IN THE HIGH COURT OF DELHI AT NEW DELHI
WRIT PETITION (CIVIL) NO. 11901 OF 2015

IN THE MATTER OF:

PUBLIC RESOURCE ORGANISATION, INC. & ORS. …PETITIONERS

VERSUS

UNION OF INDIA & ANR. …RESPONDENTS

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1951 SCC 936 : 1951 SCC OnLine SC 54

In the Supreme Court of India

(BEFORE M.C. MAHAJAN AND VIVIAN BOSE, JJ.)

HARLA . . Appellant;

Versus

STATE OF RAJASTHAN . . Respondent.

Criminal Appeal No. 5 of 1951[†], decided on September 24, 1951

Advocates who appeared in this case :

H.J. Umrigar, Advocate, for the Appellant;

G.C. Mathur, Advocate, for the Respondent.

The Judgment of the Court was delivered by

VIVIAN BOSE, J.— The appellant was convicted under Section 7 of the Jaipur Opium Act and fined Rs 50. The case as such is trivial but the High Court of Rajasthan in Jaipur granted special leave to appeal as an important point touching the vires of the Act arises. We will state the facts chronologically.

2. It is conceded that the Rulers of Jaipur had full powers of Government including those of legislation. On 7-9-1922, the late Maharaja died and at the time of his death his successor, the present Maharaja, was a minor. Accordingly, the Crown Representative appointed a Council of Ministers to look after the Government and administration of the State during the Maharaja's minority.

3. On 11-12-1923, this Council passed a Resolution which purported to enact the Jaipur Opium Act, and the only question is whether the mere passing of the Resolution without promulgation or publication in the gazette, or other means to make the Act known to the public, was sufficient to make it law. We are of opinion that it was not. But before giving our reasons for so holding, we will refer to some further facts.

4. About the same time (that is to say, in the year 1923 — we have not been given the exact date) the same Council enacted the Jaipur Laws Act, 1923. Section 3(*b*) of this Act provided as follows:

> "**3.** Subject to the prerogative of the Ruler the law to be administered by the Court of Jaipur State shall be as follows:
>
> * * *
>
> **(*b*)** All the regulations now in force within the said territories, and the enactments and regulations that may hereafter be passed from time to time by the State and published in the Official Gazette."

This law came into force on 1-11-1924.

5. It is admitted that the Jaipur Opium Act was never published in the gazette either before or after 1-11-1924. But it is contended that that was not necessary because it was a "regulation" already in force on that date.

6. The only other fact of consequence is that on 19-5-1938, Section 1 of the Jaipur Opium Act was amended by the addition of sub-section (*c*) which ran as follows:

> "(*c*) It shall come into force from 1-9-1924."

The offence for which the appellant was convicted took place on 8-10-1948.

7. Dealing first with the last of these Acts, namely, the one of 19-5-1938, we can put that on one side at once because, unless the Opium Act was valid when made, the mere addition of a clause fourteen years later stating that it shall come into force at a date fourteen years earlier would be useless. In the year 1938 there was a law which required all enactments after 1-11-1924, to be published in the gazette. Therefore, if the Opium Act was not a valid Act at that date, it could not be validated by the publication of only one section of it in the gazette fourteen years later. The Jaipur Laws Act of 1923 required the whole of the enactment to be published; therefore publication of only one section would not validate it if it was not already valid. We need not consider whether a law could be made retroactive so as to take effect from 1924 by publication in 1938, though that point was argued. That throws us back to the position in 1923 and raises the question whether a law could be brought into operation by a mere resolution of the Jaipur Council.

8. We do not know what laws were operative in Jaipur regarding the coming into force of an enactment in that State. We were not shown any, nor was our attention drawn to any custom which could be said to govern the matter. In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge.

9. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a

resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential.

10. In England the rule is that Acts of Parliament become law from the first moment of the day on which they receive the Royal assent, but Royal Proclamations only when actually published in the Official Gazette. See footnote (*a*) to para 776, p. 601 of *Halsbury's Laws of England* (Hailsham Edition), Vol. VI and 32. *Halsbury's Laws of England* (Hailsham Edition), p. 150, note (*r*). But even there it was necessary to enact a special Act of Parliament to enable such proclamations to become law by publication in the gazette though a Royal Proclamation is the highest kind of law, other than an Act of Parliament, known to the British Constitution; and even the publication in the London Gazette will not make the proclamation valid in Scotland nor will publication in the Edinburgh Gazette make it valid for England. It is clear therefore that the mere enacting or signing of a Royal Proclamation is not enough. There must be publication before it can become law, and in England the nature of the publication has to be prescribed by an Act of Parliament.

11. The Act of Parliament regulating this matter is the Crown Office Act of 1877 (40 and 41 Victoria Ch. 41). That Act, in addition to making provision for publication in certain Official Gazettes, also provides for the making of rules by Order-in-Council for the best means of making proclamations known to the public. The British Parliament has therefore insisted in the Crown Office Act that not only must there be publication in the gazette but in addition there must be other modes of publication, if an Order-in-Council so directs, so that the people at large may know what these special laws are. The Crown Office Act directs His Majesty in Council carefully to consider the best mode of making these laws known to the public and empowers that body to draw up rules for the same and embody them in an Order-in-Council. We take it that if these proclamations are not published strictly in accordance with the rules so drawn up, they will not be valid law.

12. The principle underlying this question has been judicially considered in England. For example, on a somewhat lower plane, it was held in *Johnson* v. *Sargant & Sons*[1] that an order of the Food Controller under the Beans, Peas and Pulse (Requisition) Order, 1917 does not become operative until it is made known to the public, and the difference between an order of that kind and an Act of the British Parliament is stressed. The difference is obvious. Acts of the British Parliament are publicly enacted. The debates are open to the public and the Acts are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has

been done. They also receive wide publicity in papers and, now, over the wireless. Not so Royal Proclamations and orders of a Food Controller and so forth. There must therefore be promulgation and publication in their cases. The mode of publication can vary; what is a good method in one country may not necessarily be the best in another. But reasonable publication of some sort there must be.

13. Nor is the principle peculiar to England. It was applied to France by the Code Napoleon, the first article of which states that the laws are executory "by virtue of the promulgation thereof" and that they shall come into effect "from the moment at which their promulgation can have been known". So also it has been applied in India in, for instance, matters arising under Rule 119 of the Defence of India Rules. See, for example, *Crown* v. *Manghumal Tekumal*[2], *Shakoor Hasan Kachhi Memon* v. *Emperor*[3] and *Babulal Rajoolal Jain* v. *Emperor*[4]. It is true none of these cases is analogous to the one before us but they are only particular applications of a deeper rule which is founded on natural justice.

14. The Council of Ministers which passed the Jaipur Opium Act was not a sovereign body nor did it function of its own right. It was brought into being by the Crown Representative, and the Jaipur Gazette Notification dated 11-8-1923 defined and limited its powers. We are entitled therefore to import into this matter consideration of the principles and notions of natural justice which underlie the British Constitution, for it is inconceivable that a representative of His Britannic Majesty could have contemplated the creation of a body which could wield powers so abhorrent to the fundamental principles of natural justice which all freedom-loving people share. We hold that, in the absence of some specific law or custom to the contrary, a mere resolution of a Council of Ministers in Jaipur State without further publication or promulgation would not be sufficient to make a law operative.

15. It is necessary to consider another point. It was urged that Section 3(*b*) of the Jaipur Laws Act of 1923 saved all regulations then in force from the necessity of publication in the gazette. That may be so, but the Act only saved laws which were valid at the time and not resolutions which had never acquired the force of law.

16. The appeal succeeds. The conviction and sentence are set aside. The fine, if paid, will be refunded.

Appeal allowed

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† Appeal from the Judgment and Order dated 18-8-1950 of the High Court of Judicature for Rajasthan at Jaipur (Nawal Kishore, C.J. and Dave, J.) in Criminal Reference No. 229 of Samvat 2005 : **AIR 1951 Raj 25 : 1950 SCC OnLine Raj 27 [Reversed]**

[1] *Johnson* v. *Sargant & Sons*, (1918) 1 KB 101 : 87 LJ KB 122

[2] *Crown* v. *Manghumal Tekumal*, ILR 1944 Karachi 107 : 1943 SCC OnLine Sind CC 4

[3] *Shakoor Hasan Kachhi Memon* v. *Emperor*, ILR 1944 Nag 150 : 1943 SCC OnLine MP 136

[4] *Babulal Rajoolal Jain* v. *Emperor*, ILR 1945 Nag 762 : 1944 SCC OnLine MP 42

(2014) 10 Supreme Court Cases 673

(BEFORE RANJAN GOGOI AND M. YUSUF EQBAL, JJ.)

a GULF GOANS HOTELS COMPANY LIMITED AND ANOTHER . . Appellants;

Versus

UNION OF INDIA AND OTHERS . . Respondents.

Civil Appeals Nos. 3434-35 of 2001† with Nos. 3436-39 of 2001, b decided on September 22, 2014

A. **Constitution of India — Arts. 300-A, 21, 48-A and 51-A(g) — Deprivation of property without "authority of law" — Demolition of property ordered to protect environment, but based on executive guidelines not having force of "law" — Impermissibility — Held, violation of Art. 21 of Constitution on account of alleged environmental violation cannot be c subjectively and individually determined — It can only be done through law — Words and Phrases — "Authority of law" — Environment (Protection) Act, 1986, Ss. 3 and 6**

B. **Administrative Law — Administrative Action — Administrative or Executive Function — Administrative Orders/Decisions/Executive Instructions/Orders/Circulars/Guidelines — Executive Guidelines — d Enforceability — Pre-conditions — Guidelines cannot be enforced unless shown to have acquired the force of "law" — To acquire such force of law, guidelines concerned must satisfy minimum elements of law i.e. they must inter alia possess a certain form possessed by other laws in force, encapsulate a clear mandate and disclose a specific purpose — Further, such guidelines claimed to be law, need some authentication and must be notified e or made public in order to bind citizens**

— Alleged environmental guidelines putting restriction on construction activity in coastal areas and sea beaches in Goa within 500 m of high tide line (HTL), held had no force of law as important ingredient of mandate was missing therein and guidelines were neither authenticated as per provisions of Art. 77 of Constitution nor were they notified/published — Hence, such f guidelines could not be enforced to prejudice of appellants by ordering demolition of their properties on ground of they being within restricted area i.e. between 90 to 200 m from HTL — Further held, Stockholm Conference, 1972 in which India was participant and which was the basis of these guidelines, having nowhere expressed any internationally approved parameters of acceptable distance from HTL, incorporation of any such g feature of international values in municipal laws of the country cannot be made through guidelines — Jurisprudence — Law — Elements of law — Natural Justice — Publication — Constitution of India — Arts. 77 & 73 and 166 & 162 and Sch. VII List I Entries 13 and 14 — International Law — International Law vis-à-vis Municipal Law — Incorporation of International Law into Municipal Law — Permissible modes

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† From the Judgment and Order dated 13-7-2000 in WPs Nos. 212 of 1991 and 309 of 1989 passed by the High Court of Bombay at Goa

C. **Jurisprudence — Law — What is — Elements of law — Indispensable elements — Held, law must possess a certain form; contain a clear mandate/explicit command which may be prescriptive, permissive or penal and the law must also seek to achieve a clearly identifiable purpose — Ingredients of disclosure of clear mandate and purpose are indispensable — Constitution of India — Art. 13 — General Clauses Act, 1897 — S. 3(29) — Words and Phrases — "Law"**

D. **Environment Protection and Pollution Control — Water/River/Coastal Pollution — Coastal Areas/Wetlands/Coastal Regulation Zone Notifications — Safeguarding environment of coastal areas — Executive guidelines restricting construction activity in coastal areas and sea beaches in Goa within 500 m of high tide line (HTL) — Said guidelines not shown to have force of law, hence found unenforceable — Orders passed by Goa State authorities on basis of above guidelines and confirmed by High Court, requiring appellants to demolish their constructions on ground of they being within restricted area i.e. between 90 to 200 m from HTL, set aside — Environment (Protection) Act, 1986 — Ss. 3 and 6 — Environment Protection and Pollution Control — Water/River/Coastal Pollution — Coastal Regulation Zone (CRZ) Notification w.e.f. 19-2-1991**

E. **Administrative Law — Administrative Action — Administrative or Executive Function — Administrative Orders/Decisions/Executive Instructions/Orders/Circulars/Guidelines — Government orders/decisions — Authentication of, in required manner under Arts. 77 and 166 of Constitution, held, is mandatory — Consequences of non-authentication — Held, in absence of such authentication, orders/decisions would not be treated as orders/decisions of Government but mere expression of opinion — On facts, unauthenticated environmental guidelines putting restriction on construction activity in coastal areas and sea beaches in Goa within 500 m of high tide line (HTL), held could not be treated as order of Government — Hence, on basis of such guidelines, orders for demolition of properties of appellants could not be made on ground that their constructions were between 90 to 200 m from HTL — Constitution of India, Arts. 77 and 166**

F. **Administrative Law — Administrative Action — Administrative or Executive Function — Administrative Orders/Decisions/Executive Instructions/Orders/Circulars/Guidelines — Publication of — When mandatory — What is claimed to have force of law can only bind citizens when it is notified or made public — Mode of publication — Held, must be as prescribed by statute — In absence of such statutory prescription, publication has to be made through customarily recognised official channel i.e. Official Gazette — On facts, where alleged environmental guidelines were not gazetted, held same were not enforceable — Natural Justice — Publication — Executive Wing of State — Authentication (Orders and Other Instruments) Rules, 1958 — Authentication (Orders and Other Instruments) Rules, 2002 — Constitution of India, Arts. 77 and 166**

The appellants were the owners of Hotels, Beach Resorts and Beach Bungalows in Goa. It was alleged that constructions raised by the appellants were in derogation of the environmental guidelines in force warranting demolition of the same as a step to safeguard the environment of the beaches in Goa. Specifically, it was the case of the State that the constructions in question were between 90 to 200 m from the high tide line (HTL) despite the fact that under the guidelines in force, constructions within 500 m of HTL were prohibited. The State authorities had accordingly issued orders of demolition of properties of the appellants. Challenging these demolition orders, the appellants had filed writ petitions before the High Court. The respondent, Goa Foundation, an NGO claimed to be dedicated to the cause of environmental and ecological well being of Goa, also filed writ petitions before the High Court seeking demolition of the constructions raised by the appellants. The High Court, by separate impugned orders upheld the orders passed by the authorities requiring the appellants to demolish their existing structures. It is against the aforesaid orders passed by the High Court, the present appeals were filed.

The appellants took the stand that at the relevant point of time when building permissions and sanctions were granted in respect of the constructions undertaken, the prohibition was with regard to construction within 90 m from HTL and none of the constructions were within the said divide. They further contended that the alleged environmental guidelines were not "law" so as to constitute activities contrary thereto as acts of infringement of the law and hence illegal.

The question arose before the Supreme Court as to whether the following environmental guidelines had the force of "law":

(*i*) Directives to the State Governments in Letter dated 27-11-1981 of the then Prime Minister;

(*ii*) Notification dated 22-7-1982 of the Governor setting up the Ecological Development Council for Goa, inter alia, for scrutiny of beach construction within 500 m of HTL;

(*iii*) Environmental Guidelines for Development of Beaches of July 1983;

(*iv*) Order dated 11-6-1986 of the Under-Secretary, Ministry of Tourism, also addressed to Chief Secretary, Government of Goa, constituting an Inter-Ministerial Committee for considering tourist projects within 500 m.

Answering in negative and setting aside the orders of the High Court, the Supreme Court

Held :

The question 'what is "law"?' has perplexed many a jurisprude; yet, the search for the elusive definition continues. It may be unwise to posit an answer to the question; rather, one may proceed by examining the points of consensus in jurisprudential theories. What appears to be common to all these theories is the notion that law must possess a certain form; contain a clear mandate/explicit command which may be prescriptive, permissive or penal and the law must also seek to achieve a clearly identifiable purpose. While the form itself or absence thereof will not be determinative and its impact has to be considered as a lending or supporting force, the disclosure of a clear mandate and purpose is indispensable. It may, therefore, be understood that a government policy may acquire the "force of "law" " if it conforms to a certain form possessed by other

laws in force and encapsulates a mandate and discloses a specific purpose.

(Paras 15 and 16)

Bennett Coleman & Co. v. *Union of India*, (1972) 2 SCC 788, *followed*

Article 77 of the Constitution provides the form in which the executive must make and authenticate its orders and decisions. If the government orders or instructions are not in accordance with clauses (1) or (2) of Article 77, the same would deprive the orders of the immunity conferred by the aforesaid clauses and they may be open to challenge on the ground that they have not been made by or under the authority of the President in which case the burden would be on the Government to show that they were, in fact, so made. In the present case, the said burden has not been discharged in any manner whatsoever. Clause (2) of Article 77 also provides for the authentication of orders and instruments in a manner as may be prescribed by the Rules. In this regard, vide S.O. No. 2297 dated 3-11-1958 published in the Gazette of India, the President has issued the Authentication (Orders and Other Instruments) Rules, 1958. The said Rules have been superseded subsequently in 2002. Admittedly, the provisions of the said Rules of 1958 had not been followed in the present case insofar as the promulgation of the guidelines is concerned. In the absence of due authentication and promulgation of the guidelines, the contents thereof cannot be treated as an order of the Government and would really represent an expression of opinion.

(Paras 19 to 21)

State of Uttaranchal v. *Sunil Kumar Vaish*, (2011) 8 SCC 670 : (2011) 4 SCC (Civ) 325 : (2011) 3 SCC (Cri) 542 : (2011) 2 SCC (L&S) 410, *followed*

Air India Cabin Crew Assn. v. *Yeshaswinee Merchant*, (2003) 6 SCC 277 : 2003 SCC (L&S) 840, *distinguished*

H.M. Seervai: *Constitutional Law of India*, 4th Edn., Vol. 2, 1999, *referred to*

It is also essential that what is claimed to be a law must be notified or made public in order to bind the citizen. So far as the mode of publication is concerned, such mode must be as prescribed by the statute. In the event the statute does not contain any prescription and even under the subordinate legislation there is silence in the matter, the legislation will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette. Admittedly, the "guidelines" concerned were not gazetted.

(Paras 22 and 24)

Harla v. *State of Rajasthan*, AIR 1951 SC 467 : 1952 Cri LJ 54, *followed*

B.K. Srinivasan v. *State of Karnataka*, (1987) 1 SCC 658, *relied on*

Johnson v. *Sargant & Sons*, (1918) 1 KB 101 : 87 LJ KB 122, *considered*

If the guidelines relied upon by the Union of India in the present case fail to satisfy the essential and vital parameters/requirements of law, the same cannot be enforced to the prejudice of the appellants as has been done in the present case. The view that while dealing with issues concerning ecology and environment, a strict view of environmental degradation should be adopted having regard to the rights of a large number of citizens to enjoy a pristine and pollution free environment by virtue of Article 21 of the Constitution, cannot be accepted. Violation of Article 21 of the Constitution on account of alleged environmental violation cannot be subjectively and individually determined when parameters of permissible/impermissible conduct are required to be legislatively or statutorily determined under Sections 3 and 6 of the Environment (Protection) Act, 1986 which has been so done by bringing into force the Coastal Regulation Zone (CRZ) Notification w.e.f. 19-2-1991. (Paras 25 to 27)

Gulf Goans Hotels Co. Ltd. v. *Union of India*, WP No. 212 of 1991, order dated 13-7-2000 (Bom); *Goa Foundation* v. *Panajim Planning & Development Authority*, WP No. 309 of 1989, order dated 13-7-2000 (Bom), *reversed*

Gulf Goans Hotels Co. Ltd. v. *Union of India*, SLP (C) No. 15101 of 2000, order dated 27-4-2001 (SC), *referred to*

Goan Real Estate and Construction Ltd. v. *Union of India*, (2010) 5 SCC 388; *Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647; *State of Karnataka* v. *Ranganatha Reddy*, (1977) 4 SCC 471, *cited*

The genesis of the executive's decision to restrict construction activity within 500 m of HTL can be traced to the Stockholm Conference, 1972. It is India's participation in the Conference that led to the introduction of Articles 48-A and 51-A(*g*) in the Constitution and the enactment of several legislations like the Air (Prevention and Control of Pollution) Act, 1981; the Forest (Conservation) Act, 1980; the Environment (Protection) Act, 1986, etc. all of which seek to protect, preserve and safeguard the environment. It may be possible to view the aforesaid guidelines as "affirmative action", aimed at implementation of Articles 21 and 48-A of the Constitution and, therefore, outlining a visible purpose. The search for a clear, unambiguous and unequivocal command to regulate the conduct of the citizens in the said guidelines must also be equally fruitful. However, the Court is unable to find in the said guidelines any expressed or clearly defined dicta. In fact, having read and considered the guidelines, the Court is left with a reasonable doubt as to whether what has been spelt out therein are not mere suggestions or opinions expressed in the process of a continuing exploration to identify the correct parameters that would effectuate the purpose i.e. safeguarding and protecting the environment (sea beaches) from human exploitation and degradation. The above is particularly significant in view of the fact that the Stockholm Declaration in its core resolutions, merely enunciates very broad propositions and commitments including those concerning the sea beaches as distinguished from specific parameters that could have application, without variation or exception, to all the signatories to the declaration. The Stockholm Conference having nowhere expressed any internationally approved parameters of acceptable distance from HTL, incorporation of any such feature of international values in the municipal laws of the country cannot arise even on the principle enunciated in *Gramophone Co. of India*, (1984) 2 SCC 534.

(Para 17)

Gramophone Co. of India Ltd. v. *Birendra Bahadur Pandey*, (1984) 2 SCC 534 : 1984 SCC (Cri) 313, *distinguished*

Vishaka v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932; *Vineet Narain* v. *Union of India*, (1998) 1 SCC 226 : 1998 SCC (Cri) 307; *Ram Jawaya Kapur* v. *State of Punjab*, AIR 1955 SC 549; *Fomento Resorts & Hotels Ltd.* v. *Miguel Martins*, (2009) 3 SCC 571 : (2009) 1 SCC (Civ) 877, *cited*

O-D/53916/C

Advocates who appeared in this case :

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Atul Y. Chitale, Senior Advocate (Ms Priyanka S. Mathur, S.N. Terdal, Navjot Neelam, B.V. Balaram Das, Siddharth Bhatnagar, Pawan Kr. Bansal, S. Mohan, Rahul Arya, T. Mahipal, Sanjay Parikh, Ms Manita Saxena, Ms N. Vidya, A.D. Sikri, Ms A. Subhashini and P.N. Puri, Advocates) for the Respondents.

Chronological list of cases cited ***on page(s)***

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2. (2010) 5 SCC 388, *Goan Real Estate and Construction Ltd.* v. *Union of India* 680*f*, 680*g*
3. (2009) 3 SCC 571 : (2009) 1 SCC (Civ) 877, *Fomento Resorts & Hotels Ltd.* v. *Miguel Martins* 684*a*
4. (2003) 6 SCC 277 : 2003 SCC (L&S) 840, *Air India Cabin Crew Assn.* v. *Yeshaswinee Merchant* 687*a*
5. SLP (C) No. 15101 of 2000, order dated 27-4-2001 (SC), *Gulf Goans Hotels Co. Ltd.* v. *Union of India* 679*a*
6. WP No. 309 of 1989, order dated 13-7-2000 (Bom), *Goa Foundation* v. *Panajim Planning & Development Authority* **(reversed)** 678*g*
7. WP No. 212 of 1991, order dated 13-7-2000 (Bom), *Gulf Goans Hotels Co. Ltd.* v. *Union of India* **(reversed)** 678*g*, 689*f-g*
8. (1998) 1 SCC 226 : 1998 SCC (Cri) 307, *Vineet Narain* v. *Union of India* 683*d*
9. (1997) 6 SCC 241 : 1997 SCC (Cri) 932, *Vishaka* v. *State of Rajasthan* 683*c*
10. (1996) 5 SCC 647, *Vellore Citizens' Welfare Forum* v. *Union of India* 681*b*, 681*c*
11. (1987) 1 SCC 658, *B.K. Srinivasan* v. *State of Karnataka* 689*b*
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13. (1977) 4 SCC 471, *State of Karnataka* v. *Ranganatha Reddy* 681*g-h*
14. (1972) 2 SCC 788, *Bennett Coleman & Co.* v. *Union of India* 684*a-b*
15. AIR 1955 SC 549, *Ram Jawaya Kapur* v. *State of Punjab* 683*d-e*
16. AIR 1951 SC 467 : 1952 Cri LJ 54, *Harla* v. *State of Rajasthan* 688*b*, 688*d-e*
17. (1918) 1 KB 101 : 87 LJ KB 122, *Johnson* v. *Sargant & Sons* 688*e*, 688*e-f*

The Judgment of the Court was delivered by

RANJAN GOGOI, J.— The appellants are the owners of Hotels, Beach Resorts and Beach Bungalows in Goa who have been facing the prospect of demolition of their properties for the last several decades. The respondent Goa Foundation is a non-governmental body which claims to be dedicated to the cause of environmental and ecological well being of the State of Goa. The respondent Goa Foundation had filed parallel writ petitions before the High Court for demolition of the allegedly illegal constructions raised by the appellants. Both sets of writ petitions i.e. those filed by the appellants against the orders of demolition by the State authorities and the writ petitions filed by the Goa Foundation seeking demolition of constructions raised by each of the appellants were heard together by the Bombay High Court. The High Court, by separate impugned orders dated 13-7-2000[1,2], had upheld the orders passed by the authorities requiring the appellants to demolish the existing structures. It is against the aforesaid orders passed by the High Court

1 *Gulf Goans Hotels Co. Ltd.* v. *Union of India*, WP No. 212 of 1991, order dated 13-7-2000 (Bom)

2 *Goa Foundation* v. *Panajim Planning & Development Authority*, WP No. 309 of 1989, order dated 13-7-2000 (Bom)

that the present group of appeals have been filed upon grant[3] of leave by this Court under Article 136 of the Constitution of India.

a **2.** The constructions raised by the appellants are not per se illegal in the conventional sense. They are not without permission and sanction of the competent authority. What has been alleged by the State and has been approved by the High Court is that such constructions are in derogation of the environmental guidelines in force warranting demolition of the same as a step to safeguard the environment of the beaches in Goa. Specifically, it is the b case of the State that the constructions in question are between 90 to 200 m from the high tide line (HTL) despite the fact that under the guidelines in force, which partake the character of law, constructions within 500 m of HTL are prohibited except in rare situations where construction activity between 200 to 500 m from HTL is permitted subject to observance of strict conditions. Admittedly, all constructions, though completed on different c dates and in different phases, were so completed before the Coastal Regulation Zone (CRZ) were enacted (w.e.f. 19-2-1991) in exercise of the powers under the Environment (Protection) Act, 1986.

3. The above basis on which the impugned action of the State is founded has been sought to be answered by the appellants by contending that at the relevant point of time when building permissions and sanctions were granted d in respect of the constructions undertaken, the prohibition was with regard to construction within 90 m from HTL. Admittedly, none of the constructions are within the said divide. The guidelines, detailed reference to which are made in the succeeding paragraphs of the present order, are not "law" so as to constitute activities contrary thereto as acts of infringement of the law and hence illegal. Such guidelines do not confer the power of enforcement and e lack the authority to bring about any penal consequences.

4. Having very broadly noticed the contours of the adjudication that the present case would require, we may now proceed to consider the stand of the rival parties with some elaboration. The Stockholm Declaration of 1972 to which India was a party is the foundation of the State's claim that the guidelines in question, being in implementation of India's international f commitments, engraft a legal framework by executive action under Article 73 of the Constitution. The said guidelines are in conformity with the Nation's commitment to international values in the matter of preservation of the pristine purity of sea beaches and to prevent its ecological degradation. Such commitment to an established feature of International Law stands engrafted in the municipal laws of the country by incorporation. The guidelines g commencing with the instructions conveyed by the Prime Minister of India in

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3 *Gulf Goans Hotels Co. Ltd.* v. *Union of India*, SLP (C) No. 15101 of 2000, order dated 27-4-2001 (SC), wherein it was directed:

"Heard the learned counsel for the parties. Leave is granted. Printing is h dispensed with; appeals shall be heard on the SLP paper books. Documents, if any, may be filed within eight weeks from today. Interim order to continue, until further orders."

a Letter dated 27-11-1981 addressed to the Chief Minister of Goa; the environmental guidelines for development of beaches published in July 1983 by the Government of India and the 1986 Guidelines issued by the Inter-Ministerial Committee by the Ministry of Tourism, Government of India by Order dated 11-6-1986 have been stressed upon as containing the responses of the Union of India to the Stockholm Declaration. It is contended that enactment of laws by the legislature is not exhaustive of the manner in which India's international commitments can be furthered. Executive action, in the absence of statutory enactments, is an alternative mode authorised under Article 73 of the Constitution.

5. In the present case, the exercise of executive power is traceable to Schedule VII List I Entries 13 and 14 to the Constitution. The power to give effect to the guidelines and to penalise violators thereof may not have been available at the time when the guidelines became effective. However, with the enactment of the Environment (Protection) Act, 1986 (hereinafter referred to as "the Act") with effect from 19-11-1986, Sections 3 and 5 empowered the Central Government to pass necessary orders and issue directions which are penal in nature. It is in the exercise of the said power under the Act read with the guidelines referred to above that the orders impugned by the appellants have been passed. Though the Coastal Regulation Zone (CRZ) Notification under the Act was issued on 19-2-1991 and admittedly is prospective in nature, till such time that the said notification came into force it is the guidelines which held the field being administrative instructions having the effect of law under Article 73 of the Constitution.

6. The stand of the State in support of the impugned action has been noticed at the outset for a better appreciation of the arguments advanced by the appellants. Shri K. Parasaran, Shri C.U. Singh and Shri Raju Ramachandran, learned Senior Counsel who had appeared on behalf of the appellants in the different appeals under consideration have submitted that the purport and effect of the CRZ Notification published on 19-2-1991 in exercise of the powers conferred by the Act and the Rules read together has been considered by this Court in *Goan Real Estate and Construction Ltd.* v. *Union of India*[4] to hold that: (SCC p. 398, para 31)

> "*31.* ... Thus, the intention of legislature while issuing the Notification of 1991 was to protect the past actions/transactions which came into existence before the approval of the 1991 Notification."

It is further submitted that in *Goan Real Estate & Construction Ltd.*[4] construction which had commenced after the amendments made in the year 1994 to the Notification dated 19-2-1991 till the same were declared illegal on 18-4-1996, were protected by this Court by holding that though the amending notification was declared illegal by this Court

> "all orders passed under the said notification and actions taken pursuant to the said notification would not be affected in any manner whatsoever". (SCC p. 400, para 38)

4 (2010) 5 SCC 388

According to the learned counsel, the above is the approach that this Court had indicated to be appropriate for adoption while considering the Regulations and its impact on environmental issues insofar as coastal areas and sea beaches are concerned.

7. Insofar as the Guidelines of 1983 and 1986 are concerned, it is contended that the Stockholm Declaration saw the emergence of the concept of sustainable development in full bloom. In *Vellore Citizens' Welfare Forum* v. *Union of India*[5] this Court understood sustainable development to mean

> " 'Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs' ". (SCC p. 658, para 10)

In *Vellore Citizens' Welfare Forum*[5], it is further held that: (SCC p. 658, para 10)

> "*10.* ... 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features are yet to be finalised by the international law jurists."

8. The Stockholm Declaration, naturally, does not and in fact could not have visualised specific and precise parameters of sustainable development including prohibitory and permissible parameters of industrial and business activities on the sea beaches that could be universally applied across the board. The very text and the language of the guidelines, according to the learned counsel, make it clear that there is no mandate of law in any of the said guidelines which are really in the nature of evolving parameters embodying suggestions for identification of the correct parameters for enactment of laws in the future. It is accordingly argued that the guidelines do not amount to an exercise of law-making by the executive under Article 73 of the Constitution. In any case, the guidelines were never published or authenticated as required under Article 77 of the Constitution. Pointing out the provisions of the Air (Prevention and Control of Pollution) Act, 1981, it is argued that the aforesaid Act was enacted to implement the decisions taken in the Stockholm Conference of 1972. Parliament though fully aware of the resolutions and decisions taken in the Stockholm Conference as well as the commitments made by India as a signatory thereto did not consider it necessary to enact a comprehensive law to protect and safeguard ecology and environment until enactment of the Environment (Protection) Act with effect from 19-11-1986. Even thereafter, the parameters for enforcement of the provisions of the Act insofar as the sea coast and beaches are concerned had to await the enactment of the CRZ Notification of 19-2-1991. Shri Parasaran has particularly relied on a decision of this Court in *State of Karnataka* v. *Ranganatha Reddy*[6] to contend that even if the Court is to hold otherwise

5 (1996) 5 SCC 647
6 (1977) 4 SCC 471

what would be called for is a "balancing act" which would lean in favour of the protection of the property having regard to the long period of time that has elapsed since the impugned action was initiated against the appellants.

9. In reply, Shri Chitale, learned Senior Counsel appearing for the Union of India has placed before the Court several documents which the Union would like the Court to construe as the "law in force" to regulate commercial/business activities on the sea beaches in order to maintain environmental health and ecological balance. It is contended that the aforesaid guidelines, though had existed all along, could not be specifically enforced in the absence of the statutory powers to penalise the violations thereof. Such power, the learned counsel contends, came to be conferred with the enactment of the Environment (Protection) Act with effect from 19-11-1986. The guidelines which all along had laid down the parameters for application of the provisions of the Act were replaced by the CRZ Regulations with effect from 19-2-1991. The learned counsel has contended that the guidelines issued are traceable to the power of the Union executive under Schedule VII List I Entries 13 and 14 read with Article 73 of the Constitution.

