THE SENTINEL

K.Ravi

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Senior Advocate

New Goal  New path

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Preface

Universe is said to be ever-expanding. The same can be certainly said of the horizon of Law. At no point of time can one say that nothing more is required to be added to the existing laws. Though my contribution to the latter process of expansion is as negligible as it is to the former, I am inclined to share some ideas here with the readers — the ideas that germinated in that fertile soil and participated in that process.

This is the third of my books on Law; more on the philosophical foundation of Law than on any particular instance of it. The first was "Justice versus Natural Justice". I was impelled to write that book way back in 1996 by the hurdles that I faced in persuading courts to uphold the basic principles of Justice encapsulated in two cryptic aphorisms: "Audi Alteram Partem" and "Nemo judex in causa sua". The second book, "Law, Logic & Liberty" appears more general though many essays in it actually stemmed from my court-room experiences.

With utmost humility. I must add here, a short note on the foreword given by an eminent Judge of the Supreme Court of India* to my second book. The book contained a detailed article wherein I had critically examined a judgment rendered by that very same judge, pointing out a certain fallacy in that judgment. That did not prevent me from seeking a foreword from him nor did it matter to him for he gave the foreword unhesitatingly. After reading the book, "Law, Logic & Liberty", Justice V.R.Krishna Iyer, who is hailed as an eminent jurist and a champion of libertarian views, sent a letter to me, observing: "A fine book is a cherished asset. Your book falls within this category and I treasure it because of the valuable thoughts you

*. Justice M.Srinivasan.

have incorporated. It will be a reference book on my table." That book contains an essay where I have critically examined one of his oft-quoted judgments and argued that he had fell into an error in assuming that a particular issue had been decided in two earlier cases while they had not touched that issue at all. Courage and conviction were appropriately rewarded. This illustrates how any fruitful debate can be and ought to be.

The March of Law spans over a period of several centuries but my experience only half a century. Mindful of that limitation, I present my thoughts unfolding in the forthcoming pages, not claiming acceptance but only a fair consideration.

I was ably guided and assisted by advocates Ayshwarya R and R.Murugan through their valuable suggestions that have gone into this book. I also thank Mrs.C.G.Rama and Miss Keerthana for assisting me in proof-reading and compiling references for citations and foot notes. Devaki of Nivethitha Pathipakam and Mrs.Dhanalakshmi deserve a special mention for their timely assistance in bringing out this book within a brief period of a fortnight.

I profusely thank the Hon'ble Mr. Justice F.M.Ibrahim Kalifulla, former Judge, Supreme Court of India for sparing a few hours of his precious time to read the draft of this book and write an excellent foreword to it. I also express my deep gratitude to Hon'ble Mr. Justice Sanjay V. Gangapurwala, former Chief Justice, Madras High Court, for consenting to release this book and to Hon'ble Dr. Justice Anita Sumanth, Judge, Madras High Court, for consenting to receive the first copy of this book, amidst their busy schedules.

May God bless us all with lasting peace.

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12-08-2025

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FOREWORD

My friend K.Ravi, popularly known as Vanavil K.Ravi by virtue of his multifaceted activities, apart from his exceptionally brilliant performance as a Senior Advocate, in the other fields of Literature, Art and Public Life, his contribution is immeasurable. He is close to my heart.

He has ordained me to write this Foreword to his present work 'The Sentinel'. When this work comes to the book stand, it will be of great use for the lawyers, particularly the younger generation on the topics which he has covered extensively in this work.

There are 4 chapters in this book titled as 'The Sentinel', 'The Salutary Principle – A Send Off', 'Custodial Interrogation' and 'Snippets of Stay Thoughts'. The Sentinel Qui vive which in the forefront highlights the pivotal role that is being played by the Apex institution of Judiciary. Dictionary meaning of Sentinel is ' a person employed to keep watch for some articulated event', that is, the act of looking out on an elevated post attending under view, a structure commanding a wide view of its surroundings. The other expression Qui Vive is 'Custodian of heightened watchfulness or preparation for action' which can be noted as a warning to a sense of danger or called to a state of preparedness or a warning which serves to make one more alert to danger.

Dictionary meaning apart understanding in common parlance, Mr.Ravi being part of the legal fraternity, by virtue of his imbibed high qualities, having got experience at the bar for the past 50 years and having the highest regard for the Institution of Judiciary and especially for its Apex body, has penned this book to highlight the supreme role played and being played by the Apex Court for the benefit and protection of the citizens of this country.

He has traced the evolution of Indian Constitution as was dedicated to this nation on 25th November, 1949 after its formation on 25th September, 1946 and brought into effect from 26th January, 1950. The establishment of the Supreme Court of India on the 28th January, 1950 when the Chief Justice along with seven judges took their seats. He was at pains to highlight the voice of the Supreme Court which did not hesitate to authoritatively state in its landmark Judgments right from A.K.Gopalan's case by 6 Judges Bench, followed by Menaka Gandhi case in 1978 and in between, the famous Kesavananda Bharati case ((1973) 4 SCC 225) Kesavananda Barati Vs. State of Kerala) dealt with by 13 Judges Bench wherein the lofty principle of 'Basic Structure of the Constitution' was evolved by the majority judgment.

Each Judgment referred to by the author in his book has laid down the principles, which are being followed by the Hon'ble Supreme Court and the High Courts of the country for interpreting the issues

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which come up for deliberations and decisions even today. Of course, the Author has expressed his sentiments such as '***the expectation of speedier course of correction by the highest institution of justice***'. He emphasized the point that '***despite having been amended 106 times in 75 years of its existence, the Constitution still remains as a living organism breathing life into every activity of public importance.***' and '***Its basis structure cannot be touched even by representatives elected by the people***'. In the same breath, he was conscious that '***There has been a murmur in some quarters that no generation can bind the future generations with their ideas***', and yet he reiterates '***Having said so, I am now reconciled to the fact that our Constitution is almost immortal***', '***They must answer the question 'Qui Vei?' with a loud reply, "Long live the Constitution"***'., '***I wonder whether Dr.Ambedkar, while he delivered his final speech before the Constitution Assembly, and, Kania C.J., when he delivered his Judgement in A.K.Gopalan's case, had this risk in mind.', 'If that be the case, the claim that the Supreme Court has unlimited jurisdiction would be a misnomer. Rejecting such a tall claim is not doing disrespect to that great Institution, rather it enhances and fortifies its dignity and greatness.***' The various above expressions the Author has made in this book fully supports my view of his writing in this book is only his attempt to showcase the Apex Court in very high esteem and not to belittle its stature.

The Author was well justified when he wants to stress upon the need for the Institution of Judiciary to bestow a serious look for safeguarding the most valuable and fundamental freedom guaranteed by the Constitution, namely, the Salutary Principle of 'presumption of innocence till guilt is proved'. The author was at pains when his attempt to get a authoritative pronouncement on Article 20(3) of the Constitution of India failed. One could not only see his anguish which provoked him to make a detailed narration and the need for the Sentinel to qui vive on the salutary principle. The Author therefore made a detailed reference to Section 438 as it was in 1980, its modification in 2018 and the redrafted provision in the present new code of 2023. The decisions starting from Gurubaksh Singh authored by then Chief Justice Y.V.Chandrachud, the subsequent decisions in Nikesh Tarachand Shah, Vijay Madanlal Chandra case (2023) and the qui vei which remains unanswered, ultimately gives a wakeup call in the following words, '***This discussion highlights the quality or the lack of it in our legal draftsmen and also brings to the fore how the Courts are making all attempts to save such vague, ambiguous and complicated provisions to somehow protect the Society from offenders. Whatever be the justification, it is an undeniable fact that the fundamental, salutary principles of the Legal System built on the foundation of Rule of Law are gradually being given a farewell, a send-off and even restricted and choked to death. The jurists of tomorrow, wake up!***'

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In the chapter of Custodial Interrogation, again, the constitutional safeguards under Article 20(3) which states '***No person accused of any offence shall be compelled to be a witness against himself***', is another master piece of the author by making a detailed reference on case laws on the subject starting from **Nandini Satpathy** Vs. **P.L.Dani, M.P.Sharma** Vs. **Satish Chandra, State of Bombay** Vs. **Kathi Kalu Oghad**, vis-à-vis the relevant other provisions namely 179 IPC, 161 Cr.P.C. and the corresponding provisions Section 180(1) in the 2023 code and after elaborating on the principles laid down in various decisions, the Author is of the view '**Thus, the issue whether permitting custodial interrogation is violative of Article 20(3) has not been duly considered and decided in any case, till date. In all the cases cited above, it was taken for granted that Custodial Interrogation is not impermissible under the constitution, though such a presumption is unwarranted and is not based on any clear authority to that effect.**'

Finally, in the last chapter of this book, 'Snippets of Stray Thoughts', the Author after having got the field experience in the legal set up has emboldened to suggest very many points for the Institution of Judiciary to further enhance its performance despite the shortcomings, namely, the docket explosion with no corresponding increase in the number of Judges and the limited infrastructure which is prevalent as on date. I am sure this book will not only enlighten the Members of the Bar and the Bench but will be an eye-opener for the concerned people to come up to the expectation of the litigant public who have reposed highest amount of confidence in the institution of Judiciary.

I wish my friend Mr.Ravi continue to come forward with many more such works in future for the benefit of the Litigant Public.

With warm regards,

19/8/2025

Justice F.M.Ibrahim Kalifulla.

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I. THE SENTINEL

A. "Qui vive"

The observation of Justice Patanjali Sastri in a famous judgment delivered almost 75 years ago while considering the Constitutional Validity of a law was not only prophetic but also has become proverbial:

> "What is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts undercover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in the discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights," as to which this court has been given the role of Sentinel on the Qui Vive."*

The phrase "sentinel on the qui vive", so stated in the early days of our Constitution, has come to stay. It keeps visiting the judges inside and outside courts. Even recently, Justice

*. State of Madras vs V.G.Row, AIR 1952 SC 196.

Y.D.Chandrachud, as he then was, highlighted its significance, despite his observation: "The phrase may have become weather-beaten in articles, seminars and now, in the profusion of webinars, amidst the changing times. Familiar as the phrase sounds, judges must constantly remind themselves of its value through their tenures, if the call of the constitutional conscience is to retain meaning."*

The meaning of the phrase is "being a watchful guardian". Its origin and etymology are clumsy. While 'Sentinel' directly means a guard or a watcman, the phrase 'qui vive' seems to be somewhat confusing. Merriam-Webster Dictionary clarifies:

> When a sentinel guarding a French castle in days of yore cried, "Qui vive?", your life depended upon your answer. The question the sentinel was asking was "Long live who"? The correct answer was usually something like "Long live the king!". Visitors not answering the question this way were regarded as suspect, and so to be "on the qui vive" meant to be on the alert or lookout, and qui vive came to mean "alert" or "lookout" soon afterward. Nowadays, the term is most often used in the phrase "on the qui vive," meaning "on the lookout."

Now if someone asks, "Qui Vive?" should'nt we answer "The Constitution"? Yes, Long live the Constitution.

The import of that phrase now is that the higher Courts in India are the guardians of the Constitution – the great charter that We The People of India gave to ourselves on the 26th of November, 1949. This statement is more significant in the exercise of Writ Jurisdiction by the Supreme Court and the High Courts, the former under Art.32 and the latter under Art.226 of the Constitution of India.

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*. Justice D.Y.Chandrachud, as he then was, in Gujarat Mazdoor Sabha vs Union of India.

The Supreme Court of India has stood the test of time. It has been discharging its function as the Sentinel of the Constitution fairly well, notwithstanding a few aberrations, very few when compared to the volume of cases it has been confronted with. We can certainly be proud of it.

Of course, it had its own perils and pitfalls. No doubt the judges who adorned the Bench in that highest institution were mortal human beings like all others, some prone to errors and some to prejudices. Having said that, I don't hesitate to add that by and large, as an institution, it has accomplished its task well —— the task of being the Sentinel or the Guardian Angel protecting the Sanctum Sanctorum of The Constitution.

Though, time and again, it recovers from its failure and asserts the golden principle of the Rule of Law, some may express their dissatisfaction that the process of such recovery, in many significant cases, had been slow and delayed. Of course, human beings who, on an average, have less than a hundred years to live, are entitled to judge events as fast or slow in comparison with their life-span. However, one must recall how many centuries had lapsed before the scientists of the western world corrected the geo-centric model of Universe and accepted the heliocentric model; after how many centuries, Newton was able to wonder about a falling apple and discover gravity; after how many millennia of struggle, the Magna Cart was drafted, signed and sealed establishing the supremacy of law over monarchs. The expectation of speedier course-correction by the highest Institution of Justice, of course, is right and must be achieved, though, it cannot be the yardstick to judge the efficacy of the institution that has come of age only recently.

Several instances in its history, spanning over a period of 75 years, would bear testimony to this.

Let me pause for a while before I allude to a few of such instances and invite the readers now to travel with me back in

time to have a glimpse of its pre-history, the background scenario in which it sprang into existence.

B. The Birth-pangs

The Nation, meaning what Mahakavi Subramania Bharati extolled and worshipped as "The Unmutilated Hindusthan"*, was in a bitter turmoil, despite being on the verge of release from the British Rule. The release was not to be a normal or an easy delivery. It warranted a C-section procedure since the birth-pangs were terrible. However, eventually the delivery happened, not of one but two. Yes, twin babies, India and Pakistan were born in August, 1947. Again, they were so attached with each other, they had to be detached physically.

On the 16th of May 1946, the Cabinet Mission sent by U.K.Parliament to India presented its plan for the proposed free India. This plan was a statement by the Cabinet Mission and the Viceroy, Lord Wavell, outlining proposals for India's constitutional future. Instead of bringing joy to the people who had long been under the rule of invaders, it brought violence and bloodshed. A consensus could not be reached among the various political groups in India, especially between the then two major political parties, namely, the Indian National Congress and the All India Muslim League.

While demands for independence had grown louder than ever, and, the British Prime Minister Clement Attlee had pledged to grant independence to India, the simmering communal tensions erupted and put a brake in the process. Mohammad Ali Jinnah called for a "direct action day" on August 16, 1946, which spiralled into communal rioting that left thousands dead in what was later remembered as the "Great Calcutta Killing." The event was soon met with reprisals in a deeply divided Bengal, and the cycle of violence later spread to other provinces. Under such

*. "சேதமில்லாத ஹிந்துஸ்தானம் இதை தெய்வமென்று கும்பிடடி பாப்பா" (மஹாகவி சுப்பிரமணிய பாரதியார்).

volatile circumstances, 'The Constituent Assembly' was formed for drafting the Constitution of India and its first meeting was held in Delhi on 09-12-1946 in the Constitution Hall, which later was to become the Central Hall of Indian Parliament and continued to be so till the New Parliament Building was inaugurated recently.

The Constituent Assembly, originally, had 389 members, of whom 229 came from 12 British Provinces, 70 represented the Princely States and others represented different classes. However, after the Partition, the number of members got reduced to 299, since many members had opted to go with the newly formed Pakistan.

The Constituent Assembly had several Committees as listed below:

S. No.	Name of Committee	Chairman
1.	Committee on the Rules of Procedure	Rajendra Prasad
2.	Steering Committee	Rajendra Prasad
3.	Finance and Staff Committee	Rajendra Prasad
4.	Credential Committee	Alladi Krishnaswami Ayyar
5.	States Committee	Jawaharlal Nehru
6.	House Committee	B. Pattabhi Sitara-mayya
7.	Ad hoc Committee on the National Flag	Rajendra Prasad
8.	Committee on the Functions of the Constituent Assembly	G.V. Mavalankar
9.	Order of Business Committee	K.M. Munshi

Drafting Committee? Dr.B.R.Ambedkar? Conspicuous by absence! The Drafting Committee was formed later, on 29th August, 1947, after India became a free, independent Nation. Dr.B.R.Ambedkar was appointed the chairman of that committee. The Drafting Committee deliberated for 167 days, in 11 sessions spread over a period of 2 years 11 months and 17 days. The final draft was approved and adopted by the Constituent Assembly on 26th November, 1949 and The Constitution of India came into force on the 26th of January 1950, while the twin-sister in the neighbouhood was still groping in darkness and could finalise her Constitution six years later, in 1956, only to be abrogated and re-enacted twice.

