was not an uncontrolled discretion because the discretion was vested in high customs officers and there were appeals from their order. To this it might be objected that appeal to an administrative body which is not independent with a revision to the Central Government will not amount to sufficient procedural safeguard against possible discriminatory executive action. The Court further said that the discretion had to be exercised having in view the object of the Act which according to the Court was the prevention of unauthorised importation of goods. It is difficult to believe that the general statement of policy inferred from the language of the section will in any way be effective in controlling the executive action from being discriminatory. It is not known as to what is the real objective of the executive action in such matters. In effect such discretion may become a tool of 'administrative convenience'—an unsatisfactory instrument to control administrative discretion though it was sustained in *Pannalal Binjraj v. Union of India.*[18] Therefore, on the whole S. 167(8) is potentially discriminatory in nature and there is a need for the revision of the section by Parliament. Imposing limits on scope of the discretions is an improvement needed on the substantive side. But besides that procedural safeguards are also to be provided subject to which the customs authorities will exercise their discretion.

S.P.S

Constitutional Law—*Kavalappara Kottarathil Kochunni Alias Moopil Nair V. The State Of Madras And Others*[1]

The above case which may be called the *Kavalappara* case gave an opportunity to the Supreme Court of India to explain the scope of Art. 32 of the Indian Constitution a little more in detail than it had hitherto been able to do. In this case, the petitioner proceeding under Art. 32 of the Constitution prayed for a writ of *mandamus* directing the respondents, the State of Madras, and some of his kinsfolk not to enforce the provisions of the Marumakkathayam (Removal of Doubts) Act 32 of 1955 passed by the Madras State Legislature.[2] The pe-

18. A.I.R. 1957 S.C. 397.

1. Petition No. 443/1955, Supreme Court of India. Petitions Nos. 49/1955 and 41/1956 were also heard along with the above petition and a common judgment on the preliminary issue raised was pronounced by Das, C.J., on 4-3-1959. This note deals only with the opinion on this preliminary issue.

2. Under the Madras Marumakkathayam Act 22 of 1932, Section 42 gave to the members of a Malabar *Tarvad* (A *tarvad* is a joint family) a right to enforce partition of tarwad properties or to have them registered as impartible. That Act did not apply to *sthanams*. *Sthanam* connotes the

titioner had till then claimed the Kavalappara *sthanam*[3] properties as his own and this claim seems to have been upheld by the Privy Council in prior litigations. But as a result of the impugned Act he stated that he was discriminated against and that his right to property under Art. 19 (1) (f) and Art. 31 was affected. Two suits had been filed by respondents to enforce their rights in the suit properties which they asserted was family property. During the pendency of the first suit the *sthanee* petitioner had executed two deeds of gift[3] and sometime thereafter the above legislation was passed.

Immediately, the respondent members of the family published a notification in local newspapers to treat the petitioner only as the *Karnavan*[4] of the family property. The petitioner, therefore, preferred the instant petition under Art. 32.

Certain preliminary objections were taken by the respondents. They pleaded that the petitioner could not pursue the remedy under Art. 32 when he could get relief in the suit which has been filed by one of the respondents after the passing of the impugned Act, that the violation of the right to property by private individuals was not within the purview of Art. 19 (1) (f) or Art. 31 (1), that the application under Art. 32 could not be maintained until the State had taken or threatened to take any action under the impugned Act which was merely a piece of declaratory legislation and that only a suit would lie for getting a declaration that the law was void.

It was further urged that, since the rival contentions of the parties raised a disputed question of fact, proceedings under Art. 32 could not be resorted to. Now the petitioner contended that he had been discriminated against in so far as he and his *sthanam* properties alone had been singled out for hostile treatment by the Act in vio-

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status and attendant property of the senior Raja or chieftain of certain families in Kerala. The holder of a *sthanam* is called a *sthanee* and the propety appurtenant to this office or dignity was called *sthanam* properties. Doubts arose whether the above Act applied to *sthanam* properties also. Act 32 of 1955 sought to remove this doubt. Such of the *sthanams* where there was intermingling of the *tarwad* and *sthanam* properties, or where members of the *tarwad* were receiving maintenance from *sthanam* properties as of right or in pursuance of a custom, or where at any time there was no male member of the *tarwad* eligible to succeed to the *sthanam* were rendered by section 2 of Act 32 of 1955 as *tarwad* properties to which Act 22 of 1932 could apply.

