LAW, LOGIC & LIBERTY

Critical essays in the Constitutional Law of India

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VANAVIL CULTURAL CENTRE, CHENNAI.

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Dedication

I dedicate this book to Advocate, late Shri

R.M. Seshadri, I.C.S. (Retd.,),

whose affectionate guidance helped me in the

early stages of my career.

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Foreword

It was only in June, 1996, the author came to be known as a 'writer', when he published his first book "Justice Versus Natural Justice". This book is his 'Production No.2', if I can use that expression. In this book, the author has attempted to highlight the importance of logic in the field of law. No doubt, logic plays an important role in the administration of justice, but many a time, judicial pronouncements may transcend logic. One learned Judge who adorned the Bench in the High Court of Madras nearly four decades ago used to say that "a true judicial mind hovers around several factors and finally rests on a conclusion which is pronounced as judgment". Any matter can be viewed from two or more angles. The author has rightly taken the precaution in his Preface to say, "Some views have been expressed, none demands acceptance".

The author has chosen six topics to express his views on the judgments cited by him. His logic is forceful and his reasoning is lucid. The approach to decided cases in the chronological order will enable the reader to perceive clearly the development of the law. The discussion is both interesting and impressive. The summing up at the end of each essay brings out the essence

thereof and deserves special appreciation. The last of the essays 'NO LAW IS IMMORTAL' discloses how an Ordinance of 1944 is trying to disprove the title.

There is no doubt that the book will provoke the thoughts of every reader and enlighten him/her on certain nuances of the Constitutional Law.

I pray to the Lord of Seven Hills to shower His choicest Blessings on the author so that he may come out with more books of this kind.

Signature

(M. Srinivasan)

PREFACE

The interdependence among law, logic and liberty is obvious. That at times these three may be at loggerheads with each other is not that obvious. Still, one cannot be oblivious to this fact. Law, naturally tends to curtail liberty, notwithstanding the restrictions imposed on its makers by the fundamental charter. Logic is the saviour; the guiding principle. Wherever in the name of authority, despotism raises its head, in defiance of the Constitution, logic, and logic alone, provides the necessary weaponry in defence of the Constitution. Logic is not a mere semantic exercise. It is the principle of coherence that checks any waywardness. The essays in this book have sprung from the idea that logic is the middle term that relates law and liberty and makes the relationship meaningful.

The Constitution of India is a complete code in itself. This author firmly believes that no external support is required for it. During many a crisis, it has served the purpose and saved the people of this great nation. It has withstood the test of time and has successfully resisted despotism. No doubt, it suffered wounds in its battles. Still it survives, unmutilated. The framers of the Constitution deserve to be respected. The Constitution is not an outcome of sheer intelligence; but it originated in the fervour and spirit of the struggle for freedom. This origin gave the right direction to the wisdom of its makers.

This book expresses a quest — the quest for clarity. The one institution that has always commanded respect in the free India is the Supreme Court. Several eminent and dispassionate judges have adorned the seats of this great institution. The institution, as such, has been both responsible and responsive — responsible in upholding the Rule of Law and the supremacy of the Constitution; responsive to the will of the people, the will to eschew orthodoxy and march towards a glorious future. This author salutes this esteemed institution.

The essays in this book reflect a particular point of view, which may well be characterised philosophical. That view pertains to the role of the judiciary. While the chief concern of the law-makers should be laying down stringent provisions in such a manner that no offender of a law escapes the sanctions, the chief concern of the judges ought to be placing interpretational limits thereon to ensure that under no circumstances an innocent is punished. Only by these two organs taking such opposite views the social balance may be maintained. A shift in concern by the legislature would corrupt the society, as a shift in concern by the judiciary would disrupt it. Now and then such shifts do occur. Such shifts can be made more infrequent only by undertaking a logical review of the authoritative pronouncements of the highest judicial institution in this country. Only in this spirit such a review is attempted in this book.

Life is fast; so fast, that even those who have an intellectual thirst find it difficult to spare more than a few hours in a week for reading. There is a wide range of intellectual materials which lay claim on such limited hours. Any voluminous work by an unknown author is likely to be ignored. That is the reason which made this author write as small a book as possible on a topic which is as wide as an ocean. The process of selection was not an easy task. Naturally the selection was dictated by the opportunities that this author had in the course of his professional career. Much more can be

written, and will be written, if that be the will of the Almighty so directs.

This book contains six essays. The first deals with the question, whether any inherent power can be conceded in India to the State, de hors the Constitution. In the course of this discussion, the question relating to the limits of the power of Parliament to amend the Constitution is taken up, with reference to the decisions in the famous ***'Kesavananda Bharathi's*** *case*. The second essay deals with the scope and ambit of Article 20(2) of the Constitution, which formulates the rule against double jeopardy. The third deals with the power of the superior courts to release on bail a person charged with an offence, but not yet convicted, with reference to Article 21 and Article 20(3) of the Constitution. The fourth one deals with the scope of Article 265 and seeks to explain how the power to tax is exercised, at times, in a colourable manner. The fifth deals with the power to punish, with reference to Article 20(1) of the Constitution. In the course of this discussion, the definitional nature of Article 20(1) is taken note of and presented in a form wider than what is granted to it by the narrow interpretation that it only expresses the rule against ex post facto laws. The last one raises an interesting question: how an Ordinance promulgated in 1944, as a temporary measure, is still considered to be in force, even after our nation became free India and its people gave to themselves the Constitution?*

The discussions in this book reflect a purely academic point of view. Several questions have been raised; every one of them claims consideration. Some views have been expressed; none demands acceptance.

The Emperor among poets, Kambar, suggests in the very first line of his epic "Ramayanam " that God made all the worlds in such a manner that they appear to exist by themselves, at the same time manifesting His immanence everywhere. The same may verily be said of the Indian Constitution. It made this great polity in such a manner that though this nation appears to exist by

** AIR 1973 SC 1461

itself, it throbs with the blood infused by the Constitution _ the blood which fills every cell that comprises this organic nation.

”உலகம் யாவையும் தாம்உள வாக்கலும்
நிலைபெ ருத்தலும் நீக்கலும் நீங்கலும் நீங்கலா
அலகி லாவிளை யாட்டுடை யார் அவர்
தலைவர் அன்னவர்க் கேசரண் நாங்களே.” *

*First verse of the Tamil epic ‘Ramayanam’, by Kambar.

THE BEACON LIGHT

1. "Law is a despot since violence is its monopoly."* This pithy statement made by one of the most eminent judges of this country, V.R.Krishna Iyer, J., would be true, but for the beacon-light of the Constitution, whose radiant arms reach every sphere of law and curtail every despotic trend that tends to raise its head.

2. There can be no doubt about the importance of the role of the Constitution in upholding the rule of law. The Constitution is the bed-rock of democracy itself. It is the fundamental document which, in India, the people gave to themselves, forty nine years ago.

3. Every student of the Constitution is confronted, at the outset, with a question regarding the very status of the Constitution. Whether the role of the Constitution is negative or positive or both. One view may be that the State is free to do anything that is not prohibited by the Constitution. The opposite view may be that the State shall not do anything that is not permitted by the Constitution.

4. The debate boils down to the question whether the Constitution in India is prohibitive or permissive in nature. When the State does an act and claims that it is entitled to do that since the Constitution does not prohibit such act, can it still be called upon to show how the Constitution permits such act. This question is of vital importance for an understanding of the status of the Constitution.

5. The view that the State may do any act not prohibited by the Constitution, and does not require a Constitutional permission to do an act may be called, for the sake of convenience, 'the negative theory of the Constitution' or in short 'the negative theory' (NT). The other view, that the State shall not do any act not permitted or authorised by the Constitution, though such act is not prohibited

*Justice V.R. Krishna Iyer, "LAW AS THE COLONIAL DESPOT": a review article at page 28, THE HINDU, dated 7-7-1998.

by the Constitution, may be called 'the positive theory of the Constitution' or in short, 'the positive theory' (PT).

6. According to NT, the Constitution plays a negative role, by imposing restrictions and prohibitions upon the State which has inherent powers to do any thing. According to PT the State does not have any such inherent power and whatever powers it has are conferred only by the Constitution.

7. The above question is not merely academic. An answer to it has far-reaching consequences. A situation that arose in a certain state in India nearly 15 years after the advent of the Constitution, illustrates the confusions that resulted from the clamour for power among the various organs of the State and emphasises the need for a correct understanding of the status of the Constitution as a harmonising principle and a resolving power. The said situation resulted in the President of India making a reference under Article 143(1) to the Supreme Court. A Bench of seven judges heard the reference. The opinions rendered in that case are reported in *In re, under Art. 143 of the Constitution of India, AIR 1965 SC 745.* In that case, the Legislative Assembly of a certain State had issued a reprimand to a person for having circulated a pamphlet. The Speaker of the Assembly had ordered arrest of the person and accordingly that person was arrested and detained in jail. An advocate moved the High Court concerned, for bail, and the release of the person was ordered by a Division Bench of the said High Court. The Assembly, at once, passed a resolution declaring that the person already arrested, and his advocate and the two judges who constituted the Division Bench of the High Court, had committed Contempt of the House. On this premise, the Speaker of the Assembly ordered arrest of all these persons, including the two judges. Thereafter the full court comprising of 28 Judges of the said High Court entertained a

writ petition filed by the said two judges and stayed the order of the Speaker. At this stage the President of India referred the questions which thus arose, to the Supreme court, under Article 143(1). The decision thereon need not be set out herein.

8. The facts which led to the Presidential reference in the above case, thus, clearly brings out the significance of a proper understanding of the roles of the various constitutional functionaries.

9. At the outset, the scheme of the Constitution of India suggests that it sets out not only what shall not be, but also what shall be. The very first article reads as follows:-

"Name and territory of the Union.

(1) India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be specified in the First Schedule

(3) The territory of India shall comprise:-

(a) the territory of States;

(b) the Union territories specified in the First Schedule; and

(c) such other territories as may be acquired."

It is true that India, that is, Bharath, existed even before the advent of the Constitution. In fact, it has a long history of more than 5000 years. However it assumed a new form with the advent of the Constitution as 'a Union of States'. For centuries, it was in a gaseous state, its molecules always exhibiting a tendency to fly apart in different directions, contained only by the geographical necessity. In reaction to the colonial despotism of the British rule,

its molecules came nearer to each other. However it still continued to be in a fluid state. After release from its bondage, it cooled down and solidified by bringing its molecules together in accordance with a well-knit political design. This chemical change was brought out by the resolution of the people of India, the resolution to constitute India into a 'Sovereign Democratic Republic' which resolution is embedded in every Article of the fundamental document that the people of India gave to themselves on the 26th day of November 1949. The geographical loss which India suffered in partition, was more than offset by the political gain it achieved, not merely by its independence, but more by its emergence into a sovereign Democratic Republic, constituted by and ruled in accordance with the Constitution.

10 Even territorially, the nation that was constituted thus was not identical with what was geographically known as India or Bharath before the advent of the Constitution. Article 1 (3) and Articles 2 and 3 clarify this position.

11. Part II of the Constitution defines citizenship and thus positively confers citizenship and rights attached thereto upon certain persons as stipulated therein. Article 11 in part II grants a wide power to parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. Article 11 reads as follows:-

> ***"Parliament to regulate the right of citizenship by law.—*** Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship."

The above article thus appears to save the inherent power of

Parliament to make such provisions, and thus may be cited by those who advocate the doctrine of inherent powers of State, implied in NT. However a closer reading clarifies that Article 11 does not refer to any inherent power. The phrase, ‘the power of Parliament’, in Article 11 may very well mean the power which is conferred on Parliament by the Constitution. In fact Article 10 itself confers power on Parliament to make provisions regarding citizenship. Article 10 reads:-

> ***“Continuance of the rights of citizenship.—*** Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.”

Moreover entry 17 in the first list of the Seventh Schedule in the Constitution also grants such powers. Hence the phrase ‘the power of Parliament’ in Article 11 means only the power so conferred on Parliament by the Constitution and there is no need to assume that it refers to any inherent power of Parliament.

12. In parts, V, VI, VIII, IX, IX-A and X of the Constitution the various functionaries or organs which shall constitute the State, comprised of the Union and the States, are set out. Thus the Constitution contains not only provisions limiting and controlling exercise of powers by the State and its various organs, but also provisions by which it constitutes the State itself and its various organs and also provisions conferring specific powers on the State and its organs.

13 The doctrine of inherent power, as implied by NT is not supported by any provision in the Constitution. Postulating such inherent powers, de hors the Constitution, is not warranted by any principle of jurisprudence. Such a postulate would lead to serious inconsistencies

and disastrous consequences that would undermine the supremacy of the Constitution itself.

14 In the case under Article 143, referred to above the contentions raised on behalf of the State legislature concerned, claiming privileges identical with those enjoyed by the House of Commons in England, was a consequence not of any doctrine of inherent power, but it was a direct consequence of Article 194(3) of the Constitution, as it then stood, which made an explicit reference to privileges enjoyed by the House of Commons. The said clause 3 of Article 194 consisted of two parts. The first part empowered the legislatures of States to make laws prescribing their powers, privileges and immunities. The second part provided that until such laws were made the legislatures, would enjoy the same powers, privileges and immunities, which the House of Commons in England enjoyed at the commencement of Indian Constitution.

15 Denying the existence of any inherent power in the State, either in its legislative wing comprising of Parliament and the legislatures of States, or in its executive and judicial wings, does not lead to any anomaly or chaos. There would be no lacuna in the functions of the State on account of such denial. This is so because, the Constitution itself confers on parliament very wide powers of legislation, including the residuary powers of legislation. Article 248 reads:-

"248. (1) Parliament has exclusive power to make anylaw with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those lists."

Thus wherever and whenever a denial of inherent power to the State

tends to prove counter-productive, Parliament may make suitable laws to provide for that which the State could not do without such laws. Reference may be made to *Ram Jawaya Vs. State of Punjab, AIR 1955 SC 549.* The facts which led to that case may now be stated briefly. In 1950, deviating from the then existing procedure of approving books prepared by private publishers to be used as text books in schools, the State Government concerned prepared and published by itself text books on certain subjects. Aggrieved by this, certain publishers approached the Supreme Court under Article 32, contending that without a law specifically authorising the State to carry on such business, the State could not undertake such venture. Mukherjea, C.J., speaking on behalf of a Constitution Bench, overruled this contention. He held that even without a specific legislation empowering the executive Government of a State to carry on a business, such Government could do so. In the course of the judgment there are observations suggestive of the doctrine of inherent powers. In para 12 of the judgment it is said:-

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away."

However ultimately the Bench derived the State's power to carry on trade from the power conferred on the executive by Article 298 to enter into contracts. Article 298, as it stood then, read as follows:-

"1. The executive power of the Union and of each State shall extend, subject to any law made by the appropriate legislature to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of

such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively and to the making of contracts.

2. All properties acquired for the purposes of the Union or of a State shall vest in the Union or in such State, as the case may be."

16. After referring to the above Article, the Bench stated as follows:

"For the purpose of carrying on the business the Government do not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with authors and other people. This power of contract is expressly vested in the Government under Art. 298 of the Constitution. In these circumstances, we are unable to agree with Mr. Pathak that the carrying on of the business of printing and publishing text books was beyond the competence of the executive Government without a specific legislation sanctioning such course."

In other words the ratio of the decision rests on the derivation of a power not expressly granted by the Constitution from another power expressly granted by the Constitution. The suggestion of the doctrine of inherent powers stands, in the above decision, as an obiter dictum. However, by Section 20 of the Constitution (Seventh Amendment) Act, 1956, Article 298 was amended and as a result of such amendment, the said Article, now, declares that the executive power of the Union and of each State shall extend to carrying on of any trade or business. This only shows that a need was felt to grant such an express power to the executive and that accordingly Article 298 was reformulated in 1956. However, it is surprising that in *Ram Jawaya's* case no reference was made to Article 289(2) which

explicitly refers to a trade or business of any kind carried on by or on behalf of the Government of a State.

17. Thus the doctrine of inherent powers is unsupported by authority. It has no place in the Constitutional scheme. The Indian Constitution is a wise blend of aspects chosen from the Constitutions of the great democratic nations of the world. It has such synthetic completeness as would render the doctrine of inherent power otiose. Whenever a need is felt for conferring any specific power on any agency, Parliament may make laws conferring such power on such body. Parliament may make any such law by virtue of the wide residuary power conferred upon it by Article 248.

18. In 1951 there was a presidential reference to the Supreme Court, under Article 143 of the Constitution, seeking the opinion of the Supreme Court on the validity of three provisions of law, by which it appeared that the legislature concerned had delegated some of its functions to the executive. A Bench of seven judges heard the reference and each of the judges gave his separate opinion on those three questions. All the seven opinions are reported together under the caption, *In re Article 143 of the Constitution of India, in AIR 1951 SC 332.* In the leading opinion expressed by Kania, C.J., it was said in para 35 :-

> ".... the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage."

While the majority of the judges constituting that Bench concurred with this statement, the view expressed by Patanjali Sastri, J., as he then was, struck a different note. In his view, when a law is made by a body pursuant to a conferment of law-making power upon it, so conferred by a document which has a fundamental status like the Constitution, such law would be valid unless it violates any express

condition or restriction imposed on its power by the document which conferred such power on it. In other words this view appears to support the doctrine of inherent powers. In fact, it does not. That it does not lend such support is clear from what Patanjali Sastri,J expressed in para 127:-

"The position, therefore, is substantially similar to that under the Indian Councils Act, 1861, and the Government of India Act, 1935, so far as the words conferring law-making power are concerned. Is then this impugned enactment, which merely purports to delegate law-making power to the Central Government for Part C States, a 'law' within the meaning of Art.245(1)? There can be no question but that the Act was passed by Parliament in accordance with the prescribed legislative procedure, and I can see no reason why it should not be regarded as a law. It will be recalled that the restricted interpretation which Markby J. 3 Cal 63 at p.91 put on the word in S.22 of the Indian Councils Act in accordance with Blackstone's definition (formulation of a binding rule of conduct for the subject) was not accepted by the Privy Council in 'Burah's case', 5 I.A. 173. Even if a mere delegation of power to legislate were not regarded as a law "with respect to" one or other of the "matters" mentioned in the three Lists, it would be a law made in exercise of the residuary powers under Art.248."

19. In the above passage it is conceded that a mere delegation of power to legislate with respect to a matter, may not amount to a law either with respect to such matter or with respect to any of the matters enumerated in the three lists. After making such concession, it is said that such delegation would still be a law by itself made in exercise of the residuary powers granted to Parliament by Article 248. The

recourse to Article 248 clearly negatives the doctrine of inherent powers. However, in this view only Parliament can delegate its legislative powers while no State legislature can do so, since State legislature may make laws only with respect to one or the other of the matters enumerated in lists 2 and 3 of the VII schedule in the Constitution, and they do not have any residuary power. Since the present discussion is not concerned with the doctrine of delegation of powers, without making further analysis of this view, it may be concluded that even the view expressed by Patanjali Sastri, J., in the above case, does not lend support to the doctrine of inherent powers.

20. The doctrine of inherent power of the State attempted to raise its head assuming a new garb, under the name of 'police power' of the State. It was said that the State had inherent powers to regulate private rights in public interest. In the Constitutional scheme in India, carefully thought-out provisions have been made conferring such regulatory powers upon the State. As such there is no warrant to assume that de hors the Constitution and apart from the specific powers conferred by the Constitution upon the State to regulate private rights in public interest, certain additional powers must be deemed to inhere in the State, as postulated in U.S.A., to counteract against the excessive expansion of the "due process" clause. The American doctrine of police power need not be imported into India, since the Indian Constitution is a complete code that takes care of every thing that is required for a good administration. In fact, Patanjali Sastri. C.J., speaking for the majority of a Constitution Bench in *State of West Bengal vs Subodh Gopal Bose, AIR 1954 SC 92,* rejected the need for importing the doctrine of police power into Indian jurisprudence. He agreed with the observations of Mukherjea J. in *Charanjit Lal v. Union of India, AIR 1951 SC 41* at p.56 that :-

"In interpreting the provisions of our Constitution we should go

by the plain words used by the Constitution-makers and the importing of expressions like 'police power' which is a term of variable and indefinite connotation in American law, can only make the task of interpretation more difficult."

21. The concept of police power became a matter of contention before another Constitution Bench which heard *Kameshwar Prasad and others vs State of Bihar, AIR 1962 SC 1166*. In that case, a certain rule prohibiting any Government servant from participating in any demonstration or strike relating to his conditions of service, was challenged as unconstitutional and violative of fundamental rights. N.Rajagopala Iyengar, J., speaking for the Bench, denied a place for the doctrine of police power in the Constitutional scheme of India. Referring to the contention that such legislative interference with the freedom of citizens could be supported on the basis of certain American decisions, it was said in that case, in para 8 of the judgment, as follows:-

"As regards these decisions of the American Courts it should be borne in mind that though the First Amendment to the Constitution of the United States reading "Congress shall make no law.... abridging the freedom of speech….." appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power-the scope of which however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the Constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications etc. has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and

without much use for resolving the questions arising under Art. 19(1) (a) or (b) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision."

22. In a different context, a Bench of seven judges of the Supreme Court had an occasion to consider the concept of police power in the context of the Constitution of India, in *Synthetics and Chemicals Ltd. and others vs State of U.P, (1990) 1 SCC 109.* In that case the challenge was to a levy of vend-fee and duties on industrial alcohol by certain State legislatures. It was contended that the police power of the State enabled the State to make regulations in respect of intoxicating liquor, and that to levy an impost on such liquor would be a part of such regulatory measure. Referring to this contention, Sabya Sachee Mukharji, J., speaking for six out of seven judges of the Bench, observed in para 62, as follows:-

"It is true that in State of West Bengal v. Subodh Gopal Bose and Kameshwar Prasad v. State of Bihar the concept of police power was accepted as such, but this doctrine was not accepted in India as an independent power but was recognised as part of the power of the State to legislate with respect to the matters enumerated in the State and Concurrent Lists, subject to Constitutional limitations. It was stated that the American jurisprudence of police power as distinguished from specific legislative power is not recognised in our Constitution and is, therefore, contrary to the scheme of the Constitution. In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution-makers and the importing of expression like 'police power', which is a term of variable and indefinite connotation, can only make the task of the interpretation more difficult."

After stating thus, it was immediately said in para 64 of that judgment, surprisingly, as follows:-

"We recognise power of the State to regulate though perhaps not as emanation of police power, but as an expression of the sovereign power of the State. But that power has its limitations...."

The resort to the sovereign power of the State would not be in line with what was said in para 62 and extracted above, unless the term "the sovereign power of the State", is taken to mean the powers which the State has in terms of the Constitution.

23. It would be an interesting exercise to examine part III of the Constitution as to how the Constitution has carefully provided for a golden balance between the fundamental rights of the individuals on the one hand and the right of the State to regulate and restrict such individual rights in public interest on the other hand. The said part contains twenty six Articles, as on this date: Article 12 to Article 35, both inclusive. Of these, Article 12 defines the term 'the State' for the purpose of part III. Article 13 declares the effect of laws that are inconsistent with the said part, and laws that take away or abridge the rights conferred by the said part, excluding an amendment of the Constitution from its purview. Articles 17 and 18 abolish, respectively, the practice of conferment of title by the State. Articles 23 and 24, prohibit respectively, all forms of forced labour and child labour. Articles 31 A, 31B and 31C save certain laws notwithstanding the declaration in Article 13, and thus in effect, notwithstanding a violation of any one or more of certain fundamental rights conferred by part III on persons and citizens. Articles 33 and 34, respectively, provide for restriction of the rights conferred by part III, in application to those employed in certain

categories of service and for restriction of such rights whenever and wherever martial law is imposed. Article 35 casts an obligation on parliament to make laws prescribing punishment for offences declared as such under part III and disentitles any State legislature from making certain laws, saving, at the same time certain existing laws, unless repealed or amended by parliament. Thus out of the twenty six Articles in part III, twelve Articles mentioned above do not directly declare any right of any person or citizen, as inviolable by the State. This statement does not undermine the significance or importance or the fundamental nature of any of these twelve Articles. However, in contrast with these twelve Articles, the remaining fourteen Articles directly confer certain rights either on persons or on citizens and primarily make such rights inviolable by the State. Even while conferring such eminent rights or the fundamental rights proper, carefully-worded provisions are made in most of these Articles empowering the State to regulate and restrict even such inviolable rights under certain circumstances, in the larger interest of the society as such. The rights conferred by such Articles may, therefore, be said to constitute rights which are prima facie inviolable though violable under certain special circumstances, the burden of establishing the existence of such special circumstances resting heavily on the shoulders of the agency that seeks to violate such rights.

24. Except in Articles 14, 20, 21, 26, 27, 29, 30 and 32, in the remaining Articles, namely 15, 16, 19, 22, 25 and 28, provisions have been made indicating special circumstances under which the State may regulate or restrict by making appropriate laws the rights conferred thereby, In Articles 14, 20, 21, 26, 27, 29, 30 and 32 no provision is made empowering the State to make any law either restricting or regulating the rights granted thereby. However, Article 26, while declaring the rights of every religious denomination and any section

thereof to establish and maintain institutions for certain purposes to manage its religious affairs, to own and acquire properties and to lawfully administer such properties, makes these rights subject to public order, morality and health, without defining these three terms. Articles 26, 27, 29 and 30 confer rights not generally on persons or citizens, but on selected class of persons belonging to either certain religious or certain linguistic groups. Article 28 guarantees that no religious instruction or worship will be forced upon any body, and to this extent it is general. The remaining four Articles are Articles 14, 20, 21 and 32. Of these four articles, article 14 is, as also Article 19 is, made violable under certain special circumstances set out in Articles 31A and 31C. Article 32, by virtue of clause four therein, may be suspended in the manner provided for by the Constitution itself. Articles 20 and 21 alone remain inviolable as such, however which too are made vulnerable under the provisions of the Acts and Regulations set out in the Ninth schedule of the Constitution.

25. Thus every right conferred by part III of the Constitution is made subject to a certain power on the part of the State. Therefore, it cannot be said that denying any inherent power, or police power to the State in India would result in any chaos. The Constitution of India is a complete code which has carefully provided for every situation of conflict that may arise between the rights of the individuals on the one hand and the larger interest of the society on the other hand.

26 In the Constitutional scheme adopted by the people of India, there is no place for either any inherent right in any individual or any inherent power in the State.

27. Though this conclusion seems to be very simple still difficult questions of great significance arose in this regard. Such questions are:-

(i) *Whether the Constitution can be amended in such a way that any right conferred by part III is either taken away or abridged, though such amendment is made according to the procedure laid down in the Constitution itself for making an amendment?*

(ii) Whether an amendment of the Constitution resulting in taking away or abridgement of any of the rights conferred by part III is a law that would be void within the scope of Article 13(2)?

28. In the first stage of the history of the Indian Constitution, the law of the land was that by an amendment of the Constitution any right conferred by part III could be taken away or abridged, since such an amendment was not "Law" for the purpose of Article 13(2). This law was laid down in *Shankari Prasad Singh Deo Vs. Union of India, AIR 1951 SC 458,* by a Constitution Bench of the Supreme Court. Patanjali Sastri, J., speaking for the Bench stated this view, in para 13, in the following words:-

"Although "law" must ordinarily include Constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and Constitutional law, which is made in exercise of constituent power. Dicey defines Constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State." It is thus mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt our constitution-makers, following the American model, have incorporated certain fundamental

rights in Part III and made them immune from interference by laws made by the State. We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from Constitutional amendment. We are inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgement or nullification of such rights by alterations of the Constitution itself in exercise of sovereign constituent power. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of Art. 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. In short, we have here two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations adverted to above, we are of opinion that in the context of Art. 13, 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of Constituent power, with the result that Art. 13(2) does not affect amendments made under Art. 368."

Another Constitution Bench in Sajjan Singh vs State of Rajasthan

etc., AIR 1965 SC 845, reiterated the same law.

29. In the second stage of the history, an eleven-judge Bench of the Supreme Court in *Golaknath and others vs State of Punjab, AIR 1967 SC 1643,* overruled these two earlier decisions and held as follows:-

A. Article 368, as it then stood, set out only the procedure for amending the Constitution and did not confer any power to amend the Constitution on the parliament.

B. The power to amend could be derived from Article 245, 246 and 248 of the Constitution.

C. An amendment was 'Law' within the meaning of Article 13 and hence could not take away or abridge any right conferred by part III. Any amendment which takes away or abridges any such right would be void.

30. The third stage is marked by the historic judgment rendered by the Full Court of thirteen judges of the Supreme Court in *Keshavananda Bharati vs State of Kerala etc., AIR 1973 SC 1461.* Though eleven separate opinions, in the form of judgments were pronounced by the thirteen judges, a summary of the majority view was issued and signed by nine judges. The said summary included the following statements:-

a. *Golaknath's* case was overruled.

b. Article 368 did not enable parliament to alter the basic structure or frame work of the Constitution.