10. The learned counsel has also drawn the attention of the Court to its earlier decision in *Gramophone Co. of India Ltd.* v. *Birendra Bahadur Pandey*[7] to contend that it was not necessary to enact a specific law to give effect to the Stockholm Declaration inasmuch as the understanding and agreement reached in the International Convention to which India was a party stood embodied in the municipal laws of the country by application of the doctrine of incorporation. Particular emphasis was laid on the views expressed by this Court in para 5 of the decision in *Gramophone Co. of India*[7] which may be extracted below: (SCC p. 540)

> "5. There can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, *unless they are in conflict with an Act of Parliament*. Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a

7 (1984) 2 SCC 534 : 1984 SCC (Cri) 313

principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law. But if conflict is inevitable, the latter must yield." (emphasis in original)

11. Shri Sanjay Parikh, learned counsel appearing for the respondent NGO, Goa Foundation, has submitted that the Prime Minister's Letter dated 27-11-1981; the 1983 Guidelines as well as the Guidelines of 1986 have to be construed to be law within the meaning of Article 73 of the Constitution. Placing reliance on the decision of this Court in *Vishaka* v. *State of Rajasthan*[8], Shri Parikh has submitted that in framing the guidelines to ensure prevention of sexual harassment at workplace this Court has placed reliance on the fact that the Government of India has ratified some of the resolutions adopted in the Convention on the Elimination of All Forms of Discrimination Against Women and had made known its commitments to the cause of women's human rights in the Fourth World Conference of Women held in Beijing. Similarly, relying on the observations of this Court in para 52 in *Vineet Narain* v. *Union of India*[9], it is contended that: (SCC p. 266)

> "*52.* … it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature…."

12. Shri Parikh has also relied on a judgment of old vintage in *Ram Jawaya Kapur* v. *State of Punjab*[10] to contend that the executive power of the Union is wide and expansive and

> "comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State". (AIR p. 556, para 13)

13. Shri Parikh has further contended that commitments of the country made at an international forum which are in tune with the constitutional philosophy i.e. to preserve and maintain ecology and environment, must be understood to have been incorporated in the municipal laws of the country and executive decisions to the above effect will fill in the void till effective statutory exercise is made which in the instant case came in the form of CRZ Notification dated 19-2-1991. Shri Parikh has also submitted that passage of time resulting in astronomical rise of property value; use of the otherwise illegally constructed property during the pendency of the present proceeding and such other events cannot be the basis of any claim in equity for

8 (1997) 6 SCC 241, pp. 250-51, para 13 : 1997 SCC (Cri) 932
9 (1998) 1 SCC 226 : 1998 SCC (Cri) 307
10 AIR 1955 SC 549

protection of the product of an apparently illegal act. Reliance in this case has been placed on a decision of this Court in *Fomento Resorts & Hotels Ltd.* v. *Miguel Martins*[11].

14. The cases of the respective parties having been noticed the necessary discourse may now commence. In *Bennett Coleman & Co.* v. *Union of India*[12], a "Newsprint Policy", notified by the Central Government for imposing conditions on import of newsprint came to be challenged on the ground of violation of the fundamental rights. Beg, J., in a concurring judgment, observed: (SCC pp. 826-27, para 93)

> "*93*. What is termed 'policy' can become justiciable when it exhibits itself in the shape of even purported 'law'. According to Article 13(3)(*a*) of the Constitution, 'law' includes 'any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law'. *So long as policy remains in the realm of even rules framed for the guidance of executive and administrative authorities it may bind those authorities as declarations of what they are expected to do under it. But, it cannot bind citizens unless the impugned policy is shown to have acquired the force of 'law'*." (emphasis supplied)

15. The question 'what is "law"?' has perplexed many a jurisprude; yet, the search for the elusive definition continues. It may be unwise to posit an answer to the question; rather, one may proceed by examining the points of consensus in jurisprudential theories. What appears to be common to all these theories is the notion that law must possess a certain *form*; contain a clear mandate/explicit command which may be prescriptive, permissive or penal and the law must also seek to achieve a clearly identifiable purpose. While the form itself or absence thereof will not be determinative and its impact has to be considered as a lending or supporting force, the disclosure of a clear mandate and purpose is indispensable.

16. It may, therefore, be understood that a government policy may acquire the "force of 'law' " if it conforms to a certain form possessed by other laws in force and encapsulates a mandate and discloses a specific purpose. It is from the aforesaid prescription that the guidelines relied upon by the Union of India in this case, will have to be examined to determine whether the same satisfies the minimum elements of law. The said guidelines are:

> *1*. Directives to the State Governments in Letter dated 27-11-1981 of the then Prime Minister;
>
> *2*. Notification dated 22-7-1982 of the Governor setting up the Ecological Development Council for Goa, inter alia, for scrutiny of beach construction within 500 m of HTL;
>
> *3*. Environmental Guidelines for Development of Beaches of July 1983;

11 (2009) 3 SCC 571 : (2009) 1 SCC (Civ) 877
12 (1972) 2 SCC 788

4. Order dated 11-6-1986 of the Under-Secretary, Ministry of Tourism, also addressed to Chief Secretary, Government of Goa, constituting an Inter-Ministerial Committee for considering tourist projects within 500 m.

17. The genesis of the Executive's decision to restrict construction activity within 500 m of HTL can be traced to the Stockholm Conference. It is India's participation in the Conference that led to the introduction of Articles 48-A and 51-A(*g*) in the Constitution and the enactment of several legislations like the Air (Prevention and Control of Pollution) Act, 1981; the Forest (Conservation) Act, 1980; the Environment (Protection) Act, 1986, etc. all of which seek to protect, preserve and safeguard the environment. It may be possible to view the aforesaid guidelines as "affirmative action", aimed at implementation of Articles 21 and 48-A of the Constitution and, therefore, outlining a visible purpose. The search for a clear, unambiguous and unequivocal command to regulate the conduct of the citizens in the said guidelines must also be equally fruitful. However, we are unable to find in the said guidelines any expressed or clearly defined dicta. In fact, having read and considered the guidelines, we are left with a reasonable doubt as to whether what has been spelt out therein are not mere suggestions or opinions expressed in the process of a continuing exploration to identify the correct parameters that would effectuate the purpose i.e. safeguarding and protecting the environment (sea beaches) from human exploitation and degradation. The above is particularly significant in view of the fact that the Stockholm Declaration in its core resolutions, merely enunciates very broad propositions and commitments including those concerning the sea beaches as distinguished from specific parameters that could have application, without variation or exception, to all the signatories to the declaration. The Stockholm Conference having nowhere expressed any internationally approved parameters of acceptable distance from HTL, incorporation of any such feature of international values in the municipal laws of the country cannot arise even on the principle enunciated in *Gramophone Co. of India*[7].

18. The position is best highlighted by noticing in a little detail the objectives sought to be achieved in the Stockholm Conference and the core principles adopted therein so far as they are relevant to the issues in hand:

> "The United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972, having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment,
>
> * * *
>
> *The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity*." (emphasis supplied)

7 *Gramophone Co. of India Ltd.* v. *Birendra Bahadur Pandey*, (1984) 2 SCC 534 : 1984 SCC (Cri) 313

Extract of the relevant principles—

"*Principle 7*

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

* * *

Principle 11

The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organisations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

* * *

Principle 14

Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.

* * *

Principle 23

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

Principle 24

International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing.

Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."

19. Article 77 of the Constitution provides the form in which the Executive must make and authenticate its orders and decisions. Clause (1) of Article 77 provides that all executive action of the Government must be expressed to be taken in the name of the President. The celebrated author H.M. Seervai in *Constitutional Law of India*, 4th Edn., Vol. 2, 1999 describes the consequences of government orders or instructions not being in accordance with clauses (1) or (2) of Article 77 by opining that the same would deprive the orders of the immunity conferred by the aforesaid clauses and they may be open to challenge on the ground that they have not been made by or under the authority of the President in which case the burden

would be on the Government to show that they were, in fact, so made. In the present case, the said burden has not been discharged in any manner whatsoever. The decision in *Air India Cabin Crew Assn.* v. *Yeshaswinee Merchant*[13], taking a somewhat different view can, perhaps, be explained by the fact that in the said case the impugned directions contained in the government letter (not expressed in the name of the President) was in exercise of the statutory power under Section 34 of the Air Corporations Act, 1953. In the present case, the impugned guidelines have not been issued under any existing statute.

20. Clause (2) of Article 77 also provides for the authentication of orders and instruments in a manner as may be prescribed by the Rules. In this regard, vide S.O. No. 2297 dated 3-11-1958 published in the Gazette of India, the President has issued the Authentication (Orders and Other Instruments) Rules, 1958. The said Rules have been superseded subsequently in 2002. Admittedly, the provisions of the said 1958 Rules had not been followed in the present case insofar as the promulgation of the guidelines is concerned.

21. In the absence of due authentication and promulgation of the guidelines, the contents thereof cannot be treated as an order of the Government and would really represent an expression of opinion. In law, the said guidelines and their binding effect would be no more than what was expressed by this Court in *State of Uttaranchal* v. *Sunil Kumar Vaish*[14] in the following paragraph of the report: (SCC p. 678, paras 23-24)

> "*23*. It is settled law that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in the manner specified in the rules made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. In other words, unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government.
>
> *24*. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, can such noting be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The

13 (2003) 6 SCC 277, p. 311, para 72 : 2003 SCC (L&S) 840

14 (2011) 8 SCC 670 : (2011) 4 SCC (Civ) 325 : (2011) 3 SCC (Cri) 542 : (2011) 2 SCC (L&S) 410

noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review."

22. It is also essential that what is claimed to be a law must be notified or made public in order to bind the citizen. In *Harla* v. *State of Rajasthan*[15] while dealing with the vires of the Jaipur Opium Act, which was enacted by a resolution passed by the Council of Ministers, though never published in the Gazette, this Court had observed: (AIR p. 468, para 8)

"*8.* … Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is, or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a resolution without anything more, is abhorrent to civilised man."

23. The Court in *Harla* v. *State of Rajasthan*[15] noticed the decision in *Johnson* v. *Sargant & Sons*[16] and particularly the following: (AIR pp. 468-69, para 11)

"*11.* The principle underlying this question has been judicially considered in England. For example, on a somewhat lower plane, it was held in *Johnson* v. *Sargant & Sons*[16], that an order of the Food Controller under the Beans, Peas and Pulse (Requisition) Order, 1917, does not become operative until it is made known to the public, and the difference between an Order of that kind and an Act of the British Parliament is stressed. The difference is obvious. Acts of the British Parliament are publicly enacted. The debates are open to the public and the Acts are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done. They also receive wide publicity in papers and, now, over the wireless. Not so Royal Proclamations and Orders of a Food Controller and so forth. There must therefore be promulgation and publication in their cases. The mode of publication can vary; what is a good method in one country may not necessarily be the best in another. But reasonable publication of some sort there must be."

15 AIR 1951 SC 467 : 1952 Cri LJ 54
16 (1918) 1 KB 101 : 87 LJ KB 122

24. It will not be necessary to notice the long line of decisions reiterating the aforesaid view. So far as the mode of publication is concerned, it has been consistently held by this Court that such mode must be as prescribed by the statute. In the event the statute does not contain any prescription and even under the subordinate legislation there is silence in the matter, the legislation will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette *(B.K. Srinivasan* v. *State of Karnataka)*[17]. Admittedly, the "guidelines" were not gazetted.

25. If the guidelines relied upon by the Union of India in the present case fail to satisfy the essential and vital parameters/requirements of law as the trend of the above discussion would go to show, the same cannot be enforced to the prejudice of the appellants as has been done in the present case. For the same reason, the issue raised with regard to the authority of the Union to enforce the guidelines on the coming into force of the provisions of the Environment (Protection) Act so as to bring into effect the impugned consequences, adverse to the appellants, will not require any consideration.

26. An argument had been offered by Shri Parikh, learned counsel appearing for the respondent, Goa Foundation, that while dealing with issues concerning ecology and environment, a strict view of environmental degradation, which Shri Parikh would contend has occurred in the present case, should be adopted having regard to the rights of a large number of citizens to enjoy a pristine and pollution free environment by virtue of Article 21 of the Constitution. We cannot appreciate the above view. Violation of Article 21 on account of alleged environmental violation cannot be subjectively and individually determined when parameters of permissible/impermissible conduct are required to be legislatively or statutorily determined under Sections 3 and 6 of the Environment (Protection) Act, 1986 which has been so done by bringing into force the Coastal Regulation Zone (CRZ) Notification w.e.f. 19-2-1991.

27. In view of the foregoing discussion, the orders impugned in the writ petitions filed by the appellants cannot be sustained. Consequently, the said orders as well as each of the orders dated 13-7-2000[1,2] passed by the High Court of Bombay will have to be set aside which we hereby do while allowing the appeals.

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17 (1987) 1 SCC 658

1 *Gulf Goans Hotels Co. Ltd.* v. *Union of India*, WP No. 212 of 1991, order dated 13-7-2000 (Bom)

2 *Goa Foundation* v. *Panajim Planning & Development Authority*, WP No. 309 of 1989, order dated 13-7-2000 (Bom)

(1996) 6 Supreme Court Cases 634

(BEFORE B.P. JEEVAN REDDY AND K.S. PARIPOORNAN, JJ.)

I.T.C. BHADRACHALAM PAPERBOARDS AND ANOTHER .. Appellants;

Versus

MANDAL REVENUE OFFICER, A.P. AND OTHERS .. Respondents.

Civil Appeals Nos. 11821-22 of 1996†, decided on September 9, 1996

A. **Tenancy and Land Laws — A.P. Non-Agricultural Lands Assessment Act, 1963 (14 of 1963) — S. 11(1) — Exemption order — Requirement of publication in A.P. Gazette — Held, mandatory — Giving due publicity to the order would not be sufficient compliance — While admitting other requirements of S. 11(1) to be mandatory, only the requirement of mode of publication cannot be said to be directory**

B. **General Clauses Act, 1897 — S. 23(5) — A.P. General Clauses Act, 1891 (1 of 1891) — S. 21 — Statutory requirement of publication of rule/order in Official Gazette is mandatory — Object of publication in Official Gazette is not merely to give information to public but to give final official confirmation to the rule/order — It is an official version of the rule/order which could be relied upon by courts under S. 83 of Evidence Act — Evidence Act, 1872, S. 83 — Gazette — Publication in — Object, value and purpose of — Dissemination by newspapers or mass media not a substitute for**

C. **Administrative Law — Subordinate legislation — Publication of — Where parent Act prescribes mode of publication or promulgation, requirement to follow that mode is mandatory — Ultra vires**

D. **Interpretation of Statutes — Mandatory or directory — Order/rules made under Act — Mode of publication of, prescribed by the Act — Held, mandatory**

E. **Statute Law — Mandatory or directory — Taxing statute — Power to grant tax exemption conferred by statute on Govt. — Held, dispensing with payment of tax being a serious matter, requirements of provision conferring such power is mandatory and must be strictly complied with by Govt. — Administrative Law — Subordinate legislation**

Section 11 of the A.P. Non-Agricultural Lands Assessment Act, 1963 (NALA Act) confers upon the Government the power to exempt any class of non-agricultural lands from the levy. The Government issued GOMs No. 877 dated 16-6-1965 under Section 7 of the Act which provides for tax remission with a view to provide incentives to the industries established in the State. On 17-12-1976 the Government issued GOMs No. 201. It was not issued under any enactment(s). It inter alia provided exemption from non-agricultural assessment to industries established in scheduled areas in the State stating that the usual land revenue be levied on the extent of land instead of non-agricultural assessment. It was stated that the orders issued in the said GO shall come into force with immediate effect. The concerned authorities were requested to see that due publicity be given to the scheme. On 2-5-1990, the Government issued GOMs No. 386 which stated that GOMs No. 201 was not published in the Andhra Pradesh Gazette as required under Section 21 of the Andhra Pradesh General Clauses Act and that it also did not clarify whether the

† From the Judgment and Order dated 15-4-1994 of the Andhra Pradesh High Court in WPs Nos 3097 and 17179 of 1990

concession granted thereby was a permanent one or was operative only for five years as was provided in GOMs No. 877. To provide incentives to industries, the GO granted exemption from payment of assessment under the NALA Act to such industries for five years but it was directed that "usual land revenue be levied on the extent of land instead of non-agricultural lands assessment as per rules". The appellant established a factory in the scheduled area. The land was acquired by the State for the purpose of the appellant. According to the appellant it completed the construction of the factory in 1979 and commenced production on and from 1-10-1979. When a demand was made by the Tehsildar in the year 1980 for payment of NALA in respect of the said land, the appellant submitted that by virtue of GOMs No. 201 dated 17-12-1976, it was not liable to pay the said tax.

First question was whether the publication of the exemption notification in the Andhra Pradesh Gazette, as required by Section 11(1) of the Act, is mandatory or merely directory? The appellant contended that while the requirements that the power under Section 11 should be expressed through an order, that it must contain the grounds for granting exemption and that the order should specify whether the exemption is on a permanent basis or for a specified period are mandatory, the requirement of publication in the Gazette is not. The appellant contended that the said requirement is merely directory and that it was enough if due publicity was given to the order. Rejecting the contention

Held :

The object of publication in the Gazette under Section 11 of NALA Act is not merely to give information to the public. The Official Gazette, as the very name indicates, is an official document. It is published under the authority of the Government. Publication of an order or rule in the Gazette is the official confirmation of the making of such an order or rule. The version as printed in the Gazette is final. The same order or rule may also be published in the newspapers or may be broadcast by radio or television. If a question arises when was a particular order or rule made, it is the date of Gazette publication that is relevant and not the date of publication in a newspaper or in the media. In other words, the publication of an order or rule is the official irrefutable affirmation that a particular order or rule is made, is made on a particular day (where the order or rule takes effect from the date of its publication) and is made by a particular authority; it is also the official version of the order or rule. It is a common practice in courts to refer to the Gazette whenever there is a doubt about the language of, or punctuation in, an Act, Rule or Order. Section 83 of the Evidence Act, 1872 says that the court shall presume the genuineness of the Gazette. Court will take judicial notice of what is published therein, unlike the publication in a newspaper, which has to be proved as a fact as provided in the Evidence Act. If a dispute arises with respect to the precise language or contents of a rule or order, and if such rule or order is not published in the Official Gazette, it would become necessary to refer to the original itself, involving a good amount of inconvenience, delay and unnecessary controversies. It is for this reason that very often enactments provide that Rules and/or Regulations and certain type of orders made thereunder shall be published in the Official Gazette. To call such a requirement as a dispensable one — directory requirement — is, unacceptable. Where the parent statute prescribes the mode of publication or promulgation that mode has to be followed and such a requirement is imperative and cannot be dispensed with. (Paras 13 and 15)

Pankaj Jain Agencies v. *Union of India*, (1994) 5 SCC 198; *Sammbhu Nath Jha* v. *Kedar Prasad Sinha*, (1972) 1 SCC 573 : 1972 SCC (Cri) 337; *B.K. Srinivasan* v. *State of Karnataka*, (1987) 1 SCC 658, *relied on*

Further, a levy created by a statute can be lifted, suspended or withdrawn only by a statute or in the manner prescribed by the statute creating the levy. Dispensing with the levy or payment of tax is a serious matter. It is done only with a view to promote a countervailing public interest. When such a power is conferred by legislature upon another authority, that authority has to, and can, exercise that power only in strict compliance with the requirements of the provision conferring that power. It is in the interest of the general public that such notifications are not only given wide publicity but there should also be no dispute with respect to the date of their making or with respect to the language and contents thereof. In the context of Section 11(1) there is no reason to make a distinction that while the other requirements mentioned in Section 11(1) are mandatory, only the requirement of publication in the Gazette is not. The power given by Section 11 is of a substantive nature besides being in the nature of an exception. For this reason too, the provision conferring that power has to be complied with fully, i.e., in all respects. (Para 16)

Bangalore Woollen, Cotton and Silk Mills Co. Ltd v *Corpn. of the City of Bangalore*, (1961) 3 SCR 707 . AIR 1962 SC 562; *Municipal Board* v. *Prayag Narain Saigal & Firm Moosaram Bhagwan Das*, (1969) 1 SCC 399 · (1969) 3 SCR 387; *Raza Buland Sugar Co. Ltd.* v. *Municipal Board*, (1965) 1 SCR 970 : AIR 1965 SC 895, *distinguished*

Harla v *State of Rajasthan*, 1952 SCR 110 : AIR 1951 SC 467, *State of Kerala* v. *P.J. Joseph*, AIR 1958 SC 296 : 1958 Ker LT 362, *referred to*

F. **Interpretation of Statutes — Mandatory or directory — When to hold an act done neglecting performance of public duty created by provisions of statute as null and void would work serious general inconvenience or injustice to persons having no control over those entrusted with the duty and also would not promote the main object of the legislature provisions creating such duty should be treated as directory — Applicability of the principle — Held, inapplicable when the requirement of the provision is itself mandatory (Para 20)**

Dattatreya Moreshwar Pangarkar v *State of Bombay*, 1952 SCR 612 . AIR 1952 SC 181; *State of U.P* v *Manbodhan Lal Srivastava*, 1958 SCR 533 : AIR 1957 SC 912 . (1958) 2 LLJ 273; *J.K. Gas Plant Mfg. Co (Rampur) Ltd* v *King Emperor*, 1947 FCR 141 . AIR 1947 FC 38, *distinguished*

G. **Tenancy and Land Laws — A.P. Non-Agricultural Lands Assessment Act, 1963 (14 of 1963) — S. 11(1) — Power conferred under, on Govt. to grant tax exemption either permanently or for a specified period — Held, provision is a piece of conditional legislation and not delegated legislation**

H. **Tenancy and Land Laws — A.P. Non-Agricultural Lands Assessment Act, 1963 (14 of 1963) — S. 11(1) — Power to grant exemption either permanently or for a specified period — Order passed by Govt. granting exemption for a period anterior to the date of passing of the order but posterior to the date of commencement of the Act — Held, valid**

I. **Statute Law — Conditional legislation — Statute conferring power to bring an Act into force and power to grant exemption on Govt. — Held, is a piece of conditional legislation and not delegated legislation — Administrative Law — Delegation of legislative function**

J. **Statute Law — Conditional legislation — Power of, conferred by Act on Govt. — Held, can be exercised by the Govt. with retrospective effect provided it should be from a date subsequent to the date of commencement of the Act and not anterior to that date**

K. **Administrative Law — Subordinate legislation — Govt. orders — Statutory GO and non-statutory GO on the same subject covering the same**

period — If inconsistent with each other, held, the statutory GO would prevail over the non-statutory GO

a *Held* :

The power given to the executive to bring an Act into force as also the power conferred upon the Government to exempt persons or properties from the operation of the enactment are both instances of conditional legislation and cannot be described as delegated legislation. Very often the legislature makes a law but leaves it to the executive to prescribe a date with effect from which date the Act shall come into force. The power conferred on the Government under Section 11 of the Act is a b species of conditional legislation. (Para 26)

Jalan Trading Co (P) Ltd v. *Mill Mazdoor Union*, (1967) 1 SCR 15 . AIR 1967 SC 691 . (1966) 2 LLJ 546; *Hamdard Dawakhana (Wakf)* v. *Union of India*, (1960) 2 SCR 671 : AIR 1960 SC 554, *Field* v. *Clark*, 143 US 649 : 36 L Ed 294 (1892), *Tulsipur Sugar Co. Ltd.* v. *Notified Area Committee*, (1980) 2 SCC 295, *relied on*

Hampton & Co. v. *U.S.*, 276 US 394 : 72 L Ed 624 (1927); *Queen* v. *Burah*, (1878) 3 AC 889, *Russell* v *Queen*, (1882) 7 AC 829 : 51 LJPC 77 : 46 LT 889; *King-Emperor* v. c *Benoari Lal Sarma*, (1944) LR 72 IA 57 : AIR 1945 PC 48; *Sardar Inder Singh* v. *State of Rajasthan*, 1957 SCR 605 : AIR 1957 SC 510; *In Lockes Appeal*, 72 Pa 491, *cited*

Section 11(1) says that the Government can grant the exemption "either permanently or for a specified period". It cannot be held that this power can be exercised only prospectively. The period specified can cover either wholly or partly the period anterior to the date of order, so long as the period specified is subsequent d to the commencement of the Act. (Para 28)

A. Thangal Kunju Musaliar v. *M. Venkitachalam Potti, Authorised Official and ITO*, (1955) 2 SCR 1196 AIR 1956 SC 246, *applied*

The retrospective operation given to GOMs No. 386 is valid and lawful. Once this is so, the very existence of GOMs No. 201 becomes doubtful. There cannot be a statutory and a non-statutory GO on the same subject and covering the same period, inconsistent with each other. While GOMs No. 386 provides exemption only for a e period of five years prescribed therein, GOMs No. 201 pertains to grant the exemption on a permanent basis. The appellant can, therefore, claim exemption only under and in accordance with GOMs No. 386. (Para 28)

L. **Tenancy and Land Laws — A.P. Non-Agricultural Lands Assessment Act, 1963 (14 of 1963) — S. 11(2) — Requirement of laying of Govt. order granting exemption before Legislative Assembly — Held, is an instance of f simple laying and hence the requirement is not mandatory despite the use of word 'shall'**

M. **Interpretation of Statutes — Mandatory or directory — Conditional legislation conferring power on Govt. to grant exemption — Statutory requirement of 'simple laying', instead of 'laying subject, to affirmative or negative resolution', of the Govt. order granting exemption before appropriate legislature — Held, requirement not mandatory despite use of word 'shall' — g Administrative Law — Subordinate legislation — Requirement of laying before legislature**

Held :

The requirement of 'laying' prescribed by sub-section (2) of Section 11 is not mandatory and an order of exemption under Section 11 cannot be said to be ineffective or unenforceable for the reason of 'non-laying' as required by Section 11(2) of the Act. The requirement of laying is one form of legislative control over h subordinate legislation. (Para 29)

Atlas Cycle Industries Ltd. v. *State of Haryana*, (1979) 2 SCC 196 : 1979 SCC (Cri) 422, *followed*

D.K. Krishnan v. *Secy., Regional Transport Authority*, AIR 1956 AP 129 : 1956 Andh LT 127 : 1956 Andh WR 142, *approved*

N. Administrative Law — Promissory estoppel — Against Govt. — Applicability — Distinction between administrative act and act done under a statute to be kept in mind — Where GO issued without complying with mandatory requirements of statute, even if promise or representation held out by such GO is acted upon by person, that would not entitle such person to invoke the principle of promissory estoppel against the Govt. — Where statute requires an act to be done by Govt. only in the manner prescribed therein, then non-compliance with the mandatory statutory requirement will render the act invalid and such act will not create any representation so as to invoke promissory estoppel against the Govt. on the basis of such act — There is no estoppel against statute

It was contended that even if it is held that the publication in the Gazette was mandatory yet GOMs No. 201 could be treated as a representation and a promise and inasmuch as the appellant had acted upon such representation to his detriment, the Government should not be allowed to go back upon such representation. It was submitted that by allowing the Government to go back on such representation, the appellant would be prejudiced. It was also contended that where the Government makes a representation, acting within the scope of its ostensible authority, and if another person acts upon such representation, the Government must be held to be bound by such representation and that any defect in procedure or irregularity can be waived so as to render valid which would otherwise be invalid. It was further submitted that allowing the Government to go back upon its promise contained in GOMs No. 201 would virtually amount to allowing it to commit a legal fraud. Rejecting the contentions

Held :

For the purpose of determining applicability of the principle of promissory estoppel it is necessary to keep in mind the distinction between an administrative act and an act done under a statute. Where the matter is not governed by a law made by a competent legislature, the executive can act in its executive capacity since the executive power of the State extends to matters with respect to which the legislature of a State has the power to make laws (Article 162 of the Constitution). But where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no room for any administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith. If it is found that the act done by the Government is invalid and ineffective for non-compliance with the mandatory requirements of law, it cannot be held that notwithstanding such non-compliance, it yet constitutes a 'promise' or a 'representation' for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the Government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous. It falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to rules of estoppel. It cannot therefore, be said that where an act is done in violation of a mandatory provision of a statute, such act can still be

made a foundation for invoking the rule of promissory/equitable estoppel. Moreover, when the Government acts outside its authority, as in this case, it is difficult to say that it is acting within its ostensible authority. (Para 30)

Wells v. *Minister of Housing & Local Govt.*, (1967) 2 All ER 1041 : (1967) 1 WLR 1000; *Collector of Bombay* v. *Municipal Corpn. of the City of Bombay*, 1952 SCR 43 : AIR 1951 SC 469; *Dadoba Janardhan* v. *Collector of Bombay*, ILR (1901) 25 Bom 714 : 3 Bom LR 603; *Municipal Corpn. of the City of Bombay* v. *Secy. of State for India in Council*, ILR (1905) 29 Bom 580 : 7 Bom LR 27, *distinguished*

Ramsden v. *Dyson*, (1866) LR 1 HL 129; *Ariff* v. *Jadunath Majumdar*, (1931) LR 58 IA 91 : AIR 1931 PC 79, *cited*

R-M/T/16706/C

Advocates who appeared in this case :

Soli J. Sorabjee, Senior Advocate (Ms Nisha Bagchi, Kailash Vasdev and C.K. Sasi, Advocates, with him) for the Appellants;

K. Ram Kumar, C. Balasubramaniam and T.V.S.N. Chari, Advocates, for the Respondents.

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The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J.— Leave granted.

2. The Andhra Pradesh Non-Agricultural Lands Assessment Act, 1963 (14 of 1963) (the Act) levies non-agricultural land assessment (NALA) for each fasli year at the rates specified. The rate varies depending upon the nature of user. Section 3 is the charging section. Section 7 of the Act provides for remission of NALA. It reads:

> "7. *Remission*.—The Government may, by general or special order and for just and sufficient reason to be recorded therein, remit in whole or in part, the assessment payable under this Act in respect of any non-agricultural land in a local area."

3. Section 11 confers upon the Government the power to exempt any class of non-agricultural lands from the levy. Since it is this section which falls for consideration in this appeal, it would be appropriate to set it out in full:

> "11. *Power to exempt*.—(1) The Government may, by order, published in the Andhra Pradesh Gazette, setting out the grounds therein, exempt either permanently or for a specified period, any class of non-agricultural lands from the levy of assessment under this Act, subject to such restrictions and conditions as the Government may consider necessary to impose.
>
> (2) Every order made under sub-section (1) shall, immediately after it is made be laid on the table of the Legislative Assembly if it is in session, and if it is not in session in the session immediately following, for a total period of fourteen days which may be comprised in one session or in two successive sessions and if, before the expiration of the session in which it is so laid or the session immediately following, the Assembly agrees in making any modification in the order or in the annulment of the order, the order shall thereafter have effect only in such modified form, or shall stand annulled, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that order."

4. Section 13 confers upon the Government the power to make rules to carry out the purposes of the Act.

5. In the year 1965, the Government issued GOMs No. 877 dated 16-6-1965 under Section 7 of the Act directing that

> "with a view to provide incentives to the industries established both in the public and private sectors in the State, either before or after the Ist July, 1963 half of the assessment payable under the Act in respect of the non-agricultural lands in the entire area of the industrial undertakings shall be remitted for a period of five years from the date of establishment, or up to the date of production of rated capacity of such undertakings, whichever is earlier".

The validity of the GO is not in issue nor is it sought to be enforced by the appellant. It is referred to more as representing the first step in the matter of providing incentives to newly established industries.

6. On 17-12-1976, the Government in Social Welfare Department issued GOMs No. 201. The GO does not purport to have been issued under any enactment(s). At the end of the GO, it is recited that it is issued "by order and in the name of the Governor of Andhra Pradesh". The contents of the GO are to the following effect: with a view to explore the possibilities of rapid industrialisation of *scheduled areas* in the State, the Government had set up an Expert Committee which had submitted its report in February 1976. The Expert Committee had recommended the setting up of a High-Power Committee to formulate and implement industrial schemes in the scheduled areas. The Government, accordingly, constituted a High-Power Committee in May 1976. The High-Power Committee recommended certain incentives and concessions to industries to be established in scheduled areas. The Government examined the said recommendations in consultation with the Revenue, Industries and Commerce, Finance and Planning Departments and, hence, the said order. Four types of exemptions are provided by the GO, viz., (*i*) exemption from sales tax on purchase of raw material, machinery etc.; (*ii*) a total exemption from stamp duty; (*iii*) fifty per cent exemption in the charges for water used for industrial purposes drawn from sources maintained at the cost of Government or any local body; and (*iv*) exemption from non-agricultural assessment. It says,

> "according to the orders issued in GOMs No. 877 Revenue dated 16-6-1965, the entrepreneurs who have established industries whether before or after 1-7-1963 are required to pay half the assessment payable under the Andhra Pradesh Non-Agricultural Lands Assessment Act, 1963 in respect of non-agricultural land in the entire areas of the industrial undertakings for a period of five years from the date of establishment or up to the date of production of rated capacity of such undertakings, whichever is earlier. *In the case of industries set up in the scheduled areas, it is hereby ordered that the usual land revenue be levied on the extent of land instead of non-agricultural assessment*".