It is no doubt true that the major credit for embodying the collective soul of more than 370 million people and for giving shape to their aspirations goes to Dr.B.R.Ambedkar. Yet, his humility and honesty are truly reflected in what he acknowledged:

> "The credit that is given to me does not really belong to me. It belongs partly to Sir B.N. Rau, the Constitutional Adviser to the Constituent Assembly who prepared a rough draft of the Constitution for the consideration of the Drafting Committee. A part of the credit must go to the members of the Drafting Committee who, as I have said, have sat for 141 days and without whose ingenuity of devise new formulae and capacity to tolerate and to accommodate different points of view, the task of framing the Constitution could not have come to so successful a conclusion. Much greater, share of the credit must go to Mr. S.N. Mukherjee, the Chief Draftsman of the constitution. His ability to put the most intricate proposals in the simplest and clearest legal form can rarely be equalled, nor his capacity for hard work. "He has been as acquisition to the Assembly. Without his help, this Assembly would have taken many more years to finalise the Constitution. I must not omit to

mention the members of the staff working under Mr. Mukherjee. For, I know how hard they have worked and how long they have toiled sometimes even beyond midnight. I want to thank them all for their effort and their co- operation."

C. ENTER THE SENTINEL

The Supreme Court of India came into existence on the 28th of January 1950. The first proceedings and inauguration took place at 9:45 am that day, when the judges took their seats. It is therefore regarded as the official date of establishment. It replaced both, the Federal Court of India and the Judicial Committee of the Privy Council, which were then at the apex of the Indian court system.

The Supreme Court initially had its seat at the Chamber of Princes in the parliament building where the Federal Court of India sat from 1937 to 1950. The first Chief Justice of India was H. J. Kania, J. In 1958, the Supreme Court moved to its present premises. Originally, the Constitution of India envisaged a supreme court with a chief justice and seven judges, leaving it to Parliament to increase this number.

D. THE PERILS AND PITFALLS

A.K.Gopalan vs State of Madras

The testing ground was provided by the first significant case that the Supreme Court, as the Sentinel, had to decide. The judgment was delivered on 19-05-1950 by an eminent bench of six judges in A.K. Gopalan vs State of Madras, AIR 1950 SC 274.

The question was whether the Preventive Detention Act, 1950 or any provision in it was unconstitutional. The six judges delivered six distinct judgements. The majority of them held that the Act as such was not unconstitutional though section 14

of that Act alone was unconstitutional but severable from the Act. Fazal Ali J. delivered the dissenting judgment holding that the Act was unconstitutional. The discussions centred around a pivotal issue: whether the phrase, 'procedure established by law' in Art. 21 of the Constitution would include within its fold the principles of natural justice.

Art. 21 of the Constitution reads:

> 21. Protection of life and personal liberty
>
> No person shall be deprived of his life or personal liberty except according to procedure established by law.

Chief Justice Kania noted that the constitution of the U.S.A. reads that no person shall be deprived of life, liberty, or property, without due process of law and the term 'due' has been interpreted to include 'jus' thus imparting jurisdiction to the courts to pronounce what is due from otherwise according to law. He distinguished Art.21 of the Constitution of India in which the term 'due' is not found and proceeded to state:

> "The deliberate omission of the word 'due' from art.21 lends strength to the contention that the justiciable aspect of Law, i.e., to consider whether it is reasonable or not by the court, does not form part of the Indian Constitution."

The Chief Justice concluded that though the procedure to deprive a person of his life or personal liberty in India needs to be in accordance with what is prescribed in the statutory law enacted for that purpose, such procedure cannot be judged on the touchstone of jus naturale or natural justice which according to him was undefined and vague. The said conclusion was derived from three features of Art.21, namely, the deliberate omission of the word 'due', the limitation imposed by the word 'procedure' and the insertion of the word "established". Patanjali Sastri, J. agreed with the chief justice and stated that "procedure established by law" must be taken to refer to a procedure which

has a statutory origin. Das, J. also ruled that 'established' in this context means 'enacted'. In the result, despite the dissent recorded by Fazl Ali, J., Natural Justice was denied entry into the Constitution of India.

Were not a section of people, the oppressed lot, condemned as untouchables, denied entry into temples in India? Was it not so, till social reformers like Madurai Vaidhyanatha Iyer took them inside?

Similarly, Natural Justice had to wait outside the gates guarded by our Sentinel. It was allowed entry only after Shah, J. delivered on behalf of a two-judge bench his judgment in State of Orissa vs Dr.Binapani Devi, AIR 1967 SC 1269. It was finally given its 'due' status (pun intended) by the authoritative pronouncement of a Seven Judge Bench in Maneka Gandhi vs Union of India, (1978) 1 SCC 248. Of course, that revolution was initiated earlier in 1963 itself in London, in the then House of Lords, by Lord Reid in Ridge vs Baldwin, 1963 (2) All. ER 66. I cannot speak in better words of this revolution than what Prof. Wade had said, referring to the erroneous view that had held the field before Ridge vs Baldwin:

> "When a Lord Chief Justice, an Archbishop of Canterbury, and a three-judge Court of Appeal have strayed from the path of rectitude, it is not surprising that it is one of the more frequent mistakes of ordinary mortals. The Courts themselves must take some of the blame, for they have wavered in their decisions, particularly the period of about fifteen years which preceded Ridge vs Baldwin."*

The law laid down in Maneka Gandhi's case is now the Law of the land. The propositions of Law laid down by Bhagavathi, J. in that case were endorsed almost unanimously.

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*. Prof.Wade: Administrative law

It was a writ petition filed under Art.32 of the Constitution by the petitioner when her passport was impounded by the authorities. The contention of the petitioner was that there was no procedure prescribed by the Passport Act, 1967 for impounding or revoking a passport and thereby preventing the holder of the passport from going abroad and in any event, even if some procedure could be traced in the relevant provisions of the Act, it was unreasonable and arbitrary, inasmuch as it did not provide for giving an opportunity to the holder of the passport to be heard against the making of the order and hence the action of the central Government in impounding the passport of the petitioner was in violation of Article 21. In this factual matrix, Bhagavathi, J., in his lead-judgment, stated as follows:

> "This contention of the petitioner raises a question as to the true interpretation of Article 21, what is the nature and extent of the protection afforded by this article ? What is the meaning of 'personal liberty' : does it include the right to go abroad so that this right cannot be abridged or taken away except in accordance with the procedure prescribed by law ? What is the inter-relation between Art. 14 and Article 21 ? Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable?" – (para 4).
>
> …….. ……..
>
> "The decision in A. K. Gopalan's (supra) case gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive - each article enacting a code relating to the protection of distinct rights, but this theory was over-turned in R. C. Cooper's case (supra) where Shah, J., speaking on behalf of the majority pointed out

that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human: rights. The guarantees delimit the protection of those rights in their allotted fields : they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters cannot be accepted as correct". – (para 5).

….. …….. ……

"Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article ? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E. P. Royappa v. State of Tamil Nadu & another, namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes, at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically,

> is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "'right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied." (Emphasis supplied). – (para 7).

A.K.Goplan's case thus stood ceremoniuosly and rightly overruled.

If anyone exclaims "Maneka Gandhi Case! Oh, that passport case?", that person ought to be reminded that it was not a case that laid down propositions confined to the facts of that case but its propositions are transcendental and have attained Universal acceptance as foundational principles of Constitutional Law. It was, indeed, a milestone in the history of our Constitution!

Having said that, I would like to add one observation that crosses my mind. However erroneous the reasoning adopted by the majority in A.K.Gopalan's case might have been, it had a strikingly political and historical flavour, to some extent, echoing the thoughts of Dr.Ambedkar who expressed it with an acute foresight in his final speech in the Constituent Assembly:

> "The condemnation of the Constitution largely comes from two quarters, the Communist Party and the Socialist Party. Why do they condemn the Constitution? Is it because it is really a bad Constitution? I venture to say 'no'. ….. …. The Socialists want two things. The first thing they want is that if they come in power, the Constitution must give them the freedom to nationalize or socialize all private property without payment of compensation. The second thing that the Socialists want is that the Fundamental Rights mentioned in the Constitution must be absolute and without any

limitations so that if their Party fails to come into power, they would have the unfettered freedom not merely to criticize, but also to overthrow the State."*

E. THE PERPETUAL MOTION MACHINE

The next battle-cry that confronted the Sentinel was from what is generally, though not correctly, considered to be the apex-institution of the State, namely, Parliament.

The historical background to this part of our discussion starts in 1951 with the passing of laws by certain State Legislatures abolishing Zamindari system. When these Acts were challenged, some High Courts held that such Acts were unconstitutional, being violative of the fundamental rights, but some High Courts upheld the validity of such Acts. While appeals and also original petitions under Art.32 were pending before the Supreme Court on this issue, Parliament passed The Constitution (First Amendment) Act, 1951, enabling Parliament to pass laws imposing reasonable restrictions on certain fundamental rights guaranteed under Part III of the Constitution which would save the Acts referred to above. This amendment of the Constitution itself was challenged in Shankari Prasad Singh Deo vs. Union of India, AIR 1951 SC 458 and was decided unanimously by the Constitution Bench of five judges. The Amendment was upheld. Rather, Parliament's power to amend even any or all of the fundamental rights guaranteed under Part III of the Constitution was upheld. The Court speaking through Patanjali Sastri, J. negatived the contention that the Act by which Constitution is amended, that is, the Amending Law, is also, like any other law, subject to the discipline and mandate of Art 13(2) which provides that "the State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of such contravention be void." The Bench held that Amending Acts

*. Dr.Ambedkar

are not laws within the meaning of that term for the purpose of Art.13 (2) and therfore are immune from it.

It was October, 1951, when Shankari Prasad case was decided; less than one year and a three-quarter had passed since the Constitution had been adopted and since the Supreme Court had come into existence. For nearly 16 years since the decision was delivered in Shankari Prasad case, the Sentinel did not wake up to this issue.

In fact, Shankari Prasad verdict was followed even after a lapse of 14 years in Sajjan Singh vs State of Rajasthan, AIR 1965 SC 845.

The awakening came only in 1967 in the verdict of the majority, led by Subba Rao, C.J., in Golaknath vs State of Punjab, AIR 1967 SC 1643, overruling the verdict in Shankari Prasad and Sajjan Singh vs State of Rajasthan. The eleven-judge bench in Golaknath case adopted the device of prospective overruling due to the time lapse.

Golaknath case was a verdict by a Bench of 11 judges and deserved the highest respect. Reason and Respect do not respect each other always. Yes, the ghost of Shankari Prasad verdict haunted the Court Hall till 1973. Then came what is now considered the Holy Book of Indian Constitution, the historical verdict in Kesavananda Bharati vs State of Kerala, (1973) 4 SCC 225 by an unprecedented 13-judge Bench, so constituted to test the validity of the verdict of the 11-judge Bench in Golaknath case and the verdict of another 11-judge Bench in R.C.Cooper vs Union of India, 1970 SCC (1) 248.

RC Cooper case was against the Nationalisation of certain Banks. Shah, C.J. delivered the lead judgment of the majority of 10 out of 11 judges striking down the Bank Nationalisation Act on the grounds that the compensation was inadequate, the Act was discriminatory and violative of the Fundamental Rights guaranteed under Art.19 (1) (f) and (g) and Art. 31.

In order to negate the effect of Golaknath's case and the verdict in R.C.Cooper vs Union of India, 1970 SCC (1) 248, Parliament passed the 24th and 25th Amendments to the Constitution.

The highlights of 24th Amendment Act were:

- Articles 13 and 368 were amended by adding one clause to each of these two Articles, declaring that Article 13 shall not apply to any constitutional amendment made under Article 368.
- The marginal note of Article 368 was changed from "Procedure for Amendment to the Constitution" to "Power of Parliament to amend the Constitution and Procedure thereof".
- A non-obstante clause was added to Article 368 which stated that "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with procedure laid down in this Article." This clause suggested that Parliament had power to amend any part of the Constitution including the Fundamental Rights.
- It created the differentiation between ordinary law and amendment to the Constitution. In the former case, the President had the choice to give assent whereas in the latter case it was obligatory for President to give assent.

By the 25th Amendment, Clause (2) in Article 31 was substituted with a new one and a new Clause 2B was added after Clause 2A and a new Article 31C was added after Article 31B.

> (a) for clause (2), the following clause shall be substituted, namely:—

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause";

(b) after clause (2A), the following clause shall be inserted, namely:—

"(2B) Nothing in sub-clause (f) of clause (1) of article 19 shall affect any such law as is referred to in clause (2)".

3. Insertion of new article 31C After article 31B of the Constitution, the following article shall be inserted, namely:—

31C. Saving of laws giving effect to certain directive principle. Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any

of the rights conferred by article 14, article 19 or article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

Without delving deeply into the nitty gritties and the involved semantics in the eleven separate judgments delivered in Kesavanada Bharati case, I reproduce here the Signed Statement summarising the resultant propositions that was issued on 24th April, 1973, contemporaneously with the 11 judgments.

"The view by the majority in these writ petitions is as follows

1. Golak Nath's case is over-ruled.

2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

3. The Constitution (Twenty-fourth Amendment) Act, 1971 is valid.

4. Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid.

5. The first part of section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid.

6. The Constitution (Twenty-ninth Amendment) Act, 1972 is valid.

The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.

Signed:
S.M. Sikri, C.J.
J.M. Shelat, J.
K.S. Hegde, J.
A.N. Grover, J.
P. Jaganmohan Reddy, J.
H.R. Khanna, J.
A.K. Mukherjea, J.
Y.V. Chandrachud, J.
A.N. Ray, J."

Only 9 out of the 13 judges had signed the statement. Still that constituted a sufficient majority. Why the remaining 4 judges did not sign this statement is still a mystery. That some who wrote the dissenting judgments have signed this statement adds more to that mystery! Whatever transpired on 24th April, 1973, in the precincts of that great Institution, the outcome saved the Constitution; insulated it from being punctured, emasculated or being overthrown by elected representatives.

Though, soon thereafter, our Nation plunged into darkness of Emergency, it recovered quickly and after such recovery the wise persons who adorned the high chairs in the Supreme Court added contents considerably to the shell of what was recognised as the basic structure in Kesavanandha Bharati.

In Minerva Mills, 1980 SCC (3) 625, a Constitution Bench clearly held that certain fundamental rights, especially those guarnteed in Art.s 13, 19 and 21 are ingrained in the basic

structure of the Constitution and are 'inalienable' in the sense each of them is immune from being taken away or diluted by any amendatory process. The following snippets from the celebrated judgment of Y.V.Chandrachud, C.J. , speaking for the majority of 4:1 in that case, are not merely eloquent but are also elevating and enlightening:

> "The history of India's struggle for independence and the debates of the Constituent Assembly show how deeply our people value their personal liberties and how those liberties are regarded as an indispensable and integral part of our Constitution."
>
> "The demand for inalienable rights traces its origin in India to the 19th Century and flowered into the formation of the Indian National Congress in 1885."
>
> "The Motilal Nehru Committee appointed by the Madras Congress resolution (1928) said at pp. 89-90:"
>
> > *"It is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances.."*
>
> "The Indian nation marched to freedom in this background. The Constituent Assembly resolved to enshrine the fundamental rights in the written text of the Constitution. The interlinked goals of personal liberty and economic freedom then came to be incorporated in two separate parts, nevertheless parts of an integral, indivisible scheme which was carefully and thoughtfully nursed over half a century. The seeds sown in the 19th Century saw their fruition in 1950 under the leadership of Jawaharlal Nehru and Dr. Ambedkar. To destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure."