31. The fourth stage was set in motion by the decision of a Constitution Bench in *Minerva Mills vs Union of India, AIR 1980 SC 1789,* where Chandrachud, C.J., speaking for himself and three other judges held

that Articles 14 and 19 cannot be abrogated and an amendment which sought to effect that under the guise of being necessary to achieve the goals set out in part IV was void. In para 61 and 62 of the judgment it was said as follows:-

"... In other words, the Indian Constitution is founded on the bed-rock 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."

"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."

32. This was followed by several other decisions by which the contents of the basic structure of the Constitution was enlarged. As illustrations, it may be cited that free and fair elections were held to be a basic feature of the Constitution in *Kihota Holla Ohon vs Zachilu, AIR 1993 SC 412;* the quintessence of equal justice in *Raghunatha Rao vs Union of India, AIR 1993 SC 1267;* the independence of the judiciary in *Gupta vs Union of India, AIR 1982 SC 149;* and so on.

33. The basic conclusion reached by nine eminent judges out of the thirteen who decided *Keshavananda Bharati* case, appeals to this author for certain reasons, apart from the reasons stated therein. The said conclusion and such additional reasons may now be stated.

34. The conclusion was that by virtue of the power to amend a provision of the Constitution, the basic structure of the Constitution cannot be altered. It was held that the power to amend did not include in it a power to abrogate, destroy or emasculate, which view was expressly and approvingly stated by at least seven out of the thirteen judges.

35. One reason that immediately occurs to this author, in support of that conclusion is that all the elected representatives who should amend the Constitution were elected by the people under and through the process set out in the Constitution. They assume such offices only after taking a solemn oath as prescribed in the Constitution. The person who assumes the office of the President of India takes oath in the following form, as prescribed in Article 60:

"I, A.B., do swear in the name of God/solemnly affirm that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India."

The members of both the houses of Parliament take oath in form III A or III B, as the case may be, prescribed in the third schedule of the Constitution which reads as follows:-

"I, A.B., having been nominated as a candidate to fill a seat in the Council of States (or the House of the people) do swear in the name of God/Solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold sovereignty and integrity of India."

36. It is clear that the President takes a solemn oath to protect and defend the Constitution and the members of Parliament take oath to bear

true faith and allegiance to the Constitution. If these oaths have any sanctity, and if it is true that the people elect their representatives to such high offices with the hope that such representatives would stand by such oaths, then it can very well be said that these representatives are expected to act in consonance with such oaths and not in breach thereof. No person who has taken a vow to protect and defend the Constitution and no person who has taken a vow to bear true faith and allegiance to the Constitution can lawfully do any act that tends to destroy the very Constitution under which he thus assumed his office. A simple, legally recognised rule of estoppel is enough to prevent those who have taken such oaths from acting in violation of these oaths. So long as they are in their offices, assumed by them after taking such oaths, they are bound by the words and spirit of their solemn oath. They would be free to violate it only after they step down from such offices. Once they step down, they would not have the legal power to amend the Constitution. An excellent, in-built safeguard, provided by a simple, unobjectionable rule of estoppel! It cannot be postulated that the power to amend the Constitution can be used to the extent of destroying the very Constitution itself. People elect their representatives under the process envisaged by the Constitution. Could it be their will that such representatives could throw away the Constitution itself or could amend the Constitution to such an extent that no longer would such people have an opportunity to again elect their representatives to rule them?

37. The above reasoning is not based on mere semantics, but it is a direct and logical consequence of the nature of offices assumed by those who have the power to amend and of the solemn promise that they make while assuming such offices, which promise they cannot violate while they continue to hold such offices. It is not necessary to uphold this reasoning, it is not necessary that the term ‘amendment’ should always have a restricted meaning so that it does not include

in its fold a power to repeal or to totally alter the basic structure. To fall back upon such an interpretation of the term ‘amendment’ and to give a restricted meaning to it might be a mere semantic exercise. If a conclusion is based on a mere semantic device, then it stands on shifting sands. Adopting such a semantic interpretation would only invite criticisms like the one levelled by Palekar.J., in his opinion delivered in *Kesavanandha Bharati's* case. That criticism, as it occurs in para 1249 of AIR, is extracted hereunder:-

“Quibbling on the meaning of the word ‘amendment’ as to whether it also involved repeal of the whole Constitution is an irrelevant and unprofitable exercise. Luckily for us besides the word ‘amendment’ in Article

368 we have also the uncomplicated word ‘change’ in that article and thus the intention of the framers of the Constitution is sufficiently known. Then again the expression ‘amendment of the Constitution’ is not a coinage of the framers of our Constitution. That is an expression well-known in modern Constitutions and is commonly accepted as standing for the alteration, variation or change in its provisions.”

38. There is one more aspect to this line of reasoning. Not only the President and the members of parliament and legislatures of States take oaths, as stated above, but even the Hon’ble Judges of the Supreme Court are obliged to take oath in Form No.IV prescribed under the third schedule in the Constitution. The said oath reads:-

“I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India,) do swear in the name of God/Solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, (that I will uphold the sovereignty and

integrity of India) that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."

Such judges not only shall bear true faith and allegiance to the Constitution but shall also uphold the Constitution and the laws. They may, of course, strike down a law or even an amendment of the Constitution if such law or amendment would make a dent in the basic structure of the Constitution, since the phrase 'the Constitution and the laws' in the above oath clearly indicate the priority in case of a conflict between the two and also since primacy is given to the Constitution in the earlier part of the oath requiring true faith and allegiance to the Constitution, without mentioning the term 'laws' in that context. More over the term 'laws', in this context, can only mean laws which are not void under Article 13. As such no judge can interpret any law or any provision of the Constitution so as to empower any person or body of persons to destroy or alter the basic structure of the Constitution.

39. In this view of the matter a question may arise, whether the forms of these oaths are amendable or not. The answer can only be that even these forms may be amended in such a way that no such amendment alters or destroys the basic structure of the Constitution. In other words the requirement to stand by the Constitution and protect it at any cost as the primary duty, shall not be done away with by amending any of these oaths. Without doing so, even the forms of these oaths may be amended. Recently Justice P.A. Choudary, in an article in page 25, in The Hindu dated 16.6.98, captioned "Indian Constitution is not British", has objected to the words 'as by law established', following the words 'the Constitution' in the forms of the oaths under consideration. His view is that the phrase might

mislead one to assume that the Indian Constitution was enacted under some power given by a law in force in British India. Without conceding that this view is correct it may be said that an amendment by omitting the words 'as by law established' in the above forms would not alter or destroy the basic structure of the Constitution and hence such amendment, if carried out, would be permissible. This is just an illustration of the principle stated above. In fact the forms of oath prescribed in the third schedule of the Constitution were amended by the Constitution (Sixteenth Amendment) Act, 1963, by adding in such forms the words, "that I will uphold the sovereignty and integrity of India". Such addition was made so as to effectively pre-empt any constitutional functionary from raising any demand for separation of any part of the Indian territory from India. It is surprising that what was reckoned, by the members of the Body which brought about the above amendment, as an effective device against demands of separatism, did not surface for consideration before the eminent Bench of thirteen judges which heard *Kesavananda Bharathi's* case.

40. Thus these oaths prescribed by the Constitution provide a clear, inbuilt safe-guard against any inroad into the basic structure of the Constitution. The members of the body which can amend the Constitution cannot become such members without taking such oaths; once they become such members after taking such oaths, they cannot use their power of amendment to do any violence to the basic structure of the Constitution. Thus the term 'amendment' may not have a restricted meaning, as such; still, its meaning gets contextually restricted, in Article 368, on account of the restrictions placed by the oaths on those who have such amending powers. Though with a weapon, literally, anybody may be killed, when it is given to a watchman of a house, its use gets restricted to the extent that it shall not be used against the inmates of the house. Similarly

when the Constitution gives the power to amend the Constitution to persons who should protect and bear allegiance to the Constitution, the said power to amend gets restricted in the sense that it shall not be used to destroy the Constitution itself.

41. What amendments would pass the test and what amendments would fail on the ground they make a dent in the basic structure of the Constitution cannot be easily and exhaustively enumerated. The task is entrusted to the wisdom of the highest judicial institution of this nation. That wisdom may falter, but would never fail. The members of this institution are the guardians of the Constitution, appointed as such by the Constitution itself.

42. The view expressed above does not mean that the Constitution, as such, should not be substituted with another. It only means that this cannot be done within the frame work of the present Constitution, by those who purport to act, and who cannot but act, within such frame-work. Such substitution may be done by extra-constitutional methods like a National referendum or revolution. In this sense, no law, not even the Constitution, is immortal. The rich experience of Forty Eight years, when the Constitution has withstood several tests and has guided the nation in its slow but steady march towards the goals of perfection set out in the preamble of the Constitution, strengthens one's optimism that a need may not arise to over-throw the present Constitution completely.

43. In the light of the above discussion it may be concluded that whenever an act of the Union or a State or any of their instrumentalities is challenged as ultra vires the power of such agency, the challenge should be sustained unless a provision of law or a provision in the Constitution is shown, conferring specifically upon such agency the power to do such act. When it is said that courts have inherent

powers, it must be accepted that they have such powers only because of the saving provisions in Section 151 of the Civil Procedure Code and Section 482 of the Code of Criminal Procedure, and in the absence of these statutory provisions, courts may not have any inherent power.

44. The result of the above discussion may be summarised as follows:-

1. *No agency or organ of the State may do anything, to do which it is not empowered by the Constitution;*

2. *Parliament has been conferred with residuary powers of legislation under Article 248 which enables it to make any law even with respect to any matter not enumerated in any of the three Lists, subject however to Articles 249 to 254. By such conferment, Parliament has a supremacy in and only in the field of legislation, which supremacy may also be taken away by an amendment of the Constitution.*

3. *Neither a State legislature nor the executive has any such supremacy by way of any residuary power;*

4. *Even the exercise of powers conferred on such agencies and bodies is subject to and controlled by certain Constitutional limitations, especially those imposed in and by part III of the Constitution under the caption 'Fundamental Rights', there also being certain other restrictions imposed by provisions in other parts of the Constitution.*

5. *Even the so-called inherent powers of the courts in India are available to such courts, only on account of the statutory recognition in Section 151 Civil Procedure Code and Section 482 Criminal Procedure Code. Thus such powers are not in fact inherent powers, de hors the Constitution, but they are*

powers statutorily recognised as such under the scheme of the Constitution.

THE RULE AGAINST DOUBLE JEOPARDY

1. The Principle that no one shall be tried more than once for the same offence appears to be one of the fundamental principles of the Rule of Law, recognised by all systems of jurisprudence. However, in practice, this principle has been diluted to a very great extent, both by the law-makers and the Courts. The extent to which the latter have contributed to such dilution is quite significant. The aim of the present paper is to highlight this, however, only with reference to the authoritative pronouncements of the Supreme Court of India in this regard.

2. The following provisions of law in India, are relevant for a study of this problem:

   (i) Article 20 (2) of the Constitution

   (ii) Section 26 of the General Clauses Act, 1897

   (iii) Section 300 (1) & 300 (6) of the Code of Criminal procedure

3. The above provisions of law are extracted hereunder :-

Article 20 (2) of the Constitution

"No person shall be prosecuted and punished for the same offence more than once."

Section 26 of the General Clauses Act, 1897

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."

Section 300(1) & (6) of the Criminal Procedure Code

(1) "A person who has once been tried by a Court of Competent Jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof."

………

(6) "Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (10 of 1897) or of section 188 of this Code."

4. A grievance that a person was sought to be tried more than once for the same offence came up before the Supreme Court for the first time in *Maqbool Hussain Vs. State of Bombay, AIR 1953 SC 325,* decided by a Constitution Bench of the Supreme Court. In Maqbool's case the authorities under the Sea Customs Act, 1878, had confiscated, under Sec 167 (8) of the Act, gold from a person who had brought it into India from abroad, without declaring the same. They had given him an option to redeem that on a certain payment. Subsequently the delinquent was prosecuted for this same act in the regular criminal court on a charge of commission of an offence under Section 8 of the Foreign Exchange Regulation Act, 1947. The accused filed an application in the High Court concerned, under Article 228 of the Constitution, contending that the case initiated against him in the criminal court involved a substantial question of law as to the interpretation of the Constitution, and praying that

the same should be withdrawn and decided by the High Court. The substantial question which arose was whether the prosecution of the accused in the criminal court was barred under Article 20 (2) of the Constitution in view of the earlier action and order by the authorities under the Sea Customs Act, as stated above, for the same offence. When the matter came up by Special Leave to the Supreme Court, a Constitution Bench held that on the facts of the case the prosecution in the criminal court was not barred under Article 20(2) of the Constitution. Bhagwati.J. speaking for the Bench laid down the following propositions:

> P1) "It [Article 20(2) of the Indian Constitution] incorporated within its scope the plea of "autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence." (Para 11)
>
> P2) "In order that the protection of Art 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a Court of Law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath." (para 12.)

P3) “Confiscation is no doubt one of the penalties which the Customs authorities can impose but that is more in the nature of proceedings in rem than proceedings in personam, the object being to confiscate the offending goods which have been dealt with contrary to the provisions of the law and in respect of the confiscation also an option is given to the owner of the goods to pay in lieu of confiscation such fine as the officer thinks fit.” (para 16.)

P4) “The Customs Officers are not required to act judicially on legal evidence tendered on oath and they are not authorised to administer oath to any witness…

... far from being authorities bound by any rules of evidence or procedure established by law and invested with power to enforce their own judgments or orders the Sea Customs Authorities are merely constituted administrative machinery for the purpose of adjudging confiscation, increased rates of duty and penalty prescribed in the Act.” (para 16.)

5. The Law declared by the Apex Court in the above case was:-

(L1) “... when the Customs Authorities confiscated the gold in question, neither the proceedings taken before the Sea Customs Authorities constituted a prosecution of the appellant nor did the order of confiscation constitute a punishment inflicted by a Court or judicial tribunal on the appellant.” (para 18.)

6. In the above case, for laying down propositions P(l) and P(2), Bhagwati.J. laid emphasis on the conjunction in the phrase

"Prosecuted and punished". The emphasis implies that the meaning of Article 20(2) would be that a person prosecuted and punished for an offence shall not be once again prosecuted and punished for the same offence. In this view, prosecution and punishment, in conjunction, must be present in both instances so that the second instance attracts the prohibition in Article 20(2). In other words, a prosecution that did not end in punishment and a punishment that was not awarded after a prosecution (if there could be one), do not attract Article 20(2). In this view, Article 20(2) does not prohibit prosecuting and punishing a person for an offence although he had been prosecuted for the same offence but not punished (might have been discharged or acquitted). Similarly the said Article does not prohibit prosecuting and punishing a person for an offence, though that person had been punished for the same offence, without having been prosecuted for the same. Whether a person can be punished without being prosecuted, is a question, the answer to which depends upon provisions other than Article 20(2) of the Constitution. Similarly, in this view, a person prosecuted and punished for an offence can be either prosecuted or punished but cannot be "Prosecuted and punished" subsequently for the same offence. Thus an over-emphasis on the conjunction in the phrase "Prosecuted and punished" might lead to illogical assertions.

7. In fact, in P1, the import of this conjunction has been aptly explained to mean that to attract Art 20(2) there should have been a punishment in the first instance & not merely a prosecution. In other words, unless the prosecution in the first instance had ended in a conviction & not in acquittal or discharge, Art 20(2) is not attracted. Thus the implication of the conjunction is to lay stress on the ingredient of 'punishment' and not that of 'prosecution'. P2 postulates that Art. 20(2) would get attracted only when the earlier prosecution and punishment were in proceedings before a court of law or a judicial

tribunal. In other words, P2 seeks to read Art. 20(2), with the addition of the words “ before a court of law or a judicial tribunal”, after the word, “Punished”. If the law of the land permits prosecution and punishment of a person only before either a court of law or a judicial tribunal, then such words are superfluous and it would be enough to read Article 20 (2) in the form in which it actually stands. However if prosecuting and punishing a person is permitted not only before a court of law or a judicial tribunal, but also before persons or bodies not being such court or tribunal, then the consequence of importing these words into Article 20(2) would imply that the Constitution does not prohibit prosecuting and punishing a person more than once for the same offence by any agency other than a court of law or a judicial tribunal.

8. In *Maqbool's* case the result of the judgment could have been supported on the basis of propositions P(l) and P(3) alone. An order of confiscation of smuggled goods is an order in rem. It cannot be said that a person who has illegally smuggled certain goods into this country is the lawful owner of such goods. Hence if such a person is deprived of such goods, it cannot be said that he is punished by an order depriving him of such goods. Deprivation of that which one does not legally possess will not amount to a punishment. The further order granting such person an option to redeem such goods on payment of a certain sum will also not amount to any punishment. Hence the order of confiscation cannot be equated to a punishment and therefore it would not attract Article 20(2).

9. However without confining the discussion to propositions P(l) and P (3), the Constitution Bench in the above case, proceeded to lay down two other propositions, namely P(2) and P(4) to support the conclusion. It thus laid down the law, LI, in a manner, wider than what was called for, though the second limb of LI itself would have

been enough on the facts of that case. On account of such wide statement of law, the protective force of Article 20(2) was whittled down as may be seen from the further developments in this regard.

10 Immediately after the above decision was rendered the same issue was raised before another Constitution Bench of the Apex Court in *S.A. Venkataraman Vs. Union of India and another, AIR 1954 SC 375*. In that case a public servant was accused of having shown undue favour to a certain company and a certain firm, in consideration of receipt of illegal gratification from such company and firm. He was found guilty of such accusations by a Commissioner appointed under Section 3 of The Public Servants (Inquiries) Act of 1850. After considering the said public servant's representation against the proposed dismissal and after consulting the Union Public Service Commission, the President of India dismissed him from service. Subsequently a prosecution was launched against the person so dismissed. It was for the same offences under section 5(2) of the Prevention of Corruption Act and certain sections of the Indian Penal Code. The said person filed a petition under Article 32 of the Constitution in the Supreme Court of India contending that the prosecution initiated against him in the criminal court was violative of Article 20(2) of the Constitution. A Constitution Bench held that such prosecution was not violative of Article 20(2) of the Constitution, on the basis of the following propositions :-

a) "In order to enable a citizen to invoke the protection of clause (2) of Article 20 of the Constitution, there must have been both prosecution and punishment in respect of the same offence. The words 'Prosecuted and punished' are to be taken not distributively so as to mean prosecuted 'or' punished. Both the factors must co-exist in order that the operation of the clause may be

attracted." (para 5.)

b) *"It has also been held by this court in 'Maqbool Hussain's case...' that the language of Article 20 and the words actually used in it afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceeding before a court of law or judicial tribunal, and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute, but which is not required by law to try a matter judicially and on legal evidence." (para 6.)*

c) *"...in Article 20(2) both these words ['Prosecution' and 'Punishment'] have been used with reference to an 'offence' and the word 'offence' has to be taken in the sense in which it is used in General Clauses Act as meaning 'an act or omission made punishable by any law for the time being in force'. It follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes." (Para 15.)*

d) *"A Commissioner appointed under this Act [Public Servants (Inquiries) Act of 1850] has no duty to investigate any offence which is punishable under the Indian Penal Code or the Prevention of Corruption Act and he has absolutely no jurisdiction to do so. The subject-matter of investigation by him is the truth or otherwise of the imputation of misbehaviour made against a public servant and it is only as instances of misbehaviour that the several articles of charge are*

investigated…” (Para 15.)

e) *“...an order of dismissal of a servant cannot be regarded as a punishment for an offence punishable under particular sections of the Indian Penal Code or of the Prevention of Corruption Act. A somewhat analogous case would be that of a member of the Bar whose name is struck off the rolls on grounds of professional misconduct, in exercise of disciplinary jurisdiction by the proper authority. The professional misconduct might amount to a criminal offence but if we are to accept the petitioner’s contention as correct, the man cannot be prosecuted for it, even though the authority inflicting the penalty of removal was not a competent court to investigate any criminal charge nor was the punishment imposed in exercise of disciplinary jurisdiction, a punishment for an offence.” (para 16.)*

11. Of the 5 propositions a, b, c, d and e laid down in the case, proposition ‘a’ is nothing but proposition P(l) set out herein above while discussing *Maqbool’s* case. Similarly proposition ‘b’ is the same as proposition P(2) in Maqbool’s case. Proposition ‘c’ is a new addition. It postulates that a prosecution in order to attract Article 20(2), must be referable to the law which creates the offence. It further postulates that the earlier punishment must have been in accordance with the prescription of that law. In other words, proposition ‘c’ implies that Article 20(2) is attracted only when the earlier prosecution and the earlier punishment were both referable to a single law, which created such offence and prescribed such punishments. This proposition appears to be a mere tautology. No prosecution would be valid unless authorised by law and unless a person is accused of either having committed an act or having

omitted to do something, which commission or omission is declared punishable under such law. Similarly, no punishment would be valid if awarded except in accordance with what is prescribed by such law, for such act or omission. This statement takes us nowhere. It just states what is obvious. However this statement is made only to provide a lead to the next proposition 'd'. On the facts of *S.A. Venkataraman's* case the Commissioner appointed under the Public Servants (Inquiries) Act of 1850 had no jurisdiction at all either to prosecute or punish under any section of the Indian Penal Code or the Prevention of Corruption Act under provisions of which Code and Act, the Public Servant in that case was subsequently prosecuted before a Criminal Court. Therefore it cannot be said that the said commissioner had either prosecuted or punished the public servant for any offence.

12. Proposition 'e' states that dismissal of a servant is not a punishment for an offence. This proposition is indisputable. Punishment, in the context of the Rule of law, is awardable only by the State and its instrumentalities, in exercise of the Sovereign power of the state. When a master dismisses his servant, though such dismissal may be stated to be a punishment in the popular sense of the word, it is not one awarded by the State or its instrumentalities, in exercise of the sovereign power of the State. This is so even where the master happens to be the State itself. In that case the State dismisses its servant not in exercise of the sovereign power, but in accordance with the role of the employer that it has incidentally undertaken. As rightly pointed out by the Constitution Bench in *Venkataraman's* case, the master dismisses his servant not because the servant committed an offence, but because the servant was guilty of 'misbehaviour' or 'misconduct', which may incidentally be an offence too. The fields covered by the term 'misconduct' and the term 'offence' may overlap. However the reason for dismissal is misconduct, as such.

13. The next in line is the case of *Leo Roy Frey Vs. Superintendant, etc., AIR 1959 SC 119*. In that case, the authorities under the Sea Customs Act had confiscated a vehicle and certain articles involved in smuggling, granting liberty to those who were accused of such smuggling to redeem the vehicle and the articles, on payment of a fine. The authorities also imposed a huge penalty on the accused, as contemplated under the Sea Customs Act. After these orders were passed, prosecution in regular criminal court was launched against the accused, for the same act of smuggling, on charges of certain offences declared under Foreign Exchange Regulation Act and Sea Customs Act, read with section 120B of the Indian Penal Code. Pending such criminal trial, the accused were taken into custody and were refused bail. The accused moved the Supreme Court for issue of writs of Habeas Corpus, contending that their detention was illegal since the very prosecution of the criminal case was barred under Article 20(2) of the Constitution. The petitions were heard by a Constitution Bench and the judgment was rendered by S.R.Das, C.J., on behalf of the Bench. The Bench dismissed the petitions holding that the challenge based on Article 20(2) was ill-founded. While the Constitution Bench observed that in imposing confiscation and penalties the collector acted judicially, it still held that this was not decisive and did not necessarily attract the protection guaranteed by Article 20(2). The Bench further held that the relevant question that had to be answered for invoking Article 20(2) was whether the petitioners had been previously prosecuted and punished for the same offence for which they were then being prosecuted before the criminal court. The Bench held, on the facts of that case that the petitioners therein were not prosecuted and punished by the customs authorities for the same offence which formed the subject matter of the criminal case. The reasoning proceeded as follows :-

“The offences with which the petitioners are now charged

include an offence under S.120B, Indian Penal Code. Criminal conspiracy is an offence created and made punishable by the Indian Penal Code. It is not an offence under the Sea Customs Act. The offence of a conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences. This is also the view expressed by the United States Supreme Court in United States V. Rabinowich, (1915) 238 US 78. The offence of criminal conspiracy was not the subject matter of the proceedings before the Collector of Customs and therefore it cannot be said that the petitioners have already been prosecuted and punished for the "Same offence". It is true that the Collector of Customs has used the words "Punishment" and "Conspiracy" but those words were used in order to bring out that each of the two petitioners was guilty of the offence under S.167(8) of the Sea Customs Act. The petitioners were not and could never be charged with criminal conspiracy before the Collector of Customs and therefore Art. 20(2) cannot be invoked. In this view of the matter it is not necessary for us, on the present occasion, to refer to the case of Maqbool Hussain V. State of Bombay 1953 SCR 730 : (AIR 1953 SC 325) and to discuss whether the words used in Article 20 do or do not contemplate only proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal as ordinarily understood. In our opinion, Art. 20 has no application to the facts of the present case." (para 4.)

14. The above reasoning suggests that when a person is prosecuted and punished for an offence 'A', he may be prosecuted and punished once again for the very same offence 'A', provided in the second instance he is charged with some other offence 'B' in conjunction with offence 'A'.

    With respect, it is submitted that a doubt naturally arises as to the acceptability of this line of reasoning though, having emanated from the Apex Court, it has the binding force of law. In this view, Article 20(2) does not prohibit a person being prosecuted and punished twice for the same offence, if the second time a new offence is added alongside the old one for which he had already been punished.

15. In *Leo Roy's* case, incidentally, two things were effected. By observing that the Collector acted judicially, that is, has a duty to act judicially, in ordering confiscation and imposing penalties, proposition P(4), laid down in *Maqbool's* case was simply brushed aside, unceremoniously. In paragraph 4 of the Judgement in *Leo Roy's* case it was stated :-

    "That in imposing confiscation and penalties the Collector acts judicially had been held by this court in its judgement pronounced on May 16, 1957, in F. N. Roy V. Collector of Customs, Petition No. 438 of 1955."

16. In fact no such proposition had been authoritatively laid down in *F. N. Roy's case (AIR 1957 SC 648).* In spite of those comments, the proposition that an authority ought to act judicially while ordering confiscation or imposing penalties, is indisputable, at least after the epoch-making judgement in *Maneka Gandhi Vs. Union of India, 1978 1SCC 248,* though even earlier, a Constitution Bench of the Supreme Court, through its judgement rendered by S. K. Das, J., in *Sew Pujan Rai Indrasana Rai Limited V. Collector of Customs*

and others, AIR 1958 SC 845 had authoritatively laid down this proposition.

17. The second thing done by S. R. Das, C.J., in the judgement in *Leo Roy's* case was to leave open the question whether, as stated in Maqbool's case, Article 20(2) referred only to criminal proceedings before a court of Law or a judicial tribunal as ordinarily understood.

18. The Judgement that appears to have really concluded the issue relating to interpretation of Article 20(2), is *Thomas Dana V. State of Punjab, AIR 1959 SC 375,* decided by a Constitution Bench. B.P. Sinha, J. rendered the judgement on behalf of himself and three other judges, thus being the majority judgement. K. Subba Rao, J. delivered the dissenting judgement. Certain persons were convicted by a regular criminal court on the charge of attempt to smuggle currencies into India, under certain sections of the Foreign Exchange Regulation Act and section 120B of I.P.C. They challenged such conviction in a petition filed in the Supreme Court under Article 32 of the Constitution. Their main contention was that prior to such conviction, the authorities under the Sea Customs Act had punished them by ordering confiscation of such currencies and also the vehicle involved, granting liberty to redeem them on a certain payment and also by imposing a further heavy penalty on them for the same acts, and that such orders barred the subsequent conviction for the same offence, in view of Article 20(2). The following observations were made by B.P. Sinha, J., in the majority judgement, in paragraphs 10,11 and 12 :-

> Ob.1) "It is, therefore, necessary first to consider whether the petitioners had really been prosecuted before the Collector of Customs, within the meaning of Art. 20(2). To "prosecute" in the special sense of law,

means, according to Webster's Dictionary,

> "(a) to seek to obtain, enforce, or the like, by legal process; as, to prosecute a right or a claim in a Court of law. (b) to pursue (a person) by legal proceedings for redress or punishment; to proceed against judicially esp., to accuse of some crime or breach of law, or to pursue for redress or punishment of a crime or violation of law, in due legal form before a legal tribunal; as, to prosecute a man for trespass, or for a riot."

According to "Wharton's Law Lexicon", 14th edn. p.810, "prosecution" means "a proceeding either by way of indictment or information, in the criminal courts, in order to put an offender upon his trial. In all criminal prosecutions the king is nominally the prosecutor". This very question was discussed by this Court in the case of Maqbool Hussain V. State of Bombay, …. with reference to the context in which the word, "prosecution" occurred in Art. 20. In the course of the judgement, the following observations, which apply with full force to the present case, were made :-

> " …and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

In that case, this Court discussed in detail the provisions of the Sea Customs Act, with particular reference to chapter

XVI, headed “offences and penalties.” After examining those provisions, this Court came to the following conclusion:-

> “We are of the opinion that the Sea Customs Authorities are not a judicial tribunal and adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgement or order of a Court of Judicial tribunal necessary for the purpose of supporting a plea of double jeopardy.”