It is stated that the orders issued in the said GO shall come into force with immediate effect. The Director of Information and Public Relations, Director of Industries and Director of Tribal, Cultural Research and Trading Institute and the Convenor of High-Power Committee were requested to see that the scheme is given full publicity. Though the GO seeks to provide exemption from the relevant provisions of the Andhra Pradesh General Sales Tax Act, 1957 (6 of 1957) Stamp Act, laws concerning the municipalities (water charges) and Andhra Pradesh Non-Agricultural Lands Assessment Act, it does not refer to the provisions for exemption, if any, in any of the said enactments nor does it recite that it is issued under those provisions.

7. On 2-5-1990, the Government of Andhra Pradesh issued another order contained in GOMs No. 386. The GO is in two parts, the non-statutory part and the statutory part. In the non-statutory part of the GO, reference is made to GOMs No. 877 dated 16-6-1965 and to GOMs No. 201 dated 17-12-1976. It refers to the contents of GOMs No. 877 and to the contents of GOMs No. 201 (insofar as it related to exemption under the Act). It then states that GOMs No. 201 was not published in the Andhra Pradesh Gazette as required under Section 21 of the Andhra Pradesh General Clauses Act, 1891 (1 of 1891) and that it also did not clarify whether the concession granted thereby was a permanent one or was operative only for five years as was provided in GOMs No. 877. The GO then recites:

> "A doubt has, therefore, arisen with regard to implementation of the above concession and the District Collectors of Adilabad and Khammam have sought for a clarification",

that the Government has examined the matter carefully in consultation with the Commissioner of Land Revenue and is issuing the appended notification which was directed to be published in the extraordinary issue of Andhra Pradesh Gazette dated 5-5-1990. The statutory part of the GO may now be set out. It reads:

> "In exercise of the powers conferred by sub-section (1) of Section 11 of the Andhra Pradesh Non-Agricultural Lands Assessment Act, 1963 (Andhra Pradesh Act 14 of 1963), the Governor of Andhra Pradesh hereby directs that with a view to provide incentives to the industries already established or to be established both in the public and private sectors in the scheduled areas of the State, be exempted from payment of assessment under the Non-Agricultural Lands Assessment Act, 1963, but the usual land revenue be levied on the extent of land instead of Non-Agricultural Lands Assessment as per rules.
>
> The above concession shall be applicable for a period of 5 years from the date of establishment of the industry or till the industry reaches its rated capacity in its production whichever is earlier and thereafter full assessment under Non-Agricultural Land Assessment Act should be levied and collected from such undertakings/entrepreneurs.
>
> This notification shall be deemed to have come into force with effect from 17-12-1976.
>
> A.N. TIWARI
> Secretary to Government"

8. The appellant, Bhadrachalam Paper Boards Limited, established a factory on an extent of about 507 acres 10 gunthas of land in Sarapaka village in the scheduled areas of Khammam district. The land was acquired by the State for the purpose of the appellant. The appellant says that it completed the construction of the factory in 1979 and commenced production on and from 1-10-1979. When a demand was made by the Tehsildar in the year 1980 for payment of NALA in respect of the said land, the appellant submitted that by virtue of GOMs No. 201 dated 17-12-1976, it is not liable to pay the said tax. Representations were also made to the Collector and the Secretary to the Government in the Revenue Department. Notwithstanding that the matter was being considered at higher levels, the Mandal Revenue Officer continued to issue demand notices from time to time. Ultimately, on 16-2-1990, the authorities under the Act raised a demand in a total sum of Rs 23,10,149.50 p. for the fasli years 1393 to 1399 (1983-84 to 1988-89) and for another sum of Rs 3,07,850 (for the year 1989-90) and sought to attach the moveables of the appellant. In those circumstances, the appellant filed a writ petition (No. 3091 of 1990) in the High Court of Andhra Pradesh for issuance of an appropriate writ, order or direction declaring the said demand of NALA as illegal and unenforceable and to direct the respondents not to take any action to collect the said assessment from the appellant. It may be noticed that the writ petition was filed sometime prior to 2-5-1990, on which date the aforementioned GOMs No. 386 was issued.

9. The respondents opposed the writ petition contending that GOMs No. 201 dated 17-12-1976 was not effective or enforceable in law and that the only exemption to which the appellant is entitled is the one provided in GOMs No. 386 issued on 2-5-1990. The respondents pointed out that GOMs No. 386 has been given retrospective effect from 17-12-1976 which means that it supersedes GOMs No. 201, thereby rendering the latter GO totally ineffective and inoperative.

10. The High Court dismissed the writ petition upholding the contentions of the respondents. It also negatived the plea of promissory estoppel and legitimate expectation put forward by the appellant.

11. In this appeal, Shri Soli J. Sorabjee, learned counsel for the appellant, urged the following contentions:

(1) GOMs No. 201 dated 17-12-1976 is a valid order issued under Section 11 of the Act. Though the GO does not recite the source of power or the provision under which it has been issued, it must be related to the Government's power under Section 11. The GO has been issued complying with all the requirements of Section 11 except two, viz., (*i*) publication in the Andhra Pradesh Gazette and (*ii*) 'laying' before the legislature for the requisite period. Both the said requirements are, however, directory in nature and are not mandatory. It must be held that

the said GO is an order of exemption validly issued under Section 11 of the Act.

(2) Though not published in the Gazette, the GO itself directs the several authorities of the Government to give it wide publicity and we must presume that it was so given. Having regard to the fact that the object of giving publicity is to acquaint the people of the issuance/existence of such an order, the publicity given must be deemed to be sufficient. The mere non-publication in the Gazette is not fatal.

(3) GOMs No. 201 does not infringe upon or curtail the rights of anyone. It does not create any liability of tax nor does it create any other charge upon anyone. It embodies the policy of the Government granting incentives to new industries set up in scheduled areas of the State. It is an invitation, an assurance and a promise to potential entrepreneurs to establish industries in the scheduled areas of the State.

(4) The appellant has no control over the Andhra Pradesh Government. It was the duty of the Andhra Pradesh Government to have published the said GO in the Gazette. It is well settled that where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect thereof would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the legislature, such prescriptions should be treated as directory. Non-compliance with such prescriptions does not affect the validity of the act done in disregard of them.

(5) It is well settled by a catena of decisions that 'non-laying' of the rules/orders on the floor of the legislature as required by law does not render the rules or the order void or non-existent. The requirement has been held to be directory only.

(6) The Government having issued GOMs No. 201 cannot and should not be allowed to question its validity. More so, because the appellant has acted on it. Where the Government acts within the scope of its ostensible authority and makes a representation on which another acts, it must be held bound by it. A defect in procedure or any irregularity can be waived so as to render the representation valid. Representations and promises can be embodied in non-statutory executive orders as well. In other words, the non-compliance with statutory requirement does not affect the 'representation' contained in GOMs No. 201 in any manner. The doctrine of promissory/equitable estoppel and of the legitimate expectations are attracted in such a case.

(7) Accepting the contention of the respondents would amount to permitting them to commit a legal fraud. It would amount to subjecting a person to hardship for the fault of the Government in carrying out the requirement of publication and the requirement of 'laying'. Such a course would neither be fair nor reasonable. GOMs No. 201 still subsists and is operative. GOMs No. 386, insofar as it purports to give

retrospective effect to the concession contained therein on and from 17-12-1976 is invalid and incompetent. GOMs No. 386 is in the nature of the delegated legislation. It is well settled that in the absence of a specific provision in the Act, the rule-making authority cannot give retrospective effect to the rules made by it.

12. On the other hand, Shri Ram Kumar, learned counsel for the State of Andhra Pradesh, urged the following submissions in support of the judgment under appeal: GOMs No. 201 is not valid or enforceable since it was not published in the Gazette nor was it laid before the legislature as required by Section 11. The requirement of publication in the Gazette is mandatory and not directory. The power of exemption is not a species of delegated legislation; it is an instance of conditional legislation. The power under Section 11 can be exercised only in the manner and in accordance with the requirements of Section 11 and in no other manner. It does not take effect and become enforceable until and unless it is published in the manner prescribed, i.e., in the Gazette. The power of exemption should be strictly construed. The order which is not in conformity with the requirements of Section 11 cannot be treated as an order thereunder, nor can it give rise to or form a foundation for the pleas of promissory/equitable estoppel or to legitimate expectations. It is already held by this Court that no exemption notification is effective until and unless it is published in the Gazette as required by the Act. Public interest demands strict compliance with the said requirement. Moreover, GOMs No. 386 has been validly issued and the retrospective effect given to it on and from 17-12-1976 is equally valid. It means that GOMs No. 386 must be deemed to have been issued on 17-12-1976; it is admittedly a statutory GO. If so, there cannot be another non-statutory GO on the same subject inconsistent with the terms of the statutory GO covering the same period. For this reason too, GOMs No. 201 is neither effective nor enforceable.

13. The first question we have to answer is whether the publication of the exemption notification in the Andhra Pradesh Gazette, as required by Section 11(1) of the Act, is mandatory or merely directory? Section 11(1) requires that an *order* made thereunder should be (*i*) published in the Andhra Pradesh Gazette and (*ii*) must set out the grounds for granting the exemption. The exemption may be on a permanent basis or for a specified period and shall be subject to such restrictions or conditions as the Government may deem necessary. Shri Sorabjee's contention is that while the requirements that the power under Section 11 should be expressed through an order, that it must contain the grounds for granting exemption and that the order should specify whether the exemption is on a permanent basis or for a specified period are mandatory, the requirement of publication in the Gazette is not. According to the learned counsel, the said requirement is merely directory. It is enough, says the counsel, if due publicity is given to the order. He relies upon certain decisions to which we shall presently refer. We find it difficult to agree. The power under Section 11 is in the nature of conditional

legislation, as would be explained later. The object of publication in the Gazette is not merely to give information to public. Official Gazette, as the very name indicates, is an official document. It is published under the authority of the Government. Publication of an order or rule in the Gazette is the official confirmation of the making of such an order or rule. The version as printed in the Gazette is final. The same order or rule may also be published in the newspapers or may be broadcast by radio or television. If a question arises when was a particular order or rule made, it is the date of Gazette publication that is relevant and not the date of publication in a newspaper or in the media (See *Pankaj Jain Agencies* v. *Union of India*[1]). In other words, the publication of an order or rule is the official irrefutable affirmation that a particular order or rule is made, is made on a particular day (where the order or rule takes effect from the date of its publication) and is made by a particular authority; it is also the official version of the order or rule. It is a common practice in courts to refer to the Gazette whenever there is a doubt about the language of, or punctuation in, an Act, Rule or Order. Section 83 of the Evidence Act, 1872 says that the court shall presume the genuineness of the Gazette. Court will take judicial notice of what is published therein, unlike the publication in a newspaper, which has to be proved as a fact as provided in the Evidence Act. If a dispute arises with respect to the precise language or contents of a rule or order, and if such rule or order is not published in the Official Gazette, it would become necessary to refer to the original itself, involving a good amount of inconvenience, delay and unnecessary controversies. It is for this reason that very often enactments provide that Rules and/or Regulations and certain type of orders made thereunder shall be published in the Official Gazette. To call such a requirement as a dispensable one — directory requirement — is, in our opinion, unacceptable. Section 21 of the Andhra Pradesh General Clauses Act says that even where an Act or Rule provides merely for publication but does not say expressly that it shall be published in the Official Gazette, it would be deemed to have been duly made if it is published in the Official Gazette*. As observed by Khanna, J., speaking for himself and Shelat, J. in *Sammbhu Nath Jha* v. *Kedar Prasad Sinha*[2] the requirement of publication in the Gazette (SCC p. 578, para 17) "*is an imperative requirement and cannot be dispensed with*". The learned Judge was dealing with Section 3(1) of the Commissions of Inquiry Act, 1952 which provides inter alia that a Commission of Inquiry shall be appointed "by notification in the Official Gazette". The learned Judge held that the said requirement is mandatory and

1 (1994) 5 SCC 198

* Section 21 reads:

"21. *Publication of Orders and Notifications in the Official Gazette* —Where in any Act or in any rule passed under any Act, it is directed that any order, notification or other matter shall be notified or published, that notification or publication shall, unless the Act otherwise provides, be deemed to be duly made if it is published in the Official Gazette."

2 (1972) 1 SCC 573 : 1972 SCC (Cri) 337

cannot be dispensed with. The learned Judge further observed: (SCC p. 578, para 17)

> "The commission of inquiry is appointed for the purpose of making an inquiry into some matter of public importance. The schedule containing the various allegations in the present case was a part of the notification, dated 12-3-1968 and specified definite matters of public importance which were to be inquired into by the Commission. As such, the publication of the schedule in the Official Gazette should be held to be in compliance with the statutory requirement. The object of publication in an Official Gazette is twofold: to give publicity to the notification and further to provide authenticity to the contents of that notification in case some dispute arises with regard to the contents."

14. To the same effect are the observations in *B.K. Srinivasan* v. *State of Karnataka*[3]. While pointing out the importance of subordinate legislation in the affairs of the modern State, Chinnappa Reddy, J., speaking for himself and G.L. Oza, J., made the following observations: (SCC pp. 672-73, para 15)

> "But unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not It will then take effect from the date of such publication or promulgation. *Where the parent statute prescribes the mode of publication or promulgation that mode must be followed.* Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication."

15. The above decisions of this Court make it clear that *where the parent statute prescribes the mode of publication or promulgation that mode has to be followed and that such a requirement is imperative and cannot be dispensed with.*

16. GOMs No. 201 purports to exempt a class of persons from the levy created by a statute. A levy created by a statute can be lifted, suspended or withdrawn only by a statute or in the manner prescribed by the statute creating the levy. Dispensing with the levy or payment of tax is a serious matter. It is done only with a view to promote a countervailing public

3 (1987) 1 SCC 658

interest. When such a power is conferred by legislature upon another authority, that authority has to, and can, exercise that power only in strict compliance with the requirements of the provision conferring that power. It is in the interest of the general public that such notifications are not only given wide publicity but there should also be no dispute with respect to the date of their making or with respect to the language and contents thereof. We see no reason to hold that while the other requirements mentioned in Section 11(1) are mandatory, only the requirement of publication in the Gazette is not. We see no reason to make such a distinction in the context of the said sub-section. The power given by Section 11 is of a substantive nature besides being in the nature of an exception. For this reason too, the provision conferring that power has to be complied with fully, i.e., in all respects.

17. Shri Sorabjee relied upon certain decisions in support of his contention to which a reference would be in order. The first decision relied upon is in *Bangalore Woollen, Cotton and Silk Mills Co. Ltd.* v. *Corpn. of the City of Bangalore*[4] rendered by a Constitution Bench. The procedure for levying municipal taxes is provided in Section 98 of the City of Bangalore Municipal Corporation Act, 1949 (69 of 1949). It requires that the resolution intending to impose a tax should be published in the Official Gazette and in the local newspapers. The rate-payers can submit their objections in response to such publication, after considering which the Corporation may levy the tax or duty by a resolution which is also required to be published in the Official Gazette and in the local newspapers. The Corporation passed a resolution levying the tax but the notification levying the tax was not published in the Gazette. It was contended by the appellant before this Court that the said non-publication was fatal to the legality of the imposition of tax. Reliance was placed on the decision of this Court in *Harla* v. *State of Rajasthan*[5] and *State of Kerala* v. *P.J. Joseph*[6]. *The Constitution Bench did not say that the requirement of publication in the Official Gazette is not mandatory or that it is directory. It merely held that Section 38(1) cured the said defect/irregularity.* Section 39(1) provides that

> "no act done or proceeding taken under this Act shall be questioned merely on the ground ... (*b*) of any defect or irregularity in such act or proceeding not affecting the merits of the case".

The Constitution Bench held that the provision in Section 38(1)(*b*) is

> "unambiguous and clear and it validates any defect in any act done or proceedings taken under the Act and makes it immune from being questioned on the ground of defect or irregularity in such act or proceedings not affecting the merits of the case".

The Court referred to the fact that the said resolution was published in the newspapers and was also communicated to those affected by it and was thus well known. The Court held that the failure to publish it in the Government

4 (1961) 3 SCR 707 : AIR 1962 SC 562
5 1952 SCR 110 : AIR 1951 SC 467
6 AIR 1958 SC 296 : 1958 Ker LT 362

Gazette *did not affect the merits of the imposition* and that, therefore, the validity of the levy cannot be questioned. It cannot be said that the said decision supports the proposition of Shri Sorabjee in any manner. The entire decision turned upon the provision in and effect of Section 38(1)(*b*) of the said Act.

18. The next decision relied upon is in *Municipal Board* v. *Prayag Narain Saigal & Firm Moosaram Bhagwan Das*[7]. The United Provinces Municipalities Act, 1916 (2 of 1916) prescribes the procedure for levy of water tax in Sections 131 to 135. Now, what happened in that case is: the Municipal Board prepared a draft of the rules proposing to levy tax as required by Section 131(2) and published it in the manner prescribed by Section 131(3) read with Section 94. To wit, the draft rules were published in *Rashtra Sandesh*, a local newspaper published in Hindi. Objections were received and were duly considered by the Board. The Board decided to modify the original proposals by reducing the rate of tax. Though the modified proposals were also required to be published just like the original proposals, they were not so published as a fact. After receiving the sanction of the appropriate authority, the Board passed a special resolution on 23-4-1957 as contemplated by Section 134(2) of the Act directing that the imposition of the tax shall take effect from 1-10-1957. This special resolution was not published in the manner prescribed by Section 94. Be that as it may, on receipt of the special resolution, the prescribed authority, acting under Section 135(2), notified in the Official Gazette dated 3-8-1957 that the tax imposed shall take effect from the appointed day. Sub-section (3) of Section 135 provides that:

> "A notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act."

Three objections were raised by the rate-payers to the levy of water tax, viz., (*a*) omission to publish the preliminary proposal in the manner prescribed by Section 131(3) read with Section 94, (*b*) non-publication of the modified proposal in accordance with Section 132(2) and (*c*) non-publication of the special resolution directing the imposition of tax in accordance with Section 94. All the three objections were negatived by a three-Judge Bench of this Court. With respect to the first objection, it was held that though the publication was not in the prescribed form, yet the omission was a mere irregularity and since the object of publication under Section 131(3) is to inform the inhabitants of the proposal and to enable them to file objection, that object was achieved by publication in the local daily *Rashtra Sandesh*. With respect to the second objection, it was held that since the local inhabitants did have the notice of the proposal and did indeed submit their objections, no prejudice is caused by not inviting fresh objections to the modified proposals. The Court also pointed out that the modified proposals

7 (1969) 1 SCC 399 : (1969) 3 SCR 387

raised the exemption limit and reduced the rate of tax and was thus in no way prejudicial to the inhabitants. With respect to the third objection, the Court observed that the special resolution did not require to be published in accordance with Section 94. Even if it is assumed that it required to be so published, the Court held, the non-publication was a mere irregularity for the reason that the inhabitants had no right to file any objections to the special resolution. The Court also observed that the inhabitants had clear notice of the imposition of the tax from the notification published in the Official Gazette on 3-8-1957 and that the defect of non-publication of special resolution in the manner prescribed by Section 94 was cured by sub-section (3) of Section 135. It would be noticed immediately that the objection of non-publication pertained to the *proposals* and *modified proposals* to levy taxes and that requirement was held to be not mandatory. So far as the special resolution is concerned, the Court held that it did not require to be published in the manner prescribed by Section 94. Even if it is required to be published, the Court held, the said defect of non-publication was cured by sub-section (3) of Section 135 which provided that:

> "A notification of the imposition of a tax under sub-section (2) shall be *conclusive proof that the tax has been imposed in accordance with the provisions of this Act.*"

This decision too does not say that where a notification levying tax is required by the Act to be published in the Official Gazette, the non-publication of the Official Gazette does not vitiate the levy. The decision thus turned upon the particular facts of that case and *the particular provisions therein concerned.*

19. Shri Sorabjee then relied upon the decision in *Raza Buland Sugar Co. Ltd.* v. *Municipal Board*[8]. This was also a case of levy of water tax by Rampur Municipal Board under the provisions of the United Provinces Municipalities Act, 1916. The draft rules proposing the levy of water tax were not published in the manner required by Section 131(3) read with Section 94(3) of the said Act. In other words, the draft proposals were not published in the Hindi newspaper but were published in a local newspaper published in Urdu though the notification as published was in Hindi. The complaint did not pertain to the non-publication of the final notification levying taxes but only to publication of draft proposals. The majority (Gajendragadkar, C.J., Wanchoo and Raghubar Dayal, JJ.) held that Section 131(3) read with Section 94(3) consists of two parts, the first one providing that the proposals and the draft rules for a tax intended to be imposed should be published for the objections of the public, if any, and the second laying down that the publication must be in the manner prescribed in Section 94(3)*. The majority held that having regard to the object underlying the

8 (1965) 1 SCR 970 : AIR 1965 SC 895

* Section 94(3) read as follows:

> "Every resolution passed by a board at a meeting, shall, as soon thereafter as may be, be published in a local paper published in Hindi and where there is no such local paper, in such manner as the State Government may, by general or special order, direct."

provision for publication, it must be held that while the first part is mandatory, the second part is not. In that case, it was held, the first part was complied with but that there was an irregularity in complying with the second part inasmuch as instead of publishing in a local newspaper published in Hindi, the proposals were published in a local paper published in Urdu though the publication itself was in Hindi language. It was also found that there was no regularly published local Hindi newspaper in Rampur. It was held that there was substantial compliance with Section 94(3) in the circumstances of the case *and further that Section 135(3) which created a conclusive presumption that the tax had been imposed in accordance with the provisions of the Act, excludes any complaint of defect in procedure.* We are unable to see how this decision helps the appellant's contention. There was a publication indeed in that case as required by law. *The only defect was instead of publication in a local newspaper published in Hindi (as a matter of fact, there was no such newspaper in Rampur), the publication was effected in an Urdu newspaper though the notification published was in Hindi.* We are, therefore, of the opinion that the decisions relied upon do not support the proposition that an exemption notification, which is a species of conditional legislation, need not be published in the Official Gazette though it is so required expressly by the statute itself.

20. Shri Sorabjee then relied upon the proposition repeatedly affirmed by this Court that

> "generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done." [*Dattatreya Moreshwar Pangarkar* v. *State of Bombay*[9] reiterating the proposition in *J.K. Gas Plant Mfg. Co. (Rampur) Ltd.* v. *King Emperor*[10].]

There can be little doubt about the proposition but it is difficult to agree that this principle can be employed to dispense with a mandatory requirement. It can certainly be invoked where the omission or irregularity is directory in nature but certainly not where the requirement is mandatory. No case has been brought to our notice holding otherwise. In this view of the matter, we do not think it necessary to deal with the decisions cited at any length — except with *Dattatreya Moreshwar*[9]. The matter arose under the Preventive Detention Act, 1950. The decision of the Government confirming the detention order was not authenticated in the manner prescribed by Article 166. It was argued that since the decision of the Government is not so

9 1952 SCR 612 : AIR 1952 SC 181
10 1947 FCR 141 : AIR 1947 FC 38

expressed, it must be deemed that there is no decision by the Government. This contention was repelled holding firstly that the Preventive Detention Act did not prescribe any particular form for expressing the decision of the Government confirming the detention. Even if it is assumed that the said decision being an executive decision, has to be expressed and authenticated in the manner laid down in Article 166, the Court held, the omission to comply with those provisions does not render the executive action a nullity. Where such a decision has in fact been taken by the appropriate Government, it was held, there is no further requirement of law which has to be complied with. It is in this connection that the aforesaid principle was invoked and relied upon. There is a qualitative difference between the situation dealt with in *Dattatreya Moreshwar*[9] and the situation before us. There the Preventive Detention Act did not require that the decision of the Government should be expressed or authenticated in a particular manner. Since it was a decision of the Government, it was argued that it had to be expressed and authenticated in the manner prescribed by Article 166. Thus, the defect pointed out in that case merely related to *the form in which the decision was communicated.* Whereas in the case before us, the requirement relates to the very manner in which the order is to be made. The decision in *State of U.P.* v. *Manbodhan Lal Srivastava*[11] relied upon by Shri Sorabjee also related to a directory provision [Article 320(3)(*c*) of the Constitution].

21. We may next consider the nature of the power under Section 11. The question is whether the power conferred thereunder is a species of delegated legislation or is it conditional legislation. The matter is no longer res integra. In *Jalan Trading Co. (P) Ltd.* v. *Mill Mazdoor Union*[12] one of the questions raised and answered pertained to the nature of the power conferred upon the Government by Section 36 of the Payment of Bonus Act, 1965. Section 36 empowered the Government to exempt an establishment or a class of establishments from the operation of the Act provided the Government is of the opinion that having regard to the financial position and other relevant circumstances of the establishment, it would not be in the public interest to apply all or any of the provisions of the Act. Shah, J., speaking for the majority, held that:

> "*The power so conferred does not amount to delegation of legislative authority. Section 36 amounts to conditional legislation, and is not void.*" (emphasis supplied)

It was further observed that

> "Condition for exercise of that power is that the Government holds the opinion that it is not in the public interest to apply all or any of the provisions of the Act to an establishment or class of establishments, and that opinion is founded on a consideration of the financial position and other relevant circumstances. Parliament has clearly laid down principles and has given adequate guidance to the appropriate

11 1958 SCR 533 : AIR 1957 SC 912 : (1958) 2 LLJ 273
12 (1967) 1 SCR 15 : AIR 1967 SC 691 : (1966) 2 LLJ 546

Government in implementing the provisions of Section 36. ... Whether in a given case, power has been properly exercised by the appropriate Government would have to be considered when that occasion arises."

Hidayatullah, J., speaking for himself and Ramaswami, J., (minority opinion) did not say otherwise on this aspect. The learned Judge observed:

"The section cannot rightly be described as a piece of delegated legislation."

22. In *Hamdard Dawakhana (Wakf)* v. *Union of India*[13] this Court dealt with the distinction between conditional legislation and delegated legislation. The following observations are apposite:

"The distinction between conditional legislation and delegated legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; *Hampton & Co.* v. *U.S.*[14] and the latter involves delegation of rule-making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend; (*Queen* v. *Burah*[15]; *Russell* v. *Queen*[16]; *King-Emperor* v. *Benoari Lal Sarma*[17]; *Sardar Inder Singh* v. *State of Rajasthan*[18].) Thus when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed it is an exercise of delegated legislation. But when the legislation is complete in itself and the legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying it into effect, it is conditional legislation. To put it in the language of another American case:

'To assert that a law is less than a law because it is made to depend upon a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed

13 (1960) 2 SCR 671 : AIR 1960 SC 554
14 276 US 394 : 72 L Ed 624 (1927)
15 (1878) 3 AC 889
16 (1882) 7 AC 829, 835 : 51 LJPC 77 : 46 LT 889
17 (1944) LR 72 IA 57 : AIR 1945 PC 48
18 1957 SCR 605 : AIR 1957 SC 510

relating to a state of affairs not yet developed, or to things future and impossible to fully know.'

The proper distinction there pointed out was this:

'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be subject of enquiry and determination outside the hall of legislature.' (*In Lockes Appeal*[19]; *Field* v. *Clark*[20].)"

23. *Hamdard Dawakhana*[13] was, of course, a case where clause (*d*) of Section 3 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 conferred upon the Government the power to specify by Rules made under the Act the diagnosis, cure etc. respecting which the advertisement of a drug was prohibited. The question before the Court was whether it is a case of delegated legislation or conditional legislation. The Court ultimately held that it belongs to the former category and is void being violative of Article 14 of the Constitution.

24. We may in this connection refer to the decision of the Supreme Court of United States in *Field* v. *Clark*[20]. The Tariff Act of 1890 empowered the President to suspend the operation of the Act, permitting free import of certain products within United States, on being satisfied that the duties imposed upon such products were reciprocally unequal and unreasonable. It was submitted that the said power transfers the legislative and treaty-making power to the President and, hence, unlawful. The attack was repelled holding that the President was a mere agent of the Congress to ascertain and declare the contingency upon which the will of the Congress was to take effect. The Court quoted with approval the following passage from an earlier case:

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of enquiry and determination outside the halls of the legislation."

25. Reference may also be made to the decision of this Court in *Tulsipur Sugar Co. Ltd.* v. *Notified Area Committee*[21] where the power conferred upon the Government by Section 3 of the Uttar Pradesh Town Areas Act, 1914 (2 of 1914) to extend the limits of town area was held to be a power in the nature of conditional legislation. It was held that the power was legislative in character and, therefore, the incidents applicable to an administrative order do not apply to it.

19 72 Pa 491
20 143 US 649 : 36 L Ed 294 (1892)
21 (1980) 2 SCC 295

26. What is, however, relevant is that the power to bring an Act into force as well as the power to grant exemption are both treated, without a doubt, as belonging to the category of conditional legislation. Very often the legislature makes a law but leaves it to the executive to prescribe a date with effect from which date the Act shall come into force. As a matter of fact, such a course has been adopted even in the case of a constitutional amendment, to wit, the Constitution (Forty-fourth Amendment) Act, 1978, insofar as it pertains to amendment of Article 22 of the Constitution. The power given to the executive to bring an Act into force as also the power conferred upon the Government to exempt persons or properties from the operation of the enactment are both instances of conditional legislation and cannot be described as delegated legislation.

27. The next question is whether the power of conditional legislation can be exercised with retrospective effect. The decision of this Court in *A. Thangal Kunju Musaliar* v. *M. Venkitachalam Potti, Authorised Official and ITO*[22] considered this question. The Travancore Legislature had enacted the Travancore Taxation on Income (Investigation Commission) Act (14 of 1124). Section 1(3) "authorised the Government to bring the Act into force on such date as it may, by notification, appoint". The Government issued a notification in exercise of that power on 26-7-1949 stating that the Act is brought into force with effect from 22-7-1949. The contention before this Court was that in the absence of an express provision in Section 1(2) authorising the Government to fix the date of commencement of the Act with retrospective effect, the Government had no power to say on 26-7-1949 that the Act must be deemed to have come into operation on 22-7-1949. This contention was negatived by the Constitution Bench of this Court in the following words:

> "The reason for which the Court disfavours retroactive operation of laws is that it may prejudicially affect vested rights.
>
> No such reason is involved in this case. Section 1(3) authorises the Government to bring the Act into force on such date as it may, by notification, appoint. In exercise of the power conferred by this section the Government surely had the power to issue the notification bringing the Act into force on any date subsequent to the passing of the Act. There can, therefore, be no objection to the notification fixing the commencement of the Act on 22-7-1949 which was a date subsequent to the passing of the Act.
>
> So the Act has not been given retrospective operation, that is to say, it has not been made to commence from a date prior to the date of its passing. It is true that the date of commencement as fixed by the notification is anterior to the date of the notification but that circumstance does not attract the principle disfavouring the retroactive operation of a statute.

22 (1955) 2 SCR 1196 : AIR 1956 SC 246

Here there is no question of affecting vested rights. The operation of the notification itself is not retrospective. It only brings the Act into operation on and from an earlier date. In any case it was in terms authorised to issue the notification bringing the Act into force on any date subsequent to the passing of the Act and that is all that the Government did."

28. There appears no reason why the logic of the above holding should not be applied to the power under Section 11(1) of the Act. The sub-section says that the Government can grant the exemption "either permanently or for a specified period". Having regard to the nature of the power and the character of the provision, we find no good reason to hold that this power can be exercised only prospectively. The period specified can cover either wholly or partly the period anterior to the date of order, so long as the period specified is subsequent to the commencement of the Act. We are, therefore, of the opinion that *the retrospective operation given to GOMs No. 386 is valid and lawful.* Once this is so, the very existence of GOMs No. 201 becomes doubtful. There cannot be a statutory and a non-statutory GO on the same subject and covering the same period, inconsistent with each other. While GOMs No. 386 provides exemption only for a period of five years prescribed therein, GOMs No. 201 pertains to grant the exemption on a permanent basis. The appellant can, therefore, claim exemption only under and in accordance with GOMs No. 386.

29. The next question is whether the requirement of 'laying' before the legislature is mandatory? Sub-section (2) of Section 11 of the Act requires that an order made under Section 11(1) shall be laid on the table of the Legislative Assembly for the period prescribed therein and shall be subject to such modifications as may be made by the legislature. The legislature is also entitled to annul the said order. This is one form of legislative control over subordinate legislation. Shri Sorabjee cited the decision of this Court in *Atlas Cycle Industries Ltd.* v. *State of Haryana*[23] holding that the requirement of 'laying', *couched in the language akin to sub-section (2) of Section 11* — a case of "simple laying" in contradistinction to "laying subject to negative resolution" and "laying subject to affirmative resolution" — is not mandatory notwithstanding the use of the expression 'shall' in the relevant provision. The Court was dealing with sub-section (6) of Section 3 of the Essential Commodities Act, 1955 which provides for laying the orders made under the Act before the appropriate legislature, an instance of "simple laying" or "laying without further procedure". The said decision appears to be consistent with the authorities on the subject, both in India and in United Kingdom, and is binding upon us. It is brought to our notice that as early as 1956, Subba Rao, C.J. had taken the same view in Andhra Pradesh High Court *vide D.K. Krishnan* v. *Secy., Regional Transport Authority*[24]. Accordingly, we hold that the requirement of 'laying' prescribed by sub-section (2) of Section 11 is not mandatory and an order of exemption

23 (1979) 2 SCC 196 : 1979 SCC (Cri) 422

24 AIR 1956 AP 129 : 1956 Andh LT 127 : 1956 Andh WR 142

under Section 11 cannot be said to be ineffective or unenforceable for the reason of 'non-laying' as required by Section 11(2) of the Act.

