A Critical Exposition

JUSTICE VERSUS NATURAL JUSTICE

K.RAVI, **M.A., M.Phil., B.L.,** *Advocate, Madras*

JUSTICE
VERSUS
NATURAL JUSTICE

A CRITICAL EXPOSITION

K. RAVI, M.A., M.Phil., B.L.,
Advocate, Madras

SUN PUBLISHERS
MADRAS

1996

SUN PUBLISHERS,
III Floor, YMCA Building,
223, N.S.C. Bose Road,
Madras - 600 001.
Phone: 585857

Price: **Rs. 100/-**

Printed at:
HI-TECH OFFSET (P) LTD.,
1, Angha Muthu Naicken Street,
Royapettah, Madras - 600 014.
Phone: 8552697, 846681.

To

HARI, RANI, JAYANTHI & KUMAR

who made this possible

CONTENTS

K.S. BAKTHAVATSALAM,
Judge
High Court of Karnataka
Bangalore - 560 001.

Camp:
8-A, Aruvi, Greenways Road,
Madras - 600 028.

Dated: 2.6.1996

FOREWORD

The author of this book is a multi faceted personality. I know him as a poet, artist, music director and a person who can organise meetings for good and philanthropic purposes. Now only I come to know that he can also contribute something which will be very much useful to the profession of law, to which he belongs. Rightly he has taken up the topic "Natural Justice" on the basis of which, the structure of "rule of law" is built. Mr. K. Ravi, the author, in his usual way has tried a critical review of the entire gamut of case-law on the subject, which can be used by the upcoming lawyers, for knowing the principles of "Natural Justice", which form a part of the Administrative Law.

I do hope that Mr. K. Ravi will continue his endeavour in the other branches of law also.

K. S. BAKTHAVATSALAM

INTRODUCTION

Recently I had an occasion to study the branch of law relating to natural justice, for the purpose of a case that I had to argue. I was baffled by the zigzag manner in which the judicial thoughts had meandered around the concept of natural justice. I found that an elementary postulate of justice had to suffer many wounds and amputations, in order to survive. At the same time, I was relieved to find that, now and then, apostles of justice in the attire of well-meaning judges had helped natural justice stay alive. Erudition and scholarship, at times, over-embellish certain concepts that such concepts get deformed beyond recognition. Natural justice, too, was a prey to this tendency.

I started writing this book exactly on 30.4.1996 and completed this on 15.5.1996, during which period, I felt as if I were in the illuminating company of Atkin, L. J., Lord Reid, Justice Fazl Ali, Justice J. C. Shah, and the like. I enjoyed that experience. I present the result of it now with a hope that you too would.

"இணர்ஊழ்த்தும் நாறா மலர்அனையர் கற்றது
உணர விரித்துரையா தார்"

- திருக்குறள்

Those that do not disseminate what they have learnt are like colourful flowers sans fragrance.

— (Thirukkural)

Madras **K. RAVI**

15th May 1996

1. THE BATTLE

1. Man is generally fond of words. "After all, words are my creation." thinks he. This affinity, in due course, becomes an obsession. As a result, words overshadow and colour the thoughts which they are meant to express. The phrase 'Natural Justice' t(originally, 'JUS NATURALE', in the writings of the early Roman jurists), is a paradigm case.

2. Jurists do not mean by the phrase "Natural Justice", any species of justice. If that be so, one would be inclined to ask, "what is non-Natural Justice?" Therefore the prefix 'Natural' in the phrase 'Natural Justice', should have a different function. While deriving and setting out the attributes of justice, Jurists found that certain attributes are some how more fundamental to the very concept of justice. They classified such fundamental attributes under the label 'Natural Justice'. Thus 'Natural Justice' came to be recognised as a body of principles which constitute the essential characteristics or attributes of justice. Such principles constitute the necessary conditions of justice.

3. When we say that 'Natural Justice' is a set of principles which constitute the necessary conditions of justice, we mean that no verdict can be just unless all such principles have been adhered to. Non-adherence to any one of them would disallow the claim that a certain verdict is just. Even a right decision, rendered in violation of any one of these principles, cannot be just.

4. Thus we find that the term 'Natural', in the phrase 'Natural Justice', in fact, qualifies certain principles of justice and not justice itself. By

the phrase 'Natural Justice', we mean, in fact, 'Natural principles of justice'. In *James Dunbar Smith -vs- Her Majesty The Queen, (1877-78) 3 APP cases 614, 623,* J. C. Sir Robert P. Collier, speaking for the Judicial Committee of the Privy Council, rightly used the phrase "The requirements of substantial Justice" to connote 'Natural Justice'. In *Maclean vs Workers' Union, (1929) 1 Ch.602, 624,* Justice Maugham observed:-

> "Eminent Judges have at times used the phrase 'the principles of natural justice'. The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as justice in the modern sense."

The above observation only emphasises the point that the term 'Natural', in the phrase 'Natural Justice' does not qualify Justice. Black, J. speaking for the Supreme Court of Ireland, remarked in *William Green vs Isidore J. Blake, (1948)I R 242:*

> ."....natural justice means no more than justice without any epithet. I take the essentials of justice to mean those desiderata which, in the existing stage of our mental and moral development, we regard as essential, in contradistinction from the many extra-precautions, helpful to justice, but not indispensable to it, which, by their rules of evidence and procedure, our Courts have made obligatory in actual trials before themselves. Many advanced peoples have legal systems which do not insist on all these extra-precautions, yet we would hardly say that they disregard the essentials of justice."

This passage supports the view that the phrase 'Natural justice', means, in fact 'Natural principles of Justice' or 'Essential principles of Justice'. The word 'Natural', in this context means and can only mean essential. Otherwise, we would be searching, in vain, in the pages of history for a State of Nature, where justice would be a Natural Phenomenon, Thomas Hobbes ("LEVIATHAN": Thomas Hobbes, ed., Michael Oakeshott, Oxford; Blackwell, 1946), notwithstanding.

5. What are such essential principles of Justice which, as a group, are labelled, "the Principles of Natural Justice"?

6. Two maxims are often stated to encapsulate such essential principles:

A) "Nemo Judex in causa sua";

B) "Audi Alteram Partem."

In English, these maxims, respectively, mean:-

(A) No one shall be a 'judge in one's own cause';

(B) Hear the other side.

In some cases, (eg. *Union of India v. Tulsiram Patel, AIR 1985 SC 1416,* at para 84 per Madon, J.) a third principle is also added:

(C) Justice must be manifestly seen to be done.

7. In practice, the proposition (B) has come to mean exactly that no one shall be affected or condemned without being given an opportunity to present one's case.

8. In several cases arguments were advanced that insistence on adherence to natural justice would result in injustice, on the facts of those cases, and surprisingly, such arguments were even accepted by the courts. One may wonder, whether there could be any doubt regarding the importance of such basic and essential principles of justice. Why should there be a

discussion on such elementary principles? Prof.Wade, at page 494 - 495 of his 'Administrative Law', (7th Ed., Clarendon Press: Oxford, 1994), comments:

> "Since the courts have been enforcing this rule for centuries, and since it is self-evidently desirable, it might be thought that no trained professional, whether judge or administrator, would be likely to overlook it. But the stream of cases that come before British and Commonwealth Courts shows that overlooking it is one of the most common legal errors to which human nature is prone. When a Lord Chief Justice, an Archbishop of Canterbury, and a three-judge Court of Appeal have strayed from the path of rectitude, it is not surprising that it is one of the more frequent mistakes of ordinary mortals. The Courts themselves must take some of the blame, for they have wavered in their decisions, particularly in the period of about fifteen years which preceded Ridge - vs - Baldwin."

9. Therefore, frequently arose a question, whether application of an essential principle of justice could result in injustice. If it could, then it would not qualify for being called an essential principle of justice. Thus started the legal battle, titled, 'JUSTICE VERSUS NATURAL JUSTICE'.

2. THE EXCLUSIONARY DOCTRINE

1. We saw in the earlier chapter that what are called the principles of Natural Justice are the essential principles of Justice — not of any particular species of justice, but of justice itself— in whatever system justice is sought to be done. If this is correct, then, in no case justice could be done without adhering to the principles of Natural Justice; a violation of Natural Justice, then, could never be justified in the name of justice. If it could be so justified, we must, at once, modify the definition of Natural Justice. This is a clear illustration of how a problem in semantics gains, in due course, a philosophical and practical significance, thus bringing out the insight of Ludwig Wittgenstein and the other logical positivists.

2. To resolve this problem, we have to necessarily undertake the difficult task of reviewing the authoritative pronouncements on this issue. In some cases pronouncements were made in full or partial support of the contention that the principles of natural justice might be violated in the interest of 'larger justice'. Such cases may be called, in short, the exclusionary cases. The contention they support, fully or partially, may be called, in short, 'the exclusionary doctrine'.

3. Though the review undertaken here mainly confines itself to the authoritative pronouncements of the Supreme Court of India, reference, wherever necessary, would be made to certain British cases also.

4. The exclusionary doctrine itself takes several forms. In each form, a

distinct principle is postulated as warranting exclusion of Natural Justice. In other words, in almost every form, the exclusionary doctrine implies:

a) that there is atleast another principle of justice which is more elementary or fundamental or essential than the principles of Natural Justice; and

b) that such principle could come into conflict with Natural Justice.

In a few cases, it was suggested that though a principle in conflict with Natural Justice might not be a more elementary, fundamental or essential principle of justice than the principles of Natural Justice, in the circumstances and on the facts therein Natural Justice should give in. Unless it is cumulatively established beyond doubt that there is no principle more elementary, fundamental or essential than the principles of Natural Justice, and that no set of facts could warrant an infraction of Natural Justice, the exclusionary doctrine would survive many deaths and yet get resurrected in some form or other.

5. The present attempt is to see, with an open mind, whether it is possible to save natural justice from the onslaught of the exclusionary doctrine, in the light of the authoritative pronouncements made on this subject till this date.

6. In order to see whether there is any principle of justice which could be considered more elementary or fundamental or essential than the principles of Natural Justice, we must see what principles have hitherto staked their claims to be such a principle. Such principles, with reference to the cases where they were pressed into service, would be dealt with in the later part of this discussion.

3. THE CONSTITUTIONAL STATUS

1. While treating the principles of Natural Justice, as the necessary conditions of justice, it must be added that such principles are not sufficient conditions of justice. When 'A' is said to be a necessary condition for 'X', it means that without 'A' nothing could be 'X'. No decision or order can be just unless it is made in compliance with the essential principles of justice, since such principles are the necessary conditions of justice. Such compliance however cannot ensure that the decision so arrived at is just. To be a just decision, it must also be correct and valid on merits. Hence it was stated above that compliance with Natural Justice is not a sufficient condition of justice. The principles of Natural Justice, thus, do not have a positive value. They do not make a decision just if it is otherwise unjust. However they do have a negative effect, namely that a breach of them makes even an otherwise correct decision unjust. Therefore when a Judge says:-

> "You say that you were not heard before the impugned order was passed. Now I will hear you and decide afresh what should be the order in your case",

the Judge overlooks the negative effect of the Principles of Natural Justice as stated above. With great respect, it is submitted that a violation of Natural Justice cannot be cured by saying what was stated above. This view is supported by the dictum that violation of Natural Justice, by itself, is a prejudice caused to one who complains of such violation

and no further prejudice need be shown to invalidate an order passed or action taken in violation of Natural Justice. This dictum may be found in:

a) A.R. Antulay -vs- R.S. Nayak AIR 1988 SC 1531 (para 57) Seven Judges

b) Union Carbide Corpn., Vs. Union of India AIR 1992 SC 248 (Page 299) (Constitution Bench)

2. Even earlier to these decisions, Chinappa Reddy, J. had stated, on behalf of a three-judge bench in *S.L.Kapoor -vs- Jagmohan, AIR 1981 SC 136:*

> "24...In our view the principle of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed..."

3. Lord Denning had said in *Annamunthodo v. Oilfield Workers' Trade Union, (1961) 3 All.E.R.621 (HL):*

> "Counsel for the respondent union did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice."

4. From the above dictum, it certainly follows that a violation of Natural Justice, per se and by itself, invalidates the decision or action. To declare such invalidity, it is not proper to insist upon anything, in addition, like a factual prejudice. There is one further reason why even a decision or action, right on the factual premises, would be invalid if it is found to have been taken in violation of Natural Justice. Such reason is founded on the legal proposition that any action or decision taken in violation of Natural Justice is afflicted with the vice of arbitrariness and thus it

contravenes the prohibition contained in Article 14 of the Constitution. When an action or decision is found to have been taken so, by the State or its instrumentalities, the action or decision is thus contrary to such a constitutional prohibition and hence should be declared void, without any further requirement. However the consequential reliefs that should be granted in a given case may be said to depend on the facts and circumstances of the case. In any event a finding that a decision or action was made in violation of Natural Justice is a sufficient condition for declaring the invalidity of such decision or order. If the Principles of Natural Justice have such negative force as stated above, their violation can never be cured or condoned by any forum of justice. If this is correct then exclusionary doctrine referred to above in the second chapter is clearly illogical and invalid. In order to see whether the Principles of Natural Justice are really the necessary conditions of justice it is enough for the present to note, with a sigh of relief, that after several legal battles that Natural Justice had to fight, at last, it is now settled that the Principles of Natural Justice form an integral part of Part III of the Indian Constitution (atleast, of Article 14 thereof). It is equally settled, after *Minerva Mills case (AIR 1980 SC 1789),* that Article 14 is an integral part of the basic structure of the Constitution thereby standing above and beyond even the amendatory power of the parliament. Thus, it would be strictly logical to conclude that not only a law cannot be enacted, but also no amendment of the Constitution can be brought in, to alter or deny in any manner the protection of Natural Justice enshrined in the form of Article 14 of the Constitution of India. It is now generally believed that the scope of Article 14 of the Indian Constitution was expanded on account of the pronouncement in *Maneka Gandhi's* case. It is true that Article 14 was redeemed from the clutches of the orthodox doctrine of

classification by the pronouncement in *Maneka Gandhi.* The following passages in *Maneka Gandhi,* (1978)1 SCC 248, bring out the expanded scope of Article 14:-

> "6.…This Court also applied Article 14 in two of its earlier decisions, namely, the State of West Bengal v. Anwar Ali Sarkar and Kathi Raning Rawat v. The State of Saurashtra where there was a special law providing for trial of certain offences by a speedier process which took away some of the safeguards available to an accused under the ordinary procedure in the Criminal Procedure Code. The special law in each of these two cases undoubtedly prescribed a procedure for trial of the specified offences and this procedure could not be condemned as inherently unfair or unjust and there was thus compliance with the requirement of Article 21, but even so, the validity of the special law was tested before the Supreme Court on the touchstone of Article 14 and in one case, namely, Kathi Raning Rawat's case, the validity was upheld and in the other, namely, Anwar Ali Sarkar's case, it was struck down. It was held in both these cases that the procedure established by the special law must not be violative of the equality clause. That procedure must answer the requirement of Article 14."
>
> "7. Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests

securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E.P. Royappa v. State of Tamil Nadu namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14." Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

"14.....There are certain well recognised exceptions to the

audi alteram partem rule established by judicial decisions and they are summarised by S.A.de Smith in Judicial Review of Administrative Action, 2nd ed. at pages 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair-play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases, the audi alteram partem rule is held inapplicable not by way of an exception to "fair-play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is the rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law

and the Court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances." The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L. J., emphasised in Russel v. Duke of Norfolk that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case." What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal: it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing. The audi alteram partem rule

> is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise."

5. However it is not as if before the said pronouncement in maneka no Judge of the Supreme Court of India thought of such a beneficial and expansive interpretation of Article 14. It is also generally recognised now, that in *E.P.Royappa -vs-State of Tamilnadu, AIR 1974 SC 555, and Erusian Equipment and Chemicals Ltd. -vs- State of West Bengal, AIR 1975 SC 266* seeds were sown for such an expansive interpretation of Article 14. In *Royappa,* Bhagwati. J, speaking on behalf of Y.V. Chandrachud, J., as he then was and V.R. Krishna Iyer, J. and agreeing with the other Judgment rendered by A.N. Ray, C. J stated:-

> "85....Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by an extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Arts. 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16."

6. In Erusian, while considering the question about the validity of certain resolutions and orders blacklisting certain persons without hearing them, Ray, C. J., on behalf of a three-Judge Bench of the Supreme Court stated:

> "19. where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice."

7. On a careful scrutiny of certain judgments of the Indian Supreme Court rendered even before *Royappa,* it becomes clear that right from the birth of the Indian Constitution some Learned Judges had suggested this approach which matured into a full-fledged theory in *Maneka.*

8. At the dawn of the Indian Republic a special bench of six Judges of the Indian Supreme Court, in *A.K. Gopalan -vs- State of Madras, AIR 1950 SC 27,* had an occasion to consider the inter relationship between the set of Principles labelled 'Natural Justice', in British Jurisprudence on the one hand, and the constitutionally guaranteed fundamental rights in the newly formed Indian Republic. Their Judgments make an interesting reading, in retrospect, especially the clear insight expressed in the dissenting Judgment of Fazl Ali, J. The facts of the said case and the passages from the Judgments therein may now be extracted.

9. While considering a petition under Art.32 of the Constitution for a writ of habeas corpus filed by the detenu, who was being detained under Preventive Detention Act 1950, a Bench of six judges of the Supreme

Court had to decide whether the said Act was unconstitutional. In this context each of the six judges gave a separate judgment. In the course of such judgments, the question relating to the meaning of the phrase "procedure established by Law" occuring in Art.21 of the Constitution was considered in relation to the concept of Natural Justice. Kania, C.J. distinguished the phrase "procedure established by Law" from the corresponding phrase "due process of Law" found in the Constitution of U.S.A. He expressly stated that the expression "procedure established by Law" means procedure prescribed by the laws made by the State. He rejected the argument that Law in this context, meant not only enacted Laws but also principles of Natural Justice. His reasoning was expressed in the following words.

> "18…correct question is what is the right given by Art. 21? The only right is that no person shall be deprived of his life or liberty except according to procedure established by law. One may like that right to cover a larger area, but to give such a right is not the function of the Court; it is the function of the Constitution. To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rules of natural justice, as regards procedure, are nowhere defined and in my opinion the Constitution cannot be read as laying down a vague standard… The word 'law' as used in this part has different shades of meaning but in no other Article it appears to bear the indefinite meaning of natural justice. If so, there appears no reason why in this Article it should receive this peculiar meaning.…"
>
> "18a.…The word 'established' according to the Oxford Dictionary means 'to fix, settle, institute or ordain by

enactment or agreement'. The word 'established' itself suggests an agency which fixes the limits. According to the Dictionary this agency can be either the legislature or an agreement between the parties. There is therefore no justification to give the meaning of 'jus' to law' in Art.21."

"19....The word 'due' in the expression "due process of law" in the American Constitution is interpreted to mean "just", according to the opinion of the Supreme Court of U.S.A. That word imparts jurisdiction to the Courts to pronounce what is "due" from otherwise, according to law. The deliberate omission of the word 'due' from Art.21 lends strength to the contention that the justiciable aspect of Law, i.e., to consider whether it is reasonable or not by the Court, does not form the part of the Indian Constitution. The omission of the word 'due', the limitation imposed by the word 'procedure' and the insertion of the word 'established', thus bring out more clearly the idea of legislative prescription in the expression used in Art.21. By adopting the phrase "procedure established by law" the Constitution gave the legislature the final word to determine the law."

"22....Therefore, if the legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of Part III or Art.22(4) to (7), the Preventive Detention Act must be held valid notwithstanding that the Court may not fully approve of the procedure prescribed under such Act."