> "Fundamental rights occupy a unique place in the lives of civilized societies and have been variously described in our Judgments as "transcendental", "inalienable" and "primordial". For us, it has been said in Kesavananda Bharti (p. 991), they constitute the ark 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."
>
> "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."**

These three Articles were hailed as forming "the Golden Triangle" in the Constitution.

Now, almost the entire gamut of Fundamental Rights have been included and brought under the protective umbrella of basic structure. Time plays a vital role in shaping the destiny of a Nation!

Well, I started this chapter under the sub-heading, 'Perpetual Machine!' That leads us to the III Schedule of the Constitution that prescribes oaths to be taken by elected representatives and Constitutional Functionaries while they assume their respective oaths.

There was a brief discussion in at least some of the 11 separate judgments delivered in Kesavanada Bharati case regarding the form of such Oaths prescribed in the Constitution. However,

the focus was more in the context of addressing an argument saught to be rebutted by the learned advocate Nani Palkivala. The argument was whether the two phrases 'Constitution and the law', 'Constitution of India as by law established' occuring in such Oaths imply that Constitution and law are not the same as held in Shankari Prasad case and further imply that Art.13 would therefore apply even to an amendment of the Constitution. This argument did not find favour with most of the judges who heard Kesavananda Bharati case. However, we can take a look at such oaths from a slightly different point of view. The more vital import of such oaths is that having taken the oath in the prescribed form, mandating the persons taking such oath to protect or stand by the Constitution, they cannot be a party to the overthrow of the Constitution. Any addition, subtraction or correction to any provision of the Constitution that alters the core or basic structure of it would amount to overthrowing the Constitution and substituting it with a new one. Therefore, by way amendment the basic structure of the Constitution cannot be altered. This is what some of the Learned judges endeavoured to hold in their judgments in Kesavananda Bharati while stating that the power to amend shall not include power to emasculate, etc.

We all know that in the human body old cells keep dying and new cells replace them. The science of regeneration of cells is more complicated though it is generally said that in seven years everyone would be a totally new person with new cells. It may be an over simplification, but true to some extent. Yet it is not the whole Truth. I am not just a conglommeration of my body-cells. This might lead us to a more metaphysical discussion that may be avoided here. This is stated only to emphasise the point that despite having been amended 106 times in 75 years of its existence, the Constitution still remains as a living organism breathing life into every activity of public importance.

Whatever be the satisfaction or dissatisfaction that the judgment in Kesavananda Bharati has given, it saved the Constitution from being punctured, emasculated or replaced. Its basic structure cannot be touched even by representatives elected by the people.

Since elections are held in accordance with and under the Constitution, people elect their representatives to respect the Constitution, stand by it, protect it and take oath accordingly. If that is the case, can it ever be said that people's representatives, acting in furtherance of the will of the people, have the right to alter any provision of the Constitution in any manner they deem fit?

There has been a murmur in some quarters that no generation can bind the future generations with their ideas.

Jefferson, the great American statesman who played so great a part in the making of the American Constitution, has expressed weighty views which makers of Constitution can never afford to ignore. In one place, he has said:-

> "We may consider each generation as a distinct nation, with a right, by the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country." (as quoted by Dr.Ambedkar in his final speech in the Constituent Assembly.)

In fact, my second book on Law, titled, 'Law, Logic and Liberty' has an essay captioned, 'No law is immortal'.

Having said so, I am now reconciled to the fact that our Constitution is almost immortal.

In fact, about two decades ago, Government of India appointed a Committee to draft a new Constitution. It was not pursued and

eventually there was a political change in the centre, leaving the Constitution to remain as such. That very move or attempt was unconstitutional and violative of the oaths taken by those who were in power. A Government comprised of persons who took oath to either protect, stand by, uphold or would bear true faith and allegiance to the Constitution cannot even be heard to say that the Constitution as a whole is bad and has to be replaced with a new one. They cannot engage in any activity to do away with the Constitution or even for replacing it with a new one of their choice. They must answer the question 'Qui Vive?" with a loud reply, "Long live the Constitution".

Any person who is duly elected and who takes office after taking the oath under the Constitution cannot do anything nor consent to the doing of anything that would either negate the Constitution or replace it with something else, as long as that person continues in such office.

I recall the ever-reverberating immortal lines of Mahakavi Subramania Bharati occuring in his Epic, 'Panchali Sabatham', a part of Mahabaratha:

> The act of Darman (Yudishtra) pledging his country and loosing it in gamble is like a Temple Priest selling away the idol of the Presiding Deity; like the watchman pledging and loosing in gamble the house that he is expected to safeguard.*

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* "கோயிற் பூசை செய்வோர் சிலையைக்
கொண்டு விற்றல் போலும்,
வாயில் காத்து நிற்போன் வீட்டை
வைத்திழத்தல் போலும்,
ஆயிரங்க ளான நீதி
அவையு ணர்ந்த தருமன்
தேயம் வைத்திழந்தான்; சிச்சீ!
சிறியர் செய்கை செய்தான்."
(மஹாகவி சுப்பிரமணிய பாரதியார்).

No person who has taken the oath of allegiance to the Constitution may do anything that would efface it by denting its basic structure.

I seek the permission of my readers to extract a portion of what I wrote in 1998, in book, "Law, Logic & Liberty" (Para 42, in the essay titled "The Beacon Light", page 26):

> "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 (now 76 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."

Therefore, the Constitution cannot be abrogated, emasculated or its basic structure be tampered with or replaced with another in a legal manner, though it could be done by an extra-legal, revolutionary method. The Constitution is immortal, in the sense, it will not have a natural death nor can it be killed by its own guards, though it is exposed to the risk of attack by rebels. I wonder whether Dr. Ambedkar, while he delivered his final speech before the Constituent Assembly, and, Kania, C.J., when he delivered his judgement in A. K. Gopalan's case, had this risk in mind.

The dream of making a perpetual motion machine has always eluded man, but now it seems that we do have one in

the Constitution.

F. MORE LESSONS FROM THE RECENT PAST

We have been doing some time-travelling, making tours into a somewhat distant past. Now, let us look around to take stock of the current scenario.

One question immediately pops up in my mind. Can it be said that there is no limitation whatsoever to the jurisdiction of the Supreme Court? Any claim of unlimited jurisdiction may not fit well in any system of democracy, especially, in a Constitutional Democracy like India. As it was famously said at least a century and a half ago, and reiterated in several judgments "Power tends to corrupt and absolute power corrupts absolutely."*.

Have we not heard people describing our system as Parliamentary Democracy? Some senior members of Parliament too had made such a claim. In fact, occasionally, even Dr.Ambedkar who is considered to be the chief architect of the Constitution has used the said description. Still, the fact remains that the Indian system is more appropriately described as a Constitutional Democracy and not Parliamentary Democracy. The Constitution is the Supreme Charter. All the three organs of our system, namely, the Legislative, the Executive and the Judiciary are subservient to the Constitution. It is a well-knit system of checks and balances grounded on the stable platform of the Constitution.

If that be the case, the claim that the Supreme Court has unlimited jurisdiction would be a misnomer. Rejecting such a tall claim is not doing disrespect to that great Institution, rather it enhances and fortifies its dignity and greatness.

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*. Lord Acton in his letter to Bishop Creighton dated 15th April, 1887, in the first of the three letters in the 'Acton-Creighton Correspondence (1887)'.

The Supreme Court of India, as it is now, is a creature of the Constitution and its jurisdiction and powers are only those conferred by the Constitution. It cannot exercise jurisdiction which is not so conferred by the Constitution. The Constitution does not state that it has residuary jurisdiction which it might exercise apart from what are conferred by the Constitution. At least, its Original Jurisdiction is circumscribed by certain limitations. Apart from Art.32, certain other articles like Art.s 131, 138, 139 and 140 confer Original Jurisdiction on the Supreme Court. Art. 138, 139 and 140 of the constitution empower Parliament to grant certain further powers to Supreme Court under certain circumstances.

Art.32 reads as follows:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

The Constitution thus confers upon the Supreme Court the Power to issue Writs as set out therein, for the enforcement of any of the rights conferred by Part III of the Constitution, called "the Fundamental Rights" in legal parlance.

The following Articles are provisions, other than Art.32, granting Original Jurisdiction to the Supreme Court:

> 131. Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.]

138. (1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

139. Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for any purposes other than those mentioned in clause (2) of article 32.

140. Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

Under Art.131, only the Supreme Court and no other body, shall have jurisdiction to decide certain disputes specified therein. Such disputes are those:

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States…

The Proviso to Art.131 takes away disputes arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument, that was brought into existence before the commencement of the Constitution from the jurisdiction of the Supreme Court. We are not concerned with such disputes here.

Art.139 provides that Parliament may confer on the Supreme Court power to issue directions, orders or writs for any purpose other than those mentioned in clause (2) of article 32. No such law appears to have been made by Parliament so far.

It is thus clear that the jurisdiction of Supreme Court is subject to the limitations prescribed by the Constitution as seen above.

One question arises in this context. While the Supreme Court, under Art. 32, may issue writs in exercise of its original jurisdiction only for the enforcement of any of the rights conferred by Part III of the Constitution, how did it entertain certain cases directly, in exercise of its original jurisdiction, not

for the enforcement of any of the rights conferred by Part III, but for other purposes?

The question whether the Supreme Court may entertain directly petitions under Art.32 and issue writs for a purpose other than the enforcement of any Fundamental Right was raised in certain earlier cases.

A seven-judge Bench had an occasion to consider this question in Ujjam Bai vs State of U.P., AIR 1962 S.C. 1621. It concluded with unanimity on this issue that a writ petition under Art.32 will not lie if it is not for enforcement of a fundamental right guaranteed under Part III of the Constitution. S.K.Das, J. stated:

> "An order of assessment made by an authority under a taxing statute which is intra vires and in the undoubted exercise of its jurisdiction cannot be challenged on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder. Nor can the validity of such an order be questioned in a petition under Article 32 of the Constitution. The proper remedy for correcting an error in such an order is to proceed by way of appeal, or if the error is an error apparent on the face of the record, then by an application under Article 226 of the Constitution. It is necessary to observe here that Article 32 of the Constitution does not give this Court an appellate jurisdiction such as is given by Arts 132 to 136. Article 32 guarantees the right to a constitutional remedy and relates only to the enforcement of the rights conferred by Part III of the Constitution. *Unless a question of the enforcement of a fundamental right arises, Article 32 does not apply."* (emphasis supplied)

There was a general agreement on this issue and the result that followed, though, there was dissent on some other peripheral issues.

Since the language of Art.32 is clear and unambiguous, one need not look for interpretative support to understand that provision.

In both the sub-clauses of Art.32, the key phrase is "for the enforcement of any of the rights conferred by this part". The term "this part", means Part III of the constitution which enumerates and guarantees Fundamental Rights.

Despite the express, in-built limitation, Supreme Court did entertain a few writ petitions under Art.32 even though no question of enforcement of any fundamental right arose in those petitions.

A few instances where this has happened recently are:

1. Subash Desai vs. Principal Secretary, Governor of Maharashtra & others, (2024) 2 SCC 719.
2. The State of Punjab vs. the Governor of Punjab. (2024) 1 SCC 384.
3. The State of Tamil Nadu vs. the Governor of Tamil Nadu. (2025) SCC Online SC 770.

In the first case, it was an inter se dispute between two factions of a political party in Maharashtra, when the breakaway faction joined hands with the opposition Party and staked claim to form government and it was said that the Governor had acted in violation of the Constitution leading to the change of the ruling government.

In the second and third cases, the challenge was to the action or inaction of the respective governor in Punjab and Tamil Nadu under Art.200 in withholding assent to bills passed by the respective Legislatures.

The question whether the Supreme Court may entertain under Art.32, Writ Petitions filed in such cases, not for enforcing any

right conferred by Part III of the Constitution, that is, not for enforcing any Fundamental Right, was not raised, considered or decided in these cases.

Even after using all computer-given search-tools, I could not even find the words "fundamental rights", "part III" or "enforcement" anywhere in the judgment in Subhash Desai case.

There appears to be no discussion in those judgements on whether the petitioners therein sought to enforce any of the rights conferred by part III of the Constitution.

In the second judgement, that is, Punjab Case judgment, the opening paragraph reads:

> "1. The jurisdiction of this Court under Article 32 of the Constitution has been invoked by the State of Punjab. The Government of Punjab is aggrieved on the ground that the Governor did not (i) assent to four Bills which were passed by the Vidhan Sabha nor have they been returned; and (ii) furnish a recommendation for the introduction of certain Money Bills in the Vidhan Sabha."

In para 14, only 2 issues are formulated for consideration:

> "14. Two issues arise for consideration: first, whether the Governor can withhold action on Bills which have been passed by the State Legislature; and second, whether it is permissible in law for the Speaker to reconvene a sitting of a Vidhan Sabha session which has been adjourned but has not been prorogued."

Two vital questions were not even formulated for consideration.

1. Whether any right guaranteed under part III of the Constitution is sought to be enforced in that petition.

2. Whether Supreme Court has jurisdiction to entertain, under Art.32 or any other provision of the Constitution, a petition which is not for enforcement of any right guaranteed under part III of the constitution.

Even in the third case by the State of Tamil Nadu these questions were not raised or considered.

An affirmative answer to the 2nd question must be supported by a clinching provision in the Constitution itself, of course, read with a law made by Parliament, if any, on this issue. Citing an earlier judgment of the Supreme Court in support of such an answer would amount to begging the question, unless in such earlier judgment the answer was supported expressly by a clinching provision in the Constitution itself, of course, read with a law made by Parliament, if any, on this issue.

The power granted to the Supreme Court under Art.142 to pass any decree, or order for doing complete justice is circumscribed by two conditions, namely, that it can do only "in the exercise of its jurisdiction" and only "in any cause or matter pending before it".

Art.142 reads:

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

Art.142 cannot be cited as empowering the Supreme Court to assume a jurisdiction unless conferred by the Constitution or a law made by Parliament, as stated above.

Have we come to an impasse? Is the Sentinel entrusted more with the task of protecting the fundamental rights of those who knock the doors of the Supreme Court than the task of protecting the constitution as a whole? No. Two reasons. The first reason is that the latter task is decentralised; the High Courts are entrusted with it, subject to the supervision of Supreme Court under Art. 136. The second reason is, protecting fundamental rights of the citizens would ensure that everything else falls in its place.

Considering the enormous volume of work-load on the Supreme Court, considering that it is an institution with a floating population of Judges as Administrators of Justice, none can doubt the great role it has played in protecting the Constitution. As the Highest Court of this great nation, as the Sentinel of the Constitution, it deserves a big salute!

A Postscript

I thought the essay was over and I could move on to a fresh field after that ceremonial salute. No. A lurking thought pulled me back and made me add this postscript.

In one short sentence, I would say that the Sentinel needs (more) teeth, in the sense, its arsenal needs to be refurbished and equipped with more ammunition. Let me recapitulate at least two instances, both from the field of Criminal Jurisprudence.

The first one has a name that is chanted in the corridors and court rooms more frequently than the holy name is chanted in Temples. Yes, "Arnesh Kumar"!

The ruling in Arnesh Kumar vs State of Bihar, 2014 8 SCC 273 was considered a revolutionary, landmark decision, though it only stated the obvious. It appeared revolutionary only because what was obvious had never been highlighted appropriately till then. In sum and substance, it reiterated what was there in the Code of Criminal Procedure (as it then was!).