Ob.2) “...That the Sea Customs Act did not envisage the Chief Customs Officer or the other Officers under him in the hierarchy of the Revenue Authorities under the Act, to function as a Court, is made absolutely clear by certain provisions of that Act. The most important of those is the new S. 187 A. That section is in these terms :-

> “187A. No Court shall take congnizance of any offence relating to smuggling of goods punishable under item 81 of the schedule to section 167, except upon complaint in writing, made by the Chief Customs Officer or any other officer of Customs not lower in rank than an Assistant Collector of Customs authorised in this behalf by the Chief Customs officer.”

This section makes it clear that the Chief Customs Officer or any other officer lower in rank than him, in the customs department, is not a “court”, and that the offence punishable under item 81 of the Schedule to S.167, cannot be taken cognizance of by any court, except upon a complaint in writing, made, as prescribed

in that section."

Ob.3) "…All criminal offences are offences, but all offences in the sense of infringement of a law, are not criminal offences".

Ob.4) "…Section 167 speaks of offences mentioned in the first column in the Schedule, and the third column in that schedule lays down the penalties in respect of each of the contraventions of the rules or of the sections in the Act. There are as many as 81 entries in the Schedule to S.167, besides those added later, but each one of those 81 and more entries, though an offence, being an act infringing certain provisions of the sections and rules under the Act, is not a criminal offence. Out of the more than 81 entries in the Schedule to S. 167, it is only about a dozen entries, which contemplate prosecution in the criminal sense, the remaining entries contemplate penalties other than punishments for a criminal offence. The provisions of Chap. XVII of the Act, headed "procedure relating to Offences, Appeals etc.," also make it clear that the hierarchy of the Customs officers under the Act have not been empowered to try criminal offences. They have been only given limited powers of search. Similarly, they have been given limited powers to summon persons to give evidence or to produce documents. It is true that the Customs Authorities have been empowered to start proceedings in respect of suspected infringements of the provisions of the Act, and to impose penalties upon persons concerned with those infringements, or to order confiscation of goods or property which are found to have been the

subject-matter of the infringements, but when a trial on a charge of a criminal offence is intended under any one of the entries of the Schedule aforesaid, it is only the Magistrate having jurisdiction, who is empowered to impose a sentence of imprisonment of fine or both."

Ob.5) "It is true that the petitioners were dealt with by the Collector of Central Excise and Land Customs, for the "offence" of smuggling; were found "guilty", and a deterrent "punishment" was imposed upon them, but as he had not been vested with the powers of a Magistrate or a criminal Court, his proceedings against the petitioners were in the nature of Revenue proceedings, with a view to detecting the infringement of the provisions of the Sea Customs Act, and imposing penalties when it was found that they had been guilty of those infringements. Those penalties, the Collector had been empowered to impose in order not only to prevent a recurrence of such infringements, but also to recoup the loss of revenue resulting from such infringements. A person may be guilty of certain acts which expose him to a criminal prosecution for a criminal offence, to a penalty under the law intended to collect the maximum revenue under the Taxing law, and /or, at the same time, make him liable to damages in torts. For example, an assessee under the Income-tax law, may have submitted a false return with a view to defrauding the Revenue. His fraud being detected, the Taxing officer may realise from him an amount which may be some multiple of the amount of tax sought to be evaded. But the fact that he has been subjected to such a penalty by the Taxing Authorities,

> may not avail him against a criminal prosecution for the offence of having submitted a return containing false statements to his knowledge. Similarly, a person may use defamatory language against another person who may recover damages in tort against the maker of such a defamatory statement. But the fact that a decree for damages has been passed against him by the Civil Court, would not stand in the way of his being prosecuted for defamation. In such cases, the law does not allow him the plea of double jeopardy.

19. On the basis of such observations, the Constitution Bench in that case laid down the law that the proceedings before the Sea customs Authorities under Section 167(8) were not prosecution within the meaning of Article 20(2) of the Constitution. After laying down such law, Sinha, J., proceeded to state as follows:-

> In that view of the matter, it is not necessary to pronounce upon the other points which were argued at the Bar, namely, whether there was a "punishment" and whether "the same offence" was involved in the proceedings before the Revenue Authorities and the Criminal Court. Unless all the three essential conditions laid down in cl.(2) of Art. 20, are fulfilled, the protection does not become effective. The prohibition against double jeopardy would not become operative if any one of those elements is wanting."

20. K.Subba Rao, J., expressed his dissent. After observing that an offence means any act or omission made punishable by any law for the time being in force, as defined in the Criminal Procedure Code, and after observing that the term 'punishment' and the term

'penalty' should have the same meaning for the purpose of Article 20(2), Subba Rao, J., proceeded to consider the meaning of the term "prosecuted". He observed that it is comprehensive enough to take in a prosecution before an authority other than a Magistrate or a criminal court. However he was constrained to follow the dictum in Maqbool's case that for the purpose of Article 20(2) the earlier prosecution should have been before a Court of Law or a Judicial Tribunal. After referring to certain decided cases he concluded in para 34, that:

> "The entire scheme of the Act... leaves no doubt in my mind that so far as offences mentioned in S. 167 are concerned, the Customs Authority has to function as a Judicial Tribunal."

Having concluded so, he expressed in para 34, that any contrary view would lead to an anomalous position:-

> "To illustrate, a Customs Collector may impose a penalty of Rs.25,00,000/- as in this case on his finding that a person has committed an offence under S. 167(8) of the Act, and the accused can be prosecuted again for the same offence before a Magistrate. On the other hand, if the prosecution is first laid before a Magistrate for an offence under S.167(8) and he is convicted and sentenced to a fine of a few rupees, he cannot be prosecuted and punished again before a Magistrate. Unless the provisions of the Constitution are clear, a construction which will lead to such an anomalous position should not be accepted, for, by accepting such a construction, the right itself is defeated."

21. The observations of Subba Rao, J. are logical and convincing.

However, with great respect, it is submitted that he brushed aside one essential phrase in the proposition laid down in Maqbool's case, extracted as proposition P-2 which not only says that the prosecution should have been before a court of Law or Tribunal, required by law to decide the matters in controversy judicially on evidence, but also proceeds to state that such tribunal must be one which must be authorised by law to administer oath. If this last requirement is taken note of, Subba Rao, J., should have accepted the dictum as such and could not have made the observations as extracted above. Only a Bench comprised of more than five judges would be competent to state that such last requirement laid down in *Maqbool's* case is very much besides the point and totally irrelevant to the issue concerned, not at all warranted either by the language of Article 20(2) or by any earlier authoritative pronouncement. The illustration given by Subba Rao, J., places the wide proposition P2 laid down in *Maqbool's* case under the clear light of critical evaluation.

22. From the above discussions it is clear that the following propositions of law have been authoritatively laid down by the Apex Court, with reference to Article 20(2).

Px) The proceedings before the Sea Customs Authorities for confiscation of goods do not constitute a prosecution, for the purpose of Article 20(2).

Py) An order of confiscation under the Sea Customs Act does not constitute a punishment, for the purpose of Article 20(2).

These two propositions are supported by the singular fact that an order of confiscation of goods illegally possessed by a person can never amount to a punishment of that person. Recovering a stolen property from the person who stole that or from the person who subsequently received it does not amount to punishment of that

person. Relieving a person of goods illegally possessed by him does not amount to a punishment. Such orders of confiscation and seizure are orders in rem, that is, orders in respect of certain goods and they are not orders in personam, that is, they are not orders against any person, as such. In this view, a proceeding to order such confiscation will not amount to a prosecution since the concept of 'prosecution' is inextricably connected with the concept of 'punishment'. Only a proceeding that leads to a punishment can be called a prosecution.

23. Two reasons were given in *Maqbool's* case to support the above propositions. One reason is what we have stated above, that is, an order of confiscation does not amount to a punishment. This reason is sufficient to decide the issue which arose in that case. However, Bhagavati, J. proceeded to give a second reason in his judgment in that case. The second reason is that the customs officers were not required to act judicially and hence they were "merely constituted administrative machinery for the purpose of adjudging confiscation, increased rates of duty and penalty prescribed in the Act". However, this second reason was dissented from in *Sewpujan Rai's* case by another Constitution Bench, where it was said that, "in imposing confiscation and penalties under the Sea Customs Act, the Collector acts judicially. Therefore, the view that an order of confiscation or penalty under the Sea Customs Act is an administrative or executive act is no longer tenable." Hence the propositions Px and Py would apply only to cases where orders were passed in the nature of confiscation or seizure or recovery of goods illegally possessed and not to any other case where orders are passed imposing personal penalty or fine. Redemption fine stands on a special footing. It is merely incidental to the main order of confiscation. Imposition of redemption fine is only a liberty granted and hence will not amount to a punishment.

24. However it appears that independent of the reasons stated in *Maqbool's* case, further reasons were stated in *Thomas Dana's* case to hold that proceedings under Section 167(8) of the Sea Customs Act, before the Authorities constituted thereunder, were not 'prosecution' within the reasoning of Article 20(2) of the Constitution. Three such further reasons were given in *Thomas Dana's* case, set out as observations Ob.2, Ob.4 and Ob.5 hereinabove.

25. The said three reasons may be briefly restated and noted now.

Reason No.l

Section 187 A of the Sea Customs Act contains a prohibition that no court shall take cognizance of any offence relating to smuggling of certain goods except upon a complaint by certain officers of the Customs department, named therein. Hence this provision of law clearly distinguishes between a court on the one hand and the Customs Officers on the other hand. Therefore such an officer is not a court.

Reason No.2

The schedule to Section 167 of the Sea Customs Act lists out more than 81 offences. Only about a dozen of them are stated to be triable by Judicial Magistrates while the others are left to be adjudicated by Customs authorities. Hence the section distinguishes two classes of offences, namely, those dealt with departmentally and those assigned to judicial magistrates. This distinction suggests that while the former class comprises of offences which are not criminal offences, the latter comprises of criminal offences.

Reason No.3

Since the authorities under the Customs Act are not vested with the

powers of a magistrate of a criminal court, proceedings before such authorities are in the nature of revenue proceedings. Hence such proceedings do not attract the plea of double jeopardy.

26. Only a larger Bench, comprised of more than five judges of the Supreme Court can assess the validity of each one of the above three reasons. However, with due respect, the following submissions are made, which might assist such larger Bench in assessing the validity of these three reasons, if and when an occasion arises. Regarding the first reason, it may be noted that the requirement that a court cannot take cognizance of a particular offence except upon a complaint by a particular agency, need not necessarily lead to the conclusion that such agency itself is not a court. There are provisions of law which prescribe, in respect of certain offences, that except upon a complaint given by a court, cognizance of such offences shall not be taken by another court. Section 195(l)(b), Code of Criminal Procedure is one such provision. Regarding the second reason, the mere fact that certain offences under a certain enactment are assigned to the adjudication of the Magistrate while certain other offences under the said enactment are assigned to the adjudication of other authorities does not imply, necessarily, that such authorities are not courts. Regarding the third reason, it may be noted that the mere fact that some of the powers of a magistrate are not vested in certain authorities empowered to adjudicate offences and impose penalties may not lead to the conclusion that such authorities are not courts. On the basis of such distinction alone, proceedings before such authorities need not be characterized as revenue proceedings, though such proceedings might result in levy of deterrent penalties. In support of this third reason, two illustrations are stated in the judgment in *Thomas Dana's* case. One is the power granted to the authorities under the Income Tax Act to levy penalty for evasion of tax, without affecting the right to prosecute the assessee in criminal

court for submission of a false return. The second is the availability of civil and criminal actions for defamation. The first illustration, even as stated, clearly shows that a taxing officer is not concerned with the offence of submitting a false return but is concerned with evasion of tax. Such a case may not attract Article 20(2). In the second illustration the civil action is only to recover damages, in the nature of compensation for the loss caused to an individual. It does not amount to a punishment so as to attract Article 20(2). On a similar reasoning, it may be said that any order passed with a view to recovering only a loss, whether to an individual or to the State does not amount to a punishment. In other words to the extent the penalties leviable under enactments like Customs Act, Central Excise Act etc., recover only the loss or damage caused by the delinquent, such penalties may not amount to a punishment. However penalties exceeding the limitation imposed by such purpose are punishments. Though the legislative organ is competent to prescribe such punishments, inspite of punishments prescribed to be imposed by criminal courts, for the same offence, in cases where both the machineries are resorted to, Article 20(2) would step in.

27. In this context the prohibition contained in Section 26 of the General Clauses Act, 1897, is directly on the point. The said Section reads:-

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."

In phrasing the above provision, legislature, in its wisdom, has deliberately omitted the word 'prosecuted' in the phrase "shall not be liable to be punished twice," though in its earlier part, it has stated

"the offender shall be liable to be prosecuted and punished". In such earlier part, it was so stated, only to emphasize the cardinal dictum of the Rule of Law that no one shall be punished without being prosecuted, that is, without being tried in accordance with a fair procedure. However, at the end, while stating the law, the legislature has rightly stated it in a terse manner:

> "…shall not be liable to be punished twice...."

It is submitted that Article 20(2) requires to be reinterpreted in line with Section 26 of the General Clauses Act, 1897, without any over-emphasis on the word 'prosecuted'.

28. In fact, in *Thomas Dana's* case, there appears to have been a great endeavour to establish that a proceeding before the authorities constituted under the Sea Customs Act is not a prosecution before a Court of Law, on an assumption that Article 20 (2) postulated such a requirement. In other words, according to this assumption Article 20(2) should read as under:

> "No person shall be prosecuted (before a court of law) and punished for the same offence more than once."

The words within brackets, however, are not found in Article 20(2). To assume that for the purpose of Article 20(2) the earlier punishment should have been inflicted or awarded in a prosecution before only a court amounts to adding an unnecessary gloss to the said Article, like the one stated to have been placed by Lord Hewart, C.J., in Rex vs Legislative Committee of the Church Assembly, (1923) All.E.R. REP 150 in the test formulated for issuance of a Writ of certiorari. The gloss placed by Lord Hewart, C.J., which, according to Bhagavathi,J., "stultified the growth of the doctrine of natural justice" [*Maneka Gandhi Vs. Union of India, (1978) I SCC248....*],

was removed in England by *Lord Reid in Ridge Vs. Baldwin, (1963) 2 All.E.R. 66,* and in India by Bhagavati, J., in *Maneka's* case. The gloss placed on Article 20(2) by Sinha, J., in *Thomas Dana's* case is still there, and only a Bench comprising of more than 5 judges of the Supreme Court can do away with it.

29. In fact, the gloss, added to Article 20(2) by Bhagwati, J., in *Maqbool's* case was impliedly removed by S.K.Das, J., in *Sewpujanrai's* case, but strongly reintroduced by Sinha, J., in *Thomas Dana's* case.

30. Proposition P2 laid down in *Maqbool's* case postulated that for the purpose of Article 20(2), the earlier prosecution and punishment should have been before a court of law or a tribunal required by law to decide the matters in controversy judicially, on evidence, on oath, which it must be authorised by law to administer. It is admitted in that judgment (at para 12 of AIR) that the words "before a Court of Law or judicial tribunal are not found in Article 20(2). Still it was said,

> "....if regard be had to the whole background indicated above"

such a postulate was warranted. "The whole background indicated above", referred only to:

> a) A passage in Halsbury's Laws of England - Hailsham Edition -Vol.p, pages 152 & 153, para 212, which deals with the pleas of 'autrefois convict' and 'autrefois acquit'. It only says that the test to uphold such pleas is
>
> "...Whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other....";

b) Section 26, General Clauses Act;

c) Section 403(1), Code of Criminal Procedure;

d) the rule against double jeopardy in the American Constitution; and

e) a passage from 'Constitutional Law' by Willis.

In none of the above, a statement could be found, even impliedly, that the earlier prosecution must have been before either a Court of law or a judicial tribunal of such nature as stated in para 12 of the judgment in Maqbool's case. However materials listed in (a) to (e) above were the only materials that constituted 'the whole background' which, according to Bhagavati, J., indicated such a postulate.

31. In *Sewpujanrai's* case it was held that a Collector of Customs had a duty to act judicially while imposing penalties. However, in *Thomas Dana's* case, Sinha, J., reintroduced the postulate (the gloss), relying upon *Maqbool's* case.

32. When two authorities punish the same person separately for the same offence, is it right to uphold this by pointing out certain distinctions between the powers conferred on one authority and those conferred on the other authority, when both do have the necessary power to give such punishments? Any affirmative answer would militate against common-sense, against 'Reason' itself.

33 With due respect, it is submitted that a plain reading of Article 20(2) suggests only the following position:

1) If one had been punished earlier for an offence, then one shall not be punished again for the same offence.

2) The phrase ‘prosecuted and punished’ has been used only to emphasize that without a prosecution, there shall be no punishment.

For the above purpose the term ‘prosecution’ need not mean only a proceeding before a regular criminal court, but it may be construed to mean any proceeding that enables an authority, as an instrumentality of the State, to pass an order that would amount to a punishment. For the above purpose the term ‘punishment’ may be construed to mean any order passed in pursuance of a statutory power either directing a person to be imprisoned (not as an under-trial and not under any provision of law providing for preventive detention) or imposing any fine or penalty on a person, after holding such person guilty of an offence. For this purpose, the term ‘offence’ may be taken to mean, as defined in the General Clauses Act, “an act or omission made punishable by any law for the time being in force.” It may be incidentally noted, in consonance with the dictum in

Maqbool’s case, that an order of confiscation or seizure or recovery of a property from a person, who is not in lawful possession of it would not amount to a punishment and a redemption fine which only grants a liberty to such a person to redeem the property on payment of a certain sum would also not amount to a punishment. Similarly, it may be noted that recovery of due compensation or damages for any loss would not amount to a punishment, and in this regard it may be necessary to insist that where such compensation or damages are sought to be fixed or determined by the terms of any provision having the force of law, whether called as such or differently, as penalties or additional levies or fines, they should be fair and not excessive, as otherwise they would amount to punishment for the purpose of Article 20(2).

34. It is time to step into the field of jurisprudence for resolving the above issue. Is it fair to say that one may be punished twice for the same offence, provided one is not prosecuted on both occasions? This very question presumes that one may be punished without being prosecuted first. Does not this presumption run contrary to the basic postulate of our Constitution as adumbrated in Articles 14 and 21 which require adoption of a fair procedure before a person is punished? Should an interpretation be placed on Article 20(2), which interpretation would stand stark naked, bereft of any reason whatsoever, laughing at Article 14 and Article 21?

35. There are certain provisions of law which state that imposition of a penalty on a person for a particular offence, under certain provisions in a particular enactment, will not operate as a bar to inflicting a punishment on the same person under certain other provisions of either the same enactment or any other enactment, for the same offence. Section 127 of the Customs Act, 1962 (corresponding to Section 186 of the Sea Customs Act, 1878 repealed by it) is an illustration:

Section 127, Customs Act, 1962:

> “**Award of confiscation or penalty by customs officers not to interfere with other punishment:** The award of any confiscation or penalty under this Act by an officer of customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under the provisions of Chapter XVI of this Act, or under any other law.”

In the Sea Customs Act, 1878 which stood repealed by the 1962 Act, the corresponding Section 186 was as follows:-

Section 186, Sea Customs Act, 1878:

> "The Award of any confiscation, penalty or increased rate of duty under this Act by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under any other law."

The main differences between Section 186, Sea Customs Act and Section 127, Customs Act are two:

1) the words 'or increased rate of duty' was dropped in the later Act, since the provision for imposing duty at an increased rate itself had been dropped.

2) while the provision in the earlier Act, in its last limb, speaks only of liability 'under any other law', the provision in the later Act speaks of liability 'under the provisions of Chapter XVI' of that Act or under any other law.

36. Even under the earlier Act, a Constitution Bench of the Supreme Court held in *"Soni Vallabhdas Liladhar and another Vs. The Assistant Collector of Customs, Jamnagar", AIR 1965 SC 481* that the absence of the phrase 'under the provisions of Chapter XVI of this Act' would not mean that a confiscation or penalty imposed on a person for a certain offence under the Sea Customs Act would bar punishment of such person for the same offence under any other provision of the same Act. It was so held on the sole reasoning that Section 186 was just an enabling provision and no prohibition could be read into it. Wanchoo, J., delivered the judgment on behalf of the Bench. The reasoning in para 10 runs as follows:-

> "Section 186 was thus meant for permitting prosecution in addition to action under the Act in the shape of confiscation, penalty or increased rate of duty; it was

> never intended to act as a bar to any prosecution that might be permissible after the award of confiscation, penalty or increased rate of duty. It was merely an enabling Section and not a barring Section and seems to have been put in the Act ex abundanti cautela … We cannot therefore read in S.186 a bar by implication to a prosecution under the Act simply because S.186 enables prosecution under any other law. In this view of the matter Section 186 is no bar to the prosecution for an offence under the Act in connection with a matter in which the award of confiscation, penalty or increased rate of duty has been made."

37. Somehow, one vital question does not appear to have been raised or considered in that case: The question whether sec. 186, Sea Customs Act, 1878 could be valid, since it is hit by Article 20(2). The same question may be asked even now, with reference to section 127, Customs Act, 1962.

38. When a person is punishable under a certain provision of law for a particular offence, the competent legislature may prescribe additional or more severe punishment for the same offence, not only by amending such provision, but also by enacting a new provision. Where such a new provision is so enacted, it would, of course, be read into and alongside the original provision. In that case, there would be only one trial or one prosecution, and the later enactment would be referred only for the purpose of deciding the nature and quantum of punishment. If the later enactment, however, not only prescribes such additional punishment, but also prescribes a distinct trial or prosecution by any agency different from the one empowered under the earlier provision, then resort to both does appear to militate against the spirit of Article 20(2). If this position is acceptable, then

the phrase 'prosecuted and punished' in Article 20(2) acquires a new dimension. The word 'prosecuted' in that phrase suggests that though under two different provisions, two distinct punishments may be awarded to a person guilty of an offence, on that score such person shall not be exposed to two trials or prosecutions.

39. There are a few more decisions rendered by the Supreme Court with reference to Article 20(2) or Section 26, General Clauses Act or both. However no further comment is called for in this regard from any observation made in any of those judgments. It may not be wholly irrelevant here to take note of just one such decision in *T.S. Balaiah Vs. T.S. Rangachari, ITO, etc., AIR 1969 SC 701*. This case was decided by a three-judge Bench. Ramasamy, J., delivered the judgment on behalf of the Bench. One of the questions that arose for decision in that case was whether a person can be prosecuted under Section 177, 1.P.C., and also under Section 52 of the Income Tax Act, 1922, on the same charge of filing of false returns. The contention raised on behalf of the accused was that Section 26, General Clauses Act, 1897 barred resort to both provisions and that action could be taken only under any one of them. Ramaswami, J., rejected such contention, reproduced Section 26 and proceeded to state as follows:-

"A plain reading of the Section shows that there is no bar to the trial or **conviction** of the offender under both enactments but there is only a bar to the punishment of the offender twice for the same offence. In other words, the Section provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or **both** the enactments but shall not be liable to be punished twice for the same offence." (Emphasis added)

In the above passage the words ‘conviction’ and ‘both’ shown with added emphasis, do not reflect the true meaning suggested by a plain reading of Section 26 of the General Clauses Act. To say that one may be convicted twice for the same offence, but not punished twice for the same offence is to presume that even when one cannot be punished, still one can be convicted, in the sense, “found guilty of an offence.” Whether such a futile exercise could be postulated to have been intended by the legislature? To construe Section 26 as authorising ‘prosecution and punishment’ under both enactments contemplated therein, one has to misread the phrase ‘under either or any of those enactments.’ It is not clear from the above judgment how such a construction was arrived at or could at all be supported. The judgment deals with the issues involved not in the light of Article 20(2). No reference is made therein to the said Article.

39. Would it not be in consonance with the spirit of the Indian Constitution, with the spirit of the Rule of Law itself, to interpret Article 20(2) in such a manner as would afford a constitutional recognition to the principle stated in Section 26 of the General Clauses Act, 1897?

40. The Apex Court, in its unfailing wisdom would certainly consider this question, one day or the other, through a Special Bench, that would set at rest the vibrations of thought echoed in this paper.

JAIL VERSUS BAIL

1. Article 21 of the Constitution declares:

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

2. A Constitution Bench of the Supreme Court by its unanimous judgment in *Shri Gurbaksh Singh Sibia and others Vs. State of Punjab (1980)2 SCC 565,* through Chandrachood, C.J., declared the law pertaining to Section 438, the Code of Criminal Procedure, which empowers certain Courts to prevent detention in custody of a person, not yet found guilty of an offence by a competent court. In para 26 of the judgment, it is said:

> "An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi,* that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

3. Section 438, Cr.P.C., as it now stands, is extracted here:

438. Direction for grant of bail to person apprehending arrest.

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including -

(i) *a condition that the person shall make himself available for interrogation by a police officer as and when required;*

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation,

and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

4. Though the Constitution Bench of the Supreme Court in *Gurbaksh Singh Sibia's* case has clearly laid down the law with reference to the above provision and which, in the humble opinion of this author, is in accord with the spirit and philosophy of the Indian Constitution, the significance of the said dictum, unfortunately, has not been fully appreciated in certain decisions rendered subsequently by Benches comprising of less than five judges of the Supreme Court. The purpose of this article is to highlight this most unfortunate regression in the march of Law.

5. The historical development that led to the inclusion of Section 438 in the present Code of Criminal Procedure, 1973, are clearly set out in *Gurbaksh Singh Sibia's* case and as such are worthy of being extracted here:

The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present Section 438. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power. The need for extensive amendments to the Code of Criminal procedure was felt for a long time and various suggestions were made in different quarters in order to make the Code more effective and comprehensive.

The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipatory bail". It observed in paragraph 39.9 of its report (Volume I):

> "The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity of granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.
>
> "We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the court of Session, and that the order should take effect at the time of arrest or thereafter.
>
> "In order to settle the details of this suggestion,

the following draft of a new section is placed for consideration:

497-A. (1) When any person has a reasonable apprehension

that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps under Section 204(1), either issue summons or a bailable warrant as indicated in the direction of the court under sub-section (1).

(3) If any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.

"We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the Court and prefer not to fetter such discretion in the statutory provision itself. Superior courts will, undoubtedly, exercise their discretion

> properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused."

The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced Clause 447 in the Draft Bill of the Code of Criminal Procedure, 1970 with a view to conferring an express power on the High Court and the Court of Session to grant anticipatory bail. That clause read:

> 447. (1) When any person has reason to believe that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.
>
> (2) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1).

The Law Commission, in paragraph 31 of its 48th Report (1972), made the following comments on the aforesaid clause:

> "The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very

exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

Clause 447 of the Draft Bill of 1970 was enacted with certain modifications and became Section 438 of the Code of Criminal Procedure, 1973.

6. To interpret section 438, Code of Criminal Procedure, the Constitution Bench, in *Gurbaksh Singh Sibia's* case, compared the said provision with sections 437 and 439 of the said Code. Those sections may now be extracted here, as they read now:

SECTION 437, Cr.P.C.

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear

reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into

his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court may impose any condition which the Court considers necessary -

a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgement is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

439. Special powers of High Court or Court of Session regarding bail.-

(1) A High Court or Court of Session may direct

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purpose mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

7. After considering the differences between the above two sections on the one hand and section 438 on the other hand, the Constitution Bench, in *Gurbaksh singh sibia's* case, proceeded to state, in paragraph 12 of its judgment, as follows:-

"…By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence."

"…The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has

departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully: Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in paragraph 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail."

8. One of the appeals before the said Constitution Bench was against the decision of a Full Bench of a certain High Court dismissing an application under section 438, Code of Criminal Procedure. The Constitution Bench ruled that the judgment of the said Full Bench was thereby substantially set aside. The said Full Bench had dismissed the application before it on the basis of eight propositions formulated by it with reference to the power of the court under the said section 438. Such eight propositions have been summarised in paragraph 11 of the judgment of the Constitution Bench as follows:-

(i) The power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only;

(ii) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusation not so far levelled.

(iii) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.

(iv) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.

(v) Where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under Section 438 should not be exercised.

(vi) The discretion under section 438 cannot be exercised with regard to

offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.

(vii) *The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised; and*

(viii) *Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless."*

9. The Constitution Bench critically evaluated every one of the eight propositions summarised above and rejected seven of them as invalid, agreeing only with proposition No. ii as stated above. Thereafter the Constitution Bench stated as follows in paragraph 13 of the judgment:

> "…The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor-General.

Our answer, clearly and emphatically, is in the negative."

10. Regarding proposition No:i laid down by the High Court, the Constitution Bench stated its view in paragraph 22 of its judgment, as follows:-

"By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under Section 437 or Section 439. These sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations."

