introduction of the word 'solely' the UK representative stressed on the importance of the term because 'during an emergency a State would impose restrictions on a certain national group which at the same time happened to be a racial group; that word would make it impossible for the group to claim that it had been prosecuted solely on racial grounds'. See, E/CN.4/SR.330, p.10, Mr. Hoare (UK). The question of inclusion of the word led to a separate vote and was finally adopted by 9 votes to 7 with 2 abstentions, E/CN.4/SR.331, p.6. For an account of the background of this position during the travaux préparatoires of the Covenant, see E/CN.4/SR.195 (29 May 1950), p.23, and para.143; also E/CN.4/196, pp.3-6.

\textsuperscript{472} Thus, for instance, measures derogating from the rights to residence and free movement were taken by the Nicaraguan Government against the Miskito Indians living by the Coco River because
Accordingly, derogation measures which make a distinction between different groups of people on racial grounds could be considered legitimate provided that they were not exclusively taken on this or other prohibited grounds, but because such measures were necessary and reasonable in the circumstances and proportionate to the emergency. One of the consequence of such an interpretation of the derogation clause is that in so far as the restrictions on the powers of the State to take derogation measures are concerned, the CP Covenant and the ACHR, the two treaties whose derogation clause contains an express prohibition on discrimination, stand on the same footing with the ECHR, which contains no explicit reference to this requirement in its derogation clause.473

A question may, however, arise as to the consequence of the absence of non-discrimination provision in the derogation clause of the European Convention. This has probably been aptly answered by the European organs in the Ireland v. UK case, where the main submission of the Irish Government was that 'the exercise by the respondent Government of their powers to detain and intern persons was carried out with discrimination on the ground of political opinions and this constituted a breach of art.14 (of the ECHR)'. The European Commission accepted in principle that a measure of derogation from a provision of the Convention, even if it has been found to be justified under art.15, could have been applied in a discriminatory manner, thereby constituting a violation of art.14 of the Convention.474 In other words, the Commission implied that the general prohibition of non-discrimination of art.14 will

of military necessity and the need to protect their lives and not for racial motives; this measure was considered by the IACHR to be non-discriminatory. See, the Nicaragua-Miskitos case, supra.

A similar example may be found in the measures of relocation and exclusion taken by the USA Government against American citizens of Japanese origin during the Second World War; see, Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians (Washington, 1982), esp. p.18. For the attitude of some Latin American States during that same period, esp. Peru, see ibid, p.305-14.


474Ireland v. UK, Ser.B: Report of the Commission, p.28. The Court as with the Commission did not, however, find any discrimination contrary to art.14 in the application of the measures by the UK derogating from art.5, see ibid, Ser.A: Judgement of the Court, p.87, para.230.
have a similar effect in cases of derogation to that of the specific non-discrimination prohibition of the derogation clause of the Covenant or the ACHR.\textsuperscript{475}

While reviewing States reports, the UN HR Committee has, in a few instances, called attention to some discriminatory measures taken by Governments in emergencies.\textsuperscript{476} On the other hand, the practice within the Inter-American system shows that very little importance has been attached to the doctrine of non-discrimination as a fundamental principle of human rights, whereas the significance of the principle in relation to derogation during states of emergency has been almost ignored. In so far as the general principle of non-discrimination is concerned, there is only one reference to the concept of racial discrimination (although quite unimportant) in one of the IACHR's official publications\textsuperscript{477}; there is hardly any mention of the compliance with that principle by the States' parties in the Commission's country reports;\textsuperscript{478} no consistency can be found in the case-law on discrimination arising from individual communications.\textsuperscript{479} Again, in so far as the application of the principle in relation to emergencies is concerned, the IACHR does not seem to have paid attention to this requirement of derogation. It may be noted that in the cases in which the IACHR referred to the 'most accepted doctrine' on human rights in emergencies within the

\textsuperscript{475}See also two other cases relating to emergencies where the European Commission has found violations of the provisions on non-discrimination (art.14), although, however, there was no consideration of the possible relation between art.14 and 15, viz.- the Greek case (1969), p.164, para.369; and the Cyprus case (1970), p.551, para.503.

\textsuperscript{476}See, for instance, the First Report of Chile in 1979, YBHRCommittee 1979-80, i. 17-18; see also E/CN.4/1221, p.27 and A/34/40, p.78.; also, the Second Report of the UK in 1985, A/40/40 (1985), p.100, para.528 (see also CCPR/C/SR.594, p.3).

Under the Optional Protocol, however, there is only one case in which a reference was made by the Committee to a discriminatory measure in emergencies, namely, the Weinberger (v. Uruguay) case, Comm. No. 26/1978, Adoption of Views (29 Oct. 1986), 11th Session.

\textsuperscript{477}OAS, The IACHR: Ten Years of Activities, p.320.

\textsuperscript{478}The only country reports in which some reference has been made to discrimination are the Report on El Salvador (1978), pp.159-61; and the Report on Cuba (1983), pp.48-9; p.179, para.11; and pp.180, paras.12 & 15, and 182, para.22.

\textsuperscript{479}For a detail account, see Burgenthal and Norris (eds.), The Inter-American System, supra.
Inter-American system, namely, the principle of exceptional threat, proportionality, and of non-derogability of certain rights, the principle of non-discrimination was not mentioned at all.480

C. The Principle of Consistency.

The derogation clause of the human rights treaties stipulates that the right of a State to take measures of derogation in emergencies is limited by the condition that the measures must not be inconsistent with the States' other obligations under international law. However, the monitoring organs of the three treaties have not so far had the opportunity of developing and defining a precise meaning of the principle of consistency as contained in the derogation clause and what kinds of other international obligations could be applicable in cases of derogation in states of emergency. It is still desirable to have a brief look at the relevant jurisprudence of the treaty organs.

Thus, in the Lawless case, the European Court first recognised its competence to determine *proprio motu* whether the principle of consistency has been fulfilled.481 On the other hand, it should be noticed that in the UN HR Committee's 'general

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\[\text{\footnotesize 481 } \text{Lawless case, Ser.A: Judgements on the Merits (1 July 1961), paras. 39-41. The Court also did so in the Ireland v. UK case, Ser.A: Judgement of 18 Jan. 1978, vol.23, para.222. See also, Cyprus v. Turkey case, where a Government for the first time in a case of derogation tried to define the content of the principle of consistency, Report of the Commission (10 July 1976) EHRR 4 (1982) 552-3, paras. 510 \& 512. The Commission, however, did not express any view on this question because it found that art.15 could not be applied 'in the absence of some formal and public act of derogation' by the respondent government, ibid., para. 528.}\]
comment' on the derogation clause, the only requirement which is not mentioned is the principle of consistency. Moreover, neither in the review of the States' reports nor in the views adopted under the Optional Protocol has the Committee made any reference to this principle. A similar attitude may also be found in the IACHR with regard to the principle of consistency as a requirement of derogation in states of emergency. The only case where it has attempted to apply the principle was the Nicaragua-Miskitos case.

It is thus clear that the task of determining the possible substantive content and implication of the principle of consistency in states of emergency is a difficult one. As is well-known, international obligations can arise from general international law and from treaties. With regard to this first source, 'it is difficult to see how there could exist additional obligations of respecting human rights in states of emergency arising from customary international law over and above those established by the legal regime of the derogation clause'. Moreover, there have been so far no clear norms of general international law on this point. On the other hand, some possible additional norms of customary international law in time of war may arise in fact from the standards set up in the 1949 Geneva Conventions and possibly from the two additional Protocols of 1977.

In any case, however, it seems most acceptable that the most likely types of rules applicable through the principle of consistency are those derived from conventional law, particularly those relating to the laws of war, in particular the Geneva Conventions of 1949 and the two Protocols of 1977. But, again, these treaties apply only during armed conflicts of an international character and in the case of common

482 HRCommittee, General Comment 5/3 (on art.4) in CCPR/C/21, pp.4-5.
483 But see the comments by one Committee member while reviewing the report of Afghanistan in 1985 in CCPR/C/SR.604(1985), p.6, para.36.
485 Oraa, p.201.
486 What seems more likely is that some of the principles and norms established in the derogation clause, but not all, could be deemed to constitute emerging norms of customary international law. See the remarks of the ILA Paris Report (1984), p.70 and Montreal Report (1982), p.94.
article 3 and Protocol II of a non-international character. So the additional obligations in these treaties cannot be applied during emergencies caused by lesser grave reasons. However, the possible additional human rights obligations arising from the Geneva laws include: right to humane treatment; the right to fair trial and due process of law; and the guarantees for those detained without trial.

Some other additional obligations applicable through the principle of consistency of the derogation clause could arise from other specific human rights treaties covering some of the rights contained in the three main treaties. Again, the lists of non-derogable rights under the three treaties vary in number; consequently, a State party to the European Convention and also to the UN Covenant will have its right of derogation further limited; in this case, the 'other international obligations' involved would be to respect those additional non-derogable rights recognised in the CP Covenant.

IV. Control of Derogations During Emergencies: a review of effectiveness.

A. Judicial Control under Municipal Systems:

A number of specific problems should be examined in relation to the control or governance of the declaration of states of emergency by States by judicial or quasi-judicial organs, both at the national and international levels.

The question of judicial control of states of emergency by domestic courts have given rise to frequent disagreement resulting in the advancement of several quite different proposals. Some said that due to its political nature, there should be no

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487 Only with regard to art.10(1) of the CP Covenant which also recognises this right and did not make it non-derogable; art.5 of the ACHR also contains the right to humane treatment, but that right is included in the list of non-derogable rights; consequently, no question of applying the principle of consistency arises.

488 Which under the human rights treaties are not non-derogable although the Geneva Conventions stipulate strict prohibition on their suspension under any circumstances.
judicial control at all; whereas some preferred at least some form of control. Another proposal suggests that the issue must be resolved according to the legal tradition of each State and, therefore, international law should be silent on this point.\textsuperscript{489} Three and a half decades ago, the International Commission of Jurists noted that a declaration of emergency is susceptible 'only to a \textit{posteriori} legislative ratification and judicial review.'\textsuperscript{490} The UN, on the other hand, failed to establish a decisive doctrine regarding this in its Mexico Seminar on Human Rights held in the same year as the ICJ's.\textsuperscript{491} Six years later, the UN noted that the declaration of a state of emergency 'should not be subject to judicial control'.\textsuperscript{492} Again, in a relatively recent UN study, it has been noted that 'the ordinary courts of a state should not abdicate the responsibility of testing the legality of a declaration of emergency.'\textsuperscript{493} A similar ambiguity may also be found in the ICJ's self-contradictory statement in its 1983 study on emergency that it is 'axiomatic that, for the protection of human rights, the greatest possible degree of judicial control should be striven for', and then noting that the question of judicial review of emergencies is 'another issue' which must be decided "in the light of the legal tradition of each country".\textsuperscript{494} In his important study on this subject, Prof. Alexander purported to develop the thesis that national courts "should ideally not be involved" in matters of national crisis.\textsuperscript{495}

A rather clearer vision in this regard has, however, been expressed by the ILA in its 1984 Paris Minimum Standards that at the national level, power of judicial review over declaration and duration of an emergency shall be exercised 'in terms of the constitution and legal tradition of the state concerned, keeping in view the undertaking of the state to adopt legislative or other measures to give effect to the rights recognised by any treaty to which it may be a party'.\textsuperscript{496} In its conclusion the

\begin{footnotes}
\footnotetext[489]{See ICJ, States of Emergency, p. 435.}
\footnotetext[490]{Conclusion 5 of Committee I, ICJ, the Lagos Conference on the rule of law (1961), in Brownlie, Basic Documents on Human Rights, 2nd edn. Oxford (1981) at 427-8.}
\footnotetext[491]{UN Seminar on Amparo, Habeas Corpus and Other Similar Remedies: Mexico City, Mexico, 1961, UN Doc. ST/TAO/HR/12, esp. p.26, para.92.}
\footnotetext[492]{UN Seminar on the Effective Realisation of Civil and Political Rights at the National Level, Kingston, Jamaica (1967), ST/TAO/HR/29, p.51, para.237(g).}
\footnotetext[493]{Daes, supra, paras. 90, 91 at 196. Mrs. Daes has, however, recommended a certain 'margin of appreciation' to be left with the political organs of the state.}
\footnotetext[494]{ICJ, "States of Emergency", p. 435.}
\footnotetext[495]{G.J. Alexander, supra, p.1.}
\footnotetext[496]{Para. 7 of Sec.(A) of the 'black letter rule', ILA, Paris, 1984.}
\end{footnotes}
ILA thus noted that 'there is no reason why, in appropriate cases, the judiciary should not be able to pronounce judgement invalidating the declaration of an emergency where, for instance, it is malafide or a fraud on the exercise of constitutional powers.\(^{497}\)

However, the record of protection of human rights by municipal courts during emergency has not been an encouraging one showing the vulnerability of the courts in times of crisis, upholding far-reaching expansion of governmental powers with a corresponding contraction of individual rights.\(^{498}\) It has been thus more popular to insist on the control by the democratically elected legislature and the pressure of public opinion, rather than to insist on giving such control to the judiciary.\(^{499}\)

These above difficulties on the part of municipal courts in controlling declaration of emergency and derogating measures taken by the executive have radically increased the importance of, and confidence in, international control. At the same time, what necessarily follows is the fact that while it has been frequently argued by some States that the international bodies lack the necessary competence to analyse national emergency situations (a matter of exclusive internal jurisdiction), the effectiveness of the legal regime created by the human rights treaties regarding states of emergency depends entirely on their control by the monitoring organs of the relevant treaties. However, as it will be seen in the following paragraphs, the extent and procedure of such control are different in the different bodies created under each of the treaties.

**B. International Control under the Treaty-Mechanism:**

\(^{497}\)ibid., para. 14 at 63. The ILA thus entrusted the municipal courts with the duty 'to ensure that there is no encroachment upon the non-derogable rights and that derogating measures from other rights are in compliance with the rule of proportionality'; see ibid, p. 65


Even though an in-depth assessment or evaluation of the effectiveness of existing monitoring mechanisms has not been included within the scope of this research, a brief look at the commonest criticisms of the system of implementation of international human rights norms in this field is quite expected. Speaking generally, and taking the existing mechanism of international monitoring together, three different procedures are available to implement the provisions of the relevant treaties, namely, individual communications or complaints; interstate complaints; and the system of periodic reporting, although their respective status under the treaties are far from identical and thus have not produced a consistent pattern of international protection.500

a) The UN systems:

Within the UN system, and in so far as its treaty organs are concerned, the principal tool of the UN Human Rights Committee, i.e., the review of reports by states parties on implementation of the CP Covenant under Article 40 of that Covenant, has been criticised for its failure as an effective or coherent device for fact-finding in derogation situations because of its unfocused, substantially delayed and unequipped nature in producing or testing the veracity of relevant information.501 It should be noted that the nature of the HR Committee is a special one, particularly as far as its functions under the reporting procedure are concerned. It is neither, strictly speaking, a judicial or quasi-judicial body (as the European Commission or the Court) nor a fact-finding body (as the IACHR). It has the role of reviewing States' reports and, in the dialogue with States' representatives, members of the Committee express their opinions about States' compliance with the Covenant. It has, however, made useful comments on most of the articles of the Covenant, although,

500 For instance, under the American Convention, individual petitions are mandatory (art. 44) whereas interstate complaints are optional (art. 45); by contrast, under the European Convention, inter-state complaints are mandatory (art. 24) but individual petitions are optional (art. 25). Under the CP Covenant, on the other hand, both inter-state complaints (art. 41) and individual petitions (Optional Protocol) are optional procedures, the sole mandatory measure being confined to the periodic reporting system under art. 40 of the Covenant.

unfortunately, the general comment on the derogation clause is nothing more than a restatement of the clause itself.\textsuperscript{502}

The practice within the Human Rights Committee used to be that the Committee members would informally receive information from sources other than the reporting state provided the source is not publicly identified. This obviously enabled the Committee to be more effective than would otherwise have been the case.\textsuperscript{503} However, there is no doubt that due to the ending of Soviet control in the Eastern Europe and the demise of the Soviet Union, there appears to be no problem now about acknowledging publicly the receipt of information from named NGOs. Such reports may now be officially distributed rather than being informally made available to the Committee members individually.\textsuperscript{504}

Again, the Committee as a whole had decided not to make specific general comments on particular states.\textsuperscript{505} However, in 1992, the Committee took a positive step by deciding that at the end of the consideration of each State Party’s report, specific comments would be adopted referring to the country in question and such comments would express both the satisfaction and concerns of the Committee as appropriate.\textsuperscript{506} These specific comments are in a common format and refer to ‘positive aspects’ of the report and the ‘principal subjects for concern’, as well as ‘suggestions and recommendations’.\textsuperscript{507}


\textsuperscript{505} See UN Doc. CCPR/C/18 (1980).

\textsuperscript{506} UN Doc. A/47/40, p.4.

\textsuperscript{507} For a brief, useful treatment of the Committee’s current practice in this regard, see M. Shaw, International Law, 4th edn. (Cambridge University Press. 1997); also, Ineke Boerefijn, 'Towards a Strong System of Supervision: The UN Human Rights Committee’s Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights, 17 HRQ 1995 (No. 4) pp. 766-793.
The review process of the Committee, from the very beginning, has been stumbling through a complete failure by states to submit their due reports or to submit them within reasonable time and in a comprehensible fashion on the emergency concerned. It is therefore an apt observation that while on the one hand the Committee lacks the adjudicatory powers of the European Commission and the Court of Human Rights, on the other hand it does not enjoy the flexibility of the Inter-American Commission to decide on its own accord to study human rights situations in any state party, particularly the capacity to commence on-site investigations.508 Notwithstanding the fact that a considerable number of proposals surfaced within the Committee to overcome these and other lacunae in its monitoring process each securing broad support, no consensus has been so far achieved on any of them.509

Again, among the main set-backs of the reporting procedure are also those including the widespread failure to comply with the notification requirement according to art.4(3) of the Covenant, the practice of exclusive legalistic approach which is often unrealistic, and the unwillingness of some States fully to co-operate with the Committee. Moreover, the rule adopted by the Committee requiring States to submit reports every five years has provided an excuse for some States to avoid giving the supplementary information requested at the end of the previous report.510 However, all these shortcomings prevented the Committee from assuming an effective control of states of emergency.511

509 For a brief account see Fitzpatrick, p. 93
510 The Chilean case is a good illustration of this; see UNGAOR A/39/40, Report of the HR Committee, 1984, p. 78, para. 437.
511 Attempts were made by some members to improve the procedure of monitoring situations of emergency, in which gross violation of human rights have often occurred. Perhaps the most serious attempt took place in 1982 at the 15th Session of the Committee, which encountered strong opposition from some members who construed the powers of the Committee in a very restrictive way; see the interventions of Mr. Opsahl and Mr. Ermacora, and the formal proposal of Mr. Opsahl in CCPR/C/SR. 349, pp. 4-5. See also a similar proposal by Mr. Tarnopolsky in CCPR/C/SR. 463; also CCPR/C/SR. 404, 414 & 575 and CCPR/C/SR. 334, 349 & 351. Although the majority of the Committee were in favour of these proposals, the practice of reaching decisions by consensus prevented the adoption of these proposals.
Two further problems that make the Committee's task of monitoring emergencies more difficult are:

(i) Lack of clarity on the legal status of countries in emergencies: Thus, many States do actually fail to notify the declaration of emergency according to art. 4(3). Others do not proclaim the state of emergency even if the situation amounts to a de facto state of emergency due to numerous derogations. The Committee therefore tries to clarify the legal status in the country while questioning State representatives before making any assessment of the situation.512

(ii) The doubt over whether the obligation of sending in a periodic report can be derogated from in emergencies. No clear conclusions have so far been reached in the Committee regarding this problem.513

However, on several occasions, members of the Committee have made clear statements not only about their general competence to monitor emergencies, but also about States' compliance with the principles of the derogation clause. Moreover, the policy adopted by the HR Committee under the Optional Protocol underlines the

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513Contradictory propositions have been made in the Committee on this issue; see, e.g., CCPR/C/SR. 443, Report on Lebanon, p. 5, where one member said that Lebanon was not obliged to provide a report; on the other hand, in A/38/40, Report of the HRC, 1983, p. 50, para.228, one member of the Committee pointed out that the fact that had submitted a very complete report on the situation of emergency was evidence that States consider that the reporting procedure is not suspensible in those situations.
international control of states of emergency. The Committee clearly expressed that
the respondent State is duty-bound to give a sufficiently detailed account of the
relevant facts and that without full and comprehensive information, the Committee
cannot conclude that there exists valid reasons for derogation from normal
standards.514

On the other hand, in so far as the procedure under the Optional Protocol is
concerned, the most notable features of the Control of emergencies by the
Committee include the principle that there can be no justification for the violation of
non-derogable rights; that rights which are not mentioned in the notice of derogation
cannot be derogated from; that the failure of States to provide precise responses to
allegations will justify the finding that a reliable attested violation has occurred and
that a State has a duty to investigate allegations under the Optional Protocol in good
faith and to report the results of its investigations.515

Again, the optional mechanism of interstate complaints under Articles 41 & 42 of the
Covenant has displayed even lesser impact in the implementation of Article 4 of the
Covenant. The “toothless” nature of this procedure516 as well as the wide diversity
and ideological division among states parties appear to act as a continuing powerful
deterrent to the interstate complaint procedure.