30. Shri Sorabjee next contended that even if it is held that the publication in the Gazette is mandatory yet GOMs No. 201 can be treated as a representation and a promise and inasmuch as the appellant had acted upon such representation to his detriment, the Government should not be allowed to go back upon such representation. It is submitted that by allowing the Government to go back on such representation, the appellant will be prejudiced. The learned counsel also contended that where the Government makes a representation, acting within the scope of its ostensible authority, and if another person acts upon such representation, the Government must be held to be bound by such representation and that any defect in procedure or irregularity can be waived so as to render valid which would otherwise be invalid. The counsel further submitted that allowing the Government to go back upon its promise contained in GOMs No. 201 would virtually amount to allowing it to commit a legal fraud. For a proper appreciation of this contention, it is necessary to keep in mind the distinction between an administrative act and an act done under a statute. If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinbefore, that the act done by the Government is invalid and ineffective for non-compliance with the mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a 'promise' or a 'representation' for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the Government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous. Where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no room for any administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith. Where, of course, the matter is not governed by a law made by a competent legislature, the executive can act in its executive capacity since the executive power of the State extends to matters with respect to which the legislature of a State has the power to make laws (Article 162 of the Constitution). The proposition urged by the learned counsel for the appellant falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to rules of estoppel. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel. Moreover, when the Government acts outside its authority, as in this case, it is difficult to say that

it is acting within its ostensible authority. If so, it is also not permissible to invoke the principle enunciated by the court of appeal in *Wells* v. *Minister of Housing & Local Govt.*[25]

31. Shri Sorabjee, however, relied upon certain observations in the opinion of Chandrasekhara Aiyar, J. in *Collector of Bombay* v. *Municipal Corpn. of the City of Bombay*[26]. We may briefly notice the factual context in which the observations relied upon were made. In the year 1865, the Government of Bombay called upon the predecessor-in-title of the Corporation of Bombay to remove certain existing markets from a particular site and to vacate it. In consideration thereof, the Government passed a resolution approving and authorising the grant of another site to the municipality stating that the Government shall not charge any rent for the said site since it was to be used for the benefit of the community. The Corporation accordingly gave up the old markets and constructed a new market in the alternate site allotted by the Government. About eighty years later, i.e., in 1940, the Collector of Bombay proposed to levy land revenue on the aforesaid alternate site. The Corporation sued for a declaration that the said assessment was illegal and for a further declaration that it was entitled to hold the land forever without payment of the assessment. It was held by this Court that though there was no effectual grant by the Government passing title in the land to the Corporation by reason of non-compliance with the statutory formalities, yet inasmuch as the Corporation had nevertheless taken possession of the land in terms of the government resolution and continued in such possession openly, uninterruptedly and as of right for over seventy years, the Corporation had acquired the limited title it had been prescribing for, i.e., the right to hold the land in perpetuity free of rent for the purpose of the market but for no other purpose. The majority decision did not express any opinion on the question whether the principle of equity enunciated in *Ramsden* v. *Dyson*[27] can still prevail in India in the face of the decision of the Privy Council in *Ariff* v. *Jadunath Majumdar*[28]. In other words, the majority did not express any opinion on the question whether the principle of equity in *Ramsden*[27] can be invoked even where the requirements or formalities laid down in the statute are not complied with. Chandrasekhara Aiyar, J. too, in his concurring opinion, opined that the Corporation had acquired title to the land by operation of law of limitation, i.e., on account of its long-standing possession in its own right. Having so held, the learned Judge made the following observations — relied upon by Shri Sorabjee:

> "Can the Government be now allowed to go back on the representation, and, if we do so, would it not amount to our countenancing the perpetration of what can be compendiously described as legal fraud which a court of equity must prevent being committed? If

25 (1967) 2 All ER 1041 : (1967) 1 WLR 1000
26 1952 SCR 43 : AIR 1951 SC 469
27 (1866) LR 1 HL 129
28 (1931) LR 58 IA 91 : AIR 1931 PC 79

the resolution can be read as meaning that the grant was of rent-free land, the case would come strictly within the doctrine of estoppel enunciated in Section 115 of the Indian Evidence Act. But even otherwise, that is, if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. Whether it is the equity recognised in *Ramsden case*[27] or it is some other form of equity, is not of much importance. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power. As pointed out by Jenkins, C.J. in *Dadoba Janardhan* v. *Collector of Bombay*[29] a different conclusion would be 'opposed to what is reasonable, to what is probable, and to what is fair'.

I am of the opinion that the decision of the Privy Council in *Ariff* v. *Jadunath*[28] is not applicable to the facts before us, as the doctrine of part performance is not being invoked here as in that case, to clothe a person with title which he cannot acquire except by the pursuit of or in conformity with certain legal forms. Here, as pointed out already, the Corporation became the full and absolute owner of the site on the lapse of 60 years from the date of the grant."

32. We find it difficult to treat the said observations as an authority for the proposition that even where the Government has to and can act only under and in accordance with a statute — and that too a statute containing mandatory provisions — an act done by the Government in violation thereof can yet be treated as a representation to found a plea of promissory estoppel. Shri Sorabjee relied upon certain decisions of the Bombay High Court in *Dadoba Janardhan* v. *Collector of Bombay*[29] (ILR at p. 746) and *Municipal Corpn. of the City of Bombay* v. *Secy. of State for India in Council*[30] [ILR at pp. 676-78 (*sic*)] in support of the said proposition. But in the light of what we have said hereinabove — which in our opinion is consistent with our constitutional scheme and public policy — we do not think it necessary to deal with the facts and ratio of the said decisions.

33. For the above reasons, the appeals fail and are dismissed. No costs.

34. This order does not preclude the appellant from seeking the benefit of GOMs No. 386 dated 2-5-1990 in accordance with its terms.

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29 ILR (1901) 25 Bom 714 : 3 Bom LR 603
30 ILR (1905) 29 Bom 580 : 7 Bom LR 27

considered in the light of the surrounding circumstances, the assessee as distributor was not an agent of the said company in respect of the transactions in question, but was the purchaser and hence the transactions were liable to be included in the turnover of the assessee.

10. In the result, we find that there is no merit in the appeal and the appeal must stand dismissed with costs. There will be an order accordingly.

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(BEFORE E. S. VENKATARAMIAH AND K. N. SINGH, JJ.)

BABURAO ALIAS P. B. SAMANT .. Petitioner ;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition No. 63 of 1977†, decided on December 17, 1987

Constitution of India — Article 352 — Proclamation of Emergency dated December 3, 1971 and June 25, 1975 issued by President of India upheld in absence of any material showing non-application of mind or mala fides (Para 16)

Waman Rao v. *Union of India,* (1981) 2 SCC 362 : (1981) 2 SCR 1, *followed*

Constitution of India — Articles 352, 366 (18) and (19) — Proclamation of Emergency — Must be published — No particular mode of publication prescribed — Publication in official Gazette is one of the modes

Held :

Article 352 does not prescribe that a Proclamation of Emergency should be published in the official Gazette. A Proclamation of Emergency being a very important event affecting public life has to be published in any manner known to the modern world and the publication in the official Gazette is one such mode. If the Constitution requires that a particular mode of publication is necessary then such mode must be followed but if there is no mode of publication prescribed by the Constitution then it must be considered that the Constitution has left the method of publication to the authority issuing the Proclamation in order to make it known to the members of the public. In the instant case the Proclamations of Emergency had been published in the official Gazette. (Paras 18 and 21)

Constitution of India — Articles 352(2) (as stood at the relevant time), 366(18) and (19) and 118(1) — Resolutions passed by Houses of Parliament approving Proclamation of Emergency — Publication of, need not necessarily be in official Gazette — Resolutions published in Lok Sabha and Rajya Sabha Debates in usual course of time, held, valid and effective — Slight delay in publication inconseqnential — Rules of Procedure and Conduct of Business in Lok Sabha, Rules 379 & 382 — Rules of Procedure and Conduct of Business in Rajya Sabha, Rule 260 — Evidence Act, 1872, Sections 56, 57, 74(1)(iii) & 78(2)

†Under Article 32 of the Constitution of India

Held :

The resolutions approving the Proclamations of Emergency would not be treated as ineffective merely because they are not published in the official Gazette. Even assuming that any public act or resolution which affects public life should be given due publicity, the publication of the resolutions in the Lok Sabha and Rajya Sabha Debates would be sufficient compliance with the requirement of publicity. The production of the Lok Sabha Debates and of the Rajya Sabha Debates containing the proceedings of the two Houses of Parliament relating to the period between the time when the resolutions were moved in each of the two Houses of Parliament and the time when the resolutions were duly adopted amounts to proof of the said resolutions. The Lok Sabha Debates and the Rajya Sabha Debates are the journals or the reports of the two Houses of Parliament which are printed and published by them. The court has to take judicial notice of the proceedings of both the Houses of Parliament and is expected to treat the proceedings of the two Houses of Parliament as proved on the production of the copies of the journals or the reports containing proceedings of the two Houses of Parliament which are published by them. (Paras 22, 23, 31 and 36)

Niharendu Dutt Majumdar v. *Emperor,* 1942 FCR 38 : AIR 1942 FC 22, *approved*

Harla v. *State of Rajasthan,* 1952 SCR 110 : AIR 1951 SC 467 and *State of Punjab* v. *Satya Pal Dang,* (1969) 1 SCR 478 : AIR 1969 SC 903, *distinguished*

The resolutions approving the Proclamations of Emergency would not remain ineffective till they were published. What is essential is that the resolutions should be passed within the period of two months. A little delay in publishing the proceedings would not affect the validity of the resolutions, as there is no rule which requires that the resolutions should be published in the official Gazette. The very process of passing Acts and resolutions passed by the Houses of Parliament and the State legislatures gives them ample publicity. The reports of the proceedings of Parliament and the State legislatures are widely circulated. The newspapers, radio and television are also the other modern means which give publicity to all Acts and resolutions of Parliament and the legislatures of the States. But that is not true of delegated legislation, which does not necessarily receive any publicity in Parliament or in any other way. That is the reason for the insistence of the publication of subordinate legislation in the official Gazette before it can be brought into force. (Para 35)

House of People (Extension of Duration) Act, 1976 (30 of 1976) — Section 2 — Validity — Act passed when Proclamations of Emergency dated December 3, 1971 and June 25, 1975 remained in force by virtue of valid and effective resolutions approving the same passed by the Houses of Parliament — Held, Act valid and intra vires

Finance Act, 1976 (66 of 1976) — Validity — Act passed by Lok Sabha during the period its duration was extended by validly enacted House of People (Extension of Duration) Act, 1976 — Hence valid and intra vires

Held :

The resolutions of the Lok Sabha and Rajya Sabha approving the two Proclamations of Emergency had been duly published in the official reports of the two Houses of Parliament. The two Proclamations of Emergency were kept in force by virtue of the resolutions passed by the Houses of Parliament until they were duly revoked by the two Proclamations which were issued by

the Vice-President acting as President of India in the year 1977. Since the two Proclamations of Emergency were in force when the House of the People (Extension of Duration) Act, 1976 was passed its validity cannot be questioned. The Lok Sabha passed the Finance Act, 1976 during the extended period of its duration and therefore, the validity of the Finance Act, 1976 also cannot be questioned. (Para 36)

R-M/8510/S

Advocates who appeared in this case :

Petitioner-in-person ;

Kuldeep Singh, Additional Solicitor General (*B. B. Ahuja, Ms A. Subashini, Ms J. Wad* and *C.V. Subba Rao,* Advocates, with him), for the Respondents.

The Judgment of the Court was delivered by

VENKATARAMIAH, J.—Shri Baburao alias P. B. Samant, the petitioner herein, who has argued this case in person with great clarity and precision has raised the following contentions in this petition :

(1) The Proclamation of Emergency issued on December 3, 1971 by the President of India was either ultra vires the Constitution or had ceased to be in operation on February 4, 1972.

(2) The Proclamation of Emergency dated June 25, 1975 issued by the President of India on June 26, 1975 was either ultra vires the Constitution or had ceased to be in operation on August 26, 1975 ;

(3) The House of the People (Extension of Duration) Act, 1976 (30 of 1976) is ultra vires the Constitution ; and

(4) The Finance Act, 1976 (66 of 1976) is ultra vires the Constitution.

2. Although the petitioner had also challenged Section 13 of the Constitution (42nd Amendment) Act, 1976 and clause (*c*) of Section 3 of the Constitution (24th Amendment) Act, 1971 in the petition he did not press these two contentions at the hearing of the petition.

3. The petitioner was an assessee under the Income Tax Act and Wealth Tax Act during the assessment year 1976-77 and was liable to pay income tax and wealth tax in accordance with the rates prescribed by the Finance Act, 1976 which was passed by the Lok Sabha during its extended period which was extended under the provisions of the House of the People (Extension of Duration) Act, 1976 (Act 30 of 1976), after the expiry of five years from the date appointed for its first meeting. The contention of the petitioner is that the duration of the House of the People could have been validly extended only when a Proclamation of Emergency was in force under the proviso to clause (2) of Article 83 of the Constitution and since the two Proclamations of Emergency dated December 3, 1971 and June 25, 1975 were either ultra vires the Constitution or had ceased to be in operation by the time the House of the People (Extension of Duration) Act, 1976 (Act 30 of 1976) was passed by Parliament, the House of the People (Extension of Duration) Act, 1976 (Act 30 of 1976) had no effect and consequently all Acts passed by the House of the People

during the extended period including the Finance Act, 1976 were ultra vires the Constitution. He further submitted that even though the said Proclamations had been validly issued, the Proclamation of Emergency dated December 3, 1971 had ceased to be in operation on February 3, 1972 and the Proclamation of Emergency dated June 25, 1975 which was issued on June 26, 1975 had ceased to be in operation by August 26, 1975 because the resolutions passed by the two Houses of Parliament approving the said Proclamations of Emergency as required by clause (2) of Article 352 of the Constitution as it stood during the relevant time had not been published in the official Gazette of the Government of India.

4. The petition is opposed by the Union of India. The Union of India has contended that the two Proclamations of Emergency had been duly issued by the President and approved by the resolutions of two Houses of Parliament as required by law and that actually the Proclamation of Emergency of December 3, 1971 had been revoked by the Vice-President acting as the President by the Proclamation dated March 27, 1977 and the Proclamation of Emergency dated June 25, 1975 had been revoked by him by the Proclamation dated March 21, 1977. In the month of February 1976 when the House of the People (Extension of Duration) Act, 1976 (Act 30 of 1976) was passed by Parliament both the Proclamations of Emergency were in force and therefore Parliament was entitled to extend the period of the House of the People for a period not exceeding one year at a time. The Finance Act, 1976 passed during the period so extended had been, therefore, validly passed. It was further pleaded by the Union of India that the publication of the resolutions was not necessary and that in any event since they had been published in the Lok Sabha Debates and the Rajya Sabha Debates which were published under the authority of the Speaker of the House of the People and the Chairman of the Rajya Sabha respectively the Proclamations of Emergency remained in force until they were duly revoked.

5. Article 352 of the Constitution as it stood at the relevant time read as follows :

> 352. (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.
>
> (2) A Proclamation issued under clause (1)—
>
> (*a*) may be revoked by a subsequent Proclamation ;
>
> (*b*) shall be laid before each House of Parliament ;
>
> (*c*) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :
>
> Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (*c*), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such

Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

6. Clause (1) of Article 352 of the Constitution provided that if the President was satisfied that a grave emergency existed whereby the security of India or of any part of the territory thereof was threatened whether by war or external aggression or internal disturbance, he might by Proclamation make a declaration to that effect. The Proclamation issued under clause (1) of Article 352 of the Constitution could be revoked by a subsequent Proclamation. It was required to be laid before each House of Parliament and that the Proclamation would cease to operate at the expiration of two months unless before the expiration of that period it was approved by resolutions of both Houses of Parliament.

7. On December 3, 1971 when India was attacked by Pakistan the President issued a Proclamation under clause (1) of Article 352 as he was satisfied that the security of India had been threatened by external aggression. The said Proclamation was published in the official Gazette on the same date. It reads thus :

Ministry of Home Affairs

Notification

New Delhi, December 3, 1971

C. S. R. 1789 : The following Proclamation of Emergency by the President of India, dated December 3, 1971 is published for general information.

Proclamation of Emergency

In exercise of powers conferred by clause (1) of Article 352 of the Constitution, I, V. V. Giri, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by external aggression.

New Delhi, sd/—

December 3, 1971 V. V. Giri
President

8. The said Proclamation was laid before both the Houses of Parliament on December 4, 1971. In the Lok Sabha a resolution was moved by the Prime Minister which read as follows :

I beg to move :

That the House approves the Proclamation of Emergency issued under Article 352 of the Constitution by the President on December 3, 1971.

Mr. Speaker : Resolution moved :

That the House approves the Proclamation of Emergency issued under Article 352 of the Constitution by the President on December 3, 1971[1].

9. After some discussion in the House the resolution was carried unanimously and it was adopted.[2] Similarly a resolution was adopted by the Rajya Sabha approving the said Proclamation of Emergency.[3] The said resolutions of the Houses of Parliament were no doubt not published in the official Gazette. The above Proclamation of Emergency was revoked by the Vice-President acting as President on March 27, 1977 by a Proclamation which read thus :

Ministry of Home Affairs

Notification

New Delhi, March 27, 1977

G. S. R. 132 (E).—The following Proclamation made by the Vice-President acting as President of India is published for general information :—

Proclamation

In exercise of the powers conferred by sub-clause (*a*) of clause (2) of Article 352 of the Constitution, I, Basappa Danappa Jatti, Vice-President acting as President of India, hereby revoke the Proclamation of Emergency issued under clause (1) of that article on December 3, 1971 and published with the notification of the Government of India in the Ministry of Home Affairs No. G.S.R. 1789, dated December 3, 1971.

New Delhi, sd/—
March 27, 1977 B. D. Jatti,
Vice-President acting as President.

10. The above Proclamation was published in the official Gazette Extraordinary dated March 27, 1977. On June 25, 1975 the President of India issued a Proclamation of Emergency as he was satisfied that the security of India was threatened by internal disturbance. That Proclamation was published under a notification dated June 26, 1975 in the official Gazette. It read thus :

Ministry of Home Affairs

Notification

New Delhi, June 26, 1975

G. S. R. 353 (B)

1. *See* Lok Sabha Debates dated December 4, 1971, column 4
2. *See* Lok Sabha Debetes dated December 4, 1971, column 37
3. *See* Rajya Sabha Debates dated December 4, 1971, column 46

The following Proclamation of Emergency by the President of India, dated June 25, 1975, is published for general information :—

Proclamation of Emergency

In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I Fakkhruddin Ali Ahmed, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

New Delhi, F. A. Ahmed,
June 26, 1975 President

No. 11/16013/1/75-S & P (D-11)
S. L. Khurana, Secy.

11. A resolution was moved in the Lok Sabha on July 21, 1975 seeking the approval of the Lok Sabha to the Proclamation of Emergency dated June 25, 1975 and also the order of the President dated June 26, 1975 made in exercise of the powers conferred by sub-clause (*b*) of clause (4) of Article 352 of the Constitution (as it stood then) as applying to the State of Jammu and Kashmir. The Proclamation of Emergency was also laid on the table of the Lok Sabha. That resolution was adopted by the Lok Sabha on July 23, 1975.[4] A resolution was moved seeking the approval of the said Proclamation of Emergency on July 21, 1975 in the Rajya Sabha and it was adopted by the Rajya Sabha on July 22, 1975.[5] The resolution of the Lok Sabha and the resolution of the Rajya Sabha approving the Proclamation dated June 25, 1975 were not published in the official Gazette. The Vice-President acting as President revoked the Proclamation of Emergency dated June 25, 1975 by another Proclamation dated March 21, 1977 which reads thus :

Ministry of Home Affairs

Notification

G. S. R. 117/E—The following Proclamation made by the Vice-President acting as President of India is published for general information :—

Proclamation

In exercise of the powers conferred by sub-clause (*a*) of clause (2) of Article 352 of the Constitution, I, Basappa Danappa Jatti, Vice-President acting as President of India, hereby revoke the Proclamation of Emergency issued under clause (1) of that article on June 25, 1975 and published with the notification of the Government of India in the Ministry of Home Affairs No. GSR 353(B) dated June 26, 1975.

New Delhi, B. D. Jatti
Vice-President acting as President
March 21, 1977.

12. Article 83(2) of the Constitution during the relevant time, that is, before the 42nd Amendment Act of 1976 read as follows :

83. (1) ....

4. *See* Lok Sabha Debates dated July 23, 1975, column 427
5. *See* Rajya Sabha Debates dated July 22, 1975, column 124

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House :

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate

13. As the period of five years from the date appointed for its first meeting of the then existing House of the People was about to come to a close Parliament enacted the House of the People (Extension of Duration) Act, 1976 (Act 30 of 1976) which received the assent of the President on February 16, 1976. Section 2 of that Act read thus :

2. *Extension of duration of the present House of the People.*—The period of five years (being the period for which the House of the People may, under clause (2) of Article 83 of the Constitution, continue from the date appointed for its first meeting) in relation to the present House of the People shall, while the Proclamations of Emergency issued on the 3rd day of December, 1971 and on the 25th day of June, 1975 are both in operation, be extended for a period of one year :

Provided that if both or either of the said Proclamations cease or ceases to operate before the expiration of the said period of one year, the present House of the People shall, unless previously dissolved under clause (2) of Article 83 of the Constitution, continue until six months after the cesser of operation of the said Proclamations or Proclamation but not beyond the said period of one year.

14. The Finance Act, 1976 was passed by the Lok Sabha after its period was extended as stated above and by the Rajya Sabha in the early part of the year 1976 and it received the assent of the President on May 27, 1976. Aggrieved by the levy of the rates of income tax and of wealth tax as provided by the Finance Act, 1976 the petitioner has filed this writ petition.

15. Two important questions which arise for consideration in this case are (*i*) whether the two Proclamations of Emergency were validly issued or not? and (*ii*) whether each of the said Proclamations had ceased to be in force at the expiration of two months from the date on which each of them was issued as the resolutions of the Houses of Parliament approving each of them had not been published in the official Gazette. In *Waman Rao* v. *Union of India*[6], the validity of the 40th and the 42nd Constitutional Amendments had been questioned on similar grounds. This Court while it left open the question whether the issuance of the Proclamations of Emergency raised a justiciable issue, on the basis of the material placed before it came to the conclusion that they had been duly issued. Chandrachud, C. J. observed in the course of his judgment in *Waman Rao case*[6], at page 45 thus : (SCC pp. 402-03, paras 61 and 62)

6. (1981) 2 SCC 362 : (1981) 2 SCR 1 : AIR 1981 SC 271

Thus, in the first place, we are not disposed to decide the question as to whether the issuance of a proclamation of emergency raises a justiciable issue. Secondly, assuming it does, it is not possible in the present state of record to answer that issue one way or the other. And, lastly, whether there was justification for continuing the state of emergency after the cessation of hostilities with Pakistan is a matter on which we find ourselves ill-equipped to pronounce.

Coming to the two Acts of 1976 by which the life of the Lok Sabha was extended, Section 2 of the first of these Acts, 30 of 1976, which was passed on February 16, 1976, provided that the period of five years in relation to the then House of the People shall be extended for a period of one year "while the Proclamation of Emergency issued on December 3, 1971 and on June 25, 1975, are both in operation". The second Act of Extension continues to contain the same provision. It is contended by the petitioners that the proclamation of December 3, 1971 should have been revoked long before February 16, 1976 and that the proclamation of June 25, 1975 was wholly uncalled for and was mala fide. Since the precondition on which the life of the Parliament was extended is not satisfied, the Act, it is contended, is ineffective to extend the life of the Parliament. We find it difficult to accept this contention. Both the proclamations of emergency were in fact in operation on February 16, 1976 when the first Act was passed as also on November 24, 1976 when the second Act, 109 of 1976, was passed. It is not possible for us to accept the submission of the petitioners that for the various reasons assigned by them, the first proclamation must be deemed not to be in existence and that the second proclamation must be held to have been issued mala fide and therefore non-est. The evidence produced before us is insufficient for recording a decision on either of these matters. It must follow that the two Acts by which the duration of the Lok Sabha was extended are valid and lawful. The 40th and the 42nd Constitutional Amendments cannot, therefore, be struck down on the ground that they were passed by a Lok Sabha which was not lawfully in existence.

16. The petitioner, however, contended before us that the above decision had been rendered on insufficient material and that if it was open to any person to place before this Court sufficient material the court should reconsider the question of the validity of the Proclamations of Emergency. Assuming that it is possible for this Court to reopen the case, the petitioner has not been able to place before this Court any new material on the basis of which it is possible for us to conclude that the Proclamations had been issued by the President without applying his mind or mala fide. We are, therefore, bound by the decision of this Court in *Waman Rao case*[6], upholding the validity of the two Proclamations of Emergency. The only other question which requires to be considered is whether on account of the non-publication in the official Gazette of the resolutions of the two Houses of Parliament approving the two Proclamations of Emergency, the Proclamations came to an end on the expiry of the period of two months from the date of issue thereof.

17. The fact that the two Proclamations had been approved by the resolutions passed by both the Houses of Parliament as set out earlier in the course of this judgment is not disputed by the petitioner. What the petitioner, however, contended before the court was that the resolutions which were almost

legislative in character and which had the effect of converting the federal State into almost an unitary State by conferring large powers on the Central Executive and Parliament as provided in Article 303 and in some other provisions of the Constitution should have been given wide publicity so that people who were affected thereby could if they did not feel satisfied about the need for continuing the state of emergency either protest or make appropriate representation. The petitioner urged that the democratic nature of the Constitution which had been highlighted in its Preamble required that wide publicity should be given to the resolutions of the two Houses of Parliament approving any Proclamation of Emergency and that the only means available for giving such publicity was the publication of resolutions in the official Gazette in which the Proclamations of Emergency had been published. In support of his argument the petitioner relied upon several Proclamations issued in India right from the days of Queen Victoria on many important occasions which had been widely published in the official Gazette and by other means. He also drew our attention to the Proclamations issued elsewhere which had been given similar publicity through the official Gazettes of those countries. The petitioner's argument in a nutshell was that the resolutions passed by Parliament which had the effect of continuing the duration of emergency being of the same character as Proclamations themselves should have been published in the official Gazette and in the absence of such publication the Proclamations of Emergency" should be deemed to have become ineffective on the expiry of the period of two months from the issue thereof.

18. Article 352 of the Constitution does not prescribe that a Proclamation of Emergency should be published in the official Gazette. The "Proclamation of Emergency" is defined in Article 366(18) thus :

> 366. (18) "Proclamation of Emergency" means a Proclamation issued under clause (1) of Article 352.

19. Article 366(19) of the Constitution defines a "public notification" thus :

> 366. (19) "public notification" means a notification in the Gazette of India, or, as the case may be, the official Gazette of a State.

20. Wherever the Constitution expressly requires a certain notification should be published in the official Gazette it has stated that the said notification shall be published in the form of a public notification. By way of an illustration, reference may be made to Article 364(1) of the Constitution which reads thus :

> 364. (1) Notwithstanding anything in this Constitution, the President may by public notification direct that as from such date as may be specified in the notification—
>
> (*a*) any law made by Parliament or by the legislature of a State shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification, or
>
> (*b*) any existing law shall cease to have effect in any major port or

aerodrome except as respects things done or omitted to be done before the said date, or shall in its application to such port or aerodrome have effect subject to such exceptions or modifications as may be specified in the notification....

21. Thus it is seen that any public notification issued under Article 364(1) of the Constitution has to be published in the official Gazette as provided by Article 366(19) of the Constitution. A Proclamation of Emergency being a very important event affecting public life has also to be published in any manner known to the modern world and the publication in the official Gazette is one such mode. We are of the view that if the Constitution requires that a particular mode of publication is necessary then such mode must be followed but if there is no mode of publication prescribed by the Constitution then it must be considered that the Constitution has left the method of publication to the authority issuing the Proclamation in order to make it known to the members of the public. In the instant case the Proclamations of Emergency have been published in the official Gazette.

22. The petitioner contended that even though it was not expressly provided that the resolutions passed by both the Houses of Parliament should be published in the official Gazette they should have been published for the very same reason which compelled the government to publish the Proclamations in the official Gazette. In the Constitution and in the Rules of Procedure of the Houses of Parliament and of the State legislatures there are several provisions which provide for resolutions being passed by the Houses of Parliament or the Houses of State legislatures. They are among others (*i*) Article 123(2)(*a*) — Disapproval of an ordinance ; (*ii*) Article 169 — Abolition or creation of a Legislative Council ; (*iii*) Article 213(2)(*a*) — Disapproval of an ordinance; (*iv*) Article 249 — Resolution of the Council of States empowering Parliament to legislate with respect to any matter in a State List in national interest ; (*v*) Article 252 — Resolutions of the House or Houses of State legislatures of two or more States to enable Parliament to legislate on a State subject or adoption of a law made under Article 252 by a State legislature which had not requested Parliament to make it before it was passed by the Parliament; (*vi*) Article 312 — Resolution passed by the Council of States creating a new All India Service ; (*vii*) Article 315(2) — Resolutions of House or Houses of State legislatures of two or more States to enable Parliament to provide a common Public Service Commission to such States ; (*viii*) Article 320(5) — Amendment or repeal of Regulations made by the President or the Governor under the proviso to Article 320(3) ; (*ix*) Original Article 352(2)(*c*) and the present Article 352(4) — Approval of Proclamations of Emergency by the Houses of Parliament ; (*x*) Article 356(3) — Approval of Proclamation made under Article 356(1) ; (*xi*) Article 360(2) — Approval of the Proclamation of financial emergency by the Houses of Parliament ; (*xii*) Proviso to Article 368 — Resolutions to be passed by the State legislatures approving the constitutional amendments approved by Parliament ; (*xiii*) Article 371-A(1)(*a*) — Power of Nagaland Legislative Assembly to adopt an Act of Parliament in respect of certain matters ; (*xiv*)

Articles 61, 67(*b*), 90, 94, 101(4), 124(4), 148(1), 190(4) and 217(1)(*b*) — relate to removal of high constitutional dignitaries from office ; (*xv*) Article 3 — State legislature expressing its views on the alteration of its boundaries of the State concerned ; (*xvi*) Rules 234 to 239 of the Lok Sabha Rules of Procedure and Conduct of Business — relating to modification of subordinate legislation and (*xvii*) Privilege Motions before the Houses of Parliament and the State legislatures relating to punishment for contempt or removal from membership on account of highly unbecoming conduct of members. In all these cases any resolution passed by the concerned legislative body has far-reaching consequences. They are not required to be published in the official Gazette, even though in some cases they are published, say, where a Central law is adopted under Article 252 or a member is removed on the ground of privilege etc. They would not be treated as ineffective merely because they are not published in the official Gazette. They are all however published in the Reports of the Houses of Parliament and of the Houses of the State legislature within a reasonable time.

23. The petitioner relied on the decision of this Court in *Harla* v. *State of Rajasthan*[7], in support of his contention. In that case the facts were these. The Council of Ministers appointed by the Crown Representative for the government and administration of the Jaipur State passed a Resolution in 1923 purporting to enact a law called the Jaipur Opium Act, but that law was neither promulgated or published in the Gazette nor made known to the public. The Jaipur Laws Act, 1923, which was also passed by the Council and which came into force on November 1, 1924, provided by Section 3(*b*) that the law to be administered by the court of the Jaipur State shall be "(*b*) all the regulations now in force within the said territories and the enactments and regulations that may hereafter be passed from time to time by the State and published in official Gazette". In 1938 the Jaipur Opium Act was amended by adding a clause to the effect that "it shall come into force from September 1, 1924". This Court held that the mere passing of the resolution of the Council without further publication or promulgation of the law was not sufficient to make the law operative and the Jaipur Opium Act was not therefore a valid law. It further held that the said Act was not saved by Section 3(*b*) of the Jaipur Laws Act, 1923, as it was not a valid law in force on November 1, 1924, and the mere addition of a clause in 1938 that it came into force from 1924 was of no use. In *State of Punjab* v. *Satya Pal Dang*[8], one of the questions which arose for consideration was whether the decision of the Governor proroguing the Legislative Assembly was required to be communicated to each and every member of the legislature before it could become effective. This Court held that Article 174(2) of the Constitution which enabled the Governor to prorogue the legislature did not indicate the manner in which the Governor was to make such orders known and that he could follow the well established practice that

7. 1952 SCR 110 : AIR 1951 SC 467
8. (1969) 1 SCR 478 : AIR 1969 SC 903

such orders were ordinarily made known by a public notification which meant no more than that they were notified in the official Gazette of the State. There was such a notification on March 11, 1968 and the prorogation must be held to have taken effect from the date of publication. It was not necessary that the order should reach each and every member individually before it could become effective. Insofar as the Governor was concerned it was open to him to publish a notification issued by him under Article 174(2) of the Constitution in the official Gazette of the State and such publication was considered to be sufficient. But the real question in this case is whether the resolutions passed by both the Houses of Parliament approving the two Proclamations of Emergency had also to be published in the official Gazette. We shall assume that the resolutions of both the Houses of Parliament approving a Proclamation of Emergency should be given due publicity. We have already shown above that in the Lok Sabha Debates and in the Rajya Sabha Debates the proceedings relating to the resolutions in question had been published in the usual course. Rule 379 of the Rules of Procedure and Conduct of Business in Lok Sabha provides for the publication of the full report of the proceedings of the Lok Sabha. It reads thus :

> 379. The Secretary shall cause to be prepared a full report of the proceedings of the House at each of its sittings and shall, as soon as practicable, publish it in such form and manner as the Speaker may, from time to time, direct.