3. The donees under these gift deeds had also filed petitions, which were heard together with the first petition mentioned above.

4. The term means 'manager' of a Malabar Hindu joint family.

lation of Art. 14 of the Constitution. This allegation was denied by the respondents.

On the first question whether alternative remedy was a bar to availability of Art. 32 the Supreme Court after referring to its prior rulings[5] observed that even if the existence of other adequate legal remedy might be taken into consideration by the High Court in deciding whether it should issue any of the Prerogative Writs on an application under Art. 226 of the Constitution—as to which they expressly reserved their opinion—the Supreme Court could not on a similar ground decline to entertain a petition under Art. 32, because the right to move the Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution was itself a guaranteed right[6]. Regarding the second objection, the Supreme Court held that the gravamen of the complaint of the *sthanee* petitioner was

5. *Rashid Ahmed V. Municipal Board Kairana* [1950] S.C.R. 566 and *Romesh Thapper V. The State of Madras*, [1950] S.C.R. 594.

6. [There are two groups of decisions which are to be kept distinct. One group, to which the present case belongs, has cases like *Romesh Thapper V. State of Madras* [1950] S.C.R. 594 and *Chiranjitlal Choudhri V. Union of India* [1950] S.C.R. 869 where for the alleged violation of a fundamental right, the petitioner comes directly before the Supreme Court. It is now a well-established position as stated in *Romesh Thapper's* case that the Supreme Court has a responsibility, not alone jurisdiction, to entertain such petitions.

In the second group of cases, of which *Ashwini Kumar Ghose v. Aravinda Bose*, [1953] S.C.R. 1, 5; *M.K. Gopalan v. State* of *M.P.*, [1955] 1 S.C.R. 168, 174 and *Purshotam V. B.M. Desai*, [1955] 2 S.C.R. 887, 892 are to be noted, the petitioner, whose fundamental rights have been allegedly violated, initially elects to approach the High Court under Art. 226 and then, when, the High Court decides against him, instead of proceeding further in appeal to the Supreme Court abandons the adverse High Court decision on the wayside and files an original petition under Art. 32 before the Supreme Court. In such cases the Supreme Court has till now abstained from expressing a view whether it will generally encourage such a procedure. In *Ashwini Kumar's* case the proceeding was also on an alternative basis, namely, as an appeal under Art. 136 and the relief, reversing the High Court, was given in that case under Art. 136. In *M.K. Gopalan's* case, *and Purshottam's* case, petitions were ultimately dismissed on the merits. In the first the court held that their decision on the merits should not be considered as an encouragement of such practice "except for good reasons". In *Purshottam's* case, after admitting the petition, subject to its maintainability, it was dismissed on the merits without giving a decision on the maintainability. The chances, therefore, appear to be that in all genuine cases of violation of fundamental rights, the procedural elegance of taking recourse to appeals from the decisions of High Court under Art. 226 may not be insisted upon. However, the

directly against the impugned Act passed by the Madras Legislature, which was within the expression ' State ' as defined in Art. 12. In respect of the third objection, the Supreme Court pointed out that though, in enactments like the abolition of estates, issuance of a notification by the State might be a condition precedent to the vesting of the property in the State, in the case of the impugned enactment the infringement of the fundamental right was complete *eo instanti* the passing of the enactment[7]. It was also pointed out that in this case there had already been an assertion of rights by the respondents who were the members of the family, in respect of the properties by suits and notices[8]. On the fourth objection that a proceeding under Art. 32 could not be converted into or equated with a declaratory suit under S. 42 of the Specific Relief Act, the Supreme Court stated that the powers given to the court under Art. 32 were wide enough and was not confined to the issuing of Prerogative Writs only and citing an earlier precedent[9] and the breadth of the wording of Art. 32 concluded that this was an eminently suitable case for giving the petitioner relief in the form of a declaration. It will be noted that in the above four points the Supreme Court only restated established law. But in meeting the last objection the court covered new ground. On the question as to whether disputed questions of fact can be gone into the proceedings under Art. 32, the court stated:

" Clause (2) of Art. 32 confers power on this Court to issue directions or orders or writs of various kinds referred to therein. This court may say that any particular writ asked for is or is not appropriate, or it may say that the petitioner has not established any fundamental right or any breach thereof and accordingly dismiss the petition on merits. But we do not countenance the proposition that on an appli-tion under Art. 32 this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or any other ground. If we were to accede to the aforesaid

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Kavalappara case does not belong to this second group and therefore, quite advisedly, the court did not refer to this group of cases at all in that opinion (Ed.)]

7. On the passing of an impugned Act the *sthanee* petitioner immediately became relegated from the status of a *sthanee* to the status of a *karanavan* and manager and the *sthanam* properties become *tarwad* properties.
8. *State of Bombay V. United Motors (India) Ltd*; [1953] S.C.R. 1069 *Himmatlal Harilal Mehta A. The State of Madhya Pradesh*, [1954] S.C.R. 1122 referred to.
9. *Ebrahim Wazir V. The State of Bombay* [1954] S.C.R. 933 (on appeal from an order under Art. 226).

contention of learned counsel, we would be failing in our duty as the custodian and protector of the fundamental rights.[10]"

About the manner of enquiry into disputed questions of fact the court mentioned that it could be done either by affidavits or where the affidavits filed were not satisfactory by giving another opportunity to file further affidavits or by issuing a commission, or even by setting the application down for trial on evidence or by adopting some other appropriate procedure[11]. The Court expressly left open the application of these principles to proceedings under Art. 226.

V.G.R.

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10. The judgment continued "We are not unmindful of the fact that the view that this court is bound to entertain a petition under Art. 32 and to decide the same on merits may encourage litigants to file many petitions under Art. 32, instead of proceeding by way of a suit. But that consideration cannot by itself be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may, *prima facie*, appear to have been infringed."

11. [Justice Wanchoo sounded a warning in a concurrent judgment on the dangers of accepting petitions against a general law without a case of actual enforcement of it. This judicial caution reminds one of the judgment of Justice Brandies of the United States Suprme Court in *Ashwander V. Tennessee Valley Authority*, 297 U.S. 288, 341, 345 (partly dissenting) where we find the following extract from Cooley, *Constitutional Limitations* 8th Ed. 332.

"It must be evident to anyone that the power to declare a legislative enactment void is one which the judge conscious of the fallibility of the human judgment will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline that responsibility." (Ed.)]

Conduct of Government Servants

Those who are possesed of ministerial qualifications shall, in accordance with their individual capacity, be appointed as superintendents of government departments. While engaged in work, they shall be daily examined ; for men are naturally fickle-minded, and like horses at work, exhibit constant change in their temper. Hence the agency and tools which they make use of, the place and the time of work they are engaged in, as well as the precise form of the work, the outlay, and the results shall always be ascertained.

A fine of twice the amount of their daily pay and of the expenditure (incurred by them) shall be fixed for any inadvertence on their part.

Whoever of the superintendents makes as much as, or more than, the amount of the fixed revenue shall be honoured with promotion and rewards.

The chief officer of each department (*Adhikarana*) shall thoroughly scrutinise the real amount of the work done, the receipts realised from, and the expenditure incurred in, that departmental work both in detail and in the aggregate.

Each department shall be officered by several temporary heads.

Government servants shall not only be confiscated of their ill-earned hoards, but also be transferred from one work to another, so that they cannot either misappropriate Government money or vomit what they have eaten up.

—Kautilya's Arthasathra (about 300 B.C.) Shamasatry's Translation (Second Ed. 1928) pp. 75-77.