10. After expressing his views as stated above, Kania, C.J. held that Section

14 of the said Act was, infact, ultra vires. The said Section 14 prevented disclosure of grounds for preventive detention even to the court. It was held ultra vires on the ground that it abridged the right given under Article 22(5) of the Constitution. The note of dissent by Fazl Ali, J. was expressed in the following words:

> "76....I wish to point out that even before executive authorities and administrative tribunals an order cannot generally be passed affecting one's rights without giving one such hearing as may be appropriate to the circumstances of the case. I have only to add that Halsbury after enumerating the most important liberties which are recognised in England, such as right of personal freedom, right to freedom of speech, right of public meeting, etc., adds:
>
> > "it seems to me that there should be added to this list the following rights which appear to have become well-established — the right of the subject to have any case affecting him tried in accordance with the principles of natural justice, particularly the principles that a man may not be a judge in his own cause, and that no party ought to be condemned unheard, or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case..." (Halsbury's Laws of England, Edn, 2, Vol.6, p 392).
>
> "77....I am aware that some Judges have expressed a strong dislike for the expression "natural justice" on the

ground that it is too vague and elastic, but where there are well-known principles with no vagueness about them, which all systems of Law have respected and recognized, they cannot be discarded merely because they are in the ultimate analysis found to be based on natural justice. That the expression "natural justice" is not unknown to our law is apparent from the fact that the Privy Council has in many criminal appeals from this country laid down that it shall exercise its power of interference with the course of criminal justice in this country when there has been a breach of principles of natural justice or departure from the requirements of justice; See In re Abraham Mallory Dellet, (1887)12 AC. 459 : (56 L T 615); Taba Singh v. Emperor, 48 Bom. 515 : (A.I.R.(12) 1925 P.C. 59 : 26 Cr.L.J. 391); George Gfeller v. The King, A.I.R.(30) 1943 P.C. 211: (45 Cr.L.J.241) and Bugga v. Emperor, A.I.R.(6) 1919 P.C. 108 : (20 Cr.L.J. 799). In the present case, there is no vagueness about the right claimed which is the right to have one's guilt or innocence considered by an impartial body and that right must be read into the words of Art.21. Article 21 purports to protect life and personal liberty, and it would be a precarious protection and a protection not worth having, if the elementary principle of law under discussion, which, according to Halsbury is on a par with fundamental rights, is to be ignored and excluded."

However Patanjali Sastri, J. agreed with Kania, C. J. in this issue. He stated:

> "109.... I am unable to agree that the term "Law" in Art. 21 means the immutable and universal principles of natural justice. "Procedure established by law" must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts...."

Mahajan, J. avoided a discussion of the issue from the point of view of Natural Justice or violation thereof. He found that Section 12 of the impugned Act contravened Clause 7 of Article 22 of the constitution and hence declared such Section 12 as unconstitutional, in the result, agreeing with the conclusion of Fazl Ali, J. but for different reasons. Mukerjea, J. held that the question whether the impugned Act was invalid from the view point of Natural Justice did not fall for consideration, in this case. He said:

> "197....It is enough, in my opinion, if the law is a valid law which the legislature is competent to pass and which does not transgress any of the fundamental rights declared in Part III of the Constitution...."

Das, J. agreed with Kania, C. J. holding:

> "228. ..."Established by Law" will, therefore, mean 'enacted by law'. If this sense of the word 'established' is accepted then the word 'law' must mean State made law and cannot possibly mean the principles of natural justice, for no procedure can be said to have ever been 'enacted' by those principles. When S. 124(A), Indian Penal code speaks of "Government established by law" surely it does not mean

> "Government set up by natural justice …."
>
> "244.…There is nothing to prevent the legislature from providing an elaborate procedure regulating preventive detention but it is not obliged to do so. If some procedure is provided as envisaged by Art. 21 and the compulsory requirements of Art. 22 are obeyed and carried out nobody can, under our Constitution, as I read it, complain of the law providing for preventive detention."

It was unanimously decided in the above case that Section 14 of the impugned Act was unconstitutional. Only two out of six judges held that Section 12 was also unconstitutional. That became the minority view. Since Section 14 was severable and in no way affected the detention in that particular case, the writ petition was dismissed. Twenty eight years before Bhagwati, J. pronounced the modern interpretation of Article 14 and Article 21 of the Indian Constitution, Fazl Ali, J. had arrived at almost the same result with regard to the procedural protection atleast under Article 21 of the Constitution of India.

11. In *State of Orissa -vs- Dr.Binapani Devi, AIR 1967 SC 1269,* decided in 1967 by a two-Judge bench of the Indian Supreme Court, Shah, J., speaking for the bench said, almost in a prophetic tone as follows:-

> "9. …It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed; it need not be shown to be super-added. If there is power to decide and determine

> to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of the person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

What was said by Shah, J. was already said by Lord Morris in *Ridge -vs- Baldwin, 1964 AC 40,* at page 114 thereof:

> "My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case."

The facts in Binapani Devi show that the age of a doctor in the medical service of a State was determined by the authorities as one earlier in point of time than the one that had been declared by the doctor at the time of joining the service. Though there was a prior notice to that doctor asking the doctor to show cause against such determination, the High Court of Orissa, in the writ petition filed by the doctor, set aside such determination holding, mainly that the doctor had not been given a reasonable opportunity of showing cause against the action proposed to be taken. On the appeal perferred by the State, a two-judge bench of the Supreme Court held that the High Court was right in doing so and thererfore dismissed the appeal. Shah, J. for himself and G.K. Mitter, J., stated the reasons in the following words:-

> "9.... the decision of the State could be based upon the result of an enquiry in manner consonant with the basic concept of justice. An order by the State to the prejudice

of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fairplay. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is, however, under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed; it need not be shown to be super¬added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of

a decision in any particular case."

"10. The State has undoubtedly authority to compulsorily retire a public servant who is superannuated. But when that person disputes the claim he must be informed of the case of the State and the evidence in support thereof and he must have a fair opportunity of meeting that case before a decision adverse to him is taken."

"12. …the report of that Enquiry Officer was never disclosed to the first respondent. Thereafter the first respondent was required to show cause why April 16, 1907, should not be accepted as the date of birth and without recording any evidence the order was passed. We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence."

12.. The above reasoning of Shah, J. suggesting that Natural Justice is a fundamental rule of the constitutional set-up in India, being an effective check against exercise of arbitrary authority, and to be read into every provision of Law which grants authority to affect persons, and that non-compliance with such a fundamental rule, which is a basic concept of the rule of Law, makes the exercise of power a nullity, was clearly in

line with the erudite opinion expressed in a lone voice by Fazl Ali, J. in 1950. This line of reasoning finally got recognition when a Constitution Bench of the Supreme Court of India declared in unequivocal terms in *Union of India -vs- Tulsiram Patel, AIR 1985 SC 1416* as follows:-

> 95.... The principles of natural justice have thus come to be recognized as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which is the subject-matter of that Article. Shortly put, the syllogism runs thus: violation of a rule of natural justice results in arbitrariness which is the same as discrimination; where discrimination is the result of State action, it is a violation of Article 14: therefore, a violation of principle of natural justice by a State action is violation of Article 14."

13. This conclusion may be called the Constitutional Status Rule or the Status Rule, in short. It is thus seen that much before the decision was rendered in *Maneka* and even right from the birth of the Constitution of India, Learned Judges of the Supreme Court had been suggesting that observance of Natural Justice is a mandatory requirement of the Constitution itself, whether under Article 21 or Article 14, as the case may be. To recapitulate, Fazl Ali, J. in 1950 itself in *A.K. Gopalan*, read the duty to observe the Rule of Audi Alteram Partem into Article 21, and suggested that a non-observance of this duty violated the mandate of Article 21; Shah, J. in 1967, in *Bina Pani Devi* read the Rule of Audi Alteram Partem as a fundamental Rule of the Indian "Constitutional set-up", and declared it to be a basic concept of the Rule of Law itself, almost suggesting the reasoning adopted a decade later in *Minerva Mills*;

then, in the following decade, Bhagwati, J. in *Royappa* and Ray, C. J. in *Erusian* expressed, in more explicit terms the inter-relationship between Natural Justice and Article 14 as such; such views got a more detailed exposition in 1978 in *Maneka Gandh*i; this line of reasoning culminated in the principle being stated explicitly and authoritatively in the form of a syllogism, equating violation of natural justice with violation of Article 14 itself, in 1985, in *Tulsiram Patel.*

4. THE NULLITY RULE

1. It was stated in Chapter 3 that violation of Natural Justice amounts to a violation of Article 14 of the Constitution, and in an appropriate case, Article 21 of the Constitution also. If that be so, there is no special reason to exclude Natural Justice from the requirements of reasonable restrictions set out in Sub-Clauses 2 to 6 of Article 19 also. In fact, the status of natural justice, vis a vis Article 19 was considered in *RC.Cooper -vs- Union of India, AIR 1970 SC 564,* by a special bench of 11 judges of the Supreme Court. The question there was whether an enactment which provided for nationalisation of certain banks was valid. In this context, while holding that a law of acquisition of property, apart from satisfying the requirements of Article 31 of the Constitution, must also necessarily pass the test of reasonableness under Article 19, Shah, J., speaking on behalf of 10 judges, stated in para 58-60 (AIR) of the judgment:-

> ."…For instance if a tribunal is authorised by an Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19(1)(f)."

2. In view of the proposition that a violation of Natural Justice is a violation of Article 14 and may be a violation of Article 19 or 21 also, in a given case, there can be no case in which such a violation can be justified or

even condoned. What is unconstitutional, especially on account of an infraction of one or more of the fundamental rights guaranteed in Part III of the Constitution, is void and is a nullity. Krishna Iyer, J. had an occasion to consider this aspect in *Nawab Khan Abbas Khan -vs- State of Gujarat, AIR 1974 SC 1471.* He said, speaking for a bench of two judges:-

> "6. …An unconstitutional order is void, consequential administrative inconveniences being out of place where an administrator abandons constitutional discipline and limits of power. What about the peril to the citizen if an official, in administrative absolutism, ignores the constitutional restrictions on his authority and condemns a person to flee his home? A determination is no determination if it is contrary to the constitutional mandate of Article 19. On this footing the externment order is of no effect and its violation is no offence."
>
> "7. Unfortunately, counsel overlooked the basic link-up between constitutionality and deviation from the audi alteram partem rule in this jurisdiction and chose to focus on the familiar subject of natural justice as an independent requirement and the illegality following upon its non-compliance. In Indian constitutional law natural justice does not exist as an absolute jural value but is humanistically read by courts into those great rights enshrined in Part III as the quintessence of reasonableness. …"
>
> "9. Here a Tribunal, having jurisdiction over area, person and subject-matter, has exercised it disregarding the

obligation to give a real hearing before condemning. Does it spell death to the order and make it still-born, so that it can be ignored, defied or attacked collaterally? Or does it mean nullifiability, not nullity, so that before disobeying it a court must declare it invalid? Or, the third alternative, does it remain good and binding though voidable at the instance of a party aggrieved by a direct challenge? And if a court voids the order does it work retroactively?"

"13. We may now narrow down the scope of the discussion by confining it to breaches of the audi alteram partem rule. Does this defect go to jurisdiction? Perhaps not all violations of natural justice knock down the order with nullity. In Dimes –vs- Grand Junction Canal Co. (1852) 3 HLC 759 bias or pecuniary interest in the judge was held to render the proceedings voidable, not void.

It must be concluded that even this proposition is not out of the penumbra of doubt and dispute (vide AIR 1958 SC 86)…"

"14. Where hearing is obligated by a statute which affects the fundamental rights of a citizen, the duty to give the hearing sounds in constitutional requirement and failure to comply with such a duty is fatal. May be that in ordinary legislation or at common law a Tribunal, having jurisdiction and failing to hear the parties, may commit an illegality which may render the proceedings voidable when a direct attack is made thereon by way of appeal, revision or review,

but nullity is the consequence of unconstitutionality and so without going into the larger issue and its plural divisions, we may roundly conclude that the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void and ab initio of no legal efficacy.... May be, this is a radical approach, but the alternative is a travesty of constitutional guarantees which leads to the conclusion of post-legitimated disobedience of initially unconstitutional orders..."

"19. In the present case, a fundamental right of the petitioner has been encroached by the police commissioner without due hearing. So the court quashed it — not killed it then but performed the formal obsequies of the order which had died at birth. The legal result is that the accused was never guilty of flouting an order which never legally existed."

"20. We express no final opinion on the many wide-ranging problems in public law of illegal orders and violations thereof by citizens, grave though some of them may be. But we do hold that an order which is void may be directly and collaterally challenged in legal proceedings. An order is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication. Beyond doubt, an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity. When a competent Court holds such

official act or order invalid, or sets it aside, it operates from nativity, i.e., the impugned act or order was never valid..."

3. A critical analysis of the reasoning adopted in the above case by Krishna Iyer, J. is relevant and essential for the present discussion. To do that, it is necessary to first advert to the factual matrix of that case.

4. Section 56 of the Bombay Police Act, 1951, empowered the Police Commissioner to extern any undesirable person on certain specified grounds. Such an order was passed against a person on 5.9.1967. However the said person contravened the said order and re-entered the forbidden area on 17.9.1967. Since such a contravention was declared an offence by Section 142 of the said Act, he was prosecuted for such contravention. He pleaded in defence that the order of externment passed against him on 5.9.1967 was quashed by the High Court on 16.7.1968, in a writ petition that he had filed, and that therefore the contravention committed on 17.9.1967, before the order was quashed, was not a prosecutable contravention at all. The Trial Court acquitted him, (the ground of acquital is not mentioned in the judgment under consideration). On appeal by the State, the High Court set aside the acquital and convicted him. While doing so, the High Court rejected the plea stated above and held that the earlier order of the High Court had invalidated the order of externment only with effect from the date of the issue of the writ quashing the said order. On appeal, a bench of two judges of the Supreme Court speaking through Krishna Iyer, J. expressed its reasoning in the passages quoted above and acquitted the appellant. While doing so, Krishna Iyer, J. took note of the fact that one of the grounds, on which the externment order had been qaushed on 16.7.1968, was that before the said order was passed, due opportunity to show-cause against the allegation had not been given

as required by Section 59 of the first-mentioned Act.

5. The reference to the basic link-up between constitutionality and deviation from the Audi Alteram Partem rule and the further statement that "In Indian Constitutional law, natural justice does not exist as an absolute jural value but is humanistically read by courts into those great rights enshrined in Part III as the quintessence of reasonableness" disclose a great insight, foreseeing the historic dictum in *Tulsiram Patel* that a violation of Natural Justice is a violation of Article 14 of the Constitution. However, the later part of the judgment suggests that the logical implications of this insight had not been fully realised, at that time, even by the learned author thereof. Any doctrine, in the process of being evolved and before culminating into a full-fledged rule, suffers such set-backs. Such a set-back, in this case, is reflected in the final proposition that was arrived at in conclusion. In such final proposition, Krishna Iyer, J. stipulated two conditions for holding that an order passed in violation of the Audi Alteram Partem rule was null and void. To quote again:-

> "An order (passed in violation of the Audi Alteram Partem rule) is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication."

6. The words enclosed within brackets in the above quotation are not found in the text, as printed in A.I.R., but have to be necessarily supplied in this context, if the proposition should convey what was intended to be conveyed.

In fairness to the learned judge, and in the context of what he had expressed in the previous paragraphs of his judgment, this proposition must be read, further, in conjunction with the sentence which immediately

follows, namely:

> "Beyond doubt, an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity."

So read, the final proposition assumes the following form:

> An order (passed in violation of the Audi Alteram Partem rule, affecting any one of the fundamental rights of the person concerned) is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication.

7. This proposition may be called "the nullity rule." In this form, two conditions must be satisfied before an order passed in violation of the Audi Alteram Partem rule can be said to be null and void. The conditions are:-

   1. The authority who passed the order must be under a legal obligation to afford, before passing the order, an opportunity to the person concerned to present his case.

   2. The order must affect some fundamental right of the person concerned.

8. With great respect to the learned judge, it is submitted that these two conditions are not at all necessary to hold as null and void an order passed in violation of the Audi Alteram Partem rule. The very rule of Audi Alteram Partem clearly means and implies that no person may be affected without being granted an opportunity of being heard. The maxim is cryptic; however, it ought to be, and in fact it has been, understood only in this manner. The logical implication of the rule is that every power, the exercise of which invariably affects a person, includes by necessary

implication a duty to afford an opportunity of being heard to that person, before the power is exercised in a given case. This is an indisputable result of the limitations placed on the State and its instrumentalities under Chapter III of the Constitution of India. If this statement is correct, then whenever an exercise of power affects a person, one need not further inquire whether such exercise is conditioned by an obligation to afford an opportunity of being heard to the person sought to be affected by such exercise. That such exercise affects a person, by itself, implies such obligation. This was the result of the dictum in *Dr. Binapani Devi.* This was the reasoning in *Maneka Gandhi* which paved the way for the new expansive doctrine of Article 14 and Article 21. Coming to the second condition, namely, that in order to hold as null and void such an order or action, it should affect a fundamental right of the person concerned, the condition itself seems to be redundant and fallacious. It was seen, earlier in this thesis, that a violation of Natural Justice is a violation of Article 14 (or Article 19 or Article 21, in a given case). If this is correct, then it is redundant to say that an order which is violative of Natural Justice would be null and void only if it affects one or more of the fundamental rights of the person concerned, since an infraction of Natural Justice itself is an infraction of a fundamental right guaranteed by Article 14. More over, an order which infringes any fundamental right, otherwise than by denying the protection of natural justice, is also null and void. Hence to suggest that an order affecting a fundamental right and passed in violation of natural justice is null and void may not be in tune with sound logic. An order infringing a fundamental right is null and void. An order passed in violation of natural justice is also null and void. Hence the second condition, viz, that for declaring an order passed in violation natural justice null and void, the order should affect a fundamental right

is redundant. Therefore, removing the two redundant conditions from the nullity rule, it would read:

> Any exercise of power in violation of natural justice by the State or its instrumentalities, affecting a person or a body of persons, is null and void.

9. For arriving at the above revised form of the nullity rule, two propositions were presumed. They are:

(A) Any power, the exercise of which affects a person, includes, by necessary implication, a duty to give to that person, before the power is exercised, an opportunity of being heard.

(B) Every case of violation of Natural Justice is a case of violation of Article 14 of the Constitution.

While the proposition 'B' was authoritatively laid down and explicitly stated by a Constitution Bench of the Supreme Court of India, in *Tulsiram Patel,* it becomes necessary to examine the validity of the proposition 'A' alone. For the sake of convenience we may call the proposition 'A' as the 'effect principle'.

5. THE EFFECT PRINCIPLE

1. The Effect Principle was laid down, for the first time in India, in *State of Orissa -vs- Dr.Binapani Devi, A.I.R. 1967 S.C. 1269.*

2. Before the decision in *Dr. Binapani Devi,* courts always searched for a distinct duty to act judicially in the express provisions which conferred power. Preponderance of judicial opinion, at that point of time, was that such a duty must be derivable atleast by implication from the express provisions and it never occured to the Learned Judges that whenever the exercise of a legal power affected or caused prejudice to a person, the grant of such power was sufficient to imply such a duty. The insistence, therefore, was upon finding such a duty otherwise than from the effect of the exercise of such power. At the dawn of the Indian Constitution this question arose for consideration before a bench of six judges of the Supreme Court, in *Province of Bombay -vs- Kushal Das, A.I.R. 1950 S.C. 222.* In that case point for decision was whether a writ of certiorari would lie against the Government of Bombay to quash an order of requisition of flat issued by it under a certain Ordinance. In connection with that question, Kania, C. J., in his leading judgment, cited with approval, the conditions laid down by Atkin L. J., as he then was, in *R -vs- Electricity Commissioners, (1924) 1 KB 171,* and the more explicit formulation thereof into four conditions by Slesser L.J. in *The King -vs- London County Council, (1931) 2 KB 215.* The test laid down by Atkin, L. J.

was stated in the following words:

> "wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of The King's Bench Division exercised in these writs."