However, considering an increasing trend in ratifying the Covenant's Optional
Protocol and greater follow-up by the Human Rights Committee on compliance with

514 See, for instance, A/36/40, Communication No. R 8/34, Uruguay, pp. 132-3; A/37/40,

515 See the summary of the ILA Seoul report (1986), p. 12. For the role of the HR Committee in
general under the Optional Protocol, see P.R Ghandhi, “The Human Rights Committee and the Right
of Individual Communication” 57 BYBIL (1986)201-51. For a survey of decisions given by the HR
Committee, see M. Nowak, ,7 HRLJ (1986) 287-307; 11 HRIJ (1990) 139-56; See also, P.R.
Ghandhi, “The Human Rights Committee and Derogation in Public Emergencies” 32 German

516 Where although the Committee can make an authoritative finding of facts but cannot express its
views as to breach and where the parties reserve multiple opportunities to bring the entire
proceedings to a halt; see, e.g., Hartman, supra, p. 41; also, Ghandhi, P.R., “The Human Rights
its views in individual communication cases as well as a visible demonstration of an increasing sophistication in the development of its jurisprudence, the Optional Protocol procedure offers a greatly applaudable promise as an effective monitoring mechanism. Still, what should be carefully watched in holding up such a promise is that the Committee's heavier case-load and continued restriction to written evidence leave an indication that substantial delays will also remain and perhaps even increase, thereby limiting the effectiveness of the Optional Protocol in coping with transient crises.517

Among the non-treaty UN mechanisms, the Human Rights Commission has undoubtedly been recognised as one of the most important international bodies currently monitoring human rights abuses under states of emergency. But a similar pattern of obstacles as those in the case of the Human Rights Committee have also hindered the Commission from achieving its deserved effectiveness. Thus, in performing its tasks, the Commission has been substantially handicapped by politicisation, frequent splits over the value of innovation in monitoring mechanisms, inconsistency and unevenness in the treatment of equally grave situations and so forth.518 The famous 1970 confidential procedure established by the ECOSOC Reso. 1503519 has been described to have the limitation of treating communications only as establishing patterns and is not designed to provide individual redress. It has been observed that the combined effect of high politicisation and confidentiality make the Reso.1503 procedure "an especially weak vehicle for enhancing understanding of international norms relating to states of emergency" so as to serve as a comprehensive fact-finding mechanism or as an opportunity for precise evaluation of the legitimacy of an emergency or the legality of particular emergency measures.520 However, notwithstanding its weaknesses, Reso.1503 should still be praised for the

518For a somewhat detail discussion on the Commission's role and effectiveness, see H. Tolley, The UN Commission on Human Rights (1987).
519Commonly known as the '1503 procedure', this procedure provides an unusual access to UN procedures on behalf of victims of human rights abuses; see, ESC Res.1503, 48 UN ESCOR, Supp. (No.1A)8, UN Doc. E/4832/Add.I (1970).
520See, Fitzpatrick, supra, 124.
fact that it permits NGOs and concerned Commission and Sub-Commission members to place pressure on at least some governments abusing emergency powers or engaging in patterns of gross violation of human rights in the context of de facto states of emergency.

b) The OAS System:

Within the OAS system, although the IACHR does not hesitate to be judgmental, it is primarily a fact finding body rather than a judicial or quasi-judicial organ. This tendency of reluctance to viewing itself as a quasi-judicial body can be particularly illustrated by its handling of the individual communications where on many of them the Commission has not taken timely action and its annual reports often contain a relatively small number of case "resolutions". Although one must fully appreciate that the IACHR reports contain a wealth of finding of violations and often note a lack of proportionality to the threat faced by the government or the violation of non-derogable rights etc., the Commission generally does not make a careful and explicit application of the derogation article of the American Convention. Similarly, the Commission's enviable technique of on-site visits for purposes of establishing the actual facts in an individual case has been considerably limited by its expense and the practical necessity of obtaining the government's consent to such visits.

521 For a detail discussion on the efficacy of the mechanisms under the ACHR and its impact in protecting individuals from abuses in states of emergency, see the ILA's Seoul Report (1986), paras. 93-105.
523 The IACHR has found many states of emergency to be in violation of art. 27 including: due to the absence of an exceptional threat to the organised life of the State (e.g., IACHR, Report on Chile, 1985, p. 44, para. 94); due to the institutionalisation of the emergency which is against its inherently temporary character (e.g., IACHR, Report on Colombia, 1981, p. 40); due to non-compliance with the principle of proportionality (e.g., IACHR, Annual Report, 1986, Nicaragua, pp. 165 ff); due to non-compliance with the fundamental principle of non-derogability of certain rights (e.g., IACHR, Report on Guatemala, 1983, pp. 18-19); and due to non-compliance with the formal principle of notification (e.g., IACHR, Report on Bolivia, 1981, p. 23, para. 6).
The Commission, unlike the UN HR Committee, is able to act ex officio and produce the reports which it deems necessary in the performance of its duties. Thus, in the Bolivia Report in 1980 and in the Nicaragua-Miskitos Report in 1983, the Commission applied the standards of art. 27 even though the Governments did not file a notice of derogation. Even though the Commission is very reluctant to see itself as a judicial body, it has not hesitated in making value judgements about States' compliance with the terms of human rights instruments. Moreover, it has applied several of the standards under art. 27 of the American Convention to States non-parties to the Convention, relying on its theory that art. 27, together with art. 4 of the CP Covenant and art. 15 of the European Convention embody 'the most accepted doctrine in international law' on emergencies.\textsuperscript{525}

Although, to date, the Inter-American Court of Human Rights is yet to deal with any contentious cases concerning states of emergency and its involvement in this area under article 27 of the American Convention is still limited to its advisory opinions, we should recall the two "path-breaking" opinions that represent a bold initiative by the Court respecting the monitoring process for states of emergency, namely, its Advisory Opinions on Habeas Corpus and Judicial Guarantees.\textsuperscript{526} In these two Opinions the Court expressly declared that the remedies of habeas corpus and amparo as well as fair judicial proceedings inherent in the representative democratic system are among "the judicial guarantees essential" for the protection of the non-derogable rights under Article 27(2) of the ACHR. However, what remains interesting to see is whether these theoretically sound opinions can in practice exert a significant influence on emergencies within the OAS system, where suspension of judicial guarantees during emergencies is a matter of 'habit' by many governments throughout the hemisphere and the judiciary more than often tend to restrain themselves even when formal guarantees remain.

\textsuperscript{525}\textit{IACHR, Report on Chile, 1974, OEA, Ser. L/V/II, 34, doc. 21, p. 212; Report on Paraguay, 1978, Ser. L/V/II. 43 doc. 13, p. 14; IACHR Annual Report, 1974, OEA, Ser. P/AG, doc 520/75, p. 36. It may, however, be noted that no State has so far rejected or challenged the competence of the Commission in assessing the state of emergency.}

\textsuperscript{526}\textit{Supra.}
c) The ECHR mechanism:

Since the First Cyprus case,\textsuperscript{527} the European Commission and the Court have consistently declared themselves competent to examine emergency situations according to art. 15 ECHR.\textsuperscript{528} In assuming such competence these organs did not confine themselves to what may be described as 'simple emergency' situations such as those threatening the organisation of legally and democratically constituted States, but also extended their competence to such extraordinary circumstances as revolutions overthrowing a legally constituted government.\textsuperscript{529}

The jurisprudence of the Commission and the Court has now established a consistent pattern containing at least three major elements. First, it is absolutely up to a State to declare the emergency and to take the measures that are considered necessary to overcome the situation. Secondly, the exercise of this right of the State is not unlimited and the legality of such declaration or measures may be challenged by other States in which case the European organs will be competent to examine whether all the conditions under art. 15 have been met. And thirdly, in the assessment of the situation and the necessary measures, States are entitled to a 'margin of appreciation'.\textsuperscript{530} These elements have been thus aptly summarised by one writer as:

\textsuperscript{527}YBECHR I (1956-8), 174-6.
\textsuperscript{528}And also in the light of their general duty under art. 19 'to ensure the observance of the emergencies undertaken by the High Contracting Parties'.
\textsuperscript{529}A clear example of this is the Greek case where the Commission rejected the argument of the Greek Government that any control by the Commission of the political situation there after the revolution would be equivalent to an expression of approval or disapproval of the revolution itself and thus would no longer be a 'control' but 'an interference in a State's internal affairs'. See the Greek case, Decision on Admissibility, 31 May 1968 YBECHR I 11 (1968), 716 & 724.
\textsuperscript{530}For a general study of the operation of the concept of margin of appreciation in the European Convention, see C. Morrison, 'Margin of Appreciation in European Human Rights Law', 6 HRJ (1973) 263-86; also, J. G. Merrills, 'The Development of International Law by the European Court of Human Rights' (Manchester, 1988), pp. 136-59.
In short, the right of States to declare a public emergency and to take measures derogating from their obligation in exceptional circumstances is combined with a judicial supervision of those political decisions by the European bodies.\footnote{Oraa, supra, p. 44.}

It is, therefore, important to note that the European organs did not leave it for a Government alone to determine when a state of emergency existed and what measures were required by the exigencies of the situation, and reaffirm their competence to examine and express their own views on the government's judgement.\footnote{In this context, see also the Lawless case, Ser. B: Counter Memorial of the Irish Government, p.77.} Moreover, the practice of the Commission with regard to the 'burden of proof' requires the respondent government to prove and justify the emergency situation and the measures taken. However, in a nutshell, it may be said that these principles of 'onus of proof' and the 'margin of appreciation', together with the concepts of 'reasonableness' and 'good faith',\footnote{For the construction of the concept of reasonableness and good faith, see the Lawless case, supra.} constitute the essential features of the practice of the European organs in the control of states of emergency.

It would probably be quite safe to hold that the most careful judicial analysis of the meaning and nature of the derogation provisions in times of emergency, in particular that of the European Convention, is to be found in the decision of the European Court of Human Rights in Ireland v. U.K. However, despite this credit being rightly attached to it, this judgement still stands as an indication to the limitations of the European Convention, and the existing international human rights law in general, in so far as 'proper and impartial supervision' is concerned.\footnote{There the majority of the Court disagreed with a unanimous opinion of the Commission based upon the hearing of witnesses that the U.K. government had been guilty of torture, and this despite the fact that the British government announced that it did not intend to contest this finding.} As commented by one writer:

It may well be that as a result of this judicial rejection of the Commission the Court has either destroyed or radically reduced the value of the Commission's views with regard to matters brought before it.\footnote{L.C. Green, Derogation of Human Rights in Emergency Situations, 16 Can.Y.B.Int'l L. (1978), p.99.}
On the other hand, considering that both the Court and the Commission in that particular case held the burden of proof to be on the complainant, with the standard to be applied being that of 'beyond reasonable doubt', that it will be within the discretion of the defendant state to decide whether the declaration of the emergency was justified in the given circumstances and to decide upon the measures required by such emergency, and that a state in reaching its decisions would enjoy "a wide measure of appreciation", it is probably not beyond the scope of a critical thought by a human rights researcher that the chances of a state being found guilty of wrongly declaring an emergency are not quite encouraging.

A sharp contrast between the Inter-American Commission and the European Commission on Human Rights lies in the fact that unlike its American counterpart, the European Commission has no authority to monitor derogation notices or to decide on its own initiative to undertake the study of a particular emergency. However, amongst the treaty-based monitoring organs, the European Commission has undoubtedly established its leading role in developing the formal jurisprudence of states of emergency, making invaluable contributions to the process of defining the essential elements of a 'legitimate' emergency. However, the Commission has still been criticised as being over cautious and somewhat deferential to governments and also for failing sometimes to impose 'consistently strict and objective standards' under the European Convention's derogation article. Among the factors that have substantially diminished the Commission's ability in coping with emergencies are

536 The "national authorities are in a better position than the international judge to decide both on the presence of............an emergency and on the nature and scope of derogation necessary to avert it", Ireland v. U.K., 17 Int. Leg. Materials 680, paras.207, 214 &220 (1978).
537 For an assessment of the European Commission's role in monitoring emergencies, see ILA's Seoul Report (1986), paras. 106-120.
538 It can initiate an investigation only when seized of a case upon the formal application of an individual under Article 25 of the Optional Protocol or upon an interstate application under Article 24 of the ECHR.
539 This word, used by some writers, should be interpreted very carefully in the present context. Probably the safest explanation is that the requirement of legitimacy here is to be understood as drawing a bench-mark between permissible and impermissible emergencies by the established legal norms of international human rights law.
included its structural limitations and an attitude of self-restraint\textsuperscript{541}; the lack of authority to commence review of emergency measures on its own initiative; its dependency on the Committee of Ministers for final resolutions of cases not referred to the European Court of Human Rights; and probably also the somewhat complex phenomenon of its 'double-role' as quasi-judicial enforcement body and a friendly-settlement or good offices facilitator.\textsuperscript{542}

In so far as the European Court of Human Rights is concerned, at least two structural limitations can be clearly identified which have substantially restricted its role: one, the optional nature of its jurisdiction, and the other, the necessity for the Commission or a state party to refer a case to the Court after the Commission's decision on the merits.\textsuperscript{543} One might also criticise the Court for its deferential attitude to the respondents governments in approaching cases involving derogation of human rights in emergencies.\textsuperscript{544}

\textsuperscript{541}The Commission has sometimes been reluctant to provide redress to individuals suffering abuses during states of emergency. One illustration of this may be taken from the Second Greek case, App. No. 4448/70, 6 Euro. Comm'n H.R., Dec. & Rep.5 (1977).


\textsuperscript{543}One word of hope should be uttered here that a widespread ratification of Protocol No.9 to the ECHR, which permits individuals to refer cases to the Court, would greatly expand its potential to respond to abuses. The Protocol was adopted by the Committee of Ministers on 23 Oct. 1990 and entered into force on 1 October 1994. For a useful discussion on the effects and significance of these provisions, see van Dijk & van Hoof, supra, at 166ff, also 235-239.

However, it should be noted here that with the signature of Protocol No. 11 by the States Parties to the ECHR (on 11 May 1994), the reform of the Convention system has now taken on a clear structure and has been provided with the necessary political impetus. The Protocol has now been ratified by all the States Parties to the European Convention and is due to enter into force on 1 November 1998. Thus, from that date, a permanent European Court of Human Rights will replace the existing Commission and Court (and consequently, from that date, Protocol No. 9 will cease to exist) as well as the Committee of Ministers, in so far as the last mentioned functions concerning individual and inter-state complaints are concerned. The competence of the Committee of Ministers will henceforth be limited to the supervision of the execution of the Court's judgements. See, van Dijk & van Hoof, supra at 827 ff; Yvonne Klerk, "Protocol No. 11 to the European Convention for Human Rights: A Drastic Revision of the Supervisory Mechanism under the ECHR", 14 N.Q.H.R 1996 (No. 1) pp. 35-46; also, Andrew Drzemczewski & Jens Meyer-Ladewig, "Principal Characteristics of the New ECHR Control Mechanism", 15 HRLJ 1994 (No. 3) pp. 81-86.
V. The Concept of Human Rights in States of Emergency in General International Law:

It is now desirable to make a brief examination of the norms governing human rights in states of emergency according to the general principles of international law. As it has been noted at the beginning of the discussion, there are some human rights treaties which do not contain any derogation clause and do not therefore explicitly indicate the legal regime applicable to them in situations of emergency. There are some States which are not parties to any general treaty on human rights despite being members of various international organisations. The task of identifying principles governing human rights in emergencies in general international law is thus of considerable importance. And to do so, however, it is first of all necessary to examine the existence and extent of the norms of customary international law imposing obligations to respect human rights standard in ordinary situations as well as during states of emergency.

It is now an established and generally accepted notion that States have legal obligations to respect human rights arising from general international law. The development in the past few decades in the evolution of international law has


Among these treaties are the African Charter and some ILO Conventions dealing with human rights issues.

Thus, for instance, within the framework of the UN, there are States non-parties to the CP Covenant but which are parties to the UN Charter; therefore, the international obligations concerning human rights for those States non-parties to the Covenant arise from the UN Charter and the 1948 UDHR in so far as they constitute general international law. Similarly, in the inter-American system, such obligations of the States non-parties to the ACHR but members of the OAS are to be found in the OAS Charter and the American Declaration of the Rights and Duties of Man of 1948.

For a detail discussion on the subject, see J. Oraa, Human Rights in States of Emergency', supra.
particularly marked a tremendous trend in the generation of customary international law of human rights. A great part of this achievement has been contributed by the UN Charter and the activities of different UN organs in the formulation of human rights standards through the adoption of multilateral treaties, declarations and resolutions as well as the establishment of implementation mechanisms. Moreover, there is no doubt today that at least some of the provisions of the 1948 Universal Declaration can be deemed to constitute norms of customary international law or general principle of law. Some writers have argued, probably rightly, that many rules of the 1966 Covenants are general principles of law common to different legal systems. Amongst the other rights that have received strong argument as an established or emerging norm of customary international law are included: the principle of non-refoulement in the context of art.3 of the UN Covenant against Torture, and prohibition of the execution of juveniles.

548 For a general discussion on the subject, see E. Jimenez de Arechaga, 'International Law in the Past Third of a Century', Recueil, 159, 1(1978), 172-7; Brownlie, Principles, pp.570-1; G.T. Tunkin, 'General International Law in the International System', Recueil, 147. 4(1975), pp.95ff.

549 See, inter alia, Waldock, 'Human Rights in Contemporary International Law', p.15; J.P. Humphrey, 'The UDHR: Its History, Impact and Judicial Character', in Ramcharan (ed.), 'Thirty Years After the UDHR', pp.21-40. Also, a strong case-law has been developed in favour of the right to equality and non-discrimination under arts. 7 & 14 of the UDHR to be a customary human right, see, R. Lillich, 'Civil Rights' in Meron (ed.), 'Human Rights in International Law', p.151. One writer even goes to the extent of claiming that the UDHR has become not only customary law but also norms of ius cogens, McDougal, 'Human Rights and World Public Order', p.274.


551 See, for instance, Prof. Kooijmans, the UN Special Rapporteur on Torture, UN Doc. E/CN.4/1987/13, para.10.

552 IACHR, Resolution No. 3/87 (27 March 1987), Case No. 9647 (US), p.38, para. 60.

We may, however, also refer to the US Third Statement of the Foreign Relations Law, which considers a State to be in violation of customary international law if, as a matter of State policy, it practices, encourages, or condones genocide, slavery or slave trade, the murder or causing of the disappearance of individuals, torture or any other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern
One important question in relation to our present survey that arises from the fact that there exists today binding human rights norms of customary international law, is naturally that of the existence of certain other customary norms on the basis of which States may seek to justify their non-compliance with such obligations during exceptional situations. To start with this line of inquiry, it may be briefly approached that the most important and generally recognised grounds of such excuses could probably be found in those established by the doctrine of State responsibility, namely, the plea of force majeure, self-defence or State necessity.\(^5\)

However, it may be noted that the doctrine of force majeure carries relatively less relevance in the context of taking derogating measures during states of emergency; it is due to the fact that this principle normally applies only in emergencies brought about by natural disasters which, first of all, not a common practice;\(^5\) and secondly, its operation leaves no rooms for a choice of means or manner in dealing with the emergency and thus proves to be incapable of fulfilling the substantive requirement of 'proportionality' for the legitimacy of such measures.

A similar argument may also be made with regard to the excuse of self-defence, which from its very term refers to a situation of international armed conflicts or war. But, as is normally the case, the measures derogating from human rights standards in states of emergency are not exclusively directed against those who could be called external or internal aggressors; it is rather the entire population living within the jurisdiction of that State who are affected by such measures. Hence, it seems to be a

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\(^5\)See, the ILC's body of principles of the law of State responsibility in the Report of the Commission to the GA on the work of its 32nd Session, YBILC, 2.2(1980), 33ff (art.33).

\(^5\)Thus, for instance, not a single state of emergency can be found on this ground under the ECHR, see, S. Marks, 'Principles and Norms of Human Rights, Applicable in Emergency Situations', in K. Vasak (ed.), International Dimensions of Human Rights (2 vols., Westport, Conn., 1982), i. 175-213.
well-founded argument that the plea of self-defence is not quite a suitable ground in all cases for a State in order to justify its non-compliance.

Consequently, what is left is the doctrine of necessity which seems to correspond best with emergencies under international law, first, because it can probably be suitably accommodated in most of the common forms of emergencies; and second, the doctrine tends to comply with the most fundamental and substantive characteristics of states of emergency and the derogation measures to overcome them. In the following few paragraphs, a brief attempt will be made in examining these features and application of the doctrine in relation to states of emergency in international law.