Though it was a case where the person accused under Section 498-A of the IPC and section 4 of Dowry Prohibition Act had sought bail, the directions issued in the judgment transcended the factual matrix. After noticing how persons accused of some offence are arrested by the police mindlessly and how the Learned Magistrates authorise their detention more mindlessly, the two-judge Bench of the Supreme Court gave the following Ten Commandments:

"1) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;

2) All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

4) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

6) Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the

Superintendent of Police of the District for the reasons to be recorded in writing;

7) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

8) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

9) We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

10) We direct that a copy of this judgment be forwarded to the Chief Secretaries as also the Director Generals of Police of all the State Governments and the Union Territories and the Registrar General of all the High Courts for onward transmission and ensuring its compliance."

It is common knowledge that these commandments are observed by the police and even by courts more in breach than in compliance.

I recall an experience I had in this regard several years ago, but post Arnesh Kumar case. I appeared before a Magistrate and pleaded for grant of bail to two young boys, who were totally innocent but were arrested only to apprehend an elderly person related to them. I moved the bail petition at about 9 pm when those two boys were produced by the Police reluctantly and

after a considerable delay in the house of the Magistrate. After I extensively argued for more than 30 minutes, inviting the attention of the Magistrate to the directions in Arnesh Kumar, the Magistrate apologetically expressed his helplessness and remanded those boys to judicial custody, saying something that shocked me. He said, casually, "Alright Sir, Supreme Court may say so many things, but we are bound only by the directions of our High Court." Immediate - Boss Syndrom.

It is enough to reproduce what one Learned Judge speaking for a two-judge Bench of the Supreme Court said in Satender Kumar Antil Vs CBI (2022) 8 SCC Online 8259:

> "28. We only reiterate that the directions aforesaid ought to be complied with in letter and spirit by the investigating and prosecuting agencies, while the view expressed by us on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders.
>
> 29. Despite the dictum of this Court in Arnesh Kumar (supra), no concrete step has been taken to comply with the mandate of Section 41A of the Code. This Court has clearly interpreted Section 41(1)(b)(i) and (ii) inter alia holding that notwithstanding the existence of a reason to believe qua a police officer, the satisfaction for the need to arrest shall also be present. Thus, sub-clause (1)(b)(i) of Section 41 has to be read along with sub-clause (ii) and therefore both the elements of 'reason to believe' and 'satisfaction qua an arrest' are mandated and accordingly are to be recorded by the police officer.
>
> 30. It is also brought to our notice that there are no specific guidelines with respect to the mandatory compliance of Section 41A of the Code. An endeavour was made by the

Delhi High Court while deciding Writ Petition (C) No. 7608 of 2017 vide order dated 07.02.2018, followed by order dated 28.10.2021 in Contempt Case (C) No. 480 of 2020 & CM Application No. 25054 of 2020, wherein not only the need for guidelines but also the effect of non-compliance towards taking action against the officers concerned was discussed. We also take note of the fact that a standing order has been passed by the Delhi Police viz., Standing Order No. 109 of 2020, which provides for a set of guidelines in the form of procedure for issuance of notices or orders by the police officers. Considering the aforesaid action taken, in due compliance with the order passed by the Delhi High Court in Writ Petition (C) No.7608 of 2017 dated 07.02.2018, this Court has also passed an order in Writ Petition (Crl.) 420 of 2021 dated 10.05.2021 directing the State of Bihar to look into the said aspect of an appropriate modification to give effect to the mandate of Section 41A. A recent judgment has also been rendered on the same lines by the High Court of Jharkhand in Cr.M.P. No. 1291 of 2021 dated 16.06.2022.

31. Thus, we deem it appropriate to direct all the State Governments and the Union Territories to facilitate standing orders while taking note of the standing order issued by the Delhi Police i.e., Standing Order No. 109 of 2020 , to comply with the mandate of Section 41A. We do feel that this would certainly take care of not only the unwarranted arrests, but also the clogging of bail applications before various Courts as they may not even be required for the offences up to seven years.

32. We also expect the courts to come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A. We express our hope that

> the Investigating Agencies would keep in mind the law laid down in Arnesh Kumar (Supra), the discretion to be exercised on the touchstone of presumption of innocence, and the safeguards provided under Section 41, since an arrest is not mandatory. If discretion is exercised to effect such an arrest, there shall be procedural compliance. Our view is also reflected by the interpretation of the specific provision under Section 60A of the Code which warrants the officer concerned to make the arrest strictly in accordance with the Code."

How far these directions, issued in all earnestness, have been translated into action and whether the dentistry has given more teeth to the Sentinel is yet to be seen.

The second instance that I would like to advert to in this already lengthy postscript is what happened when I moved a PIL before the Supreme Court last year. In my opinion, it was a deeply thought-out and well deliberated Writ Petition under Art.32 challenging the Constitutional validity of what is known as custodial interrogation, meaning, the practice of placing the accused under the custody of the Investigating agency for interrogation. All reported decisions relevant on the issue were annexed and it was stated in that petition that the issue had not been considered and decided in any of the known cases. The judgment in Nandini Satpaty vs P.L.Dani, (1978) 2 SCC 424 was elaborately discussed and it was submitted that the three judge bench in that case had missed the point and had made observations on presumptions that the issue had already been decided in two earlier cases while in fact it was not and therefore it was per incuriam. The three-judge bench before which that PIL was listed, at the outset, before hearing me, expressed that it was not entertaining the said petition under Art.32. My attempt to put across the vital issue that arose in that petition that the practice challenged in it denies the protection under Art.20 (3) to hundreds of persons accused of an offence everyday and the

said fundamental right needs to be protected and enforced under Art.32 was in vain. Within 5 minutes, I had to return with an order reading:

> "We are not inclined to entertain the Petition under Article 32 of the Constitution of India.
>
> 2. The Petition is accordingly dismissed.
>
> 3. Pending applications, if any, stand disposed of."

A few questions do arise in this context:

1) While a petition under Art.32 can be rejected on the ground that it does not seek to enforce any fundamental right or that whatever is challenged therein does not impact any fundamental right, does the Supreme Court have the discretion to reject it at the threshold on the ground that it is "not inclined to entertain the Petition under Article 32?

2) Is entertaining a writ petition complaining of infringment of fundamental rights discretionary?

3) If it is said to be discretionary, will it not undermine and violate the fundamental right under Art.32 to move the Supreme Court for enforcement of the rights conferred under Part III?

4) If the said right is made subject to the discretion of the Judges before whom the petition is moved, will it not virtually make such inalienable right illusory?

5) While petitions where there is not even a whisper about infringement of any fundamental right are entertained and even decided and allowed, can a petition seeking enforcement of a fundamental right be dismissed merely on the gound of disinclination of the Judges?

I only hope that these questions would soon be answered one way or the other.

While my mind races to set out a few suggestions to equip and strengthen the arsenal of the Sentinel, I defer it for the present and conclude this essay by expressing my wonder:

Oh! What a wonderful Constitution we have given to ourselves! It is self-sustaining, self-perpetuating and sensitive to the growing needs of an evolving Nation. We are truly blessed.

Once again, I salute this Majestic Institution that protects the Sanctum Sanctorum of the great Charter, the Constitution of India. I salute 'The Sentinel'.

II. The Salutary Principle – A Solemn Send Off

The Statement of the Principle

The previous essay almost ended with a salute to the Sentinel. It immediately evoked a mixed response in me. Has not the sentinel, unwittingly, permitted dilution of one of the most basic, salutary principles of Law, that too, impacting the most valuable and fundamental freedom guaranteed by the Constitution – the Salutary Principle of presumption of innocence till guilt is proved. This principle was highlighted about 4 decades ago in Gurubaksh Singh Sibia vs. State of Punjab, (1980) 2 SCC 565, by a Constitution Bench of five judges. The significance of that principle is yet to sink in the minds of many who are actively engaged in the system of dispensation of Justice. It is disappointing to note that even such authoritative pronouncements are not given due respect. Since I have dealt with that classic judgment authored by the learned Chief Justice Y.V.Chandrachud, C.J., extensively, in my book "Law, Logic and Liberty", in the essay captioned, "Jail versus Bail", I don't propose to reiterate the whole of it here but will rest my case with a brief discussion on how courts have bypassed that judgment effortlessly and enigmatically.

The basic principle of presumption of innocence till guilt is proved was emphatically endorsed and reiterated in that judgment. While doing so, what the learned Chief Justice said in para 26 of the judgment is worth revisiting:

> "We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. *An overgenerous 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 beneficient 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." (Emphases supplied).

The most significant message in the above passage is that sec.438, as it was in 1980, was not open to challenge, though, an overgenerous infusion of constraints and conditions which were not found then in Section 438 can make its provisions constitutionally vulnerable. The learned Chief Justice added a note of caution that we must avoid it at all costs.

The caution sounded by the Constitution Bench was overlooked and three decades thereafter, in 2018, Parliament rewrote Sec.438, infusing overgenerous constraints and conditions in Sec.438.

To understand the import and the impact of the re-written sec. 438, we need to read it as it was in 1980 and also read it in the modified form that it took in 2018.

Sec.438, as it was in 1980, when it was considered in Sibia's case:

> "438. (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)."

Sec.438 was re-written in 2018 as follows:

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

(1) Where any person has reason to believe that he may be arrested on 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 in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, interalia, the following factors, namely:---

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and.

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court,

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(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 be issued in the first instance against that person, he shall issue a bailable warrant in confirmity with the direction of the Court under sub-section (1).

(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).

The over-infusion of constraints and conditions is writ large on the face of the re-drafted Sec. 438.

It appears that the Constitutional validity of Sec.438 as redrafted in 2018 was neither challenged nor tested.

Now this issue has become otiose since a New Code of Criminal Procedure ("2023 code"), curiously titled in a language other than English, has come into force. The subject matter of Sec. 438 in the 1973 Code became that of Sec.482 in the 2023 Code. It reads:

Sec.482 in the 2023 Code:

(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 480, 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 be issued 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) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under section 65 and

sub-section (2) of section 70 of the Bharatiya Nyaya Sanhita, 2023.

At present the provision under the New Code of 2023 for granting what is known as 'Anticipatory Bail' in legal parlance has been set almost closer to how it was when the judgment was delivered in Sibia's case. The overgenerous infusion of constraints and conditions has been avoided. Only the restriction in respect of the serious offence of rape is retained.

This much is history. The disheartening fact remains that still the caution sounded in Sibia's case is not taken due note of, not only by Sessions Courts and High Courts but, at times, even by the Supreme Court.

An invasion, prima facie:

While the phrase 'prima facie case' is definitely a useful tool in civil cases, especially in considering applications for interlocutory orders, the import of that term into Criminal Jurisprudence has turned counter-productive.

In fact, the term 'prima facie' was not there in the Criminal Procedure Code, 1861. Even in the Criminal Procedure Code, 1973, it was not there, but after 36 years, it was imported into the Code twice, once in 2009 and again in 2013; in 2009, into Sec.s 328 and 329 of the Code dealing with lunatics and persons of unsound mind; and in 2013, into Sec.198B dealing with the accused-husband forcibly having sexual intercourse with his wife living separately. We are not concerned here with these special situations.

Regarding granting bail to the accused or authorising the detention of the accused, the term 'prima facie case' was ever absent and is still absent in the relevant provisions of the Code, in all its transformations.

Section 41, dealing with the power of police to arrest, uses the term "against whom a *reasonable complaint* has been made, or *credible information* has been received, or a *reasonable suspicion* exists that he has committed a cognizable offence" and the term, "the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence". (Emphases supplied).

In the context of granting bail, Sec.437 of the 1973 Code stated thus:

> … 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 …….. (Emphasis supplied).

The same phraseology is adopted in the corresponding provisions in the 2023 code.

It is clear that these phrases used in the provision for releasing on bail a person arrested or about to be arrested, cast a duty on the arresting officer. He must show to the Court that he has reason to believe that the accused was guilty. The import of these phrases is that existence of such reasons for his belief is a jurisdictional fact that conditions his power to arrest. Whether such reasons are present and whether they are adequate to form such a belief are justiciable in the sense, they are within the domain of the Court to determine. Thus, as a first step in any petition for bail, pre-arrest or post-arrest, the Court asks the officer to show such reasons. Only if the court is satisfied of the existence and adequacy of such reasons, it can proceed further. In other words, where the Court is not satisfied either of the existence or of the adequacy of such reasons, it will have no option but to grant bail. However, even if there are materials on record that show, prima facie, the involvement of the bail-petitioner in the alleged offence, that cannot be a ground to reject the petition for bail or anticipatory bail, since, any prima facie view may get refuted and rebutted

in trial and till then the accused ought to be presumed innocent. Thus, mere existence of a prima facie case against the accused cannot, ipso facto, lead to rejection of bail. When the court is satisfied of the existence or of the adequacy of such reasons, two and only two questions would normally arise:

I. Are there reasons to support an apprehension that the accused-petitioner is likely to abscond or flee justice?

II. Is the accused capable of tampering with evidence and is he likely to tamper with evidence?

When the answer to these questions is clearly in the negative, the court must grant bail, however, imposing formal and normal conditions, like executing security bond for his appearance, but not onerous in nature;

In case the answers are in the affirmative, the court may examine whether any conditions other that the normal conditions may be imposed to either prevent fleeing from justice or prevent tampering with evidence. Such conditions may be like directing the petitioner to report periodically to the investigation officer, prohibiting the petitioner from entering or exiting the locale of the Crime, submitting his passport into the trial court, directing him to stay away from his officialdom, if being in such official post gives him the power to tamper with evidence, etc.

So far so good. The eclipse cast on the salutary principle in 2018 by an amendment to Sec.438 has been removed in the corresponding Sec.482 of the latest Code of 2023. The law is now back in its pristine form, as it was when the Sibia Judgment was pronounced. However, even before the amendment of 2018 that infused more constraints in Sec.438, the salutary principle had been unceremoniously given a go-by in some cases.

In Jai Prakash Singh vs State of Bihar, (2012) 4 SCC 379, it was stated in para 19 of the judgment:

> "Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty." (Emphasis supplied).

The statement in Jai Prakash Singh case that "Anticipatory bail can be granted only in exceptional circumstances where the court is of the prima facie view that the applicant has been falsely enroped in the crime and would not misuse his liberty", per se militates against the salutary presumption of innocence highlighted and endorsed by the Constitution Bench in Sibia's case.

Quoting and following this, Anticipatory Bail was refused by a two-judge bench of the Supreme Court in P.Chidambaram vs Directorate of Enforcement, 2019 (9) SCC 24.

The term 'Prima Facie', as used in the above passage in Jaya Prakash Singh case, casts two instances of burden on the court – firstly, the burden of arriving at a Prima Facie finding that the charge against the appellant is false; and, secondly, the further onerous burden of assuring that the accused will not misuse his liberty. In other words, the burden is on the Bail Petitioner to show, at least, Prima Facie, that the charge against him is false. A further, more onerous burden is cast on the court: it is bound to vouch that the accused-petitioner would not misuse his liberty.

Both categories of burden are onerous. If it is a requirement of that Section that the accused must be asked to prove his innocence, at least prima facie, it would render the section itself unconstitutional. The second type of burden is perverse. The bail court cannot be saddled with such onerous burden of assuring that the accused will not misuse his liberty. The Court may only

take some solemn undertaking from the accused that he would not repeat such offence.

Questions do arise: for granting bail, is it right to cast the burden on the accused to show, even prima facie, that he is innocent? Does it not run contrary to the judgment of the Constitution Bench in Sibia's case? Where has gone the Salutary principle of presumption of innocence? Did not the Constitution Bench warn that such overgenerous infusion of constraints and conditions would expose bail provision to the attack that it is unconstitutional?

The Special Law Syndrome

Not only did the Judicial wing of the State, as in Jayaprakash Singh's case, dilute the salutary principle but the legislative wing also did so.