Slesser L. J. separated four conditions as discernible in the above passage. They are: wherever any body of persons (1) having legal authority (2) to determine questions affecting the rights of subjects (3) having the duty to act judicially and (4) act in excess of their legal authority - a writ of certiorari may issue. In this formulation of four conditions, it was proposed that the legal authority to determine questions affecting rights of subjects did not, by itself, imply a duty to act judicially. The question whether at all a person having legal authority to determine questions, affecting rights of subjects can act otherwise than judicially, in other words, whether such a person can act arbitrarily or whimsically was not asked or considered while formulating the four conditions or while approving such formulations. However in para 7 (AIR) of the judgment, Kania, C. J. suggested that the court below in that case had taken some such view nearer to the effect principle. He says:-

> "7. …Indeed, in the judgment of the lower court while it is stated at one place that if the act done by the inferior body is a judicial act, as distinguished from a ministerial act, certiorari will lie, a little later the idea has got mixed up where it is broadly stated that when the fact has to be determined by an objective test and when that decision affects rights of someone, the decision or act is quasi-judicial. …"

3. While Kania, C. J. approved Slesser's formulation, Fazl Ali, J. in his

concurring judgment appears to have deviated a little from the above line of thinking and slightly towards the direction which would lead to the effect principle.

4. Fazl Ali, J. came very near to the question whether a determination which affected the rights of a person implied a duty to act judicially. He said:-

> "22. …Besides the determination of the public purpose per se does not affect the rights of any person. It is only when a further step is taken, namely, when the Provincial Government forms an opinion that it is necessary or expedient in the interests of public purpose to requisition certain premises that the rights of others can be said to be affected. In these circumstances, I am unable to hold that the Provincial Government has to act judicially or quasi judicially under S.3 of the Ordinance."

5. None of the other four judges in the above case disagreed essentially with Kania, C. J. on this aspect. This line of reasoning dominated judicial decisions, in India, for a long time until a marked deviation was made in Binapani Devi.

6. This line of reasoning, set in motion by Atkin, L. J., in *Rex -vs- Electricity Commissioners,* was deviated from in Britain itself, in 1963, when the historic, epoch-making decision of the House of Lords in *Ridge -vs- Baldwin, (1963) 2 AII.E.R. 66,* was rendered. In *Kushal Das,* cited above, Kania, C.J. did not refer to or take note of the decision of Lord Hewart, C. J., in *Rex -vs- Legislative Committee of the Church Assembly, (1923) AII.E.R. - REP 150,* which was however mentioned in the judgments of Mukherjea, J. and Das, J. in that case. This 1923 case appears to have been decided before Slesser L. J., formulated the four conditions in *King -vs- London County Council*. In that 1923 case, Lord Hewart, C.J.

referred to the test formulated by Atkin, L. J. and stated:-

> "in order that a body may satisfy the required test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

7. This gloss placed by Lord Hewart, C. J. on the dictum of Lord Atkin, L. J. held the field for a considerable time. This gloss, according to Bhagwathi, J in *Maneka Gandhi,* "stultified the growth of the doctrine of natural justice." In *Ridge -vs- Baldwin,* referred to above, this gloss placed by Lord Hewart, C. J. on the dictum of Lord Atkin, L. J. was questioned and removed. Lord Reid, in *Ridge -vs- Baldwin,* stated the reasoning as follows:-

> "If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to be impossible to reconcile with the earlier authorities."

8. It was held in *Ridge -vs- Baldwin* that the duty to act judicially may arise from the very nature of the function intended to be performed and it need not be shown to be superadded. This was exactly the proposition independently laid down by Shah, J. as he then was, in *Dr. Binapani Devi,* without explicit reference to the case of *Ridge -vs- Baldwin.* In *Maneka Gandhi,* Bhagwati, J. took notice of this development in Britain, referred to and cited with approval Lord Reid's dictum, Shah, J's reasoning in *Dr. Binapani Devi* and the law laid down by Hegde, J. in *Kraipak -vs- Union of India, AIR 1970 SC 150* that natural justice would be insisted

upon even in administrative actions which affected persons. In *Kraipak,* Hegde, J., on behalf of a Constitution Bench, stated:-

> "13. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power."

9. After stating thus, and quoting extensively Lord Parker, *C. J. in Reg. -vs- Criminal Injuries Compensation Board, (1967) 2 QB 864* and after citing a certain Newzealand case *(Newzealand and Dairy Board - 1953 NZLR 366)* and an unreported decision of the Supreme Court of India, Hegde, J. said that he would assume that the power exercised in *Kraipak* was an administrative power and would test its validity on such assumption. After finding, as a matter of fact, that one principle of natural justice, expressed in the maxim *Nemo Judex in Causa Sua,* had been violated in that case he set aside the action which he assumed to be administrative. He further stated thus:-

> "20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge in his own cause (Nemo debet esse judex propria causa), and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the

law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now (misprinted as 'not' in AIR) questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. University of Kerala, Civil Appeal No. 990 of 1988, D/-15-7-1968 = (AIR 1969 SC 198) the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

10. The specific question relating to the issue asked by Hegde, J. in deciding

Kraipak was in fact amplified and well answered by Bhagwati, J. in *Maneka Gandhi*. In that case, Bhagwati, J. concluded that the test to decide the question of applicability of natural justice was "does fairness in action demand that an opportunity to be heard should be given to the person affected?" After formulating such a test, Bhagwati, J. stated:-

> "10. Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other? Can it be said that the requirement of fair-play in action' is any the less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice must apply equally in an administrative enquiry which entails civil consequences...."

11. After referring to *Ridge -vs- Baldwin, Dr.Binapani Devi and Kraipak,* the following conclusion was arrived at by Bhagwati, J.:-

> "10....The net effect of these and other decisions was that duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the

> manner of exercising it and its impact on the rights of the person affected and where it is found to exist, the rules of natural justice would be attracted.."

12. In short this is the same as the effect principle, namely, that every legal power, the exercise of which affects a person, includes by necessary implication, a duty to give to that person an opportunity of being heard, before the power is exercised. In shorter terms, the effect principle would be: affectative legal power implies, necessarily, a duty to observe the Audi Alteram Partem rule.

13. This discussion will not be complete without a reference to two more English cases. The first case was *H.K. (an Infant), (1967) 1 ALL.E.R. 226.* In that case Lord Parker, C. J. stated as follows:-

> "11. … But at the same time, myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bonafide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of

> natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially."

14. The next case was *Schmidt -vs- Secretary of State for Home Affairs, (1969) ALL.E.R. 904.* In that case Lord Denning, M.R. stated:-

> " .....where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf."

15. After such a hard struggle, the law relating to natural justice culminated in two propositions, labelled here as the effect principle and the principle of constitutional status (the status rule, in short). These two principles may be stated again:

a) Affectative power implies necessarily, a duty to act judicially in exercise thereof: (The effect principle)

b) A violation of natural justice is the same as a violation of

Article 14. (The status rule)

16. It was seen above, that the effect principle was authoritatively laid down by a bench of seven judges in *Maneka Gandhi* and that the status rule was authoritatively laid down by a Constitution Bench of five judges in

Tulsiram Patel. These two propositions now constitute the law of the land in India. They over rule, by necessary implication, any statement contrary to them in any judgment of the Supreme Court rendered before they were pronounced. No statement in any subsequent judgment by any bench of less than five judges, in the case of the status rule and seven judges in the case of the effect principle can be read as laying down anything contrary to the above propositions. In this context, reference may be made to a passage in *N.Meera Rani -vs- Government of Tamil Nadu, A.I.R. 1989 S.C. 2027:*

> "13...The starting point is the decision of a Constitution Bench in Rameshwar Shaw v. District Magistrate, Burdwan, (1964) 4 SCR 921: (AIR 1964 SC 334). All subsequent decisions which are cited have to be read in the light of this Constitution Bench decision since they are decisions by Benches comprised of lesser number of Judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution Bench in Rameshwar Shaw's case (supra)."
>
> "21... None of the observations made in any subsequent case can be construed at variance with the principle indicated in Rameshwar Shaw's case (supra) for the obvious reason that all subsequent decisions were by benches comprised of lesser number of Judges. We have dealt with this matter at some length because an attempt has been made for some time to construe some of the recent decisions as modifying the principle enunciated by the Constitution Bench in Rameshwar Shaw's case: (supra)"

17. The above view on the law of precedents is in line with what was stated in para 46 of the judgment of a Bench of seven judges in *A.R. Antulay -vs- R.S. Nayak, A.I.R. 1988 S.C. 1531*:- "there is hierarchy within the court itself here, where Larger Benches over rule Smaller Benches."

6. THE BATTLE FIELD

1. Now the battle field is ready. The forces, opposing each other, have been identified: the principles of natural justice, holding the shield of the nullity rule, on the one side, and the exclusionary doctrine, armed with several missiles, on the other side. The onslaught is about to begin.

2. The attack is directed against three terms, in the nullity rule: the term 'power', the term 'affects' and the term 'person or body of persons'.

3. The shield, in this case, the nullity rule, as formulated by Krishna Iyer, J. in *Nawabkhan,* reads:

> An order passed in violation of the Audi Alteram Partem Rule affecting any one of the fundamental rights of the person concerned is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication.

4. In view of the effect principle the last mentioned condition should be dropped. In view of the principle of constitutional status the reference to fundamental rights should also be deleted in the above proposition. After these two amendments, the nullity rule would and should read as follows:

> An order passed in violation of the Audi Alteram Partem Rule, affecting any person, is null and void.

In a more precise formulation the above rule would read as follows:

> Any exercise of power, affecting a person or body of persons, in violation of the Audi Alteram Partem Rule, is null and void.

5. This revision is necessary so that violation of Natural Justice is not overlooked on the flimsy ground that no order was passed in a given case, though an action was taken affecting a person or a body of persons by the State or its instrumentalities. Where an instrumentality of a State, without passing an order, physically attempts to demolish a building in contravention of the Audi Alteram Partem Rule, it would be no defence of such action to plead that since there was no order, Natural Justice was not attracted. There is one more reason, why the phrase 'exercise of power' should be substituted for the term 'order' in the above rule. In *Ram Jawaya -vs- State of Punjab, AIR 1955 SC 549,* a Constitution Bench of the Supreme court of India held that the executive power of the State was not confined to carrying out of laws. It was explicitly held therein that the state can engage in several trade and commercial activities and welfare activities even in the absence of a specific legislation sanctioning such activities. In para 15 of the judgment therein Mukherjea, C. J. stated:-

> "15. Suppose now that where the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start a trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon? We cannot say that such legislation is always necessary. If the trade or business involves expenditure of funds, it is certainly required that Parliament

should authorise such expenditure either directly or under the provisions of a statute."

6. The note of caution expressed in the statement "we cannot say that such legislation is always necessary", is amplified thereafter in para 17 of that judgment.

> "17. Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a special legislation sanctioning such course would have to be passed."

7. Another Constitution Bench of the Supreme Court of India in *State of Madhya Pradesh -vs- Bharat Singh, AIR 1967 SC 1170, referred to Ram Jawaya* and said:-

> "6...These observations must be read in the light of the facts of the case. The executive action which was upheld in that case was, it is true, not supported by legislation, but it did not operate to the prejudice of any citizen.... Viewed in the light of these facts the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the subject...."

8. Hence it follows that an exercise of power, in any form, in violation of the Audi Alteram Partem rule, where such exercise affects a person or body of persons, is liable to be declared null and void. It took several years after the framing of the Indian Constitution for the Supreme court

to effectively rule that in every sphere of activities, the State and its instrumentalities should comply with the constitutional requirements. Initially it was thought that in the contractual field the State and its instrumentalities are not circumscribed by the constitutional limitations. A view was expressed by Mathew, J. in the case of *Punnen Thomas -vs- State of Kerala, AIR 1969 Kerala 81* (F.B) that:-

> "19... the Government is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

9. However this was not accepted by the two other judges who constituted the Bench of the Kerala High Court in that case. It was only in 1975, this minority view became the law of the land when the same Mathew, J. after elevation to the Supreme Court, laid down in *Sukh Dev Singh -vs- Bhagat Ram, AIR 1975 SC 1331* (at page 1352 thereof) "the governing power wherever located must be subject to the fundamental constitutional limitations."

10. Following this dictum several cases were decided by the Supreme Court expanding the arena where the constitutional limitations would apply. *Ramana Dayaram Shetty -vs-International Airport Authority of India, AIR 1979 SC 1628; Ajay Hasia -vs- Khalid, AIR 1981 SC 487,* are just a few examples. The culmination of this line of reasoning was in the historic judgment rendered by Madon, J., on behalf of a bench of two judges in *Central Inland Water Transport Corporation Limited -vs- Brojo Nath Ganguli, AIR 1986 SC 1571,* holding that the said corporation

was an instrumentality of the State and any stipulation that it makes even in a contract should be in strict conformity with the constitutional limitations on the power of the State, and declaring that a certain clause in the service contract of that corporation was opposed to public policy since it ignored the Audi Alteram Partem rule and thus violated Article 14 of the Constitution.

11. Another historic judgment followed in *Kum.Shrilekha Vidhyarthi -vs- state of Uttar Pradesh, AIR 1991 SC 537,* where it was effectively stated by Verma, J. on behalf of a bench of two judges:-

> "20.... We have no hesitation in saying that the personality of a State requiring regulation of its conduct in all spheres by requirement of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Art. 14 and contractual obligations are alien concepts, which cannot co-exist."
>
> "21.... In our opinion, it would be alien to the Constitutional Scheme to accept the argument of exclusion of Art. 14 in contractual matters...."
>
> "25... In Wade's Administrative Law, 6th Ed., after indicating that 'the powers of public authorities are essentially different from those of private persons', it has been succinctly stated at pp.400 - 401 as under:-
>
> "..... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses power solely in order that it may use them for the public good for the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just

as much a contradiction in terms as unfettered discretion....."

12. Thus the sphere of judicial review of the acts of public authorities was expanded by all these decisions. Such expansion was in two directions. While *Sukhdev Singh, Ramana, Ajay Hasia* and the like cases expanded such sphere by interpreting Article 12, *Central Inland and Shrilekha Vidhyarthi* achieved the same result by obliterating the distinction among the fields of activities in which the State engaged itself. The result is that the State, whatever name, form and garb it may assume, shall not ignore the constitutional prohibitions, especially in Part III of the Constitution, whatever be the sphere of its activity — legislative, judicial, quasi-judicial, executive, administrative or contractual. This result justifies and fortifies the effect principle propounded above. This springs from a recognition that the public at large, in a democracy, is the ultimate repository of all powers and that whoever exercises any power in a democracy, exercises such power only as a delegatee of the public. The constitution of a democracy places the necessary limitations and guidelines for the exercise of any power by any such delegatee. "The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one." *(Minerva Mills, AIR 1980 SC 1789,* para 22, per Chandrachud, C. J.) Whenever one person affects another in India by any action or order and claims that he has some power to do so, and when in fact, it is found that such power appears to have been granted to him, the exercise of such power can be struck down legally if that person had ignored the limitations imposed on him by the Laws of the country; when such person happens to be the State or its instrumentality, such exercise is made further subject to the constitutional limitations, especially those set out in part III thereof.

13. In fact, the effect principle could have been deduced from two propositions:

one, that without the authority of law no affectative, executive power can be exercised; and two, that a violation of natural justice is a violation of article 14 itself. The first proposition was laid down in *Bharat Singh,* by a Constitution Bench. The second proposition was laid down in *Tulsiram Patel,* by a Constitution Bench. Since no law which violates article 14 can be valid, no law that permits violation of natural justice can be valid. This is derived from the second proposition. Since, according to the first proposition the State cannot exercise any executive power so as to affect a person, without the authority of law, such law should be a valid law. Since no law would be valid, if it permits violation of natural justice, no executive power can be exercised in violation of natural justice, so as to affect a person or a body of persons.

14. In view of the above discussions it has to be submitted necessarily, that there is no doubt that the decision in *Kraipak* was a land mark decision, refusing to exclude the application of Natural Justice to what was contended to be a purely administrative power. However the following statement in para 20 (AIR) of the said judgment does not fall in line with the logical result achieved by the very decision therein:-

> The rules of Natural Justice can operate only in areas not covered by any law validly made.

15. The meaning of this statement is not clear. If it means that where there is a valid law granting power and prescribing certain procedural aspects of the exercise of such power, rules of Natural Justice cannot be applied, then the statement is not in line with several decisions of the Supreme court. For instance, where a statute gives power to a local authority to demolish buildings in the locality, subject to existence of certain factual conditions and further stipulates that before exercising such power the local authority should get the concurrence of the State Government,

would it follow that the said authority can demolish a building, by merely getting the concurrence of the State Government, but without giving an opportunity of being heard to the owner and occupiers of the building? An affirmative answer is a clear negation of the rule of law. That is why courts have held that wherever the statute or the statutory rule is silent about the need to observe Natural Justice, such a need shall be read into the statute or the rule. In a judgment, more than 100 years old, Byles, J., in *Cooper - vs- Wandsworth Board of Works, (1861-73) All. E. R. Rep. Ext. 1554* stated:-

> "a long course of decisions, beginning with Dr. Bentley's case and ending with some very recent cases, established that, although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."

16. This principle was referred to and approved in *Maneka Gandhi.* In fact, Hegde, J. himself, in *Kraipak* states this principle explicitly. Therefore the statement in the judgment of Hegde, J. in *Kraipak* that the rules of Natural justice can operate only in areas not covered by any law validly made, cannot mean that where the law granting a power does not express the requirement of Natural Justice, such power can be exercised without following Natural Justice. This particular sentence in para 20 of the said judgment, as printed in AIR., is followed immediately by another sentence which throws clear light on the meaning of the first-mentioned statement. The two sentences, one after the other, in the said judgment, may now be reproduced:-

> "These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the

law of the land but supplement it."

17. The use of the phrase "in other words", implies that the meaning of the first sentence is conveyed in a better manner by the second sentence. The plain and clear meaning of the second sentence is that the rules of Natural Justice supplement the Law of the land in the sense that no power, granted by any law can be exercised in violation of such rules, though the law granting such power does not expressly require their application. This critical analysis of the above statement in *Kraipak* has become necessary on account of the fact that in certain subsequent decisions the first sentence in the above quotation was stated in support of the exclusionary doctrine. That it is not so is clear from the second sentence. In *Union of India -vs-J.N.Sinha, AIR 1971 SC 40,* para 7, a bench of two judges, through one of them, stated as follows:-

> "7.... Rules of Natural Justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in Kraipak -vs- Union of India, AIR 1970 SC 150.
>
> > "The aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it. "It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice.

> But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power."

18. The above quotation stands clearly against the effect principle that was conclusively arrived at subsequently in *Maneka Gandhi* by a bench of seven judges. It is surprising that the judgment in *Sinha* which was quoted above, was rendered by Hegde, J., the same judge who championed the cause of Natural Justice in *Kraipak.* It is a further surprise that in making the above statement, Hegde, J., was speaking also on behalf of Shah, J., who had propounded and clearly stated the effect principle for the first time in India in *Dr. Binapani Devi.* This is an illustration of the tragedy that in many cases, pioneers who propound revolutionary theses, not only in the field of law, but also in every field of thought, do not realise fully the scope, significance and impact of their own theses, leaving it for the posterity to analyse their views, cull out only what is really revolutionary in those theses and eschew the vestige of the orthodox doctrines. The very first sentence in the quotation extracted from the judgement of Hegde, J.,

in *Sinha* that rules of Natural Justice cannot be elevated to the position of fundamental rights is clearly against the status rule which equates a violation of Natural Justice to a violation of Article 14 itself, implying that Natural Justice is an integral part of Article 14 of the Constitution, as clearly and authoritatively laid down in *Tulsiram Patel* by a Constitution Bench.

19. It would be an interesting exercise to see how even very sharp intellects fall into error, by sheer slip of the mind, which occurs, more likely, whenever a person, whether a philosopher, lawyer or judge proceeds to traverse beyond what is essentially required to be stated for the purpose of the exercise undertaken by him. In *Sinha* the question which arose for consideration was whether a compulsory retirement under fundamental rule 56(j), passed without following the Audi Alteram Partem rule could be upheld. Though the High Court quashed the order of compulsory retirement on the ground of non-compliance with the Audi Alteram Partem rule, the Supreme Court reversed the decision. The essential reasoning for arriving at such a conclusion, in the words of Hegde, J. runs as follows:-

> "8...Because of his compulsory retirement he does not lose any of the rights acquired by him before retirement. Compulsory retirement involves no civil consequences. The aforementioned Rule 56(j) is not intended for taking any penal action against the Government servants. That rule merely embodies one of the facets of the 'pleasure' doctrine embodied in Art.310 of the Constitution..."
>
> "9. It is true that a compulsory retirement is bound to have some adverse effect on the Government servant who is

> compulsorily retired but then as the rule provides that such retirements can be made only after the officer attains the prescribed age. Further a compulsorily retired Government servant does not lose any of the benefits earned by him till the date of his retirement. Three months' notice is provided so as to enable him to find out other suitable employment."
>
> "12. In Binapani Devi's case.... Dr. Binapani Devi's date of birth was refixed by the Government without giving her proper opportunity to show that the enquiry officer's report was not correct.... Therein the impugned order took away some of the existing rights of the petitioner."