11. Recently a three-judge Bench of the Supreme Court, in *Directorate of Enforcement and Another Vs. P.V. Prabhakara Rao, (1997) 6 SCC 647,* entertained an appeal against an order passed by a High Court under section 438 of Cr.P.C. The High Court had ordered release of the petitioner on bail in the event of arrest. The Supreme Court set aside the said order of the High court and dismissed the original application under section 438.

12. After setting out the facts of the case, the three-judge Bench in para 8 of its judgment referred to Gurbaksh Singh's case. The passage

referred to occurs in para 21 of the judgment in Gurbaksh Singh's case, which reads as follows :-

> "…A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail."

13. After extracting the above passage from *Gurbaksh Singh's* case, three reasons, and only three reasons were stated by the three-judge Bench to set aside the order of the High Court. The said three reasons are found in paragraphs 11, 12 and 13 of the said judgment. They are extracted below:

> "11. The learned Single Judge has taken into account the fact that all other accused arrested in connection with this case have been released on bail. But they were released on bail only on the failure of the investigating agency to complete the investigation within the time prescribed in the proviso to Section 167(2) of the Code. How could this respondent take advantage of that fact? We cannot overlook that the respondent too has contributed to the non-completion of the investigation. Completion of investigation could be achieved only by interrogating all the persons involved as well as

acquainted with the matter and after collecting all material evidence procurable. So the learned Single Judge should never have counted this point in favour of granting anticipatory bail to the respondent."

"12. The most glaring feature which even the respondent did not repudiate is the magnitude of the criminal conspiracy hatched, the ingenuity with which the cabal was orchestrated and the meticulousness with which it was implemented and the colossal amount of foreign exchange siphoned off from the country. It is not disputed that whomsoever perpetrated this grave economic offence deserves to be dealt with sternly under law."

"13. When the learned Single Judge himself felt, after going through the records in this case, that the materials already collected were capable of stretching an accusing finger towards the respondent, it was not at all a proper exercise of the discretion by favouring him with an order of anticipatory bail under Section 438 of the Code."

The first reason stated in paragraph 11 extracted above finds fault with the reasoning of the High Court that since all the accused other than the petitioner in that case had been released on bail, the petitioner could also be so released. It was pointed out that factually all the other accused had been released on bail since the investigation had not been completed within the prescribed time. It was further said that the respondent therein, who had contributed to such non-completion could not take advantage of this fact. The next reason stated in para 12 highlights the gravity of the said economic

offences requiring to be sternly dealt with. The third reason stated in para 13 is that the materials on record stretched an accusing finger towards the respondent therein.

14. With great respect it is submitted that a reading of the above three reasons immediately gives rise to two questions:-

A. Does not the law declared in ***Gurbaksh Singh's*** *case imply that the judicial discretion exercised by a Superior Court under section 438 should not be interfered with by any process of construction, unless, of course, such discretion had been exercised in a palpably perverse manner?*

The passage extracted hereinabove from para 13 of the judgment in *Gurbaksh Singh's* case provides a clear answer to this question.

B. Whether the discretion to grant or refuse bail under section 438 Cr.P.C. should depend on the likelihood of the accused being really guilty or not?

In para 12 of the judgment in *Gurbaksh Singh's* case the principle of "the presumption of innocence" is hailed as a salutary principle of criminal jurisprudence.

A two-judge Bench, in *state vs. Anil Sharma, (1997) 7 SCC 187,* entertained an appeal against an order of a High Court granting bail under section 438. The Supreme Court in that case interfered with the said order of the High Court, allowed the appeal and rejected the application for pre-arrest bail order. Though the decision turned mostly on the facts of that case, an observation therein would be relevant for the purpose of the present discussion. On facts, the petitioner before the High Court in that case, who was the respondent before the Supreme Court, was a Minister of a certain State apart from being the son of a Central Minister. The charge against him

was that he had amassed wealth far in excess of known sources of his income, which could have accumulated due to a transfer of assets by his father to him. Two contentions were raised on behalf of the Appellant State against the order granted by the High Court. One contention was that in a case like that, which involved corruption in high places an order of pre-arrest bail should never have been granted. The other contention was that the investigating agency would suffer a great handicap while interrogating a person armed with such an order, especially when such person was highly influential. These two contentions are dealt with in paragraphs 6 and 8 of the judgement of the two-judge Bench of the Supreme Court. Paragraph 6 deals with the second contention. It runs as follows:

> "6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those

entrusted with the task of disinterring offences would not conduct themselves as offenders."

Paragraph 8 deals with the first contention:

> "8. The consideration which should weigh with the Court while dealing with a request for anticipatory bail need not be the same as for an application to release on bail after arrest. At any rate the learned Single Judge ought not to have side-stepped the apprehension expressed by the CBI (that the respondent would influence the witnesses) as one which can be made against all accused persons in all cases. The apprehension was quite reasonable when considering the high position which the respondent held and in the nature of accusation relating to a period during which he held such office."

After making such observations the Supreme Court allowed the appeal and set aside the order of the High Court.

The observation regarding custodial interrogation extracted above suggests that such interrogation would be more useful than an interrogation of an accused armed with an order of pre-arrest bail. However the Code of Criminal Procedure does not expressly provide for any interrogation of the accused by a police officer. The term 'interrogate', to the knowledge of this author, has not been used anywhere in the Code of Criminal Procedure except in Section 438 itself. Chapter V of the said Code deals with arrest of persons. Sections 41 to 60 are arrayed under this chapter V. Sections 41 to 45 lay down the circumstances under which a person may be arrested either by police or by a private person or by a Magistrate. Section 46 specifies the mode of making arrest. Section 47

deals with search of a place to secure the arrest of a person. Section 48 empowers the police officer to pursue an offender into any place in India. Section 49 lays down an important condition and hence may be extracted here:

No unnecessary restraint

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

Interrogation of the accused cannot be deemed to be a part of the process of investigation into the commission of an offence. Sections 157 to 163 of the Code lay down the procedure for such investigation. Even here there is no reference, express or implied, to the power of the officer making investigation to interrogate the accused. In fact section 161 empowers a police officer to examine persons, supposed to be acquainted with the facts and circumstances of the case. Such persons may be so examined only so long as they are considered to be witnesses. Sub-section (2) of section 161 lays down an important principle. The entire section 161 may be extracted here:

161. Examination of witnesses by police.

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

15. Sub-section (2) in the above provision clearly implies that the moment answer to a question tends to expose a witness to a criminal charge or to a penalty or forfeiture, the power of the police officer to examine such person any further would cease. Similarly, while Section 161(1) empowers a Magistrate to record a confession, the proviso thereto prohibits explicitly a police officer from recording any such confession. The prohibition would apply even to a police officer on whom magisterial powers have been conferred statutorily. Moreover sub-section (4) thereto lays down the procedure to be followed by a Magistrate while recording a confession. A Magistrate recording a confession is required to make a memorandum beneath such record that he had explained to the person making such confession that such person was not bound to make such confession and that it was voluntarily made.

16. The entire scheme of the Code implies that the legislature never intended that the police officer making an arrest could interrogate the person arrested with a view to eliciting any information that would expose the person arrested to any charge, penalty or forfeiture. In fact this scheme is in consonance with the principle laid down in Article 20(3) of our Constitution, which states that "No person accused of any offence shall be compelled to be a witness against himself."

17. It is no doubt true that a three-judge Bench of the Apex Court in *Nadhini Satpathi Vs. P.L. Dani, (1978) 2 SCC 424* held that section

161, Cr.P.C. enables the police to examine even the accused during investigation. Justice Krishna Iyer, speaking for the Bench, came to that conclusion on the sole ground that this question had been thus settled in *Pakala Narayana Swami Vs. Bharath AIR 1939 PC 47* and *Mahabir Mandal Vs. The State of Bihar, AIR 1972 SC 1331.* However the section which came up for interpretation in *Pakala Narayana Swami's* case and *Mahabir's* case was not section 161 Cr.P.C, but it was section 162 Cr.P.C. Sections 161 & 162 Cr.P.C. are substantially in the same form now in the 1973 Code, as they were in the earlier 1898 Code. Sec. 162, Cr. P.C. may now be extracted :-

162. Statements to police not to be signed:

Use of statements in evidence. — (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

18. In *Pakala Narayana Swami's* case, the Privy Council came to the conclusion that the prohibition in Section 162(1) Cr.P.C., that no statement made by any person to a police officer in the course of an investigation shall be used for any purpose except for the purpose stated in the proviso thereto, would apply even where such statement had been made by a person who subsequent to making such statement was made an accused. In coming to that conclusion, Lord Atkin, speaking for the Board, made the following observations, regarding section 162 Cr.P.C.:

"The reference in the Section to "this chapter" is to the group

of Sections beginning with Ch.14 forming Part 5 of the Code entitled "Information to the Police and their Powers to Investigate". After giving powers to certain police officers to investigate certain crimes the Code proceeds in S.160 to give power to any police officer making an investigation by an order in writing to require the attendance before himself of persons who appear to be acquainted with the circumstances of the case. By S.161 any policeman making an investigation under the chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him other than those the answers to which may tend to incriminate him. Then follows the Section in question which is drawn in the same general way relating to "any person." That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom may be suspected at the time. The first words of the Section prohibiting the statement if recorded from being signed must apply to all the statements made at the time and must therefore apply to a statement made by a person possibly not then even suspected but eventually accused. "Any such statement" must therefore include such a case: and it would appear that if the statement is to be admitted at all it can only be by limiting the words "used for any purpose" by the addition of such words "except as evidence for or against the person making it when accused of an offence." If such an exception were intended one would expect to find it expressed: and their Lordships cannot find sufficient grounds for so departing from the plain words used. …when the meaning of words is plain it is not the duty of the

Courts to busy themselves with supposed intentions."

19. In *Mahabir's* case, following the dictum of the Privy Council, a three-judge Bench of the Supreme Court had simply ruled that the bar of inadmissibility of a statement contained in section 162 of the Code operates not only on statements of witnesses but also on those of the accused.

20. Hence neither of the two cases, viz, *Pakala Narayana Swami's* case and *Mahabir's* case, constitutes an authority for the proposition that under section 161 of the Code, a police officer can examine even an accused. Therefore, with great respect, it is submitted that the three-judge Bench in *Nandhini Satpathi's* case assumed the contrary while holding that even an accused can be examined by a police officer under section 161 of the Code. Apart from citing *Pakala Narayanaswami's* case and *Mahabir's* case, no independent reason has been given in *Nandhini's* case for this proposition. Hence it hangs in the air, without a base; however, it is still a binding authority, and would continue to be so until overruled by a larger Bench of the Apex Court. Even according to the view expressed in *Nandini's* case, the scope of the examination of an accused by a police officer under section 161(1), is greatly circumscribed by section 161(2). In *Nandhini's* case, it is said that such examination of an accused can proceed only so long as the accused figures, **functionally as a witness.** After saying so, Justice Krishna Iyer, in paragraphs 45 and 46 deals with section 161(2), in his own inimitable style as follows:

> "Two vital, yet knotty, problems demand solution at this stage. What is 'being witness against' oneself? Or, in the annotational language of Section 161 (2), when are answers tainted with the tendency to expose an accused to a criminal charge? When can testimony be

castigated as ‘compelled’? The answer to the first has been generally outlined by us earlier. Not all relevant answers are criminatory; not all criminatory answers are confessions. Tendency to expose to a criminal charge is wider than actual exposure to such charge. The spirit of the American rulings and the substance of this Court’s observations justify this ‘wheels within wheels’ conceptualization of self-accusatory statements. The orbit of relevancy is large. Every fact which has a nexus to any part of a case is relevant, but such nexus with the case does not make it noxious to the accused. Relevance may co-exist with innocence and constitutional censure is attracted only when inference of nocence exists. And an incriminatory inference is not enough for a confession. Only if, without more, the answer establishes guilt, does it amount to a confession. An illustration will explicate our proposition.

Let us hypothesize a homicidal episode in which A dies and B is suspected of murder; the scene of the crime being ‘C’. In such a case a bunch of questions may be relevant and yet be innocent. Any one who describes the scene as well-wooded or dark or near a stream may be giving relevant evidence of the landscape. Likewise, the medical evidence of the wounds on the deceased and the police evidence of the spots where blood pools were noticed are relevant but vis-a-vis B may have no incriminatory force. But an answer that B was seen at or near the scene, at or about the time of the occurrence or had blood on his clothes will be criminatory, is the hazard of inculpatory implication. In this sense,

answers that would, in themselves, support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Art. 20 (3) if elicited by pressure from the mouth of the accused. If the statement goes further to spell in terms that B killed A, it amounts to confession. An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20 (3) strikes at confessions and self-incriminations but leaves untouched other relevant facts."

21. The above passages clearly bring out the scope of an examination of the accused by a police officer, even under section 161 Cr.P.C. It cannot be said, even by stretching the language of section 161 Cr.P.C. that the examination contemplated therein could be the same as an interrogation. That the power to interrogate an accused has not been granted to a police officer is in line with the spirit of our constitution, especially Article 20(3). In fact the wide scope of Article 20(3) was taken note of and expanded by the full court of eight judges in *M.P.Sharma Vs. Sathish Chandra, AIR 1954 SC 300*. Search warrants issued by a Magistrate under section 96 of the old Code, to search certain places in connection with an FIR registered against certain accused, were challenged under Article 32 of the Constitution. One of the grounds of challenge was that such a search would be a compulsory procurement of incriminatory

evidence from the accused himself and is, therefore, hit by Article 20(3). Jagannadha Das. J., speaking for the full court, stated as follows in paragraphs 10 and 11 of the judgement:

> The phrase used in Art 20 (3) is “to be a witness” and not to “appear as witness”. It follows that the protection afforded to an accused in so far as it is related to the phrase “to be a witness” is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course
>
> may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.
>
> Considered in this light, the guarantee under Art.20 (3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for ‘production’ of evidentiary documents which are reasonably likely to support a prosecution against them.”

22. Regarding the presence of the word ‘interrogation’ in Section 438(2) (i) of the Code, it may be said that what the legislature carefully and deliberately avoided while framing the 1898 Code, stealthily crept into the 1973 Code. It appears, at least to this author, that the inclusion of that word is more in the nature of an accident of articulation than in the nature of an incident of deliberation.

23. The isolated use of the word, 'interrogation' in Section 438 of the Code cannot be given any expansive meaning. No significance can be attached to it, in view of the conspicuous absence of a provision in the Code empowering an officer making an arrest to interrogate the person arrested. In view of the scheme of the code and the constitutional principle discussed above, the word 'interrogation' in section 438(2)(i) ought to be interpreted to mean only an 'examination', as contemplated in section 161(1), and as circumscribed by Section 161(2) of the Code. As and when a Bench of the Supreme Court comprising of more than three judges rules that an accused person cannot be examined under section 161, thus differing from the contrary view expressed in *Nandhini's* case, even the limited significance suggested above cannot be attached to the word 'interrogation' in section 438(2)(i) of the Code and thereafter it would exist just to be ignored.

24. Interpreting the term 'interrogation' in Section 438(2)(i) to mean anything more than the examination contemplated in Section 161 of the Code would make Section 438(2)(i) vulnerable to a valid challenge that a drastic power not given to a public servant, directly and expressly by the statute, is sought to be conferred through a condition that could be judicially imposed, without any statutory guidelines as to when and in what cases such power could be or could not be granted. To save the provision from such constitutional challenge, the term 'interrogation', in this context, ought to be interpreted to mean only an examination under Section 161(1) of the Code, subject to the limitation imposed on it by Section 161 (2) thereof.

25. In view of the above discussion, the observation of the two-judge Bench in *Anil Sharma's* case that "custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect

who is well ensconced with a favourable order under Section 438 of the Code", stands aloof, not in line with the constitutional principle and the scheme of the code. The said observation was besides the ratio of the said judgement, such ratio being that when the accused held a high political position, the apprehension that he would influence the witnesses is quite reasonable.

26. A two-judge Bench in *State of Andhra Pradesh Vs. Bimal Krishna Kundu, (1997) 8 SCC 104* followed the observations in Anil Sharma's case and quashed an order of the High Court concerned by which the accused had been granted pre-arrest bail. Certain printers who were responsible for leakage of question papers set for certain examinations, were charge-sheeted on allegations that after they had been black-listed for such leakage, they had conspired with certain others, got printing orders of question papers in a benami name and once again caused leakage of such question papers. It appears that while granting pre-arrest bail to them, the High Court concerned had commented about the heinous nature of the crime alleged and how it affected adversely the career of millions of students. In appeal against the grant of such pre-arrest bail, a two-judge Bench of the Supreme Court quashed the said order on the grounds stated in paragraph 12 of the judgement, extracted herein below:

> "We are strongly of the opinion that this is not a case for exercising the discretion under Section 438 in favour of granting anticipatory bail to the respondents. It is disquieting that implications of arming the respondents, when they are pitted against this sort of allegations involving well-orchestrated conspiracy, with a pre-arrest bail order, though subject to some conditions, have not been taken into account by the learned Single Judge. We have absolutely no doubt that if the respondents are

> equipped with such an order before they are interrogated by the police it would greatly harm the investigation and would impede the prospects of unearthing all the ramifications involved in the conspiracy. Public interest also would suffer as a consequence. Having apprised himself of the nature and seriousness of the criminal conspiracy and the adverse impact of it on "the career of millions of students", learned Single Judge should not have persuaded himself to exercise the discretion which Parliament had very thoughtfully conferred on the Sessions Judges and the High Courts through Section 438 of the Code, by favouring the respondents with such a pre-arrest bail order."

27. The above decision leans on *Anil Sharma's* case. The decision appears to be not in line with the dictum of the Constitution Bench in *Gurubaksh Singh's* case. Though for the purpose of comparison Section 437 of the Code was extracted above, the entire discussion so far was confined to an interpretation of Section 438 of the Code. While Section 438 provides for granting bail to a person apprehending arrest, Section 437 provides for granting bail to a person arrested during investigation into a crime. The former may be called "pre-arrest bail", in short, though it is popularly called "Anticipatory Bail"; the latter may be called "Post-Arrest Bail", in short.

28. At the outset, it may be said that there appears to be no reason at all to suppose that conditions for grant of post-arrest bail should be more stringent than those for grant of pre-arrest bail. Reasons might exist to suppose that the conditions for grant of pre-arrest bail ought to be more stringent than those for grant of post-arrest bail. Subject to this important reservation, Section 437 may now be analysed.

It will be better to read Section 437 and 439 together. Both these Sections have been extracted hereinabove. The following points are noteworthy in this regard:

1. The term 'bail' is not defined anywhere in the Code, though Section 2(a) defines the term 'bailable offence' to mean an offence shown as bailable in the First Schedule or made bailable by any other law and the term 'non-bailable offence' to mean every offence other than those that are bailable.

2. Section 436 provides for grant of bail in cases of bailable offences. Section 437 to 439 provide for grant of bail in cases of non-bailable offences.

3. Under Section 437 a person accused may be released on bail where he is detained in a police station or appears or is brought before a Court, not being a High Court or Court of Sessions. The law is stated in passive voice to the effect that under any of these circumstances a person accused may be released on bail. There is no express statement in Section 437 as to who shall order release of the accused on bail. However, contextually, it appears that when the accused is in a police station, the officer-in-charge of the station and when the accused is before a Court as stated above, such court, may release the accused on bail. A rider is attached to this, to the effect that in two cases enumerated as (i) and (ii) in Section 437(1), the accused shall not be so released on bail, unless directed by the court under circumstances stated in the provisos therein. Thus the implication is that except in cases enumerated under (i) and (ii) therein, the accused may be released on bail either by the officer-in-charge of a police

station or by the court, depending on where the accused may be at the relevant time.

4. Sub-section (2) of Section 437 is not aptly worded. It authorises such officer, and, of course, the court to release the accused if it appears to such officer or court that no reasonable ground exists for believing that the accused has committed a non-bailable offence though further inquiry into his guilt is necessary. This implies that even when the case is before the court and the accused is no longer in the custody of such officer, the accused may be released by such officer if it appears as stated above to such officer. It is further stipulated that in such cases the accused shall be released either on bail or on his executing a bond without any surety for his appearance. Whether the legislature intended that a police officer should have such power to release a person accused even when the accused is in judicial custody? To give a negative answer the section must be reformulated as follows:-

"At any stage of investigation, inquiry or trial, if it appears to such officer or court, as the case may be,-----"

On such reformulation, the phrase "as the case may be" would, serve to empower the officer at any stage of investigation and the court at any stage of inquiry or trial.

5. Sub-section 3 of Section 437 empowers the court to impose certain conditions for releasing on bail the person accused of the Commission of any of the offences specified therein.

6. While the court is empowered to direct arrest of a person

released on bail, a police officer is not so empowered.

29. From the above analyses it might appear as if Section 437 lays down conditions more stringent than those contemplated by Section 438. In other words, it appears as if conditions for grant of post-arrest bail are more stringent than the conditions for grant of pre-arrest bail. However, a closer scrutiny of the provisions clarifies that it is not so. In fact under section 438, conditions may be imposed for ordering the release on bail of a person apprehending arrest, irrespective of the nature of the accusation. Under section 437 conditions may be imposed for release of a person accused only in certain specified cases, specified in sub-section 3 thereof, which constitute serious offences, as such chosen by the legislature. In other words where the accusation is not of such serious offences, no condition may be imposed for a post-arrest bail, though even in such cases conditions may be imposed for pre-arrest bail. The limitation placed on the power of the court in releasing on bail, a person accused of offences punishable with death or life-imprisonment or under circumstances stated in clause (ii) of sub-section 1, is due to the status of the court concerned. While pre-arrest bail may be granted only by High Court or the Court of Session, post-arrest bail under Section 437 is grantable by courts sub-ordinate to these two specified Superior Courts. Hence the limitation on the power of such non-superior courts in the matter of granting bail. The presence of limitation in Section 437 and the absence of such limitation in section 438 are not in any way due to the fact that Section 437 is for granting post-arrest bail while section 438 is for granting pre-arrest bail. This position is clarified by the wide power granted under section 439 to the High Court and the court of Session to grant post-arrest bail without any such limitation, save the requirement of giving notice to the public prosecutor in certain specified cases.

30. The above discussion leads to the conclusion that, the powers of the High Court and the Court of Session to grant a pre-arrest bail and a post-arrest bail are substantially the same except to a limited extent. While for granting post-arrest bail to a person accused of certain offences specified in the proviso to section 439(1), either the issuance of a notice to the public prosecutor or a record of reasons for not issuing such notice is required as a condition precedent, no such notice is mandatory for granting pre-arrest bail, under the express terms of Section 438.

31. A three-judge Bench of the Supreme Court in *Pokar Ram Vs. State of Rajasthan and others, (1985) 2 SCC 597,* observed in paragraph 5 of the judgement:

> "Relevant considerations governing the court's decision in granting anticipatory bail under Section 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted and his appeal is pending before the higher court and bail is sought during the pendency of the appeal. Three situations in which the question of granting or refusing to grant bail would arise, materially and substantially differ from each other and the relevant considerations on which the courts would exercise its discretion, one way or the other, are substantially different from each other. This is necessary to be stated because the learned Judge in the High Court unfortunately fell into an error in mixing up all the considerations, as if all the three become relevant in the present situation."

32. No reason is stated for arriving at the conclusion that considerations

relevant for granting pre-arrest bail are materially different from those relevant for granting post-arrest bail. The alleged material difference is sought to be stated in paragraph 6:

> "The decision of the Constitution Bench in Gurbaksh Singh Sibbia V. State of Punjab clearly lays down that 'the distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest'. Unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. A direction under Section 438 is intended to confer conditional immunity from the touch as envisaged by Section 46(1) or confinement. In para 31, Chandrachud, C.J. clearly demarcated the distinction between the relevant considerations while examining an application for anticipatory bail and an application for bail after arrest in the course of investigation."

33. In fact, the only distinction pointed out in *Gurbaksh Singh's* case between a pre-arrest bail and a post-arrest bail relates to the stage at which the bail is granted. With great respect, it is submitted that in paragraph 31 of the judgement in *Gurbaksh Singh's* case, Chandrachud, C.J. has not demarcated any distinction between the considerations relevant for granting pre-arrest bail and those for granting post-arrest bail. To this extent the last sentence in the passage quoted above from Pokar Ram's case does not appear to be

correct.

34. It is true that there are differences between section 437 and 438 of the Code. They are due to the difference in the status of the Courts empowered by these sections and not due to the difference in the nature of the orders that they are empowered to pass. *Gurbaksh Singh's* case is not an authority for the proposition that considerations relevant for granting pre-arrest bail are more stringent in nature than those relevant for granting post-arrest bail. On the other hand, it clarifies that the limitations placed on the powers of Courts subordinate to the court of Session, to grant post-arrest bail, by section 437, cannot be and ought not to be read into Section 438. To this extent, it is submitted with great respect, that the two-judge Bench which decided *Pokar Ram's* Case did not appreciate the correct implications of the law laid down in *Gurbaksh Singh's* case. Moreover, in paragraph 9 of the judgement in *Pokar Ram's* Case, it is said:

> "The accusation against the respondent is that he has committed an offence of murder punishable under Section 302 IPC. Surprisingly, when anticipatory bail was granted on September 30, 1983, there is not a whisper of it in the order of the learned Sessions Judge, Jodh-pur. When a person is accused of an offence of murder by the use of a firearm, the court has to be careful and circumspect in entertaining an application for anticipatory bail. Relevant considerations are conspicuous by silence in the order of the learned Sessions Judge. Could it be said in this case that the accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive? Could it be said that the object being to injure

> and humiliate the respondent by having him arrested? What prompted the learned Sessions Judge to grant anticipatory bail left us guessing and we are none the wiser by the discussion in the order of the learned Single Judge declining to interfere."

35. The questions in the above passage appear to be inspired or misinspired by the discussion in paragraph 31 of the judgement in *Gurbaksh Singh's* case, which may now be extracted:

> "In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by malafides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail.

36. It is clear that the above passage has not been properly construed in *Pokar Ram's* case. The views expressed in *Pokar Ram's* case do

not appear to be in line with the dictum of the Constitution Bench in *Gurbaksh Singh's* case. It is clear from the above passage that anticipatory bail should generally be granted in cases where the accusation is either motivated or made with the object of humiliating or injuring the accused. However the converse is not true; that is, it cannot be said that anticipatory bail should not be granted unless the accusation is either motivated or made with the object of humiliating or injuring the accused. This distinction was lost sight of, in *Pokar Ram's* case.

37. ***The following points emerge from the above discussion:***

1) The power of the High Court and the court of Session to order release of a person, whether already arrested or about to be arrested, is unlimited, subject to point No. 3 stated hereinbelow.

2) In exercise of such power, such courts may impose any condition as they may think fit.

3) Where such power is exercised by such courts to order release of a person who apprehends arrest, on a charge of an offence triable exclusively by the Court of session or punishable with death or life-imprisonment. Such courts are obliged to either issue a notice to the Public Prosecutor or record reasons for not issuing such notice; this obligation is not statutorily imposed in other cases.

4) Courts other than the High Court and the Court of Session (in short, non-superior courts) do not have the power to grant pre-arrest bail in any case.

5) Non-superior courts have the power to grant post-arrest bail in all cases, subject only to two limitations. One limitation is that where a non-superior court has reasons to believe that a person has been guilty of an offence punishable with death or life-

imprisonment, it cannot grant bail to such person, unless the person is either a woman or less than sixteen years old or sick or infirm. The other limitation is that a non-superior court has no power to grant bail to a person accused of having committed a cognizable offence when such person has already been either convicted once of an offence punishable with death or life-imprisonment or imprisonment for at least seven years, or convicted at least twice of an offence that is both non-bailable and cognizable. An exception is engrafted to the second limitation. Even in a case where the second limitation applies, the court may grant bail, if the accused is either, under the age of sixteen years, or a woman, or sick or infirm or if such court is satisfied that it is just and proper to grant such bail for any other special reason.

6) Except in the case of a person accused of one or more of certain specified offences, a non-superior court, while granting bail, need not impose any condition. In the case of any of the specified offences, the court may impose certain conditions specified in Section 437. Whenever a non-superior Court releases on bail under sub-section (1) or (2) of Section 437, any person accused of any offence other

than the specified offences, it shall record its reasons for doing so.

7) Where a case is triable by a Magistrate and is concerned with any non-bailable offence, if the trial is not concluded within 60 days from the first date fixed for taking evidence, and if the accused has been in custody during the whole period of such 60 days, such Magistrate is obliged to release such accused on bail unless the Magistrate records reasons for not doing so.

8) An over-generous infusion of constraints and conditions that are not found explicitly in the Code, on the powers of the Courts

detailed above, could make the relevant provisions of the Code constitutionally vulnerable, as held in *Gurbaksh Singh's* case, by a Constitution Bench and this view cannot be narrowed down or varied by any Bench of the Supreme Court not comprised of more than five judges.