While enacting a special law to deal with the growing menace of terrorism, Parliament passed the Terrorists and Disruptive Activities (Prevention) Act, 1987 (No. 28 of 1987), TADA in short, where certain conditions for granting bail to persons accused under that Act were imposed. Sec.20 (8) of that Act imposed such conditions, which came to be known later as the Twin Conditions, in the following terms:

> "(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless-
>
> (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

A Constitution Bench, in Kartar Singh vs State of Punjab (1994) 3 SCC 569, upheld these conditions on the ground that treating heinous crimes like terrorism by imposing such conditions cannot be said to be an unreasonable condition infringing Art.21. It was also noted that such conditions were already there in certain other Acts. This is stated in para 349 of the Judgment:

> "Therefore, the condition that "there are grounds for believing that he is not guilty of an offence", which condition in different form is incorporated in other Acts such as clause (i) of Section 437(1) of the Code and Section 35(1) of FERA and 104(1) of the Customs Act, cannot be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution."

It is saddening to note that a very highly placed, responsible body like a Five-Judge Bench of the Supreme Court can state in its judgment something that is contrary to a verifiable fact. Sec.35 (1) of FERA, meaning, the Foreign Exchange Regulation Act, 1973, does not contain any condition even remotely similar to the Twin Conditions in TADA. Sec.35 (1) of FERA reads:

> Power to arrest .-(1) If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.
>
> (3) Where any officer of Enforcement has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject

> to the same provisions as the officer-in-charge of a police station has, and is subject to, under the, Code of Criminal Procedure, 1973 (2 of 1974).

Likewise, even Sec.104 (1) of Customs Act did not have anything even remotely similar to the Twin Conditions in TADA. Sec.104 (1), Customs Act:

> 104. Power to arrest.— (1) If an officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of Customs] has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

Maybe the Constitution Bench made a wrong reference by oversight but had in mind Sec.59 (1) of FERA and Sec.123 and 138-A of Customs Act, instead. To some extent, these provisions do cast reverse burden on the Accused. In FERA, it is the burden of proving absence of Mens Rea, when overt act is either admitted or proved; in Customs Act, the burden of proving that the seized goods were not smuggled goods and the accused had not done any act with a culpable mental state. Of course, none of these provisions casts a reverse burden for the purpose of grant of bail. They may, to some extent, be justified. When there is an admitted/proved FERA violation, the person resposible thereto is bound to show that it happened without his knowledge, consent or without premeditation on his part. Similarly, in case of Seizure of goods under Customs Act, a person claiming the goods is bound to establish how the goods came into his possession. Therefore the analogy drawn by the Constitution Bench between these provisions on the one hand and TADA provision on the other hand, may not be perfect. The

former cannot be relied upon to support the latter. One more reason to reject such analogy is given a little later in this essay with reference to a similar provision in a later Act.

The Constitution Bench in TADA case added in para 352 a sort of appeasing statement:

> "It is true that on many occasions, we have come across cases wherein the prosecution unjustifiably invokes the provisions of the TADA Act with an oblique motive of depriving the accused persons from getting bail and in some occasions when the courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in order to circumvent the authority of the courts invoke the provisions of the TADA Act. This kind of invocation of the provisions of TADA in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police. Unless, the public prosecutors rise to the occasion and discharge their onerous responsibilities keeping in mind that they are prosecutors on behalf of the public but not the police and unless the Presiding Officers of the Designated Courts discharge their judicial functions keeping in view the fundamental rights particularly of the personal right and liberty of every citizen as enshrined in the Constitution to which they have been assigned the role of sentinel on the qui vive, it cannot be said that the provisions of TADA Act are enforced effectively in consonance with the legislative intendment. ……"

There can be no doubt that terrorism ought to be dealt with an iron hand. Any act leading to terrorism deserves a harsh punishment. However, permitting a person arrested and booked under an Act to combat Terrorism, to languish in Jail without bail by imposing too onerous conditions for bail may not be a good jurisprudential step. The need for a special law and the

further need for restricting the scope of the Salutary Principle of presumption of innocence till proved guilty to tackle social menaces like terrorism highlight the failure of Law Enforcement to a great extent and of the Judiciary to some extent under the existing laws. Well, it is all now a part of History!

The PMLA conundrum

However, recently, the assault on the Salutary Principle came in the form of Prevention of Money Laundering Act, 2002 (PMLA). Sec.45 of that said Act incorporated the very same Twin Conditions for granting bail to a person charged with an offence included in Part A of the Schedule thereto and punishable with imprisonment for more than 3 years. That is, for the application of the famous or infamous Twin Conditions (Twin Conditions Number 1), further two conditions (Twin Conditions Number 2) were incorporated: (1) the offence must be one mentioned in Part A of the Schedule; (2) It must be punishable with imprisonment for more than 3 years.

When the Act was challenged before a Two Judge bench in **Nikesh Tarachand Shah vs Union Of India,** (2018) 11 SCC 1, the challenge to the Twin Conditions Number 1 somehow magically turned to be a challenge to Twin Conditions Number 2. The Bench held Sec.45 unconstitutional mainly on the ground that the criterion of above-3-year-period imprisonment had no nexus to the purpose of the Act and it is an invidious discrimination invalidating the Section itself.

After giving some imaginary illustrations vis-à-vis Sec.45, it was stated in Tarachand case

> "34. …. All these examples show that manifestly arbitrary, discriminatory and unjust results would arise on the application or non application of Section 45, and would directly violate Articles 14 and 21, inasmuch as

the procedure for bail would become harsh, burdensome, wrongful and discriminatory depending upon whether a person is being tried for an offence which also happens to be an offence under Part A of the Schedule, or an offence under Part A of the Schedule together with an offence under the 2002 Act. Obviously, the grant of bail would depend upon a circumstance which has nothing to do with the offence of money laundering. On this ground alone, Section 45 would have to be struck down as being manifestly arbitrary and providing a procedure which is not fair or just and would, thus, violate both Articles 14 and 21 of the Constitution."

"37. …. In short, a classification based on sentence of imprisonment of more than three years of an offence contained in Part A of the Schedule, which is a predicate offence, would have no rational relation to the object of attaching and bringing back into the economy large amounts by way of proceeds of crime. When it comes to Section 45, it is clear that a classification based on sentencing qua a scheduled offence would have no rational relation with the grant of bail for the offence of money laundering, as has been shown in the preceding paragraphs of this judgment."

Why the two-judge bench in Tarachand case was so preoccupied with the doctrine of classification? Why did it concentrate more on the Legislature imposing stricter conditions for granting bail only in certain cases in order to hold that the twin-conditions for granting bail is discriminatory? Why did it not choose the more obvious route of holding that the twin-conditions being against the salutary principle of presumption of innocence, are per se unreasonable and hence and therefore violative of art. 14?

No answer comes to my mind, I am ready to consider any answer that a more informed mind might suggest.

Since Sec.45 was declared unconstitutional in Tarachand case on the basis of a convoluted reasoning, it became easier for Parliament to amend Sec. 45 by omitting the words signifying the three year period in the twin conditions. Result? Sec.45 was upheld in the amended form in Vijay Madanlal Choudhary vs Union Of India, (2023) 12 SCC 1 by a three-judge bench.

The judgment delivered by the 3 judge bench in Vijay Madanlal case, opens with these words:

> "It is relevant to mention at the outset that after the decision of this Court in Nikesh Tarachand Shah vs. Union of India & Anr., the Parliament amended Section 45 of the 2002 Act vide Act 13 of 2018, so as to remove the defect noted in the said decision and to revive the effect of twin conditions specified in Section 45 to offences under the 2002 Act. This amendment came to be challenged before different High Courts including this Court by way of writ petitions."

The three-judge bench in Vijay Madanlal upheld the twin conditions in Sec.45 on the following grounds:

1. The defect on the basis of which that section was declared unconstitutional in Tarachand case stood cured by the subsequent amendment.
2. In several earlier decisions similar twin conditions had been upheld.
3. Certain Foundational facts must be established by the prosecution before invoking the twin conditions.
4. The offences for which the twin conditions are imposed in Sec.45 have international ramifications

and the Constitution must be interpreted in consonance with principles of International Law.

It was stated in Para 135 of that judgment:

> 135. We are conscious of the fact that in paragraph 53 of the Nikesh Tarachand Shah, the Court noted that it had struck down Section 45 of the 2002 as a whole. However, in paragraph 54, the declaration is only in respect of further (two) conditions for release on bail as contained in Section 45(1), being unconstitutional as the same violated Articles 14 and 21 of the Constitution. Be that as it may, nothing would remain in that observation or for that matter, the declaration as *the defect in the provision [Section 45(1)], as existed then, and noticed by this Court has been cured* by the Parliament by enacting amendment Act 13 of 2018 which has come into force with effect from 19.4.2018. We, therefore, confined ourselves to the challenge to the twin conditions in the provision, as it stands to this date post amendment of 2018 and which, on analysis of the decisions referred to above dealing with concerned *enactments having similar twin conditions* as valid, we must reject the challenge. Instead, we hold that the provision in the form of Section 45 of the 2002 Act, as applicable post amendment of 2018, is reasonable and has direct nexus with the purposes and objects sought to be achieved by the 2002 Act to combat the menace of money-laundering *having transnational consequences including impacting the financial systems and sovereignty and integrity of the countries.* (Emphases supplied).

Though the Twin Conditions (No.1) militates against the Salutary Principle of 'Presumption of innocence till proved guilty', it was upheld

A. because the Twin Conditions (No.2) faulted in Tarachand Case have been subsequently removed and the defect cured;

B. because the Twin Conditions (No.1) are already there in several enactments;

C. because they are reasonable restrictions having direct nexus with the purpose of combating the menace of money-laundering having transnational consequences.

Reason A does not answer the question. Even after removing the stipulation that the Twin Conditions (No.1) shall apply only where the offence charged is under Part A of the Schedule and punishable with imprisonment for more than 3 years (Twin Conditions No.2), would it not still be unreasonable, arbitrary and against the Salutary Principle of presumption of innocence to impose the twin conditions casting the burden on the accused to show he is not guilty? Can it not be said that the twin conditions are violative of Art.14 and are unconstitutional even after the amendment?

Reason B that such Twin Conditions are already there in some enactments does not in any way save them from the charge of being unconstitutional. What is unconstitutional cannot become constitutional by sheer dint of having been in vogue for quite some time. As held by three distinct Constitution Benches 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 Constitutional guarantee cannot be compromised, waived or acquiesced in nor can there be an estoppel against Constitution. Apart from that we saw that the similar reason given in TADA case turned out to be a result of oversight and therefore erroneous.

Reason C needs to be stated only to be quickly brushed aside. The schedule in the PMLA is now an overpopulated zoo with almost all species of Legal Enactments covered by it. For the present discussion, the subdivision of the Schedule into distinct paragraphs is not relevant, since, after the 2018 amendment the Twin Conditions apply to all offences under the Act, irrespective of whether they are in one Part or another, one paragraph or another. It comprises most of the common offences under I.P.C. like 120B, 392 to 402, 411, 417, 420, 471. Also included is Sec.63, Copyright Act. So, if a person residing in Chennai promises to supply a certain article to another person in Mumbai, representing that he has an adequate quantity of it in his godown and induces that other person to part with a sum as an advance and later fails to supply and it also comes to light he never had a godown at all, a clear case of cheating is made out under Sec.420, I.P.C. Now this is covered in the Schedule in PMLA. Can it be said that this is an offence having "direct nexus with the purposes and objects sought to be achieved by the 2002 Act to combat the menace of money-laundering having transnational consequences including impacting the financial systems and sovereignty and integrity of the countries"?

The Semantic Explosion

A contention was, probably, raised in Vijay Madanlal case that the scheduled offence in a given case may be a non-cognizable offence and yet rigors of Section 45 of the 2002 Act would result in denial of bail even to such accused. It was repelled by the bench. The reason is given in Para 136 of that judgment:

> "The person is not prosecuted for the scheduled offence by invoking provisions of the 2002 Act, but only when he has derived or obtained property as a result of criminal activity relating to or in relation to a scheduled offence *and then indulges* in process or activity connected with such proceeds of crime." (Emphasis supplied).

It is quite baffling that there appears to be certain incoherence in Vijay Madanlal Judgment. In the last cited passage, it is said that a person is not prosecuted for the scheduled offence by invoking provisions of the 2002 Act, but only when he has derived or obtained property as a result of criminal activity relating to or in relation to a scheduled offence and then indulges in process or activity connected with such proceeds of crime. The conjunction 'AND', emphasised here, is of seminal significance. It is clear from this that the author of this judgment was of the opinion that the condition precedent for prosecuting a person under PMLA is comprised of two essential jurisdictional facts: firstly, he must have derived or obtained property as a result of criminal activity; secondly, after so deriving or obtaining property, he should have indulged in process or activity connected with such proceeds of crime. The meaning is clear.

However, the interpretation placed on Sec.3 of PMLA in that very same judgment controverts the very reason given in Para 136. Sec.3 may now be visited:

> 3. Offence of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.
>
> Explanation.—For the removal of doubts, it is hereby clarified that,—
>
> (i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property,

in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

The bench holds that reading the term 'and' and taking its literal meaning as a conjunction would defeat the legislative intent. The bench holds that the conjunction 'and' in that section must be read as the disjunctive 'or'. This interpretative incursion is made in Sec.3 not to save it from any attack but to make it more effective.

Without raising the question what prompted the three-judge bench to take up this interpretative exercise, which is normally resorted to only to save a provision, we may say that probably the Bench has attempted to resolve the conflict between two portions of the same provision: the conflict between the phrase "and projecting or claiming" in the first portion and the phrases "or projecting" and "or claiming" in the Explanation. Without dwelling on the nitigrities of such interpretation, straight away, we may juxtapose this interpretation with what was said in para 136 of that judgment, which reads:

> " ….that every such offence as included in the schedule will not become an offence of Money Laundering, as such, unless pursuant thereto Crime Proceeds are derived AND THEN the offender "indulges in process or activity connected with such proceeds of crime." (Emphasis supplied).

Let us try to resolve this issue in simpler terms.

Sec.3 enumerates what acts would amount to an offence of money laundering.

Such enumeration includes, "concealment, possession, acquisition or use AND projecting or claiming it as untainted property"

The question is whether the term AND must be read as such or as "OR". Lawyers who are trained to deal with many "and/or" will not have any difficulty in understanding this AND or OR conflict.

If it is taken in its plain meaning, in accord with the Golden Rule of literal interpretation, any of the acts of concealment, possession, acquisition or use of Proceeds of Crime will not be an offence of Money Laundering unless such act is coupled with a further act of "projecting or claiming" such proceeds "as untainted property".

On the other hand, if it is taken as the disjunctive 'OR', then it will be one among the acts enumerated. That is any of the acts, namely, concealment, possession, acquisition or use crime proceeds OR projecting or claiming such proceeds as untainted property, any one of these acts, like being merely in possession, and every one of these acts, by itself, would constitute an offence of Money Laundering.

The bench not only wanted to save the Act from the challenge of unconstitutionality but also wanted to give it teeth and make

it effective. While the first task was called for in the petitions before it, the latter was not.

We are on a more important issue. In order to repel the contention that the offence of Money Laundering under the Act includes many offences which cannot by any stretch of imagination have transnational consequences, it was stated in para 136 that every such offence as included in the schedule will not become an offence of Money Laundering, as such, unless pursuant thereto Crime Proceeds are derived AND THEN the offender "indulges in process or activity connected with such proceeds of crime." A conjunction and a time-lapse divide the two parts of this sentence. The first part is deriving or obtaining the proceeds. The second part is indulging in process or activity connected with it. The Explanation enumerates the various processes or activities that should be indulged in to make it a Money Laundering offence. They are:

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property …

The intention of the legislature gathered by the Bench appears to be that deriving or obtaining Crime Proceeds from one of the Scheduled Offences PLUS one of the acts enumerated will constitute the offence of Money Laundering.

The interpretation that reads 'and' before the term 'projecting' as 'or' leads to an anomalous situation.