20. Neither the facts of the case, as seen above, nor the reasoning in support of the conclusion arrived at warranted the general remarks in para 7 of the judgment. These general remarks stand against the two well-settled doctrines, namely, the effect principle and the status rule. If the effect principle is correct then the last sentence in such para 7 should read as follows:-

> whether the exercise of a power conferred should be made in accordance with any of the principles of Natural Justice or not depends upon the effect of the exercise of that power.

It should not depend upon anything else. It should not depend upon the express words of the provision conferring the power or the nature of the power conferred, or the purpose for which it is conferred, as assumed by Hegde, J. Similarly if Natural Justice is an integral part of Article 14, the first sentence in the quotation extracted from such para 7 is clearly wrong. What manifested in the judgment of Hegde, J. in

Sinha, was nothing but an extension of the 'gloss' placed by Hewart, C. J., to the dictum of Lord Atkin, L. J. This 'gloss' was condemned and burried, once in England by Lord Reid in *Ridge -vs- Baldwin* and again in India, by Bhagwati, J. in *Maneka Gandhi.* However it seems that the ghost of such 'gloss' continued to make visitations, under unwarranted circumstances, as may be seen from certain later cases. Even recently in *Superintendent of police v. Deepak Chowdhary, (1995) 6 SCC 225,* a bench of two judges, allowed an appeal against an order of the High Court, by which a sanction accorded for prosecuting a person had been quashed on the ground that no opportunity of hearing was given to him before the sanction was accorded. K. Ramaswamy, J., speaking for the bench said:-

> "5... The grant of sanction is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a Court of law. What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction. The grant of sanction, therefore, being administrative act the need to provide an opportunity of hearing to the accused before according sanction does not arise. The High Court, therefore, was clearly in error in holding that the order of sanction is vitiated by violation of the principles of natural justice."

No reference was made to any case whatsoever in that judgment. The ditinction that was extinguished in *Kraipak* surfaced unceremoniously in the above 1995 case.

7. THE LEGISLATIVE ATTACK

1. The decision of another Bench of two Judges in *Dr. Rash Lal Yadav v. State of Bihar (1994) 5 SCC 267* accepted the legislative supremacy theory, which was suggested in *Sinha,* on the following facts:- A person appointed as the chairman of the Bihar School Service Board for three years was removed from the said post within one year of such appointment. No opportunity to be heard was given to him before he was so removed. His writ petition was dismissed by the High Court of Patna. His appeal was heard and dismissed by a two-judge bench of the Supreme Court of India. In this case a notification removing the incumbent from the post of chairman was issued under Section 10 (7) of a certain Act. The Act had infact replaced an ordinance of a similar nature. The corresponding provision in the ordinance stipulated that before such removal a reasonable opportunity to show cause against such removal shall be given to the person sought to be removed. While the Act was enacted, this stipulation was dropped. The High Court of Patna, in this case, inferred from this fact that the legislature deliberately excluded application of the Audi Alteram Partem Rule to a case of removal of chairman or any member of the said Board. Speaking for the two-judge Bench of the Supreme Court of India, Ahmadi, J., as he then was, expressed complete agreement with this view and further stated that the exercise of such power of removal by the State Government stood circumscribed by the conditions stated in section 10(7) of the said Act,

and continued :-

> "The power cannot be exercised unless relevant material is placed before the State Government on the basis of which the State Government as a reasonable person is able to conclude that one or more of the conditions mentioned in the sub-section exists and therefore, it is necessary to exercise power of removal to safeguard the Board from harm.... Of course, if the State Government exercises the power vested in it under the said sub-section and if the exercise of such power is challenged in court, the State Government will have to satisfy the court that it exercised the power bonafide and on material relevant to establishing the existence of the factual situation necessary for exercise of the said power. That can at best be the extent of judicial scrutiny. The High Court did examine the material on which the State Government's decision for removal was founded, vide para 51-A of the judgment, and came to the conclusion that there was justification for the exercise of power and, therefore, the State Government was justified in ordering removal... We, therefore, see no reason to interfere..."

2. In the above case on the question of natural justice, reference was made only to five cases: (a) *Kraipak*, (b) *Dr. Binapani Devi,* (c) *Colonel J.N. Sinha* (d) *Swadeshi Cotton Mills* and (e) *Mohinder Singh Gill*. Of these five cases, two have already been dealt with in detail, earlier in the present discussion. They are *Kraipak* and *Dr. Binapani Devi.* The other three cases are yet to be dealt with. The innocuous statement already referred to above in *Kraipak* does not suggest or imply legislative supremacy

over natural justice though, in *Sinha,* it was stated in support of such a theory. Certainly the judgment in *Dr. Binapani Devi* had nothing to do with any such suggestion. In fact, *Maneka* was decided after *Kraipak* and explicitly taking note of *Kraipak,* by a special bench of seven Judges. No view was expressed even by implication in *Maneka* to support the legislative supremacy over natural justice. Neither Beg, C. J. nor Chandrachud, J. as he then was, nor Bhagwati, J. nor V.R. Krishna Iyer, J. who represented the majority of the Special Bench which heard that case suggested anywhere in the judgment that a provision of law can exclude application of natural justice, totally. Infact Krishna Iyer, J. after considering in detail the dissenting view of Fazl Ali, J. in *A.K.Gopalan,* approved the view that the procedure established by law for the purpose of Article 21 included in its fold, principles of natural justice, though Krishna Iyer, J. was a little doubtful whether such principle included the four-fold formulation of natural justice, of Professor Willis approved by Fazl Ali, J. In his inimitable style, Krishna Iyer, J. concluded, in *Maneka, AIR 1978 SC 597:-*

> "122. In sum Fazl Ali, J. struck the chord which does accord with a just processual system where liberty is likely to be the victim. May be, the learned Judge stretched it a little beyond the line but in essence his norms claim my concurrence."

3. Bhagwati, J. more explicitly, expressed himself in *Maneka (AIR)* on the claim of the so-called exclusionary doctrine:-

> "63…Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from 'fair play in action', it may equally be excluded where, having regard to the nature of the action to be taken,

its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants exclusion. There are certain well recognised exceptions to the audi alteram partem rule established by judicial decisions and they are summarised by S. A. de Smith in Judicial Review of Administrative Action, 2nd Edn. at pages 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair-play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases, the audi alteram partem rule is held inapplicable not by way of an exception to 'fair play in action', but because nothing unfair can be inferred by not affording an opportunity to present or meet a case..... the audi alteram partem rule would, by the experiential (misprint: 'experimental') test be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands... that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not

> be forgotten that 'natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances'. The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise..."

4. From the above passage it is clear that even while speaking of exclusion of natural justice, Bhagwati, J. never suggested such exclusion to be brought in merely by a provision of law. On the other hand he carefully phrased his view: ."..having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, 'fairness in action' may demand and warrant in extreme cases such exclusion." Of these circumstances, courts are the ultimate authorities to decide. Thus a limited judicial supremacy, conditioned by objective principles, seems to have been recognised by Bhagwati, J. on natural justice.

The view expressed by Krishna Iyer, J. in *Mohinder Singh Gill, AIR 1978 SC 851,* is not different. However, in one place, at least, Krishna Iyer, J. casually remarks:

> "43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority..." (Emphasis supplied)

6. In the above passage, no doubt, a limited legislative supremacy over natural justice is suggested. However, one fact must not be overlooked: that this pronouncement itself was pre-Maneka and much prior to a clear cut, categorical recognition of the constitutional and fundamental status of natural justice, as declared in *Tulsiram Patel.* Factually, the judgment in *Mohinder Singh Gill* was delivered on 2.12.1977, while the judgment in *Maneka* was delivered on 25.1.1978. Hence, the remark quoted above, was a vestige of the old law that saw natural justice not as a fundamental right to fair procedure, permeating every article in Part III of the Constitution of India, but as an abstract principle of Roman origin, imported into India via the English Channel. Despite having made such a casual remark, Krishna Iyer, J. clearly soars above the old law and heralds, in unequivocal terms, the coming of the new doctrine. In fact, the new doctrine was in the horizon, visible, though, clouded. Ignoring the unnecessary details of facts, it is found that the challenge in *Mohinder Singh Gill* was to an order by the Election Commission, cancelling a poll for an entire Parliamentary constituency and directing re-poll, without any prior hearing of the candidates. Krishna Iyer, J. formulated the related question, aptly:

> "37.
>
> (a) ……
>
> (b) Since the text of the provision is silent about hearing before acting, is it permissible to import into Article 324(1) an obligation to act in accord with natural justice?"

Krishna Iyer, J. proceeded :-

> "62. In Wiseman v. Borneman (1967) 3 All ER 1045 there

was a hint of the competitive claims of hurry and hearing. Lord Reid said 'Even where the decision has to be reached by a body acting judicially, there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see material against him...' We agree that the elaborate and sophisticated methodology of a formalised hearing may be injurious to promptitude so essential in an election under way. Even so, natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. To burke it altogether may not be a stroke of fairness except in very exceptional circumstances. Even in Wiseman where all that was sought to be done was to see if there was a prima facie case to proceed with a tax case where inevitably, a fuller hearing would be extended at a later stage of the proceedings, Lord Reid, Lord Morris of Borth-Gost (sic for Borth-y-Gest) and Lord Wilberforce suggested "that there might be exceptional cases where to decide upon it ex parte would be unfair, and it would be the duty of the tribunal to take appropriate steps to eliminate unfairness" (Lord Denning M. R., in Howard v. Borneman (1974) 3 WLR 660 summarised the observations of the law Lords in this form). No doctrinaire approach is desirable but the Court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that counsel should be allowed to appear nor is it compulsory

that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases, be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election Commission, if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on what, in the critical circumstances, should have been done for a fair play of fair hearing. This is a matter pre-eminently for the election tribunal to judge, having before him the vivified totality of all the factors. All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty."

"75. Fair hearing is thus a postulate of decision-making

> cancelling a poll, although fair abridgement of that process is permissible. It can be fair without the rules of evidence or forms of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law."

7. Thus the casual remark in para 43(AIR) in the above judgment simply hangs in the air, not further explained, supported or elaborated, and only to be ignored, with due respect. The main thesis presented in the judgment does not support the legislative supremacy theory. Even the said casual remark, as suggested earlier, is limited in scope. It postulates exclusion of natural justice only by a valid law. In other words, wherever a provision of law seeks to exclude application of natural justice, its validity would be examined on that score. Such examination necessarily would lead to the limited judicial supremacy over natural justice enunciated in *Maneka*. This hint was taken up and well brought out by Jeevan Reddy, J., when he observed in *State of Uttar Pradesh V. Vijay Kumar Tripati, (1995) Supp 1 SCC 552:*

> "7....The normal rule enunciated by this Court is that wherever it is necessary to ensure against the failure of justice, principles of natural justice must be read into a provision. Such a course, of course, is not permissible where the rule excludes, either expressly or by necessary intendment, the application of the principles of natural justice but in that event validity of rule may fall for consideration..."

8. The resultant position appears to be that a legislative abridgement of

natural justice in a given situation will be and ought to be tested very strictly by courts of law and except in extreme and the rarest of rare cases a total exclusion of natural justice should never be sustained. This was the conclusion arrived at by Krishna Iyer, J. in *Mohinder Singh Gill*. Bhagwati, J. in *Maneka* held with equal force that total exclusion of natural justice was alien to the spirit of the Indian Constitution.

9. Having failed in its attempt to lift certain powers, executive, administrative and contractual, beyond the reach of natural justice, and having further failed in its attempt to do so through exercise of legislative power, the exclusionary doctrine revived its attempt to do so by resort to the constitutional provisions. The attempt was, in the form of the contention that a provision in the constitution itself can effectively exclude the application of natural justice to certain situations. This aspect of the present discussion leads to a consideration of certain decisions, including *Tulsiram Patel,* rendered in the field of service jurisprudence.

8. THE CONSTITUTIONAL ATTACK

1. In the preceding chapters, *Tulsiram Patel, AIR 1985 SC 1416,* was frequently referred to as a clear authority for the proposition that a violation of the principles of natural justice is a violation of Article 14. Though this is so, that proposition was not laid down for the first time in that case. *Tulsiram Patel* was decided on 11.7.85. However in *West Bengal State Electricity Board v. Desh Bandu Gosh* decided on 26.2.85, by a three-judge Bench of the Supreme Court and reported in AIR 1985 SC 722, this principle was suggested as the logical result of the new interpretation of Article 14, thereby impliedly, though not expressly referring to *Royappa* and *Maneka.* In *Tulsiram Patel* the principle was expressly stated. Thus the judgment in *Tulsiram Patel* rendered a great service to the cause of justice, more particularly to the cause of the essential principles of justice called natural justice. However, not withstanding such great service it did, the final decision therein approved of a position which denied natural justice under certain circumstances. It is necessary to examine the context and the ratio of the said judgment in detail.

2. In order to appreciate the issues raised, considered and decided in *Tulsiram Patel,* two amendments made to Article 311, after the framing of the Constitution and before *Tulsiram Patel* was decided, require consideration. Article 311, as originally enacted, when the Constitution

was framed, was in the following form:-

> "Article 311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.
>
> 1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
>
> 2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:
>
> Provided that this clause shall not apply —
>
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;
>
> (b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or
>
> (c) where the President or Governor or Rajpramukh, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give to that person such an opportunity.

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final."

3. This Article was amended for the first time by the Constitution (7th amendment) Act, 1956, whereby the words "or Rajpramukh" in clause 'C' of the proviso were omitted. This amendment has no significance or relevance for the present discussion. The next amendment to this Article was brought about by the Constitution (15th amendment), Act, 1963. Clauses 2 and 3 of the said Article were substituted as shown hereunder:-

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply —

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in

writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

4. This Article was amended again by the Constitution (42nd amendment) Act, 1976, whereby clause 2, as substituted by the 15th amendment was amended in certain respects. After the 42nd amendment, clause 2 of the said Article took the following form, preserved till this date:-

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:-

Provided further that this clause shall not apply —

(a) where a person is dismissed or removed or reduced

in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry."

5. The 15th amendment became necessary only to bring the said Article in line with the interpretation placed on it in *Khem Chand v Union of India, AIR 1958 SC 300,* at the same time to curtail an unnecessary extension of the principles which prompted such interpretation. In *Khem Chand,* a Constitution Bench of the Supreme Court held that a reasonable opportunity is one where the delinquent is informed of the charges and the allegations forming the basis of such charges, and is further given an opportunity to cross-examine, examine and finally given an opportunity to make his representation as to why the proposed punishment should not be inflicted on him. The Constitution Bench held in that case that the last-mentioned opportunity would be meaningful only if the competent authority proposed tentatively, after the enquiry was over and after applying his mind to the gravity or otherwise of the charges proved, to inflict one of the three punishments, namely, dismissal, removal and reduction in rank and communicated the same to the delinquent. To make this requirement explicit, but at the same time to limit the consideration of the representation to the evidence already adduced during the enquiry,

the above amendment was made. In *Union of India v. H.C.Goel, AIR 1964 SC 364,* a Constitution Bench of the Supreme Court held as follows:-

> "(10) Article 311 consists of two sub-articles and their effect is no longer in doubt. The question about the safeguards provided to the public servants in the matter of their dismissal, removal or reduction in rank by the Constitutional provision contained in Art.311, has been examined by this court on several occasions. It is now well settled that a public servant who is entitled to the protection of Art.311 must get two opportunities to defend himself. He must have a clear notice of the charge which he is called upon to meet before the departmental enquiry commences, and after he gets such notice and is given the opportunity to offer his explanation, the enquiry must be conducted according to the rules and consistently with the requirements of natural justice. At the end of the enquiry, the enquiry officer appreciates the evidence, records his conclusions and submits his report to the Government concerned. That is the first stage of the enquiry, and this stage can validly begin only after charge has been served on the delinquent public servant."
>
> "(11) After the report is received by the Government, the Government is entitled to consider the report and the evidence led against the delinquent public servant. The Government may agree with the report or may differ, either wholly or partially, from the conclusions recorded in the report. If the report makes findings in favour of the public

servant, and the Government agrees with the said findings, nothing more remains to be done, and the public servant who may have been suspended is entitled to reinstatement and consequential reliefs. If the report makes findings in favour of the public servant and the Government disagree with the said findings and holds that the charges framed against the public servant are prima facie proved, the Government should decide provisionally what punishment should be imposed on the public servant and proceed to issue a second notice against him in that behalf. If the enquiry officer makes findings, some of which are in favour of the public servant and some against him, the Government is entitled to consider the whole matter and if it holds that some or all the charges framed against the public servant are, in its opinion, prima facie established against him, then also the Government has to decide provisionally what punishment should be imposed on the public servant and give him notice accordingly. It would thus be seen that the object of the second notice is to enable the public servant to satisfy the Government on both the counts, one that he is innocent of the charges framed against him and the other that even if the charges are held proved against him, the punishment proposed to be inflicted upon him is unduly severe. This position under Art.311 of the Constitution is substantially similar to the position which governed the public servants under S.240 of the Government of India Act, 1935. The scope and effect of the provisions of

> S.240 of the Government of India Act 1935, as well as the scope and effect of Art.311 of the Constitution have been considered by judicial decisions on several occasions and it is unnecessary to deal with this point in detail."

6. The effect of this decision made the restrictive clause, restricting the second opportunity, to the evidence already adduced, insignificant. The attempt to abridge the scope of natural justice was effectively defeated. Hence the third-mentioned amendment was brought in by the 42nd amendment Act. By this amendment the portion in clause 2 requiring giving of another opportunity was deleted and a proviso was added before the then-existing proviso. Under the new proviso it was no longer necessary to give another opportunity to the delinquent to make representation on the question of penalty. Under these circumstances a three-judge Bench of the Supreme Court, in *Union of India v. Mohammed Ramzan Khan, AIR 1991 SC 471,* considered two earlier judgments of the Supreme Court on this issue, rendered after the 15th amendment, but before the 42nd amendment and then proceeded to State the legal position after the 42nd amendment. Ranganath Mishra, C. J., speaking for the court said:-

> "10. A Three-Judge Bench of this Court in State of Gujarat v. R.G. Teredesai, (1970)1 SCR 251: (AIR 1969 SC 1294) has indicated that the Inquiry Officer was under no obligation or duty to make any recommendations in the matter of punishment to be imposed on the government servant against whom the departmental inquiry is held and his function merely is to conduct the inquiry in accordance

with law and to submit the record along with the findings or conclusions on the delinquent servant. But if the Inquiry Officer has also made recommendations in the matter of punishment, that is likely to affect the mind of the punishing authority with regard to penalty or punishment to be imposed on such officer which must be disclosed to the delinquent officer. Since such recommendation forms part of the record and constitutes appropriate material for consideration of the Government, it would be essential that that material should not be withheld from him so that he could while showing cause against the proposed punishment make a proper representation. The entire object of supplying a copy of the report of the Inquiry Officer is to enable the delinquent officer to satisfy the punishing authority that he is innocent of the charges framed against him and that even if the charges are held to have been proved the punishment proposed to be inflicted is unduly severe. At p.254 (of SCR): (at p.1296 of AIR) of the Reports Grover, J. speaking for this Court stated:

> "The requirement of a reasonable opportunity, therefore, would not be satisfied unless the entire report of the Inquiry Officer including his views in the matter of punishment are disclosed to the delinquent servant."