As has already been noted above, the doctrine of State necessity has been recognised as one of the legal justifications excluding responsibility for a breach by a State of an international obligation.\(^5\)\(^5\)\(^5\) It has been emphasised that in order to be accepted in international law, the excuse of necessity must absolutely be of an exceptional nature, fulfilling a number of very strict conditions. These conditions include: that the interest of the State threatened must be one of exceptional importance and the threat must be extremely grave and actual or imminent; that the non-compliance with the international obligations must be the only means available to avert such extremely grave danger, and the action taken must be extremely necessary for that purpose.\(^5\)\(^5\)\(^6\) It is thus easily noticeable here that almost all of these characteristics closely correspond with the conditions for derogating from human rights standards in emergencies as set forth in the derogation clause of the human rights treaties, namely, the principle of exceptional threat; suspension of obligations only as a last

\(^5\)\(^5\)\(^5\) ILC Report, supra. The Commission considered the doctrine to be 'deeply rooted in the general theory of law', ILC A./35/40, p.104.

resort (and exhaustion of other legitimate means); the principle of proportionality; and the principle of temporariness.557

However, these above principles relating to the application of State necessity to human rights obligations in emergencies which, again, correspond to the basic principles implicit in the derogation clause of the human rights treaties, have been reaffirmed by the ILO organs in two leading cases as those derived from international custom and general principles of law.558

Again, the legal doctrine and practice of the international monitoring organs, together with a large body of scholarly works in this field, have constituted a well-founded approach that at least the main principles of the derogation clause of the

557 One can also see another reflection of correspondence of the principle of non-derogability of fundamental rights under the human rights treaties with as the ILC has established that a State cannot invoke the plea of necessity when 'the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law', see, ILC Report, supra, p.34 [draft art. 33(2)(a)]. A similar argument may also be made with regard to another characteristic of the doctrine of necessity, namely, the international accountability of the State pleading the necessity; this feature closely correspond with the notion of accountability of the derogating State to the international monitoring organs under the treaty concerned; see, ILC, supra, p.50.


human rights treaties are emerging as principles of general international law. As has
been pointed out in the preceding paragraphs, the derogation clause can be seen to
have adopted several of the main principles of the doctrine of necessity. To name
in particular, these include the principle of exceptional threat, the doctrine of
proportionality, the principle of temporariness, and also probably the principle of
non-derogability of some fundamental rights. Again, the derogation clause
contains two principles of 'procedural' nature, namely, the principles of proclamation
and of notification, which seem more suitable within the framework of treaty law
than in general international law. Moreover, there is one principle of utmost
importance in the field of human rights, i.e., the principle of non-discrimination
which, although recognised in the derogation clause, has not been explicitly included
in the principles of the doctrine of necessity.

Another strong and popular argument is that 'as a result of subsequent States
practice', the norms of art.4 of the UN Covenant are emerging as norms of
customary international law. It has been pointed out that in the light of the fact
that the CP Covenant has acquired a 'probative value' as a multilateral law-making

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559 Thus, Ago, in his report, finds the derogation clause of the UN Covenant as a particular
adaptation of the doctrine of necessity to the specific subject of human rights in emergencies, see
'Ago Report', supra, p.45. It has also been argued that one of the main reasons for incorporating a
derogation clause in the Covenant was to establish an appropriate legal regime for situations of
emergencies in order to prevent arbitrary derogations by States through the application of the rather
wider doctrine of necessity in general international law, see, F. Castberg, The European Convention
on Human Rights (Leiden, 1974), p.165; see also the views expressed by the ILA in its Warsaw

560 In this sense, one may argue that the four common non-derogable rights under the derogation
clause which are widely recognised as norms of ius cogens, a State cannot justify its non-
compliance with these obligations using the plea of necessity.

561 Although, however, it has been argued that one may find that this principle is implicit in the
concept of proportionality and the purposive elements in necessity, see Oraa, supra, p.229, note 12.

562 The reason for particular reference to the CP Covenant is clear: the Covenant is a 'quasi-
universal' treaty of a 'general' character (in contrast with specialised UN treaties like the Genocide
Convention of 1948 or the Slavery Convention of 1956), whereas the ECHR or the ACHR is a
regional treaty. See, for instance, Oraa, p.230.
treaty containing general standards and concluded after a long period of discussion
with the participation of a great number of States, the Covenant and in particular
some of the principles of the derogation clause have 'norm-creating character' and
'generating effect' of creating rules of customary international law.\(^{563}\)

Amongst the other elements which have been considered to be important expressions
of State practice and evidence of customary law, reference may be made to the
repetitive mention of the same norm in several human rights treaties. Thus, the
principles of the derogation clause of art.4 of the CP Covenant have been generally
accepted in the main regional treaties.\(^{564}\) Another evidence can be found in the
practices and jurisprudence of the different judicial, quasi-judicial and supervisory
organs interpreting the provisions contained in the derogation clause of the human
rights treaties. Such practice and the case-law are often invoked out side the context
to treaty law and considered to be an authoritative interpretation of human rights
norms in general international law. Thus, for instance, the IACHR has applied some
of the fundamental principles of the derogation clause to States non-parties to the
American Convention (but members of the OAS and therefore bound by the UN
Charter and the AmDHR of 1948) 'as a matter of general international law'.\(^{565}\) A

\(^{563}\) For the argument in favour of these features of the CP Covenant, see *inter alia*, J. de Arechaga,
'International Law', esp. p.22; Oraa, pp.229ff.; also, ICJ Reports in the North Sea Continental Shelf

\(^{564}\) That is, art.15 of the European Convention and art.27 of the American Convention; see also, the
internazionale di scienze criminali*, p.15.

\(^{565}\) E.g., the IACHR Reports on Chile in 1974 and 1985, see, Burgenthal (ed.), 'Protecting Human

However, for an interesting account of the legal basis for the extension of the main principles of the
derogation clause to States non-parties to the ACHR and the process in which the principles
contained in art.27 of that Convention (the derogation clause) has been recognised as forming part
not only of a regional customary international law ("American International Law") but also of
general international law ("most accepted doctrine internationally"), see Oraa, supra, pp.238-242;
see also, Meron, *Human Rights and Humanitarian Norms.*
similar practice may also be noticed within the framework of the United Nations. Thus, while considering to what extent the principles of the derogation clause in the human rights treaties are customary in nature, it has been noted that "Having regard to the present state of international law....at least some of these principles are of the nature of customary law."\textsuperscript{566} Another UN report reaffirmed the doctrine that "art.4 of the ICCPR........may be considered as reflecting the general international law of human rights on the subject of emergency situations and limitations of human rights."\textsuperscript{567}

Another evidence of the emergence of some principles of the derogation clause as norms of customary international law may be found in the fact that within the inter-American system, no State has ever attacked on legal grounds the application by the IACHR of the principles of the derogation clause to States non-parties to the ACHR. A similar situation may also be found in the UN system where no State has ever objected to the work and the position of principle taken by the Special Rapporteur on the application of the principles of the derogation clause to States non-parties to the Covenant, or to the application of these principles by the UN Commission on Human Rights or other specialised organs.

Finally, yet another evidence may be found in art.38 of the ICJ Statute according to which the principles of the derogation clause could be considered to be general

\textsuperscript{566}Explanatory Paper by the Special Rapporteur L. Despouy, UN Doc. E/CN.4/Sub.2/1985/19 (17 June 1985). Amongst such principles, he included: the principles of non-derogability, temporariness, and non-discrimination. In one of his later reports, Mr. Despouy reconfirmed these norms and criteria as forming part of an 'international legal framework deriving from prevailing international norms, the practice of international organisations and the internal law of states, which provides a frame of reference for the legality of states of emergency', E/CN.4/Sub.2/1989/30/Add.2/Rev.1, p.2.


principles of law recognised by most of the world legal systems. The institution of states of emergency has been adopted by almost all the modern national legislation, together with its common characteristics that are very closely reflective of those of the derogation clause.\textsuperscript{568}

\section*{VI. CONCLUSIONS :}

Generally speaking, three broad categories of issues have been attempted to be researched in the preceding discussion relating to the question of human rights and the rule of law in states of emergency.

The first contained two key questions of legitimacy and validity of a state of emergency: i) that upon what criteria do the rules of international human rights law determine the acceptability and legitimacy of a state of emergency; and ii) that what substantive and procedural pre-requisites must be fulfilled in order for a state to invoke the derogation provisions of the human rights treaties on the basis of a 'valid' state of emergency. The second category included the important issue of the contents and scope of the essential conditions for the application of the 'derogation' clause itself under the treaties as well as the effectiveness of their monitoring organs in the supervision of such application by the states parties. And in the third phase a brief inquiry has been made into the position of these above issues under general international law today.

Accordingly, the main features of the concept of emergencies as envisaged in the human rights treaties and interpreted by the relevant monitoring bodies may be summarised as follows:

\footnote{568See, Questiaux study, supra, p.20, para.73.}
(i) The emergency must be "Actual" or at least "Imminent". In other words, a state of emergency of the so-called 'preventive nature' (i.e., in order to face possible exceptional situations) is not acceptable under international law.

(ii) The effects of such danger must involve the whole population. This provides one of the essential safeguards against any abuse of the emergency concept. The exceptional situation must be such so as to threaten the life of the nation as a whole.

(iii) The threat must be to the very existence of the nation. As it has been already noted earlier, the derogation clause of the human rights treaties describes the grounds for invoking the clause in wide general terms instead of specifying all permissible situations. Indeed, it is neither desirable nor possible to foresee in abstracto all possible situations that may automatically justify an emergency and that each case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society under the modern concept of the rule of law.\textsuperscript{569}

(iv) The declaration of emergency must be as last resort. In other words, exhaustion of normal measures must be rendered inadequate or ineffective to resolve the exceptional situation.

(v) The declaration of emergency must be as a temporary measure. Any measure of derogation from human rights obligations must end when the threat resulting in the declaration of the emergency disappears.

Among the human rights instruments that contain a derogation clause, only the CP Covenant includes the requirement of 'official proclamation' so as to reduce the

\textsuperscript{569}In this context see the comments added to the final text approved in the ILA Paris Conference of 1984; ILA Paris Report (1984), p. 59, para. 1.

However, one writer has attempted to classify the possible situations into three broad groups: (1) Political Crises, i.e., war (international war, civil war, war of national liberties), internal unrest, grave threats to public order or subversion; (2) Public or natural disasters; and (3) Economic Crises. See, Oraa, supra, p.31. Moreover, one Report of the UN Commission on Human Rights summarises the circumstances defined in municipal law, see UN Commission on Human Rights, "Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile", UN Doc. E/CN.4/826 (1962), p. 257. See also, D. O'Donnell, 'States of Exception', \textit{Int. C.J. Review} 21 (1978) 54; Martins, "The Protection of Human Rights", p. 153.
incidence of de facto states of emergency. In fact most municipal systems enumerate strict conditions regarding declaration of emergencies and most national Constitutions agree that except in sudden and exceptional situations (ex necessitate) when the executive (and not the military or the judiciary) could declare the emergency (still subject to confirmation by the legislative within a prescribed period of time), it is the legislature which holds the authority to declare an emergency through a special and expeditious procedure.

With regard to ‘notification’ of the derogation, the second essential pre-requisite for a valid state of emergency, it has been observed that the monitoring organs, especially the UN HR Committee, fail to make a clear distinction between the notice to inform other States parties (as well as the monitoring organs) which is the principal purpose of this requirement and the information provided to the organ under other procedures (i.e., the reporting procedure under art. 40 of the CP Covenant and under the Optional Protocol). Instead, the HR Committee seems to have put greater emphasis on the second obligation, with the risk of weakening the more important object of notification. This may have damaging consequence for the international protection of human rights because if States are not kept fully aware of the exact situation in the derogating State, they would be prevented from exercising their right to ensure the fulfilment of treaty obligations through, for instance, inter-State complaint procedure.

Among the three treaties, the ECHR has clearly proved itself to be the most effective mechanism in monitoring derogation. In so far as the notification is concerned, the European system represent a very consistent practice in the sense that derogating
States have fulfilled their obligations which have allowed other States parties to be informed of the real situation and to exercise their rights under the Convention.\textsuperscript{572} The fact that under the ECHR the inter-State complaint procedure automatically comes into operation has lead to the result in this context that most cases on notification before the European organs were initiated through this procedure and has been proved to be a very effective one.

Under the CP Covenant, there has been a widespread failure to notify States parties of derogation; many haven't notified at all, others made it too general, too late and brief, or without any indication of the articles derogated from or of the reasons therefore, etc.\textsuperscript{573} Among the reasons for such failure, reference may be made to the relatively brief experience of the implementation of the Covenant; the lack of clarity on the part of some governments in emergencies about the true legal situation as far as the derogations from the Covenant are concerned; the fear of international criticism; the explicit refusal of some States to declare and notify actual states of emergency; the lack of expertise of some governments concerning the functioning of the derogation clause; the limited powers of the Committee under the reporting procedure; the absence of a stronger emphasis on the fulfilment of this requirement of notification by making a clear distinction between the two different obligations of States of notifying and of informing the Committee under other procedures; and, finally, the fact that not many States have so far accepted the inter-State complaints procedure under art. 41 of the Covenant.

The position under the ACHR is not, however, any thing more encouraging, firstly because notices of derogations, unlike the other two treaties, are not officially published by the IACHR\textsuperscript{574} and, secondly, because the IACHR has not sufficiently

\textsuperscript{572} As observed by the European Commission, 'information given to the Commission or a Sub-Commission in proceedings under art. 24 or 25 cannot rank as, or replace, information required under art.15, para.(3); see the Greek Case, Report of the Commission, p. 42, para. 80(6).

\textsuperscript{573} For the notices of derogation under the CP Covenant, see, Human Rights: Status of International Instruments (UN Publications, 1987).

\textsuperscript{574} The only place where an indirect, though incomplete, information may be found is in one UN study on derogation; see, UN Sub-Commission on PDPM, First Annual Report and List of States which, since 1 Jan. 1985, have Proclaimed, Extended, or Terminated a State of Emergency,
insisted on the importance of this requirement.\textsuperscript{575} The lack of operation of the inter-State complaints procedure is also to be included in this list.

The most important rationale for drawing a list of non-derogable rights in the international treaties seems to be that such rights are absolutely fundamental and indispensable for the protection of the individual, and that the derogation of these rights by the State in public emergencies would never be justified because they have no direct bearing on the existing situation.\textsuperscript{576} From this point of view, and after a close study of the non-derogable rights contained in the three treaties, the enlistment of such rights may be criticised on at least two grounds:\textsuperscript{577} firstly, that it does not contain certain rights which are very important and very much at risk in public emergencies; and secondly, that it contains, at least in the case of the CP Covenant and the ACHR, a number of other rights which are not so fundamental and at risk in emergencies, neither do they have any direct implication for the security of the State.

Again, it has been particularly emphasised that two most important and fundamental rights have not been expressly declared to be non-derogable by the derogation clause, namely, the right to be free from arbitrary arrest and detention, and the right to due process of law, despite the fact that in the last few decades gross violation of the most fundamental rights and freedoms have been made possible partly because of the lack of these minimum guarantees during states of emergency. However, in the light of the jurisprudence of the monitoring organs, a number of studies and recommendations by several international organisations, and academic analysis of the subject by scholars in this field, it seems to be an established and well founded

\begin{footnotesize}
\textsuperscript{575}However, there have been three cases in which the IACHR has called attention to the failure of States to comply with the notification requirement - in the case of El Salvador (supra.) for not notifying the extensions of the emergencies, and in the cases of Bolivia (IACHR, Report on Bolivia, 1981, pp. 22(para. 3.5) and 116) and Columbia (Report on Columbia, 1981, OEA/Ser.L/V/II. 53, doc. 2, p. 221) for not sending the notices of derogation. In two other cases (the Guatemala case, supra, and the Nicaragua-Miskitos case, supra.), the Commission has pointed out that certain States have not complied with the notification requirement of art. 27(3), because they did not send the notice in time.


\textsuperscript{577}See, e.g., J. Oraa, p. 95.
\end{footnotesize}
argument that at least some of the most fundamental guarantees contained in these rights are non-derogable even in times of emergency.

In assessing the proportionality of the measures of derogation, which has been considered as one of the most difficult tasks of the monitoring organs in emergencies, the treaty bodies have formulated certain general principles constituting important guidelines for its application. There is a wide coincidence in the general application of the principle by the organs of the three treaties. These principles require that measures derogating from human rights standards can only be taken when the ordinary provisions of the law and the limitations are not enough to deal with the emergency and that each measure of derogation should be necessary and proportionate to the threat; that such measures must bear a relation to the threat; that the measure of derogation taken should be potentially able to overcome the emergency;\textsuperscript{578} that closer and stricter scrutiny must be made with regard to rights which are considered fundamental, important and vulnerable to emergency situations, when the necessity for derogation and the proportionality of the threat are judged. The monitoring organs should not only consider the need for taking derogation measures but also the manner in which such measures have been used in practice. Special importance should be attached to the necessary safeguards taken by governments to avoid abuses, paying particular attention to the different phases of the emergency. Finally, as with the state of emergency itself, the derogation measures are temporary in nature and should therefore last as long as the emergency exists.

The celebrated principle of non-discrimination forms the second substantive condition of derogation under the derogation clause of the CP Covenant and the ACHR. The absence of this condition in the derogation clause of the ECHR does not, however, bear any significant consequence, since discriminatory application of derogation measures is also forbidden under the European Convention by the operation of the general non-discrimination provision of art.14; the practice of the European organs confirms this position.

\textsuperscript{578}But this does not mean that the judgement on the strict necessity of the measures will depend on the fact that the measures actually overcome the emergency.
The list of grounds on which the derogation clause prohibits discrimination in applying derogation measures is more restricted than the one in the general provision on discrimination in the treaties; it is mainly due to allow States to take different measures with regard to certain groups during states of emergency. Again, even on the grounds expressly mentioned in the derogation clause, what is prohibited is taking derogation measures 'solely' based on discriminatory grounds, but it allows derogation measures establishing certain differences of treatment even on racial, ethnic, or religious grounds, when reasonably justified and deemed to be justified to overcome the emergency.

With regard to the third substantive condition of derogation, the principle of consistency, it may be noted that neither the treaties themselves nor the case law of the monitoring bodies provide any clear answer to what other obligations under international law are meant for the application of the principle or what would be the practical implications of the operation of the principle in states of emergency. It has, however, been apparent that the body of law relevant for the application of the principle is that of the laws of war, especially the Geneva Conventions of 1949 and the two Protocols of 1977, particularly in the areas of the right to humane treatment, fair trial and due process of law, and the guarantees against arbitrary detention, noting that these rules apply only in a limited situation and not in all emergencies. However, it may also be noted that due to the growth of the international obligations of States in the area of human rights, not only through treaties but also through customary norms and general principles, a greater application of the principle of consistency could be foreseen in the near future.

However, the fact today that the members of the community of nations assume obligations to respect fundamental human rights and freedoms under customary international law is probably beyond any doubt, although the exact nature and extent of such obligations may still be said to be far from precise or unanimous. At the same time, the principles of general international law also recognises that there may be certain exceptional circumstances when it is possible for a State to seek to justify
their non-compliance with such obligations. In so far as such non-compliance involves suspension of or derogation from human rights standards in certain emergency situations, the most suitable ground that best corresponds with states of emergency seems to be that of 'State necessity' in international law. Moreover, the conditions required for making a legitimate plea of State necessity virtually resemble most of the substantive requirements of the derogation clause under the human rights treaties. Accordingly, at least three of such principles may be identified in general international law that govern human rights in states of emergency, viz.- the principles of exceptional threat, proportionality, and non-derogability of certain peremptory norms.579 In so far as these peremptory norms are concerned from which no derogation can be allowed, it seems to be well-established notion that such norms consist of at least the four common rights recognised in the derogation clause of the principal human rights treaties. There has been strong argument that the non-derogability of these four most fundamental rights are considered not only as principle of general international law but also as the norm of ius cogens and therefore applicable even to states non-parties to the human rights treaties.580

Again, while it has been noticed that customary international law recognises the existence of certain principles governing human rights standards in states of emergency, which again are closely reflective of most of the important principles implied in the derogation clause of the treaties, some of the principles of the derogation clause581 are themselves emerging as norms of general international law. Amongst the most potential candidates in this list are: the principle of the existence of actual or imminent threat of exceptional nature; the principle of proportionality; the principle of non-derogability of most fundamental rights; and the celebrated principle of non-discrimination. The emergence of these principles contained in the

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579 Although no explicit reference of the principle of non-discrimination is found in the doctrine of necessity, this celebrated principle has been said to be 'in a very advanced state of crystallisation' in the process of transposition into customary international law; see Oraa, supra, p. 260; also, the Commentary on the ‘Siracusa Principles’ by O’Donnell, States of Siege or Emergency and their Effects on Human Rights: Observations and Recommendations of the ICJ (August 1981); ILA Montreal Report (1982), p.94; the ‘Oslo Statement’, p. 2ff.
581 Which, on the other hand, is popularly considered as 'a particular application (or adaptation) of the doctrine of necessity' to the subject of human rights in states of emergency in the treaty law.
derogation clause as norms of customary international law is, however, evident in their incorporation into a 'general multilateral treaty of a quasi-universal character' (i.e., the UN Covenant) and their repetition in other regional treaties (i.e., the ECHR & the ACHR); in the practice and jurisprudence of international monitoring organs reaffirming the application of these principles as norms of general international law; in the developments, particularly in the recent time, within the organs of the UN (especially the Commission and the Sub-Commission on Human Rights) through extensive studies and periodic reports (notably those by the special rapporteur and the Ad Hoc Working Groups on states of emergency) as well the application of these norms by the ILO organs in relevant cases; and also in the fact that the legal regime governing the institution of the states of emergency, which can even be traced in the very early stage of legal development (e.g., in ancient Rome), is recognised by most modern legal systems and the principles as referred to above are considered as the 'general principles of law' by civilised nations (according to art.38(1)(c) of the Statute of the ICJ).