9) To say that when the allegations point out to serious offences, involving well orchestrated-conspiracy, pre-arrest bail should not be granted and to say that arming a person accused of serious offences with a pre-arrest bail order before such accused is interrogated by the police would impede the investigation, do not appear to be in line with the law declared in *Gurubaksh Singh's* case. Saying such things amounts to placing over-generous constraints and conditions in Section 438 and it could make the very statutory provision constitutionally vulnerable. In the light of this discussion it would be more appropriate to wait for a decision by another Constitution Bench on these issues. Though *Gurbaksh Singh's* case has concluded the issues, the need for another authoritative pronouncement arises only on account of the subsequent decisions by smaller benches of the Supreme Court placing constraints on the wide power granted to the Superior Courts by Section 438 of the Code.

10) When a person suspected to have committed an offence is detained in Custody, he runs the risk of losing his job/career/ business and thereby the members of his family, especially, those dependent on him are denied of livelihood, not only during the period when the accused is so detained, but also, probably, for quite some more years to come. In case the accused is ultimately acquitted of the charges, how to compensate the loss and hardship suffered by him and the members of his family? This question, coupled with the salutary principle of presumption of innocence till one is proved

guilty should weigh more than anything else in the minds of judicial authorities dealing with applications for bail, whether it is pre-arrest or post-arrest.

11) Even at the risk of repetition two sentences from paragraph 31 of the judgement in *Gurbaksh Singh's* case may be reproduced as a concluding note:

> "A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail."

THE POWER TO TAX

1. The primary duty of the State is to protect its subjects and promote their welfare. Even to discharge this duty the State needs wealth. Taxation is a means to generate such wealth in favour of the State. Thus the power to levy tax is a very important power of the State. A success of a scheme of taxation depends on the willingness of the people to share their earnings with others. Such willingness, naturally, has its own limits. Thus arises the need to circumscribe the State's power of taxation with carefully chosen principles. The Constitution of India enunciates certain principles that govern the power of taxation.

2. Article 265 declares as follows:-

> "No tax shall be levied or collected except by authority of law."

3. Article 265 is significant in as much as it imposes a fundamental restriction on the taxing power of the State. It embodies the principle expressed at times as "No taxation without representation".

4. The terms 'taxation' and 'tax' have been defined in clause 28 of Article 366 as follows:-

> " 'Taxation' includes the imposition of any tax or impost whether general or local or special, and 'tax' shall be construed accordingly."

5. Thus the term 'tax' would include any impost whatsoever. The above definition is an inclusive definition. A term so defined includes in its fold more than what it ordinarily means. Though there is a clear-cut distinction between tax and fees and though the Constitution itself recognises this distinction for legislative purposes, the above

inclusive definition suggests that the term 'tax' wherever used in the Constitution, includes in its fold, 'fees' unless the context otherwise requires. In fact Article 366 itself begins with these words:

> "In this connection, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them….."

6. There seems to be no justification for holding that the term 'tax' is used in any restricted sense in Article 265. It says that no tax shall be levied or collected except by authority of law. The context does not require that 'fees' should be excluded from the term 'tax' used in Article 265. There is no reason at all to hold that while no tax may be levied or collected without authority of law, fees may be so levied or collected. Hence, in consonance with the spirit of the constitution, it must be said that the term 'tax' in Article 265 is used in its widest sense and includes in its fold fees, cess, toll, and any impost whatsoever. Article 265, thus prohibits levy or collection of any impost, whether tax, fees, cess, toll or any other compulsory levy, without authority of law. As far as the Constitution of India is concerned, it appears that in the enumerations in the three Lists of the seventh schedule, a distinction is made, only between a fee and a tax, for certain purposes, so that the term 'tax' would include for such purposes all imposts except 'fees'.

7. The meaning of the general term 'tax', the nature of the internal distinction between its two species, namely, tax simpliciter and fees and the constitutional scheme in this regard were set out with utmost clarity by Mukherjea, J., speaking on behalf of a seven-judge Bench of the Supreme Court, in *Commissioner, H.R.E. -vs-L.T. Swamiar, AIR 1954 SC 282*. The relevant portions in para 42 to 48 of that Judgement may now be reproduced here:

"...It seems to us that though levying of fees is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fees under a separate category for purposes of legislation and at the end of each one of the three legislative lists, it has been given a power to the particular legislature to legislate on the imposition of fees in respect to every one of the items dealt with in the list itself. Some idea as to what fees are may be gathered from cl.(2) of Arts. 110 and 119 referred to above which speak of fees for licences and for services rendered. The question for our consideration really is, what are the indicia or special characteristics that distinguish a fee from a tax proper? On this point we have been referred to several authorities by the learned counsel appearing for the different parties including opinions expressed by writers of recognised treatises on public finance.

A neat definition of what "tax" means has been given by Latham C.J. of the High Court of Australia in — 'Matthews v. Chicory Marketing Board', 60 CLR 263 at p.276. "A tax", according to the learned Chief Justice, "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment 'for services rendered'." This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law

vide - 'Lower Mainland Dairy v. Crystal Dairy Ltd.', 1933 AC 168. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of 'quid pro quo' between the tax-payer and the public authority.... Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax-payer depends generally upon his capacity to pay.

Coming now to fees, a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay… These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

As regards the distinction between a tax and a fee, it is argued in the first place on behalf of the respondent that a fee is something voluntary which a person has got to pay if he wants certain services from the Government;

but there is no obligation on his part to seek such services and if he does not want the services, he can avoid the obligation. The example given is of a licence fee. If a man wants a licence that is entirely his own choice and then only he has to pay the fees, but not otherwise. We think that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees.

It is difficult, we think, to conceive of a tax except, it be something like a poll tax, the incidence of which falls on all persons within a State. The house tax has to be paid only by those who own houses, the land tax by those who possess lands, municipal taxes or rates will fall on those who have properties within a municipality. Persons, who do not have houses, lands or properties within municipalities, would not have to pay these taxes, but nevertheless these impositions come within the category of taxes and nobody can say that it is a choice of these people to own lands or houses or specified kinds of properties, so that there is no compulsion on them to pay taxes at all. Compulsion lies in the fact that payment is enforceable by law against a man in spite of his unwillingness or want of consent; and this element is present in taxes as well as in fees.

Of course, in some cases whether a man would come

within the category of a service receiver may be a matter of his choice, but that by itself would not constitute a major test which can be taken as the criterion of this species of imposition. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest… Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action… If as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services. As indicated in Art. 110 of the Constitution, ordinarily there are two classes of cases where Government imposes 'fees' upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either heavy or moderate from that person in return for the privilege that is conferred.

A most common illustration of this type of cases is furnished by the licence fees for motor vehicles. Here the costs incurred by the Government in maintaining an office or bureau for the granting of licences may be very small and the amount of imposition that is levied is based really not upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, according to all the writers on public finance, the tax element is predominant… and if the money paid by licence holders goes for the upkeep of roads and other matters of general public utility, the licence fee cannot but be regarded as a tax.

In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and as said by Seligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes…

Our Constitution has, for legislative purposes, made a distinction between a tax and a fee and while there are various entries in the legislative lists with regard to various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of any of the matters that is included

> in it. The implication seems to be that fees have special reference to governmental action undertaken in respect to any of these matters."

8. Thus it appears that there is no reason to exclude from the term 'tax' in Article 265, any impost that carries an element of compulsion with it.

9. The great Tamil sage Thiruvalluvar has put it aptly in one of his aphorisms:

> "When the king begs, it is like some one who is armed with a spear asking for alms." [Thirukkural No. 552]

10. If this is borne in mind, it may well be said that any impost by the State (the modern substitute for the king) is an impost which carries an element of compulsion with it. So, the term 'tax' in Article 265 includes every impost by the State, by whatever name it is called. In other words Article 265 prohibits the State from making any impost whatsoever except by authority of law. The phrase, 'by authority of law' means 'by authority granted under some provision in a statute enacted by a competent legislature'. This proposition is quite plain. If it is said that without such an authority under such a statutory provision, a rule, regulation or any sub-ordinate legislation may make such levy, it would offend the most celebrated rule of Constitutional jurisprudence, namely, that by means of subordinate legislation no power could be created if such power has not been conferred by the parent Act itself. Apart from being such a general principle of jurisprudence, it may be noted that while under Article 245, the Constitution expressly permits Parliament and state legislatures to make laws, nowhere does it permit any other authority to make any law, save the power of the President and Governor to promulgate temporary laws in the form of Ordinances. The power to make

laws is not granted to any other authority and hence no subordinate legislation could be a 'law', for the purpose of Article 265.

11. A three-judge Bench of the Supreme Court recognised this principle in *Orissa State Electricity Board vs Indian Aluminium Co.Ltd., (1975) 2 SCC 431,* Bhagwati, J., speaking for the bench, stated in para 6 of the judgment as follows:-

> "We do not think that the High Court was right in saying that by making regulations under Section 79(j) the Board could confer upon itself power to unilaterally revise the rates for supply of electricity. Section 79(j) empowers the Board to make regulations not inconsistent with the Supply Act to provide for "principles governing the supply of electricity by the Board to persons other than the licensees under Section 49". This power to make regulations must obviously be exercised consistently with the provisions of the Supply Act and the regulations made in exercise of this power cannot go beyond the Supply Act. If the power to enhance the rates unilaterally in derogation of the contractual stipulation does not reside in any provision of the Supply Act, it cannot be created by regulations made under the Supply Act. Either this power can be found in some provision of the Supply Act or it is not there at all. Regulations in the nature of subordinate legislation cannot confer authority on the Board to interfere with the contractual rights and obligations, unless specified power to make such regulations is vested in the Board by some provision in the statute, expressly or by necessary implication...."

12. Having thus rejected the doctrine of inherent powers, it may now

be said that without authority granted by a provision in a Statute or Ordinance, no impost whatsoever shall be levied by the State or any of its organs and instrumentalities.

13. The impost may take any form-a fee, a tax, a cess, a toll, a fine, a premium, a levy, a penalty, an assessment, etc. Notwithstanding the nomenclature, any impost made by the State or any of its organs/ instrumentalities, should comply with the requirement of Article 265.

14. This wide import assigned to Article 265 is justified when it is realised that Article 265 is a corollary to Article 300A which reads:-

> "No person shall be deprived of his property save by authority of law."

The term 'property' in this Article is not restricted to immovable property alone. It means property of any kind, movable or immovable and even money. A Constitution Bench of the Supreme Court in *Jalan Trading Co. vs Mill Mazdoor Sabha, AIR 1967 SC 691,* recognised that compelling payment of money would amount to deprivation of property. In para 28, Shah, J., speaking on behalf of the Bench in the above case, stated as follows:-

> "... Clause (1) of Art.31 guarantees the right against deprivation of property otherwise than by authority of law. Compelling an employer to pay sums of money to his employees which he has not contractually rendered himself liable to pay may amount to deprivation of property, but the protection against depriving a person of his property under Cl.(1) of Art.31 is available only if the deprivation is not by authority of law...."

15. In *Ahmedabad Urban Development Authority vs Srinath Kumar*

etc., (1992) 3 SCC 285, this principle was stated in more general terms in para 4 of the judgment:

> "…Whenever there is any compulsory exaction of any money from a citizen there must be a specific provision for imposition of such tax and/or fee. There is no room for any intendment for imposition of compulsory payment. Whenever there is any compulsory exaction of money from a citizen, nothing is to be read and nothing is to be implied."

16. It might seem that the most obvious is being unnecessarily elaborated. However such elaboration is warranted by the fact that the most obvious is lost sight of even by those in exalted positions. This point has been illustrated in another article in this book, where it is more appropriate.*

17. Even where a levy by way of tax complies with the requirement of Article 265, still it might be unconstitutional in certain other ways. For example it may violate any of the fundamental rights enshrined in part III of the Constitution; or it may be levied under a statutory provision, made by a legislative body which is not constitutionally competent to make such legislation; or the enactment under which it is levied may be a piece of, what is called, 'colourable legislation'. A brief discussion of the last-mentioned aspect would expose the tendency exhibited by highly-placed Constitutional functionaries to overstep the limits of their powers.

18. The facts of a case which came up before a three-judge Bench of the Supreme Court in *Shakthi Kumar M Sanchetti and another vs State of Maharashtra and others, (1995) 1 SCC 351,* illustrate how a Constitutional functionary easily and covertly oversteps the Constitutional limitations on its power. The legislature of

* See page 130 hereunder

Maharashtra State enacted “Maharashtra Tax on Entry of Motor Vehicles into Local Areas Act, 1987”. The objects and reasons for the said enactment were stated to be as follows:- (reproduced from para 3 of SCC).

> “....From 1984 onwards some States and the Union Territories adjoining the State of Maharashtra have reduced the rate of sales tax on motor vehicles and chassis substantially. Such reduction in tax rates by the neighbouring States have resulted in diversion of trade to those areas and the manufacturers of motor vehicles in Maharashtra, for want of market, had to resort to branch transfers to these areas and cater to the needs of consumers in Maharashtra, from those areas. This resulted in the avoidable loss of legitimate sales tax revenue to a large extent by the State of Maharashtra. With a view to compensate such loss of legitimate revenue, the State Government has decided to levy with immediate effect a tax on entry of motor vehicles purchased outside the State and brought in the local areas of the State for use or sale.”

19. To achieve the object stated above, Section 3 of the said Act authorised levy and collection of a certain tax. Section 3 may now be reproduced:-

> “Incidence of tax.-(1) Subject to the provisions of this Act and rules made there under, there shall be levied and collected a tax on the purchase value of a motor vehicle, an entry of which is effected into a local area for use or sale therein and which is liable for registration in the State under the Motor Vehicles Act, 1939, at such

rate or rates as may be fixed by the State Government by notification in the Official Gazette by not exceeding the rates prescribed for motor vehicles in the schedules appended to the Bombay Sales Tax Act, or fifteen paise in the rupee whichever is less:

Provided that, no tax shall be levied and collected in respect of a motor vehicle which was registered in any Union Territory or any other State under the Motor Vehicles Act, 1939 for a period of fifteen months or more before the date on which it is registered in the State under that Act.

(2) The tax shall be payable and paid by an importer within 15 days from the entry of motor vehicle into the local area or before an application is made for registration of the vehicle under the Motor Vehicles Act, 1988, whichever is earlier, in the manner laid down under Section 10 of this Act.

(3) The tax shall be in addition to the tax levied and collected as octroi by a Municipal Corporation, Municipal Council, Zilla Parishad, Panchayat Samiti or Village Panchayat or any other local authority, as the case may be, within its local areas."

20. The above tax was levied pursuant to Entry 52 of List II of Seventh Schedule of the Constitution of India.

Entry 52 reads as follows:-

"Taxes on Entry of goods into a local area for consumption, use or sale therein"

21. The levy so made, by the aforesaid enactment, to achieve the object stated above, per se violates the prohibition placed by Article 286(1) of the Constitution on the taxing power of a State legislature. Article 286(1) reads as follows:-

> "Restrictions as to imposition of tax on the sale or purchase of goods.-(1) No Law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place -
>
> (a) Outside the State; or
>
> (b) in the course of the import of the goods into, or export of the goods out of, the territory of India."

22. At the outset, it may be said that no Article in the Constitution may be interpreted in such manner as to render its provision superfluous or otiose. When Article 286 (1) prohibits a State from imposing or authorising the imposition of a tax on a sale or purchase made outside the State, some practical meaning should be attached to this prohibition. In the absence of Article 286 in the Constitution, can still one State levy a tax on a sale or purchase made in another State? An answer to this question must take note of Article 245(1). The said Article 245(1) empowers the legislature of a State to make laws for the whole or any part of the State. No Article in the Constitution empowers the legislature of a State to make any law for any part of the territory of India outside the territory of such State. In an earlier discussion in this book, it was concluded that no Constitutional entity or functionary has any power that is not conferred on it by the Constitution.* Hence the legislature of no State can levy or authorise the levy of any tax on an event which takes place outside its territory, for such levy would be a law made by such legislature for

* See page 1 hereinabove

a part of the territory of India outside the State concerned. Therefore to prohibit, such levy, Article 245 (1) alone would do. In other words even while conferring the law-making power on legislatures of States, Article 245(1) specifies the limits of such power. No law may be made by the legislature of any State to have extra-territorial operation, the term 'territorial' here pertaining to the territories of the State as set out in the first schedule of the Constitution.

23. Though the legislature of a State cannot levy a tax .on an event that takes place outside the State, can it be said that a law made by a legislature of a State concerning or pertaining to its citizens would still be invalid if and to the extent to which it pertains to activities of its citizens outside its territorial limits? This question itself is absurd. Territorially, there is a dualism, or more appropriately, a pluralism in the Constitution of India. In view of the first schedule, every State in India has its own territories, and every Union territory also has its own territories. Article 1(3) declares that the territory of India shall comprise, the territory of States, the Union territories and other acquired territories. It would be perfectly legal to speak of the Indian territories and at the same time the territories of a certain State in India. However, there is no dualism or pluralism in respect of citizenship. No law made by the legislature of a State may discriminate between persons who do not belong to that State and persons who belong to that State. The question whether in the matter of admissions to educational institutions, a State may show preference to its own residents on the basis of a fictional domicile, came up for consideration in *Pradeep Jain -vs- Union of India, AIR 1984 SC 1420.* Bhagavati, J., came down very heavily upon such discrimination. In para 3 of the judgment, Bhagavati, J., stated as follows:-

"Article 1 of the Constitution then proceeds to declare

> that India shall be a Union of States but emphasizes that though a Union of States, it is still one nation with one citizenship. Part II dealing with citizenship recognises only Indian Citizenship: it does not recognise citizenship of any State forming part of the Union."

24. Therefore it cannot be argued that notwithstanding Article 245(1), the legislature of a State may enact a law pertaining to an event that takes place outside the territories of that State, even if it be an event in which a person who normally resides in that State participates. Therefore to prohibit the legislature of a State from making a law pertaining to an event that takes place outside its territories, Article 245(1) would suffice.

25. If so, why only one of the categories of such events should have been picked out and made the subject of the special prohibition in Article 286? Why sale or purchase of goods should require such a special treatment? The reason is obvious. Though the legislature of a State will not be able to lay its hands on a sale or purchase of goods that takes place outside its territory, contemporaneously with that event, still it might become possible for such legislature to lay its hands on such sale or purchase if and when the goods so purchased are brought inside its territorial limits. Article 286 prohibits exactly this. In the absence of Article 286 a legislature of a State may levy a tax on the sale or purchase of goods that takes place outside its territories at the point when such goods might enter its territories. If this meaning is not assigned to Article 286, the said Article would be superfluous.

26. The Act passed by the legislature of the State of Maharashtra, has the object of levying a tax on entry of Motor vehicles purchased outside the State and brought into the State. The objects and reasons

for the said Act were extracted above, which make it clear that in effect the tax sought to be levied is a sales tax under the guise of entry tax. The charging Section, namely, Section 3 of the said Act, extracted above, makes the levy incident on an entry into a local area by a motor vehicle, for use or sale in such local area, provided such motor vehicle is liable for registration in that State under the Motor Vehicles Act, 1939. This is a feeble device to cover up the infraction of Article 286. It is rightly conceded by the three-judge Bench in *Sancheti's* case that the phrase 'local area' means only an area administered by a local body like a Corporation, Municipal Board, District Board etc. It is said in para 4 of the judgment as follows:-

> "...The expression "local area" has been used in various articles of the Constitution, namely, 3(b), 12, 245(1), 246, 277, 321, 323-A, and 371-D. They indicate that the constitutional intention was to understand the "local area" in the sense of any area which is administered by a local body, may be corporation, municipal board, district board etc. The High Court on this aspect held, and in our opinion rightly that the definition does not comprehend entire State as local area as the use of word 'a' before "local area" in the section is significant. The taxable event according to High Court, is not the entry of vehicle in any area of the State but in a local area. The High Court explained it by giving an illustration that if a motor vehicle was brought from Jabalpur (Madhya Pradesh) for being used or sold at Amaravati (in Nagpur District of Maharashtra), which was the border area, taxable event was not the entry in Nagpur District but entry in area of Amaravati Municipal Corporation. The levy, therefore, is not, as urged by the learned counsel

for appellant, on entry of vehicle in any part of the State but in any local area in the State. It cannot, therefore, be struck down on this ground."

27. Understanding the phrase, "a local area", as rightly understood by the three-judge Bench in that judgment, it is seen that Section 3 of the said Act does not levy tax on every entry of a motor vehicle into a local area in the State. It excludes from such levy, entries of motor vehicles that are not liable for registration in that State. Where a vehicle purchased outside the State and duly registered outside the State under the provisions of the Motor Vehicles Act, enters a local area in the State for use therein, it cannot be said that such a motor vehicle is again liable for registration in that State under the Motor Vehicles Act. Section 46 of the Motor Vehicles Act provides that a vehicle duly registered in one State is not required to be registered elsewhere in India. Hence the entries of vehicles duly registered outside the State are excluded from the levy under Section 3 of the above-noted Act. Likewise, entries of vehicles which are registered already within the State are also excluded, since such vehicles having been registered in the State are not liable for registration again in the State. After excluding these two categories what remains is only the category of vehicles not registered anywhere, whether within or outside the State. The charge under Section 3 applies only to entries of such unregistered vehicles.

28. The proviso to Section 3(1) reads as follows:-

(As quoted in para 3 (SCC) of the judgment in Sancheti's case)

"Provided that, no tax shall be levied and collected in respect of a motor vehicle which was registered in any Union Territory or any other State under the Motor Vehicles Act, 1939 for a period of fifteen months or

> more before the date on which it is registered in the State under that Act.”

This proviso, as extracted above, appears to be clumsily worded. Despite best efforts, rather, great struggle, this author is yet to understand the correct import of the phrase, “for a period of fifteen months or more before the date…” Whatever may be the meaning of this phrase, the proviso postulates levy and collection of such tax in respect of a vehicle registered outside the State, placing only a period-limitation on such levy. What is the nature and extent of this period-limitation? It appears that the said period is to be reckoned with reference to the date on which a vehicle that entered a local area in the State of Maharashtra was registered in that State. In other words, the proviso seems to apply only to vehicles registered outside Maharashtra, which, subsequently entered Maharashtra and was again registered in Maharashtra. This means that exemption from levy is attracted only to such vehicles registered both outside and also in Maharashtra. A vehicle registered outside Maharashtra is not liable for registration in Maharashtra, in view of Section 46 of the Motor Vehicles Act, as stated hereinabove. If the proviso seeks to exempt certain vehicles from the levy, then exempting some only of the vehicles registered outside Maharashtra is meaningless, since all the vehicles so registered outside Maharashtra are not liable for registration once again in Maharashtra and are already outside the purview of the charging section, as explained above. In this view, the proviso becomes redundant. The charging Section itself exempts from the charge, registered vehicles. No proviso is necessary to again exempt from the charge a category of vehicles already exempted. A vehicle registered outside the State at least fifteen months before it is again registered in the State is a category of registered vehicle. Registered vehicles form the genus. Vehicles registered outside a

State before a certain period form a species of the said genus. When the whole of the genus is exempted from the charge under sub-section 1, there is no need for a proviso to exempt only a species of such genus from such charge.

29. However the above argument has proceeded on the basis that in view of Section 46 of Motor Vehicles Act, a vehicle once registered some where in India is not liable to be registered once again anywhere in India. This Section 46 is expressly made subject to Section 47 of that Act. Under Section 47, a motor vehicle registered in one State, but kept in another State for more than 12 months is liable to get assignment of a new registration mark in the latter State. If the assignment of such new registration mark can be deemed to be registration of the vehicle, then the position narrated above with reference to Section 3(1) and the proviso gets altered. In that case registered vehicles which have become liable under Section 47 for assignment in a State of a new registration mark would attract the subject tax upon its entry into a local area, of course, in that State, for use or sale therein. If this is correct then the proviso gets a meaning. The phrase, "for a period of fifteen months or more", cannot relate to levy and collection of tax. Saying that a tax shall not be levied or collected for a period of fifteen months, reckoned from a certain date, conveys a certain meaning. However, saying that a tax shall not be levied and collected for a period of fifteen months <u>or more,</u> reckoned from a date, makes no sense at all. Hence, with some difficulty, an attempt may be made to relate the phrase, "for a period of fifteen months or more" to the registration done outside Maharashtra. In that case, even among vehicles which become liable for assignment of a new registration mark under Section 47 in the State, those vehicles which had remained with such out-of-State registration for at least 15 months are exempted from such tax. Such period of 15 months, under that proviso is reckoned from the

date when it is re-registered in the State, in the sense of acquiring a new registration mark in the State. If this interpretation is accepted, only two categories of vehicles attract the tax under Section 3(1). The first category comprises of unregistered vehicles that are liable for registration in the State. The second category is comprised of vehicles registered outside the State, but kept for more than 12 months in the State. The charge is thus made applicable to the first category, that is, unregistered vehicles, and to the second category, that is, vehicles registered outside but kept for more than twelve months in the State. In view of the proviso the second category is further classified into two classes of vehicles. One class comprises of registered vehicles registered outside the State at least 15 months before the assignment of new registration mark to it in the State. The second class comprises of vehicles registered outside the State, but kept for more than 12 months in the State and whose registration outside the State is not yet 15 months old. In other words, according to this interpretation, a combined reading of Section 3(1) and the proviso suggests that in respect of vehicles registered outside the State, the charge is attracted only by those vehicles kept in the State for more than 12 months but levy and collection of such tax would become time-barred, if both such levy and collection are not made within three months from the date of expiry of such 12 months. This cumbersome exercise is necessitated only by the clumsiness in the drafting of the Section under consideration. If it cannot be held that assignment of a new registration mark under Section 47 of the Motor Vehicles Act is the same as becoming liable for registration under the said Act, even this cumbersome meaning cannot be given to the proviso.

30. Apart from the confusions in interpreting the charging Section and the proviso, one other question arises with reference to the above Section. What is the nexus between registration of a vehicle and

levy of a tax on its entry into a local area?

31. Where a taxing statute authorises levy of tax only upon one category of entities, exempting the other categories, and where the included and excluded categories together comprise one class of entities, the Section would be liable to be struck down as offending Article 14, unless the difference between the two categories has a reasonable nexus with the object of such taxation. Just because the legislature of a State has the power to levy a tax on sale of goods made within its territories, it cannot levy such tax only upon events of sale, where the buyer is not one whose mother-tongue is the language spoken by the majority in that State. Such a levy would be discriminatory and unconstitutional, liable to be struck down, since levy of sales tax does not have any reasonable nexus with the mother-tongue of a person. Similarly, non-registration under Motor Vehicles Act in a State has no reasonable nexus with levying a tax on entry of goods into a local area. In the absence of such nexus the discrimination between vehicles registered in the State and vehicles not registered in that State is violative of Article 14. The criterion of registration has nexus only with the object of collecting what the State has lost by way of Sales Tax on account of the purchase by a resident of that State made outside that State. Such object however is what Article 286 directly prohibits. Thus the above taxation provides a classic illustration for the legislature doing covertly what it is prohibited from doing. Thus it is a colourable exercise of power by the legislature of a State. What is colourable cannot be explained in any manner better than the manner in which Krishna Iyer, J., explained it while delivering the majority judgment of a seven-judge Bench in *R.S.Joshi vs Ajit Mills Ltd. etc., AIR 1977 SC 2279.* Such explanation in para 16 of that judgment is reproduced here:

> "....A thing is colourable which is in appearance only and

not in reality, what it purports to be. In Indian terms, it is maya. In the jurisprudence of power, colourable exercise of or fraud on legislative power or more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law not with standing what is the pith substance of the Act? Does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary power implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is besides the point, and it is not permissible to suggest Parliamentary incompetence on the score of mala fides."

32. Even earlier a Constitution Bench in *K.C. G. Narayan Deo Vs. State of Orissa, AIR 1953 SC 375,* through Mukerjea, J., stated as follows in para 9 of its judgment:

"The legislature cannot violate the Constitutional prohibitions by employing an indirect method."

* See page 130 hereunder

33. In *Sancheti's* case the three-judge Bench did not consider this aspect of the said Maharashtra Act. Though in the opening para of the judgment a reference is made to the claim, "that the levy was colourable exercise of the legislative power of the State as Entry 52 of List II of Seventh Schedule of the Constitution of India did not permit imposition of such tax", no discussion is made about the doctrine of colourable legislation. The dictum of the seven-judge Bench in Joshi's case is not adverted to. At the end of para 3, after extracting the objects and reasons of the said legislation and Section 3 it is stated as follows:-

> "This section is an illustration of the charge or incidence of tax and the measure of tax rolled in one. It creates liability on one hand for payment of tax on entry of any vehicle in a local area for use or sale therein and on the other that the amount of tax shall be on the purchase value of the vehicle. The latter part is what is commonly known as the machinery or procedural part pertaining to calculation and realisation of tax. The charge is on the entry of vehicle into a local area for use or sale and not on its purchase. The submission founded on the expression, "there shall be levied and collected a tax on the purchase value of a motor vehicle" proceeded thus on a misconception. Therefore, so long as the levy is on the entry of the vehicle into a local area for use or sale therein it cannot be said to be invalid merely because the measure of levy has been provided to be purchase value of the motor vehicle."