Another three-Judge Bench decision of this Court is that of Uttar Pradesh Government v. Sabir Hussain (1975) Suppl. SCR 354 : (AIR 1975 SC 2045) where this Court held (at p.2049 of AIR):

> "In view of these stark facts the High Court was right in holding that the plaintiff (respondent) was not given a reasonable opportunity to show cause against the action proposed to be taken against him and that the non-supply of the copies of the material documents had caused serious prejudice to him in making a proper representation."

"11. The question which has now to be answered is whether the Forty-Second Amendment has brought about any change in the position in the matter of supply of copy of the report and the effect of non-supply thereof on the punishment imposed."

"12. We have already noticed the position that the Forty-Second Amendment has deleted the second stage of the inquiry which would commence with the service of a notice proposing one of the three punishments mentioned in Art.311(1) and the delinquent officer would represent against the same and on the basis of such representation and/or oral hearing granted the disciplinary authority decides about the punishment. Deletion of this part from the concept of reasonable opportunity in Art.311(2), in our opinion, does not bring about any material change in regard to requiring the copy of the report to be provided to the delinquent."

"13. Several pronouncements of this Court dealing with Art.311(2) of the Constitution have laid down the test of natural justice in the matter of meeting the charges. This Court on one occasion has stated that two phases of the inquiry contemplated under Art. 311(2) prior to the

42nd amendment were judicial. That perhaps was a little stretching the position. Even if it does not become a judicial proceeding, there can be no dispute that it is a quasi-judicial one. There is a charge and a denial followed by an inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principles of natural justice. As this Court rightly pointed out in the Gujarat case (AIR 1969 SC 1294), the disciplinary authority is very often influenced by the conclusions of the Inquiry Officer and even by the recommendations relating to the nature of punishment to be inflicted. With the Forty-Second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his conclusions with or without recommendations as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of

natural justice would be affected."

"15. Deletion of the second opportunity from the scheme of Art.311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Art.311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the 42nd amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with the recommendations, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-

Second Amendment has not brought about any change in this position."

"16. At the hearing some argument had been advanced on the basis of Art.14 of the Constitution, namely, that in one set of cases arising out of disciplinary proceedings furnishing of the copy of the inquiry report would be insisted upon while in the other it would not be. This argument has no foundation in as much as where the disciplinary authority is the Inquiry Officer there is not report. He becomes the first assessing authority to consider the evidence directly for finding out whether the delinquent is guilty and liable to be punished. Even otherwise, the inquiries which are directly handled by the disciplinary authoriy and those which are allowed to be handled by the Inquiry Officer can easily be classified into two separate groups — one, where there is no inquiry report on account of the fact that the disciplinary authority is the Inquiry Officer and inquiries where there is a report on account of the fact that an officer other than the disciplinary authority has been constituted as the Inquiry Officer. That itself would be a reasonable classification keeping away the application of Art.14 of the Constitution."

"17. There have been several decisions in different High Courts which, following the Forty-Second Amendment, have taken the view that it is no longer necessary to furnish a copy of the inquiry report to delinquent officers. Even on some occasions this Court has taken that view. Since we have reached a different conclusion the judgments in the different

High Courts taking the contrary view must be taken to be no longer laying down good law. We have not been shown any decision of a coordinate or a larger Bench of this Court taking this view. Therefore, the conclusion to the contrary reached by any two-Judge Bench in this Court will also no longer be taken to be laying down good law, but this shall have prospective application and no punishment imposed shall be open to challenge on this ground."

"18. We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."

"19. On the basis of this conclusion, the appeals are allowed and the disciplinary action in every case is set aside. There shall be no order for costs. We would clarify that this decision may not preclude the disciplinary authority from revising the proceeding and continuing with it in accordance with law from the stage of supply of the inquiry report in cases where dismissal or removal was the punishment."

7. The law on this subject, in spite of the decision in *Mohd. Ramzan Khan* still required a more authoritative pronouncement. It was so, because there

was another decision of another bench of three judges of the Supreme Court in *Kailash Chandar Asthana - vs - State of U.P., AIR 1988 SC 1338,* wherein the Court refused to invalidate an order passed dismissing a judicial officer, though the report of a tribunal which conducted the enquiry into the charges was not furnished to the delinquent officer and based on the report the High Court of U.P., by a full court decision had recommended removal of the officer, pursuant to which the Government terminated his services. L.M. Sharma, J., as he then was, speaking for the court, stated :-

> "5.... The question of service of copy of the report arose on account of a right of a second show cause notice to the Government servant before the 42nd Amendment and since present disciplinary proceeding was held later the petitioner cannot legitimately demand a second opportunity. That being the position, non-service of a copy of the report is immaterial."

8. This decision in *Kailash Chandar Asthana* was not referred to or relied upon in *Mohd. Ramzan.* In fact Ranganath Mishra, C. J., who delivered the judgment in *Mohd. Ramzan* had clearly stated, "we have not been shown any decision of a coordinate or a larger Bench of this Court taking this view." In view of this seeming conflict, a subsequent case, *Managing Director, ECIL-vs- Karunakar, 1994 AIR SCW 1050,* came to be referred to a Constitution Bench. Sawant, J., delivered the leading judgment for himself and on behalf of three other judges. Sawant, J. held, after considering several cases on this issue starting from *Khemchand,* that:-

> " 7... The reason why the right to receive the report of

> the Inquiry Officer is considered as essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. ...Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusion, the delinquent employee should have an opportunity to reply to the Inquiry Officer's findings."

9. It was further held in that case that even where the statutory rules do not permit the furnishing of such report or are silent on the subject, a copy of the report must be given. It was also held that a failure by the employee to ask for the report must not be construed as a waiver. It was further declared that the law laid down in *Mohd. Ramzan* should apply to employees in all establishments, whether Government or non-Government, whether public or private, and whether there are rules governing such proceedings or not. It was also held that even where the punishment imposed is not one of the three mentioned in Article 311 of the Constitution, furnishing of a copy of the report to the employee is mandatory, provided there are rules in such cases requiring an enquiry to be held before imposing such punishment. Then arose the crucial question (at page 1074 of SCW):-

> "(v) The next question to be answered is what is the effect on the order of punishment when the report of the Inquiry Officer is not furnished to the employee and what relief should be

granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

10. Directions were given that wherever such report was not furnished the courts/tribunals should cause the same to be furnished, give to the employee an opportunity to show how his case was prejudiced because

of its non-supply and if prejudice is established the punishment should be set aside otherwise there should be no interference. Even where the punishment is so set aside, the courts/tribunals have been directed to reinstate the employee and grant liberty to the employer to proceed with the enquiry, suspend the employee and continue the enquiry from that stage. This rule was made inapplicable to orders of punishment passed before the date of judgment in *Mohd. Ramzan.* Such a prospective ruling was stated to be required by administrative reality and public interest. K.Ramaswamy, J., agreed with Sawant, J., on all aspects except one. While Sawant, J., held that granting of relief to the petitioner in *Mohd. Ramzan* was per incuriam, since it applied the prospective rule restrospectively to a punishment awarded before the date of that judgment, K.Ramaswamy, J. disagreed on this point.

11. With great respect, it is submitted that the directions given by Sawant, J. in *ECIL* are not in line with the legal position settled by earlier decisions. Megarry, J., in *Leary -vs- National Union of Vehicle Builders, 1971 (1) Ch. 34* stated:-

> "if one accepts the contentions that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body this has the result of depriving the member of his right of appeal from the expelling body.... As a general rule at all events, I hold that failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

12. In India the law was stated explicitly and authoritatively in *A.R. Antulay -vs- R.S. Nayak, AIR 1988 SC 1531* by a bench of seven judges. Speaking for the majority, Sabyasachi Mukharji, J. stated in para 57 of the judgment:-

> "... He (counsel) invited us to consider two questions: (1) does the impugned order promote justice? and (2) is it technically valid? After considering these two questions, we are clearly of the opinion that the answer to both these questions is in the negative. No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental right itself renders the impugned action void. So also the violation of the principles of natrual justice renders the act a nullity."

13. The same principle was reiterated in *Union Carbide Corpn. - vs- Union of India, AIR 1992 SC 248,* decided by a Constitution Bench (at page 299 thereof). However what was ultimately decided in that case, which dealt with a court-assisted settlement in the Bhopal Gas leak matter, should be strictly confined to the unique facts and circumstances of that case and such decision on facts, was never intended to be the general rule. How far the direction given in *ECIL* to ignore violation of natural justice in the absence of prejudice on merits is right on the facts of the case is not a question within the scope of the present discussion, for it would be a mixed question of law and facts. However the view taken by Sawant, J. overlooks the unconstitutionality and the consequential nullity of orders passed in violation of natural justice, particularly, in violation of the Audi Alteram Partem rule. It is enough to note for the present discussion that inspite of the constitutional amendments denying natural justice Courts have insisted upon observance of natural justice. This view is directly in line with the reasoning adopted by Chandrachud, C. J. on behalf of the majority in *Minerva Mills Ltd. -vs- Union of India, AIR 1980 SC 1789,* decided by a Constitution Bench. The question which arose for consideration in that case was whether the amendments introduced by Sections 4 and 55 of the Constitution (fortysecond amendment) act, 1976

damaged the basic structure of the Constitution by destroying any of its basic features of essential elements. Chandrachud, . J. declared both the sections and the consequential amendments brought in by them as void. He stated the reasons in the following words:-

> "21. We will first take up for consideration the comparatively easier question as regards the validity of the amendments made by Section 55 of the 42nd Amendment. It introduces two new clauses in Article 368, namely, clauses (4) and (5). Clause (5) speaks for itself and is self-explanatory. Its avowed purpose is the "removal of doubts" but after the decision of this Court in Kesavananda Bharati, AIR 1978 SC 1461 there could be no doubt as regards the existence of limitations on the Parliament's power to amend the Constitution. In the context of the constitutional history of Article 368, the true object of the declaration contained in Article 368 is the removal of those limitations. Clause (5) confers upon the Parliament a vast and undefined power to amend the Constitution, even so as to distort it out of recognition. The theme song of the majority decision in Kesavananda Bharati is:
>
> 'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity'.
>
> The majority conceded to the Parliament the right to make alterations in the Constitution so long as they are within its basic framework. And what fears can that judgment raise or

misgivings generate if it only means this and no more. The Preamble assures to the people of India a polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments to the Constitution as it deems

expedient so long, as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of 'Fraternity assuring the dignity of the individual and the unity of the Nation'. The newly introduced clause (5) of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever." No constituent power can conceivably go higher than the sky-high power conferred by cl.(5), for it even empowers the Parliament to "repeal the provisions of this Constitution", that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by

abjuring commitment to the magnificent ideal of a society of equals. The power to destroy is not a power to amend."

"22. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."

"23. The very 42nd Amendment which introduced clauses (4) and (5) in Art.368 made amendments to the preamble to which no exception can be taken. Those amendments are not only within the framework of the Constitution but they give vitality to its philosophy; they afford strength and succor to its foundations. By the aforesaid amendments, what was originally described as a 'Sovereign Democratic Republic' became a "Sovereign Socialist Secular Democratic Republic" and the resolution to promote the 'unity of the Nation' was elevated into a promise to promote the "unity and integrity of the Nation." These amendments furnish the most eloquent example of how the amending power can be

exercised consistently with the creed of the Constitution. They offer promise of more, they do not scuttle a precious heritage."

"24. In Smt. Indira Nehru Gandhi v. Raj Narain, (1976) 2 SCR 347: (AIR 1975 SC 2299) Khanna, J. struck down clause 4 of Article 329A of the Constitution which abolished the forum for adjudicating upon a dispute relating to the validity of an election, on the ground that the particular Article which was introduced by a constitutional amendment violated the principle of free and fair elections which is an essential postulate of democracy and which, in its turn, is a part of the basic structure of the Constitution. Mathew, J. also struck down the Article on the ground that it damaged the essential feature of democracy. One of us, Chandrachud, J. reached the same conclusion by holding that the provisions of the Article were an outright negation of the right of equality conferred by Art.14, a right which, more than any other, is a basic postulate of the Constitution. Thus, whereas amendments made to the preamble by the 42nd Amendment itself afford an illustration of the scope of the amending power, the case last referred to afford (sic, for 'affords') an illustration of the limitations on the amending power."

"25. Since, for the reasons above mentioned, Clause (5) of Art.368 transgresses the limitations on the amending power, it must be held to be unconstitutional."

"29. The next question which we have to consider is whether the amendment made by Section 4 of the 42nd Amendment to Article 31C of the Constitution is valid. Mr. Palkhivala did not challenge the validity of the unamended Art.31C, and indeed that could not be done. The unamended Article 31C forms the subject-matter of a separate proceeding and we have indicated therein that it is constitutionally valid to the extent to which it was upheld in Kesavananda Bharati, (AIR 1973 SC 1461)."

"30. By the amendment introduced by Section 4 of the 42nd Amendment, provision is made in Art.31C saying that no law giving effect to the policy of the State towards securing "all or any of the principles laid down in Part IV" shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Art. 31. It is manifest that the scope of laws which fall within Article 31C has been expanded vastly by the amendment. Whereas under the original Article 31C, the challenge was excluded only in respect of laws giving effect to the policy of the State towards securing "the principles specified in Clause (b) or Clause (c) of Art. 39" under the amendment, all laws giving effect to the policy of the State towards securing "all or any of the principles laid down in Part IV" are saved from a constitutional challenge under Arts. 14 and 19. (The reference to Art.31 was deleted by the 44th Amendment as a consequence of the abolition of the right to property as a fundamental right). The question for consideration in the light of this position is whether S.4

of the 42nd Amendment has brought about a result which is basically and fundamentally different from the one arising under the unamended article. If the amendment does not bring about any such result, its validity shall have to be upheld for the same reasons for which the validity of the unamended article was upheld."

"60. Fundamental rights occupy a unique place in the lives of civilized (sic, for civilized) societies and have been variously described in our Judgments as "transcendental", "inalienable" and "primordial." For us, it has been said in Kesavananda Bharati (1973) Supp SCR 1 (p. 991): (AIR 1973 SC 1461), they constitute the ark of the Constitution."

"61. The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights

and directive principles is an essential feature of the basic structure of the Constitution."

"62. This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice — social, economic and political. We, therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal is human freedoms. One of the faiths of our founding fathers was the purity of means.

Indeed, under our law, even a dacoit, who has committed a murder cannot be put to death in the exercise of right of self-defence after he has made good his escape. So great is the insistence of civilised laws on the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution."

"63... On any reasonable interpretation, there can be no doubt that by the amendment introduced by Section 4 of the 42nd Amendment, Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31C."

"79. Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual."

"80. These then are our reasons for the order which we

passed on May 9, 1980 to the following effect:

> "Section 4 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution."
>
> "Section 55 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it removes all limitations on the power of the Parliament to amend the Constitution and confers power upon it to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure."

14. After the dictum laid down in *Minerva Mills,* to allow violation of natural justice, which is the same as violation of Article 14, to be brought about even by a constitutional amendment, may not be in line with the settled law on the amendatory powers of the parliament. It is in this spirit that the benevolent dictum in *Mohd. Ramzan* must be interpreted. This aspect was not considered by Sawant, J. Hence the judgment in *ECIL* case cannot imply that violation of natural justice may be ignored if it had not resulted in prejudice on facts.

15. For the present, the conclusion reached is that no constitutional provision may be introduced by way of an amendment so as to abrogate the right to natural justice guaranteed and protected by Article 14 of the Constitution. This is not different from saying that by no amendment of the constitution, Article 14 can be deleted from it.

16. Now *Tulsiram Patel* may be re-examined. The question which arose for consideration in that case related to the second proviso to Art.311(2) of the Constitution. The said proviso excludes the operation of Art.311(2) in every one of the three circumstances mentioned as (a), (b) and (c). This proviso has not suffered any substantial change since the framing of the constitution, except change of certain words to bring them in tune with the change made in the main sub-article (2) by the 15th amendment, changing the requirement of giving an opportunity as the requirement of conducting an inquiry. The contention that the second proviso is unconstitutional would be ill-founded, since, it has been there since the framing of the Constitution. Hence, in that case, it was contended that the second proviso must be liberally construed in favour of the Government servants and strictly against the Government. It was contended that on such a construction it could be held that some minimum opportunity, as opposed to a full inquiry, was not ruled out by the said proviso. It was further contended that Art.311 should be read as subject to Art.14, and since the Audi Alteram Partem rule was part of Article 14, this contention meant that Article 311, together with the second proviso to sub-article(2) should be construed as being subject to a minimum requirement of observance of the Audi Alteram Partem rule. These contentions were rejected. The Bench however accepted the status rule, that natural justice is part of Article 14. The rejection of the contentions was on the ground

that one constitutional provision could abridge another constitutional provision. Could this be right?

17. The question whether a constitutional provision itself is right cannot be asked in a legal sense. The ultimate touchstone on which every provision of law may be tested is the constitution itself. There is no other authority, acceptable legally by which the validity of a provision in the constitution can be tested. Though philosophically or politically such an authority may be postulated, it cannot be so postulated for the purpose of a legal scrutiny. The question of the validity of a provision of law, for the purpose of adjudication by a court, is the same as the question whether such provision is constitutional or unconstitutional. In fact, the principles of Natural Justice, which were originally evolved as transcendental principles, especially, in countries which did not have a formal written constitution, in due course, came to be recognised as principles enunciated, implied and protected by constitutional provisions in countries which have framed formal constitutions. It happened so, atleast in U.S.A. and India. In U.S.A., the principles of natural justice are derived, and guaranteed by 'the due process of law' clause found in its Constitution. In India, they are reckoned as part of Articles 14, 19 and 21 of the Constitution and have even been described as permeating the entire Part III of the Constitution. Therefore, it is difficult to contend that there is some principle or set of principles, which are transcendental in the sense, standing outside and beyond the reach of the constitution, atleast in countries which do have formal constitutions.

18. The question here is not whether a particular constitutional provision is right or wrong. The question is whether a provision in a constitution can restrict the scope and application of another provision in the same

constitution. There may not be much difficulty in giving an affirmative answer to this question. The further question is whether a provision in a constitution falling within a particular section or chapter therein, considered and generally recognised to be fundamental and basic to that constitution itself, can be interpreted so as to restrict in scope and application of another provision which forms part of such fundamental and basic chapter or section. Even this question can have an affirmative answer. However when it is asked whether a provision in a constitution outside a particular section or chapter therein, considered and generally recognised to be fundamental and basic to that constitution itself, can be interpreted so as to restrict the scope and application of another provision which forms a part of such fundamental and basic chapter or section, it is very difficult to suggest and justify an affirmative answer, unless one would like to obliterate the distinction between ordinary provisions and fundamental provisions within a constitution and treat every provision therein as having equal status. However, in India the law declared by an eminent bench of 13 judges in *Kesavananda Bharathi* and further interpreted by a Constitution bench in *Minerva Mills* is that there are certain features in the constitution which form the basic structure of the constitution itself and that Articles 14, 19 and 21 therein form the core of such basic structure. It was already noticed that the status principle, formulated above, recognised natural justice to be atleast one of the central principles enshrined in Article 14. If this broad reasoning percolates through the juristic understanding, pebbled and bewildered by seemingly unconnected doctrines and theories, then, ultimately, when this broad reasoning reaches the heart of such juristic understanding and settles down, no interpretation would be ventured judicially or

semantically as would juxtapose any provision of the constitution with the need to observe natural justice. With a sense of relief given by this hypothetical conclusion, it must be admitted, at present, that the constitution bench which decided *Tulsiram Patel* did favour such an interpretation of the second proviso in Article 311(2).

19. It was held in *Tulsiram Patel* that the said sub article (2) explicitly conferred the protection of natural justice upon Government servants and explicitly, by its second proviso, denied such protection under three distinct circumstances. They further held that in view of such explicit denial, it would be impermissible to re-import such protection even in such exclusionary circumstances, by resort to article 14. This is the law of the land, in India, at present. In fact the effect of the second proviso, so interpreted in *Tulsiram Patel,* was not the subject of consideration either in *Mohd. Ramzan* or in the *ECIL,* which decided only the scope of the first proviso, to mean that the delinquent would be entitled to a copy of the enquiry report, in all cases where the enquiry officer is not the authority to impose the three major punishments.