When a person accused of Money Laundering engages an advocate to defend him and pays his fee, at least a part of crime proceeds goes to the advocate; when he pays Court Fees for challenging the charge, another part goes to the Court; when the

advocate pays for a cup of coffee that day, another part goes to the canteen or hotel owner. Can it be said that all these persons derived or obtained crime proceeds? To negate their liability recourse must necessarily be had only to the grand old Queen of Criminal Jurisprudence, Mens Rea! Unless the prosecution has reason to believe that these persons, the advocate, the court officer, the canteen manager received such sums with knowledge that they were part of Crime Proceeds, they cannot be proceeded against. This protection applies not only to the persons denoted by way of illustration, but also to any person except the person or persons who committed the Scheduled Crime originally.

Even against the original perpetrators of a Scheduled Offence, the prosecution under PMLA cannot be launched unless the prosecutor has reason to believe that he derived or obtained proceeds from that crime and indulged in one or more activities enumerated in Sec.3 vis-a vis those proceeds. An illustration may clear the issue. A person who infringes the copyright of another by making a cinematograph film with story authored by that other person and without his consent, commits an offence under Sec.63 of the Copyright Act, being one of the Scheduled Offences under the PMLA. Suppose that film flops in the box office and the result is a huge loss to the person guilty of that offence, he does not derive or obtain any proceeds from that Crime. In such a case, can his house be attached and he be prosecuted under PMLA?

Thus the prosecution must discharge its initial burden of establishing the overt act and Mens Rea, that the accused received the proceeds, that too, with knowledge they are proceeds of crime. Only upon showing materials in support of that conclusion to the bail court, the Twin Conditions get triggered in any given case. The clear implication is that when the accused under PMLA moves for bail, the Court must be satisfied that reasonable grounds exist to believe that the accused is not guilty of such offence, meaning, not guilty of receiving proceeds

from a Scheduled Offence knowingly or having received so, has not indulged in one or more activities enumerated in Sec.3. In other words, the prosecution must first discharge the initial burden of showing two things:

- that there are reasons to believe that the accused received proceeds of a crime either by directly perpetrating that crime or receiving such proceeds from another with knowledge that they were tainted Crime Proceeds;
- that after receiving such proceeds the accused indulged in one or more activities enumerated in Sec.3, vis-à-vis such proceeds.

Sec.45 simply says that the court shall not release the accused on bail without first hearing the prosector and satisfying itself of the above two condtions and an additional condition that the accused is not likely to flee justice. In other words, it nowhere casts any burden on the accused but casts a heavy burden on the prosecutor to show the above two conditions are satisfied. The burden is on the prosecutor. The role of the accused or his advocate is only to dent or dislodge the reasons shown by the prosecution for these two aspects. The burden of showing the two features bulleted above and the burden of showing that the accused is likely to flee justice is certainly on the prosection under Sec.45 and that is why it mandates that bail shall not be granted without giving an opportunity to the prosecutor to oppose bail and where it is so opposed the court must be satisfied of two conditions before rejecting bail, the burden of showing which lies on the prosecution. The prosecutor's role is not a passive role but an active role.

We are now in a muddle. Whether the twin conditions deviate from presumption of innocence or not would depend upon how the Highest Court might interpret Sec.45, if and when a larger bench revisits the judgment in Vijay Madanlal case. I have only

hinted one plausible interpretation that could save the provision from the attack of being unconstitutional.

One more question arises regarding the and/OR/or debate with reference to Sec.3. Let us assume that a person comitted an offence of cheating under Sec.420, which is a scheduled offence and received a certain sum from it. Let us also assume that either he retains such money or spends it to his advantage. Can it be said that he also commits the offence of Money Laundering and be punished for the same act? Would it not violate another salutary principle adumbrated in Art.20 (2) that no person shall be prosecuted and punished for the same offence more than once. Unless money laundering offence is held to be a different offence, other than the Predicate Offence, punishing a person for the Predicate Offence and again for Money Laundering Offence would be violative of Sec.20 (2). After receiving Crime Proceeds, the accused must have indulged in some activity that would amount to Money Laundering offence. To say mere 'possession' or 'use' with nothing more is an additional activity constituting the offence of money laundering would be absurd because a person who receives proceeds of crime from a scheduled offence has no other option except to retain it or use it. These two cases are exhaustive. There can be no third option. Unless such retention or use is coupled with an additional feature, the whole section becomes unconstitutional. Whether projecting or claiming such proceeds as untainted can be such an additional feature is a different question.

The law relating to Money Laundering must be clear and have direct nexus to what the Bench in Vijay Madanlal case called 'Transnational Consequences'. Otherwise it would not only be clumsy but also violative of salutary principles having Constitutional recognition.

Questions:

I. Can a person deriving or obtaining crime proceeds do anything other than the acts enumerated above — concealment, possession, acquisition, use, projecting as untainted property, claiming as untainted property? What else can the person deriving or obtaining proceeds do?

II. How can one who derives or obtains proeeds from an offence acquire it thereafter? So, does not 'acquisition' as one of the activities enumerated seem meaningless?

III. If the definition of an offence be so complicated, requiring hair-splitting analysis, can a lay-man be expected to understand it and comply with it?

IV. Are Laws made for the citizens to understand and act in obedience to them or made for Lawyers and Judges alone to understand or misunderstand and argue to establish the guilt or innocence of the poor, blinking citizens waiting for verdicts that may be as unitelligible to them as such laws are?

V. Do all the scheduled offences have transnational ramifications?

VI. While everyday thousands of cases are registered in police stations across the Nation, charging offences covered under the Schedule to the PMLA, most of them resulting in generation of proceeds, what are the legislative guidelines controlling the discretion of the Enforcement Directorate to pick and choose only a few of them for prosecuting under PMLA? Is not the Act liable to be struck down on this sole ground that it gives unfettered discretion to the ED to prosecute or not to prosecute a person charged with a Scheduled Offence, for the distinct offence of Money Laundering? Will not such unguided discretion lead to corruption, vendetta and political witchhunt?

The last question, somehow, appears to have escaped the attention of the Advocates and the Bench, both, in Tarachand case and Vijay Madanlal case, though it might be a sufficient ground to either strike down the Act or read down the provisions, especially, Sec.3, by holding that among the numerous Scheduled Offences only offences having "Transnational Consequences", as rightly noted by the three-judge bench, can be taken up for prosecution under the Act.

I have not referred to the more horrific provision in Sec 24 casting a cast-iron burden of proof on the accused, since I hope that the validity of that provision is likely be decided one way or the other by the Supreme Court in the Review Petition filed against the judgment in Vijay Madanlal case.

A Wake-up Call!

This discussion highlights the quality or the lack of it in our legal draftsmen and also brings to the fore how the Courts are making all attempts to save such vague, ambiguous and complicated provisions to somehow protect the Society from offenders. Whatever be the the justification, it is an undeniable fact that the fundamental, salutary principles of the Legal System built on the foundation of Rule of Law are gradually being given a farewell, a send-off and even restricted and choked to death. The jurists of tomorrow, wake up!

III. Custodial Interrogation

Introduction:

Law tends to regulate Liberty; Logic saves it from any intrusion that would be more than what is necessary for the well being of the Society. I express my deep gratitude to Professors* who taught me a good deal in Logic that enables me to have an objective approach and debate on intricate questions in any field.

Arrogance, atrocity and autocracy never stay in memory for long. Apathy and Amnesia take over. Even those who witnessed the horrific events during the dark period of Emergency between 1975 and 1977, have easily forgotten them. The scar gets erased and the trauma vanishes quickly. Forgetting, of course, is a boon, as otherwise human mind will be burdened beyond its optimum limit and would soon collapse under that pressure. However, memory of every such instance should not get totally erased since the lessons it taught should stay so that it does not get repeated. History is the storehouse of such lessons. The memory of an event may get bedimmed in individual consciousness but the lessons it brought or taught should remain etched visibly in the collective Consciousness of the Society, rather, in the Conscience of the Society. This Societal Conscience must remain distributed to its various organs, the Institutions that guard the Society against collapse. The Supreme Court of India, as the

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'Sentinel' of the Constitution, is one of the premium Institutions that reflect such Collective Consciousness.

Why, this preamble? It is given only to show how easily, even the Sentinel, at times, slips into slumber.

I recall the last portion of the first essay in this book, where a reference was made in brief to a brief order passed by the Supreme Court dismissing a PIL filed as a Writ Petition under Art.32 challenging the practice of sending the accused to the custody of the police or other investigating agency for 'Custodial Interrogation'. That brief reference is expanded and explained here in detail.

The practice of 'custodial interrogation' is a vestige of the imperialistic doctrines left behind by the British. That is being continued in spite of the Constitutional Guarantee in Art.20 (3) of the Constitution. This is a slippery ground where the Sentinel fell short of the expectations of the Founding Fathers of our Constitution.

I had expressed my ideas in this regard, twenty-five years ago, when I wrote the book, "Law, Logic and Liberty". I am now constrained to highlight the essence of it in more explicit terms as the present scenario calls for an urgent attention to this issue.

The term 'Custodial Interrogation' is used here in its ordinary, popular sense to mean the situation where a person is interrogated by officers having authority in law to investigate into and/or prosecute a person for an offence, while keeping such person under restraint. The term 'police' as used here would include any agency that is authorised to investigate any offence.

The question, "is Custodial Interrogation permissible as against the prohibition in Article 20 (3) of the Constitution?" has not been directly considered or decided by the Supreme Court, till this date.

The question is simple and straight forward: is not custodial interrogation, done with the sole purpose of gathering evidence for the involvement of the accused in the offence from the accused himself, violative of Art.20 (3)?

- Article 20 (3): "No person accused of any offence shall be compelled to be a witness against himself."

The Setting:

The cases examined here, in fact, did not touch the real issue, but dealt only with certain related, peripheral issues. **Nandini Satpathy vs P.L. Dani, (1978) 2 SCC 424** came very near to the issue and therefore it is pivotal to this discussion. Thus, the case-law on the subject gets naturally divided into two phases: Pre-Nandini cases, in the first phase; Nandini and post-Nandini cases in the second phase.

Only two significant cases arose in this context before the decision was rendered in Nandini Case. One is **M.P.Sharma vs Satish Chandra, (1954) 1 SCC 385** decided by a bench of Eight Judges and the other is **State of Bombay Vs Kathi Kalu Oghad, 1961 SCC Online SC 74** decided by a bench of 11 judges.

At the risk of repetition, I state that in neither of these two cases nor in any other case, the issue whether custodial interrogation is permissible under the Constitution in view of the prohibition in Art.20 (3) was directly considered or answered.

Pre-Nandini cases

1) M.P.Sharma & Others vs Sathish Chandra, (1954) 1 SCC 385

The contention raised and accepted in this case was that the phrase "to be a witness against himself" in Art.20 (3) cannot be confined to oral testimony given by an accused during the trial of a criminal case against him, but it also applies to evidence of

whatever character extracted from a person who is or is likely to become incriminated thereby as an accused. On facts, the case related to search and seizure of documents from the place of the accused. In that context it was held unanimously by an eminent bench of Eight Judges that search of and seizure from the premises of the accused does not offend Art.20 (3) since the warrant is not addressed to the accused, but it is addressed to officers and therefore willl not amount to compelling the accused. However, in that context, B.Jagannadhadas, J. speaking on behalf of the Bench stated as follows in para 11;

> "...Broadly stated, the guarantee in article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in article 20(3) is 'to be a witness'. A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see section 119 of the Evidence Act) or the like..... Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in article 20(3) is "to be a witness" and not to "appear as a 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..." (Para 11).

Let us not "miss the substance for the sound". The clear proposition that emerged from this decision is that testimonial compulsion prohibited by Art.20 (3) is not confined to oral testimony given in court but it would *"extend to compelled testimony previously obtained"* from the accused.

2) State of Bombay Vs Kathi Kalu Oghad, 1961 SCC Online SC 74: AIR 1961 SC 1808

The question before the eleven-judge Bench in this case was whether taking of fingerprints and thumb impressions of the accused violated Art.20 (3). The answer given was in the negative. They held that Art.20 (3) is not attracted to that situation. In that context, the eleven-judge bench examined the judgment in M.P.Sharma case and expressed agreement with the main proposition in it, though disagreeing on the wide terms in which it had been stated.

8. "…….. Though the question directly arising for decision in that case (M.P.Sharma case) was whether a search and seizure of documents under the provisions of ss. 94 and 96 of the Code of Criminal Procedure came within the ambit of the prohibition of cl. (3) of Art. 20 of the Constitution, this Court covered a much wider field..."

9. "This Court did not accept the contention that the guarantee against testimonial compulsion to be confined to oral testimony at the witness stand when standing trial for an offence. The guarantee

was, thus, held to include not only oral testimony given in court or out of court, but also to statements in writing which incriminated the maker when figuring as an accused person. After having heard elaborate arguments for and against the views thus expressed by this Court after full deliberation, we do not find any good reasons for departing from those views. But the Court went on to observe that "'to be a witness" means "to furnish evidence" and includes not only oral testimony or statements in writing of the accused but also production of a thing or of evidence by other modes. It may be that this Court did not intend to lay down - certainly it was not under discussion of the Court as a point directly arising for decision - that calling upon a person accused of an offence to give his thumb impression, his impression of palm or fingers or of sample handwriting or signature comes within the ambit of 'to be a witness' which has been equated to 'to furnish evidence'."

.....

11 "..... the observations of this Court in Sharma's case that s.139 of the Evidence Act has no bearing on the connotation of the word 'witness' is not entirely well- founded in law. It is well-established that cl.(3) of Art.20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge.....When an

accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'..."

After the above passages, the majority set out seven propositions in Para 16 as follows:

i. An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

ii. The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion.

iii. 'To be a witness' is not equivalent to 'garnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

iv. Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing

parts of the body by way of identification were not included in the expression to be a witness.

v. 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

vi. 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

vii. To bring the statement in question within the prohibition of Art. 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made..."

The only issue that directly arose for determination in that case was whether taking of fingerprints and thumb impressions of the accused violates the guarantee in Art.20(3). Therefore, propositions iv, v and vii alone form the ratio decidendi and the other four propositions are mere observations. With due respect I submit that what they said about the judgment in M.P.Sharma case is equally true of the majority judgment in Kathi Kalu Oghad, which also covered "a much wider field".

Even if we take all the 7 propositions as binding ones, they having emanated from such an eminent source, none of them justifies the practice of custodial interrogation. Propositions i and ii almost touch the issue under consideration. They envisage that even while in police custody the accused may make a self-incriminating statement voluntarily, without any compulsion.

This is so counter-intuitive that in the real world scenario, it would be almost impossible to find an illustration of it. Will any person voluntarily make a self-incriminatory statement, that too, to an officer of the law-enforcement agency? The question that is more relevant for the present discussion would be: whether any court before which the accused appears or is produced, would send him for detention in police custody to enable him to make a self-incriminating statement voluntarily without any compulsion? Will we not be deceiving ourselves if we answer this in the affirmative? This illustrates how a semantic wordplay may lead to self-deception.

Let us imagine a situation where after producing the accused before the court, the police pray that the court may authorise the detention of the accused for a certain period so as to enable the accused to make some voluntary statements. The court must laugh at it and ask:

- "if he wants to make some statements voluntarily why should he be detained in police custody?
- Why should he not make such voluntary statements in the court itself?
- If he is not inclined to make any self-incriminating statement in Court, can he be sent to police custody thereafter? Is it not prohibited under Sec.164 (3), Cr.P.C. 1973, now Sec.183 (3) of the New Code?