34. Even before the above passage, it is said in the same para 3 as follows:-

> "The legislature, therefore, clearly intended to avoid any

loss of legitimate sales tax revenue by the State. But the levy cannot be held to be bad because the legislature intended to avoid any loss of sales tax in the State, so long it is not found to be invalid either because of any constitutional or statutory violation. It is not the intention or propriety of a legislation but it is legality or illegality which renders it valid or invalid."

35. It is not clear how it was stated therein that what the legislature intended to avoid was, "loss of legitimate sales tax revenue by the State". The term 'legitimate' is loaded. It gives an impression that a citizen of India who is normally residing in a particular State should procure goods for his consumption or use only inside that State and that the State has a legitimate expectation in this regard. The use of the term 'legitimate' is unfortunate. Again the phrase, "so long it is not found to be invalid either because of any constitutional or statutory violation", is unfortunate. There is no reason why Article 286 was not adverted to and why the subject Act was not found to be invalid on account of violation of the said Constitutional provision.

36. The expression "local area", in the said Act is only a ruse to cover up the Constitutional violation as stated above. The Bench concedes that the entire State is not a local area. If it is so, what meaning can be assigned to the phrase "a local area" in Section 3(1)? If it means any local area, such tax would be levied every time a vehicle enters a local area. When a vehicle is brought from the Union territory of Pondichery to the City of Chennai, it has to necessarily enter at least fifteen local areas. It would be a mockery of the taxing power if such tax is levied as many times as a vehicle enters one local area or the other in the State. To say that "a local area", means the first local area that a vehicle enters in the State, is to put words into the statute for the sake of convenience. In the alternative, it may be contended

* See page 1 here in above

that every entry into a local area is not for use therein. However after every such entry, the vehicle is driven on the roads of the local area concerned and as such is used in that local area. It is common sense that use of a vehicle is only to be driven on roads. To avoid this dilemma, the term "use" in Section 3(1) must be interpreted to mean "constant use" or at least "repeated use". Again this would amount to putting words into the Statute. The scheme of the charging section clearly implies that the tax is sought to be levied on entry of vehicles into any local area in the State and NOT any specified local area, with the result that such tax is leviable on every vehicle that enters the State, provided such vehicle is intended for sale or use in the State. Thus, on account of non-specification of the local area, the section covers all the local areas in the State, that is, the entire State. Hence the incidence of tax is not on the entry into a particular local area, but it is on the entry into the State, as such. The reference to 'a local area' is thus a mere device. Moreover, the incidence of tax is on vehicles liable for registration in the State. Liability for registration in the State is not in any way connected with the concept of entry into a local area. Thus the phrase 'local area' in the charging section is redundant and has been used, only to cover up the real nature of the tax. Non-specification of a local area in the charging Section and mixing up the criterion of registration with entry into a local area, added with the dependence of the measure of levy on the purchase value establish that the State, by this Act seeks to impose a tax on the purchase of vehicles that takes place outside the State, in violation of Article 286 (1). To do this, resort is made to Entry 52 in list II of seventh schedule, only as a device. In fact the statement of objects and reasons clearly expresses that the purpose of the enactment was to levy a tax on vehicles purchased outside the State, so that loss of Sales Tax could be avoided. Such a statement of object and the object itself are unconstitutional, being violative

of Article 286(1). Article 286(1) does not say that no law of a State shall impose a sales tax on goods purchased outside the State. On the other hand, it states that no law of a State shall impose a tax on the sale of goods that takes place outside the State. Therefore the prohibition in Article 286(1) is against imposition of any tax on such sale, under any name whatsoever. In view of the opening words in Article 245(1), the power of Parliament and that of the legislature of a State to make law are subject to the provisions of the Constitution. Therefore no law can be made to achieve an object or to fulfil a purpose, which object and purpose are per se unconstitutional, prohibited by Article 286(1), and when a law is made with such object or for such purpose, it is mandatory for the Supreme Court, as the guardian of the Constitution, to strike down such Act as a whole. The above case where a substantial question of law arose as to the interpretation of the Constitution could have been referred to a Bench of five judges, as required under Article 145(3). Not referring a case of this nature to a Constitution Bench is by itself, contrary to Article 145(3). However, it appears that a similar case regarding the validity of the Tamilnadu Entry of Motor Vehicles into Local Areas Act, 1996 has been referred to a Constitution Bench. It gives a hope that questions raised above would be considered and answered by the Constitution Bench which would hear that case, so that the law on this issue is declared and settled with clarity.

THE POWER TO PUNISH

1. The term 'Punishment' is defined in the Oxford dictionary as follows:-

   "To make somebody suffer, eg. by sending them to prison or by making them pay money, because they have broken the law or done something wrong."

   The essential feature of a punishment is that it invariably affects the person on whom it is imposed either physically or financially or otherwise. Without ruling out the possibility that one may impose punishment on oneself, the present discussion may be confined to punishments imposed or imposable by one person on another. Even this aspect covers a large class of cases and can still be narrowed down to make the present discussion fruitful. Cases like a mother punishing her disobedient child may be excluded. It may appear necessary to include in this discussion cases like a teacher punishing his disobedient pupil or a master punishing his disobedient servant, since law has extended its arms, gradually, also into these spheres. However, the purpose of this discussion would be better served even if such cases are excluded from consideration. In other words, cases in which the society, by and large, recognises one's right to impose certain punishment on another, on the sole ground of existence of a specific relationship between such persons, are purposively excluded from the present discussion. Thus the principles governing 'Service Jurisprudence' fall outside the scope of this discussion. This discussion, therefore, relates to the constitutional limitations on the power to impose a punishment, excluding cases where one's power to punish another is a socially recognised consequence of the natural or legal relationship between those two.

2. Generally all societies recognise the sovereign right of the State to

punish its errant citizens. Hobbes, Machiavilli, Voltaire, Rousseaou, Bentham, Mill and almost all thinkers have recognised this aspect of the sovereign power. However, in societies founded on the bed-rock of the Rule of Law, this power is subjected to certain well-defined limitations. The most important of such limitations is the need to declare to the public what acts are punishable and how and by whom such acts are punishable. Whenever, regularly-constituted courts, or tribunals, established by law, impose any punishment on a person, such imposition must have legal recognition in the sense that there must be some instrument having the force of law authorising imposition of such punishment under certain specific circumstances. It cannot be different in any manner when the authority that seeks to impose a punishment on a person happens to be some agency other than such courts and tribunals, so long as such agency is not entitled to impose such punishment on such person by the very nature of the relationship between such agency and such person. In other words, wherever an agency does not have any inherent right to punish a person, no punishment can be imposed by such agency on such person except under an express authority granted by law. This position flows from Article 20(1) of the Constitution of India. The said Article may now be reproduced:-

> "20. Protection in respect of conviction for offences.—(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

3. The ingredients of Article 20(1) are:-

a) Any penalty that may be inflicted on a person must be referrable to and authorised by some law which should have been in force when the act, that warranted such infliction, was committed;

b) Such act must be an offence, in the sense that it should amount to a violation of the law referred to above.

c) The penalty imposed shall not be greater than what is permitted by such law.

In other words, the following conditions must be satisfied before a person could be subjected to any penalty:-

i) That person should have violated some provision of a law in force;

ii) Such law must authorise imposition of a penalty on a person guilty of such violation;

iii) The punishment so imposed cannot be greater than what is permitted under such law;

A rider may be added:-

iv) Such law must be a valid law, having been enacted by a competent body, and the relevant provisions therein not being inconsistent with any provision in Part III of the Constitution, captioned "Fundamental Rights."

4. The above four principles control, govern and circumscribe the power of any instrumentality of the State to impose any penalty on any person, wherever it makes such imposition in its capacity of being such instrumentality.

5. At times it has been suggested that the term 'offence' has not been defined in the Constitution. However, Article 20(1) defines the term 'offence':-

> "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence…"

6. In other words unless a person violates a law in force, he cannot be convicted of any offence. Since no useful purpose would be served to have on book certain offences of which no one can be convicted, it may be said that the direct implication of Article 20(1) as extracted above is that the term 'offence' means a violation of a law in force. In fact that is how the term 'offence' has been defined in the General Clauses Act. Section 3(38) of the said Act defines the term 'offence' as:

> " 'Offence' shall mean any act or omission made punishable by any law for the time being in force;"

7. The first of such four principles implies that no penalty can be imposed on a person unless he is guilty of an offence, that is, guilty of violation of a law in force. Wherever an instrumentality imposes or seeks to impose a penalty on any person, it must first be asked what is the law in force that such person has violated. The next question would be, whether any penalty has been prescribed under such law for being imposed on a person guilty of such violation. The third question would be whether the penalty imposed or sought to be imposed by the instrumentality is in accord with the penalty that may be imposed under such law. The next question would be whether such law is a valid law.

8. Article 20(1) does not further say that only the person or agency

authorised by such law to impose such penalty may impose such penalty. However resort may be had to Article 21 to prohibit any person or agency not so authorised from imposing any such penalty. Article 21 reads:-

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

The view that deprivation contemplated by Article 21 must be a total loss, as put forth in *A.K. Gopalan vs State of Madras, AIR 1950 SC 27* is no longer good law, especially after the decision in *Maneka Gandhi vs Union of India, AIR 1978 SC 597,* followed by a number of decisions where several species of rights were brought under the protective umbrella of Article 21. In this wide sense, it may be said that the phrase, "except according to procedure established by law", in Article 21 prohibits imposition of penalty by any person or agency other than the person or agency expressly authorised by such procedure established by law.

9. A doubt may arise: whether for violation of a law in force penalty prescribed by some other law in force may be imposed? The doubt arises in view of the use of the finite clause 'the' before the phrase 'law in force', in the concluding portion of Article 20(1). In strict sense, this is not permitted under Article 20(1). However, in practice, when a law prescribes a penalty for violation of another law, the first-mentioned law must be deemed to require compliance with the next-mentioned law and therefore the former is deemed to have been violated when the next-mentioned law is in fact violated. Therefore, when penalty is prescribed for such violation by the first-mentioned law in force, it must be deemed to be for violation of that law itself. In simpler terms, where law 'x' prescribes a punishment for violation

of law ‘y’, it can be said that law ‘x’ commands compliance with law ‘y’, and that the punishment prescribed by law ‘x’ is for violation of this command. In this view no problem would arise practically when penalty is prescribed by one law for violation of another law. Moreover, the term ‘law’ in Article 20(1) includes a provision of law. This is so because in many cases violation contemplated by the said Article 20(1) would be only a violation of some provision of law in force. Hence for violation of one provision, penalty may be prescribed by another provision and it makes no difference whether such other provision forms part of the law whose provision is violated or of another law.

10. Thus it is clear that some law in force should prescribe a penalty for a certain violation, before such penalty could be imposed. Whether such prescription should be in the statute itself or in any other instrument drawn up pursuant to a power given under such statute, may now be considered. In other words, the question is, can the legislature delegate the power to prescribe such penalty to some other person or agency. This question takes us into the field of delegation of powers.

11. At the dawn of the Indian Republic, the President of India referred to the Supreme Court, under Article 143 of the Constitution, three questions, concerning certain provisions in the Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947, and Part C States (Laws) Act, 1950. A Special Bench of seven judges of the Supreme Court heard detailed arguments of the Attorney General, Advocate Generals of various States and other Advocates on these questions. Each of the seven judges gave a separate opinion. All the seven opinions are reported in one piece in *AIR 1951 SC 332* under the cause-title, *“In re Article 143, Constitution of India and Delhi Laws Act”*. In short, such opinions dealt with the extent upto which

a legislature in India can confer any of its powers on a subordinate authority. From a reading of all the seven opinions it appears that only Pathanjali Sastri, J., as he then was, of the seven judges, went to the extent of holding that so long as a legislature does not violate any express condition limiting its power, it is as free as British Parliament to make law, including a law that some other specified agency would legislate a specific law, which such legislature is competent to legislate. However there seems to have been a consensus among the majority that, in India, an essential legislative function, entrusted by the Constitution to Parliament or a State legislature cannot be delegated as such, though within their fields of competence, parliament and such legislatures are permitted to enact the broad principles of a law and empower any nominated agency to work out the details that are ancillary to such law. A Constitution Bench of the Supreme Court in *Harishankar Bagla -vs- The State of Madhya Pradesh, AIR 1954 SC 465,* held unanimously, speaking through Mahajan C.J., in para 9 of the judgment, as follows:-

> "It was settled by the majority judgment in the 'Article 143 Constitution of India and Delhi Laws Act, 1912 etc.', AIR 1951 SC 332 that essential powers of legislation cannot be delegated. In other words, the Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."

12. To the knowledge of this author, the above proposition has not been subsequently deviated from by any bench comprised of five or more judges of the Supreme Court, though controversies have arisen regarding what functions are essentially legislative and what are merely ancillary. In *Devidas -vs- State of Punjab, AIR 1967 SC 1895,* a Constitution Bench reiterated this law. Subba Rao, C.J., speaking for the Bench, in para 15, cited approvingly the law on the subject as laid down in an earlier case, namely *Vasanth Lal Madan Bai Senjan wala -vs- State of Bombay, AIR 1961 SC 4:-*

> "The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down anystandard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous

> and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature."

13. The question that arises as a result of the above discussion would be whether prescribing a penalty for violation of a law is an essentially legislative function or not. If it is so, then such prescription should be made by a competent legislature and the power to make such prescription cannot be delegated by such legislature to any agency of its choice. If it is not so, then the power may be delegated. If the former is correct, the term 'law in force' in Article 20(1) can mean only a statutory instrument enacted by a competent legislature, namely parliament or any State legislature and it will not include any Rule, Regulation or any subordinate legislation. If the latter is correct then the phrase 'law in force' in Article 20(1) may include such subordinate legislation. Hence the question is: which of the two is correct, the former or the latter?

14. The view, expressed hereinabove, that Article 20(1) defines, in fact, an offence as a violation of a law in force, indicates that the power to specify such violations and stipulate penalties therefor must be deemed to be essentially legislative functions. To hold otherwise would amount to a denial of the Rule of Law itself. To say that offences can be brought into existence by an executive fiat, without legislative sanction, substitutes the rule of the executive whim for

the rule of law. Hence it must be said, in order to uphold the rule of law, that the phrase 'the law in force' in Article 20(1) means only statutory enactments and not any subordinate legislation. Does this mean that no offence, in the sense of violation of a provision of law can be brought into existence by a rule or regulation framed under a statute? The answer, invariably should be in the affirmative. The question whether penalties for a violation as stated above can be prescribed by any such rule or regulation need not necessarily be answered in the negative. The reason is embedded in the very language of Article 20(1) itself. The said Article prohibits levy of a penalty <u>greater than</u> what is prescribed <u>under</u> the law in force. The term 'under the law in force' clarifies the point. It means that a law should provide for a mechanism to impose penalties for a violation of its provisions and that any penalty imposed under such mechanism would be deemed to have been imposed under such law. Since Article 20(1) prohibits imposition of a penalty greater than what may be imposed under the law in force, the task of prescribing the maximum penalty must be deemed to be an essentially legislative function. Hence in this view of the matter, a statute which authorises a subordinate agency to prescribe penalties for violation of its provisions, must necessarily specify the maximum penalty that is leviable, in each case.

15. Therefore, Article 20(1) contains inbuilt safeguards against any excessive delegation in the matter of prescribing penalties for offences. Since this discussion pertains to offences and penalties, the Constitutional provisions governing delegation of powers in respect of matters other than declaring offences and prescribing penalties are not considered here.

16. Though a penalty for violation of a law in force is prescribed under the law in force, such provisions of law should still not be violative

of any of the fundamental rights in Chapter III of the Constitution. Otherwise, such provision would be hit by Article 13 and hence would be void. It took almost 20 years after the birth of the constitution in India, for the highest judicial agency in the country to realise and express the view that the various fundamental rights set out in Chapter III of the Constitution are not placed in water-tight compartments excluding each other, but form one harmonious system, interwoven in a definite pattern. It was so expressed by the full court comprised of eleven judges in *R.C.Cooper -v- Union of India, AIR 1970 SC 564.* The ratio of the majority judgment in Cooper's case was explained in clear terms by Shelath, J., speaking on behalf of seven judges of the Supreme Court in *Sambhu Nath Sarkar -vs- State of West Bengal, AIR 1973 SC 1425.* The said passage in para 39, may now be reproduced.

> "In Gopalan 1950 SCR 88 = (AIR 1950 SC 27) the majority court had held that Art.22 was a self-contained Code and therefore a law of preventive detention did not have to satisfy the requirements of Arts. 19, 14 and 21. The view of Fazl Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Art. 19(1)(a),(d) and that a law providing for preventive detention had to subject to such judicial review as is obtainable under cl.(5) of that Article. In (1970) 3 SCR 530 = (AIR 1970 SC 564) the aforesaid premise of the majority in Gopalan 1950 SCR 88 = (AIR 1950 SC 27) was disapproved and therefore it no longer holds the field. Though Cooper's case, (1970) 3 SCR 530 = (AIR 1970 SC 564) dealt with the inter-relationship of Art. 19 and Art.31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this

> case held the major premise of the majority in Gopalan 1950 SCR 88 = (AIR 1950 SC 27) to be incorrect...."

17. Therefore it follows that Article 20 must be read harmoniously with the other Articles in Chapter III of the Constitution, especially Article 21,19 and 14. These three articles have been recognised as pre-eminent. A Constitution Bench speaking through Chandrachud, J., as he then was, in *Minerva Mills Ltd.-vs- Union of India, AIR 1980 SC 1789,* in para 79, stated as follows:

> "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 14 is the summit on the apex of this golden triangle aptly described by Bhagawati, J., in *Maneka's* case as

> "…a founding faith of the constitution. It is indeed the pillar on which rests exclusively the foundation of our democratic Republic."

18. Thus it is needless to say that the law in force contemplated by Article 20(1) should be tested on the touchstone of Article 14. The procedure prescribed by such law in force should also satisfy the requirements of Article 14. That is, the law in force, within the meaning of Article 20(1) must not only prescribe a penalty for violation of a law, but must also prescribe a fair procedure for adjudicating whether there has been a violation and for determining the quantum of penalty to be imposed, which cannot be greater than what is specified by such law. Wherever a penalty is prescribed for a violation of any law, these requirements should be insisted upon.

19. From the above discussion, the following propositions clearly

emerge:-

a) *Every instance of violation of a law in force, for which a penalty is imposable under such law or any other law in force, is an offence; it is equally true that every offence is a violation of some law in force for which a penalty is imposable as stated above.*

b) *Such law in force should be a valid law, not violative of any provision in Chapter III of the Constitution; especially such law in force must prescribe a fair procedure for adjudicating whether there has been a violation and for determining the quantum of penalty to be imposed, and must specify the maximum penalty imposable for such violation.*

For convenience, the first mentioned proposition may be called 'the proposition of substance' (POS, in short) and the second mentioned proposition may be called 'the proposition of procedure' (POP, in short).

20. The above propositions flow from a plain reading of Article 20(1), without stretching the language in any manner. The first part of the Article prohibits conviction of a person of any offence except for violation of a law. It is further clarified therein that such law must be a law in force. It is further clarified therein that such law should have been in force when the act charged as an offence was committed. In substance there is no difference between saying that no person can be convicted of an offence unless he has violated a law and saying that only a violation of a law would amount to an offence. The phrase 'the act charged as an offence', clarifies that unless there has been such violation the act would not amount to an offence. That such violation should be a violation of a law in force is an additional requirement. This additional requirement incorporates the common

law prohibition against 'ex post facto law'. On this ground it has been rightly said in several cases, as in para 8 of the judgment in *Rao Shiv Bahadur Singh & another vs State of Vindya Pradesh, AIR 1953 SC 394,* decided by a Constitution Bench, that, "This Article, in its broad import has been enacted to prohibit convictions and sentences under "ex post facto law". On account of this, the definitional nature of the first limb of Article 20(1) expressed as POS herein should not and need not be lost sight of. However, very unfortunately, it has been lost sight of due to an over-emphasis on the other aspect of it, namely that it incorporates a prohibition against expost facto law. Had it not been lost sight of, the Constitution Bench speaking through B.P.Sinha, J., in *Thomas Dana's* case* would not have said in para 12: "all criminal offences are offences, but all offences in the sense of infringement of a law are not criminal offences". Had it not been lost sight of, the term 'civil penalties' would not have been smuggled into Indian Jurisprudence, or would have been banished at least in the post-constitutional era**. A recognition that Article 20(1) enunciates POS is of paramount importance in upholding the Rule of Law. To describe certain penalties as 'civil penalties' and thus exempt them from the discipline of Article 20(1) is analogous to aiding criminals to escape the arm of justice under a fake passport. The fact that levy of penalty, even under the guise of compensation or damages, in terms of a contract is expressly prohibited by Section 74, Contract Act, fortifies the above view. Any levy that tends to become a penalty should comply with the requirements of Article 20(1).

21. POP is as important as POS, in upholding the rule of law. It is, as stated in para 7 of the judgment (SCC) in *Maneka's* case by Bhagwati, J. "The principle of reasonableness which legally as well as philosophically is an essential element of equality or

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* See page 42 hereinabove

** This point is elaborated in paragraphs 62 &63 of this article.

non-arbitrariness", and it "pervades Article 14 like a brooding omnipresence".

22. It is not an easy task to set out the various positive ingredients of a fair procedure. However, a negative definition is easier. No procedure that does not, in spirit comply with the two fundamental principles of Natural Justice namely, 'Audi Alteram Partem' and 'Nemo Judex in causa sua', can be called a fair procedure. The first principle, AAP, has been elaborately dealt with elsewhere ("Justice versus Natural Justice": K.Ravi. SUN Publishers, Chennai; 1996) by this author, which resulted in formulation of a minimal principle of Natural Justice stated there as follows:-

> "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."

23. While the first principle suffered simple injuries in the frontal assault that it faced not only in the executive chambers of bureaucracy but also in legislatures and Temples of Justice, the second principle suffered grievous injuries in all such places. So the second principle requires to be placed in an intensive care unit, and should be attended upon immediately.

24. The second principle, expressed in the maxim "Nemo Judex in Causa Sua", means " No one shall be a judge in one's own cause." In other words a person interested in a certain dispute, either monetarily, or personally or officially is prohibited by this principle from adjudicating upon such dispute. The person making an allegation and the person who would adjudicate the validity of

such allegation must not be the same person. These two persons must not have any relationship that might give rise to a reasonable apprehension that they sail together, with reference to such dispute. By deciding the dispute in a certain manner, if a person would have a pecuniary advantage, it is obvious that such person is disqualified from passing a verdict on that dispute. This is the rule against pecuniary bias. Personal bias is a case where the adjudicator has either an inimical attitude or favourable disposition towards one of the contesting parties. There is no difficulty in accepting the second category of bias as a disqualifying principle. No court has refused to accept this principle, though grave difficulties arise in establishing personal bias, especially the first alternative of it, namely, 'inimical attitude' often characterised as malice or malafides or vindictiveness. A discussion of such difficulties would lead to a discussion of Rules of evidence and hence would be beyond the scope of the present venture. The third category of bias, namely, official bias seems to be a tricky sort. What is called the rule against official bias starts from the wider principle stated above, namely, that the person making an allegation and the person deciding its truth or validity should not only be different persons but they should be so different that no relationship exists between them as might give rise to a reasonable apprehension that the decision would be influenced by the person making the allegation. This principle gets illustrated in the short facts of the English case, *R vs Sussex Justices Exp. Mc Carthy, (1924) 1 KB 256.* In that case, a conviction against a motorist was set aside on the sole ground that the person acting as a clerk to the judges was also the solicitor for another person who had sued the same motorist for damages.

25. In India, after the advent of the Constitution, two cases came up before the Supreme Court, raising the question of official bias. They are *Gullapalli Nageswara Rao vs A.P.S.R.T.C, AIR 1959 SC*

308, decided by a Constitution Bench and *Gullapalli Nageswara Rao vs State of A.P., AIR 1959 SC 1376,* decided by a three-judge Bench. They may be called, the first Gullapalli case and the second Gullapalli case, respectively.

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 Justices* mentioned above he proceeded to state, in para 30 (AIR) :-

> ".... 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."

26. 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. 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) ...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."

27. The principle that emerges from the two Gullapalli cases is that an officer who is part of a department cannot adjudicate a dispute between such department and another person. The mere fact that the officer is a part of the department disqualifies him to decide such a dispute. Nothing more is required to establish such disqualification.

This rule against official bias was derived, in the *First Gullapalli* case, from the principle that justice must not only be done, but should manifestly be seen to be done. This principle has been recognised in some cases* as the third fundamental principle of Natural Justice. For the sake of convenience, the said principle would be referred to in this discussion as 'Nemo Judex' principle itself. If this principle is correct, one fails to understand how in several matters law itself provides for an officer of a department hearing a dispute between such department and another person. For example, Chapter XVI of the Customs Act, 1962 provides for confiscation of goods and levy of penalty where goods are brought into India from outside involving violations set out in the provisions therein. Section 122, in that Chapter, entrusts adjudication of such confiscation and assessment and levy of penalties to Collectors, Assistant Collectors and officers of customs according to the value involved. This gives rise to a question, namely, is not Section 122 of the Customs Act, 1962 violative of the 'nemo judex' principle and hence violative of Article 20(1) itself? There are numerous enactments, made before and after the birth of the Constitution, containing provisions which empower departmental authorities to adjudicate disputes between the department on the one side and others on the other. In all such cases the 'nemo judex' principle is literally, and in spirit, violated. However it appears that the validity of such provisions have not been seriously challenged, with the result that such provisions have continued to be in force for more than forty eight years since the Constitution came into existence. The reasons are quite obvious and may be discussed now.

28. Before the ruling in *Maneka's* case, the requirement of compliance with principles of Natural Justice was considered to be applicable only in certain cases where, authorities had a duty to act judicially. In

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* See Union of India Vs Tulsiram Patel, AIR 1985 SC 1416, para 86

view of this restriction, violation of Natural Justice escaped censure in several cases under the pretext that in such cases there was no duty to act judicially. This view had been originally propounded by Atkin L,J., as he then was, in *R vs Electricity Commissioner, (1924) 1 KB 171,* and was made more explicit by Lord Hewart, C.J., in *Rex vs Legislative Committee of the Church Assembly, (1928)1 KB 411.* Later this view was set out as four separate conditions by Slesser L.J., in the *King vs London County Council (1931) 2 KB 215.* This view dominated the decisions in India made before and after the advent of the Constitution, at least till 1978 when *Maneka's* case was decided. In England, this view was upset in 1963 itself in the epoch-making decision of *Ridge vs Baldwin, (1963)2 All. E.R. 66.* In India, even in the post-constitutional era, the view expressed by Atkin.L. J. was followed. At the dawn of the Indian Constitution, in *Province of Bombay vs Kushal Das Adwani, AIR 1950 SC 222,* a Bench of six judges of the Supreme Court, by a majority of 5:1, expressly referred to and followed Atkin.L.J.'s view. Only Fazl Ali, J. expressed his dissent. This dissenting view became the Law of the land after the pronouncement in *Maneka's* case. The historical development in this regard are set out clearly by Bhagavati, J. in para 59 and 60 of the judgment in *Maneka's* case, which may now be reproduced.

> "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 'fairplay 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 inquiry which entails civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi-judicial proceeding as distinguished from an administrative proceeding and the distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by the law under which it is functioning to act judicially. This requirement of a duty to act judicially in order to invest the function with quasi-judicial character was spelt out from the following observation of Atkin, L.J. in Rex v. Electricity Commissioners: "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 Bench Division…" Lord Hewart, C.J., in Rex v. Legislative Committee of the Church Assembly read this observation to mean that the duty to act judicially should be an additional requirement existing independently of the "authority to determine questions affecting the rights of subjects"— something super-

added to it. This gloss placed by Lord Hewart,C.J., on the dictum of Lord Atkin, L.J., bedevilled the law for a considerable time and stultified the growth of the doctrine of natural justice. The Court was constrained in every case that came before it, to make a search for the duty to act judicially sometimes from tenuous material and sometimes in the crevices of the statute and this led to over-subtlety and over-refinement resulting in confusion and uncertainty in the law. But this was plainly contrary to the earlier authorities and in the epoch-making decision of the House of Lords in Ridge v. Baldwin, which marks a turning point in the history of the development of the doctrine of natural justice, Lord Reid pointed out how the gloss of Lord Hewart, C.J., was based on a misunderstanding of the observations of Atkin, L.J., and it went counter to the law laid down in the earlier decisions of the Court. Lord Reid observed: "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 me impossible to reconcile with the earlier authorities." The learned Law Lord held 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 super-added. This decision broadened the area of application of the rules of natural justice.

...This development in the law had its parallel in India in the Associated Cement Companies Ltd. v. P.N. Sharma where this Court approvingly referred to the decision in

Ridge v. Baldwin (supra) and, later in State of Orissa v. Dr. Binapani observed that: ‘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’. This Court also pointed out in A.K. Kraipak v. Union of India, another historic decision in this branch of the law, that in recent years the concept of quasi-judicial power has been under-going radical change and said:

“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.”

The net effect of these and other decisions was that the 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.