However, from the above brief observation, one may notice an interesting and unique transposition between the norms of general international law and the conventional rules of international human rights law, regarding the principles governing human rights in states of emergency. To state in the simplest words, while on the one hand the incorporation of a derogation clause into international human rights treaties has been considered as a particular application or adaptation of the customary international law doctrine of necessity to the subject of human rights in states of emergency (and some of the basic principles implied in the derogation clause as the reflection and virtual reiteration of certain existing norms of general international law), certain principles of the treaty law contained in the derogation clause are, on the other hand, said to have been emerging as principles of customary international law.582 One of the most notable importance of this observation seems to be that this apparent transposition (which is not a 'closed' one but rather of a dynamic nature)

582 By such reasons as widespread international recognition and practice; application by international judicial, quasi-judicial, supervisory and other organs; 'repetitive nature' of the norms; acceptance of the principles by most domestic legal systems as 'general principles of law' etc.
between these two branches of international law is very likely to strengthen the process of enlarging the list of treaty norms regarding derogation for being considered as the emerging principles of customary international law and also of attaching further importance and gravity to compliance by States, whether parties to any human rights treaties or not, with these standards regarding human rights in states of emergency. It is for quite obvious reasons that this process of normative transposition between conventional and customary international law would tend to minimise the gap between these two species of the modern law of nations in the present context, and would greatly facilitate the efforts at promoting and protecting the most fundamental rights and freedoms of the individual during states of emergency.
CHAPTER: IV

INDEPENDENCE OF THE JUDICIARY

AND

HUMAN RIGHTS
INTRODUCTION:

It is a self-evident fact of the modern society that the rule of law is a most fundamental requirement for the enforcement of human rights standards at the domestic level and that enforcing the rule of law is to a large extent the responsibility of the courts. An independent and impartial judiciary is therefore not only a crucial pre-requisite but the essential key to the process of such enforceability.583 Indeed, the right to a fair trial by "an independent and impartial tribunal" has long been regarded as "a central feature of the rule of law"584 and, as the UN Human Rights Committee puts it in its General Comment on the relevant article of the CP Covenant (i.e., Article 14), such provisions 'are aimed at ensuring the proper administration of justice'.585

Accordingly, the doctrinal notion of the independence and impartiality of the judiciary essentially proceeds from the basic conviction that to be able to enjoy their fundamental rights, individuals under a particular jurisdiction need the protection of its legal system that is able to function under such conditions which not only recognise such rights, freedoms and remedies but also guarantee the practice of a judicial culture that would ensure their actual practical enforcement. Such a system, therefore, can only be impartial, independent and rendered operational by judges, lawyers, jurors and other officers of justice confident of their safety and of the absence of any undue interference from other branches of governance of the state as well as of any adverse influences or interests, private or public, whether of political, economic, religious or other kind, in the exercise of their judicial functions.

However, the following discussion aims to proceed towards the proposition that it is indeed of essence today that the subjective understanding of the principle is combined with a wider and more practical objective comprehension, thereby extending its practical application to a broader infrastructure within which the notions of administration of justice vis-a-vis the protection of human rights tend to

585 UN HRC, General Comment 13/21, UN Doc. A/30/40, pr.1 (adopted on 12 April 1984 (SR 516) and 23 July 1984 (SR 537).
operate in reality. This introductory note also calls for a brief mention that the scope and mandate of the given task is rather more a general than a specific one. It tends to endeavour a broad general inquiry into the nature and meaning of the doctrine of the independence of the judiciary; its conceptual linkage and practical interactions with the notions of the rule of law as well as the modern legal edifice of human rights; standards of existing international norms of this latter pertaining to the doctrine; essential features of the doctrine in the present context as evolved from the common understanding, established standards, national practices and the expanding jurisprudence of the monitoring organs of international human rights treaties; standards of ideal of judicial independence and impartiality and the extent of possible limitations thereto, including the scope and application of the principle of 'judicial accountability' in the context of the protection of human rights.

I. A General Approach.

It may be noted at the outset that since, historically, systems of courts generally originated as off-shoots of the monarch's advisory council lingering an essential link between the judiciary and the executive, the doctrine of the independence of the judiciary is relatively of a recent development. However, beginning at least in the middle of the seventeenth century, one important doctrine that gained recognition in the historical development of the rule of law as one of its central notion is the right of the individual to be tried by the ordinary courts of the land'. Recognising this doctrine, the English Petition of Right of 1628 provided against the trial of alleged offenders by the "martial law......used in armies in time of war". In a similar pattern, the Habeas Corpus Act of 1640 abolished the Star Chamber and courts having a similar jurisdiction based on the Royal Prerogative and provided that the King and his Privy Council were to have no jurisdiction in matters of criminal and civil law and insisted on trial "in the ordinary courts of justice and by the ordinary course of the law".

In the mid-eighteenth century, the importance of the independence of state organs from each other, the modern doctrine of separation of powers was particularly advocated for by Montesquieu. Writing about the independence of the judiciary he noted that there will be no liberty if the judicial power is not separated from the legislative and the executive and that a combination of these powers would leave the

586 See Montesquieu, "l'Esprit des Lois", (1748), Book XI.
life and liberty of individuals to arbitrary control and tyranny. This doctrine considerably influenced the framers of the Constitution of the United States, who interpreted it to mean that while none of the three branches of government should be able to exercise complete control over another, each should, by a system of checks and balances, be able to moderate the actions of the others.\(^{587}\) A similar influence may also be found in the contemporary French Declaration of the Rights of Man and of the Citizen of 1789 which affirmed, in its Article 16, that every community in which a security of rights and a separation of powers is not provided for needs a constitution. Indeed, one of the principal grounds of the French Revolution was the appointment under the *ancien régime*, at the King's pleasure of special judges for the trial of a particular case or person. Accordingly, later, the germ of the principle contained in the French Declaration of the Rights of Man and of the Citizen of 1789, that no man may be removed from his "lawful" or "natural" judge, received explicit expression in the revised Constitutional Charter of France of 1830;\(^{588}\) an advanced and more explicit expression of this principle was later contained in Art.19 of the French Constitution of 1848 that the separation of powers "is the first condition for a free government".

Historically, therefore, the doctrine of separation of powers found a place of particular relevance to the principle of independence of the judiciary and was rendered necessary because that was the way the integrity of judicial functions could be maintained. Later, these two concepts became close allies in the new constitutionalism of limitation of government by law and the protection of civil and political rights.\(^{589}\) However, notwithstanding this close link, the doctrine of separation of powers should not be understood as a strict pre-condition of the principle of judicial independence. The doctrine has been applied in different forms and degrees in different countries with varying extents of manifestation. Thus, for instance, the French Revolution proclaimed the ideal of strict separation of powers and compelled the *ordre judiciaire* to refrain from encroaching upon or interfering with legislative and administrative action.\(^{590}\) The Americans, on the other hand,

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587 See, e.g., *The Federalist* (1788).
588 The Charter expressly required that "no one shall be removed from his natural judges" [Art. 53] and that "no special courts or commissions may be established for any reason or under any name whatsoever" [Art. 54]. These principles later appeared in Art. 4 of Chapter V of the French Constitution of 1791. For a brief account of the historical antecedents of this development, see Mohammed Ahmed Abu Rannat, "Study of Equality in the Administration of Justice", supra at 12-22, paras. 11-36.
adopted the doctrine in the form of checks and balances, raising it to the status of fundamental constitutional principle.

II. Judicial Independence and Politics:

It is probably no exaggeration to say that the greatest and most frequent invasion on the sanctity of judicial independence emanates from the arena of politics. Indeed, it is for quite obvious reasons that any system of respect for, and protection of, human rights would be in jeopardy if there is a practice of external and subordinating influence of politics upon the judiciary, or the dominance of political or partisan considerations in the administration of justice. Although law and politics are inevitably and inextricably intertwined and in the ultimate analysis all powers within a state are necessarily political, the premises on which legislative, executive and judicial powers and functions are granted and exercised are substantially distinct. Thus, irrespective of the extent to which the doctrine of separation of powers is accepted in a particular system, the judiciary remains a separate and particularly unique institution in respect of its premises, technique and style.

Consequently, therefore, if the judiciary become the 'obsequious pawn in the game of politics' or when the judicial officers are employed 'to subserve the fiats of the executive or the legislature' irrespective of law, the rights and freedoms of the individual are immediately at stake. In the same line of reasoning, when the judiciary becomes the persecutor, prosecutor or perpetrator of partisan propaganda, their impartiality and independence are imperilled and the public confidence in the judicial process is shaken and subverted. As one UN report on this subject observes: "The danger of the eclipse of the independence of the judiciary is obviously most acute in countries where there is neither democracy, nor rule of law, nor social conscience and legal institutions lack strength and resilience".

A close link between a democratic system of governance and an independent judicial system is therefore clearly imaginable. In a society that practices freedom, dissent and consideration of legality, where exists a measure of open minded tolerance, public debates and discussion, where the press and media operate as the expressions of public opinion, it provides the most primary foundation for the development of the

rule of law and a system of checks and balances within which to grow an independent and impartial system of judicial administration.

III. 'Independence' and 'Impartiality': the twin-concept.

One important point to be noted in the present context is that the principles of independence and that of impartiality of the judiciary, if they are taken as two separate principles, are so closely inter-linked that one might tend to proceed with the understanding that a broad caption of independence would automatically include both the characters of these principles. It is reasonably understandable since while it is quite difficult to imagine an impartial judicial system which lacks the properties of independence, an absence of the impartial qualities cannot render a judiciary truly independent in a practical sense of the term.

As Prof. Harris puts it: "The requirement that the court must be 'impartial' needs little amplification. It is reflected in the 'universally accepted doctrine' that no man may be a judge in his own cause and is an obvious characteristic for a court to possess".593

As regards the distinction between the requirements of independence and impartiality it may be noted that while 'independence is primarily freedom from control by, or subordination to, executive power in the State; impartiality is rather absence in the members of the tribunal of personal interests in the issues to be determined by it, or some form of prejudice.594

The notion of impartiality relates to the course of the trial and indicates that the judge or trier of fact will not favour one party or other during the trial and the parties will have equal opportunity to present their positions. Impartiality also describes the


appropriate attitude of the court to the case being tried and that there will be an unbiased assessment of the evidence.595

It has been observed by the Inter-American Commission that the requirement of an impartial tribunal requires a judge to rescue himself if he has some connection with the case which may bias his decision. Also, control of a criminal investigation by government officials who are relatives of the accused constitutes a clear conflict of interest and infringes the right to an independent and impartial investigation.596

Tests for determining 'impartiality':

While determining the impartiality of a tribunal both the objective and subjective tests must be used.597 It has, however, been noted by the European Court that the objective test is to be applied strictly while the subjective test is to be used less strictly.598

The objective test examines whether there are any ascertainable facts, apart from the judge's personal conduct, that raise doubts about the judge's impartiality. Facts to be considered are, e.g., the way in which a tribunal is composed and organised. Thus, as observed by the European Court: "If an individual, after holding in the public

595 In this respect it may be noted that although the term 'impartiality' is closely related to what has been properly called as the 'objectivity of a trial', they may still be distinguished in certain respects. Thus, while impartiality may be described as the unbiased attitude of the judge or the jury and the equal treatment of the parties in conducting the proceedings, objectivity relates to the correctness of a trial's procedures, the way evidence is evaluated so as to select the most effective judicial approach to discover the truth.

596 Panama Report 1978 at 59.

597 As has been the general practice of the European Commission and the Court of Human Rights; see, Piersack case, 53 Series A 14, para.30 (1 Oct 1982).

prosecutor's department an office whose nature is such that the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality". It is not, however, necessary to measure the precise extent of the role the judge had played in the case and is sufficient to find that the impartiality of the tribunal was capable of appearing open to doubt.

Where the same person who acted as the investigating judge in the preparatory investigation of a case also sits as the judge in the actual trial of that case, it is important to distinguish between three important factors of relevance, namely-

(a) whether the trial judge's position in the proceedings enabled him to play a crucial role in the trial court; (b) whether the judge had a pre-formed opinion (for example, by his active participation in the preparatory investigation he could have acquired detailed knowledge of the case, which might have influenced him which was liable to weigh heavily in the balance at the moment of the decision; and (c) the trial court may have to review the lawfulness of measures taken by the investigatory judge.

In a more recent case before the European Court of Human Rights, the applicant raised questions under Art. 6(1) of the European Convention concerning the independence and impartiality of the judicial committee of Luxembourg's Conseil

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599 Piersack case, supra, at 15 para.30.

600 As it was the case in the De Cubber case, supra.


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d'Etat in proceedings brought before it to challenge a number of measures relating to milk production quotas. In the Court's view, the fact that four members of the Conseil had to rule in Procola's national proceedings on the lawfulness of a regulation which they had previously scrutinised in their advisory capacity was capable of casting doubt on the institution's structural impartiality. In other words, the applicant could have legitimate grounds for concern that the members of the Conseil d'Etat might feel bound by the opinion previously given by them in their advisory capacity. This doubt in itself was enough to call into question the impartiality of the tribunal.

However, one should take great caution in interpreting the above position since although special circumstances may warrant a different conclusion, the mere fact that a trial or appeal judge has also conducted pre-trial investigations and ordered certain decisions there should not be taken as in itself justifying the fear as to his impartiality.603

The subjective test, on the other hand, inquires whether a particular judge is impartial in his personal convictions. As stated by the European Commission, "appearance [of impartiality] may be important" and "justice must not only be done : it must also be seen to be done".604 The general principle is, however, that personal impartiality is presumed until there is proof to the contrary. Again, a tribunal will not necessarily be deemed partial because some of its members may be unfavourably disposed to a party. It is not a general rule that a superior tribunal, which sets a judicial or


604 Ben Yaacoub, supra at 11, para. 96.
administrative decision aside, is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority. Consequently, it would not constitute a bias to have the same tribunal deal with the case again. Again, if there is any legitimate reason to fear a lack of impartiality, a judge must withdraw from the tribunal, because what is at stake is the confidence which the courts must inspire in the public in a democratic society.⁶⁰⁵

IV. Relevance of the Doctrine to Human Rights and the Rule of Law:

It is a well-recognised fact today that the gradual acceptance in different modern legal systems of the principles relating to the twin-concept of independence and impartiality of the judiciary as enforceable legal rules has been closely related to the emergence and development of fundamental norms concerning the protection of human rights in the last few decades, particularly in so far as the rights of individuals in the administration of justice are concerned.⁶⁰⁶ This indispensable conceptual pertinence and a visible practical interdependence between the doctrine in question and that of the rule of law and human rights has indeed found a lucid expression in the text of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993:⁶⁰⁷

The administration of justice, including law enforcement and prosecutorial agencies and, especially an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realisation of

⁶⁰⁵ See Ringeisen case, 13 Series A at 13, para.97 (16 July 1971).
In this context see also, “Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment”, UN Doc. E/CN.4/Sub.2/428 (11 July 1979), p.2, para.8; also, the Rannat study, supra, paras. 11-36.
⁶⁰⁷ UN Doc. A/CONF.157/23, part.1, para. 27.
human rights and indispensable to the process of democracy and sustainable development.

Human rights are frequently put into danger by domestic legislative enactments or executive actions. This is when the independence and impartiality of the judiciary acquires its greatest importance in the determination of the rights and remedies of the individual as against the state being called upon to review the validity of such enactments or actions. Thus, for instance, while dealing with the provisions of Art. 8(1) of the American Convention on Human Rights, the Inter-American Court noted that the guarantees of these provisions including the establishment of 'an independent and impartial tribunal' clearly recognise the concept of due process of law which is a necessary pre-requisite to ensure the adequate protection of those whose rights and obligations are pending before a court or tribunal.608 In the performance of its public law function of administering the law between citizens and the state (in comparison with its rather easier function of administering the law between an individual and another) and securing the observance of human rights and the rule of law, there are inevitable conflicts between the judiciary on the one hand and the executive or the legislature on the other. Judicial remedies provide the only sanctuary of safeguards for individual rights when the executive or the legislative branches or particular individuals or groups infringe or fail to protect them.

Again, the complex interpretation and application of the matrices of legal rights and institutionalised judicial remedies do not depend merely on the words of relevant statutes; the determination of the question of jurisdiction and the interpretation of the letters of law vastly depend on the tradition of the legal system that include the outlook of the judiciary and the legal profession. If such outlook does not reflect an independent and impartial system of judicial administration, it is for quite obvious reasons that the rights, freedoms and remedies of the individual cannot be guaranteed the best protection, nor can the society expect to maintain a fair, equitable legal order under the rule of law.

It is a self-evident fact that adequate protection of the rights of citizens requires that all persons have effective access to legal services provided by lawyers who are able

to perform effectively their proper role in the defence of those rights,609 and to counsel and represent their clients in accordance with the law and their established professional standards and judgement without any undue interference from any quarter.610

It is no exaggeration to say that the most important landmark of the last one decade or so is the considerable political, institutional, economic and social upheavals in many parts of the world, particularly those in the Central and Eastern Europe, which are radically affecting the development of these states.611 In a broad general sense, the principal positive consequence of these developments is a drastic change in the conception of the law which, previously conceived in a monolithic manner- where both the body of law and the judicial authorities- predominantly served as the means of defence for the state, has been brought under continued efforts in setting up a system that would endeavour to strike a proper balance between the various authorities within the administration of justice. One of the most significant consequences of this conceptual revolution is the emergence of a system that tends to widen the scope and extent of the application of the doctrine of independence and impartiality of the judiciary and the legal profession and hence the better protection of fundamental human rights and freedoms.612

V. Relevant International Human Rights Norms and Standards:


612To take a few examples, reference may be made to the establishment in Russia in July 1991 of a Constitutional Court to protect the rule of law and the constitutional rights of citizens, which marks a significant transition from the former system of justice where no court was competent to rule on the constitutionality of the Government's laws and acts. This would definitely prove to be a positive step in the process of strengthening the safeguards of the independence of the judiciary and protection of lawyers; see, UN Doc. E/CN.4/Sub.2/1992/25, paras. 61-65.

As in the case of some other contemporarily independent nations in that region, the Declaration of Independence of Armenia (23 August 1990) contained the principles of the separation of powers and the depoliticization of law enforcement agencies; see, E/CN.4/Sub.2/1993/25, paras. 53-56. Similarly, in Mongolia, the new Constitution of 1992 recognized the principle of independence of judges and their freedom from interference by any quarter. On the basis of these constitutional principles, a Court Organization Act was adopted in February 1993 in order to guarantee the independence of judges in the practical discharge of their functions, covering their salaries, appointments, immunities, tenure, disciplinary measures and so on; ibid., paras. 89-90.

Also, following the adoption (on 25 June 1991) of the fundamental constitutional instrument relating to the sovereignty and independence of the Republic of Slovenia, the first Constitution of the new independent state of Slovenia (promulgated on 28 December 1991) contained guarantees of the independence of the judiciary by virtue of the principle of the strict separation of powers and through the definition of status of judges; ibid., para. 102.
While reaffirming the determination of the peoples of the world "to establish conditions under which justice can be maintained", the preamble of the UN Charter emphasises the need to establish "conditions" which are necessary and conducive to justice in all its aspects. Again, "fundamental human rights" and "the dignity and worth of the human person" form an integral part of this concept of justice postulated in the Charter. The right to a fair judicial trial and to an independent, impartial system of judiciary are among the most basic prerequisites for justice, human rights and the rule of law.

A broad principle of independence and impartiality of the judiciary has been embodied in the Universal Declaration of Human Rights of 1948. Thus, Article 7 of the Declaration pronounces the principle of equality before law and equal protection of law against any discrimination. The indispensable role the judiciary in promoting and safeguarding the enjoyment of fundamental human rights and freedoms was then categorically emphasised in the Universal Declaration that everyone has the right to an effective remedy 'by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law' [Art. 8] and to a fair trial and public hearing 'by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him' [Art. 10]. All these principles have later been given the strength of treaty-law by the adoption of global as well as regional human rights conventions, covenants and protocols. Thus, for instance, Art. 14(1) of the International Covenant on Civil and Political Rights provides that 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. Similar expressions of guarantees of the doctrine of independence and impartiality of the judiciary have also been contained in the three major regional human rights treaties.613

Similarly, the UN Declaration on the Elimination of All Forms of Racial Discrimination (Art.7), International Convention on the Elimination of All Forms of Racial Discrimination (Art.5), Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (Art. 13), Convention on the Rights of the Child (Art. 37), Convention Relating to the Status of Refugees (Art. 16), the Convention relating to the Status of Stateless persons (Art.16), Convention on the Protection of the Rights of all Migrant Workers and their Families (Art. 18),

613See Art.6 of the ECHR; Art.8 of the ACHR; Art. 7(1) (d) of the African Charter.
Declaration of Basic Principles of Justice for Victims of Crime (Art. 5), and the Geneva Conventions' common article 3 [para. 1(d)] and Additional Protocols I (Art. 75 para. 4) and II (Art. 6, para. 2) all stress the fundamental concept of equal justice under the law, equal access to and equal treatment before the tribunals and all other organs administering justice, all of which are the essential expressions of an independent and impartial judicial system.