20. The conclusion is that one provision in the constitution can take some cases of exercise of affectative power beyond the reach of natural justice. The provisions enabling declaration of an emergency found in the constitution offer another illustration in support of the above conclusion. However, this conclusion does not in any way affect the proposition that no provision can be introduced into the constitution, by way of amendment, to restrict the reach of natural justice, as was arrived at after taking note of the ratio in *Minerva Mills.* This result flows from the doctrine of limited amending power, accepted in *Kesavananda.*

21. In sum, the attempts of the exclusionary doctrine to defeat natural justice in the hypothetical legal battle, by postulating administrative power,

executive power and contractual power as being outside the ambit and reach of natural justice failed miserably due to benevolent and discerning judicial dicta laid down with great insight by eminent judges.

22. Legislative power was also not successful in whittling down and restricting the reach of natural justice. This statement does not mean that legislative power is not exercisable without observance of natural justice. The statement means that by legislation no power, administrative, executive or contractual can be permitted to be exercised in violation of natural justice. However the same could not be said of a constitutional provision. While natural justice is not subject to the legislative supremacy, it has yielded and submitted itself to the constitutional supremacy — such supremacy recognised only in constitutional provisions enacted originally by the framers of the constitution and not in the amending power of the parliament.

23. In *Kochuni -vs- State of Madras and Kerala, AIR 1960 SC 1080,* Subba rao, J., speaking on behalf of the majority of the Constitution Bench which heard that case, had an occasion to consider whether one provision in the Constitution can affect another provision in the same Constitution. He stated:-

> "22. Fundamental rights have a transcendental position in the Constitution. Our constitution describes certain rights as fundamental rights... and places them in a separate part. It provides a machinery for enforcing those rights. Article 32 describes a guaranteed remedy for the enforcement of those rights and makes the remedial right itself a fundamental right it is true that any other Article of the Constitution may exclude the operation of the fundamental rights in respect of a specific matter — for instance, Arts.31A and 31B. It

> may also be that an Article embodying a fundamental right may exclude another by necessary implication, but before such a construction excluding the operation of one or other of the fundamental rights is accepted, every attempt should be made to harmonise the two Articles so as to make them co-exist, and only if it is not possible to do so, one can be made to yield to the other. Barring such exceptional circumstances, any law made would be void if it infringes any one of the fundamental rights...."

24. In that case the majority held that a law depriving a citizen of his property shall be void, unless it complied with the provisions of cl.(5) of Art.19 of the Constitution. They found that the dictum of the majority in *A. K. Gopalan* refusing to test a law of Preventive Detention, which attracted Articles 21 and 22, by the principles of Article 19, though binding on them, (at that time), must be restricted to Article 21 and 22 only. Thus they circumscribed the ratio in *A. K. Gopalan* and propounded that any law depriving a citizen of his property, notwithstanding that it should satisfy Article 31(1), should also satisfy Article 19 (5) of the Constitution. It was contended therein that the conditional prohibition in Article 31(1) against depriving a person of his property save by authority of law, impliedly permitted such deprivation under a law made for that purpose and such law should not be tested under Article 19. This contention was rejected. In doing so the majority conceded that one provision in the constitution may even by implication override or abridge another provision in that constitution, but such implication should not be readily inferred. However they accepted the position that one such provision can expressly abridge or override another provision, as they found Article 31 A and 31 B illustrated. Though Subba Rao, J. observed that fundamental rights in the Indian Constitution have a transcendental position, by the term

'transcendental' it was meant there that fundamental rights transcended enacted laws. The transcendental nature of the fundamental rights was not further extended to make them transcendental vis a vis the constitution itself. For the present purpose, it can be concluded that the majority in *Kochuni* denied legislative supremacy over fundamental rights, but conceded that the Constitution itself, through its other provisions might affect or even abridge the fundamental rights. Natural Justice being an integral part of the fundamental rights, the same may be said of the position between natural justice on the one hand and the legislature and the Constitution on the other hand. Though a constitutional provision may thus expressly override or abridge the nullity rule of natural justice, it would be beyond the scope of the present discussion to consider whether the second proviso to Article 311(2) of the Constitution is invariably such an express provision, as construed by Madon, J. in *Tulsiram Patel.*

[*] See page 1 hereinabove

9. THE VESTED-RIGHT THEORY

1. The exclusionary doctrine failed, substantially, in its attempt to establish the transcendence of any power in relation to natural justice, notwithstanding its marginal success in establishing the supremacy of the Constitution, that too, as originally framed. After such failure, the exclusionary doctrine then started its attack on the term "affects" which occur in the nullity rule of natural justice. A legal fiction was created that any exercise of power which did not affect any vested right of a person or a body of persons, did not affect that person or body of persons at all. The reasoning took the following form: no one has a right, much less a vested right to trade in intoxicating substances or to gamble and hence no exercise of power denying or refusing such right could be questioned on the ground of violation of natural justice. This vested right theory was brought in from different perspectives in different cases. In *State of Bombay v. R.M.D.C., AIR 1957 SC 699,* S. R. Das, C. J., on behalf of a Constitution Bench of the Supreme Court of India ruled that no one has a fundamental right to gamble and no order or law which restricts or denies gambling can be struck down as violative of any fundamental right. To quote S. R. Das, C. J.:-

> "36. … We have no doubt that there are certain activities which can under no circumstance be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those

activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words. Learned counsel has to concede that there can be no “trade” or “business” in crime but submits that this principle should not be extended and that in any event there is no reason to hold that gambling does not fall within the words “trade” or “business” or “commerce” as used in the Articles under consideration.

The question arises whether our Constitution makers ever intended that gambling should be a fundamental right within the meaning of Art. 19 (1) (g) or within the protected freedom declared by Art. 301.”

“42. ...We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country’s trade, commerce or intercourse to be declared as free under Art.301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word “trade”, “business” or “inter-course.”

“We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts. 19(1) (g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and

they are not protected either by Art. 19 (1) (g) or Art.301 of our Constitution."

2. The above reasoning applies only to a claim for protection of a certain activity under Art.19. In such a situation, such protection is denied to activities that are found to be inherently evil, (Mala in Se), or dangerous or opposed to public policy. A consideration of the validity or the invalidity of such characterisation would be beyond the scope of the present discussion. From the reasoning stated above it does not follow that in the application of laws to regulate or prohibit such activities the protection of natural justice could be denied. The reasoning does not support the position that the State and its instrumentalities can exercise powers, affecting certain activities in violation of the Audi Alteram Partem rule and yet justify such exercise on the ground that such activities are inherently evil, dangerous, opposed to public policy etc. Hypothetically viewed, where a statutory authority orders closure or sealing of a certain restaurant, without complying with the Audi Alteram Partem rule, can such an order be upheld or allowed to be enforced, accepting the plea of the said authority that the restaurant was used in fact as a gambling den? The authority, in such a hypothetical case, was clearly wrong in concluding that in fact the place was used for gambling, without affording an opportunity to the owner and occupiers of the place to show the contrary. In such a situation, when an incorporated company moves the Supreme Court under Art.32 of the Constitution, claiming to be the owner of the restaurant and complaining that the order referred to above infringed its fundamental right, such a petition may not be thrown out stating that the petitioner cannot claim a fundamental right to carry on a gambling activity. Such a petition may not be thrown out on the ground

that the petitioning company, not being a citizen, cannot claim such a fundamental right. It should be recognised that the actual complaint of the company is that by determining a question of fact whether the building in question was being used as a gambling den, without affording an opportunity to the petitioner to show that it was not so, the authority had violated natural justice, and thus infringed the prohibition of Art. 14. If it is so recognised, the petitioning company would be at once recognised as a 'person' for the purpose of Art.14 and would be allowed to prosecute the petition further to establish the violation of natural justice. Finally, after finding that natural justice had been so violated, the court may have to allow the petition and quash the order in question on the ground of the procedural unfairness. To say, in such a situation, that such relief should not be granted to one who had engaged in or permitted a gambling activity is to commit the fallacy of petitio principii. To further say, in such a situation, that records clearly established the fact, namely, that the building in question was being used as a gambling den, would amount to the court taking upon itself the jurisdiction of the statutory authority and in any case would be against the 'nullity rule' propounded and defended herein, which is only a logical result of the constitutional status of natural justice.

3. However, an observation of Chinnappa Reddy, J., made on behalf of a three-Judge Bench of the Supreme Court, in *Liberty Oil Mills v. Union of India, AIR 1984 SC 1271,* appears to support the opposite view. In fact, Chinnappa Reddy, J. made that observation in the context of considering the power to make exparte interim orders. He expressed that in some cases where such interim orders would have a very serious effect of preventing a person from pursuing his profession or business,

even temporarily, there must be observed some modicum of residual, core natural justice, sufficient to enable the affected person to make an adequate representation. After saying so, he added (shown to be in para 20 of the judgment within brackets, in the AIR):-

> "These considerations may not, however, apply to cases of liquor licensing which involve the grant of a privilege and are not a matter of right: See Chingleput Bottlers v. Majestic Bottling Company, Civil Appeals Nos. 11970-71 of 1983."

4. The above observation was not actually required to be made in the context of the above judgment. The observation suggests that in cases of grant of liquor licence or refusal thereof, even a minimum principle of natural justice need not be followed. In support of this observation, the decision in *Chingleput Bottlers* was referred to. It thus becomes necessary to examine *Chingleput Bottlers, (1984) III SCC 258,* where a Bench of two Judges had to decide, among other things, whether a certain Commissioner's decision not to grant licence to an applicant for liquor-vending on the basis of the collector's report that the applicant was factually a benamidar of another company, without supplying a copy of such report to the applicant, could be sustained in law. A.P.Sen, J. rejected the contention that the Commissioner was under an obligation to furnish a copy of such report to the applicant. He proceeded to say:-

> "27. We do not think that the Commissioner was under an obligation to furnish Messrs Chingleput Bottlers with a copy of the report submitted by the Collector or of the representation made by Messrs Majestic Bottling Company. This equally applies to the two-page note appearing in the file of Messrs Chingleput Bottlers. It was quite proper for

the Commissioner to make secret and discreet inquiries from confidential sources. There was no duty cast on him to disclose to Messrs Chingleput Bottlers the sources of adverse information or to give them an opportunity to confront the informants. Rules of fair play only enjoin that Messrs Chingleput Bottlers should know the case against them. This apparently they did from the questionaire issued by the Commissioner and the questions put by the Commissioner on July 5, 1982 on the basis of the information gathered by him. The Commissioner has relied upon the report of the Collector and the conclusions reached by the Collector are based on the statement of Ramabadran recorded by the Assistant Commissioner (Excise). Further, at the hearing on July 5, 1982, the Commissioner recorded the statement of Ramabadran, managing partner of Messrs Chingleput Bottlers. There was no occasion for the Commissioner to have recorded the statement of Ramabadran over again unless this was to give him an opportunity to explain the substance of the report of the Collector or other information gathered by him irrespective of the source."

5. After stating so, Sen, J. formulated the proposition aptly, in the following words:-

"29. It is a fundamental rule of law that no decision must be taken which will affect the rights of any person without first giving him an opportunity of putting forward his case."

"30. There has ever since the judgment of Lord Reid in Ridge v. Baldwin been considerable fluctuation of judicial opinion in England as to the degree of strictness with

which the rules of natural justice should be extended, and there is growing awareness of the problems created by the extended application of principles of natural justice, or the duty to act fairly, which tends to sacrifice the administrative efficiency and despatch, or frustrates the object of the law in question. Since this Court had held that Lord Reid's judgment in Ridge v. Baldwin would be of assistance in deciding questions relating to natural justice, there is always "the duty to act judicially", whenever the rules of natural justice are applicable. There is therefore the insistence upon the requirement of a "fair hearing.""

"31. In the light of these settled principles, we have to see whether the Commissioner acted in breach of the rules of natural justice or fair play in passing the impugned order."

6. It would have been in strict compliance with logic had it been said, after the above observations, that in view of the facts stated in para 27 of the judgment, quoted above, sufficient opportunity had been given in this case to the applicant for meeting the charge of benami. However, Sen, J. preferred to adopt another method. He proceeded to state:-

"32. There is authority for the proposition that an authority or body need not observe the rules of natural justice where its decision, although final, relates not to a 'right' but to a "privilege or licence." In a number of recent decisions, the courts have, while extending the protection of natural justice in the former category of claims, denied such protection to the latter category."

"40. There is nothing in the language of Rule 7 of the Rules to suggest that in refusing to grant the privilege,

> the Commissioner is obliged to act 'judicially'. The order refusing a licence under Rule 7 is purely an administrative or executive order and is not open to appeal or revision. There is no lis between the Commissioner and the person who is refused such privilege. The power of refusal of licence unlike the power to grant is not subject to any pre-condition."
>
> "41. It must follow that the grant of a liquor licence under Rule 7 of the Rules does not involve any right or expectation but it is a matter of privilege."

7. After making the above observation, however, Sen, J. allowed the appeal preferred by the State Government, refusing to hold that the order was vitiated by violation of natural justice, not on the ground that the authority was not under any obligation to comply with natural justice, but on the ground that the authority, had, in fact, acted in sufficient compliance of natural justice. This decision could have very well followed immediately after para 27 of the above judgment. What was stated after such para 27 and before the above conclusion, stand aside, clearly as obiter. Apart from certain English decisions, a decision of the Supreme Court of India in *Kishanchand Arora v. Commissioner of Police, AIR 1961 SC 705,* was also relied upon to substantiate the proposition set out as obiter in *Chingleput Bottlers.* In *Kishanchand* court had to consider the validity of Section 39 of Calcutta Police Act, granting discretion to the Commissioner of Police to grant or refuse licences for Eating Houses. One important ground of challenge was that the said provision did not require any hearing of the applicant before refusing licence. Wanchoo, J., speaking for the majority of the Constitution Bench which heard that case, said:-

> "5... the exercise of the discretion depends upon the subjective satisfaction of the Commissioner as to whether the person applying for a licence satisfies the three conditions mentioned above. It is true that the order when made one way or the other affects the fundamental right of carrying on trade, but in the circumstances it cannot but be an administrative order (See, Nagendra Nath Bora v. The Commissioner of Hills Division and Appeals, Assam, 1958 SCR 1240 at p.1253) and though the Commissioner is expected to act reasonably there is no duty cast on him to act judicially. In Nakkuda Ali v. M.F.De S.Jayaratne, 1951 A.C. 66, the Privy Council pointed out that it was quite possible to act reasonably without necessarily acting judicially and that it was a long step in the argument to say that because a man is expected to act reasonably he cannot do so without a course of conduct analogous to the judicial process. The compulsion of hearing before passing the order implied in the maxim Audi Alteram Partem applies only with judicial or quasi-judicial proceedings; ... "

8. The ratio in *Kishanchand* represented the old law on natural justice — the law, as it was, before *Ridge v. Baldwin,* in England and before *Maneka* in India. Enough was stated earlier in this discussion that such old law ceased to be the law in India after the authoritative pronouncement by a Bench of seven Judges in *Maneka.* The entire ratio in *Kishanchand* was based on the character of the power sought to be exercised. The said power was found to be administrative, and not quasi-judicial. On this basis it was held that the absence of the requirement to follow natural justice did not invalidate the said section. This line of reasoning ceased to be

the law after *Maneka.* Therefore, the reasoning of Sen, J. in *Chingleput Bottlers* was more in line with the ratio of *Kishanchand* and hence it did not reflect the law as laid down in *Maneka.* The reliance placed by Sen, J. on *Nakkuda Ali -vs- Jayaratne, 1951 AC 66,* cannot lend much support to his view, since *Nakkuda Ali* was, even then, no longer good law after *Ridge v. Baldwin.* In fact, Sen, J. was aware of the effect of *Ridge v. Baldwin* on *Nakkuda Ali.* The principle laid down in *Nakkuda Ali* was that in cases of grant or refusal of privileges like licences, principles of natural justice are not attracted. This view did not find acceptance in *Ridge v. Baldwin.* Lord Reid, in *Ridge v. Baldwin* did not approve this principle. This effect of *Ridge v. Baldwin* cannot be ignored. However Sen, J. in *Chingleput Bottlers* after referring to *Nakkuda Ali* and placing reliance on it, observed in para 38 (SCC) as follows:

> "38. It is beyond the scope of the present judgment to enter into a discussion on the apparent conflict between the decision of the Privy Council in Nakkuda Ali's case and the observations of Lord Reid in Baldwin case..."

9. Hence it is difficult to accept the observations in Chingleput Bottlers as constituting an authority for the proposition that for granting or refusing liquor licences, natural justice is not attracted, on the ground that trading in liquor is inherently bad and cannot create any vested right.

10. The vested-right theory takes a different angle of attack on natural justice. It now says that a temporary servant may be removed from service in violation of the Audi Alteram Partem rule. This is based on the contention that such an employee has no vested right to continue in employment for ever.

11. In *Ramgopal Chaturvedi v. State of Madhya Pradesh, AIR 1970 SC*

158, decided by a Bench of three Judges of the Supreme Court, on the factual matrix that the person appointed temporarily as a Civil Judge was terminated, without being heard, it was held as follows:-

> "10. ...It was next argued that the impugned order was in violation of the principles of natural justice and in this connection reliance was placed on the decision of this court in State of Orissa v. Dr. Miss Binapani Devi … In the present case, the impugned order did not deprive the appellant of any vested right. The appellant was a temporary Government servant and had no right to hold the office. The State Government had the right to terminate his services under Rule 12 without issuing any notice to the appellant to show-cause against the proposed action. …In the present case, the impugned order did not involve any element of punishment nor did it deprive the appellant of any vested right to any office."

12. With the march of law and the expanding contours of service jurisprudence, the above conclusion may not appear to be a well-settled authority on this subject. Still it appears to have found the approval of the Supreme Court very recently in *M.P. Hastha Shilpa Vikas Nigam Ltd. -vs- Devendra K.Jain, (1995) 1 SCC 638,* decided by a bench of two judges. No decided case, including *Ramgopal Chaturvedi,* was referred to in that judgment.

13. Thus the attack on the word 'affects', in the nullity rule of natural justice, shifts the battle from the legal arena to the factual field. In a given case, when it is found as a matter of fact that the impugned exercise of power

was not capable of affecting any person, certainly natural justice, is not attracted. This is obvious from the statement of the nullity rule itself. It would be beyond the scope of the present discussion to consider, factually, what powers, when exercised, would affect a person or body of persons and what powers would not. Hence the attack on this ground need not extend the present discussion any further. However one further aspect of this attack appears to be interesting. In some cases, a distinction between a direct and an indirect effect was suggested. A consequent view was taken that unless an exercise directly affected a person, it would not be vitiated on the ground of violation of natural justice. Examination cases afford an illustration to this line of thinking. In *Board of High School and Intermediate Education v. Ghanshyam Das Gupta, AIR 1962 SC 1110,* decided by a Constitution Bench of the Supreme Court, the decision of a full Bench of the High Court of Allahabad in that case, was upheld, whereby cancellation of examination results of three candidates, on the ground that they had used unfair means at the examination was quashed because no opportunity had been granted to the affected persons to rebut the allegations against them. However in the *Bihar School Examination Board v. Subash Chandra Sinha AIR 1970 SC 1269,* the cancellation of an entire examination held at a particular centre on the ground that unfair means were practiced on a large scale at that centre, was upheld by a bench of three judges, though such cancellation was not preceded by any opportunity to showcause against it. Hidayathullah, C. J., speaking for the court, stated the reasons in the following words:-

> "13. This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or atleast a vast majority of

> them at a particular centre. If it is not a question of charging any one individually with unfair means but to condemn the examination as ineffective for the purpose it was held, must the Board give an opportunity to all the candidates to represent their cases? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged anyone with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go." (Emphasis supplied)

14. The ratio of this case suggests that while an exercise of power directly affecting certain persons, like in *Ghanshyam Das* should comply with Natural Justice, an exercise of power which does not directly affect any person or body of persons, in particular, as in this case, does not attract natural justice. This view seems to have prevailed upon a Bench of two Judges which decided *Union of India v. Anand Kumar Pande, (1994) 5 SCC 663.* In that case, the Supreme Court refused to interfere with an order cancelling a written examination held for recruiting candidates to certain posts, though no opportunity had been given to the candidates, before such cancellation, to rebut the charge that unfair means had been adopted at a particular centre. Kuldip Singh, J., speaking for the Bench, expressed himself in the following words:-

> "9. This Court has repeatedly held that the rules of natural justice cannot be put in a strait jacket.… The purpose of

> a competitive examination is to select the most suitable candidates for appointment to public services.... Even if a candidate is selected he may still be not appointed for a justifiable reason. In the present case the railway authorities have rightly refused to make appointments on the basis of the written examination wherein unfair means were adopted by the candidates. No candidate had been debarred or disqualified from taking the exam. To make sure that the deserving candidates are selected, the respondents have been asked to go through the process of written examination once again. We are of the view that there is no violation of the rules of natural justice in any manner in the facts and circumstances of the case."