I respectfully submit that no valid answer can be given to these questions and the discretion of the magistrate under Sec. 167 (2), Cr.P.C. 1973, now Sec.187 (2) of the New Code, to authorise the detention of the accused in such cutody as he thinks fit, should not be made a mockery or an empty formality. In this backdrop, let us revisit proposition (i) stated in Kathi Kolu Oghad case. The relevant portion reads: "the mere fact of being in police custody at the time when the statement in question was made would not, by itself, *as a proposition of*

law, lend itself to the inference that the accused was compelled to make the statement, though *that fact,* in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

Is not the question whether a statement was made voluntarily or under compulsion a pure question of fact? Then, why the phrase, "as a proposition of law" crept into this Proposition? Does not the phrase "though that fact" clearly affirm that it is not a question of law? Language and Logic are at loggerheads.

Proposition (ii) does not justify the practice of Custodial Interrogation. It reads: "The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion."

It does not speak about questioning the accused while keeping him in custody. Again, it also speaks of voluntary statement.

Thus, it is quite obvious that Kathi Kolu Oghad case is an authority for the proposition:

> When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony.

Kathi Kolu Oghad case is also an authority for the obvious, indisputable, proposition that voluntary statements are not statements extracted under compulsion. This is a lexicographical tautology. No statement obtained under compulsion can ever be voluntary; no statement made voluntarily can ever be said to have been made under compulsion.

Kathi Kolu Oghad case is not an authority for the proposition that obtaining self-incriminating statements from the accused while detaining him in police custody will not amount to compelling the accused to be a witness against himself which is prohibited by Art.20 (3).

3) Nandini Case

A more direct case that might come nearer to the issue under consideration arose before a Three Judge Bench in Nandini Satpathy Vs P.L. Dani, (1978) 2 SCC 424.

When the accused refused to answer a set of questions given in police station where she was summoned to appear and her refusal led to the launching of a criminal prosecution against her under Sec.179, I.P.C., the accused challenged such prosecution on the ground that it violated her right to remain silent, protected by Art.20 (3). In this context, the scope of Article 20 (3) and that of the right to remain silent were considered. In Para 10 of the judgment, His Lordship Mr.Justice V.R.Krishna Iyer, in his own inimitable style, formulated 10 questions for consideration:-

i. Is a person likely to be accused of crimes i.e. a suspect accused, entitled to the sanctuary of silence as one 'accused of any offence'? Is it sufficient that he is a potential – of course, not distant – candidate for accusation by the police?

ii. Does the bar against self-incrimination operate not merely with reference to a particular accusation in regard to which the police investigator interrogates, or does it extend also to other pending or potential accusations outside the specific investigation which has led to the questioning? That is to say, can an accused person, who is being questioned by a police officer in a certain case, refuse to answer questions plainly non-criminatory so far as that case is concerned but probably exposes him to the

perils of inculpation in other cases in posse or in esse elsewhere?

iii. Does the constitutional shield of silence swing into action only in Court or can it barricade the 'accused' against incriminating interrogation at the stages of police investigation?

iv. What is the ambit of the cryptic expression 'compelled to be a witness against himself' occurring in Article 20(3) of the Constitution? Does 'compulsion' involve physical or like pressure or duress of an unlawful texture or does it cover also the crypto-compulsion or psychic coercion, given a tense situation or officer in authority interrogating an accused person, armed with power to insist on an answer?

v. Does being 'a witness against oneself' include testimonial tendency to incriminate or probative probability of guilt flowing from the answer?

vi. What are the parameters of Section 161(2) of the Cr. Procedure Code? Does tendency to expose a person to a criminal charge embrace answers which have an inculpatory impact in other criminal cases actually or about to be investigated or tried?

vii. Does 'any person' in Section 161 Cr. Procedure Code include an accused person or only a witness?

viii. When does an answer self-incriminate or tend to expose one to a charge? What distinguishing features mark off nocent and innocent, permissible and impermissible interrogations and answers? Is the setting relevant or should the answer, in vacuo, bear a guilty badge on its bosom?

ix. Does mens rea form a necessary component of section 179 I.P.C., and, if so, what is its precise nature? Can a mere apprehension that any answer has a guilty potential salvage the accused or bring into play the exclusionary rule?

x. Where do we demarcate the boundaries of benefit of doubt in the setting of section 161(2) Cr.P.Code and Section 179 I.P.C.?

Section **179 IPC and Section 161 Cr.P.C**. (the Code of 1973) may be relevant in this context and are extracted below.

Section 179 IPC

179. Refusing to answer public servant authorised to question.—

> Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

S.214 in the 2023 Code correspond to S. 179 of the 1973 Code. They are in pari materia.

Section 161 Cr.P.C, 1973

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 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.

S.180 (1) in the 2023 Code correspond to S.161 (1) of the 1973 Code. They are in pari materia.

The Three-Judge bench took note of 2 points of defence raised by the petitioner in that case who had been charged under Section 179 IPC. They were:

A. "Any person" in Section 161 (1), Cr.P.C. excludes an accused person and therfore the accused cannot be examined by the police officer under that section.

B. Questions prone to expose the accused to a criminal charge must be excluded.

After rejecting the contention that Article 20 (3) would apply only to oral testimony given in Courts and holding that it would apply even to the stage of investigation, they proceeded to consider the core issue whether the phrase 'any person' in Section 161 (1) Cr.P.C. would include the accused. While doing so they stated the point as follows:

> "So, the first point to decide is whether the police have power under Sections 160 & 161 of the Cr.P.C. to

question a person who, then was or, in the future may incarnate as, an accused person."

After formulating the issue in terms indicated above they proceeded to state that:

> **"The Privy Council and this Court have held that the scope of S.161 does include actual accused and suspects and we deferentially agree without repeating the detailed reasons urged before us by counsel."**

The three Judge Bench cited two decisions, **Pakala Narayana Swamy's** case, decided by the Privy Council **and Mahabir Mandal's case,** decided by the Hon'ble Supreme Court.

In para 36 of the judgment in Nandini case, three paragraphs from the Privy Council case are quoted. Neither in those paragraphs nor anywhere in the judgment of the Privy Council, the above question is considered. Those paragraphs in the judgment of the Privy Council deal only with the principle of interpretation of statutes. After quoting such paragraphs relating to the principle of interpretation of statutes , it is stated in Nandini case:

> "They (the Privy Council) reached the conclusion that 'any person' in S.161, Cr.P.C. would include persons then or ultimately accused."

However, the Privy Council never reached that conclusion in that case.

In Nandini case, it is further stated:

> "The view was approved in Mahabir Mandal's case. We hold that 'any person supposed to be acquainted with the facts and circumstances of the case' includes an accused person who fills that roll because police suppose him to have committed the crime and must,

therefore, be familiar with the facts. The supposition may later prove a fiction but that does not repel the section. Nor does the marginal note 'examination of witnesses by police' clinch the matter. A marginal note clears ambiguity but does not control meaning. Moreover, the suppositious accused figures functionally as a witness. 'To be a witness', from a functional angle, is to impart knowledge in respect of a relevant fact, and that is precisely the purpose of questioning the accused under Section 161, Cr.P.C. The dichotomy between 'witnesses' and 'accused' used as terms of art, does not hold good here. The amendment, by Act 15 of 1941, of sec. 162 (2) of the Cr.P. Code is a legislative acceptance of the Pakala Narayana Swamy reasoning and guards against a possible repercussion of the ruling. The appellant squarely fell within the interrogational ring. To hold otherwise is to fold up investigative exercise, since questioning suspects is desirable for detection of crime and even protection of the accused."

The provision that was considered in Pakala Narayana Swamy was Section 162 Cr.P.C. and not Section 161. It is stated therein (Re: middle of internal Page 289 in AIR):

> "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 …….".** (Emphasis supplied).

In Pakala Narayana Swamy case the appeal before the Privy Council was by the accused charged with murder and convicted as such by the courts below. Only two questions of law raised by the Appellant were considered by the Privy Council. The first question was whether a statement made by the wife of the deceased was admissible under Section 32 (1) of the Indian Evidence Act. The second question was whether a statement of the accused made to the police before arrest was protected by Section 162 (1), Cr.P.C. **It must be noted here that there was no Constitution of India at that time though there was The Government of India Act, 1935, in which there was no provision even remotely akin to Article 20 (3) of the Constitution.** The Privy Council ruled on the first question that the statement of the wife of the deceased was admissible in evidence but on the second question it held that the statement of the accused said to have been made to the police was inadmissible under Section 162 (1) Cr.P.C., though it was stated to have been made before the accused was arrested.

Sec.162 (1), Cr.P.C., 1898 ran thus:

> No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into 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.

This provision was retained as such in the 1973 code without any change. The Corresponding provision in the New Code of 2023 is Sec.181 (1). All the three are in pari materia.

Interpreting 'any person' in Sec.162 (1) widely to include the accused is beneficial to the accused. However, a similar interpretation of Sec.161 (1) will be against his interest. As such the interpretation of that term in Sec.162 (1) cannot, ipso facto, be applied to interpreting Sec.161 (1).

The further reference in Nandini to Mahabir Mandal case is equally unwarranted in as much as the question raised and decided in Mahabir Mandal was not relating to Sec.161, Cr.P.C. but it also pertained to Sec.162.

In Mahabir's case, the Hon'ble Supreme Court had simply ruled that the bar of inadmissibility of a statement contained in section 162 (1) of the Code operates not only on statements of witnesses but also on those of the accused, following the dictum of the Privy Council seen above.

Thus, based on an erroneous assumption that the Privy Council, in Pakala Narayana Swamy, and the Hon'ble Supreme Court, in Mahabir Mandal, had laid down the law that under Section 161 (1) Cr.P.C. the police or the investigation agency may summon even the accused for interrogation, the Three Judge Bench in Nandini Satpathy came to the conclusion that a "suppositious accused" or "a suspect" can be so summoned by the police. With great respect it is submitted that this part of the judgment in Nandini's case would be per incuriam unless it is confined to mean only suspects before they are arrested and will not apply to those who become accused and are arrested. In

other words, if at all Nandini Satpathy's case is an authority for any proposition, it is so only in respect of the police summoning witnesses, one or some of whom might subsequently turn out to be the accused. It is not an authority for holding that the accused, post-arrest, can be sent to police custody for custodial interrogation

The following propositions emerge from a reading of the judgment in Nandini's case along with the two earlier cases referred to above:

A. It was not decided in Pakala Narayana Swamy case or in Mahabir Mandal case that even an accused can be summoned by the police.

B. Nandini's case too is not an authority for that and if it is taken to be such authority it would be per incuriam and the proposition has to be reconsidered.

C. In all the above-mentioned cases it has been held that no self-incriminatory statements may be elicited from the accused by the police or the investigating agency under compulsion.

D. Compulsion need not be physical threat but also includes the atmospheric tension causing mental agony and anxiety.

E. In other words, there is no need to interrogate the accused, after arrest, in a coercive atmosphere. Any attempt to aid or enable the investigating officer to elicit self-incriminatory statement or material from the accused would militate against the prohibitive sweep of Art.20 (3).

The wise words of Justice V.R.Krishna Iyer in that judgment must never be lost sight of:

> "We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or

violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like ……." (page 425, SCC).

The question in Nandini case was:

Whether the accused can be summoned by police for eliciting facts?

Nandini case is NOT an authority for a positive answer to this question since it was assumed that the question had been so answered in Pakala Narayanaswamy case and Mahabir Mandal case, which assumption turns out to be incorrect.

The question that is now under consideration is different. It is: Whether the accused can be interrogated by police while the accused is kept in custodial detention?

A positive answer to the first mentioned question does not entail a positive answer to the one under consideration.

There is no reason to whittle down the significant protection given in Art.20 (3). The apprehension that interrogating the accused while detaining him in police custody is a very effective tool to bring out the truth is mislaid. In several cases, the accused make false self-incriminating statements unable to bear the torture, physical or mental. The police ought to be denied the luxury of taking the easy route in crime detection. They must do their field work properly, investigate and gather evidence instead of staying in police station, kicking and torturing the accused and getting compelled statements, true or false. We may not have Sherlock Holmes but at least we do have great investigators who quickly did enormous field work and forensic analyses to solve a horrific crime like the murder and massacre that took the lives of several persons, including a former prime minister of India*.

In any case, Art.20 (3) cannot be sacrificed at the altar of convenience.

Where the magistrates acting under Sec.187 (2) of the New Code of 2023 (BNSS), corresponding to Sec.167 (2) authorise the detention of the accused in police custody or in the custody of the investigating agency, it would amount to a clear violation of Art.20 (3), unless it is authoritatively held that placing the accused under the custody of police or any other investigation agency for the purpose of making custodial interrogation is not prohibited by Art.20 (3).

There could be no other reason for placing the accused under the custody of police or any other investigation agency except for making custodial interrogation to elicit truth, since all other processes like identification parade, medical examination, voice test, taking specimen signature or thumb impression can very well be done without detaining the accused or even when he is detained in judical custody.

Though extraction under compulsion of self-incriminatory statements from the accused is prohibited under Article 20 (3) of the Constitution, in several cases that were decided after Nandini's case, the Hon'ble Supreme Court had assumed that custodial interrogation is permissible under the constitution.

State Rep By The CBI vs Anil Sharma, (1997) 7 SCC 187

In this case, a Two Judge Bench of the Hon'ble Supreme Court simply accepted the submission of the CBI and stated thus in para 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 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 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."

There is no discussion in this judgment about the constitutionality of custodial interrogation. Practical utility cannot override a constitutional prohibition.

The supposition that "responsible police officers would conduct themselves in a responsible manner" has been frequently belied in several cases as would be elaborated hereunder.

D.K.Basu & another vs State of West Bengal, (1997) 1 SCC 416

While Anil Sharma was decided on 03.09.1997, another Two Judge Bench had rendered its judgment on 18.12.1996 in D.K.Basu. It was confronted with a very scary situation in which there had been several custodial deaths, that is, death of detenues and arrestees while they were in the custody of police or some other investigating agency like CBI, ED and others. It is surprising that just about nine months before the decision was rendered in Anil Sharma's case, the Hon'ble Supreme Court had noticed in D.K.Basu, glaring facts of inhuman treatment meted out to the detenues and arrestees in such custody, and yet it was stated in Anil Sharma's case that the court had 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. It is more surprising that while dealing with such series of custodial deaths, the Two Judge Bench in D.K.Basu's case did not advert to the prohibition in Article 20 (3). On the other hand it proceeded to state that "the welfare of an individual must yield to that of the community". On such premise, they stated that there was need "to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge". It is still more surprising that they said so even after noticing the statement in Miranda* by the American Supreme Court that the Fifth Amendment Right cannot be abridged. With great respect it is submitted that the constitutional provisions are embedded in a well thought out, collective, socio-philosophical wisdom of the society and cannot be bypassed or narrowed down by philosophical doctrines subscribed to by individuals, whoever they might be, even judges.

In line with the statement in Anil Sharma that custodial interrogation is a useful tool in investigation, similar statements were made in a few cases by the Hon'ble Supreme Court. They are:-

i. CBI Vs Anupam J Kulkarni (Two Judge Bench), (1992) 3 SCC 141 – SCC online Web Edition.

ii. CBI vs Vikas Mishra, (2023) 6 SCC 49 – SCC online Web Edition.

iii. V.Senthil Balaji Vs The State (2024) 3 SCC 51 – SCC online Web Edition.

In none of these cases the question whether permitting Custodial Interrogation is violative of Art.20 (3) was raised or duly considered and decided.

* Miranda vs Arizona, 384 U.S. 436 (1966)

In the judgment dated 07-08-2023 in V.Senthil Balaji vs State, (2024) 3 SCC 51 the two-judge Bench of the Supreme Court, in Para 56 to 61, considered Sec.167 (2) of the 1973 Code that granted discretion to the Magistrate to authorise detention of the accused in such custody as he thinks fit. In that scholarly judgment, the Bench made a fine distinction between 'detention' and 'custody', culling out meanings assigned in several dictionaries to these terms. However, it did not consider the question whether there were enough guidelines for the exercise of the said discretion. The Bench noticed that the Law Commission had found that there were no such guidelines and even after that the Bench left the issue at it, since it was not raised and argued in that case. Moreover, the discussion in that case revolved more around the question of the period for which detention may be ordered.