This was the advance made by the law as a result of the decision in Ridge v. Baldwin (supra) in England and the decision in Associated Cement Companies’ case (supra) and other cases following upon it, in India. But that was not to be the end of the development of the law on this subject. The proliferation of administrative

law provoked considerable fresh thinking on the subject and soon it came to be recognised that 'fair play in action' required that in administrative proceeding also, the doctrine of natural justice must be held to be applicable. We have already discussed this aspect of the question on principle and shown why no distinction can be made between an administrative and a quasi-judicial proceeding for the purpose of applicability of the doctrine of natural justice. This position was judicially recognised and accepted and the dichotomy between administrative and quasi-judicial proceedings vis-a-vis the doctrine of natural justice was finally discarded as unsound by the decisions in In re: H.K. (An Infant) and Schmidt v. Secretary of State for Home Affairs (supra) in England and, so far as India is concerned, by the memorable decision rendered by this Court in A.K.Kraipak's case (supra)."

29. One of the main reasons why the Constitution Bench in *Maqbool Hussain's* case* (discussed elaborately in a previous article in this book) held that the rule of double jeopardy contained in Article 20(2) of the Constitution did not apply to certain proceedings initiated by the Customs officers was the opinion that such officers, in confiscating smuggled goods and levying penalty for such smuggling, did not have a duty to act judicially. This dictum was thus coloured by the view expressed by Atkin.L.J., read with the gloss placed on it by Lord Hewart. C.J. Of course, in *Sewpujanrai's* case,** another Constitution Bench of the Supreme Court held that the customs officials had a duty to act judicially in such cases. Even then, it was not realised that in order to bring the exercise of power within the discipline of Natural Justice, a legal authority

* See page 30 hereinabove
** See page 41 & 42 hereinabove

to determine questions affecting the rights of subjects was enough and an insistence on the presence of a duty to act judicially was unwarranted. This realisation dawned only in *Maneka's* case, which itself, of course, was a culmination of a revolution set in by certain earlier Indian decisions.

30. There was another view which inhibited the otherwise natural question, namely, how statutory provisions granting powers in violation of the 'nemo judex' principle could be valid? That view postulated the principles of Natural justice to be subordinate to the legislative powers of the State. In an extreme form, this view amounted to saying that unless the statute which conferred a legal authority directed compliance with natural justice, such compliance need not be insisted upon. This extreme view was later moderated to the effect that unless the statute which conferred a legal authority excluded, explicitly or implicitly, the application of the principle, compliance with it should be insisted upon. Even in its moderate form, it recognised the legislative supremacy over the principles of natural justice. According to the moderate view the legislature can provide that in a given case principles of natural justice need not be followed. The moderate view was well-expressed in para 7 of the judgment in *Union of India vs J.N. Sinha, AIR 1971 SC 40* decided by a Bench of two judges, extracted below:-

> "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 v. 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.”

31. It took almost fourteen years thereafter to accept authoritatively the position that natural justice is a part and parcel of Article 14 itself. This was recognised by a Constitution Bench of the Supreme Court in para 95 of its Judgment in *Union of India vs Tulsiram Patel, AIR 1985 SC 1416:*

> “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 a principle of natural justice by a State action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of 'State' in Article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially."

32. At least, after the realisation that the fundamental principles of natural justice are guaranteed by Article 14 of the Constitution, the legislative supremacy theory should have walked out. Unfortunately that theory continued to hold the field even after the authoritative recognition of the fundamental and Constitutional status of natural justice. The Constitution Bench speaking through Madon. J, representing the majority, while declaring the Constitutional status of natural justice, in *Tulsiram Patel's* case, at the same time and by the same stroke upheld the legislative supremacy theory. In the humble opinion of this author this appears to be illogical, or at least, paradoxical. In order to appreciate this position, the reasoning in *Tulsiram Patel's* case expressed by Madon. J., may be set out in two steps:-

a) *A violation of a principle of natural justice is a violation of Article 14.*

b) *Though the rules of natural justice have a definite meaning and connotation in law and their contents and implications are well understood, still they are not statutory rules. They are not immutable but flexible. Therefore they can be modified and in exceptional cases they can even by excluded.*

Statements (a) and (b) are mutually contradictory. The consequence of accepting statement (a) is set out by Madon. J. himself in the above case, in very clear terms, in para 95, quoted above.

33. If the statement that Article 14 guarantees that any law or State action that violates natural justice in any case would be liable to be struck down is correct, then statement (b) that principles of natural justice could even be excluded by a legal provision is wrong. In fact it was not at all necessary, in *Tulsiram Patel's* case for Madon. J., to have made the statement (b), supporting the legislative supremacy over natural justice. The Bench in that case had to consider whether a Constitutional provision can deny the need for observance of natural justice in any given case. For that purpose it need not have taken pains to support the legislative supremacy theory. Accepting or denying the legislative supremacy, may not be relevant to decide the question of Constitutional supremacy over natural justice. To hold that the Constitution itself may override natural justice in any given case one need not accept that an ordinary law made by Parliament or any State Legislature can also do that. In the humble opinion of this author, a combined reading of the Full Court decision in *Kesavananda Bharathi vs State of Kerala, AIR 1978 SC 1461 and the decision of a Constitution Bench in Minerva Mills Ltd. vs Union of India, AIR 1980 SC 1789,* clearly establishes that Article 14 of the

Constitution is a part of the basic structure of the Constitution and hence cannot be subjected to the amendatory power of Parliament. In this view, if the guarantee of observance of natural justice is embedded in Article 14, then not even by an amendment of the Constitution can that be denied. However, for the purpose of the present discussion it is not necessary to consider this aspect. The present discussion is confined to the question whether by a statutory provision the guarantee of observance of natural justice can be denied. It can be concluded that any affirmative answer to this question cannot co-exist with the recognition that such guarantee is a part of Article 14 itself.

34. Consistent with the Constitutional status of natural justice, any statutory provision that empowers an officer of a department or agency to adjudicate a dispute between such department or agency on the one hand and another person on the other can be challenged as unconstitutional, being violative of 'nemo judex' principle guaranteed by Article 14. If this challenge is accepted several provisions of law like those in the Customs Act, Central Excise Act, the Forest Act, would be struck down despite their having held the field for several years. The dilemma is whether to save these well-settled legal provisions by giving up the Constitutional status of natural justice or to save such status by giving up such provisions. Is there any third way out?

35. The provisions of law which fall for consideration in this regard appear to be mainly of two types: one being those empowering authorities to refuse or withdraw some privilege, the grant or continuance of which is circumscribed by express legal provisions; the other being those empowering authorities to levy any penalty on any person or to order that such person shall forfeit anything of value, except a privilege as stated above. The former may be called

'privilege cases' and the latter may be called 'penalty cases', for the sake of convenience. Of course, in both cases factual allegations may have to be adjudicated upon. In both cases the final orders may adversely affect the party concerned. Hence, in both the cases, the principles of natural justice, namely the principle of Audi Alteram Partem, and the nemo judex principle are required to be observed. However the nemo judex principle itself postulates that there can be different kinds of bias like, pecuniary, personal and official. While in both the cases a real likelihood of pecuniary or personal bias would vitiate the proceedings, can it be conceded that the rule of official bias may not have application in privilege cases though such rule applies in penalty cases. There is a reason to suggest this. An officer of a certain department/agency, in the absence of pecuniary and personal bias may not have any reason to refuse to any person or withdraw from any person, a privilege. He may be interested in refusing or withdrawing such privilege only if he is inimical towards the person concerned, or if he is interested in some other person who would stand to gain by such refusal or withdrawal. Without any of these, by virtue of his office alone, an authority may not be interested in either denying to a person or withdrawing from a person any privilege. However in penalty cases the position would be different. It is a common feature that authorities are under pressure to some how or other bring to books offenders who violate provisions of law. Due to such pressure, either in an anxiety to show good statistics or in an anxiety to cover up their laches in tacitly permitting violations which serve their interest, such authorities may hunt for innocent victims. Hence in such cases the rule against official bias ought to be strictly insisted upon. Thus it may be considered whether the rule against official bias could be restricted only to penalty cases.

36. A more pragmatic approach would be to allow the provisions which authorise an officer of a particular department or agency to

adjudicate upon a dispute to which such department or agency is a party, provided that there is a provision by which the decision by such authority could be reviewed elaborately on the basis of facts and law by some other outside agency like an impartial tribunal, as provided for in statutes like the Customs Act where the Customs, Excise and Gold (Control) Appellate Tribunal, hears such appeals. Whenever there is no such provision for such review by an outside agency, the law which empowers an officer of an agency that is a party to a dispute to adjudicate upon such dispute should be declared to that extent, unconstitutional, being violative of the nemo judex principle guaranteed by Article 14.

37. All these are only compromises. No doubt, a Constitutional guarantee cannot be compromised. It is especially so in the case of Article 14, as clearly ruled by three Constitution Benches of the Supreme Court in *Behram Khurshid vs Bombay State, AIR 1955 SC 123, in Basheshar Nath vs I.T.Commissioner, AIR 1959 SC 149* and in *Olga Tellis vs Bombay Municipal Corporation, AIR 1986 SC 180.* A passage from para 14 of the judgment in *Basheshar Nath's* case, in the words of S.R. Das, C.J., may now be reproduced.

> "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 do 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. Its seems to us absolutely clear, on the language of Art. 14 that it is a command issued by the Constitution to 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."

It is for a Constitution Bench of the Supreme Court to decide in an appropriate case in future, whether settled provisions of law violative of the rule against official bias should be permitted to continue and if so, on what grounds.

38. Before parting with this discussion it would be worthwhile to take note of attempts by the executive to violate such a solemn constitutional guarantee. A paradigm case would be where a statutory body assumes to itself a power to adjudicate and decide whether a person who enters into transactions with such body is guilty of theft or not and further designates its own officers to

make such adjudication, levy penalty and sit on appeal against such adjudication and levy, though the parent statute has not designated any authority for any of these functions and has not authorised the said body specifically to undertake such adjudication and make such levy. Electricity Boards of certain states, constituted as such, by and under Section 5 of the Electricity (Supply) Act, 1948, hereinafter called “the 1948 Act”, have assumed such powers, in the guise of framing terms and conditions of supply of electricity to consumers.

39. Section 39 of the Indian Electricity Act, 1910, hereinafter called “the 1910 Act”, declares as follows:-

> ***“Theft of energy.***— Whoever dishonestly abstracts, consumes or uses any energy shall be punishable with imprisonment for a term which may extend to three years, or with fine which shall not be less than one thousand rupees, or with both: and if it is proved that any artificial means or means not authorised by the licensee exist for the abstraction, consumption or use of energy by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of energy has been dishonestly caused by such consumer.”

40. Section 40 to 47 and 49 of the 1910 Act provides for levy of penalties for various offences described thereunder, pertaining to supply or use of electricity. Section 48 of the said Act provides:-

> ***“Penalties not to affect other liabilities.—*** The penalties imposed by Section 39, Section 39-A or Sections 40 to 47 (both inclusive) shall be in addition to, and not in derogation of, any liability in respect of the payment of compensation or, in the case of a licensee,

the revocation of his licence, which the offender may have incurred."

41. The 1910 Act does not specify which court shall try the offences under the said Act. In such cases, Section 26(b) of Criminal Procedure Code provides that such offences may be tried by the High Court or the courts by which such offences are shown to be triable in the first schedule of the said Code. Under such schedule, offences under Section 39 to 44 of the 1910 Act are triable by the first class magistrate, such offences being punishable with imprisonment for a term upto three years. Under the said schedule the other offences under the 1910 Act are triable by any magistrate, being punishable either only with fine or imprisonment for a term less than three years.

42. Thus the provisions in the 1910 Act declaring offences and prescribing penalties, satisfy all the requirements of Article 20(1). The preamble of the 1910 Act states that its object is to amend the law relating to the supply and use of electrical energy. In contrast to this, the object of the 1948 Act, as expressed in its preamble, is to provide for the rationalisation of the production and supply of electricity, for taking measure conducive to electrical development and for all matters incidental thereto. It is obvious that while the 1910 Act deals also with the use of energy, the 1948 Act does not deal with the use of energy, though both the Acts deal with the supply of energy. Even in this respect, while the 1910 Act is a law relating to such supply, the 1948 Act is a law to provide for the rationalisation of such supply. In other words the 1948 Act does not deal fully even with the supply of energy. It deals only with one aspect of such supply, such aspect being rationalisation of supply. With this objective, it creates statutory bodies, including State Electricity Boards. It confers under Section 19 powers on such

Boards to supply electricity to a licensee. Under Section 26 such Boards shall have all the powers and the obligations of a licensee under the 1910 Act, except a few that are mentioned in the proviso therein. Since under Section 19 a Board is not empowered to supply electricity to any non-licensee, and since under the scheme of the Act, and especially Section 27 therein the Board cannot exercise a power not provided in the said Act, a further provision is made in Section 49 thereof, empowering the Board to supply electricity even to non-licensees. Section 49 (1) reads as follows:-

> "Provision for the sale of electricity by the Board to persons other than licensees - (1) Subject to the provisions of this Act and of regulations, if any made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs."

The above provision empowers the Board to supply electricity to a non-licensee with three riders attached to that power: The first rider is that such supply would be subject to the provisions of the 1948 Act and the regulations made thereunder; the second rider is that such supply may be made by the Board upon such terms and conditions as the Board thinks fit; the third rider is that the Board may frame uniform tariffs for the purpose of such supply. Sub-Sections (2) and (3) deal exclusively with the fixation of tariffs. Sub-Section (4) concerns tariff and terms and conditions of supply. Sub-Section (4) prohibits the Board from showing preference to any person in fixing the tariff or in stipulating the terms and conditions of supply. Section 78 of the 1948 Act empowers the State Government to make

rules to give effect to the provisions of that Act, enumerating certain specific fields that such rules may cover. Section 79 empowers the Board to make regulations to provide for certain matters enumerated thereunder, as items (a) to (jj), and to provide for any other matter arising out of the board's functions under the said Act, prescribing some formalities and conditions for exercise of this power. Section 79 A requires that such rules and regulations as and when made shall be laid before the State Legislature concerned. Boards in certain States have framed their terms and conditions for supply of electricity to non-licensees in the form of regulations made under section 79 of the 1948 Act. Boards in certain other States have framed such terms and conditions not as such regulations, but merely under the enabling provision in section 49(1) of the 1948 Act. In such terms and conditions clauses have been incorporated by certain Boards to assess and levy penalties called, "extra levies" on consumers found guilty of theft of energy, naming the officers of such boards, by designation, as authorities to make such assessment and to hear appeals against such assessments.

43. Certain questions arise regarding such clauses in such terms and conditions:-

1. *Is it not a violation of Article 20(1) of the Constitution to levy a penalty greater than what is prescribed under the 1910 Act for one and the same offence?*

2. *Is it not a violation of Article 20(2) of the Constitution to levy a penalty under the terms and conditions in addition to those leviable under the 1910 Act on a person for one and the same offence of theft of energy?*

3. *Will not such a levy amount to depriving a person of his personal liberty otherwise than in accordance with the*

procedure established by law and hence will it not be a violation of Article 21 of the Constitution?

4. *Are not the clauses in such terms and conditions empowering the officers of the Board to adjudicate the question, whether or not a consumer is guilty of theft of energy, assess penalties and hear appeals therefrom, violative of the nemo judex principle and hence violative of Article 14 of the Constitution?*

5. *When Sections 39 to 50 of the 1910 Act constitute a complete code in respect of theft and misuse of electrical energy, can any Electricity Board constituted under the 1948 Act, abridge or enlarge such code, merely on the ground that it has been empowered to supply electricity to non-licensees on such terms and conditions as it thinks fit?*

6. *Whether the Board has the legal power to levy penalties for theft of energy, in addition to those leviable under Sections 39 to 50 of the 1910 Act?*

44. Recently a three-judge Bench of the Supreme Court in *Hyderabad Vanaspathi Ltd. vs Andhra Pradesh State Electricity Board, 1998 Supreme Today 454* considered the questions 4 and 6 framed above. Regarding question No.6, the said three-judge Bench held that such terms and conditions are not ultra vires any provision of either the 1948 Act or the 1910 Act. Regarding question No.4, the Bench impliedly held that such terms and conditions are not unconstitutional. The other questions, stated above, were not considered in that case.

45. The judgment of the said Bench, as reported in the journal cited above, appears to be divided into 8 sections. In the first section, only the facts are stated. In the second and third sections statutory

provisions and relevant clauses in the terms and conditions are extracted respectively. In section four, after a brief discussion it is held that the terms and conditions are not merely contractual but they are statutory in character. In sections five and six, the contentions that certain terms and conditions are contrary to and ultra vires the provisions of the 1948 Act and the 1910 Act, respectively are rejected. In section 7 it is held that such terms and conditions are neither unreasonable nor violative of principles of natural justice and that they do not attract the nemo judex principle. This is only to indicate the scheme of the judgment. Now the reasons given in the judgment may be closely examined.

To hold that the terms and conditions are statutory in character, the Bench states as follows in para 20 of the judgment:

> "We have already seen that Section 49 of the Supply Act empowers the Board to prescribe such terms and conditions as it thinks fit for supplying electricity to any person other than a licensee. The section empowers the Board also to frame uniform tariffs for such supply. Under Section 79(j) the Board could have made regulation therefor but admittedly no regulation has so far been made by the Board. The Terms and Conditions of Supply were notified in B.P.Ms.No. 690 dated 17.9.1975 in exercise of the powers conferred by Section 49 of the Supply Act. They came into effect from 20.10.1975. They were made applicable to all consumers availing supply of Electricity from the Board. The section in the Act does not require the Board to enter into a contract with individual consumer. Even in the absence of an individual contract, the Terms and Conditions of Supply notified by the Board will be

applicable to the consumer and he will be bound by them. Probably in order to avoid any possible plea by the consumer that he had no knowledge of the Terms and Conditions of Supply, agreements in writing are entered with each consumer. That will not make the terms purely contractual. The Board in performance of a statutory duty supplied energy on certain specific terms and conditions framed in exercise of a statutory power. Undoubtedly the terms and conditions are statutory in character and they cannot be said to be purely contractual."

46. After stating the opinion of the Bench in the above manner, certain earlier decisions of the Supreme Court are dealt with in this regard. In para 21, a reference is made to *Punjab State Electricity Board vs Basi Cold Storage etc., 1994 Supp.(2) SCC 124* (*PSEB* case, in short). It is said that in the said case the conditions of supply were held to be 'akin to subordinate legislation'. With great respect it is submitted that *PSEB* case was not concerned with the question whether such conditions were akin to subordinate legislation or not. The said observation was made in *PSEB* case in a totally different context pertaining to a question, whether certain disputes between a consumer and the Board were required to be settled through arbitration. In passing, and without any discussion on the point, in para 7 of the judgment in *PSEB* case, it was said that such conditions were akin to subordinate legislation. It was said so, only for the limited purpose of emphasising that such conditions could not override any statutory provision and for no other purpose. Moreover it was not said that such conditions constituted subordinate legislation. Being akin to, cannot be equated to, being the same.

47. In para 22, a reference is made to *Bihar State Electricity Board and*

others vs Parameswar Kumar Agarwala & others, (1996) 4 SCC 686. In the *BSEB* case, the Board had issued a notification proposing to charge consumers at a certain rate for periods when meters remained defective, in order to curb theft of energy. It was held in that case that the notification was inconsistent with the clauses in the agreement of supply and hence was unsustainable. In the course of the said judgment, in para 16, it was said as follows:-

> "…it deserves to be pointed out that the terms and conditions have sacrosanctity, in that Rule 27 of the Indian Electricity Rules, 1956, framed by the Central Electricity Board in exercise of power under Section 37 of 1910 Act has, read with Annexure VI thereof, provided the model conditions of supply which are required to be adopted by the State Boards. It is on the basis of this statutorily prescribed model, with suitable variations, that energy had been supplied by the Board to the consumers. The model conditions can be said to be akin to the model Standing Orders prescribed by Industrial Employment (Standing Orders) Act, 1946, which when certified, become part of the statutory terms and conditions of service between the employer and employees and they govern the relationship between the parties, as held in Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd … We are inclined to think that similar is the effect of terms and conditions, on which a State Board supplies energy to the consumers."

48. All that follows from the above passage is that where a Board has adopted, as its own, the terms set out in Annexure VI to the Indian Electricity Rules which prescribe the model terms of supply, such terms and conditions become statutory terms of supply. For this the

decision in *Workmen vs Firestone Tyre and Rubber Co. of India P.Ltd., (1973) 1 SCC 813* was cited. In the *Firestone* case it had been observed in para 45-46, in passing:

> ".... Standing Orders which have been certified under the Industrial Employment (Standing Orders) Act, 1946 become part of the Statutory Terms and Conditions of service between the employer and his employee..."

49. However, the clauses relating to theft of energy which find a place in the terms and conditions framed by the Boards in several States, do not find a place anywhere in Annexure VI to the Indian Electricity Rules, 1956. Rule 27 therein permits a licensee to adopt Annexure VI, with such variations as the circumstances of each case require for the purpose of Section 21(2) of the 1910 Act. While Section 21 (2) permits a licensee to make conditions regulating his relations with consumers, and circumscribes the right to make such conditions with certain stringent requirements, State Electricity Boards are not subject to Section 21(2), in view of the proviso to Section 26 of the 1948 Act, relieving them of obligations under Section 21(2) of the 1910 Act. By no stretch of diction could terms regarding theft be considered as mere 'variations' of the terms in Annexure VI, since the latter do not deal with theft at all. Therefore the terms and conditions framed by the Board, when not being an adoption of Annexure VI, cannot be construed as statutory, even according to the reasoning in BSEB case.

50. Thus the view expressed in *Hyderabad Vanaspathi* case that the terms and conditions framed by the State Electricity Boards are statutory in character, does not, per se, follow either from the *PSEB* case or from the *BSEB* case, or even from a combined reading of these two cases. Hence the view expressed in *Hyderabad Vanaspathi* case is

based SOLELY on the reasoning that terms and conditions framed by a statutory body, in exercise of a statutory power, are statutory in character.

51. Can it be said that an Electricity Board is empowered by Section 49 to frame terms and conditions of supply? The test to determine whether or not a provision empowers an agency to do something is to see whether such agency could do such thing even in the absence of such provision. If it could not, then it can be said that such provision empowers it to do that; if it could, then it cannot be said so. Applying this test, it is found that in the absence of Section 49 of the 1948 Act, the Board cannot supply electricity to non-licensees. Hence it may be said that the said Section 49 empowers the Board to supply electricity to non-licensees. In effecting such supply, the Board frames terms and conditions of supply. In the absence of the phrase 'upon such terms and conditions as the Board thinks fit', in the said Section 49, can the Board frame such terms and conditions? It can. Therefore it cannot be said that the said Section empowers the Board to frame such terms and conditions. The effect of saying that the Board may supply upon such terms and conditions as it thinks fit is that the Board is free to choose its own terms and conditions, notwithstanding the model conditions prescribed in Annexure VI to the Indian Electricity Rules, 1956. In other words, the phrase clearly indicates that no statutory terms and conditions of supply are imposed on the Board. Hence Section 49 (1) itself makes it clear that such terms and conditions are non-statutory.

52. Even otherwise a question would still remain as to whether statutory terms and conditions in a contract can be violative of or inconsistent with provisions of any statute. Though Section 49 (1) itself provides that such terms and conditions must be subject to the provisions of the 1948 Act and Regulations made thereunder, this does not mean

that such terms and conditions need not comply with the provisions of the Contract Act or the provisions of the Constitution itself. Hence even saying that such terms and conditions are statutory in character does not make them immune from an attack that they are violative of some provision of the Contract Act or the Constitution. The question whether the Board under its terms and conditions, can assume to itself powers to adjudicate, to levy penalty and to hear appeals in cases of theft of energy, is not answered, by merely saying that such terms and conditions are statutory in character.

53. The Board cannot grant unto itself, under its own terms and conditions, any power not granted to it by the parent statute. A three-judge bench, in *Orissa State Electricity Board vs Indian Aluminium Co. Ltd., (1975) 2 SCC 431* (*OSEB* case, in short), held that the Board cannot do so even by making Regulations under Section 79 (j) of the 1948 Act. In para 6 of the judgment, Bhagavati, J., speaking for the Bench, stated as follows:-

> "…We do not think that the High Court was right in saying that by making regulations under Section 79(j) the Board could confer upon itself power to unilaterally revise the rates for supply of electricity. Section 79(j) empowers the Board to make regulations not inconsistent with the Supply Act to provide for "principles governing the supply of electricity by the Board to persons other than the licensees under Section 49". This power to make regulations must obviously be exercised consistently with the provisions of the Supply Act and the regulations made in exercise of this power cannot go beyond the Supply Act. If the power to enhance the rates unilaterally in derogation of the contractual stipulation does not reside in any provision of the Supply Act, it cannot be

> created by regulations made under the Supply Act. Either this power can be found in some provision of the Supply Act or it is not there at all. Regulations in the nature of subordinate legislation cannot confer authority on the Board to interfere with the contractual rights and obligations, unless specified power to make such regulations is vested in the Board by some provision in the statute, expressly or by necessary implication..."

54. Therefore, it follows that unless the powers to adjudicate, to levy penalties and to hear appeals are conferred on the Board by some provision in the parent Act, the Board cannot assume to itself such powers under the terms and conditions framed by it, or even under Regulations that it might make under Section 79(j) of the 1948 Act. Regulations, no doubt, are in the nature of subordinate legislation. Regulations, no doubt are statutory in character. Notwithstanding these characters, Regulations cannot grant any new power to the Board. Hence, whether terms and conditions are statutory or non-statutory, whether they are akin to subordinate legislation or not, it makes no difference, regarding the issue concerned. Whatever may be their character, they cannot confer any new power on the Board. It is surprising that the attention of the Bench was not drawn to these aspects in *Hyderabad Vanaspathi* case. In para 27 of the judgement in that case, it is said as follows:-

> "…Section 49 empowers the Board to supply electricity on 'such terms and conditions as it thinks fit'. It may also frame uniform tariffs. We have found that the terms and conditions of supply are statutory in character. They can be invalidated only if they are in conflict with any provision of the Act or the Constitution. Learned counsel have not shown to us any provision in the Supply Act with which

> Clause 39 is in conflict. In so far as the Supply Act is concerned, argument hovers around Section 49 only. The only limitation in that Section is that the terms and conditions of supply should be subject to the provisions of the Act. Clause 39 does not violate any provision in the Supply Act..."

55. The above statement does not take into account the invalidating factors other than inconsistency with any provision of the 1948 Act or the Constitution. It is true that the inconsistency with the parent Act would invalidate any clause in such terms and conditions. However there are also other factors which have the same effect. One such factor is granting to the Board a power not given by the Act. This is the result of the decision of the three-judge Bench in the *OSEB* case. Had the attention of the three-judge Bench in *Hyderabad Vanaspathi* case been drawn to the earlier decision by another three-judge Bench in *OSEB* case, the later Bench would have either followed the earlier decision of a coordinate Bench or would have placed the matter for being referred to a larger bench. Another invalidating factor would be violation of any other law in force. As an illustration it may be said that where a clause in such terms and conditions is opposed to public policy, and thus hit by Section 23 of the Contract Act, such clause would be invalid by the mere reason of its being violative of Section 23 of the Contract Act. If the nemo judex principle is a part of the public policy in India and if a clause in such terms and conditions violates such principles, then such clause is invalid. Similarly a clause in such terms and conditions cannot operate contrary to the law contained in Section 74 of the Contract Act. The said Section of the Contract Act, as interpreted by a Constitution Bench of the Supreme Court in *Fateh Chand vs Balkishandas, AIR 1963 SC 1405,* lays down the principle

that notwithstanding any stipulation in a contract only a reasonable sum, subject to the amount named in the contract, may be recovered from the defaulting party by the other party. A stipulation in a contract framed by an instrumentality of the State cannot override this law.

56. If the Terms and Conditions are statutory, then they can only have the status of a subordinate legislation. Such terms and conditions have been framed pursuant to the permission in Section 49 of the 1948 Act. Hence Section 49 could be challenged on the ground that it delegates to the executive the power to legislate, without providing the necessary guidelines. No word in Section 49, even remotely, suggests that rules may be framed to deal with the offence of theft of energy and to adjudicate and levy penalty in such theft cases. If the said section is held to authorise framing of terms regarding adjudication of cases of theft of energy, then the said section itself would be thrown open to a challenge on the ground that it makes excessive and impermissible delegation, without setting out appropriate guidelines. If that section is held to be one that does not authorise framing of such terms, then the terms and conditions in question cannot be statutory. It appears that the attention of the Bench, which heard the *Hyderabad Vanaspathi* case, was not drawn to this dilemma.