24. Rule 382(1) of the said Rules provides for the printing and publication of Parliamentary papers. It reads thus :

> 382. (1) The Speaker may authorise printing, publication, distribution or sale of any paper, document or report in connection with the business of the House or any paper, document or report laid on the Table or presented to the House or a Committee thereof.
>
> (2) A paper, document or report printed, published, distributed or sold in pursuance of sub-rule (1) shall be deemed to have been printed, published, distributed or sold under the authority of the House within the meaning of clause (2) of Article 105 of the Constitution.

25. Similarly in the Rules of Procedure and Conduct of Business of the Council of States (Rajya Sabha) Rule 260 provides thus :

> 260. *Preparation and publication of proceedings of Council.*—The Secretary-General shall cause to be prepared a full report of the proceedings of the Council at each of its meetings and shall, as soon as practicable, publish it in such form and manner as the Chairman may, from time to time, direct.

26. The Rules of Procedure of the both the Houses of Parliament are made under Article 118(1) of the Constitution which reads thus :

> 118. (1) Each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.
>
> (2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this

have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be. . . .

27. Section 57 of the Indian Evidence Act, 1872 requires the court to take judicial notice of the facts stated therein. Clause (4) of Section 57 of the Indian Evidence Act, 1872 reads thus :

> 57. The court shall take judicial notice of the following facts :
>
> (4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province or in the State.

28. Section 56 of the Indian Evidence Act, 1872 provides that :

> 56. No fact of which the court will take judicial notice need be proved.

29. Section 74 of the Indian Evidence Act, 1872 refers to the documents which are considered to be public documents. Sub-clause (*iii*) of clause (1) of Section 74 reads thus :

> 74. The following documents are public documents :—
>
> (1) documents forming the acts or records of the acts—
>
> (*iii*) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country.

30. Section 78 of the Indian Evidence Act, 1872 lays down the mode of proof of certain public documents. The relevant part of it reads thus :

> 78. The following public documents may be proved as follows :
>
> (1) . . .
>
> (2) The proceedings of the legislatures,—
>
> by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of the government concerned.

31. The Lok Sabha Debates and the Rajya Sabha Debates are the journals or the reports of the two Houses of Parliament which are printed and published by them. The court has to take judicial notice of the proceedings of both the Houses of Parliament and is expected to treat the proceedings of the two Houses of Parliament as proved on the production of the copies of the journals or the reports containing proceedings of the two Houses of Parliament which are published by them.

32. In *Niharendu Dutt Majumdar* v. *Emperor*[9] the Federal Court of India was called upon to decide a question almost similar to the question which has arisen before us in this case. The facts of that case were these. Sec-

9. (1942) FCR 38 : AIR 1942 FC 22

tion 102 of the Government of India Act, 1935 authorised the Governor-General to issue a Proclamation of Emergency, the relevant part of which read as follows :

> 102. (1) Notwithstanding anything in the preceding sections of this chapter, the Federal legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a "Proclamation of Emergency") that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List or to make laws, whether or not, for a Province or any part thereof, with respect to any matter not enumerated in any of the lists in the Seventh Schedule to this Act.
>
> (3) A Proclamation of Emergency—
>
> (*a*) may be revoked by a subsequent Proclamation ;
>
> (*b*) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament ; and
>
> (*c*) shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by Resolutions of both Houses of Parliament.

33. The Governor-General had issued a Proclamation in exercise of his powers under Section 102(2) of the Government of India Act, 1935 declaring that a grave emergency existed, whereby the security of India was threatened, by war on September 3, 1939 on receipt of information from His Majesty's Government in the United Kingdom that a state of war existed between His Majesty and Germany and on September 29, 1939 the Defence of India Act, 1939 was enacted. The appellant in that case was convicted by the Additional Chief Presidency Magistrate at Calcutta on July 21, 1941, of offences under sub-paragraphs (*e*) and (*k*) of paragraph (6) of Rule 34 of the Defence of India Rules and was sentenced to be detained till the rising of the court and to pay a fine of Rs 500, and in default to undergo six months' rigorous imprisonment. The conviction and sentence were upheld on appeal by the High Court, and the appellant had preferred the abovesaid appeal before the Federal Court against the judgment of the High Court of Calcutta. On appeal although the appellant was acquitted on the ground that the facts established in the case did not make out the offences for which he had been punished the Federal Court negatived the contention of the appellant that the Proclamation of Emergency issued under Section 102 of the Government of India Act, 1935 had ceased to be in force at the expiration of six months as there was no proof of the fact that the said Proclamation of Emergency had been approved by the resolutions of both the Houses of the British Parliament as required by clause (*c*) of Section 102 of the Government of India Act, 1935. Before the High Court the relevant volumes of the "Parliamentary Debates" which contained the official reports of the debates in the Houses of the British Parliament had been produced and accepted by the High Court as proof that the British Parliament had passed the necessary resolutions. But the appellant contended that that

proof was not adequate and that only copies of the Official Journals of the two Houses had to be produced. The Advocate-General of Bengal contended that the court was not entitled and indeed ought to take judicial notice of the fact that the resolutions were passed and that in any event the volumes of the Parliamentary Debates were all that was necessary in the way of legal proof. Gwyer, C.J., while rejecting the above contention of the appellant observed at pages 45-47 thus :

> In our opinion, the volumes of the Official Parliamentary Debates afforded adequate legal proof of the passing of the two resolutions by the Houses of Parliament. Section 78, Indian Evidence Act, sets out certain categories of public documents and the manner in which they may be proved. The first four categories (as amended by the Adaptation of Indian Laws Order, 1937) are these :
>
> (1) Acts, orders, or notifications of the Central Government in any of its departments or of any Provincial Government or any department of any Provincial Government.
>
> (2) The proceedings of the legislatures, which may be proved "by the journals of those bodies respectively, or by published Acts or abstracts, or by copies, purporting to be printed by orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government" ;
>
> (3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council or by any department of Her Majesty's Government.
>
> (4) The Acts of the executive or the proceedings of the legislature of a foreign country, which may be proved "by journals published by their authority, or commonly received in that country as such", and in certain other ways not here material. In our opinion, the proceedings of Parliament fall under either the second or fourth of the categories set out above. It may be said that the reference in the second category to proceedings of "the legislatures", following immediately upon the first category which is confined to acts, orders or notifications of governments in British India, is to be taken as a reference to the legislatures of British India only. We find it difficult, however, to believe that Section 78 excludes any reference whatsoever to the proceedings of Parliament, especially when the executive acts of the government of the United Kingdom are given a category to themselves, and we should find ourselves compelled, if we adopted that construction, to hold that proceedings in Parliament fell into the fourth category, that is to say, "the proceedings of the legislatures of a foreign country" ; but it would perhaps be even more difficult to suppose that Parliament can have been so described by the Indian legislature in 1872. The explanation may be that "the legislatures" to which the second category refers are intended to include all the legislatures which have the power to make laws for British India or for any part thereof but we have no doubt that the present case must fall within either the one category or the other. . . .
>
> We have ascertained by inquiry from the Legislative Department of the Government of India that the Official Reports of the Council of State and of the Legislative Assembly, which follow very closely the form and manner

of presentation of the Official Parliamentary Debates in England, are the only record of the proceedings of the two Houses, no other record similar to that of the journals of the two Houses of Parliament in England being made. The proceedings of the Indian legislature could clearly be proved by tendering in evidence copies of these Official Reports ; and we can see no reason why the proceedings of Parliament cannot be proved by an exactly similar English publication, issued with a similar authority.

Having regard to the view which we take on this point, we need not consider the other contention urged by the Advocate-General of Bengal, that the passing of the two Resolutions by Parliament was a matter of which the courts were entitled to take judicial notice.

34. We have quoted in extenso the relevant part of the judgment in *Niharendu Dutt Majumdar case*[9] with which we respectfully agree since we are concerned in this case with a similar question.

35. We do not also find much substance in the submission of the petitioner that the publication in the Lok Sabha Debates and in the Rajya Sabha Debates had been made after about two months and therefore until the resolutions were published they were ineffective. What is essential is that the resolutions approving the Proclamation of Emergency should be passed within the period of two months. A little delay in publishing the proceedings would not affect the validity of the resolutions. Let us take the case of an Act of Parliament. Under Section 5 of the General Clauses Act, 1897 where any Central Act is not expressed to come into operation on a particular day then it shall come into operation on the day on which it receives the assent of the President and unless the contrary is expressed a Central Act shall be construed as coming into operation immediately on the expiration of the day preceding its commencement. Even if there is some delay in the publication of the Central Act in the official Gazette, its operation does not get suspended until such publication unless the contrary is expressed in the statute itself. While on the face of it, as observed, by Sir C. K. Allen in his *Law and Orders* (2nd Edn.) at page 132, it would seem reasonable that legislation of any kind should not be binding until it has somehow been 'made known' to the public, "that is not the rule of law and if it were, the automatic cogency of a statute which has received the royal assent would be seriously and most inconveniently impaired". The reasoning was that statutes at least received publicity of Parliamentary debate and that therefore they were, or should be 'known'. But this was not true of delegated legislation, which did not necessarily receive any publicity in Parliament or in any other way. That is the reason for the insistence of the publication of subordinate legislation in the official Gazette before it can be brought into force. Insofar as the Acts and resolutions passed by the Houses of Parliament and the State legislatures are concerned the very process of passing the law or the resolutions in the Houses of Parliament or the State legislatures gives them ample publicity. The reports of the proceedings of Parliament and the State legislatures are widely circulated. The newspapers, radio and television are also the other modern means which give publicity to all Acts and resolutions of Parliament and the legislatures of the States. In ancient

days the King's soldiers and announcers had to go round the realm to give publicity to the royal proclamations. The present day world is different from the ancient world. The publication in the Parliamentary Debates though after some short delay is adequate publication of the resolutions of Parliament as there is no rule which requires that the resolutions should be published in the official Gazette. Hence mere non-publication of the resolutions approving the Proclamations of Emergency in the official Gazette did not make them ineffective.

36. We are satisfied that the resolutions of the Lok Sabha and Rajya Sabha approving the two resolutions have been duly published in the official reports of the two Houses of Parliament. This ought to meet the contention of the petitioner that any public act or resolution which affects public life should be given due publicity. We also hold that the production of the Lok Sabha Debates and of the Rajya Sabha Debates containing the proceedings of the two Houses of Parliament relating to the period between the time when the resolutions were moved in each of the two Houses of Parliament and the time when the resolutions were duly adopted amounts to proof of the said resolutions. The court is required to take judicial notice of the said proceedings under Section 57 of the Indian Evidence Act, 1872. We are, therefore, of the view that the two Proclamations of Emergency were kept in force by virtue of the resolutions passed by the Houses of Parliament until they were duly revoked by the two proclamations which were issued by the Vice-President acting as President of India in the year 1977. Since the two Proclamations of Emergency were in force when the House of the People (Extension of Duration) Act, 1976 (Act 30 of 1976) was passed its validity cannot be questioned. The Lok Sabha passed the Finance Act, 1976 during the extended period of its duration and therefore the validity of Finance Act, 1976 also cannot be questioned. In view of the foregoing this petition should fail and it is accordingly dismissed. There will be no order as to costs.

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(BEFORE SABYASACHI MUKHARJI AND S. RANGANATHAN, JJ.)

COLLECTOR OF CUSTOMS, BOMBAY .. Appellant ;

Versus

BHOR INDUSTRIES LTD. .. Respondent.

Civil Appeals Nos. 392-95 of 1988†, decided on April 20, 1988

Customs Tariff Act, 1975 — Heading 38.01/19(6) — 'Plasticizers, not elsewhere specified' — 'Santicizer 429' imported by respondent, held, falls under (Para 5)

Collector of Customs, Bombay v. *Bhor Industries Ltd.*, (1985) ELT 291, *approved*

†Appeal under Section 130-E(*b*) of the Central Excise and Salt Act, 1944 from the Order dated December 15, 1986 of the Customs Excise and Gold (Control) Appellat-Tribunal, New Delhi in Appeal No C/2130 to 2132/86-C & 1027/83 and Order No. 757-760 of 1986

made first and thereafter Group 'B' candidates as Group 'A' was shown above Group 'B' in the order mentioned in the Promotion Policy.

6. Mr Ramaswamy appearing on behalf of the Bank submitted that during the intervening period a large number of officers have been promoted and in the absence of such officers being impleaded as parties in the present case, their rights in respect of seniority will be affected. We find no force in the above contention inasmuch as we are not deciding the question of seniority in the present case. The Bank is free to decide the question of seniority inter se between the parties according to law. The only relief to which the petitioners are praying and in our view rightly that they should be granted notional promotion from December 27, 1982 the date from which the promotions were given to officers of Group 'B'. So far as this relief is concerned, we do not find that there is any necessity of impleading any other parties in the case.

7. In the result we allow this appeal, set aside the order of the High Court and direct that all Group 'A' officers including the petitioners of the State Bank of Hyderabad who had appeared in the test held in May 1982 and were declared successful shall be given notional promotion in Grade Scale II from December 27, 1982. After giving the notional promotion to the abovementioned officers, the Bank would be free to decide the question of seniority in accordance with law.

8. In the facts and circumstances of the case there will be no order as to costs.

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(BEFORE L.M. SHARMA AND N.M. KASLIWAL, JJ.)

D.B. RAJU .. Appellant;

Versus

H.J. KANTHARAJ AND OTHERS .. Respondents.

Civil Appeal No. 3634 (NEC) of 1989, decided on July 13, 1990

Election — Electoral roll — Correction of entries in — When becomes final — Election to State Legislative Council — Nomination of person as members of Mandal Panchayats for their inclusion in electoral roll — Procedure — Publication of names of nominated members essential — On receipt of information about publication of at least two-third of the total number of names, Electoral Registration Officer can proceed to revise the electoral roll — On facts, such information was not proved to have been received before expiry of the period fixed for filing nomination papers — Moreover, modified electoral roll made public only after that period — Hence held, electoral roll modified by including the names of nominated person after the prescribed period — Accordingly High Court's order for recount of the votes after excluding the nominated members proper — Karnataka Zilla Parishads, Taluk Panchayat

Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983, Section 5(9) — Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983, Section 5(9) — Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats (Conduct of Election) Rules, 1985, Rules 40(1) Explanation 73 — Representation of the People Act, 1950, Sections 22, 13-B

Election — Electoral roll — Purpose and use of preparing, explained

(Para 12)

Administrative Law — Subordinate legislation — Publication or promulgation of, essential so as to be effective — Action taken confidentially without informing the persons interested would render it ineffective

Held :

The electoral roll does not get automatically amended on the completion of the process of nomination of the additional members. Ordinarily the question of inclusion of a new name in the electoral roll arises only when an application is made before the Electoral Registration Officer in this regard, but the power can be exercised by the officer even without such an application. (Para 5)

The question of inclusion of the names in the electoral roll can arise only after the nomination is complete in the eye of law. A nominated person is entitled to be included as a voter for the election to the Council constituency after he becomes a member of the Mandal Panchayat and not before. A nominated person will become a member of the Panchayat only after due publication of his name in accordance with Rule 73. It is, therefore, necessary to have the names of the nominated person affixed on the notice board of the office of Tahsildars, the notice boards of the mandal Panchayats and in the Chavadis. The Deputy Commissioner who was Electoral Registration Officer could have taken steps for inclusion of the names in the electoral roll of the State Council constituency after receipt of the information of their due publication in the offices situated at different places. But in view of the Explanation to Section 40(1) it was not necessary for the Deputy Commissioner to wait for the information in this regard from all the places. On his satisfaction that the publication of two-third of the total number of the names were complete, he was free to proceed further and to revise the electoral roll under Representation of the People Act, 1950 by including all the nominated members.

(Paras 3 and 5)

The intending contestants and their supporters heavily depend upon the final electoral roll for deciding their future conduct, and it is, therefore, extremely essential that it is made available to them before the expiry of the period fixed for filing the nomination papers. If the roll as it stood earlier, was confidentially corrected by the Electoral Registration Officer concerned sitting in his office without any information or knowledge to persons who are inserted in finding out its final shape, the same cannot be considered to have been prepared according to law. The Acts of the legislature are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done, and this is done only after debates take place which are open to the public. The matter receives wide publicity

through the media. But the case is different with the delegated legislation and also in the case of orders passed by the authorities like the Electoral Registration Officer in the present case. The mode of publication can vary but there must be reasonable publication of some sort. (Para 14)

Bachhittar Singh v. *State of Punjab*, 1962 Supp 3 SCR 713: AIR 1963 SC 395; *B.K. Srinivasan* v. *State of Karnataka*, (1987) 1 SCC 658; *Harla* v. *State of Rajasthan*, 1952 SCR 110: AIR 1951 SC 467; *Fatma Haji Ali Mohammad Haji* v. *State of Bombay*, 1951 SCR 266: AIR 1951 SC 180; *State of Maharashtra* v. *Mayer Hans George*, (1965) 1 SCR 123: AIR 1965 SC 722; *Johnson* v. *Sargant and Sons*, (1918) 1 KB 101 :118 LT 95, *relied on*

In the present case the Deputy Commissioner who was the Electoral Registration Officer was not in a position to assert that the report of publication of the names of two-third or more of the nominated persons in the offices of the Mandal Panchayats had been received in his office before the deadline. Moreover, the electoral roll will be deemed to have been modified when it was made public and not earlier when the actual correction in the list was made in the Deputy Commissioner's office which fact was kept confidential in spite of repeated demands for information. Since the electoral roll was made public after expiry of the period fixed for receipt of nomination papers, in the eye of law, it was not modified by inclusion of the names of the nominated members within the prescribed time. Therefore, the High Court was justified in directing the recount of the votes after excluding the nominated members.

(Paras 8 and 11)

R-M/10115/C

The Judgment of the Court was delivered by

SHARMA, J.— This appeal under Section 116-A of the Representation of the People Act, 1951, is directed against the decision of the Karnataka High Court setting aside the election of the appellant D.B. Raju to the State Legislative Council, and directing the recount of the votes after excluding those of 242 nominated members. The election was held by adopting the 'single transferable vote method'. The polling took place on July 3, 1988 and the counting was taken up on the next date, that is, July 4, 1988. After several rounds of counting the appellant was declared as the successful candidate.

2. The election in question relates to the Chitradurga Local Authorities Constituency, comprising 121 Mandal Panchayats. The last date and time fixed for receiving nomination papers was 3.00 p.m. on June 3, 1988. According to the appellant's case, a decision was taken by the Chitradurga Zilla Parishad in its special meeting held on May 28, 1988 to nominate two members from each Mandal Panchayat, that is, a total number of 242 members. Accordingly, steps were taken under the provisions of the Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983 (hereinafter referred to as 'the Parishads Act') read with the rules framed thereunder, and 242 members were duly nominated in time to be included in the elec-

toral roll. This has been denied by the election petitioner-respondent 1, as also some of the respondents who contested the election. According to their case, the inclusion of the names of the nominated members in the electoral roll took place after the period for nomination was over and they were, therefore, not included in the electoral roll in the eye of law. The main question in the case which thus arises is as to whether the names of the 242 nominated members were included in the electoral roll within the time permitted by the law.

3. The Deputy Commissioner, who was impleaded in the election petition as respondent 5 (in this appeal also he is respondent 5), had triple role to play in connection with the disputed election. He was authorised under the Parishads Act and the Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats (Conduct of Election) Rules, 1985 (hereinafter referred to as 'the Parishads Rules') to take steps for completing the nomination of the members; under Section 13-B of the Representation of the People Act, 1950, he was the Electoral Registration Officer for preparation and revision of the electoral roll; and he was also the Returning Officer under the Representation of the People Act, 1951. According to the case of the appellant, a resolution was passed by the Zilla Parishad on May 28, 1988 nominating the aforementioned 242 members, and the Chief Secretary of the Zilla Parishad sent the list of the names to the Deputy Commissioner on May 30, 1988. The Deputy Commissioner was, under Section 5(9) of the Parishads Act, required to publish the said names so as to complete the process of nomination. He was also vested with the jurisdiction to include the names in the electoral roll under the provisions of the Representation of the People Act, 1950. It is relevant to note at this stage that the question of inclusion of the names in the electoral roll could arise only after the nomination was complete in the eye of law. A nominated person was entitled to be included as a voter for the election to the Council Constituency after he became a member of the Mandal Panchayat and not before. Having learnt about the nominations on the eve of the election, some persons challenged the same and objected before the Deputy Commissioner to the proposed publication. However, the Deputy Commissioner on June 1, 1988 passed an order directing the necessary steps to be taken under the Parishads Act, and accordingly a list of the nominated members was pasted on the notice board of the office of the Deputy Commissioner. Before the nominated persons could be treated to have become members of the Panchayats it was necessary that certain other steps also were taken in accordance with the Parishads Act and the Parishads Rules. Sub-section (1) of Section 40 of the Parishads Act, which is mentioned below, makes it clear that a

nominated person becomes the member of a Mandal Panchayat only on the publication of his name under Section 5(9):

> "40. *Commencement of term of office.*—(1) The term of office of the members elected at a general election or at a second election held under sub-section (7) of Section 5, or nominated shall commence on the date immediately after the expiry of the term of office of the outgoing members of the Mandal Panchayat or the period of appointment of an Administrative Committee or Administrator under Section 8, or on the date of publication of their names under sub-section (9) of Section 5, whichever is later."

The manner of publication of the names has been prescribed by Rule 73 of the Parishads Rules in the following terms:

> "73. *Publication of names of members elected or nominated to Mandal Panchayat.*— The Deputy Commissioner shall, as soon as conveniently may be, publish the list containing the names of the members elected or deemed to have been elected or nominated to the Mandal Panchayat by causing such list to be affixed on the notice board of his office, office of the Tahsildar, concerned Mandal Panchayat and in the Chavadi."

With a view to complete the nomination, the Deputy Commissioner sent out the names for affixing the same on the notice boards of the office of the concerned Tahsildars and Mandal Panchayats and in the Chavadis. The Deputy Commissioner could have taken steps for inclusion of the names in the electoral roll of the State Council Constituency after receipt of the information of their due publication in the offices situated at different places. There is a serious dispute as to when the necessary information became available at Chitradurga and the formal steps of including those names in the electoral roll were actually taken. After examining the evidence led by the parties, the High Court has held that the names were not included in the electoral roll by 3.00 p.m. on June 3, 1988.

4. Mr M.C. Bhandare, the learned counsel appearing in support of the appeal, has contended that the High Court fell in grave error in deciding the disputed issue against the appellant as it failed to take note of the provisions of the Explanation to Section 40(1) of the Parishads Act, which reads as follows:

> "*Explanation.*—When the names of members elected at a general election or at a second election held under sub-section (7) of Section 5 or nominated are published on more than one date, the date by which the names of not less than two-third of the total number of members has been published shall be deemed to be the date of publication for purposes of this section."

The learned counsel argued that the evidence on the record establishes that information of the publication of the names of more than two-third of the total number of nominated persons had reached the Deputy Commissioner in time for the amendment of the Council Constituency roll and the Deputy Commissioner had actually made an order for the inclusion of the names in the roll on June 2, 1988. Accordingly, the final electoral roll including the nominated members was ready in the office of the Returning Officer, and the appellant, as a matter of fact, had inspected the same. Reliance has been placed on his deposition as well as on the documentary evidence in the case.

5. The most important evidence in the case is to be found in the statement of the Deputy Commissioner examined as PW 4. Besides, the election petitioner examined several other witnesses. An examination of evidence on record leads to the conclusion that the Chief Secretary of the Zilla Parishad had sent the list of the nominated members to the Deputy Commissioner on May 30, 1988 and a copy thereof was placed on the notice board of the Deputy Commissioner's office on June 1, 1988. However, that did not complete the process of nomination. The provisions of Section 40(1) of the Parishads Act make it abundantly clear that a nominated person would become a member of the Panchayat only after due publication of his name in accordance with Rule 73. It was therefore necessary to have the names of the nominated persons affixed on the notice board of the office of the Tahsildars, the notice boards of the Mandal Panchayats and in the Chavadis. Mr Bhandare is right that in view of the Explanation to Section 40(1) it was not necessary for the Deputy Commissioner to have waited for the information in this regard from all the places. On his satisfaction that the publication of two-third of the total number of the names were complete, he was free to proceed further and to revise the electoral roll under the Representation of the People Act, 1950 by including all the nominated members. But the question is as to when the Deputy Commissioner did receive the information about the two-third of the total number, and further whether he, as a matter of fact, revised the electoral roll before 3.00 p.m. on June 3, 1988. It is significant to note that the electoral roll did not get automatically amended on the completion of the process of nomination of the additional members. Ordinarily the question of inclusion of a new name in the electoral roll arises only when an application is made before the Electoral Registration Officer in this regard, but the power can be exercised by the officer even without such an application. In the present case it appears that a tactical battle was going on in the political arena between the two rival groups; one attempting to get the electoral roll amended by the inclusion of the nominated members and the other trying to foil it. The Deputy Commissioner was under pressure from both

sides, and as the evidence discloses, he had to consider the different stands taken before him, which slowed down the entire process. Let us examine the evidence in this background.

6. The Deputy Commissioner has, in his evidence, stated that his office received the information about the nomination from the Zilla Parishad on May 30, 1988 when he was at Bangalore. He returned back to Chitradurga on May 31, 1988 and examined a copy of the resolution of the Parishad as also the list of the nominated persons. Soon thereafter he was approached by the two groups, one supporting the resolution and the other opposing it. Ultimately he decided to publish the list as required by Section 5(9) of the Parishads Act read with Rule 73 of the Parishads Rules. Accordingly, a copy of the list was placed on the notice board of his office and lists for the publication in the Taluk offices were handed over to the Tahsildars who were already present in Chitradurga. The lists for the publication in the offices of the Mandal Panchayats and Chavadis, which were scattered at considerable distances, were sent to the Chief Secretary of the Zilla Parishad. The Deputy Commissioner postponed the further step for modification of the electoral roll awaiting the report on publication from the different offices. Some reports from the Taluk offices were received on June 1, 1988 itself, but the Deputy Commissioner in his evidence was not in a position to give the details. His examination-in-chief was, therefore, discontinued and he was asked to bring the documents on the next date with reference to which he could answer the further questions. Accordingly, he later appeared with the papers and stated that the last reports regarding the publication from the Taluk Office of certain places were received on June 4, 1988. In his cross-examination the Deputy Commissioner stated that on the basis of his records he could say that he had received reports from 5 Taluk offices only on June 1, 1988, and none from the Mandal Panchayats; and on June 2, 1988 he had received reports about the publication in the Mandal Panchayats from 2 Taluks. As there were only 9 Taluks in his district, it can be presumed that information about the publication of two-third number at Taluk offices had reached the Deputy Commissioner by the evening of June 2, 1988. However, there does not appear to be any relevant evidence available on the records, and none has been shown to us by the learned counsel, with regard to the publication of the requisite number of names in the Mandal Panchayat offices and in the Chavadis. It has been contended on behalf of the appellant that since the burden is on the election petitioner to prove such facts which may vitiate the election, he must fail in the present state of evidence. Before adverting to this aspect we propose to consider the other evidence relating to the revision of the electoral roll.

7. The electoral roll was produced before the High Court and was marked as Ex. P-6. Although it ought to have borne the dates of its preparation and revision, none is to be found there. The inclusion of the names of the nominated members was, according to the evidence, done by attaching slips to Ex. P-6. The Deputy Commissioner was unable to state as to the date on which Ex. P-6 was prepared and typed. So far the "updated Voters' List" was concerned, it was placed on the notice board of the office of the Deputy Commissioner at 8.55 p.m. on June 3, 1988, after a lot of wrangling between the rival groups. In answer to a question in cross-examination the Deputy Commissioner stated:

> "I cannot say if the preparation of this list was complete by 3.00 p.m. on June 3, 1988 as it is a ministerial part of it."

As has been mentioned earlier, the dispute about the validity of the belated nominations had been raised on May 31, 1988 before the Deputy Commissioner when he returned to Chitradurga from Bangalore and he took a decision on June 1, 1988 to proceed with the publication so as to complete the process of nomination. According to his statement, which he made after verifying from the documents, the necessary information from the Mandal Panchayats and Chavadis started reaching him on June 2, 1988. But they were inadequate as they were only from two Taluks. At the earliest the information about the publication of the necessary number of names reached Chitradurga on June 3, 1988 when the two groups were arrayed against each other in his office, one urging the revision of the electoral roll and the other opposing it. The deadline was 3.00 p.m. on June 3, 1988 which was approaching fast. But it is important to note that the Deputy Commissioner was not aware that the period available for the revision of the electoral roll was expiring in the afternoon. He was under a wrong impression that the entire calendar date of June 3, 1988 was available for the purpose. Towards the end of paragraph 3 in his written statement the Deputy Commissioner categorically stated that he "was under a bona fide impression that direction for the inclusion of the name in the electoral roll of the constituency shall be given under Section 23 at any time on the last date for making nominations". In the earlier writ petition between the parties (in which the issue raised was not decided) respondent 5 had made a similar statement in paragraph 2 of his reply. Being under that wrong impression he was not in a hurry to take the decision in regard to the revision of the electoral roll quickly. The election petitioner, PW 1, was himself not a candidate but was an active supporter of one of the candidates and was seriously involved in the question of the revision of the roll, and, as stated in his evidence, the publication of the names under Rule 73 of the Parishads Rules was complete by June 3, 1988 only in some of the Mandal Panchayats. After the deadline at 3.00 p.m. on June 3, 1988 was crossed an application, which

has been marked as 'Annexure R-III', signed by the Secretary, District Janata Party, was given to the Deputy Commissioner asserting that no further additions or deletions in the electoral roll were permissible and an endorsement to that effect should be made by the Returning Officer. The Deputy Commissioner did not immediately give his reply thereto. The parties were also insisting for the publication of the electoral roll in its final shape. According to the further evidence of PW 1, the Deputy Commissioner promised them that he would contact the Chief Electoral Officer at Bangalore by telephone and only thereafter he would decide on his further action. The party workers including the witness awaited the further development and at 8.55 p.m. the Deputy Commissioner declared that the names of the newly nominated members were included in the voters list. Soon thereafter he also replied to the letter of the Janata Party Secretary by a letter headed as "Endorsement", stating:

> "With reference to the above, you are hereby informed that action has been taken to include the nominated members by the Zilla Parishad to the Mandal Panchayat in the District and as per Section 27(*c*) read with Section 23(3) of the R.P. Act, 1950, the Electoral Roll for Local Authority constituency has been updated and a copy pasted in the office on June 3, 1988 at 8.55 p.m."

Two other Janata Party members have been examined as PWs 2 and 3 in the case supporting the above version.

8. Mr Bhandare has relied upon the oral evidence of the appellant wherein he claimed to have gone to the office of the Deputy Commissioner on June 2, 1988 to secure a prescribed form for filing his nomination as a candidate in the election and was allowed to examine the electoral roll which was kept on a table in the office. He asserts that after verifying his name and serial number in the list he discovered that the names of nominated members were also included therein. He stuck to this story in the cross-examination and insisted that it was at 11.00 in the morning on June 2, 1988 that he had seen the revised roll. It is difficult to accept his case on this evidence. According to the Deputy Commissioner himself the report about the publication in the office of the Mandal Panchayats from only two Taluks were received by the evening of June 2, 1988 and it is, therefore, not believable that the Deputy Commissioner had amended the roll before June 3, 1988. The Deputy Commissioner has not claimed to have revised the roll on June 2, 1988. On the other hand, he made a very significant assertion in his written statement in the present election petition which is quoted below:

> "The Deputy Commissioner issued direction for the inclusion of the names of nominated members on June 3, 1988 and the electoral roll for Local Authorities constituency has been updated and a copy pasted in the office on June 3, 1988 at 8.55 p.m."

In the earlier writ petition also he had made a similar statement, as mentioned below, towards the end of paragraph 2 of his reply:

> "The Deputy Commissioner issued direction for the inclusion of the name of respondents 3 to 246 on June 3, 1988 and the electoral roll for Local Authorities constituency has been updated and a copy pasted in the office on June 3, 1988 at 8.55 p.m."

A plain reading of the above statement suggests that both the updating of the electoral roll and pasting a copy thereof took place on June 3, 1988 at 8.55 p.m. The statement cannot be interpreted to mean that the revision of the electoral roll had been done about 6 hours earlier. The circumstances that (i) the Deputy Commissioner was not able to assert in his evidence before the court that the revision of the roll had taken place before 3.00 p.m.; (ii) he was under an impression that the revision was permissible till the midnight; and (iii) in spite of the available documents to him he was not in a position to assert that the report of publication of the names of two-thirds or more of the nominated persons in the offices of the Mandal Panchayats had been received in his office before the deadline, strongly support the case of the election petitioner.