In Vijay Madanlal Choudhary vs Union Of India, (2023) 12 SCC 1, repeated references are made to Nandini case, M.P.Sharma case and Kathi Kalu Oghad in several paragraphs. All such references are in passages setting out the submissions of the advocates. The Bench did not deal with these cases or the issue now engaging us.

Thus, the issue whether permitting Custodial Interrogation is violative of Art.20 (3) has NOT been duly considered and decided in any case, till date. In all the cases cited above it was taken for granted that Custodial Interrogation is not impermissible under the constitution, though such a presumption is unwarranted and is not based on any clear authority to that effect.

It is an undeniable fact that in several cases the accused are sent to police custody just for the asking mechanically and without application of mind. The recent examples of death of persons due to custodial torture call upon the Sentinel to rise

up to the occasion and resolve this issue by issuing unfailing guidelines for the exercise of discretion by the magistrates under Sec.187 (2) os BNSS, 2023, upholding the sanctity of the Constitutional protection embedded in Art.20 (3).

IV. Snippets of Stray Thoughts

Stifling the Voice

Courts have repeatedly said that Bail is the Rule and Jail is the Exception. This statement is observed more in breach than in compliance. One glaring example is provided in cases where the accused is booked for defamatory speech or writing under Sections 499 to 508 or for Hate Speech under Sections 153A and 505 of IPC. Social Media Platforms are infested with these instances since hate has now become the password for many politicians and Social Media Personalities!

None of these offences is punishable for a term of more than 3 years of imprisonment. Most of them are punishable only with imprisonment for a maximum period of two years.

Those in power make use of these provisions to settle scores against their political opponents.

Persons arrested are detained in custody for at least a few days before they could get bail from superior courts.

One question is never asked: *for what purpose a person accused under such provisions is arrested?* No investigation, whatsoever, is called for in such cases. Where someone has made a speech or written something that appears to constitute one of these offences, the only question to be addressed before charging that person of such an offence is whether he spoke or

wrote that. The further question whether what he spoke or wrote constitutes an offence has to be determined by a court, after trial, and, that question does not fall within the domain of the police. There is absolutely no scope for any investigation in such cases, since, in most of the cases the speech or the writing would have been recorded and not denied by the maker. The denial may be only with reference to its import and that can be determined only by the court. Whenever a person accused under any of these provisions seeks bail or anticipatory bail, unfortunately the question, "for what purpose he is arrested or about to be arrested" is not asked. The discussions in courts revolve more about the contents of such speech or writing, and, remarks are made on it which are flashed in the News Media immediately. At times, the courts even give lengthy sermons to the accused in such cases. When I say courts, it includes even the highest. Should not in all such cases, bail must be readily given? Should it not be ruled that arrest in such cases is unwarranted and illegal, being against the guidelines set out in Arnesh Kumar's case (Supra).

Arrest and detention pending investigation or trial cannot take the place of punishment meted out to the accused who has not yet been proved guilty.

The police and the magistracy ought to be sufficiently sensitised on this aspect. The growing tendency to arrest political opponents on accusation under such offences must itself be arrested so that law ceases to be the playground for vendetta-politics.

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The 24 hour Rule, a misnomer!

It is generally believed, unfortunately even by Learned Magistrates, that whenever the police arrests a person and produces the arrestee before the court within 24 hours from the time of arrest, it is in due compliance with law. This Twenty-four

hour rule turns out to be one that is more abused than complied with. In most of the cases a person is simply taken away by officers to the Police Station and the arrest is registered after a considerable delay and thereafter the 24 hour period is reckoned from the time the arrest is so registered.

The 24 hour rule itself is a misnomer. The requirement of law, as it is in Sec.57, BNSS of 2023 and even as it was in the earlier Code, is not that. The police officer is bound to produce the accused before the Court or the officer in charge of a police station *"without unnecessary delay"*.

> 57. A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

This provision is easily overlooked and the next following provision alone is noticed.

> 58. No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 187, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court, whether having jurisdiction or not. (Emphases supplied).

A closer reading makes it clear that these two provisions deal with two different aspects. Sec.57 casts an obligation on the officer who makes the arrest. Sec.58 casts an obligation generally on any police officer. While Sec.57 casts a positive obligation, Sec.58 casts a negative obligation. In clearer terms, while Sec.57 casts, on the Officer making the arrest, a positive obligation to take or send the accused before a Magistrate or the Officer

in charge of a Police Station, Sec.58 casts, on every officer, a negative obligation, namely, that he shall not detain the accused in custody for a period longer than what is reasonable under all the circumstances of the case but not exceeding 24 hours. This difference is significant but mostly overlooked.

The person making arrest must comply with the mandatory obligation cast on him under Sec.57. He must, immediately take the arrestee to the nearest magistrate or to the Police Station without unnecessary delay, meaning, if there is delay, he is obliged to explain how it was necessary. He cannot rely upon Sec.58 to claim entitlement to detain the person arrested for 24 hours. The maximum period of 24 hours is not an alternative to the requirement to take the arrestee without unnecessary delay to the nearest magistrate or to the Police Station. The maximum period is an additional, precautionary mandate of the Code.

Does the officer making the arrest have a discretion as to where to take or send the accused? No. The question whether the arrestee should be taken to the nearest magistrate or police station is answered by the phrase "subject to the provisions herein contained as to bail" in Sec.57 itself.

Provision in BNSS as to Bail are found in Chapter XXXV.

> 480. (1) When any person other than a person accused of a non-bailable offence is arrested without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:"

Sec.480 deals with grant of bail to a person arrested for commission of a bailable offence

> 480. (1) When any person other than a person accused of a non-bailable offence is arrested without warrant

by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:"

Sec.482 deals with grant of bail to a person arrested for commission of a non-bailable offence.

The dichotomy is clear. Only in the case of a bailable offence, the officer in charge of a police station has the power under Sec.480 to release the arrestee on bail. In a case of non-bailable offence, only the Court may grant bail as provided in Sec.482.

Therefore, it follows that the phrase "subject to the provisions herein contained as to bail" in Sec.57 clearly clinches the issue as to where the accused may be sent immediately after arrest:

- to the court or the police station, if the offence is bailable;
- only to the court if it is non-bailable.

It cannot be presumed that the Code gives an unguided discretion to the officer making arrest to send the arrestee either to the police station or to the court. That is circumscribed by the provisions in Sec.480 and Sec.482, the provisions as to bail.

If this position is authoritatively laid down as a binding proposition of law, the custodial overreach by the police will stand substantially curtailed.

The general opinion now prevalent that a person arrested on accusation of a non-bailable offence may be taken to police station and detained there for 24 hours seems to be not in accordance with law.

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A Journey Through The System:

Justice delayed is Justice denied! Though the phrase sounds cliched, it is true and significant. The active life of a human being is about 40 years and when one is made to wait for more than a quarter or even half of it to get justice in a matter of importance to life, it only leads to frustration. To instill confidence in the minds of people that they are well protected by a system of justice, they must be assured of at least a few basic features:

1. Their grievance will be fully heard, considered and decided.
2. The judge must be impartial.
3. A quick redressal will be delivered.
4. The redressal will be effective and enforceable.

The 1st feature comprises of the two essential principles of Natural Justice, namely, Audi Alteram Partem and Nemo Judex In Causa Sua. The 2nd and 3rd are equally essential. These are the four pillars on which stands the edifice of Justice.

I am impelled to make a few suggestions in this regard, backed by experiene gained in fifty years, with the hope that they might get due consideration from those who can effect appropriate changes in it. I admit that the suggestions can be made better by a process of debate and discussion.

A. In some cases, I find that the judge attempts to be too fast in arriving at a conclusion, so fast that some essential facts are missed out leading to the filing of review or curative petitions. I am reminded of one significant statement of the great philosopher Immanuel Kant in his preface to his magnum opus, "The Critique of Pure Reason". As translated by Norman Kemp Smith*, it reads: "…. if the size of a

* Page 13 in Immanuel Kant's Critique of Pure Reason, Translated by Norman Kemp Smith, Macmillan & Co., Ltd., London, 1929.

volume be measured not by the number of its pages but by the time required for mastering it, it can be said of many a book, that it would be much shorter if it were not so short." Therefore, the Judge may do well by first gathering the facts by listening to the advocate patiently. A little more time spent on this shouldn't matter much, for a stitch in time saves nine. An over anxiety to do something fast might put a brake and delay the process. This suggestion might seem too elementary to be reiterated but it is one that is easily forgotten in practice.

B. I also find two extreme positions adopted by some judges. One where the judge is just a silent spectator, listening to the Counsel and simply reserving orders not giving an iota of what he has concluded from the submissions made in the case; the second kind is the judge who becomes too active with his comments and sermons forcing the advocate to argue with the judge instead of aruguing before the judge. Would it not be better if a golden mean is adopted where the judge actively participates in the discussion to the extent, only to the extent, to get more clarity on the submissions made? It will help the advocates to clarify some grey areas in their submission and also, to some extent, dispel the avoidable apprehension that post hearing something had happened to change the mind of the judge. I wonder: what is the sanctity in keeping the result in suspense till the judgment comes in a sealed cover, opened and pronounced? Is it wrong to have a transparent discussion in the court hall indicating which submissions are acceptable to the judge and which are not, postponing only the formal expression of it in writing by reserving the judgment? Will it not dispel the apprehension just mentioned above?

C. To ensure effective redressal, the judgment or order, interim or otherwise, should be clear and specific. No half-hearted order should be given with reluctance. If the circumstances of the case requires a certain remedial or restrictive order the same should be granted whole heartedly and effectively. If safegaurds are required these too may be added with clarity. Granting an order to maintain Status Quo without clarity of what the status is at that moment leads only to more confusion and avoidable contempt proceedings. Such an order reflects the reluctance on the part of the bench to hear the facts in a little more detail. Hearing for a minute or two more would ensure that the order passed carries adequate clarity and conviction. Civil contempt proceedings must aim at enforcement rather than punishment.

D. An interim order must normally and generally be operative till the matter is heard and decided. Only in a rare case should it be made operative till a certain date. However, in many cases, the judges grant interim orders till the date to which the matter is adjourned. Such "till then orders" lead to the advocates troubling the court to extend it from time to time and in some cases, when the case is not called due to paucity of time, the advocates have to anxiously wait to mention and get an extension. All these are avoidable. This practice, to some extent, springs from an apprehension of foul play by which a party getting an interim order might try to delay the case being listed for hearing. The apprension reflects the defect in the system of listing cases, which subject takes us to the next point in this discussion.

E. In subordinate courts the calendar system is followed and there is no confusion about when a matter might possibly be heard; at least it gives a certainty to the advocates when they should be ready to argue a case. However, in High Courts and the Supreme Court, the calendar system is not followed; instead, the cause-list system is being followed. The latter system carries with it some uncertainty. Another facet of the problem is that when a judge adjourns the matter to a particular date, on many occasions, the matter does not get listed on such adjourned day. Whenever there is a change of roster and a case gets shifted to the board of another judge, the judicial order passed earlier to post the matter on a fixed date is not honoured. Streamlining the procedure of listing will go a long way in reducing instances of avoidable adjournments and delay caused thereby. Every advocate must know when he should be ready to argue a case. Uncertainty in this regard is not conducive to the cause of justice. The High Courts and the Supreme Court may consider following the calendar system and causelists can be published only to indicate the bench before which the case is listed and its serial number in the list.

F. One more aspect about listing of the case need to be highlighted. When an advocate on record approaches a Senior Advocate with a brief, he is unable to even tell the Senior Advocate when the case will get listed. That is an awkward situation. If a Senior Advocate accepting the brief based on the belief that the case might be listed on a particular day is told in the last minute the case will not be listed on that day but only on the next day, that Senior Advocate will feel greatly embarrased as he may not be available on the next day. Either he

should return the brief and the AOR should find and engage another Senior Advocate in the eleventh hour or seek an adjournment. All these can well be avoided by giving an option to the AOR to mention in a prescribed form two alternative dates for listing the case.

G. I have noticed in many courts (I avoid the term 'most' due to reverence) more time is spent on dealing with peripheral issues than on core issues. The judge spends much of his time on the formal aspect of the case, whether notice has been served properly, whether Legal Representatives are on record, etc. All these have to be settled at the level of the Registry and should not swallow the valuable time of a judge. The same applies to requests for adjournments. A rule may be made that adjournment Memos after serving all the opposite sides, have to be filed 24 hours in advance and if there is consensus the registry will give a fresh date otherwise the Memo will be heard by a Registrar. Only when the Registrar finds it difficult, it should be placed before court. This can be the normal procedure except where due to unavoidable and unforseeable circumstances an advocate is prevented from following this.

H. By spending the first five minutes in allocating appropriate time-duration for cases to be heard that day in the presence of AORs or their juniors, a judge will make it clear when a case is likely to be taken up. To some extent, the sequence system followed by the Supreme Court serves this purpose though too much jumping the queue may be avoided while fixing the sequence. It is also desirable that the sequence be fixed and published the previous day itself.

I. When an advocate takes an adjournment in one of his cases listed for hearing that day because he has another listed for hearing at the same time before another judge and eventually that other case is not taken up for some reason or other, then both the cases get adjourned. Unwittingly the bar and the bench contribute thus to the mounting arrears of cases.

J. With great respect to all the Learned Judges, past, present and future, I pray with utmost humility with folded hands to all those who are ordained to write judgments not to make reading them an ordeal. I request them to write brief, simple but clear judgments, avoiding all temptations to exhibit their unmatched erudition and flair for flowery expressions. A lot of time is spent in dictating facts and submissions. Instead the Written Submissions may be directed to be submitted by both or all sides and these may form part of the judgment as annexures so that straight away the dictation could start with the point that arises for consideration.

K. I now recall one suggestion which I made, in a paper titled "Welfare of Advocates", that I presented in a seminar four decades ago, in the early 1980s. It has since been partly implemented, of course, not as a result of my paper but because every innovative idea descends contemporaneously upon several minds. I had suggested in that paper that chief examination in civil cases may be replaced by evidence through affidavit. This has been implemented. I had further suggested that instead of recording of evidence by court being the rule and recording of evidence by Commissioner appointed by court being the

exception the procedure may be reversed. Let trial be conducted before Advocate Commissioners appointed from a panel of advocates except where upon an application the court is satisfied that demeanour of witness is significantly relevant in a given case. I had suggested that a panel of advocates having 10 to 15 years standing may be drawn up by the courts and a nominal, affordable fee is fixed to be paid by both sides to the Commissioner recording the evidence. Though now in some High Courts retired district judges are appointed on ad hoc basis to do this, instead of that, if recording of evidence by advocate commissioners is adopted, it would not only go a long way in reducing the burden of the court but also help middle order advocates and it would prove to be an advocate-welfare measure.

L. I do acknowledge that despite being over-burdened, courts are performing well. Still that shouldn't halt our deliberations to improve the system and make it better. While granting leave under Art.136 or even while ordering notice to the respondents in an S.L.P., would it not be better to formulate the question, to consider which, leave is granted or notice is ordered? Would it not relieve the registry from posting that case only before the Senior most of the judges who granted leave or ordered notice and instead leave it to the computer to do the job of listing a case before any bench in a random manner?

I sincerely hope that the above suggestions are taken in the right spirit and such of them found worthy of being considered be discussed, modified and fine-tuned appropriately before being taken to the next stage of implementation. I recall with humility how my Learned Senior Sri R.M.Seshadri patiently lent his ear

when I had expressed to him most of the above ideas in 1982 and encouraged me with an appreciative nod!

I end this book with a satisfaction of having discharged a duty that I owe to the legal fraternity. My endeavour to do more would never end. Jai Hind!