The widely ratified standards laid down by the ILO provide basic protection in the area of professional legal activities. For instance, one of the essential guarantees of the impartiality and independence of the judiciary is contained in the Discrimination (Employment and Occupation) Convention (Convention No. 111),614 prohibiting any discrimination in employment made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin. On several occasions, these provisions were found to apply to judges and other professionals involved in the functioning of judicial institutions, which provide minimal assurance of independent and impartial administration of justice.615 Another aspect of protection of the legal profession is illustrated by standards in the field of trade-union freedoms. Thus, under the provisions of Convention No. 87 concerning Freedom of Association,616 all workers, including judges, lawyers and other members of the judiciary have the right to establish and join organisations of their own choosing for the protection of their rights, and to organise themselves in order to protect their interests. Indeed, these provisions may provide essential reinforcement for them in forming collective resistance against potential encroachment on their independence.

Moreover, elaborate standards on specific issues relating to the administration of justice have been provided on the basis of common understanding and consensus by declarations, guidelines, principles etc. at different levels, particularly those at the instance of the United Nations. The most important among these include the Basic Principles on the Independence of the Judiciary617, the Basic Principles on the Role

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614 Adopted by the ILO Conference at its forty-second session on 25 June 1958, which came into force on 15 June 1960.
616 Adopted by the ILO Conference at its thirty-first session on 9 July 1948, which entered into force on 4 July 1950.
of Lawyers, the Guidelines on the Role of Prosecutors, and also the Draft Declaration on the Independence and impartiality of the Judiciary, Jurors and Assessors and Independence of Lawyers. A brief reference to the provisions of these relevant instruments would, however, be made at a later stage of this chapter.

VI. Essential Features of the Doctrine: The Modern Concept.

Although the modalities, methods and means of securing the independence and impartiality of the judiciary differ between countries as does the extent of application of the doctrine of separation of powers, a number of features may be broadly drawn that would tend to summarise the effects of these two principles in general terms as well as on the rule of law and human rights in the modern society. Such features include a degree of professionalism in judicial functions; insulation of the judiciary in respect of appointment, promotion, posting, transfer, removal, emoluments and other conditions of work and service of judges and other judicial officers from external and extraneous influences; administrative and functional autonomy of the judiciary and recognition of the norms of non-interference by the legislature and the executive in the role assigned and entrusted to it; accountability of the judiciary tempered by the principle of independence and so forth.

A. Personal Independence of Judges:

a) Selection and Appointment:

To ensure a balanced independent and impartial judiciary it is imperative that every citizen have access on general terms of equality and without unreasonable restrictions, to the public services including the judiciary. Indeed, it is a self-
evident fact that where discrimination operates in the selection and appointment of judges, this inevitably lowers the quality of the justice which they dispense\textsuperscript{622}. Extreme care must therefore be taken in the selection and appointment of judges, such as, when appointments are made by the executive, it should be done only with the consent of the legislative body, for example, by one special legislative chamber.

One UN study shows that there is a growing tendency for judges to be appointed on the recommendation of, or in effect by, 'a Judicial Service Commission' or a 'Superior Council' of the Judiciary (including senior or retired judges together with representatives of the executive and sometimes the legislature and the bar), in attempt to remove appointments from the arena of day-to-day politics, to require high qualifications and to maintain continuity of judicial administration\textsuperscript{623}. It has been observed that no single, consistent pattern exists between states in the selection and appointment of judges and a variety of methods has been employed by countries in this regard, thereby, involving the legislature, executive, the judiciary itself, representatives of the practising legal profession, or a combination of two or more of these bodies\textsuperscript{624}. Thus, for instance, Singhvi's UN study\textsuperscript{625} identifies four different models of practices in judicial appointments, namely:

i) direct selection, such as by competitive examinations, and promotions from the cadre of career judiciary;

ii) appointments from the legal profession;

iii) a mixed practice of these all above; and

iv) by elections.

It is indeed difficult to suggest that any particular practice is the best model for judicial appointments since each of them has its merits and demerits. For instance, the practice of appointments by public examinations resembles a system more closely familiar with that of the civil services that generally lacks the sense and outlook of an independent profession. Again, the practice of election of judges has the shortcoming

\textsuperscript{622}The Basic Principles on the Independence of the Judiciary provides that:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training and qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory. [Principle: 10]

\textsuperscript{623}See, M. A. Abu Rannat, supra, p.89, para. 221; also, UN Doc. E/CN.4/Sub.2/428, p.6, para.21.

\textsuperscript{624}See the UN Seminar on National and Local Institutions for the Protection and Promotion of Human Rights (Working Paper No.3), supra.

\textsuperscript{625}Supra.
of suffering from insecurity and uncertainty of tenure, although such a system tends to provide a democratic and periodic accountability.

b) Professional training and legal expertise:

By the very nature of its purpose and functions, the judicial service signifies a highly dignified and honourable intellectual discipline with a distinctive professional ethos and culture. Along with the above mentioned selection and appointment of judicial officers on the basis of their competence and integrity to the profession, adequate and appropriate legal education and professional training are all among the most important factors in the development of this crucial dimension of the doctrine. Indeed, it is a matter of common understanding that the possession of sound judicial and legal expertise on the part of the judges lies at the front of the primary requirements for enabling them to discharge their judicial functions without undue dependence upon others claiming such knowledge or expertise.

On the other hand, this requirement of education and training is also of utmost importance for developing a culture of judicial and legal professionalism which make substantial contribution to the establishment and maintenance of an independent and impartial judicial system. This also reflects a sense of community and continuity on the part of judges and other judicial officers who carry out the practice of such a system, thus fostering 'a value system committed to integrity and excellence'.

Again, one particular feature of the administration of justice in the modern society is an increasing requirement of using 'specialised' knowledge in a variety of fields. This may be illustrated by an increasing trend in different legal systems of establishing specialised tribunals or semi-judicial bodies of experts to deal with various technical matters ranging from the criminal responsibility of the insane to the application of environmental law and many more. Since these bodies do not always enjoy the same guarantees of independence as are characteristic of the judiciary, it is in the very interest of an independent judiciary to keep the powers and functioning of such expert bodies under control within the judicial system. One important method of such control lies in increasing the capacity of the judiciary, such as by promoting at least a basic understanding of relevant scientific and technological developments, to comprehend and review adequately the work of such expert organs.

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Moreover, apart from academic and institutional knowledge, a certain standard of experience should also be attained by judges, such as by serving an adequate apprenticeship and attending other judicial training. One UN study has, however, also indicated the importance of including study of human rights standards and development of awareness of human rights issues in programmes for the training for judges.\textsuperscript{627}

B. Collective Independence:

a] Tenure, transfer and other conditions of service:

Where the judges are appointed by the executive, particular emphasis is to be placed on the security of tenure as a means of securing the independence of the judiciary. Similarly, the rules governing the transfer of judges from one post to another are often calculated or intended to promote their feeling of security and therefore to preserve their independence.\textsuperscript{628} Thus, for instance, deriving a great influence from Montesquieu's doctrine of separation of powers in the mid-eighteenth century, the Constitution of the US provided that all federal judges "shall hold their offices during good behaviour,"\textsuperscript{629} thus reflecting the similar provisions of the British Act of Settlement of 1701 that the King's judges were no longer to remain in office at the King's pleasure but could be removed only upon the address of both houses of Parliament.\textsuperscript{630} It has been particularly emphasised at one UN Seminar that judges should be irremovable except in cases of physical or mental disability.\textsuperscript{631} In this regard, one country-study identifies a number of grounds being in practice for the termination of judges before any statutory time limits are reached, such as a prescribed retiring age or a new election of judges etc. In addition to a proven inability to perform judicial functions on account of physical or mental disability, such grounds include, \textit{inter alia}, conviction for criminal offences; such "misconduct" as the "violation of the Constitution or the laws or other serious breach of their

\textsuperscript{627}UN Doc. E/CN.4/Sub.2/428, p.5, para.18.
\textsuperscript{628}The Basic Principles on the Independence of the Judiciary provides in this regard:

The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. [Principle: 11]

See also Principles 12-14 of the Basic Principles in this context.
\textsuperscript{629}Art. 3, sec.1 of the US Constitution.
\textsuperscript{630}It may, however, be noted that since that Act of 1701, only one judge has actually been removed in this way in England- in 1830; see, Lord Elwyn-Jones, "Judicial Independence and Human Rights", in Robert Blackburn & John Taylor (Des), \textit{Human Rights in the 1990s: Legal, Political and Ethical Issues} (Mansell: London, 1991), p.45.
\textsuperscript{631}UN Seminar on National and Local Institutions for the Promotion and Protection of Human Rights, op. cit., para.51.
duties"; serious disciplinary offence; gross and repeated neglect of official duties which show the judge to be manifestly unfit to hold his position, and so forth.632

Again, it has been a generally recognised fact that a judge's remuneration and retirement pension must be high enough to relieve him from financial anxieties and put him beyond the need for auxiliary employment and any venal temptations. Recognising this necessity for the independence of the judges, Rannat's study still included the caution that 'the payment to judges of excessively high salaries may tend to create in the judiciary a social outlook, which would risk a discriminatory application of certain laws, including those relating to the protection of property'.633

b) Rights, Privileges and immunities:

The rights and freedoms of conscience, belief, thought, speech, expression, association, assembly and movement are fundamental and universal human rights guaranteed to every individual member of the judiciary are no exception to the entitlement of these rights and freedoms. Indeed, in addition to their enjoyment of these rights and freedoms in their capacity as individuals, judges are particularly in a position to exercise these rights and freedoms by virtue of their professional identity and functional independence. These rights are thus of vital importance and significance for the members of the judiciary devoted to interpret, protect, represent and defend the rights of other members of the community.634

Again, certain privileges and immunities attaching to judges in relation to possible judicial proceedings are also important factors in upholding the independence and impartiality of the judiciary. Thus, for instance, judges, particularly in the higher judiciary in the commonwealth legal systems, generally enjoy a complete immunity from civil action for any judicial act committed in their judicial capacity even though such acts might be alleged to have been done maliciously and corruptly.635 Such a principle is essentially based on the basic premise that the judges must be permitted

633Rannat, supra, p. 98, para. 239.
634See, e.g., the observation of the European Court of Human Rights in Ezelin v. France, E.CourtHR, Judgment of 26 April 1991 (Chamber) Ser.A No. 202 (with regard to the right of peaceful assembly and freedom of expression of lawyers).
635See, e.g., the observation of Crompton J. in Fray v. Blackburn (1963) 3 B & S. 576; also, Anderson v. Gormie (1895) 1 Q.B. 668.
to administer the law independently and freely without favour or fear of consequences.\textsuperscript{636}

In civil law systems, on the other hand, the civil liability of a judge is generally restricted to cases of fraud, extortion, malicious acts or to denial of justice or gross negligence. However, there exist insurmountable obstacles in translating the theoretical civil liability of judges into a decree for certain damages or compensation and thus, in effect, they practically enjoy a complete immunity even in the civil law systems.\textsuperscript{637} Again, in many Continental systems, such as in France, Germany and many East European countries,\textsuperscript{638} a victim of a judicial wrong may sue the state for damages and the state has the right to sue the judge concerned for the recovery of such damages. Such a system is a relatively new innovation and has been welcomed by many as a procedure that tends to shield judicial independence to a certain extent and to protect a judge from the harassment of litigation, still serving the purpose of a form of judicial accountability against malpractices.

\section{C. Institutional Independence :}

In a broad general sense, the judiciary is composed not only of professional career judges and other adjudicating officers but also of certain other groups who are directly involved in the functioning of the judicial process. Such groups obviously include judicial experts, assessors, jurors, and the members of the legal profession who collectively form an important and integral part of the institutional infrastructure of the judiciary as a whole. The 'institutional' feature of judicial independence and impartiality therefore require an examination of the role of these officers in the structural and functional process of the judiciary as well as the significance of their independence and impartiality on such process.

On the other hand, the 'institutional' notion of the doctrine of independence and impartiality of the judiciary calls for another line of inquiry into the subject, namely the position of the judiciary in the power-structure of the state; structural organisation of the judicial institution and the issue of its changeability; institution of special judicial, quasi-judicial bodies and other administrative tribunals as well as the impact of their operation on the doctrine under scrutiny vis-a-vis the protection of

\textsuperscript{636}\textit{See, Scott v. Stansfield (1868) LR 3 Ex. 220, 223 by Kelly, C.B.}
\textsuperscript{637}\textit{See, Cappelletti, op. cit., esp. p.43.}
\textsuperscript{638}\textit{See, Singhvi, supra, E/CN.4/Sub.2/1985/18/Add.1, para.177.}
fundamental human rights and freedoms. The following discussion would, however, tend to examine these two different institutional aspects of the judiciary accordingly.

a. Other members of judicial institution:

i. Lay-judges and other non-career members of courts:

In different countries, lay-judges, magistrates and justices of the peace etc. play a considerable role in the administration of justice. They form an integral part of the judiciary and belong to its hierarchy, ethics and discipline. However, although such lay members of the judiciary are not required to possess any legal qualifications, and although a different standard is applied with regard to their selection, appointment, tenure and other conditions of service, a proper course of professional orientation, instruction and initiation is still of importance for them in the performance of their functions and in the appreciations of same ethics of integrity and independence which are essential for the professional career judges.

ii. Judicial Experts, Jurors and Assessors etc.:

The practice of engaging jurors and assessors in the process of administration of justice is common to many legal systems. Generally speaking, jurors are drawn from the lay population whereas assessors are employed in the course of adjudication because of their specialised knowledge or technical skill. In this sense, an assessor may also be described as an independent expert witness with an adjudicative role. Such role may range from an advisory status to a judge with a limited mandate or even a full member of the court. A similar diversity exists regarding the role of jurors in different legal systems. Thus, jury trial is used for both civil and criminal cases in some jurisdictions, whereas in others it is hardly or never used for civil matters. Whereas in civil cases they determine the amount of a claim to be awarded, their more common function in criminal cases is to determine the guilt or innocence of the accused, although in some systems jurors fully participate in the trial along with the professional judge in deciding the verdict both on guilt or innocence and on sentence.\(^6\)\(^3\)\(^9\)

However, what emerges from all these diversities of the role and function of jurors and assessors in judicial administration is the fundamental principle that in those legal systems where the jurors and assessors form part of the judicial system, they play a substantive role in the administration of justice and make considerable contribution to the outcome of the proceedings affecting the rights and remedies of the parties involved. Hence, for a fair administration of justice that ensures protection of fundamental human rights and freedoms and the enforcement of judicial guarantees and remedies, the independence and impartiality of jurors and assessors are equally important as for the professional career judges.640

It may, however, be noted here that in spite of the fact that the modern principle of independence and impartiality of the judiciary has been repeatedly enunciated in all major human rights treaties, the meaning, scope or applicability of the doctrine has not been strictly defined in international human rights law. Thus, while in a strictly restricted interpretation one may proceed with the conception that the principle embraces only the specific category of 'judges of courts' *stricto sensu*, a more liberal thought may still consider whether certain other institutions playing an important role in the administration of justice and the protection of human rights be included into a more comprehensive concept of the term "judiciary". Instances of such institutions may be found in certain categories of public officials who, though not called "judges" as such by law, may still be regarded as exercising certain judicial functions in a broad sense. Examples of these categories include the "Prokuratura", an institution typical of the legal systems of a number of Eastern European states641; the "Parliamentary Commissioner" or "Ombudsman", an institution typical to the Scandinavian and various other legal systems642; or the institution of the *Ministerio Público*, known in the Hispanic American legal systems.643 In addition, as has been suggested in one UN study644, one may also consider the inclusion within the scope


641This institution ensures that no citizen is subjected to unlawful criminal prosecution or to any other unlawful restrictions of his rights, see "Study on the Right of everyone to be Free from Arbitrary Arrest, Detention and Exile", UN Publication, Sales No. 65.XIV.2, paras. 330-335.

642These institutions make substantial contribution to the protection of human rights, especially of freedom from arbitrary arrest, against abuses of administrative and sometimes also of judicial authorities; see *Rannat*, supra, paras. 336-341.

643See *Rannat*, supra, paras. 342-356.

of the doctrine of various other actors in the administration of justice who are neither regarded as "judges" as such nor as public authorities or organs; examples of such bodies include the arbiters in many legal systems with broad powers to make binding decisions with respect to various types of disputes (in particular commercial litigations), or various traditional procedures for the settlement of grievances at the community level - such as village councils - which, although not fully integrated into the judicial system established by law, have been proved to be of substantial impact upon the human rights of the peoples involved.

Accordingly, therefore, specific and consistent measures should be carefully adopted with regard to such matters as the application of the doctrine of non-discrimination in the selection and appointment of these officers; absence of criminal records; right of either party to challenge the appointment of a particular expert or a juror etc. on specified grounds; protection of such officers from undue influences either from outside or within the institution itself including by providing criminal legislation; disciplinary or civil sanctions for proven lack of integrity and failure to maintain professional independence and impartiality etc. It is important to emphasise that the role and the responsibility for the administration of jury system must formally and qualitatively be under the exclusive control of the judiciary. It is of utmost importance that the courts provide adequate facilities and suitable environment for the jurors and assessors that would minimise contact between them and the parties, lawyers and the general public. The courts are also under the obligation to ensure adequate protection to them from threats, influence, interference or intimidation including from the court itself.645 The secrecy of jury deliberation must be protected and jurors cannot be asked to give reasons for their verdict. Indeed, this principle lies at the very heart of the whole system that the jury is free to reach its verdict according to its own conscience and in doing so the jurors are free of the judge.

However, it is also an important factor that persons called for jury service are provided with appropriate orientation and instruction by the court in order to promote their understanding of the judicial system and their role in the proceedings concerned.

iii. The Legal Profession:

645In one leading English case on the subject [R. v. Rose and Others (1982) 2 All.E.R. 536], the court clerk entered the jury room and told the jury that they would be discharged if they did not reach a verdict by a certain time. The Court of Appeal deplored this grave material irregularity and quashed the conviction.
In a democratic society governed by the rule of law, the function of the judiciary is closely associated with the function of the legal profession. A lawyer may or may not be regarded as an officer of the court in a particular legal system, but he is still an important limb of the law and an indispensable part of the entire system. Therefore, in the same way as the judiciary, the legal profession must also be free from interference from the executive, the legislature and also the judiciary within the proper sphere of discretion which the law allows it.

In the modern societies, the legal profession has the potential of playing a significant role. As W. Friedmann puts it:

"The active and enlightened role of the lawyer in the complex process of social engineering is an indispensable and vital aspect of mankind's increasingly urgent and precarious struggle for civilised survival."

Thus, first of all, it represents a powerful institution with special knowledge of the working of the legal systems which inherently exercise considerable influence on the society as a whole. In this process, while the legal profession can exercise substantive educational influence on the general public, its collective influence can also serve as a constraining force on the arbitrariness of other centres of power within the state. Again, members of the legal profession, by virtue of their technical legal knowledge and expertise, perform the unique function of mediating between the individual and the law and translating into effective action the legitimate aspirations of the individuals upon whose fundamental rights and dignity a society under the rule of law is assumed to be based.

Accordingly, just as the independence of the judges is an essential precondition for the exercise of individual rights and freedoms, so also is the existence of an independent legal profession. As early as in 1792, Sir Thomas Erskine gave a

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648 The English legal system provides an admirable instance of the relation between the independence of the legal profession and the judiciary as whole. See, in general, Roscoe Pound, Jurisprudence, Vol.V, part. VIII, 'The System of Law' (1959). Indeed, in England, the history of judicial independence is also the history of the independence of the legal profession, which has been recognized as the cradle of the legal culture of that system. It is in the Inns of lawyers that the most crucial battles of ideas were fought, institutional equation for the impartiality and independence of the justice system and the liberty of the British people were worked out, the dignity and freedom of the legal profession were established, and the ethics and etiquette of the profession became a living tradition. The ideas and ideals reflected in the judicial independence and impartiality as the basic principle of the British legal system and its commitment to the freedom and independence of the legal profession exercised a substantial and lasting influence throughout the world, particularly in its former colonies and dominions.
memorable expression of the importance of a fearless, independent legal profession in his famous work *The Rights of Man*:

From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practice, from that moment the liberties of England are at an end.649

In this sense, the independence of the legal profession is vital not for the sake of lawyers themselves but because they serve the most essential cause of the rights and freedoms of human beings and of the society as a whole under the rule of law.650 A number of important issues are, however, significant in ensuring such independence and impartiality and should therefore be carefully considered.

Thus, with regard to access to the legal profession, the whole process should be governed by objective criteria and not made excessively dependent upon subjective and vaguely defined standards of personal character which, if misapplied, may have the result of excluding persons from this profession on the basis of their race, colour, religion, opinions, or other discriminatory grounds.651 It is also important that the teaching of human rights is properly integrated into the academic curriculum and professional training of lawyers, with particular stress being laid on the human rights aspects in the legal field.652 In this regard, it has been rightly emphasised that "human rights law needs human rights lawyers; not just academic lawyers refining and distinguishing lines of case-law, but lawyers conservant with human rights law and willing and able to advise clients on the means of enforcement".653

Lawyers professional organisations, by enforcing professional ethics and aiming at protecting lawyers from improper influences and pressures, may play a significant role in promoting and strengthening the independence of the legal profession. It is therefore an important responsibility of the state to ensure that Bars of lawyers or

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650 The UN Human Rights Committee has on several occasions while considering the states reports expressed its serious concern as to how the legal profession is organized, the restrictions and limitations applicable or operating in practice and the freedom of the lawyers in the exercise of their profession; see, e.g., SR 282 pr.50 (on Tanzania) & SR 366 pr.13 (on Iran). It was noted in the Committee that if, in a given situation, that crucial freedom was interfered with, 'the entire judicial system became warped', see SR 431 pr.72 (on Peru).
other similar organisations are established and organised in a way that they are able to determine and regulate independently the essential conditions attaching to the practice of the profession of lawyers.\textsuperscript{654} These organisations tend to uphold the principles of honesty, impartiality, restraint and fellowship on which the legal profession is based and to undertake any supervisory tasks required for the honour and integrity of its members, as well as taking any disciplinary measures against them. It is also therefore imperative that such organisations, which should be ideally autonomous, non-governmental representative bodies, remain free from any domination by the state, and that appropriate safeguards be taken to ensure the continuity of the independence of such organs. An autonomous collective group provides an institutional strength and concerted self-defence for its members against any invasion or threat to their independence or impartiality.