9. It has been contended on behalf of the appellant that the burden to prove that the names of the nominated members were not included in the electoral roll in time is on the election petitioner and unless he is able to lead acceptable evidence to discharge the same, the election petition is bound to fail. The argument is that the oral evidence led by the petitioner cannot be accepted for recording a finding that the controversial names had not actually been included in the electoral roll before 3.00 p.m. which was in the custody of the Deputy Commissioner. The fact that political opponents of the appellant who were opposing the inclusion of the names were repeatedly asking the Deputy Commissioner orally as well as in writing to inform them whether the names were actually included in the electoral roll or not itself shows that they could not be sure of the actual position till 8.55 p.m. The bald assertion of the witnesses for the petitioner in this regard cannot be given much weight. Thus the position, according to the learned counsel, available from the records of the case is that there is no reliable evidence on the crucial issue and, therefore, the election petition must be dismissed.

10. Apart from supporting the finding of fact recorded by the High Court in favour of the election petitioner, Mr Shanti Bhushan, learned counsel for the respondents, argued that the electoral roll must be held to have been modified in the eye of law only at 8.55 p.m. when the alleged inclusion of the names was made public and not earlier. He relied upon the decision in *Bachhittar Singh* v. *State of Punjab*[1]. The appellant in that case was appointed as a Kanungo and later promoted as Assistant

1 1962 Supp 3 SCR 713: AIR 1963 SC 395

Consolidation Officer in the former State of Pepsu. A departmental inquiry was held against him as a result of which he was dismissed by the Revenue Secretary. He preferred an appeal to the State Government. The Revenue Minister expressed his opinion in writing that instead of his dismissal he should be reverted to his original post of Kanungo. The said remarks were, however, not communicated to the appellant officially and the State of Pepsu was merged with the State of Punjab. The matter was thereafter re-examined and the Chief Minister passed an order confirming the dismissal of the appellant. This order was communicated to the appellant which led to the filing of the writ petition in the High Court. The High Court dismissed the writ application and the appellant appealed before this Court by special leave. One of the questions considered by this Court was as to the effect of the order in writing by the Revenue Minister, Pepsu, recommending reversion of the appellant in place of his dismissal. For the reasons, mentioned below, the court held that the order of the Revenue Minister was of no avail to the appellant: (SCR p. 721)

> "Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."

11. As has been pointed out earlier, the evidence of the appellant that he had actually seen the final voters list in the office of the Deputy Commissioner must be rejected as unreliable. There is no acceptable evidence at all to show as to when the alleged corrections were made in the voters list. At 8.55 p.m. on June 3, 1988 the inclusion of the names was made public for the first time. The question is as to whether the electoral roll will be deemed to have been modified when it was made public at 8.55 p.m. or earlier when the actual correction in the list was made in the Deputy Commissioner's office which fact was kept confidential in spite of repeated demands for information.

12. Besides fixing the identity of the persons to be allowed to vote at the election, the purpose of the preparation of the roll is to enable the persons included therein to decide as to whether they would like to contest the election. It is also helpful to such persons in assessing their chances of success by reference to the voters finally included in the roll. For the purpose of canvassing also, the intending contestant requires a copy of the final voters' list. The intending contestants and their supporters thus heavily depend upon the final electoral roll for deciding their future conduct, and it is, therefore, extremely essential that it is

made available to them before the expiry of the period fixed for filing the nomination papers. If the roll as it stood earlier, was confidentially corrected by the Electoral Registration Officer concerned sitting in his office which did not see the light of the day, the same cannot be considered to have been prepared according to law. The observations in *Bachhittar Singh case*[1] will be fully applicable inasmuch as the officer here also could reconsider the list again.

13. Mr Bhandare in reply relied upon the judgment in *B.K. Srinivasan* v. *State of Karnataka*[2] and argued that unlike the Karnataka Town and Country Planning Act, 1961 and the Rules which were under consideration in the said case, the Representation of the People Act does not require a display of the electoral roll. The learned counsel is correct and he rightly said that putting the final voters list on the notice board is not a necessary requirement under the law. But that does not lead to the further conclusion that the electoral roll can be prepared secretly and kept in the drawers of the officer without any information or knowledge to persons who are interested in finding out its final shape. The reported case was dealing with the principle of subordinate legislation and in paragraph 15 of the judgment made important observations which support the respondents' point of view. It was stated thus: (SCC p. 672, para 15)

> "There can be no doubt about the proposition that where a law, whether Parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the 'conscientious good man' seeking to abide by the law or from the standpoint of Justice Holmes's 'Unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known."

It was further observed that unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the government or other official dignitary and it was, therefore, necessary that subordinate legislation in order to take effect must be published or promulgated in some suitable manner whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. The decision instead of helping the appellant is clearly against him.

14. The vital difference between an Act of a legislature and a subordinate legislation was earlier noted in *Harla* v. *State of Rajasthan*[3]. The

2 (1987) 1 SCC 658
3 1952 SCR 110: AIR 1951 SC 467

Acts of the legislature are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done, and this is done only after debates take place which are open to the public. The matter receives wide publicity through the media. But the case is different with the delegated legislation and, if we may add, also in the case of orders passed by the authorities like that in the present appeal before us. The mode of publication can vary but there must be reasonable publication of some sort. A reference may also be made to the decision in *Fatma Haji Ali Mohammad Haji* v. *State of Bombay*[4], which the question as to whether certain powers given to the government for issuing a direction to the Collector not to act in accordance with the prescribed rules had been actually exercised or not was under consideration. It was stated that the power had to be exercised in clear and unambiguous terms and, (SCR p. 275)

> "the decision that the power has been exercised should be notified in the usual manner in which such decisions are made known to the public."

Before closing this discussion we should refer to the case of *State of Maharashtra* v. *Mayer Hans George*[5] where the English decision of *Johnson* v. *Sargant and Sons*[6] relied upon by this Court in *Harla case*[3] came to be considered. The respondent Mayer Hans George was a German smuggler who was carrying gold from Switzerland to Manila by an aeroplane which stopped at Bombay for some time. The respondent did not get down from the plane but he was searched by the Indian officers and was found to be carrying gold illegally. He was charged with criminal activity on the basis of a notification requiring him to declare the gold as transhipment cargo in the manifest of the aircraft, which he had failed to do. His defence was that he had no knowledge of this notification. After his conviction by the trial court, the High Court on appeal acquitted him. The Supreme Court by a majority judgment reversed the decision and found him guilty on the ground that the notification had been published in the official gazette of India. The defence plea that since he was a foreigner and was, therefore, not expected to be aware of the notification was rejected. While discussing the arguments addressed in the case, the court appreciated the criticism of Prof. C.K. Allen against the judgment in *Johnson* v. *Sargant and Sons*[6], but there was no comment or suggestion against the correctness of the judgment in *Harla* v. *State of Rajasthan*[3]. On the other hand, the observations at page 163 G-H are on the same lines. It was stated that where there is no statutory requirement as to the mode or form of publication, "we conceive the rule to be that it is neces-

4 1951 SCR 266
5 (1965) 1 SCR 123: AIR 1955 SC 722
6 (1918) 1 KB 101: 118 LT 95

sary that it should be published in the usual form, i.e., by publication within the country in such media as generally adopted to notify to all persons concerned the making of the rules". Having regard to the nature and purpose of the power for rectification of the electoral roll by the Electoral Registration Officer, the principle enunciated in the abovementioned cases must be held to be applicable. We accordingly hold that in the eye of law the electoral roll in question was not modified by the inclusion of the names of the nominated members before 8.55 p.m. on June 3, 1988. We, therefore, affirm the decision of the High Court and dismiss the appeal with costs.

(1990) 4 Supreme Court Cases 191

(BEFORE M.H. KANIA AND N.M. KASLIWAL, JJ.)

Civil Appeal No. 1101 of 1981

K.J. JOHN, ASSTT. PUBLIC PROSECUTOR GRADE I, PALAI .. Appellant;

Versus

STATE OF KERALA AND OTHERS .. Respondents.

With

Writ Petition (Civil) No. 346 of 1988

UTTAR PRADESH ASSTT. PUBLIC PROSECUTORS' ASSOCIATION, THROUGH ITS PRESIDENT SHRI ANRUDDH CHAUBEY AND ANOTHER .. Petitioners;

Versus

STATE OF U.P. AND ANOTHER .. Respondents.

Civil Appeal No. 1101 of 1981 and Writ Petition (Civil) No. 346 of 1988, decided on July 12, 1990

Criminal Procedure Code, 1973 — Section 24(6) and (9) — Appointment of Public Prosecutors — 'Regular cadre of prosecuting officers' in sub-section (6) — Means cadre having post of Public Prosecutor at the highest level — Where Assistant Public Prosecutors are members of regular government service having their separate cadre whereas Public Prosecutors and Additional Public Prosecutors are appointed on contract basis for a fixed period and thus their posts are tenure posts, held, State Government not bound to appoint Public Prosecutors and Additional Public Prosecutors only from the cadre of Assistant Public Prosecutors — Sub-section (6) to be read in the light of sub-section (9) — Kerala Government Law Officer (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978 — Rule 5 — Service Law — Appointment

Held :

The expression "regular cadre of Prosecuting Officers" comprised a service with Assistant Public Prosecutor at the lowest level and Public Prosecutors

AIR 1958 SC 296

In the Supreme Court of India

(BEFORE S.R. DAS, C.J. AND T.L. VENKATARAMA AYYAR, S.K. DAS, A.K. SARKAR AND VIVIAN BOSE, JJ.)

STATE OF KERALA AND OTHERS ... Appellants;

Versus

P.J. JOSEPH ... Respondent.

Civil Appeal No. 172 of 1954*, decided on December 18, 1957

Advocates who appeared in this case:

M.U. Isaac and Sardar Bahadur, Advocates, for the Appellants;

P. Govindan Nair and M.R. Krishna Pillai, Advocates, for the Respondent.

The Judgment of the Court was delivered by

S.R. DAS, C.J.— This appeal filed with a certificate of fitness under Article 132(1) of the Constitution of India is against the judgment and order pronounced on October 24, 1952, by a Division Bench of the High Court of Judicature for Travancore Cochin in Writ Petition No. 32 of 1952, presented on March 26, 1952, before the said High Court by the present respondent.

2. The facts are shortly as follows : Since 1945 the respondent had been wholesale dealer in foreign liquor in Ernakulam in the erstwhile State of Cochin. In that State there was an Act called the Cochin Abkari Act (Act 1 of 1077 ME). For the neighbouring State of Travancore there was the Travancore Abkari Act (Act 4 of 1073 ME). The Travancore State framed rules under its Abkari Act which were duly published in the Official Gazette under Section 65 of the Travancore Act. The Travancore practice was to fix a quota for each licensee for the sale of different varieties of foreign liquor on which no commission was charged and to charge each licensee 20% commission in respect of sales in excess of the quota. No rules had been framed by the Cochin State under its Abkari Act until June 2, 1949, when a set of rules was published in the Cochin Sarkar Gazette under Section 69 of the Cochin Act. On July 1, 1949, the two States of Travancore and Cochin were united together and became the United State of Travancore Cochin. The respondent used to take out wholesale license under the Cochin Abkari Act 1 of 1077 ME. At the date of the integration of the two States the respondent held a license for 1125 ME which covered the period between August 17, 1949, to August 16, 1950. He took out another license for the period between August 17, 1950, to March 31, 1951,

and thereafter another for the period between April 1, 1951, to March 31, 1952. The licenses were wholesale licenses for the sale of foreign liquor, Indian made foreign spirits, Indian made wines and beer brewed in India not to be consumed on the licensed premises. They were in Form FL 1 as prescribed by Rule 7 of the Cochin Rules. By clause (1) of these licenses the previlege extended only to sales to other wholesale or retail licensees and sale to persons other than licensees was prohibited except in sealed receptacles to such extent and in such manner as might be permitted by the Commissioner. The licenses further provided that the quantity to be sold in one transaction to persons other than licensees was not to be less than one pint.

3. By an order dated December 19, 1949, (Ext. B) the Board of Revenue of the United State of Travancore Cochin, one of the appellants before us, informed the respondent that his sale quota to persons other than licencees had been fixed as therein mentioned. By a memorandum (Ext. C) issued by the Assistant Excise Commissioner on June 23, 1951, and endorsed by the Excise Inspector, Ernakulam on July 1, 1955, the respondent was informed that he must remit a commission on all sales in excess of the quota fixed for him calculated at 20% on his cost price for such excess quantity sold by him. The respondent maintained that the Excise Authorities had no right whatever to fix the quota or to direct that commission would be payable on sales in excess of that quota. He complained that the Excise Authorities had no right to fix different quotas for different licensees as had been done and thereby introduce unfair discrimination opposed to Article 14 of the Constitution. He further contended that the aforesaid two orders amounted to an unreasonable restriction on his freedom to carry on his business and constituted an infringement of his fundamental rights under Article 19(1)(*g*) of the Constitution.

4. On the basis of the aforesaid contentions and allegations the respondent presented his writ petition before the High Court on March 26, 1952. The appellants, who were respondents in that petition, filed a counter affidavit affirmed by the Assistant Excise Commissioner, Ernakulam. They explained that the quota system had been in vogue in the Travancore area and had only been extended to the Cochin area by the Government in order to bring about a uniformity and that accordingly the Board of Revenue had fixed the sale quota of each of the foreign liquor licensees for the Cochin area including the present respondent and charged the same commission as was being charged in the Travancore area. They further pointed out that it was after the fixation of the sale quota that the present respondent took out his license for the period from August 17, 1950, to the end of March 1951, and then the last license from April 1951 to March 31, 1952, and, therefore, he could not now be heard to challenge the order fixing the

quota. It was submitted that according to the Cochin Abkari Act and the rules framed thereunder the Excise Authorities had the right to limit retail sale by fixing the sale quota of each of the foreign liquor licensees and by levying a commission on the excess quantity sold by the licensees. The restriction thus imposed was, according to them perfectly reasonable and was made in the best interest of the general public and in furtherance of the Abkari policy of the State and there was no unfair discrimination made against the petitioner or unreasonable restriction imposed on him and consequently there had been no contravention of the provisions of Article 14 or Article 19(1)(*g*). It was maintained that the levy of 20% commission was not illegal and was not opposed to any of the provisions of the Constitution and such imposition did not really affect the petitioner who could easily pass it on to the actual consumers. It was pointed out that the Secretary, Travancore Wine Merchants Association having applied for the extension of the system of charging commission on sales of foreign liquor to Cochin area also, the Government allowed the extension as a matter of general policy. An affidavit in reply was filed by the present respondent dealing with the allegations made in the counter affidavit.

5. The matter came up before a Division Bench of the High Court of Judicature for Travancore Cochin. In the course of his final arguments the learned Government Pleader, who appeared for the Excise Authorities and the State who were the respondents in the writ petition, produced a document (Ext. 1) in support of his contention that there was an implied contract to pay the 20% commission. The document was a letter dated July 6, 1950, from the Secretary, Board of Revenue to the Travancore Cochin Government, Revenue Department. After referring to the request of the Secretary of the Travancore Wine Merchants Association to sanction additional quotas of foreign liquor to the wholesale licensees of the Cochin area on payment of a 20% commission on the price of the liquor sold in excess of the quota so fixed, it stated that if the Government, for the sake of uniformity, thought that excess quotas should be allowed to wholesale licensees in Cochin, the same might be allowed on payment of a commission of 20% on the price of the liquor sold in excess of the quota. The letter concluded with a request that the Board might be favoured with order of the Government in the matter at an early date. Below that there is an endorsement which reads as follows:

"ORDER D. DIS. NO. 5208/50/RD DATED 14-7-1950.

Sanction is accorded for extra quota of foreign liquor being allowed to wholesale licensees in Cochin on payment by them of a commission at 20% of the price of liquor. The commission so realised from the wholesale licensees in the Cochin area will be credited to Government.

By order of His Highness the
Raj Pramukh,
(Sd.) *Assistant Secretary.*

To
The Secretary Board of Revenue,
The Accountant General."

6. After hearing the parties the Division Bench, for reasons elaborately discussed in its judgment, held that the fixation of quotas for sale to non-licensees as also the impost of a commission of 20% upon sale in excess of the said quota were unauthorised and illegal, that the collection of the aforesaid commission from the petitioner (now respondent) by threat of closure of his shop after the presentation of the writ petition was also illegal. The High Court accordingly allowed the writ petition and directed the Excise Authorities to repay the amount collected from the petitioner (now respondent) and to desist from fixing a quota or levying the impost of any commission until a law authorising such impost or collection was made and also to pay the costs. The appellants before us, who were respondents in the writ petition, applied for and obtained a certificate of fitness for appeal to this court under Article 132(1) of the Constitution and have filed this appeal. After the filing of the appeal the new State of Kerala came into being on the reorganisation of the States and the new State of Kerala, in which is included the United State of Travancore Cochin, has since been substituted as one of the appellants.

7. Learned counsel appearing in support of this appeal before us contends that the order dated July 14, 1950, endorsed on the foot of Ext. (1) was a statutory order passed by the State under Section 17 of the Cochin Abkari Act 1 of 1077 ME. That section provides, inter alia, that a duty of such amount, as the Diwan may prescribe, shall, if he so directs, be levied on all liquors and intoxicating drugs sold in any part of the Cochin State. In the counter affidavit was contended that the Secretary, Wine Merchants Association having applied for the extension of the system of charging commission to the Cochin area, the Government allowed the extension as a matter of general policy. No reference whatever was made in the counter affidavit to what is now alleged to be a statutory order passed by the State in exercise of its powers under Section 17. It was not alleged before the High Court and has not been alleged before us that a copy of this alleged order was published in the Official Gazette or was ever communicated to the present respondent. On December 19, 1949, the present respondent received only a letter (Ext. B) from the Secretary, Board of Revenue fixing his quota for sale to persons other than licensees. Again, on June 23, 1951, he received a copy of memorandum (Ext. C) from the Excise Division Office, Ernakulam to the Excise Inspectors asking the latter to

demand commission at 20% on excess sales. There was no reference in either of those two documents to any alleged order of July 14, 1950. Further the endorsement does not, in terms or in form, purport to be au order made by the State in exercise of the powers conferred on it by Section 17 of the Cochin Abkari Act. It, is more in the nature of an intimation given to the Board of Revenue that the government accorded sanction to extra quotas of foreign liquor being allowed to wholesale licensees in Cochin on payment of the Commission. The State did not make any order fixing any extra quota for any licensees or imposing a commission. It only authorised the Excise Authorities to allow extra quotas to wholesale licensees in Cochin on payment by them of the requisite commission and directed that the commission so realised from the wholesale licensees in the Cochin area should be credited to the Government. The document was nothing more than what in terms it purports to be, namely, a departmental instruction that the Excise Authorities might allow extra quotas to wholesale licensees on payment of the requisite commission. Indeed it was in pursuance of this departmental instruction that the Excise Authorities sent Ext. B. and C. to the present respondent. In our opinion Ext. (1) cannot be regarded as a statutory order fixing any quota or imposing any commission. We are also of the opinion that the High Court should not have permitted the appellants to produce and to file Ext. (1) during final argument or use the same against the respondent.

8. Further, Section 18 of the Cochin Abkari Act, which does not appear to have been brought to the notice of the High Court, is, without the proviso which is not material, as follows:

"18. Such duty may be levied in one or more of the following ways:

(*a*) by duty of excise to be charged in the case of spirits or beer, either on the quantity produced in or passed out of a distillery, brewery or warehouse licensed or established under Section 12 or Section 14 as the case may be, or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the Diwan may prescribe;

(*b*) in the case of intoxicating drugs by a duty to be rateably charged on the quantity produced or manufactured (or issued from a warehouse licensed or established under Section 14;)

(*c*) by payment of a sum in consideration of the grant of any exclusive or other privilege:

(*1*) of manufacturing or supplying by wholesale, or

(*2*) of selling by retail, or

(*3*) of manufacturing or supplying by wholesale and selling by

retail,

any country liquor or intoxicating drug in any local area and for any specified period of time;

(*d*) by fees on licences for manufacture or sale;

(*e*) in the case of toddy, or spirits manufactured from toddy, by a tax on each tree from which toddy is drawn, to be paid in such instalments and for such period as the Diwan may direct; or

(*f*) by (import, export or) transport duties assessed in such manner as the Diwan may direct:

Provided...."

9. It will be noticed that none of the several ways referred to in the section can possibly be relied upon as authorising the imposition of any commission on the sale of foreign liquor by a wholesale licencee in excess of his quota except clause (*d*) : According to that clause the duty on foreign liquor in excess of the quota can only be levied by imposing a fee on licenses for the sale of such foreign liquor. It will be recalled that all the three licenses in question were issued under Cochin Abkari Act 1 of 1077 ME and the Rules which had been framed thereunder on June 2, 1949, and which were in force on the dates of the issue of those licenses. Rule 7 provided that licenses for the sale, amongst others, of foreign liquor would be in the form appended thereto. Form FL 1 is for a wholesale license for the wholesale vend, inter alia, of foreign liquor not to be drunk on the premises and it provided that a license in that form would be issued by the Board of Revenue for an annual fee of Rs 2000. All the licenses issued to the respondent were in Form F.L. 1 and he paid Rs 2000 for each of them. The imposition of a further duty under Section 17 read with Section 18 by way of fees on licenses for sale would obviously, therefore, amount to an amendment of the provisions of Rule 7 of the Cochin Abkari Rules under which the licenses had been issued. Section 69 of the Act requires that all rules made or notifications issued under this Act shall be made and issued by publication in the Cochin Sarkar Gazette. The section further provides that all such rules and notifications so published shall thereupon have the force of law and be read as part of this Act and might in like manner be varied, suspended and annulled. The rules, which included Rule 7 under which the licenses in question had been issued, have been published in Cochin Sarkar Gazette and those rules have the force of law and have to be read as part of the Act and can only be varied, suspended or annulled in like manner i.e. by a rule or notification similarly published. It is conceded that the endorsement at the foot of the Ext. (1), which is said to be a statutory order made under Section 17 and which obviously varied the provisions of Rule 7 by enhancing the fee on licences by adding a 20% commission to the fee already paid was not published in the Cochin

Sarkar Gazette. It follows, therefore, that even if the endorsement could be regarded as a rule or notification prescribing the levy of duty, not having been published in the manner aforesaid, the same cannot be regarded as a valid order having the force of law and, therefore the impost cannot be said to be supported by authority of any law. Learned counsel faintly suggested that the endorsement in question was neither a rule nor a notification but was an order and was, therefore, not governed by Section 69. Section 18 being the machinery section for working out Section 17, and the alleged order not being in terms or form an imposition of a fee on license for sale, under Section 18 clause (*d*) learned counsel could not refer us to any other section in the Act under which an order of the kind appearing at the foot of Ext. (1) could be made or show us under what provision of law could such an order have legal effect without its publication in the Official Gazette. Assuming the endorsement at the foot of Ext. (1) was an order, not having been published in the Official Gazette, it cannot, by reason of Section 69, in any way vary Rule 7 which fixes the fee on licenses in Form FL 1 at Rs 2000 per annum. The fact of the matter is that the impost was nothing but an executive order, if an order it was, which had no authority of law to support it and was, therefore, an illegal imposition. As explained by this Court is *Mohammad Yasin* v. *Town Area Committee Jalalabad*[1] and again in *Bengal Immnity Company Limited* v. *State of Bihar*[2] an impost not authorised by law cannot possibly be regarded as a reasonable restriction and must, therefore, always infringe the right of the respondent to carry on his business which is guaranteed to him by Article 19(1)(*g*) of the Constitution. In this view of the matter it is not necessary to express any opinion on the other points dealt with in the judgment of the High Court.

10. For reasons stated above this appeal must be dismissed with costs.

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* Appeal from the Judgment and Order dated 24th October, 1952, of the former Travancore Cochin High Court in Original Petition No. 32 of 1952.

[1] (1952) 1 SCC 205 : (1952) SCR 572

[2] (1955) 11 SCR 653, 681

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016 & CM Appls. 19862-19864/2016

UNION OF INDIA ..... Petitioner
Through: Mr. Mukesh Kr. Tiwari, Adv. for Mr. Ruchir Mishra, Advs.

versus

VANSH SHARAD GUPTA ..... Respondent
Through: None

% Date of Decision : 24th May, 2016

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (Oral)

1. Even at the pass-over stage, a second pass over is sought. Since, that is not the practice of this Court, this Court has no other option but to proceed ahead with the matter.

2. It is pertinent to mention that the present writ petition has been filed challenging the order dated 04th November, 2015 whereby the Central Information Commission (for short 'CIC') has directed the petitioner to upload all the latest amended bare Acts and to examine the functionality of its e-mail ID and develop an appropriate RTI filing mechanism. The CIC has also directed the petitioner to pay Rs.10,000/- under Section 19(8)(b) of the RTI Act to the library of

National Law School of India University, Bangaluru. The relevant portion of the impugned order is reproduced hereinbelow:-

> *"6. Needless to say that a duty upon the state to inform citizens about the Law as and when it was made and the citizens also have right to know of the Law. If is impossible for any Government to expect obedience to their Law without informing the people in legible form. It is more difficult especially when the text of Law is not available in easy accessible format. It will result in two major problems, (1) People will be kept in dark about their Laws, (2) Private Publishers will exploit this in-access to Law to make money by publishing updating Acts as their copyrighted work. It is surprising that the Ministry has not used the Information technology to provide access to text of law.*
>
> *7. The law and enactments are in public domain and none can claim copyright in the law. Apart from this general right to know, RTI Act has offered a specific and enforceable right to information. Section 4 mandates the Ministry of Law to place the texts of enactments. It is the duty of Legislative Department to provide information about access of every updated enactment. It is not just an recommended obligation under Section 4(1)(a) of RTI Act, but a constitutional mandate, a legal necessity, and an essential requirement for peace. It is not possible to imagine 'enactment' becoming secret because of this ambiguity and non-legibility.*
>
> *xxx xxx xxx*
>
> *9. The Commission records its appreciation for Mr. Vansh Sharad Gupta. Although he filed his RTI application in 2012 when he was a 2nd year student, his complaint has reached this Commission for hearing*

10.9.2015. Even though the information sought by him will be irrelevant due to delay, the issue raised by him is significant not only for law students like him but also for common citizens. Needless to say that in the absence of access to law there would be no access to justice.

xxx xxx xxx

11. It is the minimum responsibility of state to provide updated information about amendments, which will go in long way in helping people. The access to law is not just a requirement of Law student and law researchers, but a necessity of all citizens. For instance, the Parliament by the Criminal Law (Amendment) Act, 2013, has amended section 100 of Indian Penal Code, which provide a right of private defence of body even to the extent of causing death in case of acid attack. Many men or women are not even aware of self defence right that they can even kill assailant if the later is attacking to kill, rape or throw acid, or cause grievous hurt etc.

Decision:

11. The Commission directs the respondent authority, Legislative Department to inform the complainant and the Commission as to what action has been taken including details of the programme of updation, the possible date of its completion, expenditure involved, personnel employed etc. The Commission also recommends the department to recognise urgency and significance of the issue, expedite the process, allocate more fund to employ more personnel and complete the process of updation as soon as possible.

12. The Commission also directs the respondent

authority to examine the functionality of the email ID in view of the Complainant's claim that most of the email ID have failed. The Legislative Department also should have perfect RTI filing system and answer mechanism.

13. For the failures of the above, the Commission, exercising its powers under Section 19(8)(b) of RTI Act, directs the respondent public authority to pay Rs.10,000/- (Rupees Ten Thousand Only) as a token compensation to the library of the National Law School of India University, Bangaluru, for causing loss of time of several law students, more specifically of the appellant, not providing easy access to email, or not making email ids easily available, delaying the information etc, within one month."

3. In the present writ petition, it has been averred that the respondent never filed an RTI application in the prescribed form and the requisite fee. It is also stated that the respondent did not file the first appeal and hence the second appeal could not have been entertained by the CIC.

4. This Court is not an appellate Court of the CIC. Technical and procedural arguments cannot be allowed to come in the way of substantial justice. The directions given by the CIC in the impugned order are not only fair and reasonable but also promote the concept of rule of law. It is unfortunate that the petitioner did not take the initiative on its own to upload the latest amended bare Acts.

5. Public can be expected to follow the law only if law is easily accessible 'at the click of a button'. In fact, as rightly pointed out by the CIC, the RTI Act itself mandates the Government to place the

texts of enactments in public domain.

6. This Court also take judicial notice of the fact that in challenging the imposition of costs of Rs.10,000/-, the Government of India would have spent more money in filing the present writ petition. Consequently, this Court is of the view that the costs of Rs.10,000/- which was directed to be paid by the CIC, should be recovered from the salary of the Government officials who authorized the filing of the present writ petition.

7. With the aforesaid observations and direction, the present writ petition stand disposed of.

MANMOHAN, J

MAY 24, 2016
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra with Mr.Mukesh

versus

VANSH SHARAD GUPTA ..... Respondent

Through None

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% 03.06.2016

C.M.No.22914/2016

At the request of learned counsel for the petitioner, adjourned to 14th July, 2016.

MANMOHAN, J

JUNE 03, 2016
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 4761/2016**

UNION OF INDIA ..... Petitioner

Through : Mr Ruchir Mishra, Mr Sanjiv Kumar Saxena and Mr Mukesh Kumar Tiwari, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent

Through : None.

CORAM:
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

O R D E R

% 14.07.2016

Petitioner seeks recall of judgment dated 24.05.2016.

The matter be listed on 05th August, 2016, before the bench that had passed the judgment dated 24.05.2016.

SANJEEV SACHDEVA, J

JULY 14, 2016
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016

UNION OF INDIA ..... Petitioner
Through: Mr. Ruchir Mishra, Advocate with Mr. Sanjiv K. Saxena and Mr. Ramneek Mishra, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R
% **08.09.2016**

CM Appl. 22914/2016 in W.P.(C) 4761/2016

Learned counsel for petitioner-applicant states that the Bare Acts in searchable and PDF format from the year 1947 till date would be available on the website by 31st December, 2016. He, however, states that he cannot make a statement with regard to hard copies of Bare Acts as publication of the same are done only by the Publication Division under the Law Ministry.

Since the rule of law requires that the text of enactments be placed in public domain, the Secretary, Legislative Department, is directed to ensure that Government of India publications of Bare Acts are easily available.

Let an affidavit be placed on record by the Secretary, Legislative Department, within a period of four weeks.

Keeping in view the importance of the issue at hand, this Court appoints Mr. Jayant K. Bhushan, Senior Advocate, Cell No.9811022668 and Mr. Abhijat, Advocate, Cell No.9811800833 as Amicus Curiae in the matter to assist this Court.

Registry is directed to supply copies of the paper book to both the Amicus Curiae within a period of two weeks.

Issue notice to respondent by registered post and dasti, returnable for 18th November, 2016.

MANMOHAN, J

SEPTEMBER 08, 2016
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016

UNION OF INDIA ..... Petitioner
Through: Mr. Ruchir Mishra, Adv.

versus

VANSH SHARAD GUPTA ..... Respondent
Through: Mr. Jayant Bhushan, Senior Advocate as Amicus Curiae
Mr. Abhijat, Adv. as Amicus Curiae

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **18.11.2016**

CM Appl. 42731/2016

Keeping in view the averments in the application, the present application is allowed and the time for updation and uploading of Central Acts is extended till 31st March, 2017.

It is made clear that no further extension of time would be granted for the said purpose.

W.P.(C) 4761/2016 & CM Appl. 22914/2016

List on 18th April, 2017.

MANMOHAN, J

NOVEMBER 18, 2016
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016 & CM APPL. 22914/2016

UNION OF INDIA ..... Petitioner
Through: Mr. Ruchir Mishra, Advocate with Mr. Mukesh Kumar Tiwari, Advocate.

versus

VANSH SHARAD GUPTA ..... Respondent
Through: Mr. Abhijat, Advocate as Amicus Curiae with Ms. Dakshara Arora, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R
% **18.04.2017**

Today, Mr. Ruchir Mishra, learned counsel for petitioner has handed over a letter dated 07th April, 2017 written to him by the Deputy Secretary, Ministry of Law and Justice, Legislative Department, Government of India. The same is taken on record. The said letter reads as under:-

> *"I am directed to say that, in consequence to the order dated 8th September, 2016 an application being CM No.42731/2016 was moved in Delhi High Court for seeking extension of time till 31st March, 2017 for updation and uploading of Central Acts on the website. The above CM was heard by Hon'ble Court on 18th November 2016 and after hearing, Hon'ble Court, in view of the facts pointed out in the above CM, granted extension till 31st March, 2017 for updation and uploading of the Central Acts.*

2. It is stated that in so far as English version of Central Acts is concerned, updating of Central Acts (India Code) for the years 1947 to 2016 have been completed and the same have been uploaded on the website of Legislative Department. A link to this effect as "Acts of Parliament from the year 1947-2016 updated as on 30.03.2017" has been provided on the Legislative Department's website. To access the aforesaid updated Central Acts, a link has also been provided on the India Code website. With this, the process of updating and uploading of Central Acts from the years 1947 to 2016 has been completed except the matters as explained in following paras 3, 4 and 5.

3. It is mentioned that in view of the innumerable number of amendments through the amending Acts and notifications in respect of Central Acts relating to Ministry of Finance such as Income tax, Wealth tax, Gift tax, the updating process is going on and will be completed shortly.