57. Regarding the contention that by empowering its own officers to adjudicate a dispute between itself and third parties, the Board has violated the nemo judex principle, the three-judge Bench in *Hyderabad Vanaspathi* case, in para 43 of its judgment states as follows:-

> "…The principle 'Nemo Judex in Causa Sua' will not apply in this case as the officers have no personal lis

> with the consumers. As pointed out by learned senior counsel for the Board, they are similar to Income Tax or Sales Tax Officials. There is nothing wrong in their adjudicating the matter especially when the consumers may be represented by an advocate and the formula for making provisional assessment is fixed in the clause itself…"

58. It is surprising that the attention of the Bench was not drawn to the principle laid down by a Constitution Bench in the *first Gullapalli* case. In that case no personal bias was imputed to the authority who passed the impugned order. However the impugned order was quashed on the ground that the authority was the head of the department which was a party to the dispute. In other words, the rule that official bias vitiates the proceedings was accepted and laid down by the Constitution Bench in that case. To say that nemo judex principle would apply only when an officer has a personal bias with the consumer, may not be in line with the decision of the Constitution Bench. The officers of the Board empowered in the terms and conditions are not similar to Income Tax or Sales Tax officials. While the latter are so constituted under Statutory provisions, the former are not. While appeals to impartial tribunals are provided for, against the decisions of tax officers, by the statutes themselves, the only appeal provided under the terms and conditions of a Board is to another officer of the Board. This only illustrates what the Apex Court said through Desai.J., speaking for a two-judge Bench in *Ram and Shyam Co. vs State of Haryana, AIR 1985 SC 1147,* in para 9 of the judgment, on the question of filing an appeal to the State Government against an order passed by an officer of the State.

> "The cliche of appeal from Caesar to Caesar's wife can

> only be bettered by appeal from one's own order to oneself."

59. In the case of a contract between the State and an individual, where clause 12 of the contract provided that the individual party would be liable to pay damages to the State as may be assessed by the State for any breach of conditions by the individual, a two-judge Bench of the Supreme Court, in *State of Karnataka Versus Shree Rameshwara Rice Mills, etc., (1987)2 SCC 160,* in paragraph 7 & 8 of the judgement stated as follows:-

> "…The terms of Clause 12 do not afford scope for a liberal construction being made regarding the powers of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in Clause 12 are "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench,

is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

"We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed."

60. It appears that the attention of the three-judge Bench is *Hyderabad Vanaspathi* case was drawn to the above mentioned *Rameshwara Rice Mills* Case, only in support of the submission under Article

14. Hence the above case was unceremoniously brushed aside in para 41 of the judgement in *Hyderabad Vanaspathi* Case on the ground that it did not apply. It is surprising that the law stated with utmost clarity in *Rameshwara Rice Mills* Case was not referred to in the context of nemo judex principle. Can it be said under such circumstances that the law laid down in *Rameshwara Rice Mills* case on the applicability of nemo judex principle has been over-ruled even by implication in *Hyderabad Vanaspathi* case?

61. When a standard contract is prescribed by a monopolistic instrumentality of the State, and imposed on the citizens, without affording any opportunity to bargain, such a contract, whether called statutory or not, ought to be strictly reasonable. If any term in such a contract is against public policy or against any statutory provision, then such term cannot be anything but unreasonable and the act of such instrumentality in imposing such a term cannot be anything but arbitrary. Article 14 of the Constitution, after the expansive import given to it in *Maneka's* case, cannot and does not permit imposition of such terms by the State and its instrumentalities on persons. Was not this principle recognised by Madon. J., in the celebrated judgment which he pronounced on behalf of a two-judge Bench in Central Inland *Water Corporation vs Brojonath Ganguly, AIR 1986 SC 1571*? Was not this principle reiterated in another revolutionary judgment pronounced by Verma, J., as he then was, on behalf of a two-judge Bench in Kumari *Srilekha Vidhyarthi vs State of U.P, AIR 1991 SC 537*?

62. The question whether the State has any inherent power that is not conferred on it by the Constitution was dealt with in an earlier article in this book*. It was concluded there, that the State has no such inherent power. In yet another article**, it was said that the term 'tax' as used in Article 265 of the Constitution, and as defined

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* See page 1 hereinabove

** See page 103 hereinabove

in Article 366(28), includes any impost, whether called a fine, penalty, levy, tax or fee, imposed by the State, attaching coercive sanctions to the process of recovery thereof. If it is so, the extra levy provided for theft of energy under the terms and conditions of a State Electricity Board would fall within the strict discipline of Article 265 and hence such levy cannot be imposed without a specific authority in the statute. It is surprising that the term 'civil penalty' has surreptitiously entered the Indian jurisprudence, despite the Constitutional vigil. Such term is really a contradiction in terms. If that term denotes what is normally recoverable in a purely civil action, it is not a penalty. Compensation for breach of a contract, damages for a libel or defamation, compensation payable to a victim of an accident, compensation payable to an employee ousted from service for no fault on his part, are instances of civil liabilities. Such compensations/damages cannot be called penalties. They would be treated as penalties whenever their quantum tends to become excessive, in the sense of representing more than what is just and equitable and the moment they become penalties, they are liable to be cut down. In other words courts do not award penalties except as a measure of punishment. The mandate of Article 20(1) is that penalties would be levied only for violation of a law in force and would never be greater than what is prescribed as such in that law. Any attempt to mix up compensation and penalty would be against the principle of Article 20(1) and hence unconstitutional, and hit by Article 13. This author is aware of the fact that the term 'civil penalty' has already trespassed into the field of Indian jurisprudence. Even a trespasser cannot be thrown out except by the due process of law. Hence only a Constitution Bench of the Supreme Court in an appropriate case should evict this trespasser or exorcise this evil spirit that tends to corrupt the Constitutional frame work of the Indian Criminal Jurisprudence.

63. When a certain provision in West Bengal Criminal Law Amendment (Special Courts) Act, 1949 empowered the Special Court to impose in addition to any sentence authorised by law, a further fine on a person who procured any property by corrupt means, a Constitution Bench in *Kedarnath Bajaria vs The State of West Bengal, AIR 1953 SC 404,* set aside the additional penalty levied under that provision on the ground that the offence, in that case, was committed before the provision was enacted and hence the levy was not what was prescribed by a law that was in force at the time of the commission of the offence, thus being in violation of Article 20(1) and that the levy was not saved by being dubbed as a civil penalty. However when a compensation was payable to certain employees under Section 25 FFF(l) of the Industrial Disputes Act, by an employer who had closed an undertaking, a Constitution Bench in *Hathi Singh Manufacturing Company Ltd. etc. vs Union of India etc., AIR I960 SC 923* rightly held that such compensation not being a condition precedent to closure, but being a mere consequence of such closure, the closure effected without paying such compensation was not a violation of any law and therefore Article 20(1) was not attracted to such a case. In other words, the test to decide whether a particular levy is a penalty that attracts Article 20(1) or a civil compensation/ damages, is to find out for what Act or omission the levy is imposed: if the Act or omission is a violation of a prohibition or a mandate in law, then such levy would be a penalty; in all other cases, the levy would be only a compensation or damages.

64. Applying this test to the extra levy imposable under the terms and conditions of a State Electricity Board, it may be said that such levy is imposed only for an offence declared under Section 39 of the 1910 Act, and hence it is a penalty falling within the discipline of Article 20.

65. May be, theft of electricity and the like offences, are chronic diseases, as Hansaria, J. aptly described in the *BSEB* case. However as Hansaria, J. has himself put it, in the concluding paragraph of his judgment, even to achieve a laudable object, the State cannot adopt means that are not in conformity with settled principles of law.

66. The law-makers and those in charge of maintaining the Rule of Law, cannot overlook the paramount importance of the following fundamental principles of the Rule of Law.

   1. *No person can be found guilty of any violation of a law except by the authority or the hierarchy of authorities empowered in that regard by law, and that too, no such finding may be rendered without following the procedure established by law, which ought to be fair and reasonable.*

   2. *A person may be tried for any such violation only once, subject to appeal, review and revision as may be provided in law.*

   3. *No penalty may be imposed on a person for any such violation unless so prescribed by law.*

   4. *The penalty thus imposed cannot exceed the maximum stipulated by law.*

   5. *Empowering authorities to try a person for any such violation and to hear appeals, revisions, etc. therefrom and prescribing maximum penalties for such violation are essential legislative functions, which cannot be delegated by the competent legislature.*

67. In the humble opinion of this author, Article 20, 21 and 22 of the Constitution together constitute an exhaustive code of the

fundamental principles of criminal jurisprudence which form an important part of the very structure of the Rule of Law, and thus the basic structure of the Constitution itself. Any inroad into these principles, whether by the executive, legislature or judiciary, would tend to dilute the democratic character of the nation itself.

NO LAW IS IMMORTAL

1. *A - All men are mortals*

   B - Socrates is a man

   C - Therefore Socrates is mortal

   This is an illustration of a valid syllogism, given in standard text books on logic. Nothing will be more disappointing to a student of philosophy, than the conclusion given above. Socrates, as a philosopher, exhibited an inextinguishable quest for knowledge and fearless heroism in welcoming his own tragic end, and he was thus duly immortalised by his disciple Plato. The truth or falsity of the above syllogism depends on the meaning that is attached to the term "Mortal" or "Mortality". Though the above syllogism is perfectly valid, its validity does not guarantee the truth of the conclusion. While the validity or invalidity of a syllogism belongs to the realm of logic (at times, contemptuously characterised as dry), the truth or falsity of a proposition belongs to the realm of life (at times, characterised as dynamic).

2. This understanding may prove to be helpful, while critically examining a proposition of law laid down in a particular case.

3. This discussion is mainly concerned with the question, whether an Ordinance, promulgated in 1944 by the Governor General of what was then called 'the British India', could still be alive, even after the emergence of India as a Sovereign Democratic Republic, by the people of India adopting, enacting and giving to themselves the Constitution of India. This question assumes significance in view of the fact that judicial orders are passed quite frequently under such Ordinance. The significance is enhanced on account of the fact that in many cases such orders are passed against popular politicians

who had allegedly amassed wealth by misusing their political offices. The Ordinance in question is: "Criminal Law Amendment Ordinance, 1944" (Ordinance No. 38 of 1944).

4. Section 72 of the ninth schedule of the Government of India Act, 1935 (hereinafter called "the enabling provision"), empowered the Governor-General to make and promulgate such Ordinances. The enabling provision stood as follows :-

> "The Governor - General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature, and may be controlled or superseded by any such Acts."

5. Pursuant to this enabling provision, Criminal Law Amendment Ordinance, 1944 (hereinafter called "the 1944 Ordinance") was promulgated on 23rd August 1944 by the then Governor - General. In terms of the enabling provision, the said Ordinance could have been valid only for a period not exceeding six months from its promulgation. How then, such a temporary Ordinance is still being invoked? For an answer to this question a reference should be made to section 1 (3) of the "India and Burma (Emergency Provisions) Act, 1940" (hereinafter called "the 1940 Act").

Section 1 (3) of the 1940 Act read as follows:-

> "Section seventy-two of the Government of India Act... shall, as respects Ordinances made during the period specified in section three of this Act, have effect as if the words "for the space of not more than six months from its promulgation" were omitted…"

Section 3 of the 1940 Act read as follows:-

> "The period referred to in the preceding sections is the period beginning with the date of the passing of this Act and ending with such date as His Majesty may by Order in Council declare to be the end of the emergency which was the occasion of the passing of this Act".

6. The 1944 Ordinance would have suffered a natural death on the expiry of six months from its promulgation, but for the provisions in the 1940 Act, quoted above. The 1944 Ordinance was passed during the period specified in section 3 of the 1940 Act, that is, before the termination of the emergency which occasioned the passing of the 1940 Act. Thus the life of the 1944 Ordinance was extended on account of the boon granted to it by the 1940 Act. One is reminded of the boon granted to Markandeya by Lord Shiva. In the case of Markandeya the boon was granted by the Almighty, the God himself, who is by definition, immortal. However in the case under consideration, the grantor of the boon, namely the 1940 Act, was not immortal. The emergency which occasioned the passing of the 1940 Act was declared to have ended on 01.04.1946 by "The India and Burma (Termination of Emergency) Order, 1946". Inspite of the termination of such emergency, it appears that the 1944 ordinance continued its survival and thus it appears to have attained immortality, in the sense that it would never suffer natural death at all, but can only be killed by a repealing enactment.

7. The decision in *J.K. Gas Plant Manufacturing Company (Rampur) Limited Vs King-Emperor*, rendered by the Federal Court and reported in *AIR 1947 FC 38* and the subsequent decision by a Constitution Bench of the Supreme Court of India in *Hansraj Moolji Vs The State of Bombay, reported in AIR 1957 Supreme Court 497,* appear to have confirmed the immortality of Ordinances like the 1944 Ordinance. In fact, neither of these two decisions had anything to do, directly, with the 1944 Ordinance. The First of these two decisions, namely the one rendered by the Federal Court, in *J.K. Gas Plant* case, had to deal with certain similar Ordinances passed in 1943, 1944 and 1945, in relation to constitution of Special Tribunals to try certain cases. Those Ordinances had also been promulgated under the same enabling provision. They too had been promulgated during the period covered by the emergency contemplated in section 3 of the 1940 Act. With reference to the attack on the ground that such Ordinances must be deemed to have expired on the termination of the emergency, which occasioned the passing of the 1940 Act, only one contention was raised in that case. The said contention was considered and rejected by the Federal Court. The said contention was that instead of the words "for the space of not more than six months from its promulgation", in the enabling provision, the words "for the period mentioned in section 3 of the 1940 Act" should be substituted. The said contention appears to have been advocated by placing reliance upon the phrase "in cases of emergency", found in the enabling provision. It was argued that the enabling provision enabled the Governor General to promulgate Ordinances "in cases of emergency" and hence an Ordinance so promulgated could not have continued to exist after such emergency ceased to exist. The Federal Court held that the term 'emergency' in the enabling provision did not denote the emergency which occasioned the passing of the 1940 Act. On this reasoning, the Federal Court ruled that an Ordinance

promulgated under the enabling provision need not, by definition, cease to exist on the termination of the emergency which occasioned the passing of the 1940 Act. The relevant passage in the judgment of the Federal Court reads as follows:

> " It was contended on behalf of the appellants that the true construction to be given to section 72 as so amended was in effect to substitute in section 72 in respect of the duration of an Ordinance, the period specified in section 3 of the Act for the original six months period and that accordingly on the expiration of that period. viz., on the 1st April, 1946, Ordinances made after the passing of the Act automatically came to an end. It was not made very clear how one could arrive at such a construction. It appeared to be based on the suggestion that the power to promulgate an Ordinance under section 72 was by the section confined to the existence of an emergency, cf. the words in the sub-section "in cases of emergency", and that the Act was intituled an Act to make emergency provision with respect to the Government of India and Burma and defined the period of emergency. Unless therefore the construction contended for by the appellants was accepted no period would be provided for the continuance of these Ordinances, and that could not have been the intention of the Legislature, as the ordinance-making power of the Governor-General was recognised as temporary only. In our opinion, the emergency on the happening of which an ordinance can be promulgated is separate and distinct from and must not be confused with the emergency which occasioned the passing of the Act and the clear effect of the words of the Act on section 72

> is that Ordinances promulgated under that sub-section during the period specified in section 3 of the Act are subject to no time limit as regards their existence and validity, unless imposed by the Ordinances themselves, or other amending or repealing legislation, whether by Ordinance or otherwise."

Hence the contention stated above was rejected. Beyond this, the judgment of the Federal Court, is not an authority for the proposition that an Ordinance which may be promulgated only in cases of emergency and is so promulgated, can continue to be in force even after the situation of emergency which occasioned the making of the Ordinance had ceased to exist.

8. In fact Zafrullah Khan, J., who was a party to this decision of the Federal Court, pronounced by the Honourable Chief Justice Sir Patrick Spens, had, on an earlier occasion, concurred with the opinion of the Honourable Chief Justice Varadhachariar of the same Court, in *King-Emperor Vs Benoari Lall Sharma, AIR 1943 FC 36,* where it was stated, though casually :-

> "Legislation by Ordinance has no doubt been given the same effect as ordinary legislation and the ambit as to the subject-matter is the same in both cases. But there are two fundamental points of difference which have a material bearing on the present question: One is that by the very terms of section 72 of the ninth schedule to the Constitution Act, the operation of the Ordinance is limited to a period of six months (and even now it is only temporary, though the particular limit has been removed), and secondly, it is avowedly the exercise of a special power intended to meet an emergency."

9. Zafrullah Khan, J., in a subsequent decision in *Emperor - vs - Sibnath Banerjee, AIR 1943 FC 75* asked a relevant question:-

> "…an Ordinance is necessarily of limited duration, whether under section 72 or under the terms of the India and Burma [Emergency Provisions] Act of 1940. If an Ordinance purported to declare that during a period anterior to the emergency or even after the termination of the period of the Ordinance, a provision of statute law was or would be different from what the Legislature had enacted, would it be any better than an attempt by the Indian Legislature to affect the operation of an Act of Parliament outside the local limits of the jurisdiction of that Legislature?"

10. Therefore it is clear that in *J.K. Gas Plant* case, the Federal Court did not consider, and was not called upon to consider, the question whether an Ordinance made under the enabling provision and saved by the 1940 Act from natural death on the expiry of six months from its birth, could continue to exist and be in force even after the termination of the emergency which occasioned the promulgation of the Ordinance itself.

11. In Hansraj Moolji's case, this question directly arose for consideration, however, with reference to a certain Ordinance passed in 1946. N.H. Bhagwati.J., expressed the unanimous verdict of the Constitution Bench and held that the effect of section 1 (3) of the 1940 Act was to treat such an Ordinance on par with the Acts passed by a competent legislature and hence to treat it as an enactment, not with any limited duration. He said, in para 19 (AIR) of the judgement:-

> "Ordinances thus promulgated were perpetual in duration and continued in force until they were repealed."

As on today, this is the law in India. Hence the 1944 Ordinance ought to be treated as one, still in force.

12. The above conclusion does not mean that no doubt at all should be raised about the immortality so conferred on the 1944 Ordinance. The zeal to question even settled principles of law, in many cases, has resulted in a constructive revolution or at least in a reformation or reformulation. Moreover, on many occasions, courts have overruled their own earlier decisions. A decision rendered by a Bench of five judges of the Supreme Court of India, in *Shankari Prasad's case, AIR 1951 SC 458* and confirmed again by a Bench of five judges of the same court in *Sajjan Singh's case, AIR 1965 SC 845* was overruled by a larger Bench of eleven judges which heard the *Golaknath's case, AIR 1967 SC 1643.* This decision itself was subsequently overruled by a thirteen-judge Bench of the same Court in *Kesavanandha Bharathi's case, AIR 1973 SC 1461.* Truly, no law is, and none can be, immortal. In this spirit the following questions, regarding the 1944 Ordinance, are raised here :

(A) The 1944 Ordinance was a temporary measure enacted for the avowed purpose of ensuring peace and good Government of British India, (not the free India). The term good government in the enabling provision certainly meant, at least tacitly, "Government by the Britishers of British India". The Ordinance itself was made by a British Governor - General and not by an elected legislative body. In view of these facts, when it is said that such an Ordinance still governs the citizens of the free India, would it not hurt the conscience of the common Indian?

(B) The Constitution of India, vide Article 123, provides that an Ordinance promulgated by the President of India shall be of

a limited duration only. The Constitution of India does not, in terms, permit making of any permanent enactment except by a duly elected legislative body. Hence, when a permanent status is conferred on a pre-independence Ordinance, would it not run contrary to the spirit and scheme of the Constitution of India?

(C) *After citing a passage from the judgement of Sir Patrick Spens, C.J., in J.K. Gas Plant case. Bhagwati, J., in paragraph 21 of his judgement in Hansraj Moolji's case, stated:*

"In our opinion, the above observations of Spens C.J. enunciate the correct position. The Ordinance in question having been promulgated during the period between 27.6.1940 and 1.4.1946, was perpetual in duration and continued in force until it was repealed."

It was stated hereinabove that only one contention in this regard was raised and that alone was considered by Sir Patrick Spens, C.J., in J.K. Gas Plant case and that the question whether an Ordinance like the 1944 Ordinance could continue to exist without any limitation on its duration, was not at all considered in that case. Hence, was the Constitution Bench, which decided Hansraj Moolji's case right in drawing support from the decision in J. K. Gas Plant case, for its answer to the above-mentioned specific question, which question was neither raised nor answered in J.K. Gas Plant case?

(D) *The Federal Court, in J.K. Gas Plant case, did not hold that such an Ordinance would continue to be in force even after the cessation of the emergency which occasioned the promulgation of such Ordinance. In that case the Federal*

Court said that such an Ordinance would not cease to be in force merely on the cessation of the emergency which occasioned the passing of the 1940 Act. The two emergencies-the one which occasioned the promulgation of the 1944 Ordinance and the one which occasioned the making of the 1940 Act-were found to be distinct from each other. The judgement by the Federal Court was delivered on 11.04.1947 when India was still under the British Rule. After India became a free country on 15.08.1947 and then a Constitutional Republic on 26.01.1950, could it still be said that the emergency which occasioned the promulgation of the 1944 Ordinance continued to exist?

(E) In paragraph 14 of the judgement in Hansraj Moolji's case it was stated thus:

"Every statute for which no time is limited is called a perpetual Act, and its duration is prima facie perpetual. It continues in force until it is repealed… If an Act contains a proviso that it is to continue in force only for a certain specified time, it is called a Temporary Act. This result would follow not only from the terms of the Act itself but also from the fact that was intended only as a temporary measure. This ratio has also been applied to emergency measures which continue during the subsistence of the emergency but lapse with the cessation thereof."

In paragraph 18 of the said judgement it was stated thus:

"The emergency under which the Governor-General was invested with the power to make and promulgate Ordinances for the peace and good government of British India or any part thereof under s.

72 was the condition of the exercise of such power by the Governor-General and did not impose any limitation on the duration of the Ordinances thus promulgated. For determining the duration of such Ordinances one had to look to the substantive provisions of s. 72 which in terms enacted and laid down the limitation of "not more than six months from its promulgation" on the life of the Ordinance. If these words had not been omitted by s. 1 (3) of the India and Burma (Emergency Provisions) Act, 1940, the Ordinances thus promulgated would have been of a duration of not more than six months from their promulgation."

The above passage constituted the ratio decidendi of the said judgement. Whether the ratio approvingly referred to in paragraph 14 of the said judgement that the temporary nature of an Act follows not only from its terms but also from the fact that it was intended only as a temporary measure, and the ratio formulated in paragraph 18 of the same judgement are reconcilable? If the former is correct, then the statement in the latter, that the emergency under which the Governor-General was empowered to promulgate Ordinances was just a condition of the exercise of such power, not imposing any limitation on the duration of the Ordinances thus promulgated, cannot be correct. Is this not a logical inconsistency in the said judgement?

(F) *The proposition stated in paragraph 14 of the judgement in Hansraj Moolji's case, was that an enactment which was intended only as a temporary measure was necessarily temporary in duration. It was further stated therein that this proposition had been applied to emergency measures which*

continued during the subsistence of the emergency but lapsed with the cessation of the emergency. The 1940 Act was certainly an Act intended as an emergency measure and intended to be a temporary one. Section 3 of that Act clearly postulated that the emergency situation which occasioned the passing of that Act would eventually come to an end. In fact by the "India and Burma (Termination of Emergency) Order, 1946" such emergency was declared to have ended on 01.04.1946. With such declaration of cessation of such emergency, the 1940 Act itself must be deemed to have expired. If the 1940 Act thus ceased to be in force on and from 01.04.1946, then from such date the enabling provision would have read, as it was originally enacted, restricting the life of an Ordinance made thereunder to six months. Therefore, on the day when the Constitution of India came into force, the 1944 Ordinance would not have been an existing law at all and hence could not have been saved by Article 372 (1) of the Constitution. Explanation III to Article 372 clearly states that by virtue of that Article a temporary law would not continue to be in force beyond the date on which it would have otherwise expired. In fact the 1944 Ordinance could not have been an existing law, on the day when the Constitution of India came into force, unless it is held:

- *that the 1940 Act did not expire upon termination of the emergency which occasioned the passing of the said Act: or*

- *that though the 1940 Act might have so expired, still the enabling provision would continue to have the effect as contemplated by Section 1 (3) of the said Act, as regards the 1944 Ordinance.*

Even if either of the two propositions is correct, then the 1944 Ordinance would have been an existing law on the day when the Constitution of India had come into force. The first proposition is contrary to the ratio approvingly referred to in paragraph 14 of the judgment in Hansraj Moolji's case. The second proposition may be correct, if and only if it can be said that Section 1 (3) of the 1940 Act amended the enabling provision and that therefore notwithstanding the expiry of the 1940 Act, the enabling provision continued and could continue to remain only as thus amended. However, it is very difficult to say that Section 1 (3) of the 1940 Act, amended the enabling provision. It only eclipsed a certain phrase therein as regards certain Ordinances and with its expiry the enabling provision was redeemed from such eclipse. Therefore neither of the two propositions appears to be correct. Therefore, is it not correct to say that the 1944 Ordinance expired along with the 1940 Act?

(G) Parliament enacted the Prevention of Corruption Act, 1988. By section 29 of the said 1988 Act, Parliament amended certain provisions in the 1944 Ordinance. On account of this, can it be said, that Parliament has endorsed in full the 1944 Ordinance? Can it not be said that Parliament rightly took for granted the continued existence of the 1944 Ordinance, in view of the pronouncement in Hansraj Moolji's case, and that therefore it had no occasion to consider whether the Ordinance was in existence or not? Had the Supreme Court in Hansraj Moolji's case declared that the 1944 Ordinance had expired, Parliament would not have merely amended portions of the said Ordinance, but might have re-enacted the same with appropriate modifications. Hence, can such amendment imply that Parliament ratified the said Ordinance? Since

Parliament has no power to ratify an Ordinance but has power only to enact an Act similar to the Ordinance, can it be said that such amendment by Parliament granted a permanent status to the 1944 Ordinance?

(H) *Regarding question (B) raised hereinabove, as to whether conferment of permanent status upon an Ordinance could be in consonance with the spirit and scheme of the Constitution, a reference may be made to the decision of a Constitution Bench of the Supreme Court, in D.C.Wadhwa Vs. State of Bihar, AIR 1987 SC 579. The question which arose in that case pertained to successive repromulgation of several Ordinances, repeatedly for several years, by the Governor of a State, without getting them enacted by the Legislature concerned. In that context what Bhagwati, C.J. said, on behalf of the Constitution Bench, in para 7 of the judgment, is relevant to the issue now under consideration:-*

"The power conferred on the Governor to issue Ordinances is in the nature of an emergency power which is vested in the Governor for taking immediate action where such action may become necessary at a time when the Legislature is not in Session. The primary law-making authority under the Constitution is the Legislature and not the Executive but it is possible that when the Legislature is not in Session circumstances may arise which render it necessary to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the Legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate Ordinances. But every Ordinance promulgated by the

Governor must be placed before the Legislature and it would cease to operate at the expiration of six weeks from the reassembly of the Legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any. The object of this provision is that since the power conferred on the Governor to issue Ordinances is an emergent power exercisable when the Legislature is not in Session, an Ordinance promulgated by the Governor to deal with a situation which requires immediate action and which cannot wait until the legislature reassembles must necessarily have a limited life. Since Article 174 enjoins that the Legislature shall meet at least twice in a year but six months shall not intervene between its last sitting in one Session and an Ordinance made by the Governor must cease to operate at the expiration of six weeks from the reassembly of the Legislature, it is obvious that the maximum life of an Ordinance cannot exceed seven and a half months unless it is replaced by an Act of the Legislature or disapproved by the resolution of the Legislature before the expiry of that period. The power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be "perverted to serve political ends". It is contrary to all democratic norms that the Executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an Ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time. That is why it is provided

that the Ordinance shall cease to operate on the expiration of six weeks from the date of assembling of the Legislature. The Constitution makers expected that if the provisions of the Ordinance are to be continued in force, this time should be sufficient for the Legislature to pass the necessary Act. But if within this time the Legislature does not pass such an Act, the Ordinance must come to an end. The Executive cannot continue the provisions of the Ordinance in force without going to the Legislature. The law-making function is entrusted by the Constitution to the Legislature consisting of the representatives of the people and if the Executive were permitted to continue the provisions of an Ordinance in force by adopting the methodology of re-promulgation without submitting to the voice of the Legislature, it would be nothing short of usurpation by the Executive of the law-making function of the Legislature. The Executive cannot by taking resort to an emergency power exercisable by it only when the Legislature is not in Session, take over the law-making function of the Legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the Legislature as provided in the Constitution but by laws made by the Executive. The Government cannot by-pass the Legislature and without enacting the provisions of the Ordinance into an Act of the Legislature, re-promulgate the Ordinance as soon as the Legislature is prorogued. Of course, there may be situation where it may not be possible for the Government to introduce and push

> through in the Legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business in a particular Session or the time at the disposal of the Legislature in a particular Session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the Ordinance. Where such is the case, re-promulgation of the Ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of re-promulgation. It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision…"

Let not the devil be invited to drive away a criminal. Not only the end sought to be achieved, but also the means adopted ought to be good.

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"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."

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