Certain immunities and privileges are essential for ensuring the independence and impartiality of the legal profession, especially the confidential and privileged character of communications between an accused person and his counsel is to be particularly stressed.\textsuperscript{655} They may not be sued on the grounds of defamation, insult or injury for any statements they make or documents they produce in court. They must enjoy civil and criminal immunity for statements made in good faith in written pleadings or oral arguments or otherwise in course of his professional work before a court, tribunal or administrative authority. However, disciplinary actions, taken generally by the relevant professional organisation, may be inflicted under specified conditions to lawyers who show lack of independence or impartiality in performing their functions, such as warning, reprimand, censure, imposition of fines and temporary or permanent exclusion from professional practice etc.\textsuperscript{656}

b. Organisational and Structural Aspects of Judicial Institution:

(a). 'Separation of Powers':

As with the other procedural guarantees, the guarantees of an independent judiciary in international human rights law form the essential basis for the "subjective claim to

\textsuperscript{654}See, H. v. Belgium, supra.

\textsuperscript{655}See, e.g., the observations of the European Court of Human Rights in Campbell v. U.K., Judgment of 25 March 1992 (Chambers) Series A No. 233; also in the Golder case, Judgment of 21 February 1975.

\textsuperscript{656}See Rannat, supra, paras. 326 & 327.
trial in court which, by their very nature, obligate the state parties to set up an independent and impartial judicial system and to give them such an institutional, functional and organisational structure that they are able to conduct a fair trial in all types of civil and criminal matters that would ensure the minimum rights of 'due process' guaranteed by the human rights instruments. In addition to the functional and internal administrative notions of judicial independence, this obligation on the part of the states is particularly emphasised with regard to the manner in which the actual independence of the judiciary from the other branches of governance of the state has been established and maintained. A lucid expression of this may be found in the words of E. I. Daes that "a judicial system which provides for independent judges reveals perhaps better than any other institution, the perfect equilibrium between the liberty of the individual and the power of the state".

The above observation is, however, clearly formulated in terms of the 'classic separation of powers doctrine' and as it has been aptly noted by one commentator in relation to the provisions regarding a system of independent and impartial judicial system and a fair trial contained in the CP Covenant, the wording and historical background of these provisions demonstrate that "agreement was reached in a universal human rights treaty on a provision based on liberal principles of separation of powers and independence of the judiciary vis-a-vis the executive". Indeed, from the beginning of its consideration of states reports, the UN Human Rights Committee expressed serious concern when the lines of demarcation between executive and judicial power has appeared indiscernible. In a more recent case under the Optional Protocol, the Committee thus noted that 'a situation where the functions and competence of the judiciary and the executive are not clearly distinguishable or

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658 These notions have been separately treated below under the features of 'functional independence'.
659 See the General Comment of the UN Human Rights Committee GC 13/21, UN Doc. A/39/40, pr.3 (adopted on 12 April 1984 (SR 516) and 23 July 1984 (SR 537).
661 See, e.g., the comments of Mr. Graefrath, member of the Human Rights Committee, on a number of state reports including SR214 pr.57 (on Senegal), SR 142 pr. 107 (on Spain), SR 155 pr.54 (on Ukrainian SSR).
663 See, e.g., SR 199 pr.40 (on Iraq); SR 391 pr. 10 (on Denmark); SR 475 pr. 38 (on Guinea). Thus, for instance, during consideration of the report of Nicaragua, a member of the Committee commented that "the police were granted the jurisdiction to apply the police regulations and laws through police examining magistrates. He asked whether in that event the police functioned as courts and why offenders could not be brought before ordinary courts"; see, comments of Mr Opsahl in SR 422 pr. 33, see also, UN Docs. CCPR/14/Add. 2 & 3 (1982-83).
where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal'.

Thus, to state in the simplest terms, the central idea here is that the executive organ in a state must not be able in any way to interfere in a tribunal's proceedings and a tribunal must not act as an agent for the Government against an individual citizen.

Although the requirements of the notion of institutional independence relate primarily to the executive, they also aim (albeit to a lesser extent) to the legislative body of the state. In any case, what is of prime importance is that the judicial institution is not made subject to directives or in some other undue manner made dependent on other organs of the state in the performance of its functions. Again, this sense of independence postulated by the doctrine must be understood not only in terms of freedom from external interference by executive or legislative actions as well as of any direct or indirect interference by powerful social groups, media, industry, political parties etc. but also, even internally, of any undue control or influence by other judicial colleagues and superiors.

664 Communication No. 468/1991, Angel N. Olo Bahamonde v. Equatorial Guinea (views adopted on 20 Oct. 1993, Forty-ninth Session; the applicant in his 'individual petition' contended that the President of the state party controlled the judiciary in that country).

665 This issue has been elaborately discussed in a number of cases before the European C.H.R., see for instance, Delcourt case, 11 Series A (17 Jan 1970); Lithgow case, 102 Series A (8 July 1986); Ettl. v. Austria case, 117 Series A (3 Apr 1987); Borgers v. Belgium, 214-A Series A (30 Oct 1991).

666 See, e.g., UN Doc. A/C.3/SR.964, at 17 (comments by the French delegate to the Human Rights Committee).


On the other hand, what follows from this last proposition is another essential feature of the judiciary, namely- the institutional impartiality of the judiciary. Thus, while the 'personal' impartiality of a judge denotes the absence of any bias or personal interest in a given case before him, the institutional impartiality may be described to require that the members of the judiciary must not allow themselves to be excessively guided or influenced by social emotions, political motives or that of "media justice".

(b). Changeability of Judicial Organisation:

Another important relevant issue that might be of vital significance in so far as the institutional independence of the judiciary is concerned is the changeability of judicial structure. Thus, while it is understandable that if the judicial structure as a whole has been left subject to arbitrary changes, it may weaken the independence of individual judges, the judicial mechanism being an integral part of the society in its broadest sense must also be capable of adjustments to correspond with its new and changing demands. There exists therefore a need for a reasonable balance between the absolute inviolability of the judicial infrastructure and excessive interference with its basic characteristics. In some countries, for instance, such a balance has been sought to be achieved by specifying the principal courts in the Constitution with a lesser or higher degree of particularisation regarding such matters as the number of judges, distribution of jurisdiction etc.

(c). ‘Special’ Quasi-Judicial, Administrative and Other Tribunals and Military Courts:

The primary institutional guarantee of the human rights instruments, as already referred to in some earlier parts, is that rights and obligations in civil suits or criminal charges are not to be heard and decided by political institutions or by administrative authorities subject to directives and such issues are strictly matters of judicial concern that are to be accomplished by a competent, independent and impartial

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668 See, e.g., the Sramek case, E.Ct.H.Rs., 84 Series A 17, at 18, para. 37 (22 Oct 1984).
669 As regards the issue of "impartiality" before the UN Human Rights Committee, see Gonzales del Rio v. Peru, No. 263/1987; Karttunen v. Finland, No. 387/1989; see also, the individual opinion of Chanet, Herndl, Aguilar, Urbina and Wennegren in Collins v. Jamaica, No. 240/1987.
670 Thus, e.g., in the United States, the judicial power is vested in the "Supreme Court", but the number of judges can be fixed by ordinary law and the Congress has power to create by such ordinary law "such inferior courts (such as the lower Federal Courts) as [it] may from time to time ordain and establish". Art. III(7) of the US Constitution.
"tribunal" established by law. In a general sense, the term tribunal corresponds to that of national civil and criminal courts, "although a tribunal denotes a substantively determined institution that may deviate from the formally (and nationally) defined term "court". At the same time, while it is not enough for national legislative bodies to designate an authority as a "court" if it does not correspond to the requirements of independence and impartiality, administrative authorities that are largely independent and free of directives may, under certain circumstances, satisfy the requirements of a "tribunal" within the meaning of the human rights instruments.

Accordingly, one important and complex issue with regard to the institutional independence and impartiality of the judiciary that remains as a matter of serious concern is the existence, organisation, nature, and jurisdiction of special or extraordinary courts or tribunals that deal, for example, with labour disputes or economic, social, or administrative matters, or that applied special rules or procedures, including particularly the operation of military or revolutionary tribunals. While noting on the existence in many countries of such courts and tribunals which try civilians, the UN Human Rights Committee noted that this could present 'serious problems as far as the equitable, impartial and independent administration of justice is concerned'; quite often the reasons for the establishment of such courts is to enable exceptional procedures to be applied 'which do not comply with normal standards of justice' and that in some jurisdictions 'such military and special courts do not afford the strict guarantees of the proper administration of justice' which are most fundamental for the effective protection of human rights.

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671 See, Nowak, supra, pp. 244-45.
672 Among the kind of bodies that have attracted close, and often critical, attention of the UN Human Rights Committee in the course of considering periodic states reports have been "Special Courts" (e.g., SR 84 pr.28, on Madagascar); "Public Security Committees" (e.g., SR 90 pr.13, on Iran); "Self-Management Courts" (e.g., SR 98 prs. 51-2, on Yugoslavia); "Comrades Courts" (e.g., SR 155 pr.15, on Ukrainian SSR); "Sharia Courts" (e.g., SR 200 pr.8, on Iraq); "State Security Courts" (e.g., SR283 pr.22, on Mali); and "Gun Courts" (e.g., SR 291 pr.44, on Jamaica). See also, the comments on SR 77 pr. 29, on Norway; SR 51 pr. 63, on Libya; and SR 328 pr.36, on Morocco.
D. Functional Independence:

Although to a certain extent it overlaps with the institutional notions of the doctrine of independence of the judiciary, one important practical aspect deserves a separate mention here as an essential feature of the doctrine. This feature relates to the control of the courts over their staff, the preparation of their budget and the making of the relevant rules of practice and procedure. Indeed, one of the most common and important issues regarding this functional independence of the judiciary concerns the questions of its structural limitations and deficiencies, such as lack of resources and shortage of judicial power, access to the administration of justice and so forth. Accordingly, this feature of the doctrine of independence of the judiciary puts both the executive and the legislature under an important obligation to ensure that adequate resources have been made available for the administration of justice, particularly with regard to appropriate facilities for the courts, for judicial and administrative personnel, for operating budgets and in general for maintaining judicial independence, dignity and efficiency.

It should, however, be noted in this context that although the administrative autonomy of the judiciary may be subject to a certain degree of consultation and decision sharing with the executive and the legislature, certain matters relating to judicial employees should be broadly dealt with by the appropriate judicial authority, including recruitment, retention, promotion, posting, transfer, education, training and the structure of the personnel system. Similarly, the judiciary should also assume the main responsibility for internal court administration and management including the assignment of cases in accordance with the rules of procedure of the court to individual judges as well as the supervision and disciplinary control of its administrative personnel and support staff.

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674 See, e.g., the observation of the Human Rights Committee in SR 475 pr. 31 (on Guinea) and also SR 348 pr. 32 (on Rwanda).


675 In this context, see the General Comment of the UN Human Rights Committee GC 13/21, UN Doc. A/39/40, pr.3 (adopted on 12 April 1984 (SR 516) and 23 July 1984 (SR 537) and also the observation of the Human Rights Committee in SR 475 pr. 31 (on Guinea) and also SR 348 pr. 32 (on Rwanda).
VII. Guarantee of Personal Security and Judicial Independence:

The safety and security of the members of the judiciary including the lawyers must be ensured by the society and neither the state, nor any other authority, nor any individual litigant should be allowed to take any revenge in any form upon them or members of their family. Indeed, it is an irony of our modern society that judicial officers, particularly lawyers, around the world have been deprived of their liberty and livelihood and have been made prisoners of conscience merely because they discharged their professional duties fearlessly and courageously. It has been observed by the Secretariat of the United Nations, on the basis of its analysis of allegations from NGOs, that in various countries, particularly those where a state of emergency had been declared, lawyers are being subjected by the executive to harassment, intimidation, arrest, abduction, torture and even summary execution and secret killing for having used legal remedies on behalf of political dissenters.676 Thus, the UN Special Rapporteur (of the Commission on Human Rights) on Summary or Arbitrary Executions Mr. Amos Wako noted "a particularly alarming trend", which is rapidly spreading, namely, the practice of death threats deliberately directed, in particular against persons who play key roles in defending human rights and achieving social and criminal justice in a society, including the judges, lawyers, magistrates and prosecutors etc. involved in trials, investigations or other legal proceedings.677 Also, in its 1987 report, the Commission's Working Group on Enforced or Involuntary Disappearances noted that "the enforced disappearance of defence lawyers and human rights advocates at the hands of government agents also appears to be on the increase".678 In August 1989, the Centre for the Independence of Judges and Lawyers presented the UN Sub-Commission with a report entitled "The Harassment and Prosecution of Judges and Lawyers", describing the cases of 145 judges and lawyers who had been harassed, detained or killed between January 1988 and June 1989. The list included 34 judges and lawyers killed, 37 detained and 38 who had been attacked or threatened with violence.679 Indeed, the summary or

676See, UN Doc. E/CN.4/Sub.2/431, paras. 24 & 60.
One NGO report shows that between June 1990 and May 1991, there have been 532 cases of lawyers in 51 countries who had been subjected to physical intimidation, threat and actual violence;
arbitrary execution, enforced or involuntary disappearance, arbitrary detention or torture of judges and lawyers do not only weaken the safeguards of their personal independence, they utterly destroy the infrastructural basis of an independent and impartial judicial system, thereby putting the fundamental human rights and freedoms as well as the rule of law in a state of extreme jeopardy.

In 1993, the Inter-American Commission on Human Rights undertook a study "on the measures necessary to ensure the autonomy, independence and personal integrity of the members of the judicial branch so that they may investigate violations of human rights properly and perform their functions to the fullest". The Commission has noted that many countries are experiencing chronic situations that generally militate against the security of the judiciary, hindering the proper functioning of the system of justice. The harassment, hounding and violence to which members of the judiciary and lawyers in general are subjected to are not isolated incidents but the part and parcel of widespread practices throughout the globe. The Commissions' report thus repeatedly emphasises the extent of the problem to be dealt with and the manifold potential threats to the impartiality and independence of the judiciary in many parts of the Continent, particularly stressing the overriding need to ensure security and physical protection for all members of the profession.

VIII. Standards of ideal of independence and Impartiality:

The first important step in enumerating a set of formal intergovernmental standards spelling out the minimum standards of judicial independence and impartiality was taken by the adoption of the Basic Principles on the Independence of the Judiciary. These Principles, intended to serve as 'the acknowledged yardstick' by which the international community may measure the 'standard of the independence of the judiciary', set forth the basic principles concerning freedom of expression and association of judges as well as rules regarding the qualification, selection, training,
conditions of service, tenure, immunity, discipline, suspension and removal of judges. One of the most important requirements of the Basic Principles is that the independence of the judiciary should be guaranteed by the state and enshrined in the constitution or the law of the country concerned and entrusts the governments and other institutions with the duty to respect and observe such independence. A similar requirement has been made with regard to the lawyers in the Basic Principles on the Role of Lawyers that such principles be respected and taken into account by governments within the framework of their national legislation and practice and brought to the attention of lawyers as well as the judges, prosecutors, members of the executive and the legislature and the public in general. The Basic Principles on the Independence of the judiciary, while providing for a set of standards of ideal independence, requires that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any improper restrictions, influences etc., direct or indirect, from any quarter or for any reason; that it should have jurisdiction over all issues of a judicial nature and there shall not be any inappropriate or unwarranted interference with the judicial process; that everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures.

The 'Lawyer Principles', on the other hand, focus special attention on such important issues as effective access to legal assistance for all groups within society; the right of the accused to counsel and legal assistance of their own choice; the education of the public on the role of lawyers in protecting fundamental rights and liberties; training and qualification of lawyers; the right of lawyers to undertake the representation of clients or causes without fear of repression or persecution; confidentiality of

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683 Principle 1 of the Basic Principles.
685 See the Preamble to the Principles.
686 See Principles 1-7 in general.

In this context, however, see the 'Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary', adopted by the ECOSOC by its resolution 1989/60 of 24 May 1989 (on the recommendation of the Committee on Crime Prevention and Control). These Procedures call upon states to adopt and implement the Basic Principles in accordance with their constitutional process and domestic practice and ask states to widely publicize these principles making the text available to all members of the judiciary. They also invite governments to hold national and regional seminars and courses on the judiciary and its independence and to keep the UN Secretary-General informed of the progresses achieved in the implementation of the Basic Principles on a regular basis. For the text (reprinted) of these Procedures, see, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (UN: New York, 1992), pp. 153-154.
professional communication and so forth.\textsuperscript{687} It may, however, be noted that certain guarantees traditionally provided for individuals in criminal proceedings, such as the right to be informed immediately of the right to a lawyer etc., are laid down in the 'Lawyer Principles' as so many of them indeed provide the necessary guarantees for the independent performance of their legal functions. These provisions of the Principles should be supplemented by a number of relevant provisions contained in other international human rights instruments including the right of every detained person to have the assistance of, and to communicate and consult with, legal counsel as well as to challenge the lawfulness of his detention such as by means of habeas corpus or amparo, as affirmed in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.\textsuperscript{688}

One important issue to be emphasised here is that with regard to the protection of lawyers during a state of emergency, art. 14 of the 'Lawyer Principles' requires that lawyers shall "at all times" act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession. What is expressly stressed in this principle is the indefensible nature of the rights of the defence as a means of guaranteeing respect for other indefensible rights.\textsuperscript{689}

Similarly, the "Prosecutor Principles" guarantee the personal, collective, functional and institutional independence of prosecutors.\textsuperscript{690} Recognising that prosecutors are essential agents of the administration of criminal justice, the Guidelines are designed to secure and promote the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. The principal objective of these provisions are that prosecutors

\textsuperscript{687}The 'Lawyer Principle', comprising a preamble and 24 articles, lay down elaborate guidelines as to the standards of independence in so far as the legal profession is concerned. It divides these principles under the heading of access to lawyers and legal services(1-4); special safeguards in criminal justice matters (5-8); qualifications and training (9-11); duties and responsibilities (12-15); guarantees for the functioning of lawyers (16-22); freedom of expression and association (23); professional associations of lawyers (24-25); and disciplinary proceedings (26-29).

\textsuperscript{688}Adopted by the GA reso. 43/173 of 9 Dec. 1988, annex, Principle 32. A similar provision may also be found in the Standard Minimum Rules for the Treatment of Prisoners with regard to 'untried prisoners' and also in the 'Safeguards guaranteeing protection of those facing the death penalty' with regard to everyone suspected or charged with a crime for which capital punishment may be imposed.

\textsuperscript{689}This provision is based on the same reasoning as that applied by the Inter-American Court of Human Rights in its well-celebrated Advisory Opinions on Habeas Corpus, OC-8/87 of 30 January 1987 and OC-9/87 of 6 October 1987.

\textsuperscript{690}See Footnote 618.

In this context, see the comments of the Human Rights Committee as to the role of the Official Public Prosecutor (SR 131 pr.19, on Bulgaria), the Procurator (SR 109 pr.71, on USSR; see also in this regard, C. T. Reid, \textit{The Ombudsman's Cousin: The Procuracy in Socialist States} (1986) pp. 311-326), or the People's Advocate (SR 142 pr.67, on Spain) and their precise powers in terms of investigation, prosecution and adjudication.

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shall be made aware of the ideals and ethical duties of their office, the constitutional
and statutory protection of the rights of the suspect, and the human rights and
fundamental freedoms recognised by national and international law. The 24 articles
contained in it focus special attention to the requirements of fairness, openness,
accountability and efficiency in matters relating to prosecutions and provide detailed
provisions concerning the qualifications, selection and training, status and conditions
of service, freedom of expression and association, role in criminal proceedings,
discretionary functions, alternatives to prosecution, co-operation with other
government agencies or institutions, and disciplinary proceedings. Thus, the personal
independence of prosecutors is guaranteed by the duty of states to ensure that
prosecutors are able to perform their functions without hindrance and, if necessary,
to provide physical protection for them and their families. Another fundamental
guarantee of independence is the principle that they should "give due attention" to
the prosecution of crimes committed by public officials in particular where violation
of human rights are concerned. In this context, another equally important
guarantee is that the prosecutors have the duty not to use evidence obtained through
violation of human rights.