4. It is also mentioned that in view of the ongoing swapping of indirect tax regime into the Goods and Service Tax (GST) regime, the Service Tax, Customs, Customs Tariff, Central Excise, Central Excise Tariff, Additional Duties of Excise (Goods of Special Importance) and Central Sales Tax were temporarily kept in abeyance. Updating and uploading of aforesaid Acts will be undertaken after their commencement.

5. It is further mentioned that certain Central Acts (the National Highways Act, 1956, the Indian Medical Council Act, 1956, the Khadi and Village Industries Commission Act, 1956, the Indian Medical Central Council Act, 1970, the Wild Life (Protection) Act, 1972 and the Homeopathy Central Council Act, 1973) were amended in innumerable times through notifications and verification of such notifications are pending for their correctness with the concerned Administrative Ministries (details of amendments are not available in the Legislative Department). Hence, the said Acts have been uploaded on the Department's website with a condition

"Subject to verification and confirmation of the administrative Ministry".

6. It is requested that the Hon'ble Court may be apprised of the facts accordingly.

7. This issues with the approval of Secretary, Legislative Department."

The learned Amicus Curiae is directed to verify the contents of the said letter and file a report within a period of two weeks.

The Ministry of Law and Justice, is also directed to produce in Court on the next date of hearing the India Code Publications as well as sample copies of some recent Bare Acts.

List the matter on 25th May, 2017.

MANMOHAN, J

APRIL 18, 2017
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016 & CM APPL. 22914/2016

UNION OF INDIA ..... Petitioner
Through Mr. Ruchir Mishra with Mr. Mukesh Kumar Tiwari, Advocates

versus

VANSH SHARAD GUPTA ..... Respondent
Through Mr. Jayant Bhushan, Sr. Advocate and Amicus Curiae with Mr. Ketan Paul and Ms. Reeja Varghese, Advocate .
Mr. Abhijat, Advocate and Amicus Curiae with Ms. Daksha Arora, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **25.05.2017**

Today in Court, learned Amicus Curiae, Mr. Jayant Bhushan, Senior Advocate has handed over a note which highlights not only the critical shortcomings but also gives valuable suggestions. The same is taken on record. The aforesaid note is reproduced hereinbelow:-

> *"1. The present matter has brought forth the problems faced by citizens in free access to accurate and comprehensive sets of laws in India. The availability of accurate legal texts, at minimal cost, is fundamental to the rule of law and a basic responsibility of the Government. With the advent of the internet, it is imperative that*

the Government make all efforts possible to provide comprehensive access to legislations and subordinate legislations online. While efforts have been made in this arena, a lot remains to be done.

2. *Critical shortcomings –*

   a. *Searchability - Older laws, which usually form the bulwark of the legal system, are typically uploaded in inaccessible formats like scanned images of pdfs or unintelligible, unformatted text boxes. This means that machines cannot process the text without additional effort, and relevant content within these laws is lost.*

   b. *Updation - Even though the government is the most authentic source of legal information, almost all its web portals suffer from content and design flaws. The laws are often not updated to reflect latest amendments.*

   c. *Cross-linking - The legal system does not consist of standalone laws. It consists of an intricate framework of laws, rules, regulations, circulars etc. which refer to and build on one another. Government websites have not made use of available tools to make the inter-connections of laws apparent in an automated, cost-friendly manner.*

   d. *Representation - Representation of laws on government websites have not followed user-centric and mobile-friendly approaches. PDFs are not mobile compatible and websites ignore basic rules of design.*

3. ***Suggestions*** *–*

a. ***Development and adoption of technical standards in the publication of all legislative documents including rules, regulations, notifications and any other form of subordinate legislation*** *–*

i. *A core component to making laws more accessible and resourceful is (i) the adoption of a system for uniquely identifying each individual legislative document and (ii) the adoption of a standard system of legislative XML[1]. Many developed nations like the United States and the United Kingdom have applied such standards to legislative information.*

ii. *Every law should have a unique ID so that each new rule, regulation, notification etc. can be tagged with the unique ID of the parent law. At the push of a button, the website can display all new regulations, notifications etc. in one place. Not only will this enable citizens to have a complete understanding of all legal information on a subject in one place, it will enable the Government to function more efficiently.*

iii. *It is imperative to conduct research on adoption of global technical standards for legislative mark-up in India.*

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[1] *Extensible Markup Language (XML) is a markup language that defines a set of rules for encoding documents in a format that is both human-readable and machine-readable. This allows documents to be identified and structured in a way that both machines and humans can identify. This in turn allows automated processing of these legislative documents, as well as more sophisticated applications to be built on top. Ultimately, it broadens and simplifies access to legal information.*

Adapting a UN accepted standard like Akoma Ntoso[2] for Indian laws could be a potential option. This India specific standard must work for laws at the Central, State and municipal level and should be applicable to all kinds of legislative documents. Once such a standard has been developed, all government departments and other competent authorities should publish legislative documents using drafting tools which apply such standards. They should also compile and publish all previous documents (including notifications, circulars etc.)

b. ***Subordinate Legislation*** *- Most laws contain accompanying rules or regulations passed either by the Central Government or the State Government. Some of these subordinate legislations are available on the concerned Ministry/Department's website, but many are not, in which case one has to conduct an independent search in the e-Gazette. The e-Gazette search engine is not intuitive and would require familiarity with the kind of gazette it is published in (weekly or extraordinary gazette) or the relevant ministry. Similar difficulties apply to notifications as well. Unless the relevant ministry publishes the notifications, such notifications (which often amend schedules in an Act or the Rules) are not easily accessible. The IndiaCode website has a link for subordinate legislation which links to (http://subordinatelegislation.gov.in/) but as of 24.05.2017, the website is not functional and the scope of that website is unknown. It is also unlikely that it will enable tagging and cross-referencing with the parent statutes enabling a holistic view of the complete law. The scope of the IndiaCode website should be expanded to include all subordinate legislation including rules, regulations, notifications and circulars that flow from a particular legislation, in one place.*

c. ***Time-bound uploading of legislative text*** *– Every legislative document, including subordinate legislation should be uploaded on the IndiaCode website in a time-bound manner. Currently, a lot of amendments and subordinate legislations are not uploaded due to the same remaining pending with the concerned Ministry for extended periods of time. Guidelines should be developed to ensure timely updation of legislative texts. Even now, a consolidated Income Tax Act and many other laws consolidated with recent amendments are not available on the IndiaCode website. A tracking system mentioned earlier coupled with guidelines mandating time-bound updation will help avoid such delays.*

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[2] *http://www.akomantoso.org/*

d. ***Priority uploading of important pre-1947 legislations*** - *While the Law Department is attempting to upload post 1947 legislations at a rapid pace, it is understandable that uploading consolidated versions of pre-1947 legislations may take time. However, consolidated versions of certain pre-1947 legislations that are of critical importance, should be uploaded on a priority basis in a time-bound manner. These must include, the Indian Penal Code 1860, Civil Procedure Code 1908, Negotiable Instruments Act 1881 and other such important enactments.*

e. ***IndiaCode platform should be made open to States and other public authorities*** - *IndiaCode should be a platform where State law departments and other statutory and public authorities, can upload all state laws and subordinate legislation. The laws should themselves be published adopting the technical standards developed for Central laws mentioned earlier. Such a system will enable quicker updation of legal information on the platform, as well as reducing the workload of the Law Department for. updation. In this regard, it will be immensely useful if the Law Department publish lists of applicable and unrepealed laws in each State by requesting the same from all State.*

f. ***Collage information from database/portals*** – *At the movement, a lot of data on legislations and subordinate legislations is available with the Government on various portals.These include http://indiacode.nic.in/, http:// lawmin.nic.in/Legis.htm, http://india.gov.in, http://egazette. nic.in. Various ministries publish rules and notifications on their own websites. The multiplicity of fora to publish information online creates unnecessary hurdles in streamlining access to legislative information. Various portals may exist for various reasons, but the Government should move towards a system where at least one portal has access to all legislative information in one place and where every competent authority is mandated to upload such information in a time-bound manner. To that end, the*

Government should start collating data from its various portals and publish it in on IndiaCode and also identify the gaps in the data available and work towards obtaining that data in a time-bound manner.

g. ***Content and Format for a Government Portal on Laws*** - *For a comprehensive resource on Central and State laws (including subordinate legislation), a review of similar portals developed in other jurisdictions such as the United Kingdom (www.legislation.gov.uk) and Australia (http://www.thelaw. tas.gov.au/index.w3) will be helpful. A professional third party agency may also be engaged to improve the website design and functionality.*

h. ***Grievance redressal*** - *There should be one nodal officer responsible for addressing grievances from the public regarding updation and improvement of content on the IndiaCode website. The officer's name, email address and telephone number should be prominently displayed on the website.*

This Court has perused the aforesaid note and is of the opinion that it contains valuable suggestions which need to be considered at the highest level. Consequently, this Court directs the Secretary, Legislative Department to convene a meeting wherein the said note should be considered.

Accordingly, the Secretary, Legislative Department is directed to invite the Amicus Curiae as well as his authorised representative for the said meeting. The Secretary shall also invite all other relevant stakeholders for the said meeting including senior officials from the NIC, Ministry of Information Technology as well as Directorate of Printing, Ministry of Urban Development.

Let the said meeting be convened in the month of July 2017.

The minutes of the said meeting shall be placed on record two weeks before the next date of hearing.

List on 1st September, 2017.

MANMOHAN, J

MAY 25, 2017
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P. (C) 4761/2016 & CM.APPL.22914/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra with Mr.Mukesh Kumar Tiwari, Advocates.
Mr.J.P.Kukreti, STD, NIC, Mr.Manoj Tuli, TD, NIC and Mr.Surinder Kumar, STD, NIC.
Mr.Udaya Kumar, Joint Secretary, Mr.K.V.Kumar, Addl. Legislative Counsel and Mr.Chitkara, Dy.Secretary from Legislative Deptt.

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr.Ketan Paul with Mr.Chirayu Jain, Advocates for Mr.Jayant Bhushan, Amicus Curiae.
Ms.Dakshaa Arora with Mr. Shaashwat Jinal, Advocates for Mr. Abhijat, Amicus Curiae.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% 01.09.2017

A short presentation has been made by the officials of the NIC and the Legislative Department. They pray for some time to give a full presentation.

In the interest of justice, re-notify on 22nd September, 2017.

MANMOHAN, J

SEPTEMBER 01, 2017/KA

Applt.-1
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P. (C) 4761/2016 & CM.APPL.22914/2016

UNION OF INDIA ..... Petitioner
Through Mr.Ruchir Mishra with Mr.Mukesh Kumar Tiwari, Advocates.
Mr.J.P.Kukreti, STD, NIC, Mr.Manoj Tuli, TD, NIC and Mr.Surinder Kumar, STD, NIC.
Mr.Udaya Kumar, Joint Secretary, Mr.K.V.Kumar, Addl. Legislative Counsel and Mr.Chitkara, Dy.Secretary from Legislative Deptt.

versus

VANSH SHARAD GUPTA ..... Respondent
Through Mr.Ketan Paul, Advocate for Mr.Jayant Bhushan, Amicus Curiae.
Mr. Abhijat, Amicus Curiae with Mr. Shaashwat Jindal, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R
% **22.09.2017**

Today, officials from the Ministry of Law and NIC made a presentation of the New India Code web portal which is in development.

After hearing the parties, the following elements are directed to be included in the new portal in the first phase:-

1. All Central Acts and Subordinate Legislations passed by the Central Government including Rules, Regulations, Notifications and Circulars should be made available on this portal.
2. The data uploaded on the portal should be available in machine readable PDF format.
3. The navigation on this portal should enable visitors of the website to view a complete chain right from the parent Act to the subordinate Legislations passed by the Central Government under the parent Act.
4. All Central Ministries, Departments, Statutory/Autonomous Bodies and other relevant competent authorities shall assign a Nodal Officer to deal with the creation and uploading of Legislative documents onto the portal created by NIC.
5. All such Nodal Officers shall create and upload this data in a standardized format. This format shall be in machine readable PDFs and hyperlink friendly.
6. The portal created by NIC shall enable uploading of aforementioned data by all such Nodal Officers.
7. All such Nodal Officers shall upload this Data along with metadata as required.
8. This portal shall also enable hyperlinking between Acts, Rules, Regulations and other subordinate Legislations as necessary.
9. This portal shall also enable uploading of Legislative documents including Acts, Rules, Regulations and subordinate Legislations by State Governments and relevant authorities under them.
10. This portal shall be mobile friendly.

It is further directed that a Nodal Agency/Committee shall be created by the Cabinet Secretariat to coordinate the implementation of the above directions.

Let the compliance report be filed one week prior to the next date of hearing.

List the matter on 15th December, 2017.

MANMOHAN, J

SEPTEMBER 22, 2017
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P. (C) 4761/2016 & CM.APPL.22914/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra with Mr.Mukesh Kumar Tiwari, Advocates. Mr.J.P.Kukreti, Sr.Director with Dr.Surinder Kumar, Sr.Director NIC. Mr.Udaya Kumar, Joint Secretary, Mr.K.V.Kumar, Addl. Legislative Counsel and Mr.Chitkara, Dy.Secretary from Legislative Department.

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr.Ketan Paul and Mr.Tushar Bhushan, Advocates for Mr.Jayant Bhushan, Amicus Curiae. Mr. Abhijat, Amicus Curiae with Mr. Shaashwat Jindal, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% 15.12.2017

In pursuance to the last order, Mr.Ruchir Mishra, learned counsel for the petitioner has filed the status report. Along with the status report, Minutes of Meeting held under the chairmanship of Additional Secretary (Coordination) dated 02nd November, 2017 in the Cabinet Secretary have been placed on record. The relevant portion of the said Minutes of Meeting is reproduced hereinbelow:-

"After detailed deliberations, following decisions were taken:-

(i) Legislative Department as well as each Ministry/Department would nominate a Nodal Officer not below the rank of Joint Secretary, for coordinating and monitoring various activities. Legislative Department would also nominate a chief coordinator for overall coordination with the Ministries/Departments.

(ii) Legislative Department will issue detailed instructions to Ministries/Departments within 2 to 3 days for uploading of rules, regulations and notifications etc., on the New India Code Portal, including the preparatory action to be taken prior to operationalization of Portal by NIC. NIC will give technical inputs to be incorporated in the instructions to enable the concerned Ministries/Departments to take preparatory work prior to operationalization of Portal as well as post-operationalization in a form which is compatible with the proposed upgradation of Portal by NIC.

(iii) NIC will upgrade the existing Portal with all the requisite features and operationalize the New India Code Portal within 30 days, utilizing its own resources.

(iv) NIC will give demo to the Committee on New India Code Portal in the next meeting of the Committee scheduled to be held during first week of December, 2017.

(v) NIC will provide user ID and password to each Ministry/Department for uploading of Acts, rules, regulations and notifications etc., on the New India Code Portal and Administrative login to Legislative Department for regular uploading of data and overall co-ordination and management of the Portal.

(vi) NIC will maintain the New India Code Portal and provide technical support to Legislative Department as well as to other Ministries/Departments for its smooth function.

(vii) Legislative Department will be responsible for uploading of all Acts on the New India Code Portal within 15 days of enactment. All existing Acts (including repealed ones) would be uploaded within 30 days of operationalization of the new Portal.

(viii) Concerned Ministries/Departments will be responsible for uploading of rules, regulations and notifications etc., on the Portal within two weeks from the date of publication. All existing rules, regulations and notifications etc., would be uploaded within 30 days of operationalization of the new Portal.

(ix) The parent Ministry/Department will be responsible for uploading of regulations issued by statutory bodies under their administrative control.

(x) Legislative Department would be overall coordinator for ensuring complete and timely uploading of all Acts, rules, regulations and notifications etc., in accordance with the direction of Hon'ble High Court and filing of periodic status report/affidavit etc., as required from time to time.

(xi) All Nodal Officers will give monthly online certificates regarding uploading of Acts, rules, regulations and notifications etc., pertaining to their Ministry/Department on the New India Code Portal, which will be monitored by Legislative Department."

This Court is prima facie of the view that the aforesaid decisions reflect a positive mindset on the part of the Cabinet Secretariat's officials in tackling the issue of digitisation of bare acts, rules, regulations and notifications. However, this Court would like the NIC officials to rise to the occasion and use their software prowess to expedite the said process and not reduce themselves to uploaders only.

The Central Government is directed to file a fresh status report at least two weeks prior to the next date of hearing.

List on 06th April, 2018.

MANMOHAN, J

DECEMBER 15, 2017
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016 & C.M.No.22914/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra with Mr.Mukesh Kumar Tiwari, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr.Abhijat, Amicus Curiae.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% 06.04.2018

At the request of Mr.Ruchir Mishra, learned counsel for the petitioner/UOI, re-notify on 20th April, 2018.

MANMOHAN, J

APRIL 06, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016 & C.M.No.22914/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra with Mr.Mukesh Kumar Tiwari, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr.Ketan Paul, Advocate for Mr.Jayant Bhushan, Amicus Curiae. Mr.Pratyush Sharma with Mr.Dakshna Arora, Advocates for Mr.Abhijat, Amicu Curiae.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **20.04.2018**

Today learned counsel for the Amicus Curiae has handed over a note dated 20th April, 2018. The said note contains ten suggestions. Let the said note be placed before the Empowered Committee appointed by the Cabinet Secretariat for consideration.

Today a demonstration of the website has been given.

This Court is of the view that the site needs to be made more user friendly. The NIC officials who are present in Court have agreed that they will prepare a new design as well as layout of this website and the information shall be displayed in a more user friendly format.

Let a fresh status report be filed at least two weeks prior to the next date of hearing.

List on 03rd August, 2018.

MANMOHAN, J

APRIL 20, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ WP(C) 4761/2016 & C.M.No.22914/2016

UNION OF INDIA ..... Petitioner
Through: Mr. Ruchir Mishra, Adv.

versus

VANSH SHARAD GUPTA ..... Respondent
Through: Mr. Abhishek Agarwal, Proxy Counsel for Mr. Abhijat, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **03.08.2018**

Learned counsel for Union of India has handed over a chart showing the status of uploading of Central Acts, Rules etc. as on 31st July, 2018. The same is reproduced hereinbelow:

INDIACODE WEB PORTAL (ICP)
***STATUS ON** UPLOADING OF CENTRAL ACTS, RULES ETC.,*
(As On 31-07-2018)

SL. NO.	***DETAILS***	***Notified/Uploaded***
1.	*Total No of Ministries/Departments*	***82***
2.	*No of Ministries/Departments having No Acts*	***09***
3.	*No of Ministries/Departments having No Rules*	***04***
4.	*No. of Acts notified (excluding pre-1938 Acts)*	***876***

5.	*Total No. of Pre-1938 Acts*	***154***
6.	*Total No. of Repealed Acts*	***107***
7.	*Total No. of Rules- Notified* *Uploaded*	***2089*** ***1972***
8.	*Total No. of Regulations- Notified* *Uploaded*	***1252*** ***1082***
9.	*Total No. of Notifications- Notified* *Uploaded*	***2832*** ***2776***
10.	*Total No. of Ordinances - Notified* *Uploaded*	***867*** ***111***
11.	*Total No. of Statues - Notified* *Uploaded*	***224*** ***54***
12.	*Total No. of Circulars- Notified* *Uploaded*	***260*** ***260***
13.	*Total No. of Orders- Notified* *Uploaded*	***146*** ***143***

Mr. Ruchir Mishra, learned counsel for petitioner states that the entire exercise of uploading the Central Acts, Regulations, Notifications, Ordinances, Statutes, Circulars and Orders shall be completed within twelve weeks.

The Union of India is directed to file an updated response to the detailed note of suggestions handed over by the learned Amicus Curiae on 20th April, 2018, atleast a week prior to the next date of hearing.

List on 07th December, 2018.

MANMOHAN, J

AUGUST 03, 2018
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Applt.Side-1
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016 & CM APPL. 22914/2016

UNION OF INDIA ..... Petitioner
Through: Mr. Ruchir Mishra, Advocate with Mr. Abhishek Rana, Mr. Sanjiv Kr. Saxena, Mr. Ramneek Mishra and Mr. Mukesh Kr. Tiwari, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent
Through: Mr. Ketan Paul, Advocate for Mr. Jayant Bhushan, Senior Advocate, Amicus Curiae.
Mr. Shaashwat Jindal, Advocate for Mr. Abhijat, Advocate, Amicus Curiae.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **07.12.2018**

Learned counsel for petitioner-Union of India has handed over a chart showing the status of uploading of Central Acts, Rules etc. as on 07th December, 2018. The same is reproduced hereinbelow:-

*"**INDIACODE WEB PORTAL***

STATUS ON UPLOADING OF ACTS AND SUBORDINATE LEGISLATIONS BY MINISTRIES/DEPARTMENTS IN THE GOVERNMENT OF INDIA
(As On 7-12-2018)

SL.NO.	***DETAILS***	***NUMBER***
1.	*Total No. of Ministries/Departments* ***appointed Nodal Officers***	***82***
2.	*No. of Ministries/Departments having* ***No*** *Acts*	***09***

3.	*No. of Ministries/Departments having **No** Rules*	***04***
4.	*No. of Ministries/Departments Registered but not **activate***	***04***
5.	*Total No. of **Central Acts in Force***	***888***
6.	*No. of Central Acts Uploaded **(1916 to 2018)***	***785***
7.	*Total No. of **Rules** to be uploaded/How many uploaded*	***2221/2220***
8.	*Total No. of **Regulations** to be uploaded/How many uploaded*	***1376/1370***
9.	*Total No. of **Notifications** to be uploaded/How many uploaded*	***5186/5124***
10.	*Total No. of **Ordinances** to be uploaded/How many uploaded*	***129/127***
11.	*Total No. of **Statutes** to be uploaded/How many uploaded*	***111/108***
12.	*Total No. of **Circulars** to be uploaded/How many uploaded*	***3073/3043***
13.	*Total No. of **Orders** to be uploaded/How many uploaded*	***322/321***
14.	*Ministries/Departments submitted **Completion Certificate***	***17***

*"**INDIACODE WEB PORTAL***

STATUS ON UPLOADING ACTS AND SUBORDINATE LEGISLATIONS BY STATE GOVERNMENTS/UNION TERRITORY ADMINISTRATIONS
(As On 7-12-2018)

SL.NO.	***DETAILS***	***NUMBER***
1.	*Total No. of State Governments appointed **Chief Nodal Officers***	***26***
2.	*Total No. of Union Territory Administrations appointed **Chief Nodal Officers***	***06***
3.	*Total No. of Acts **uploaded so far…***	***2234/2063***
4.	*Total No. of **Rules** to be uploaded/How many uploaded*	***514/282***

5.	*Total No. of* ***Regulations*** *to be uploaded/How many uploaded.*	***46/41***
6.	*Total No. of* ***Notifications*** *to be uploaded/How many uploaded*	***676/134***
7.	*Total No. of* ***Ordinances*** *to be uploaded/How many uploaded*	***113/100***
8.	*Total No. of* ***Statutes*** *to be uploaded/How many uploaded*	***131/65***
9.	*Total No. of* ***Circulars*** *to be uploaded/How many uploaded*	***18/10***
10.	*Total No. of* ***Orders*** *to be uploaded/How many uploaded*	***19/14***
11.	*State/Ut's submitted* ***Completion Certificate***	***NIL***

Today, this Court has been also given a demonstration of hyper linking software by the Union of India. In the said software, the Rules, Regulations, Notifications and Orders issued under a particular Section are reflected below the said Section in a searchable OCR PDF format.

Mr. Ketan Paul, learned counsel appearing for the Amicus Curiae states that the new software is user friendly.

Accordingly, this Court directs the Central Government to adopt the said software with regard to all Central Acts and subordinate legislations.

Learned counsel for petitioner-Union of India prays for and is granted three months to comply with the aforesaid direction.

List the matter on 26th April, 2019.

MANMOHAN, J

DECEMBER 07, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016 & C.M.No.22914/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra with Mr.Mukesh Kumar Tiwari, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr.Jayant Bhushan, Sr.Advocate as Amicus Curiae with Mr.Ketan Paul, Advocate.
Mr.Asheesh Jain, Sr.Standing Cousnel, Income Tax Deptt. with Mr.Anand Jha, Commissioner (IT), CBDT.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% 26.04.2019

A fresh status report dated 09th April, 2019 has been filed by the Union of India. In the said report, it has been stated that all Central Acts in force enacted from the year 1838 to 2018 have been uploaded on new India Code Portal; Hindi version of Central Acts have been updated and uploaded from the year 1881 to 2016 and are presently available on the website of Legislative Department at *www.legislative.gov.in*.

In the status report, it has also been mentioned that the Central Board of Direct Taxes (CBDT) wants to provide hyper-linking to its website of income-tax for the Income-tax Acts, rules, Circulars and Notifications.

The report lastly states that States have been advised to expedite the updation and uploading of their Acts and subordinate legislations on India Code Portal.

Today a demonstration has also been given with regard to the mapping of the legislation section-wise on the India Code Portal in searchable OCR PDF format.

However, on a search being made with regard to Code of Civil Procedure, it was found that the *Orders* which are provided in the *First Schedule* and which form an intrinsic part of the statute, are not available in the searchable OCR PDF format. Further, there is no mention of the Commercial Courts Act which supplants certain *Orders* with regard to commercial suits.

Consequently, this Court directs the petitioner to upload the *Schedules* and *Forms* of all Central Acts in searchable OCR PDF format as expeditiously as possible.

This Court allows CBDT to provide hyper-linking to its website *www.incometaxindia.gov.in* for all its Acts, Rules, Circulars and Notifications, within a period of two weeks.

The petitioner is directed to consider the feasibility of uploading of Bills on India Code Portal as soon as they are cleared by the Cabinet for transmission to the Houses of Parliament under the heading ‘Proposed Legislation’.

This Court may mention that the suggestion has been mooted to facilitate awareness of the Bill at the initial stage itself and to ensure that all stakeholders can give their views and opinions to the law makers before the Bill is taken up for discussion in Parliament.

List the matter for further directions on 17th May, 2019.

Order *dasti* under the signature of Court Master.

MANMOHAN, J

APRIL 26, 2019
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016 & C.M.22914/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra with Mr.Sanjiv Kumar Saxena, Mr.Mukesh Kumar Tiwari, Mr.Ramneek Mishra and Mr.Abhishek Rana, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr.Ketan Paul, Advocate/Amicus Curiae.
Mr.Asheesh Jain, senior standing counsel for CBDT with Mr.S.Eashwar, DDIT (Systems), CBDT and Mr.T.S.Mapwal, JCIT (OSD), CBDT.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **17.05.2019**

At the request of learned counsel for the petitioner/Union of India, adjourned to 19th July, 2019.

MANMOHAN, J

MAY 17, 2019
KA

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CM APPL.22914/2016 IN W.P.(C) 4761/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra, Advocate.

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr.Ketan Paul with Mr.Tushar Bhushan, Advocates for Mr.Jayant Bhushan, Amicus Curiae. Mr.Shaashwat Jindal, Advocate for Mr.Ambhijat, Amicus Curiae.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **19.07.2019**

Mr.Ruchir Mishra, learned counsel for the petitioner/Union of India prays for and is permitted to file a detailed status report within a period of eight weeks.

List on 27th September, 2019.

MANMOHAN, J

JULY 19, 2019
KA

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016

UNION OF INDIA ..... Petitioner

Through Mr.Ruchir Mishra with Mr.M.K. Tiwari and Mr.Abhishek Rana, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr.Mr.Ketan Paul, Advocate/Amicus Curiae.
Mr.Abhijat, Advocate/Amicus Curiae.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **27.09.2019**

C.M.No.22914/2016

Today Mr.Ruchir Mishra, learned standing counsel for Union of India states that all 865 Central Acts have been updated and uploaded in searchable PDF format.

According to him, the status of Subordinate Legislation notified/uploaded by the Ministries/Departments is as under:-

Sr.No.	DETAILS	NUMBER	
1.	Subordinate Legislation notified/uploaded by the Ministries/Departments:	Notified 18529	Uploaded 18204
	(a) Rules	Notified 2672	Uploaded 2493

	(b) Regulations	Notified 1484	Uploaded 1414
	(c) Notifications	Notified 12445	Uploaded 12387
	(d) Ordinances	Notified 152	Uploaded 147
	(e) Statutes	Notified 111	Uploaded 108
	(f) Circulars	Notified 1218	Uploaded 1214
	(g) Orders	Notified 447	Uploaded 441

He states that the status of section-wise linking/mapping of Subordinate Legislations as on 27th September, 2019 is as under:-

- Out of 865 Central Act, 454 Acts have the subordinate legislations such as Rules/ Regulations/ Notifications/ Orders/ Statues/ Ordinances/ Circulars etc.
- Rules/ Regulations/ Notifications/ Orders/ Statues/ Ordinances/ Circulars etc. have been linked under relevant sections of the 323 Acts out of 454 Acts.

As far as the direction with regard to feasibility of uploading of draft Bills on the India Code Portal (hereinafter referred to as the 'ICP') is concerned, it is stated that the users could go directly to the site of the Lok Sabha and Rajya Sabha to see the status of the Bills. A link has been provided on ICP to the site of Lok Sabha and Rajya Sabha.

Mr.Ruchir Sharma further states that a hyperlink to the website

of the Income Tax Departments has been provided on ICP.

He lastly states that the Customs Tariff Act, 1975 is under updation and will be uploaded shortly.

Mr.Abhijat, learned Amicus Curiae states that he will request the members of the Bar Council to use ICP extensively and give their feedbacks to Mr.K.K.Sharma, Assistant Legislative Counsel.

The Union of India is directed to make the ICP site more users friendly. Let a fresh status report be filed before the next date of hearing.

List on 13th December, 2019.

MANMOHAN, J

SEPTEMBER 27, 2019
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SB-1
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4761/2016

UNION OF INDIA ..... Petitioner
Through: Mr. Ramneek Mishra and Mr. Abhishek Rana, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R
% 13.12.2019

CM Appl.22914/2016

In view of the adjournment slip filed by the counsel for the petitioner, adjourned to 10th January, 2020.

MANMOHAN, J

DECEMBER 13, 2019
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P. (C) 4761/2016

UNION OF INDIA ..... Petitioner

Through Mr. M.K. Tiwari with Mr. Sanjiv Kumar Saxena, Advocates.

versus

VANSH SHARAD GUPTA ..... Respondent

Through None.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% 10.01.2020

CM APPL. 22914/2016

In view of the adjournment slip filed by the petitioner, adjourned to 14th February, 2020.

The petitioner is directed to file a fresh Status Report within two weeks.

MANMOHAN, J

JANUARY 10, 2020
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#SB-1

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P. (C) 4761/2016

UNION OF INDIA ..... Petitioner
Through Mr. Ruchir Mishra, CGSC with Mr. Sanjiv Kr. Saxena, Mr. Mukesh Kumar Tiwari, Mr. Ramneek Mishra and Mr. Abhishek Rama, Advocates

versus

VANSH SHARAD GUPTA ..... Respondent
Through Mr. Ketan Paul, Proxy Counsel for Mr. Jayant Bhushan, Amicus Curiae

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% **14.02.2020**

Mr. Ruchir Mishra, learned standing counsel for respondent-UOI states that as of now State Acts and subordinate legislation passed by the States are being uploaded. He, however, states that the pace of uploading is not satisfactory.

Issue notice without process fee to learned standing counsel for Delhi Administration, returnable for 13th March, 2020.

MANMOHAN, J

FEBRUARY 14, 2020
rn

#Single Bench-1

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ C.M.No.22914/2016 in W.P. (C) 4761/2016

UNION OF INDIA ..... Petitioner

Through Mr. Ruchir Mishra, CGSC with Mr. Sanjiv Kr. Saxena, Mr. Mukesh Kumar Tiwari and Mr. Ramneek Mishra, Advocates

versus

VANSH SHARAD GUPTA ..... Respondent

Through Mr. Ketan Paul, Proxy Counsel for Mr. Jayant Bhushan, Amicus Curiae. Mr. Naushad Ahmed Khan, ASC for Govt. of NCT of Delhi.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% 13.03.2020

In pursuance to the notice issued on the last date of hearing, Mr. Naushad Ahmed Khan, learned additional standing counsel enters appearance on behalf of Govt. of NCT of Delhi. He prays for and is permitted to file an affidavit with the Registry of this Court during the course of the day.

List on 1st May, 2020.

MANMOHAN, J

MARCH 13, 2020
rn

2-Judge Bench
2019
Feb. 15

(2019) 18 Supreme Court Cases 246

(BEFORE DR A.K. SIKRI AND S. ABDUL NAZEER, JJ.)

ANJALI BHARDWAJ AND OTHERS . . Petitioners;

Versus

UNION OF INDIA AND OTHERS . . Respondents.