15. Absence of vested right seems to be the basis of the above reasoning, apart from the finding that the cancellation did not cast any stigma on any candidate.

16. The distinction between the direct and indirect effects was a dominant factor in another judgment by a Bench of two Judges of the Supreme Court in *Dr. Umrao Singh Choudhary v. State of Madhya Pradesh, (1994) 4 SCC 328*. The facts of that case and the reasoning are extracted hereunder:-

A certain enactment concerning a certain university provided for removal of the vice chancellor, after following a detailed procedure of enquiry, giving a reasonable opportunity to the incumbent to show cause against such action. However Section 52(1) of the said enactment empowered the State Government, on its being satisfied of certain factual conditions, to notify that certain provisions in the said enactment would stand modified

in a certain manner. One of the results of such a notification would be that the vice chancellor would cease to hold office with immediate effect, notwithstanding that his term of office had not expired. A person appointed as Vice Chancellor of the said university for a period of four years, ceased to hold such office within two years of his appointment, as a result of one such notification issued by the State Government of M.P. His writ petition was dismissed by the High Court of M.P. His contention that principles of Natural Justice were violated by issuing such a notification without giving him an opportunity to show cause against it, was negatived. On appeal by special leave the two-judge bench of the Supreme Court of India held that natural justice stood excluded in this case by necessary implication:-

> "4.… Section 14 engrafts an elaborate procedure to conduct an enquiry against the Vice-Chancellor and after giving reasonable opportunity, to take action thereon for his removal from the office. Section 52 engrafts an exception thereto.… In view of this statutory animation the contention that the petitioner is entitled to the notice and an opportunity before taking action under Section 52(1) would be self-defeating. The principle of Natural Justice does not supplant the law, but supplements the law. Its application may be excluded, either expressly or by necessary implication. Section 52 in juxtaposition to Section 14, when considered, the obvious inference would be that the principle of natural justice stands excluded."

17. Though in the above case the fact that the effect of the impugned order on

the Vice-Chancellor was indirect would have been sufficient to negative the contention, a suggestion was made in para 4 of the said judgment that a legislative enactment could exclude the application of natural justice, either expressly or by necessary implication. After so much having been said, so far, about the constitutional status of natural justice, about how it is not subject to the legislative will and how it may not be subject even to the amendatory power of the parliament, nothing further need be said on the above observation, which is suggestive of legislative supremacy over natural justice, once again quoting that innocuous statement, that 'the principle of natural justice does not supplant the law but supplement the law', which was found in the judgment in *Kraipak* and explained enough. The said innocuous statement in *Kraipak* is analogous to the gloss placed by Hewart, C. J. on the principles formulated by Atkin, L. J. The said gloss was finally removed by Lord Reid in *Ridge v. Baldwin,* while the Indian counterpart of it unintentionally became, now and then, the source of assertions that natural justice could be legislatively excluded.

10. THE BLITZKRIEG

1. The last form of attack on natural justice comes under the guise of 'emergency'. This term 'emergency' covers and includes all cases where an affectative power is exercised by the State or any of its instrumentalities without following natural justice on the ground that the situation calls for such an exercise due to urgent need for action. It was already seen in the preceding chapter how exclusion of natural justice under the pretext of being required to act without any delay was considered and cut to size by Krishna Iyer, J., in *Mohinder Singh Gill* and again by Bhagwati, J., in *Maneka.* Krishna Iyer, J., in *Mohinder Singh Gill,* quoted Lord Upjohn's observations in *Duraiappa v. Fernando, (1967) 2 A.C. 337*. The said observation was in these words:-

> "while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable."

2. After citing this observation Krishna Iyer, J. proceeded to state:-

> "55. ...It is untenable heresy, in our view, to lockjaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self-evident. Even in such cases a

> remedial hearing as soon as urgent action has been taken is the next best. Our objection is not to circumscription dictated by circumstances but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural pre-condition of fair hearing, however minimal, even post-decisional, has relevance to administrative and judicial gentlemanliness…."

3. In *Swadeshi Cotton Mills v. Union of India AIR 1981 SC 818* a Bench of three Judges had to consider whether before taking over or causing the take over of the management of an industrial undertaking under Section 18AA of the Industries (Development and Regulation) Act, 1951, the principle of Audi Alteram Partem should be observed. R.S. Sarkaria, J., for himself and D.A.Desai, J., expressed the majority opinion that notwithstanding the words "immediate action is necessary", in Section 18AA, non-observance of the Audi Alteram Partem rule is inexcusable. In that case Chinnappa Reddy, J., recorded his dissent. He was of the opinion that the requirement of granting a pre-decisional hearing stood excluded under those circumstances. It appears that Chinnappa Reddy, J., wanted to be a little over-cautious in granting an absolute status to natural justice. His caution was fully expressed in *Liberty Oil Mills v. Union of India, AIR 1984 SC 1271,* where, speaking on behalf of a Bench of three Judges and in the context of considering whether Clause 8A or 8B in the Imports (control) Order, 1955 excluded a right to pre-decisional hearing, he stated as follows:-

> "15. ...Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of parties. It may be that the opportunity to be heard may

> not be pre-decisional; it may necessarily have to be post-decisional where the danger to be averted or the act to be prevented is imminent or where the action to be taken can brook no delay. If an area is devastated by flood, one cannot wait to issue show-cause notices for requisitioning vehicles to evacuate population. If there is an out-break of an epidemic, we presume one does not have to issue show-cause notices to requisition beds in hospitals, public or private. In such situations, it may be enough to issue post-decisional notices providing for an opportunity..... Ad interim orders may always be made exparte and such orders may themselves provide for an opportunity to the aggrieved party to be heard at the later stage. Even if the interim orders do not make provision for such an opportunity, an aggrieved party has, nevertheless, always the right to make an appropriate representation seeking a review of the order and asking the authority to rescind or modify the order....."

4. It would be against reason to contend that even in such emergent cases as hypothetically presented by Chinnappa Reddy, J., there should be show-cause notices and hearings before action is taken. As rightly expressed by Bhagwathi, J. in *Maneka* (para 63 AIR):-

> "The word 'exception, is really a misnomer because in these exclusionary cases, the Audi Alteram Partem rule is held inapplicable not by way of an exception to 'fair-play in action', but because nothing unfair can be inferred by not affording an opportunity to present or meet a case."

5. He says that only in very exceptional circumstances the Audi Alteram Partem rule can be jettisoned. He further says that in such situations, the person affected must have a reasonable opportunity of being heard genuinely.

6. The conclusion is in the offing. The principle of natural justice has to be formulated, as precisely as possible, so that improper violations are impermissible. At the same time it must take into account the need for prompt action in extreme emergencies like those envisaged by Chinnappa Reddy, J., in *Liberty Oil Mills.* The exception must find a place in the formulation itself, so that it is not abused. This requirement would necessarily tend to reduce the precision of the formulation. Hence what can be aimed at and attempted is a formulation as precisely as possible under these circumstances.

11. THE RULE AGAINST BIAS

1. The present discussion, so far, substantially confined itself to a consideration of the Audi Alteram Partem rule of natural justice. There is yet another rule, generally held to be an integral part of natural justice. That rule, often expressed by the maxim, 'Nemo Judex In Causa Sua', thereby meaning that no one shall be a judge in his own cause. This principle, for convenience, may be called the rule against bias. While the Audi Alteram Partem rule imposes a positive obligation to give an opportunity, to hear and to decide, the rule against bias imposes a negative obligation of what should not be the case. The rule against bias will now be considered. A question may arise that when several chapters have been set apart for a discussion of the Audi Alteram Partem rule, would it not be a bias against the rule against bias to allocate just one chapter for it. There are two reasons why this has been done. The first reason is that the Audi Alteram Partem rule itself is a condition precedent for the operation of the rule against bias. Unless there is a hearing it would be futile to insist upon an unbiased judge for the hearing. The second reason is that though in the earlier chapters this discussion centered around the Audi Alteram Partem rule, a substantial part of such discussion was in fact regarding the general application of natural justice itself. Whatever was said in the preceding chapters regarding the rule of nullity, the effect principle and the so-called exclusionary doctrine would equally apply to

the rule against bias also.

2. The rule against bias is just a small extension, in fact to the Audi Alteram Partem rule. While the latter mandates a hearing, the former further mandates a fair hearing.

3. Bias is often classified into two or three sub-headings, like personal bias, official bias and policy bias. At times the term pecuniary bias has also been used. In 1852, (as Prof. Wade recounts it), Lord Chancellor Cottenham affirmed a number of decrees made by the Vice Chancellor in favour of a Canal Company in which he himself was a share holder. Such decrees were set aside in *Dimes -vs- Grand Junction Canal, (1852) 3 HLC 759,* by the House of Lords, as vitiated by pecuniary bias. In a suit for damages against a motorist, the solicitor acting for the suitor was also acting clerk to the justices who heard a different case against the same motorist and convicted him of dangerous driving. The fact that the clerk's firm was acting against the interests of the convicted motorist in certain other proceedings, was held in *R -vs- Sussex Justices exp. Mc Carthy, (1924) 1 KB 256,* to invalidate the conviction. This appears to be a non-pecuniary interest case. The question of official bias came up for consideration before the Supreme Court of India in the two *Gullapalli Nageswara Rao* cases, reported respectively in *AIR 1959 SC 308 AND 1376,* the former by a Constitution Bench and the latter by a bench of three judges. In the first *Gullapalli* case, the Secretary to the Transport department of the State heard the objection to a scheme of nationalisation of bus transport. After such hearing and based on his report, the Chief Minister concerned overruled the objection and approved the scheme. Certain unsuccessful objectors filed petition under Article 32 of the Constitution and moved the Supreme Court. K.Subba Rao, J., on behalf

of the majority quashed the Chief Minister's order on the ground that it was vitiated by procedural irregularity. After taking note of the fact that under certain business rules made by the Governor concerned, the Secretary of a department was its head, Subba Rao, J., proceeded to state that in such circumstances though the formal orders were made by the Chief Minister, in effect and substance, the enquiry was conducted and the matter was heard by the Secretary, who was the head of the department, which department was one of the parties to the dispute. After citing certain English decisions including *R -vs- Sussex J*ustices mentioned above he proceeded to state:-

> "30. ...The aforesaid decisions accept the fundamental principle of natural justice that in the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute. It is also a matter of fundamental importance that a person interested in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the case. This is on the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The hearing given by the Secretary, Transport department, certainly offends the said principle of natural justice and the proceeding and the hearing given, in violation of that principle, are bad."

4. Subba Rao, J., held that in that case, apart from the above dictum, the fact that the hearing was by one person and the decision was given by another, made such hearing an empty formality.

5. However in the Second *Gullapalli* case the same Subba Rao, J., speaking on behalf of a bench of three judges refused to quash the order which was passed by the Chief Minister concerned after personally hearing the objections, consequent upon the decision in the First *Gullapalli* case. The same ground of attack was raised in the second case also. However Subba Rao, J., negatived such contentions and stated:-

> "(8). The next question is whether the State Government, in the present case, acted in violation of the said principles. The argument that as this Court held in the previous stage of this litigation that the hearing given by the Secy. in charge of the Transport Department offended the principles of natural justice, we should hold, as a logical corollary to the same, that the same infirmity would attach to the Chief Minister. This argument has to be rejected on two grounds: firstly, for the reason that on the last occasion the appellants did not question the right of the Chief Minister to decide on the objections to the scheme, — and indeed they assumed his undoubted right to do so — but canvassed the validity of his order on the basis that the Secretary, who was part of the Transport Department, gave the hearing and not the Chief Minister, and, therefore, a party to the dispute was made a judge of his own cause. If, as it is now contended, on the same reasoning the Chief Minister also would be disqualified from deciding the dispute, that point should have been raised at that stage: instead a distinction was made between the Secretary of a Department and the Chief Minister, and the validity of the order of the Chief Minister

was questioned on the basis of this distinction. This Court accepted that argument. Having obtained the judgment of this Court on that basis, it would not be open to the appellants, at this stage, to reopen the closed controversy and take a contrary position. That apart, there are no merits in this contention. There is a clear distinction between the position of a Secretary of the Department and the Chief Minister of the State. Under the Constitution, the Governor is directed to act on the advice of the Ministers headed by the Chief Minister. In exercise of the powers conferred by cls. 2 and 3 of Art. 166 of the Constitution, the Governor of Madras made rules styled as 'The Madras Government Business Rules and Secretariat Instructions', and R.9 thereof prescribes that without prejudice to the provisions of R.7, the Minister in charge of a department shall be primarily responsible for the disposal of the business pertaining to that department. The Governor of Andhra, in exercise of the powers under the Constitution, directed that until other provisions are made in this regard the business of the Government of Andhra shall be transacted in accordance with the said Rules. It is, therefore, manifest that under the Constitution and the Rules framed thereunder a Minister in charge of a department is primarily responsible for the disposal of the business pertaining to that department, but the ultimate responsibility for the advice is on the entire ministry. But the position of the Secretary of a department

is different. Under the said Rules, the Secretary of a department is its head, i.e., he is part of the department. There is an essential distinction between the functions of a Secretary and a Minister; the former is a part of the department and the latter is only primarily responsible for the disposal of the business pertaining to that department. On this distinction the previous judgment of this Court was based, for in that case, after pointing out the position of the Secretary in that Department, it was held that 'though the formal orders were made by the Chief Minister, in effect and substance, the enquiry was conducted and personal hearing was given by one of the parties to the dispute itself. We cannot, therefore, accept the argument of the learned Counsel that the Chief Minister is part of the department constituted as a statutory Undertaking under the Act."

6. However in *APSRTC -vs- Sathyanarayana Transports, AIR 1965 SC 1303,* another Constitution Bench of the Supreme Court, without reference to the Gullapalli cases held, on the facts of that case, that an order passed by the Transport Minister concerned was vitiated by bias. Similarly in *State of U.P. -vs- Mohd Nooh, AIR 1958 SC 86* a Constitution bench of the Supreme Court held, on the facts of that case, that the deputy Superintendent of Police, as the enquiry officer, conducting an enquiry into certain charges against a constable, violated the principles of natural justice by himself giving testimony against the delinquent in such enquiry. (On certain other facts a writ was not issued in that case).

7. It was discussed elaborately in the earlier chapters that violation of natural justice, by itself, is a prejudice and that proof of further prejudice was not necessary to vitiate an action in a case of such violation. In *Manak*

Lal -vs- Dr.Prem Chand, AIR 1957 SC 425, a Bar Council Tribunal was hearing a case against an advocate. The complaint against the advocate was that in a case between the complainant and another 'x', he, acting as the advocate for 'x' had assisted in procuring a fabricated order of stay, thus committing a professional misconduct. It appears that one of the members of that Tribunal, a senior counsel by profession, had in fact appeared as an advocate for the complainant in the original proceedings between the complainant and 'x'. Though the Supreme Court found that the probability of the said member of the Tribunal having acted with bias was not established, still held that on principle, his participation vitiated the proceedings. Gajendragadkar, J., speaking for the bench, stated:-

> "(6) …It is true that in judicial or quasi-judicial proceedings justice must not only be done but must appear to be done to the litigating public, it is equally true that when a lawyer is charged for professional misconduct and is given the privilege of being tried by a tribunal of the Bar Council, the enquiry before the tribunal must leave no room for a reasonable apprehension in the mind of the lawyer that the tribunal may have been even indirectly influenced by any bias in the mind of any of the members of the tribunal. In the present case, we have no hesitation in assuming that when Shri Chhangani agreed to work as the Chairman of the tribunal he did not remember that he had appeared against the appellant's clients in the criminal proceedings under s.145. We are told that Shri Chhangani is a senior member of the Bar and was once Advocate General of the High Court of Rajasthan. Besides he had not appeared in the case at all stages but had appeared only once as a senior counsel to argue the matter. It is, therefore, not at all unlikely that

Shri Chhangani had no personal contact with the client, Dr.Prem Chand and may not have been aware of the fact that, in the case from which the present proceedings arose, he had appeared at any stage for Dr.Prem Chand. We are, however, inclined to hold that this fact does not in any way affect the legal argument urged before us by Shri Daphtary. It is not Shri Daphtary's case that Shri Chhangani actually had a bias against the appellant and that the said bias was responsible for the final report made against the appellant. Indeed it is unnecessary for Shri Daphtary to advance such an argument. If Shri Chhangani was disqualified from working as a member of the tribunal by reason of the fact that he had appeared for Dr.Prem Chand in the criminal proceedings under s. 145 in question, then it would not be necessary for Shri Daphtary to prove that any prejudice in fact had been caused or that Shri Chhangani improperly influenced the final decision of the tribunal. Actual proof of prejudice in such cases may make the appellant's case stronger but such proof is not necessary in order that the appellant should effectively raise the argument that the tribunal was not properly constituted."

8. Even in England, the mere presence of a non-member, while a Tribunal deliberated, was sufficient to invalidate the decision. In *Cooper -vs- Wilson, (1937) 2 KB 309,* a police sergeant was dismissed by a chief constable. His appeal was rejected by the watch committee. Since the chief constable was present with the said committee, when the appeal was decided, it was declared that such presence was fatal to the validity of the committee's decision. Scott, L. J., said:-

> "the risk that a respondent may influence the court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such a possibility is sufficient to deprive the decision of all judicial force and to render it a nullity."

9. It is not necessary to cite all cases where the question of bias was raised. In most of them, the decision turned on facts, the questions of law being the same, as laid down in the cases cited above. However three cases decided by the Supreme Court of India merit consideration. The first of these is the famous, oft-cited *Kraipak.* The second is *Ram and Shyam Co.-vs- State of Haryana, AIR 1985 SC 1147.* The third is *Institute of Chartered Accountants -vs- L. K. Ratna, AIR 1987 SC 71.*

10. In *Kraipak,* a selection board made selection to the Indian Forest Service from among the officers who were serving in the state Forest Department. The person who was acting Chief Conservator of Forest of that State was a member of the selection Board and at the same time he was also one of the candidates seeking selection to the Indian Forest service. A Constitution Bench of the Supreme Court held that the presence of a candidate in the selection board vitiated the selection. The contention that after all the board was only a recommendatory body, was rejected, on the ground that its recommendation and the further recommendation of the Union Public Service Commission could not be dissociated from each other. The former was the foundation for the latter. It was stated by the court that the said acting Chief Conservator was undoubtedly a judge in his own cause. This circumstance was stated to be "abhorrent to our concept of justice", in the words of Hegde, J., who spoke for the bench.

11. In *Ram and Shyam*, the question of bias arose from a different angle. The highest bid of a company 'x' was not confirmed. Subsequently another

company 'y' which had participated in the auction and had made a bid lower than that of company 'x', wrote a letter to the Chief Minister of the state making several allegations against the conduct of the auction and offering a rate higher than the bid of company 'x'. The Chief Minister accepted such offer made by company 'y'. The writ petition and the writ appeal filed by 'x' were dismissed on the short ground that there was an alternative remedy. Under these circumstances Desai, J., on behalf of a bench of two judges, reasoned :-

> "9. ...An appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits. Look at the fact situation in this case. Power was exercised formally by the authority set up under the Rules to grant contract but effectively and for all practical purposes by the Chief Minister of the State. To whom do you appeal in a State administration against the decision of the Chief Minister? The cliche of appeal from Caesar to Caesar's wife can only be bettered by appeal from one's own order to oneself. Therefore this is a case in which the High Court was not at all justified in throwing out the petition on the untenable ground that the appellant had an effective alternative remedy. The High Court did not pose to itself the question, who would grant relief when the impugned order is passed at the instance of the Chief Minister of the State. To whom did the High Court want the appeal to be filed over the decision of the Chief Minister? There was no answer and that by itself without anything more would be sufficient to set aside the judgment of the High Court."