It is important to note that the circumstances governing different types of judicial
function necessitate a variety of methods in determining the standard of the ideal of
independence. This may be illustrated by the example of the UK, where an important
jurisdiction is exercised by 'lay justices of the peace', whose position necessitates
special rules governing their appointment and dismissal which might not be
appropriate to professionally trained career judges. Similarly, in many countries, the
concept of the judiciary requires the inclusion of the personnel of certain
administrative courts and, indeed, a supreme administrative court, such as the
Counseil d'Etat in France, may play a central role in the maintenance of the rule of
law. Consequently, independence of its members is of cardinal importance and
special measures of standard must be applied in determining the ideal of
independence of such bodies.

However, what is of importance to note is that the same spirit of independence and
impartiality must be applied to the administrative or constitutional courts, frequently
set up in various national systems and not being made subordinate to the ordinary
courts and to the appointment and removal of the members of such courts, whether
they being professional judicial officers or laymen. It is also important that any ad

691 Principles 4 & 5.
692 Principle 15.
hoc administrative tribunals are kept under the supervision of the ordinary courts of the law or, where in a country there exist regular administrative courts, under the control of such courts.

Within the framework of regional co-operation, one interesting and significant initiative with regard to a set of standards of ideal of the independence and impartiality of the judiciary has been taken by the Association of European Magistrates for Democracy and Freedoms.693 Considering the number and importance of the reforms underway both in the East to adapt institutions to the new situations and political changes, and in the West to assuage the feeling of discontent that is spreading among the judiciary in most of these countries, the Association adopted a "Draft Additional Protocol to the European Convention on Human Rights"694 with a view to develop a reference model on a set of minimum standards based on the 'specific regime' of international standards as set forth in the "Judiciary Principles", the "Lawyer Principles" and the "Prosecutor Guidelines". Thus, for example, the Draft contains elaborate provisions concerning enunciation of the general principles of the regulations on the judiciary in national constitutions; independence of judges in general as well as their selection, appointment, tenure, remuneration, transfer, removal, disciplinary actions etc.; autonomy of internal administration (by a Higher Judicial Council) including budget and account, recruitment and training, personnel, jurisdiction, discipline and so forth; obligation of the state to ensure adequate means for proper and efficient judicial functioning; the freedoms of expression, belief, association etc. to be exercised by judges; the relevance and importance of the autonomy and independent functioning of the public prosecutor or government procurator's office to the independence of the judiciary and so on.

IX. Limits of 'Independence' and Judicial Accountability:

As it has been noted earlier in relation to the rights, privileges and immunities attaching to the judges, members of the judiciary form no special exception to the entitlement and enjoyment of the fundamental rights and freedoms of conscience, belief, thought, speech, expression, association, assembly etc. However, as with many other individuals, these rights and freedoms are subject to certain regulations,

693 The Association is a network of national judges associations in both the Eastern and Western Europe.
694 The Draft was adopted on 16 January 1993 at MEDEL's Congress in Palermo; for the text of the draft (reprinted), see UN Doc. E/CN.4/Sub.2/1993/25, pp.47-50.

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control and limitations which in the case of the members of the judiciary, arise from
the nature of their functions and the status, dignity and honour of their office. Although there exist no common standards with regard to the degree or extent of such restrictions and limitations, it is universally accepted that enjoyment of these rights and freedoms are subject to the overriding consideration that members of the judiciary shall always conduct themselves in such a manner as to preserve the dignity of their office and their individual as well as institutional independence and impartiality.

Accordingly, in the interests of both their independence and impartiality, members of the judiciary should usually be prohibited from engaging in certain non-judicial activities, such as, gainful occupations, commercial activities, holding other paid public offices, taking public part in politics or any other works that might raise doubts as to their impartiality or be considered prejudicial to their dignity.

Similarly, where trial by jury exists, special safeguards should be designed to ensure the independence and impartiality of the jurors, for instance, certain occupations or activities may be considered incompatible with serving as a juror, such as membership of the legislative, judicial or executive branches of government and positions or activities which would be likely to have already acquainted the prospective jurors with the facts of a case.

Accordingly, to state in simple terms, whenever there is any question of incompatibility, conflict of interest or disqualification on the part of a judge in the course of his judicial functions, he is under the accountability both of his conscience and in law. A judge may be challenged on many of such grounds and the parties concerned may apply for the transfer of the case, or a grievance may be filed by them

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695 Such restrictions are generally conditioned by 'traditions, social and cultural attitudes and political organization'. Thus, for instance, whereas judges in many countries do not exercise their voting rights, in some countries they contest popular elections for their judicial office. In some countries, members of the judiciary are entitled to active membership of political parties (such political affiliation is often a condition of continuing in the judicial office, such as in Switzerland), in many systems judges have their trade unions and even rights of collective bargaining whereas in many other systems such activities would be regarded as a fall from the grace of the judicial office. See, Singhvi, supra, E/CN.4/Sub.2/1985/18/Add.1, para. 116; also, G. Mancini, Politics and the Judges - The European Perspective (1980) 43 MLR 1; H. Patrick Glenn, Limitations on Judicial Freedom of Speech in West Germany and Switzerland (1985) 34 ICLQ pp. 159-161.

696 See Principle 8 of the Basic Principles on the Independence of the Judiciary, supra. Principle 9 also provides that the judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

697 A comparative country practices in this regard can be found in Rannat, supra, p. 102, paras. 246-250.
in appeal to a higher court. Indeed, the appellate accountability of a judge is one of the most important safeguards against bias, prejudice or error of law and of fact. Another more positivist and institutional accountability, in terms of inspection and assessment of judicial work, is to be found in disciplinary sanctions and removals or recall procedures etc.

All legal systems provide for the principle of judicial accountability, although with diverse proportions and combinations regarding the degree, extent, form and manner of such accountabilities.\(^{698}\) Briefly, and in a broad general sense, the principal types of judicial accountability include a) moral accountability; b) hierarchical accountability; c) accountability to the intellectual constituency (public opinions, press, academic writings etc.) and the professional bodies of judges and lawyers; d) disciplinary accountability (which may impose such measures as warning, written censure, compulsory transfer, loss of seniority, postponement of promotion, demotion, suspension, compulsory early retirement, or even in a serious case, dismissal for misconduct etc.);\(^{699}\) e) accountability of the state for judicial errors (with or without consequential recovery from the concerned judges); f) accountability in the form of civil liability; g) accountability in terms of criminal proceedings and penal sanctions;\(^{700}\) h) accountability to the electing, co-opting, appointing or evaluating authorities; and i) accountability in terms of removal provisions and procedures etc.

**X. CONCLUSION:**

Traditionally, and from an institutional and functional point of view, the doctrine of independence of the judiciary requires the establishment and operation of an

\(^{698}\) For a general discussion based on country practices, see Singhvi, supra, E/CN.4/Sub.2/1985/18/Add.1, p.35 ff., esp. para.154.

\(^{699}\) With regard to disciplinary actions against judges, see the Basic Principles on the Independence of the Judiciary, supra, (Principles 15-20).

\(^{700}\) Indeed, criminal liability for wilful abuse of judicial office is one of the oldest and most universally recognised safeguards of the independence and impartiality of the judiciary. Penal sanctions were often imposed against judges in ancient and medieval times because they committed grave wrongs and abused their judicial office [see, Mauro Cappelletti, *Who Watches the Watchman*, 31 Am.J.Comp.L. (No. 1) 1983]. This safeguard still continues to be adopted in most modern legal systems holding the principle that the performance of judicial duties does not require or contemplate any immunity from criminal prosecution and that penal sanctions may be provided for such offences as bribery, fraud, gross misconduct etc. committed by the judges and other judicial officers [see, e.g., the decision of the U.S. Supreme Court in *Gravel v. United States* (1972) 408 U.S. 606].

For a useful discussion on this subject, see, Report of the Secretary-General, E/CN.4/Sub.2/428, p.13, para. 58-70; also, Study of Equality in the Administration of Justice, op. cit., para. 267.
autonomous and self-governing judicial mechanism independent of any other institution of the state including the legislators and the executive, and able to perform its judicial functions as well as organising its internal administration without any outside domination or interference.701 On the other hand, from the view-point of judicial personnel, judges and other judicial officers as well as jurors and assessors must retain the two-fold quality of independence and impartiality, since while any such officer may be independent in his attitudes and free from outside pressures yet may still display bias in performing his functions. In other words, a certain element of subjective prejudice might always colour the process of adjudication for "judges are human with human prejudices".702 In this sense, the doctrine implies not only a physical freedom from dependence but also a positive mental attitude of independence.

Indeed, the total independence of the judiciary from every one else lies at the very core of the entire concept of the rule of law, for the whole point about a law is that it must be upheld impartially and that no one must therefore be a judge in a cause in which he has any personal interest, or if he is open to illegitimate pressures, directly or behind the scenes. However, the motivating factor of the doctrinal advocation under inquiry here proceeds towards the proposition that a well-trained judiciary, operating within a system that develops a sense of impartiality and independence as part of its legal culture and tradition is expected to overcome any such prejudices to the maximum extent possible.

Accordingly, what is obvious from these two related aspects of the doctrine, the independence of the judiciary involves both the personal and collective independence of individual judges and other judicial officers as well as the administrative or functional independence of the courts and the institutional independence of the judiciary as a whole. In other words, and to put it in a fashion of phraseology, while the doctrine explicitly refers to the existence of a high degree of freedom on the part of the judicial system from any direct or indirect restrictions, influence, inducements, pressures, threats or interference, it also requires the judges and other judicial officers to possess the qualities of conscientiousness, equipoise, courage, objectivity, understanding, humanity and adequate legal knowledge and professionalism.

701 For a general illustration of this traditional interpretation of the doctrine, see the "Conclusions of the International Congress of Jurists on the Role of Law in a Free Society" (New Delhi, 1959); also, the UN Seminar on National and Local Institutions for the Promotion and Protection of Human Rights (Geneva, 18-29 September 1978), Working Paper Memorandum on Conclusions of Conferences of the International Commission of Jurists, 1955-77, ST/HR/SER.A/2, para. 55.
The concept of independence of judiciary does not, however, imply an 'absolute' independence entitling the judges to act in an arbitrary manner. The judges of the court are entrusted with the duty to observe the law, in the light of his own conscience, and to the best of his abilities.

It has been noted that while in almost all the legal systems certain sanctions and other forms of judicial accountability have been provided for by law against judges who fail to keep their independence or impartiality, it is also commonly recognised, and indeed forms an integral part of the requirements for upholding the doctrine of independence and impartiality of the judiciary, that adequate safeguards should also be provided against potential abuse of such sanctions by the executive for purposes of intimidation or reprisals against independent judges.

One particular point should be re-emphasised in this above context. Thus, although the publicity of judicial proceedings may sometimes pose a threat to the independence and impartiality of the judiciary by tendentious, irresponsible and sensational reporting, the press and other mass media generally make the public accountability of the judiciary a strong disciplinary factor. Thus, for instance, in the *Sunday Times case*, the European Court of Human Rights found that the decision of the House of Lords for contempt of court in the *Thalidomide case* constituted a breach of Article 10 of the European Convention of Human Rights (freedom of expression) in that the ban on the publication went further than was necessary in a democratic society for maintaining the authority of the judiciary. There exists therefore a need for a balance as it is needed for the very concept of the independence of the judiciary and the accountability of the judges for their judicial actions. Lord Denning thus noted his fashionable observation in this context that ".....the press plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above board.....But the watchdog may sometimes break loose and has to be punished for misbehaviour".

With regard to the importance of an independent legal profession it has been observed that professional organisations of lawyers play a vital role in promoting professional standards and ethics, protecting their members from persecution and improper restrictions and infringements and upholding the independence of the profession as a whole, providing legal services to all in need, and co-operating with

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705 Lord Denning, Road to Justice (1955), p.78.
governmental and other institutions in furthering the ends of justice and securing the independence of the judiciary as a whole.

It should, however, be noted in this context that although the independence of the judiciary is in general expressly recognised in the national constitutions, it is not a common practice to include similar provisions regarding independence of the legal profession. The reason seems quite obvious. The legal profession does not generally constitute an organ of the state power and its independence is assumed to be in existence independently of state organs and because its autonomy is secured by legislation, social and professional traditions and conventions. Indeed, it is the nature of the functions of lawyers and the socio-legal traditions of a country that together define the nature and scope of their independence.

What has so far been clearly understood is the fact that there can neither be a system of adequate and effective protection for fundamental human rights, nor can there be a society under the rule of law as is undoubtedly the most basic foundation of any such system, if the judges of courts are dismissed, transferred or subjected to other punitive measures for refusing to serve the interest of the executive; if discriminatory policies and practices operate in the selection of judges or if they are appointed only on temporary, provisional or ad hoc basis subjecting confirmation and tenures on judicial consideration; if there exists a systematic denial of autonomy in internal administration and adequate pay, pension or other conditions of service; if the judges are subjected to actual, or threat of, vexatious civil, criminal or disciplinary proceedings or even, in an extreme instance, to physical torture, "disappearances" or even secret executions; and if there exists a widespread practice of judicial misbehaviour in the form of corruption, bribery, gross and palpable denial of justice.

Again, similar consequence would follow if the other members of the judiciary including assessors, jurors, judicial experts etc. are subjected to comparable situations, especially if they are chosen in a manner and by a system which is meant to operate in an unfair, unequal and discriminatory manner. Similarly, as with the judges, assessors, jurors and other more direct members of the judiciary, a number of situations in relation to the legal profession have been identified that if exist in a given system would vitiate an independent and impartial system of judiciary. Such situations may arise from both internal and external factors including abolition, suspension, restriction or undue control of the professional organisation of lawyers; denial of the right of freedom of association, assembly, thought, speech, expression and movement; punitive action, prosecution, disciplinary proceedings, disbarment or
suspension from practice merely on the ground of acting contrary to executive interests; political patronage by the executive, politicisation of the legal profession, lack of unity and solidarity, lack of adequate legal education and professional training, discriminatory practices in access to legal education and the profession etc.; subjecting lawyers to executive harassment and administrative sanctions for their defence of civil liberties including detaining them without charges or trial, or in an extreme instance, subjecting them to torture, disappearances, or even assassination.

Again, in addition to cases of violations of physical integrity and encroachment of personal freedom and safety, which in effect are invariably prohibited by the human rights guarantees of the "ordinary law", there are cases of threats, harassment, hindrance etc. against judges and lawyers which are specifically forbidden by the standards and norms set forth in different human rights instruments, particularly those under the "Judiciary", "Lawyer" and "Prosecutor" principles. Ironically enough, many of these safeguards are weakened by restrictive national measures and practices, particularly in the context of states of emergency in many parts of the world.

To conclude the discussion it may be said that a broad framework of consensus on a set of commonly acceptable universal norms of minimum standards relating to the doctrine of independence and impartiality of the judiciary already exists today. Such existence, however, calls for the popular demand for incorporating these standards into binding international treaties. Although frequent commitments have been made by governments to inspire the organisation and administration of justice in their respective countries in accordance with the principles, norms and standards already in existence, and although sincere and practical efforts have been expected to be employed by nations to translate them into reality with the objective of promoting respect and ensuring protection of basic human rights and freedoms and judicial remedies, frequently there still exists an ironical gap between the vision underlying these principles and the actual situation.
CHAPTER: V

CONCLUSIONS
Speaking generally, the principal aim of the present research is to be seen as an attempt to highlight certain specific and special aspects of the ‘rule of law’, particularly in the context of its relevance and pertinence to the contemporary demands and developments in the arena of fundamental human rights and freedoms. In that direction, we began with a selected reference to the jurisprudential approaches to the meaning, nature and scope of the doctrine. This course of inquiry then briefly followed the revelation of the rule of law as a dynamic 'supra-national' concept in the early second half of the twentieth century, and the gradual exposition of its complex legal issues in the changing pattern of the world's socio-political scenario in the later years; their impact on fundamental human rights and freedoms; the awareness of the international community of such changes, and their efforts towards a consistent, universally applicable code of common standards and norms to meet these intricate problems. To this end, however, an extracted reference has been made to the endeavours of numerous international organisations, particularly those of the International Commission of Jurists, focusing attention on the traditional political, administrative and legal aspects of the rule of law, as well as emphasising its new, modern social, economic, educational and cultural phenomena.

However, the nature, scope and the essential features of the present-day notions of the rule of law so far highlighted in the limited scope of this research may be aptly recapitulated in a neat definition of the concept given by a modern writer:

"These then are the attributes of a true rule of law: a society or community consensus seeking to secure justice- that which is left to be right, reasonable, and proportionate for a particular time and place; and order, which requires continuity,
certainty, consistency - a balance between rights and restraint on power, plus the ability to meet changing conditions. The term rule of law has been thus held to stand for a universally applicable set of principles, joined by respect for the individual and by abhorrence of any arbitrary rule withdrawn from effective control by the people over whom it is exercised. Thus, that the rule of law is not something rigidly stable and unchangeable whatever might be the changes in the outside world, that its applicability is not limited to a specific legal system, form of government, economic order or cultural tradition, and that from a technical legal formula concerned with the protection of the individual against arbitrary action of the government, the doctrine rose to symbolise justice in a sense going beyond its purely forensic meaning, are the factors behind what has been meant by the dynamic "special" aspects of the rule of law.

Accordingly, in this line of thoughts, three specific areas have been identified that call for special attention in the context of these modern perception of the doctrine which inevitably and inextricably embraces the most contemporary and demanding notions of the fundamental rights and dignity of the human person. These special aspects have been thus argued to be found in the concept of human rights in the administration of justice; in the principles and practices relating to human rights in states of emergency; and in the indispensable pertinence of the doctrine of independence and impartiality of the judiciary to these modern features of the rule of law.

II. ADMINISTRATION OF JUSTICE:

Indeed, the relationship between equality, freedom, justice and peace remains one of the dominant concerns of the international community strengthening the need for a dynamic, progressive approach to the interpretation and application of the principles and norms relating to the modern concept of human rights in the administration of

justice. The concept of human rights in the administration of justice, more precisely of criminal justice, bears at least a three-fold significance in the modern society under the rule of law:

Firstly, it proceeds from an assumption that an individual by finding himself within the processes of the administration of criminal justice, such as a suspected, arrested, accused, or even a convicted or sentenced person, does not automatically disqualify himself as a 'human' being and, hence, from the 'universal' and 'inalienable' rights and dignities inherent in every member of the human race. It is for quite obvious reasons that the very nature of the criminal justice system necessitates the imposition of certain limitations and restrictions on the exercise of some of these rights and freedoms. But such persons still as always remain entitled to all the other rights as well as those 'limited' or 'restricted' rights. In addition, persons held on the criminal justice process become entitled to a number of special rights and freedoms, broadly termed as the human rights in the administration of justice, such as a right to a guarantee that the limitations and restrictions imposed for the time being on their certain rights and freedoms are properly exercised with absolute respect to the requirements of the rule of law in this regard.

Secondly, it is an inherent notion of the rule of law that no one in any way involved in administering justice should be pre-disposed with a conclusion about the guilt (or innocence) of a person. It is for the judiciary to determine such guilt or innocence; but until then, he remains entitled to a treatment as an innocent at all stages of the criminal process, be it the pre-trial investigation, arrest, detention or the trial itself. Any deviation from this broad application of the doctrine of presumption of innocence would open the door for the violation of other rights and freedoms in the administration of justice, such as by an arbitrary arrest or detention, inhuman and cruel treatment during custody or interrogation, denial of the 'minimum rights or guarantees' for a fair trial and the like. What essentially follows is that the actual observance of these rights and freedoms in a given society would best ensure that no innocent person is held victim of the criminal process. At the same time, they also serve the purpose of discovering the truth in criminal causes and ensuring that the person who has been rightfully accused, tried and convicted be awarded 'appropriate'
sentences- sentences that have been declared to be befitting, recognised and humane by the rule of law.

Thirdly, the concept of human rights in the administration of justice serves the purpose of maintaining social and political order and stability. They provide an effective check on the abuse of the criminal justice system by those entrusted with the power and authorities of the state by using it as a weapon to oppress their political opponents or the underprivileged or minority groups. At the same time, protection of these rights and freedoms in the administration of justice promotes and reinforces the respect and confidence of the ordinary citizen in the system as a whole.

It has been thus aptly observed that the concept of the "due process of Law", which lies at the very core of the notion of human rights in the administration of justice, has been developed in the constant effort of nations in recognising and protecting the sanctity of individual life and liberty, and to establish and maintain an orderly society based on human dignity and the preservation of fundamental human rights and freedoms. Its principal purpose in the field of criminal justice is to seek to provide the procedural safeguards against the abuse of criminal process and the application of substantive criminal and penal laws. To this end, the concept as consecrating certain procedures embodies the idea of 'fair play' which indeed lies at the root of the maintenance of certain 'immutable principles of justice'. These principles, taken together, constitute the standards that a given society expects from those entrusted with the authority and power of the state for its orderly and smooth functioning.

With regard to the notion of 'protection from discrimination' in the administration of justice together with its two closely related concepts of 'equality before the law' and the 'equal protection of law', it has been clearly realised that these principles have already been established as the positive legal norms of international human rights law finding specific reference in almost all the major instruments in this field. A lucid

\[707\] These expressions were used even in some early leading cases on the subject at the municipal level; see, e.g., Twining V. New Jersey, 211 U.S. 78, 102 (1908); also, International Shoe Co. V. Washington, 326 U.S. 310, 316 (1945).
expression of the significance of these indispensable modern notions of the rule of law may be found in a UN Study on this subject:

The importance of such principles lies in the fact that an equitable and fair judicial order for all citizens of all countries is essential for attainment of a just world order. The international community cannot ignore the plight of those persons who are victims of selective and oppressive application of the police, court and penal systems because of their race, ethnic origin, religion or language.708

A close view of the minimum guarantees or rights for a fair trial protected by the international human rights treaties709 shows that while a number of these express guarantees are common to all these treaties,710 they considerably diverge from each other in respect of few other minimum rights and guarantees.711 It should, however, be noted that this catalogue of minimum rights or guarantees should not be taken as

708 Draft Report of the "Study on discriminatory treatment of members of racial, ethnic, religious or linguistic groups at the various levels in the administration of criminal justice, such as police, military, administrative and judicial investigations, arrest, detention, trial and execution of sentences, including the ideologies or beliefs which contribute or lead to racism in the administration of criminal justice", submitted to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, by its Special Rapporteur Mr. Justice A. S. Chowdhury, UN Doc. E/CN.4/Sub.2/L.766, 16 July 1981, p. 8, para. 20.

709 Except the African Charter which neither uses the expression 'minimum' guarantees or rights, nor enumerates any list of protections that must be ensured to an accused for a fair trial. Instead, Art. 7(1)(c) of the Charter simply declares 'the right to defence', and includes in this the 'right to be defended by counsel of his choice'.

710 Namely- i) notification of the charges; ii) adequate time and facilities for the preparation of the defence; iii) the right of the accused to defend himself either in person or through a lawyer of his choice; iv) the attendance and examination of witnesses both against the accused and in his favour; and v) the free services of a court interpreter where he cannot understand or speak the language used in court.

711 Namely- i) free legal aid; ii) right to communicate with counsel; iii) right to appeal; iv) freedom from compulsory self-incrimination; v) right to be tried in presence; and vi) special procedures for juveniles.
any exhaustive list of rights the observance of which will ensure a fair trial in all cases whatsoever. It is thus possible that a trial may not conform to the general standard of a fair trial, even if the minimum rights guaranteed by the relevant instruments have been respected. Indeed, these requirements are the "minimum" guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as a whole. At the same time, however, it is also important to note that these minimum guarantees or rights represent specific applications of the general principles of fair trial established in the respective articles of the instruments, and a finding of a breach of any of these guarantees or specific rights dispenses with the need to examine the case in the light of the general principle.712

In any national legal system, the interest and needs of the society thus require that the modern concept of human rights in the administration of justice be realised and upheld in its entirety. And this is what is indispensable for the establishment of the rule of law as it is understood today.

III. STATES OF EMERGENCY:

One should not prima facie be convinced that a state of emergency should necessarily entail gross or excessive violations of human rights. In fact, the concept of emergency is an accepted doctrine in international law, recognising the necessity to suspend on a temporary basis respect for certain human rights in order to safeguard the nation against specific grave situations. However, despite the fact just stated, in view of the reality that states tend to look at treatment of emergencies as a matter of pre-eminently domestic concern bestowed with a wide discretionary power, it is appropriate to recall here that, at least in so far as the international treaties and the rights recognised therein are concerned, derogatory measures by the states parties

712 Thus, for instance, Art.14(3) of the CP Covenant contains the 'minimum guarantees' which represent the specific application of the general principles of fair trial embodied in Art.14(1). In this context, see the observation of the European Court in Pakelli case, 644 Series A (25 Apr 1983) and the Nielsen case, 4 Y.B. 490, 548 (15 Mar 1961).
are not sovereign prerogatives reserved by such states but rather a right recognised, defined and conditioned by the relevant treaties as well as certain norms of customary international law of human rights.\textsuperscript{713}

Accordingly, the 'concept of necessity' on the part of a state is accompanied by a number of integral doctrines, particularly- the severity of the existing situation (the doctrine of 'exceptional threat'); requirements of notification and/or proclamation; motive (good faith) on the part of the authority; consistency with other international obligations; proportionality of measures imposed with the actual condition; non-discrimination in the application of such measures; and entrenchment of a core of non-derogable rights. If these principles are respected in the application by a government of the 'defence' of necessity, it's most likely that excessive infringements of fundamental rights and sufferings of individuals would be prevented.

Again, viewed from a different angle, these celebrated principles may be described as to constitute 'the most accepted doctrine' on the topic of human rights in states of emergency, and is therefore applicable as a substantive criterion to assess whether the measures of suspension of rights can be considered justified and legitimate. The derogation clause of the treaties envisage different situations which might be permissible in one type of emergency but would not be lawful in another and the lawfulness of the measures taken will depend upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures. Particular emphasis should, therefore, be laid on the importance of a system both governed by the rule of law and with an independent judiciary which exercises control over the lawfulness of the measures of derogation. Similarly, the crucial role of a vigilant 'popular legislature' in monitoring the declaration, duration and scope of a state of emergency as well as enforcing strict accountability and control of the regime assuming or exercising emergency powers is of utmost significance in the maintenance of the rule of law during the crisis situation and hence the protection of fundamental human rights.

\textsuperscript{713}This notion has been categorically reconfirmed in Principle 61 of the Siracusa Principles, supra.
However, it is quite obvious that among the basic principles stated above, the non-derogability of certain fundamental rights is the most important under the derogation clause of the human rights treaties, establishing crucial limitations on the States' right to take derogating measures in public emergencies, despite the fact that in drawing a concrete list of such rights, the three treaties lacked unanimity. Indeed, it has not only been interesting but also important to observe a multidimensional pattern of similarities and differences between these provisions as it is from this rather ambiguous dimension inherent in the stated basic principles that a certain gap or "lacunae" finds place in the relevant existing international legal norms of human rights.

Thus, one such lacuna may be seen in the lack of a profound and careful examination of the category of 'non-derogable rights' and the implication of excluding some other rights. It is not clear what criteria has been adopted in drawing these lists and excluding others. Consequently, the derogation clause does not include some most fundamental guarantees which need to be entrenched in public emergencies, in particular the minimum guarantees for detainees and due process. On the other hand, the long lists drawn by the CP Covenant and the ACHR included certain rights which are not, strictly speaking, so fundamental and at high risk of being violated during emergencies.714

In the present context, one may identify an important safeguard against abuse of emergency powers provided by the international treaties in a general limitation or restriction clause. Under the CP Covenant, this provision is to be found in Article 5(1) requiring that the provisions of the Covenant may not 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' enumerated in the Covenant or 'at their limitation to a greater extent than is provided

714 Some writers have, however, argued that a short list would have given more strength to the category of non-derogable rights and that there would be a greater prospect of it being accepted and implemented by States; see, e.g., J. Oraa, supra, p.125.
for' in the Covenant. This provision is clearly intended to serve as a safeguard against, inter alia, regimes bent on the destruction of fundamental rights and the subversion of democratic constitutional order. Thus, for example, a government's exercise of the right of derogation under Art.4 of the CP Covenant must be judged not only for its formal compliance with the requirements of that provision (the objective criteria), but also by seeking what the governments' object, purpose and motives are (the subjective elements). In other words, if a particular public emergency is created and proclaimed by a group which seizes power in a state with the aim of establishing a regime committed to the denial of human rights, it would be arguable that a derogation under Art. 4(1) of the Covenant would be in conflict with Art. 5(1).

With regard to the question of judicial supervision of emergency situations it has been observed that the theoretical and practical difficulties that municipal courts face while purporting to control the declaration of emergency and the derogating measures have increased the importance of international control by the monitoring organs established under the international human rights treaties. These organs have assumed competence in assessing states of emergency declared by States, although due to their different nature under the respective treaty, substantive variations may be noticed in the effectiveness of such control. Thus, while the European and the Inter-American Courts are judicial organs, the European Commission is a quasi-judicial body, the IACHR acts mainly as a fact-finding body, and the UN HR Committee has only limited powers in the reviewing of States' reports.

The European organs, while recognising the right of a State to declare emergency, assumes competence to supervise it. In the assessment of the existence of an emergency and the need for derogating measures, these organs have developed a number of important principles, including the principle of 'margin of appreciation' on

715 Similar provisions have been made under Article 17 of the ECHR and Article 29(a) of the ACHR. It may be noted that the origin of these 'limitation' provisions may be found in Art.30 of the UDHR.

the part of the respondent State, the doctrine of proportionality, the principles of
good faith and reasonableness, and the onus of proof on the respondent State.

While it has been observed that the UN HR Committee has failed to establish
similarly effective control over states of emergency, these shortcomings are
essentially rooted in its limited powers under the reporting procedure and the
difference of opinion within the Committee about the course of action open to it in
order to improve the monitoring of states of emergency. However, despite all these
set backs, important guide-lines have been established both by the members in their
comments while questioning States' representatives and under the Optional Protocol.

Although the Inter-American Court has produced several advisory opinions relating
to emergencies, the IACHR has proved itself to be a more effective organ in
controlling emergency situations. It repeatedly affirmed its competence and clearly
condemned violation of the principles of the derogation clause in many cases; it also
applied such principles and standards even with regard to States non-parties to the
ACHR.

In a nutshell, it may now be said that the core of the ideas purported to be developed
in the present context revolves around the fact that while, in order to protect the 'life'
of the nation or safeguarding public order or safety in certain emergency situations,
governments are justified in compromising certain rights and freedoms, an
"emergency" does not, by itself, automatically justify suspension of fundamental
human rights. However, although the conditions contained in the derogation articles,
prima facie and at least theoretically, seems to restrict greatly a state's ability to
derogue, the barriers to derogation in practice and in a number of respects are still
far from complete.

With respect to the existing derogation clauses in major human rights treaties, a
number of important issues thus call for greater attention to be paid in order that a
clearer and workable concept of emergency be developed ensuring the maximum
possible guarantee against human rights abuses. Accordingly, the threshold of
severity to meet the definition of a public emergency justifying suspension of rights needs to be further clarified. It is also imperative that the existing implementation and monitoring mechanism at different levels reconcile their role and action in the light of changing and newer needs and demands of the modern society and be enabled to apply stricter and more objective standards of the principle of proportionality to suspensions of derogable rights. In this context, further and more practical scrutiny is essential in identifying those rights which are 'functionally' non-derogable, either because their suspension is never 'strictly required by the exigencies of the situation', or because their violation would breach the state's 'other obligations under international law'.

Finally, one important observation of the International Commission of Jurists demands inclusion here, that abuse of states of emergency is more frequently due to disregard for constitutional and legal safeguards than inadequacies in existing law.\(^{717}\)

Therefore, any programme for the prevention of such abuses should not be limited to the search for 'flawless legal formulas'; international human rights norms and their implementation mechanisms must thus seek more effective means for confronting these real potential causes of abuse and spend every effort to encourage states to include provisions relating to states of emergency in their constitutional and other municipal law. These provisions serve as important complement to existing international human rights norms and provide objective criteria for judging the conduct of relevant national authorities.

**IV. INDEPENDENCE OF THE JUDICIARY:**

It is often said that judges are subject only to 'the authority of the law'. Such a phraseology is meant to proclaim the principle of independence of the judiciary and the ultimate supremacy of the law. At the same time, such a saying clearly implies that the independence of the judiciary is an integral part of the rule of law and is a necessary condition for its practical realisation. On the other hand, the core of the

\(^{717}\)ICJ, "States of Emergency", supra. at 417, and also at 459-464.
concept of the rule of law requires that no authority shall exercise arbitrary power and no branch or organ of government is entitled to despotic power or autocracy. In this sense, the concept of the rule of law subsumes both the independence of the judiciary and its accountability. Indeed, judicial independence must for its own sake and for the sake of institutional credibility and functional balance, be tempered by judicial accountability and the ethics of judicial conduct.

However, this final section of the research purports to develop the thesis that not only the doctrine of independence of the judiciary forms a special aspect of the modern concept of the rule of law, the emergence of a new phase in the protection of human rights and freedoms has rendered it necessary that the doctrine be interpreted going beyond its traditional phenomena. Justifications for any such progressive interpretation may be found in a number of facts including that in the recent time the doctrine has received serious attention and practical concern of the international community as expressed in their constant effort in the development of elaborate treaty-law and other non-treaty rules, regulations and guidelines regarding its application in the protection of human rights, as well as by undertaking extensive studies and research and conducting conferences, seminars, symposia etc. at different levels (especially those at the instance of the United Nations), and also the fact that this significant activism has been accompanied by a contemporary socio-political upheavals in many parts of the globe entailing substantial consequences on the distribution of state powers and the organisation, competence and inter-relationship of its different organs.

It has been clearly established in the conclusions of various thematic and national working groups as well as the reports of the special rapporteurs of the UN Human Rights Commission, frequent reference to many of which has been made throughout the relevant parts of this thesis, that there exists an obvious 'cause-and-effect' relationship between the extent of the shortcomings of the independence and impartiality of the judiciary in a given jurisdiction, and the degree of intensity of its human rights violations. In promoting respect for, and maintenance of the rule of law in the present day society, this twin principle of independence and impartiality of
the judiciary and the legal profession in their personal, collective, functional and institutional senses serve as the keystone of the entire system that might prove its efficacies in responding to the protection of the rights and freedoms of the individual.

One related question that inevitably occurs in the present context is the situation of judicial independence and impartiality during states of emergency. Thus, it is for quite obvious reasons that various special courts and military tribunals, frequently set up in many countries, often on an ad hoc basis and especially in conditions of political turmoil, to adjudicate upon offences against state security or other cases of political nature, show a serious lack of independence and impartiality. As has been noted by one special rapporteur of the UN, one important effect of emergency regimes is the subordination of judicial powers to the executive or military authorities and the substitution of the principle of separation of powers by the principle of hierarchization of powers.\textsuperscript{718} While the judges of such courts do not enjoy the security of tenure characteristic of other ordinary judges and that the military judges are in effect in a position of hierarchical subordination in their relationship with the executive authorities, their manner of conducting summary and in camera trials, often without allowing assistance of civilian lawyers of the accused's choice, is most likely to show political bias in favour of the executive. Most often there is even no possibility of appeal against a decision of such courts or tribunals before the ordinary courts.\textsuperscript{719}

On the other hand, one fatal consequence of such a situation is a veritable transformation of the legal regime either due to the perpetuation of the state of emergency or because emergency provisions are normalised in the form of ordinary laws. Such measures tend to deprive the judiciary of its power to consider certain questions of constitutional law, to enforce its decisions, or to try certain categories


\textsuperscript{719}In this connexion, see UN Doc. E/CN.4/Sub.2/408, paras. 52-57; also, E/CN.4/Sub.2/431, paras. 55-62. The UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities has repeatedly pointed out the dangers arising out of trial of civilians by military tribunals; see, E/CN.4/Sub.2/SR.485, p.9. See also, Y.L. v. Canada, Human Rights Committee, UN Doc. A/41/40, p. 145.
of cases and to curb and curtail judicial powers and functions. While a number of the courts’ jurisdiction simply cease to exist, in other cases they are transferred to military courts and other special tribunals whose independence, impartiality, legal knowledge or judicial expertise is highly questionable.

Again, at a time of rising threats to personal liberties and an increasing trend of arbitrary exercise of governmental power resulting in frequent interference and violations of fundamental rights and freedoms, the role of the legal profession as a defender of individual rights as well as the collective interests of the society thus continues to be of paramount importance. This role of an independent legal profession as the defender of fundamental rights and freedoms was aptly described by a prominent Irish lawyer and legal scholar:720

The Advocate’s essential value is his independence........Our legal system needs the participation of such a group as a key component of the administration of justice. Every free society requires the troublesome presence of the independent advocate. In one sense he is like part of a discordant symphony. But, historically, it has been a common feature of the great advocates that they have been relentless in their testing and criticism of the institutions of the State and have refused to accept the notion of an unchallengeable state power. Only by so doing can the preservation of human rights be assured within the legal system. The advocate’s greatest duty is to prevent tyranny whether by abuse of process, or legislative oppression of the citizens’ rights.

An echo of this above comment may also be found in the observation made by the International Commission of Jurists that an indispensable aspect of the maintenance of the rule of law is the availability of lawyers to defend the civil, personal and public rights of all individuals and the readiness of the legal profession to act for those purposes resolutely and courageously.721

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Indeed, the independence of the legal profession is a matter of legal right of the individuals seeking remedies before courts of law because it is a functional guarantee of their rights and freedoms to be defended, represented or advised by a lawyer. It is therefore essential to the maintenance of the rule of law that there exists an organised legal profession free to manage its own affairs under the general supervision of the courts and within such regulations governing the admission to and pursuit of the legal profession as may be laid down by statutes and in accordance with the established general principles of independence and impartiality.

One self-evident fact that has repeatedly emerged in this line of inquiry is that the principles of impartiality and independence of the judiciary are the hallmarks of the rationale and the legitimacy of the judicial function of every state. However, although different legal systems have varying structure of judicial administration and that national constitutions provide for their own respective patterns of distribution of powers, they all, at least theoretically, based on one common objective- and that is to provide and ensure 'justice', accepting the fundamental postulate of the impartiality and independence of the judiciary. This fact provides the strongest support for the well founded requirement today for a universal acceptance of and adherence to the basic principles and minimum standards of impartiality and independence. Any denial of such standards should be taken as the denial of justice and violation of the fundamental human rights of the individual.

It should be noted in this context that the standards and norms contained in the three instruments pertaining to the independence of the judiciary, namely- the "Judiciary" principles", the "Lawyer" principles and the "Prosecutor" principles as referred to in the preceding discussion, are broadly based on conventional international standards, including the right to be heard and tried by an independent and impartial tribunal and the right to be assisted by a lawyer as well as the recognized guarantees of the right to fair judicial trial. In this way, these rules and principles reflect the common spirit of national normative provisions on the subject and very often merely repeat specific provisions of municipal law. It, therefore, seems justified in that light to conclude that the rules laid down in these instruments, though not possessing the strength of
enforceable treaty law, do form and represent the general principles of international law within the meaning of Art. 38, para. 1(c) of the Statute of the International Court of Justice.

However, notwithstanding its frequent recognition in most national systems, the concept of the independence of the judiciary still remains more as an ideal than a fully realised condition of fact. The judge as an individual, the judicial collegium and even the highest court in the judicial hierarchy are not exempt from human imperfection or impervious to the influence of sectional interest. This fact emphasises the importance of ensuring independence not only of individual judges but also of institutional independence of the judiciary as a whole. Only this can provide a stronger guarantee for an independent and impartial judicial system than the mere private conscience of individual judges. It is therefore of utmost importance that international human rights norms should not only define precisely and more clearly the structural and procedural standards of judicial organisations, but also enumerate more realistic and effective safeguards against undue pressure and influences as well as requiring specific sanctions for attempting violations of the principles of independence and impartiality of the judiciary.

V. CONCLUDING NOTE:

It now seems appropriate to note that the rights, freedoms, guarantees and safeguards discussed within the scope of this research should not be taken as to form an extensive catalogue for guaranteeing a fair, humane and balanced system for the administration of justice ensuring the optimum protection of the inherent and universal rights, dignity and worth of the individual, be it in a normal situation or under a state of emergency, shielded by the existence and operation of an independent and impartial judiciary. There are many more related rights and safeguards, both substantive and procedural, which must be promoted and protected for ensuring the effective functioning of these integral notions of the rule of law as it is understood today.
Again, there are major and significant differences between national legal systems in these above regards which necessarily call for the adoption of diverse substantive and procedural rules and regulations in conformity with the established universal standards developed particularly in the recent time. On the other hand, however, there are clear differences between the relevant global and regional instruments themselves, or in their interpretation by the monitoring bodies concerned, enumerating these basic norms and principles.

However, notwithstanding these certain diversities and differences, what is of great importance to note here is the fact that the very essence of these normative and conceptual developments are founded on the same premise and directed towards the same objective that tend to provide the most basic and essential general principles which are minimal to any system of protection of the fundamental human rights practised in the context of a social, political and legal infrastructure based on the modern notions of the rule of law.

One particular fact has so far been made clearly evident that the rights, freedoms, guarantees and safeguards discussed within the ambit of the three most demanding aspects of the rule of law brought under the argument of this thesis should be taken as a whole, and not in piecemeal or segmentation. Indeed, in a broad general sense, one may rightly view these apparently separate aspects of law as to constitute an integrated concept and, putting them in a particular given context, are essentially interrelated as well as interdependent. While the observance of one of them in many instances would be meaningless in the absence of another corollary right, guarantee or safeguard, violation or disregard of one of these in all most all cases entails a denial or infringement of another.

Thus, for instance, an unconstitutional or invalid declaration of an emergency by a government may pave the way for arbitrary exercise of executive powers in arresting or detaining a person in a discriminatory or unlawful manner, inhuman treatment in custody, denial of fair trial and other due process guarantees, suspension of a popular legislature, curtailment of judicial competence and other undue interference violating its independence or impartiality, imposition of improper penalties, execution of sentences in cruel, degrading manner and many more.
To conclude the discussion, it may now be said that these three special aspects of the rule of law and their impact on the ebb and flow of the battle of the modern society in the advancement of the fundamental rights and freedoms of the individual essentially lead us to the realisation that the seminal concept of the rule of law of the early twentieth century has, by the end of the century, become a dynamic doctrine of universal validity and application. Today, these have been considered to be the essential factors which embrace those institutions and principles of justice which are minimal to the assurance of the inherent and inalienable rights of the mankind.
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