12. The above reasoning of Desai, J., illustrates that a real possibility of bias would make a provision for departmental appeal ineffective for the purpose of considering the question of availability of alternative remedy under Article 226 of the Constitution.

13. The third case is the *Chartered Accountant* case. In that case, certain Chartered Accountants had been charged with professional misconduct. The council, which was the managing body of the professional institute, created statutorily, referred the case to a disciplinary committee. The disciplinary committee after hearing the accused, submitted its report to the council. The committee's report gave a finding that the accused were guilty. The council considered the report, accepted the finding, held that the accused were guilty, and issued notices to the accused calling upon them to make their representations, personally or in writing, only against the penalty proposed. The writ petitions filed by the accused were allowed by the High Court of Bombay. The said High Court held that the order was vitiated on two grounds. The first ground was that the accused were not given an opportunity to state their cases against the report. The second ground was that some members of the disciplinary committee, participated in the proceedings of the council as members thereof, when the council considered the reports of the committee. A Division Bench of the High Court dismissed the appeal. The Supreme Court confirmed the order of the High Court, on both grounds. While so confirming, R.S. Pathak, J., speaking on behalf of a Bench of two Judges, rested his decision mainly on the statement of law found in Professor

S.A. de Smith's Judicial Review of Administrative Action, (page 261 - 4th edition). The said statement is extracted hereunder:-

."....A report will normally include a statement of findings

and recommendations, which may be controverted before the parent body; and in such a case the participation of members of the Sub-committee in the final decision may be of dubious validity. The problem is not merely one of strict law; it is also one of public policy."

14. It is necessary, however, to mention one important doctrine which the courts have evolved as a compelling circumstance for condoning a violation of the rule against bias. Professor Wade, in his Administrative Law, 7th edition, at page 437, refers to a very early case found in a Year Book of 1430, where an action was brought against all the Judges of the court of common pleas in a matter where such an action could be initiated only in that court. In such a situation, who shall be the Judge? Professor Wade cites further examples in *Tolputt (H) and Company v. Mole, (1911) 1 KB 836.* In that case, a court registrar was sued in his own court and the suit was dismissed. After such dismissal the same registrar had to tax costs in his own favour. In *The Judges v. A.G. for Saskatchewan, (1937) 53 TLR 464* the Government called upon the court to determine whether the salaries of the Judges were liable to income tax. It was confirmed by the Privy Council that the said court was entitled to decide the case, as a matter of necessity. An interesting note is added by Professor Wade that the said court had in fact rendered a decision adverse to the Judges.

15. Thus came into existence the doctrine of necessity. In cases where a disqualified adjudicator cannot be replaced by another, natural justice has to give way to necessity. A pointed illustration to this doctrine was *Phillips v. Eyre 1870 LR 6 QB 1,* where a Governor of a colony was held competent to validly assent to an Act of indemnity for his own actions, since otherwise the Act could not be passed at all. In fact it is

commonplace in courts of Law that petitions are presented to judges to review their own decisions and as a matter of necessity such exercise is permitted. Similarly the provision that petitions for contempt of court are generally heard by the same judges, whose orders have been flouted, implies the doctrine of necessity.

16. Even in India, this doctrine of necessity was invoked in some cases. In *Mohapatra and Co. v. State of Orissa, AIR. 1984 SC 1572,* a decision of a Book selection committee was vitiated by bias, since some members of the said committee had themselves submitted books for selection. However, Madon, J., on behalf of a Bench of two Judges, agreed with the High Court of Orissa in that no relief could be granted in respect of the books already selected, as the matter had become fait accompli. However Madon, J. criticised the invocation of the doctrine of necessity by the High Court in that case. He said:-

> "12. ...The High Court, however, wrongly applied this doctrine to the author-members of the Assessment Sub-Committee. It is true, the members of this Sub-Committee were appointed by a Government Resolution and some of them were appointed by virtue of the official position they were holding, such as, the Secretary, Education Department of the Government of Orissa, and the Director, Higher Education, etc. There was, however, nothing to prevent those whose books were submitted for selection from pointing out this fact to the State Government, so that it could amend its Resolution by appointing a substitute or substitutes, as the case may be. There was equally nothing to prevent such non-official author-members from resigning from the committee on the ground of their interest in the matter."

17. Thus the doctrine of necessity can be invoked only in the clearest case of absence of an alternative. Whether the said doctrine can be invoked at all in a case when exercise of a power by a disqualified adjudicator affects a person? In *Phillips v. Eyre* no person or body of persons was specifically affected. In *The Judges* case also it is the same. In *Mohapatra* the Supreme Court did not apply the doctrine. In any event in view of the constitutional provisions in India, when a person is affected by an authority exercising a power, though that authority is disqualified by bias, it would be no answer to suggest that in view of the doctrine of necessity the plea should fail.

18. The question remains that where, in a given situation, a person is biased against another and the former is the sole statutory authority to exercise a power and the exercise whereof would affect the other, what should be done? Professor de Smith poses this very same question and gives his answer at page 277 of the 4th edition of his Judicial Review of Administrative Action:-

> "What would be the position in English Administrative Law if a Minister were to be called upon to decide whether or not to confirm an order made by a local authority affecting his own property? He could not lawfully transfer to another Minister his duty to decide. He might depute one of his own officials to make the decision; the decision would nevertheless be made in the Minister's name. It is submitted that the validity of the decision could not be challenged merely on the ground that the Minister was in a sense judge in his own cause; for the legal duty to decide the class of matters to which this belonged had been cast upon him, and upon

him alone. If it were possible to show that the Minister had in fact failed to consider the merits of the order for reasons of personal interest, his decision could be successfully challenged."

19. Recently a case came up before the Supreme Court of India for consideration, relating to the doctrine of necessity. A person 'x' had submitted a complaint to the Election Commission against a Chief Minister of a particular State, alleging facts which, if proved, would disqualify the said Chief Minister from being a member of the Legislative Assembly concerned. The High Court, which was moved in this regard, found that the person who was the Election Commission, as the sole authority, had engaged in certain other matters, in his personal capacity, the wife of 'x' as his counsel. On this ground, the apprehension of the said Chief Minister that the said Commission might be biased in the matter was held to be reasonable and the Commission was held to be inappropriate to deal with that petition. On appeal, the Supreme Court found that subsequently the Election Commission itself had come to be constituted of three members, including the person who was the sole Commission previously. The Supreme Court directed that the said complaint shall be heard only by the two additional members and in and only in the event of the two members disagreeing between themselves on the conclusion, the third member, said to have been biased against the Chief Minister, shall have a casting vote. A full report of this judgement is not yet available to this author. Thus to a limited extent, the doctrine of necessity was invoked and accepted in that case.

12. THE MINIMAL PRINCIPLE

1. It was stated at the end of Chapter 11 above, that the content of natural justice requires to be formulated as precisely as possible, so that no apprehension arises against it, no exception to it is required to be recognised; and so that no abuse of it, in any name, is permissible. May be, the task is difficult and the attempt, a little ambitious. However the rich back-ground materials, provided by case-laws examined above, can lend support to such a constructive zeal and optimism.

2. Now such an attempt may be undertaken. Natural Justice can be taken to mean the principle, which can be formulated, for the present, in the following terms:-

> No power shall be exercised by the State if exercise thereof is likely to affect a certain person or a certain body of persons, without first giving to that person or body an opportunity to convince the State that such exercise is not warranted.

3. This formulation appears to have several advantages. Firstly it relates to exercise of any power, whether executive, contractual, administrative, quasi-judicial or judicial. In order to attract this principle the power should be an affectative power, that is, it should affect somebody. Even there, it is enough if it is likely to affect somebody. This formulation

has another advantage of being inclusive of the first principle of natural justice expressed by the maxim 'Nemo judex in causa sua', i.e., no one shall be a judge in one's own cause, which is, at times, called the rule against bias. Only for this reason the phrase 'opportunity of being heard' is substituted with the phrase 'opportunity to convince'. An empty hearing before a biased authority is not, by any stretch of imagination, an opportunity to convince. The formulation postulates a readiness and openness to be convinced on the part of the State. In the event of absence of such convincibility, the exercise would be against the present formulation. For the present it is enough to note that the formulation suggested above is synthetic, in the sense it synthesises the two maxims 'Audi Alteram Partem' and 'Nemo judex in causa sua' into one principle. Still it is incomplete, in as much as, it has no word about the exceptional emergencies like those envisaged in Liberty Oil Mill's case. A reformulation is necessary, for and only for, the purpose of meeting such emergencies. As rightly suggested by Chinnappa Reddy, J., in Liberty Oil Mill's case, the functioning of courts of law does provide a solution to this problem. Wherever a person asking for a relief makes out a prima facie case in favour of granting such relief, and further shows that unless an immediate exparte order of a limited nature is passed irreparable loss or hardship or injury would be caused to that person, more severe than the loss, hardship or injury that might be caused to any one by not granting such an interim order, courts of law do grant such limited interim orders, exparte. This liberty should be granted, to the State also. The only difficulty that arises in this connection is that while in the example of the court, the presiding officers are called upon to decide the question of prima facie case, balance of convenience etc., of the litigant, in the case of exercise of power by an authority of the

State, what such authority has to decide is whether there is prima facie case, balance of convenience etc., in favour of his exercising the power. This necessarily makes him a judge in his own cause. However on this score power to take some interim action or pass some interim orders, in emergencies, cannot be totally denied to the State. An attempt may now be made to suitably reformulate the principle formulated above.

> No power shall be exercised by the State, if exercise thereof is likely to affect a certain person or a certain body of persons, without granting, before such exercise or as soon it becomes possible or reasonable to so grant, an opportunity to that person or body, to convince the State that such exercise is not warranted.

4. In the above reformulation, granting such opportunity before exercise is the rule; granting such opportunity after exercise would be an exception. The burden of justifying the exception would be very heavy on the authority. Where prior opportunity is not granted, the authority would be required to establish two things, factually, to justify the exercise. First, he should establish that at the time of or before the exercise, it was not possible or reasonable to grant such an opportunity. Next he must establish that the moment it became possible, without any further delay, such opportunity was granted. Judicial review, is the best mechanism to adjudicate upon these facts. It may further be added that the impossibility of a prior hearing must not be in any way due to the authority who exercised the power.

5. The above reformulation does not recognise the distinction among various powers like administrative, contractual etc., for the purpose of its application. It does not recognise the distinction between exercise of

power that affects directly and exercise of power that affects indirectly some body. So long as the exercise is likely to affect some body, whether directly or indirectly, the principle is attracted. The question, 'what is affected', is not germane to this formulation. So long as exercise of a power is likely to affect some body, whether affecting any vested right or not, the principle is attracted. The reformulation excuses the omission to grant such opportunity where the person or persons likely to be affected cannot be reasonably ascertained, even after diligent efforts. The reformulation does not recognise the legislative supremacy over the principle. Any law which empowers exercise of powers in violation of this principle will necessarily be, per se, arbitrary, offending Article 14 of the Constitution. No such law can ever be reasoable. The reformulation clearly provides for prompt action in emergencies. The reformulation operates also as the rule against bias, synthetically.

6. If such reformulated principle is projected as the principle of natural justice, would it still be required to search for cases to exclude even such a minimal principle? As it was said of the Constitution that amendatory power beyond a limit can destroy the very Constitution, it may be said of natural justice, that exclusions and exceptions beyond a certain limit would emasculate the very spirit of justice, the very spirit of any Constitution, written or unwritten. Such emasculation cannot be allowed or accomodated or condoned by any form of government which postulates some Constitution as the supreme authority, superior to its managing body or its monarch.

7. A few questions may arise:-

Whether exercise of a certain power is likely to affect a person or a body of persons;

Whether such a person or body is ascertainably certain as opposed to an unidentifiable person or body or as opposed to a faceless

multitude or plurality;

Whether, in a case, grant of an opportunity to that person or body before exercise of a power was impossible or unreasonable;

Whether, in a case, where grant of such prior opportunity was either impossible or unreasonable, such an opportunity was given as soon as grant thereof became possible or reasonable, as the case may be;

Whether the opportunity granted was adequate to enable the person or body to convince the authority against such exercise;

Whether the authority was manifestly convincible or, in other words, whether the authority appeared to be unbiased;

Such would be the questions of fact that may test the scope and applicability of this principle in any given case. Courts of law are the appropriate forums to decide such questions of fact. Errors are not ruled out in determination of such facts. However, what is assured is that there would be clarity about the principle. A system of administration of justice, free from error, may be the utopion aim. Being away from it, far or little, would not and need not prevent attempts to formulate elementary principles of justice in search of clarity and better understanding.

8. The requirements regarding the form of show-cause notices, the mode of hearing, the furnishing of reports and materials, etc., will be sub-ordinate rules to serve the cause of the minimal and synthetic principle of natural justice, formulated above. It is proposed hereby that this principle is the necessary condition of justice, wherever and in whatever form it is dispensed. This, in fact, is not a novel innovation. Some formulations have been done earlier and without reference to any abstract principle of natural justice. The Universal declaration of human rights adopted in 1948 by the general assembly of the U.N.O., The European Convention on

Human Rights and Fundamental Freedoms, 1950 and the Canadian Bill of Rights, 1960 exhibited a similar approach. Article 10 of the Universal declaration was in this form:-

> "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."

Article 6(13) of the European Convention reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, every one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Section 26 of the Canadian Bill was in this form:-

> "In the absence of express provision to the contrary no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the fundamental principle of justice for the determination of his rights and obligations."

9. The principle which emerged in this discussion may now be re-stated:

> **No power shall be exercised by the state, if exercise thereof is likely to affect a certain person or a certain body of persons, without granting, before such exercise or as soon as it becomes possible or reasonable to so grant, an opportunity to that person or body, to convince the State that such exercise is not warranted.**

10. This minimum requirement would certainly be an integral part of Article

14 of the Constitution of India. A violation of this minimum principle would amount to a violation of the said Article 14 in every case, unexceptionally and invariably. To expand this principle even slightly would result in its being excluded under certain circumstances and hence no such expanded principle can rightly be recognised as forming a part of Article 14. In this minimal version, the principle cannot be waived and by consent it cannot be denied. Regarding fundamental rights in Chapter III of the Constitution, especially, regarding Article 14, it was so said by atleast three constitution benches of the Supreme Court — once in *Behram Khurshid -vs- Bombay State, AIR 1955 SC 123,* again in *Basheshar Nath -vs- I.T.Commissioner, AIR 1959 SC 149,* and once again in *Olga Tellis -vs- Bombay Municipal Corporation, AIR 1986 SC 180.*

11. In *Behram Khurshid,* while answering a reference made by a three-judge bench, Mahajan, C. J., speaking for the majority of a Constitution Bench, expressed the following view more in the nature of an opinion:

> "52. ...In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our constitution without a fuller discussion of the matter. No inference in deciding the case should have been raised on the basis of such theory.... We think that the rights described as fundamental rights are the necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity."

> "These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the Articles, 'inter alia', Articles 15(1), 20, 21, makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under Articles 20 and 21."

12. The question which arose in *Basheshar Nath* was, whether a breach of the fundamental right flowing from Art. 14 can be waived. S.R. Das, C. J., speaking for the majority, stated :-

> "13. ...There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the Article it must be noted, first and foremost that this Article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Articles, e.g., Art.19, do. The obligation thus imposed on the State no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the article is directed to the State and the reality of the obligation thus imposed on the state is the measure of the fundamental right

which every person within the territory of India is to enjoy. The next thing to note is that the benefit of this Article is not limited to citizens, but is available to any person within the territory of India. In the third place it is to be observed, by virtue of Art.12, "the State" which is, by Art.14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the state and other subordinate authorities."

"14. Such being the true intent and effect of Art. 14 the question arises, can a breach of the obligation imposed on the State be waived by any person? In the place of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may be so? If the constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no objection to my doing it." I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems

> to us absolutely clear, on the language of Art.14 that it is a command issued by the Constitution of the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution expected to do and no person can by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State."

13. In *Olga Tellis,* a Constitution Bench had to decide the question whether a fundamental right could be affected by the doctrine of estoppel. Certain pavement dwellers had given an undertaking before the Bombay High Court, in certain earlier writ petitions, not to claim any fundamental right to dwell on platforms and to vacate their hutments before a certain date. On this ground, a contention was urged before the Constitution Bench that they were estopped from questioning the Government's action in removing them from their hutments, since they had failed to comply with the undertakings. This contention was rejected. Chandrachud, C. J., speaking for the majority, said:

> "28. ...It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts. There can be no estoppel against the Constitution… No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise that he does

not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights..."

"31. The scope of the jurisdiction of this Court to deal with writ petitions under Art.32 of the constitution was examined by a Special Bench of this court in Smt.Ujjam Bai -vs- State of Uttar Pradesh… That decision would show that in 3 classes of cases the question of enforcement of the fundamental rights would arise, namely, (1) where action is taken under a statute which is ultra vires the constitution ; (2) when the statute is intra vires but the action taken is without jurisdiction; (3) an authority under an obligation to act judicially passes an order in violation of the principles of Natural Justice. These categories are, of course, not exhaustive. In Naresh Sridhar Mirajkar -vs- State of Maharashtra .... a Special Bench of 9 Learned Judges of this court held that, where the action taken against a citizen is procedurally ultra vires, the aggrieved party can move this

court under Art.32. The contention of the petitioners is that the procedure prescribed by Section 314 of the B M C Act being arbitrary and unfair, it is not "procedure established by law" within the meaning of Art.21 and, therefore, they cannot be deprived of their fundamental right to life by resorting to that procedure. The petitions are clearly maintainable under Art.32 of the Constitution."

14. The above dicta apply to the minimal principle of natural justice. When it is said that there can be no waiver or consent against this principle, it does not mean that where, even after an opportunity has been granted, a person fails to make any attempt to convince the authority of the contrary, the authority should wait indefinitely without exercising a power. It only means that no authority can justify his not granting such an opportunity to the person affected, on the ground that such person waived such grant or consented to the same. Irrespective of waiver or consent, every authority shall grant such an opportunity. That is the mandate of Art. 14. An order passed or an action taken, without granting such opportunity, is still-born. Hence no consent, waiver or even principle of estoppel can pump life into it. This position is a logical result of the constitutional status of the principle.

15. This minimal principle of natural justice was what Lord Diplock insisted upon, in *O'Reilly v. Mackman, (1983) 2 AC 237,* when he said :-

"A fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilised legal system that it is to be presumed that parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement."

In India, one has to substitute the words "the Constitution" for the word 'Parliament' in the above passage. Bereft of all technicalities this minimal principle is, in the words of Krishna Iyer, J., (para 75, AIR, Mohinder Singh Gill): apprising the affected and appraising the representations.

16. Not the limited intelligence or experience of the present author, but only the inspiring decisions rendered by eminent judges in India and elsewhere and, of course, the spirit of relentless struggle against any form of despotism, new or old, exhibited by the brave members of the bar, made it possible to arrive at such a synthetic, yet minimal formulation of the necessary condition of justice alias natural justice. With hope that it merits consideration, though not immediate acceptance, this discussion may now be concluded recalling those memorable words of a very eminent advocate ("We, the People" : N.A.Palkhiwala, Page 292. Strand Book Stall, 1991.):-

> "There is a dust that follows the flying feet of the years, which prevents men from seeing clearly the happenings close at hand. When the history of our benighted times comes to be written, it will be plainly perceived that the Supreme Court of India was the one institution which served the nation most meritoriously in its hour of need. If freedom under law survives in India today, it is only because of the fundamental rights in our Constitution and the outstanding independence of our Courts."

JUSTICE -Vs- NATURAL JUSTICE

INDEX OF CASES

'A'

'B'

'C'

'D'

'E'

'L'

'M'

'N'

'O'

'P'