Writ Petition (C) No. 436 of 2018†, decided on February 15, 2019

Human and Civil Rights — Right to Information Act, 2005 — Ss. 3 to 17 and 19 — Effective implementation of RTI Act — Required for good governance and for ensuring freedom of speech and expression — Directions issued on various aspects

— ***Transparency in appointment of Information Commissioners*** — State Governments directed to follow system followed by Central Government, that is, placing all necessary information regarding said appointments on website — Respondents directed to specifically stipulate terms and conditions of appointment in the advertisement and put them on website as well even if S. 13(5) of RTI Act makes it clear that said terms and conditions are similar to those of Chief Election Commissioner/Election Commissioner (Paras 66.1, 66.2, 35, 36, 41 and 44)

— ***Objective and rationale criteria for shortlisting candidates*** — Search Committee directed to make criteria for shortlisting candidates, public shortlisting is done on objective and rationale basis (Para 66.3)

— ***Appointment of Information Commissioners from streams other than public service*** — Persons of eminence in public life with wide knowledge and experience in fields mentioned in Ss. 12(5) and 15(3) of RTI Act should be chosen for appointment as Information Commissioners and Chief Information Commissioners — Selection should not be confined to government employees — Respondents should take into consideration and follow directions in *Namit Sharma*, (2013) 10 SCC 359 (Paras 66.4 and 37 to 39)

— ***Vacancies*** — Respondents directed to fill up vacancies without delay and initiate process of filling up a particular vacancy one or two months before date on which vacancy is likely to occur — With regard to vacancies in Central Information Commission (CIC), judicial notice taken of fact that there is undue delay in filling up of vacancies — Respondents should not make such delay in future — Considering the pendency, worklog and disposal rate, etc., States like West Bengal, Telangana, Maharashtra, Karnataka and Odisha directed to consider increasing stipulated number of Information Commissioners (ICs) and accordingly fill them up within time stipulated — State of Andhra Pradesh directed to fill up post of State Chief Information Commissioner (SCIC) and remaining posts of ICs within 3 months — State of Gujarat directed to fill up 2 vacant posts of ICs within one month — State of Kerala directed to make timely appointment of CSIC and ICs in future — State of

† Under Article 32 of the Constitution of India

Nagaland, which was functioning without SCIC directed to fill up posts within 6 months (Paras 66.5, 29 to 34 and 42 to 65)

a — Constitution of India, Arts. 19(1)(a) and 21 (Paras 10 to 68)

Disposing of the writ petition, the Supreme Court

Held :

The right to information is a fundamental right and flows from Article 19(1)(*a*) of the Constitution, which guarantees the right to speech. This right has also been b traced to Article 21 of the Constitution which concerns about right to life and liberty. (Para 10)

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87; *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592; *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294, *relied on*

Parliament sprang into action and passed the Right to Information Act, 2005, c which became effective from 12-10-2005, persuaded by the message of the Court in its various judgments, outlining the importance of right to information that should be made available to the citizens of the country. (Para 14)

RBI v. *Jayantilal N. Mistry*, (2016) 3 SCC 525 : (2016) 2 SCC (Civ) 382, *relied on*

Since knowledge is power, getting information on any subject becomes equally important. (Para 15)

d Valedictory Address at the National Convention on Right to Information held on 15-10-2006 by the then Prime Minister of India, Dr Manmohan Singh, *referred to*

The RTI can be used as a tool, amongst others, to:

(*a*) facilitate effective delivery of socio-economic services which may lead to poverty alleviation;

(*b*) create conditions for accountability of public servants and authorities e insofar as effective implementation of social security and food security programmes are concerned. It may include implementation of NREGA, mid-day meals for school children, integrated child development scheme, grant of food security and pension for the poor senior citizens, etc.;

(*c*) ensure that there is a proper and effective delivery of services under subsidised schemes like public distribution system and shelter for poor;

f (*d*) promote participatory governance;

(*e*) empower weaker sections; and

(*f*) aid environmental protection. (Para 17)

M.M. Ansari: "Impact of Right to Information on Development: A Perspective on India's Recent Experiences", lecture delivered at UNESCO Headquarters, Paris, on 15-5-2008, *referred to*

g There is a definite link between right to information and good governance. In fact, the RTI Act itself lays emphasis on good governance and recognises that it is one of the objective which the said Act seeks to achieve. The RTI Act would reveal that four major elements/objectives required to ensure good governance are:

(*i*) Greater transparency in functioning of public authorities.

h (*ii*) Informed citizenry for promotion of partnership between citizens and the Government in decision-making process.

(*iii*) Improvement in accountability and performance of the Government.

(*iv*) Reduction in corruption in the government departments. (Para 18)

The right to information, therefore, is not only a constitutional right of the citizens but there is now a legislation in the form of the RTI Act which provides a legal regime for people to exercise their fundamental right to information and to access information from public authorities. (Para 19)

The RTI Act is a self-contained legislation, providing a comprehensive framework to ensure that right to information becomes a reality. (Para 20)

No doubt, there is a cap/upper limit of 10 Central Information Commissioners and State Information Commissioners in respect of each State respectively. Such number of CICs/SICs would depend upon the workload as the expression used is "as may be deemed necessary". (Para 21)

Apart from hearing the appeals, some more powers are also given to CIC or SICs and it is for this reason, in the entire scheme provided under the RTI Act, existence of these institutions becomes imperative and they are vital for the smooth working of the RTI Act. Of course, no specific period within which CIC or SICs are required to dispose of the appeals and complaints is fixed. However, going by the spirit of the provisions, giving outer limit of 30 days to the CPIOs/SPIOs to provide information or reject application with reasons, it is expected that CIC or SICs shall decide the appeals/complaints within shortest time possible, which should normally be few months from the date of service of complaint or appeal to the opposite side. In order to achieve this target, it is essential to have CIC/SCIC as well as adequate number of Information Commissioners. It necessarily follows therefrom that in case CIC does not have Chief Information Commissioner or other Commissioners with required strength, it may badly affect the functioning of the Act which may even amount to negating the very purpose for which this Act came into force. Same applies to SICs as well. (Paras 22 to 24)

The reading of Sections 7 and 19 of the RTI Act makes it clear that it is a time-bound legislation for effectively exercising the fundamental right to information guaranteed in Article 19 of the Constitution. (Para 25)

However, the CIC and SICs which are the final appellate authorities under the RTI Act, and are the guardians of the Act are taking many months, and in some cases even years, to decide appeals and complaints due to accumulation of pending appeals/complaints because of a large number of vacancies in Information Commissions across India. (Paras 26 and 27)

The position in each Information Commission may be examined. (Para 28)

Central Information Commission (CIC)

The petitioners are right in their submissions that there have been undue delays in filling up of these vacancies in CIC. It is expected that the vacancies shall be filled up, in future, well in time. (Paras 29 to 34)

Anjali Bhardwaj v. *Union of India*, 2018 SCC OnLine SC 3174; *Anjali Bhardwaj* v. *Union of India*, 2018 SCC OnLine SC 3175, *referred to*

It cannot be said that there is no transparency in the appointment process, when all essential information in respect of each candidate is made available to the public at large. Information in respect of Members of Search Committee,

agenda of their meetings and even the minutes of the Search Committee have also been put on website. The appointments made, finally, are also in public domain. (Paras 35 and 36)

Strangely, all those persons who have been selected belong to only one category, namely, public service i.e. they are the government employees. It is difficult to fathom that persons belonging to one category only are always be found to be more competent and more suitable than persons belonging to other categories. In fact, even the Search Committee which shortlists the persons consist of bureaucrats only. For these reasons, official bias in favour of its own class is writ large in the selection process. (Para 38)

It is by no means suggested that the persons who have ultimately been selected are not deserving for the post of Information Commissioners. It is, however, emphasised that there can be equally suitable persons from other walks of life as well who may be the aspirants for such posts. Therefore, in future, the search committee is directed to pick up suitable candidates from other categories as well. After all, the very purpose of providing wide range of suitability was to have members in CIC by giving representation to other classes as well. This would ensure wider representative character in the composition of CIC. (Para 39)

General directions for CIC and SCICs

Insofar as transparency in appointment of Information Commissioners is concerned, pursuant to the directions given by the Supreme Court, the Central Government is now placing all necessary information including issuance of the advertisement, receipt and applications, particulars of the applicants, composition of Selection Committee, etc. on the website. All States directed to follow this system. (Para 66.1)

Insofar as terms and conditions of appointment are concerned, Section 13(5) of the RTI Act states that the CIC and Information Commissioners shall be appointed on the same terms and conditions as applicable to the Chief Election Commissioner/Election Commissioner. At the same time, it would also be appropriate if the said terms and conditions on which such appointments are to be made are specifically stipulated in the advertisement and put on website as well. (Para 66.2)

Likewise, it would also be appropriate for the Search Committee to make the criteria for shortlisting the candidates, public, so that it is ensured that shortlisting is done on the basis of objective and rational criteria. (Para 66.3)

It is expected that the Information Commissioners are appointed from other streams, as mentioned in the Act and the selection is not limited only to the government employee/ex-government employee. In this behalf, the respondents shall also take into consideration and follow the below directions given by the Supreme Court in *Namit Sharma*, (2013) 10 SCC 359. (Para 66.4)

That only persons of eminence in public life with wide knowledge and experience in the fields mentioned in Sections 12(5) and 15(5) of the RTI Act be considered for appointment as Information Commissioner and Chief Information Commissioner. (Para 66.4)

That persons of eminence in public life with wide knowledge and experience in all the fields mentioned in Sections 12(5) and 15(5) of the RTI Act, namely,

law, science and technology, social service, management, journalism, mass media or administration and governance, be considered by the Committees under Sections 12(3) and 15(3) of the RTI Act for appointment as Chief Information Commissioner or Information Commissioners. (Para 66.4)

And that the Committees under Sections 12(3) and 15(3) of the RTI Act while making recommendations to the President or to the Governor, as the case may be, for appointment of the Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to citizens as part of their right to information under the Act after the appointment is made. (Paras 66.4 and 37 to 39)

The respondents should fill up vacancies, in future, without any delay. For this purpose, it would be apposite that the process for filling up of a particular vacancy is initiated 1 to 2 months before the date on which the vacancy is likely to occur so that there is not much time-lag between the occurrence of vacancy and filling up of the said vacancy. (Para 66.5)

The aforesaid directions are given keeping in view the salient purpose which the RTI Act is supposed to serve. The RTI Act is enacted not only to subserve and ensure freedom of speech. On proper implementation, it has the potential to bring about good governance which is an integral part of any vibrant democracy. Attaining good governance is also one of the visions of the Constitution. It also has vital connection with the development. (Para 67)

The writ petition stands disposed of in the aforesaid terms. However, the liberty is given to the petitioners to approach the Court again, either by way of filing interlocutory application in this petition or preferring another writ petition, if the occasion so demands. (Para 68)

SS-D/62278/S

Advocates who appeared in this case :

Ms Pinky Anand and Ms Madhavi Divan, Additional Solicitors General [Ms Pooja Dhar, Rajesh Ranjan, Arvind Kr. Sharma, Guntur Prabhakar, Ms Prerna Singh, Prasenth Mathur, Ms Madhumita Bhattacharjee, Ms Urmila Kar Purkayastha, P. Venkat Reddy Prashant Tyagi (for M/s Venkat Palwai Law Associates), Ms Hemantika Wahi, Ms Jesal Wahi, Ms Puja Singh, Ms Vishakha, Ms Parul Luthra, G. Prakash, Jishnu M.L., Ms Priyanka Prakash, Ms Beena Prakash, V.N. Raghupathy, Parikshit P. Angadi, Ravi Prakash Mehrotra, Ankit Agarwal, Ms Deepa M. Kulkarni and Nishant Ramakantrao Katneshwarkar, Advocates] for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. 2018 SCC OnLine SC 3175, *Anjali Bhardwaj* v. *Union of India* 262*b*
2. 2018 SCC OnLine SC 3174, *Anjali Bhardwaj* v. *Union of India* 253*f*, 262*a-b*
3. (2016) 3 SCC 525 : (2016) 2 SCC (Civ) 382, *RBI* v. *Jayantilal N. Mistry* 255*c*
4. (2013) 10 SCC 359, *Union of India* v. *Namit Sharma* 274*g*
5. (2002) 5 SCC 294, *Union of India* v. *Assn. for Democratic Reforms* 255*a*
6. (1988) 4 SCC 592, *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.* 254*f*
7. 1981 Supp SCC 87, *S.P. Gupta* v. *Union of India* 254*c-d*
8. (1975) 4 SCC 428, *State of U.P.* v. *Raj Narain* 254*a*

The Judgment of the Court was delivered by

Dr A.K. Sikri, J.— This writ petition is filed under Article 32 of the Constitution of India, as a public interest litigation. The petitioners state that it is filed with the aim to have effective implementation of the Right to Information Act, 2005 (hereinafter referred to as "the RTI Act") so that fundamental rights of citizens to access information from public authorities are secured. Under the RTI Act, the Central Information Commission (for short "CIC") and the State Information Commissions (for short "SICs") have been created as statutory bodies to decide appeals and complaints against public authorities for non-compliance with the RTI law. On that basis, the petitioners assert that it is essential to have proper functioning of these institutions for effective implementation of the RTI Act. As per the petitioners, neither the Central Government in respect of CIC nor the State Government in respect of SICs, are filling the vacancies for the appointment of Commissioners in a timely manner. As a result the functioning of the RTI Act is stifled. It is leading to huge backlogs of appeals and complaints in many Commissions across the country. The focus of the petition, thus, is to impress upon the respective governments to fill up such vacancies as and when they arise, without any delays.

2. It is averred by the petitioners in the petition that the RTI Act is a time-bound legislation and prescribes statutory timelines for providing the information. When that is not provided, or the applicant is aggrieved by the nature of response received, she/he is also entitled to file a first appeal with the designated first appellate authority. The first appellate authority is obligated to dispose of such an appeal within maximum period of 45 days. The reading of Sections 7 and 19 of the RTI Act makes it clear that the RTI Act is a time-bound legislation for effectively exercising the fundamental right to information guaranteed in Article 19 of the Constitution of India. However, the CIC and SICs which are the final appellate authorities under the RTI Act, and are the guardians of the Act are taking many months, and in some cases even years, to decide appeals and complaints due to accumulation of pending appeals/complaints. The main cause for such a delay is large number of vacancies in SICs across India.

3*. The petition points out that a report published in March 2018 titled, "Report Card on the Performance of Information Commissions in India**" found that eight Information Commissions had a waiting time of more than one year for an appeal/complaint to be heard, which was calculated on the basis of the number of appeals and complaints pending as on 31-10-2017 and the monthly disposal rate. Further, several Information Commissioners thereby undermine the autonomy of the Commission which hampers its smooth functioning including its ability to comply with the directions of the Supreme Court regarding the power of the Chief Information Commissioner to decide formation of Special Benches to hear matters involving complex questions of law. By not filling up vacancies in Information Commissions in a timely

* **Ed.**: Para 3 corrected vide Official Corrigendum No. F.3/Ed.B.J./25/2019 dated 3-4-2019.

** **Ed.**: Report prepared by Satark Nagrik Sangathan and Centre for Equity Studies (March 2018).

manner, the Central and State Governments are frustrating the very purpose of the RTI Act as receiving information in a time-bound manner is the essence of the law.

4. Insofar as vacancy position and workload of CIC as well as SICs are concerned, the petitioners have given the following information.

5. As on the date of filing of the petition, four posts of Information Commissioners were lying vacant in the CIC. More than 23,500 appeals and complaints were pending as on 4-4-2018, before the CIC. However, no effective steps have been taken for filling up of the vacancies. Though, the Central Government had invited applications for the post of two Information Commissioners vide Circular dated 2-9-2016 in anticipation of vacancies occurring in December 2016 and February 2017, these vacancies have not been filled.

6. In respect of various SICs, the petitioners have not only mentioned the backlog of the appeals and complaints pending therein, but also the vacancy position. It is further highlighted that though as per the RTI Act there has to be one Chief Information Commissioner and up to 10 Information Commissioners, most of the States have decided to have much lesser number of Commissioners, which again is affecting the workload. It is not necessary to give the details of such averments made in the petition as that would be taken note of while dealing with each SIC.

7. The petitioners have also alleged that there is a lack of transparency in the appointment of Information Commissioners inasmuch as the Central Government as well as various State Governments have failed to adopt proper procedure to ensure transparency in the shortlisting, selection and appointment of Information Commissioners. This lack of transparency, according to the petitioners, had led to filing of several cases in different courts challenging these appointments.

8. On the basis of averments of the aforesaid nature, the petitioners have made the following prayers:

> "A. Issue a writ of mandamus or any other appropriate writ directing the Union of India to take immediate steps to fill the vacancies in the CIC by making appointment of 4 Information Commissioners in a transparent and time-bound manner.
>
> B. Issue a writ of mandamus or any other appropriate writ directing the State Governments of Maharashtra, Gujarat, Andhra Pradesh, Nagaland, West Bengal, Kerala, Karnataka, Odisha and Telengana to take immediate steps to appoint Chief State Information Commissioners and Information Commissioners of the respective SICs in a transparent and time-bound manner.
>
> C. Issue a writ of mandamus or any other appropriate writ directing the Union of India and all State Governments to commence the selection process for Information Commissioners, including the Chief, at least three months prior to the occurrence of vacancy.

D. Issue a writ of mandamus or any other appropriate writ directing the Union of India and all State Governments to ensure that all records of deliberations and rational criteria related to shortlisting and selection of the Chief Information Commissioner and other Information Commissioners be properly recorded and made available to citizens in consonance with the provisions of the RTI Act.

E. Issue a writ of mandamus or any other appropriate writ directing the Union of India and all the State Governments to evolve an appropriate and transparent method of selection of Chief Information Commissioner and other Information Commissioners in consonance with the provisions of the Act.

F. Issue a writ of mandamus or any other appropriate writ directing the Union of India and all State Governments to ensure transparency in the selection process by:

(*a*) Publishing advertisements to invite applications from eligible candidates.

(*b*) Publicly disclosing, including through the website, the eligibility criteria for appointment as Information Commissioner/chief.

(*c*) Publicly disclosing, including through the website, the procedure and rational criteria for shortlisting candidates, if any shortlisting is done.

(*d*) Publicly disclosing, including through the website, the composition, mandate and minutes of meetings of the screening/search committee set-up.

(*e*) Publicly disclosing the names of shortlisted candidates so that people can inform the selection committee any significant adverse information they may have about any such candidate.

G. Issue such other writ, direction or order, which this Hon'ble Court may deem fit under the facts and circumstances of the case."

9. In the petition, the Union of India is arrayed as Respondent 1. Respondents 2 to 9 are the eight States, namely, the States of West Bengal, Andhra Pradesh, Maharashtra, Kerala, Odisha, Karnataka, Gujarat and Telengana. After the notice[1] of this petition was served upon the respondents, the Union of India as well as the State Governments filed their response stating the position of pendency and also the steps taken for filling up of the posts. We shall take up the case of each of the respondents separately, going by the ground realities in respect of each State. Before embarking on discussion qua each of these respondents, it would be necessary to take note of certain provisions of the RTI Act and the significance thereof, as highlighted by this Court in various judgments.

10. Much before the enactment of the RTI Act, which came on the statute book in the year 2005, this Court repeatedly emphasised the people's right to information to be a facet of Article 19(1)(*a*) of the Constitution. It has been held that the right to information is a fundamental right and flows

1 *Anjali Bhardwaj* v. *Union of India*, 2018 SCC OnLine SC 3174

from Article 19(1)(*a*), which guarantees the right to speech. This right has also been traced to Article 21 which concerns about right to life and liberty. There are umpteen number of judgments declaring that transparency is the key for functioning of a healthy democracy. In *State of U.P.* v. *Raj Narain*[2], a Constitution Bench of this Court held that: (SCC p. 453, para 74)

> "*74*. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public."

11. In *S.P. Gupta* v. *Union of India*[3], a seven-Judge Bench of this Court made the following observations regarding the right to information: (SCC p. 275, para 67)

> "*67*. … The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(*a*). Therefore, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest."

12. We may also refer to the following observation from the judgment in *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*[4]: (SCC p. 613, para 34)

> "*34*. … We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves responsibility to inform."

2 (1975) 4 SCC 428
3 1981 Supp SCC 87
4 (1988) 4 SCC 592

13. In *Union of India* v. *Assn. for Democratic Reforms*[5], this Court, while declaring that it is part of the fundamental right of citizens under Article 19(1)(*a*) to know the assets and liabilities of candidates contesting election to Parliament or the State Legislatures, also made the following pertinent remarks: (SCC p. 321, para 46)

> "*46*. … *5*. The right to get information in democracy is recognised all throughout and it is a natural right flowing from the concept of democracy."

14. Parliament sprang into action and passed the Right to Information Act, 2005, which became effective from 12-10-2005, persuaded by the message of this Court in its various judgments, outlining the importance of right to information that should be made available to the citizens of the country. After the RTI Act as well, this Court has been emphasising the importance of right to information. We may usefully refer to the judgment in *RBI* v. *Jayantilal N. Mistry*[6] where a two-Judge Bench of this Court while upholding peoples' right to access information, made the following observations regarding the right to information: (SCC pp. 564-65, paras 74-75)

> "*74*. … because an informed citizen has the capacity to reasoned action and also to evaluate the actions of the legislature and executives, which is very important in a participative democracy and this will serve the nation's interest better, which as stated above also includes its economic interests. Recognising the significance of this tool it has not only been made one of the fundamental rights under Article 19 of the Constitution but also a Central Act has been brought into effect on 12-10-2005 as the Right to Information Act, 2005.
>
> *75*. The ideal of "Government by the people" makes it necessary that people have access to information on matters of public concern. The free flow of information about the affairs of Government paves way for debate in public policy and fosters accountability in Government. It creates a condition for "open governance" which is the foundation of democracy."

15. In an article by Alwin Toffler titled "What will our future be like?", he has traced the transition—from agriculture society to industry society to knowledge based society. If we go back to the beginnings of time, agriculture was the prime source and the entire mankind was based on agriculture. 350 years ago with the invention of steam engines came the industrialised age and now what we are living through is the third gigantic wave, which is way more powerful than industrialised age. An age that is based on knowledge. Knowledge in today's times can be gathered from so many sources. In digital age, it is available online. Since knowledge is power, getting information on any subject becomes equally important. In the Valedictory Address at the National Convention on Right to Information held on 15-10-2006, the then Prime Minister of India, Dr Manmohan Singh, made the following pertinent remarks:

5 (2002) 5 SCC 294
6 (2016) 3 SCC 525 : (2016) 2 SCC (Civ) 382

"We live in an age of information, in which the free flow of information and ideas determines the pace of development and well-being of the people. The implementation of the RTI Act is, therefore, an important milestone in our quest for building an enlightened and at the same time, a prosperous society. Therefore, the exercise of the right to information cannot be the privilege of only a few."

16. The connect between information regime and development is succinctly brought about by Mr M.M. Ansari*, former Central Information Commissioner, in the following manner:

"Right to information (RTI) is harnessed as a tool for promoting participatory development, strengthening democratic governance and facilitating effective delivery of socio-economic services. In the knowledge society, in which we live today, acquisition of information and new knowledge and its application have intense and pervasive impact on processes of taking informed decisions, resulting in overall productivity gains.

People who have access to information and who understand how to make use of the acquired information in the processes of exercising their political, economic and legal rights become empowered, which, in turn, enable them to build their strengths and assets, so as to improve the quality of life.

In view of this, almost every society has made endeavours for democratising knowledge resources by way of putting in place the mechanisms for free flow of information and ideas so that people can access them without asking for it. People are thus empowered to make proper choices for participation in development process.

The efforts made thus far to disseminate information and knowledge through the use of communication technologies such as print media, radio and television as well as internet, have yielded positive results. Sharing of information, for instance, about the new techniques of farming, health care facilities, hazards of environmental degradation, opportunities for learning and earning, legal remedies for combating gender biases, etc., have made significant contributions to the well-being of poor people."

17. Mr Ansari has, in the aforesaid article*, ably demonstrated that RTI can be used as a tool, amongst others, to:

(*a*) facilitate effective delivery of socio-economic services which may lead to poverty alleviation;

(*b*) create conditions for accountability of public servants and authorities insofar as effective implementation of social security and food security programmes are concerned. It may include implementation of

* **Ed.**: M.M. Ansari, "Impact of Right to Information on Development: A Perspective on India's Recent Experiences", an invited lecture delivered at UNESCO Headquarters, Paris, France, on 15-5-2008.

NREGA, mid day meals for school children, integrated child development scheme, grant of food security and pension for the poor senior citizens, etc.;

a (*c*) ensure that there is a proper and effective delivery of services under subsidised schemes like public distribution system and shelter for poor;

(*d*) promote participatory governance;

(*e*) empower weaker sections; and

(*f*) aid environmental protection.

b **18.** There is a definite link between right to information and good governance. In fact, the RTI Act itself lays emphasis on good governance and recognises that it is one of the objective which the said Act seeks to achieve. The RTI Act would reveal that four major elements/objectives required to ensure good governance are:

(*i*) Greater transparency in functioning of public authorities.

c (*ii*) Informed citizenry for promotion of partnership between citizens and the Government in decision-making process.

(*iii*) Improvement in accountability and performance of the Government.

(*iv*) Reduction in corruption in the government departments.

d **19.** The right to information, therefore, is not only a constitutional right of the citizens but there is now a legislation in the form of the RTI Act which provides a legal regime for people to exercise their fundamental right to information and to access information from public authorities. The very Preamble of the Act captures the importance of this democratic right which reads as under:

e "... democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;"

20. There are various provisions in this RTI Act which are incorporated in order to ensure that right to information becomes a reality. It is a self-
f contained legislation, providing a comprehensive framework in this behalf. Under the RTI Act, Information Commissions have been set up at the Centre (CIC) and in all the States (SICs) to adjudicate on appeals and complaints of persons who have been unable to secure information in accordance with the RTI Act or are aggrieved by violations of the RTI Act. Chapter III titled, "*The Central Information Commission*", containing Sections 12 to 14 of the
g RTI Act, lays down the provisions relating to the constitution of CIC, the term of office and conditions of service of the Chief and the Central Information Commissioners and the procedure and grounds for removal of the Chief Information Commissioner and the Information Commissioners. Similarly, Chapter IV titled, "*The State Information Commission*", containing Sections 15 to 17, lays down the provisions relating to the constitution of SICs, the term
h of office and conditions of service of the Chief and the State Information

Commissioners and the procedure and grounds of removal of Chief Information Commissioner or State Information Commissioners.

21. As per the RTI Act, the Commissions consist of the Chief Information Commissioner and up to 10 Information Commissioners, appointed by the President of India at the Central level and by the Governor in the States, on the recommendation of a Committee. In respect of CIC, such a provision is contained in Section 12 which stipulates that CIC shall consist of the Chief Information Commissioner and "such number of Central Information Commissioners not exceeding 10 as may be deemed necessary". Similarly, provision for SIC is contained in Section 15(2) of the RTI Act. No doubt, there is a cap/upper limit of 10 Central Information Commissioners and State Information Commissioners in respect of each State respectively. Such number of CICs/SICs would depend upon the workload as the expression used is "as may be deemed necessary". The required number of CIC/SICs, therefore, would depend upon the workload in each of these Commissions.

22. Insofar as provisions relating to eliciting the information from public authorities is concerned, the same is provided in Chapter II which comprises of Sections 3 to 11. Section 3 declares that all citizens shall have the right to information, of course, subject to the provisions of this Act. Section 4 puts an obligation on every public authority to provide information. In order to facilitate the right to information, various obligations are cast upon the public authorities under this Section. Perusal of Section 4 listing these obligations is itself a clear message that it is for the purpose of facilitating the right to information to the citizens. Section 4 of the RTI Act reads as under:

> "**4.** ***Obligations of public authorities***.—(1) Every public authority shall—
>
> (*a*) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;
>
> (*b*) publish within one hundred and twenty days from the enactment of this Act—
>
> (*i*) the particulars of its organisation, functions and duties;
>
> (*ii*) the powers and duties of its officers and employees;
>
> (*iii*) the procedure followed in the decision-making process, including channels of supervision and accountability;
>
> (*iv*) the norms set by it for the discharge of its functions;
>
> (*v*) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;
>
> (*vi*) a statement of the categories of documents that are held by it or under its control;

(*vii*) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

(*viii*) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(*ix*) a directory of its officers and employees;

(*x*) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(*xi*) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(*xii*) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(*xiii*) particulars of recipients of concessions, permits or authorisations granted by it;

(*xiv*) details in respect of the information, available to or held by it, reduced in an electronic form;

(*xv*) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(*xvi*) the names, designations and other particulars of the Public Information Officers;

(*xvii*) such other information as may be prescribed,

and thereafter update these publications every year;

(*c*) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

(*d*) provide reasons for its administrative or quasi-judicial decisions to affected persons.

(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (*b*) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.

(3) For the purposes of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public.

(4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or

State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.—For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the information to the public through noticeboards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority."

23. The RTI Act also provides in-house mechanism for giving information by these public authorities. For this purpose, each public authority is supposed to designate as many officers as Central Public Information Officers (for short "CPIOs") or State Public Information Officers (for short "SPIOs") who are supposed to provide information to persons requesting for the information under this Act. Timelines are set during which CPIOs/SPIOs are supposed to give the information, namely, within 30 days of the receipt of the request for obtaining information. Within this period either information is to be provided or request is to be rejected. Rejection can be only for a reason specified in Sections 8 and 9 of the Act. Sub-section (8) of Section 7 also casts an obligation upon the CPIOs or SPIOs to give reasons for such rejection. In the rejection order, the applicant is also supposed to be informed about the period within which an appeal against such rejection may be preferred as well as particulars of the appellate authority.

24. If the information is not provided and the request is rejected, appeal can be filed before the CIC or SICs as the case may be under Section 19 of the Act. Apart from hearing the appeals, some more powers are also given to CIC or SICs and it is for this reason, in the entire scheme provided under the RTI Act, existence of these institutions becomes imperative and they are vital for the smooth working of the RTI Act. Of course, no specific period within which CIC or SICs are required to dispose of the appeals and complaints is fixed. However, going by the spirit of the provisions, giving outer limit of 30 days to the CPIOs/SPIOs to provide information or reject application with reasons, it is expected that CIC or SICs shall decide the appeals/complaints within shortest time possible, which should normally be few months from the date of service of complaint or appeal to the opposite side. In order to achieve this target, it is essential to have CIC/SCIC as well as adequate number of Information Commissioners. It necessarily follows therefrom that in case CIC does not have Chief Information Commissioner or other Commissioners with required strength, it may badly affect the functioning of the Act which may even amount to negating the very purpose for which this Act came into force. Same applies to SICs as well.

25. It is in the aforesaid perspective that the petitioners state that occurrence of vacancies in Information Commissions, which are not filled up on time, is leading to huge backlogs and concomitant long waiting time for disposal of appeals/complaints. It is emphasised that the RTI Act is a time-bound legislation and prescribes statutory timelines for providing the information from the date of application (ordinarily 30 days). In case information is not

granted, or the applicant is aggrieved by the nature of response received, she/he is also entitled to file a first appeal with the designated first appellate authority. The first appellate authority is obligated to dispose of such an appeal within maximum period of 45 days. The reading of Sections 7 and 19 of the RTI Act makes it clear that it is a time-bound legislation for effectively exercising the fundamental right to information guaranteed in Article 19 of the Constitution of India.

26. However, the CIC and SICs which are the final appellate authorities under the RTI Act, and are the guardians of the Act are taking many months, and in some cases even years, to decide appeals and complaints due to accumulation of pending appeals/complaints because of a large number of vacancies in Information Commissions across India.

27*. The petitioners refer to a report** published in March 2018 titled, "Report Card on the Performance of Information Commissions in India" found that 8 Information Commissions had a waiting time of more than one year for an appeal/complaint to be heard, which was calculated on the basis of the number of appeals and complaints pending as of 31-10-2017 and the monthly disposal rate. Further, several Information Commissions are functioning without a Chief Information Commissioner thereby undermining the autonomy of the Commission and hampering its smooth functioning including its ability to comply with the directions of this Court regarding the power of the Chief Information Commissioner to decide formation of Special Benches to hear matters involving complex questions of law. It is the grievance of the petitioners that by not filling up vacancies in Information Commissions in a timely manner, the Central and State Governments are frustrating the very purpose of the RTI Act as receiving information in a time-bound manner is the essence of the law. In this way, argue the petitioners, the fundamental right of citizens to access information from public authorities is being hindered by the non-appointment of Commissioners in the CIC and various SICs across the country.

28. In order to test the aforesaid submissions of the petitioners, we now proceed to examine the position in each Information Commission.

Central Information Commission (CIC)

29*. It is averred in the petition that as on the date of filing of the petition 4 posts of Information Commissioners were lying vacant in the CIC. As on 4-4-2018, more than 23,500 appeals and complaints were pending before it. The CIC website shows that even appeals and complaints filed in the year 2016 are currently pending for disposal by the Commission. The petitioners further mention that though all the 4 vacancies arose in a routine manner on the retirement of Information Commissioners and upon the expiry of their five years' tenure or upon attaining the age of 65 years, which fact was known to the Central Government much in advance, but no timely steps were taken for filling up of these vacancies. First vacancy had occurred more than 15 months before

* **Ed.**: Paras 27 and 29 corrected vide Official Corrigendum No. F.3/Ed.B.J./25/2019 dated 3-4-2019.
** **Ed.**: Report prepared by Satark Nagrik Sangathan and Centre for Equity Studies (March 2018).

the filing of the petition. It is also stated that while the Central Government had invited applications for the post of two Information Commissioners vide Circular/Communication dated 2-9-2016 in anticipation of vacancies occurring in December 2016 and February 2017 till date none of the vacancies has been filled. The representation made by the petitioners in this behalf has also gone unheeded.

30. Orders were passed[1] in the petition directing Respondent 1 to give the status report of the steps taken for filling up of these vacancies. On 13-12-2018[7], another order in the following terms was passed: (*Anjali Bhardwaj case*[7], SCC OnLine SC paras 1-27)

> "*1*. The Union of India has filed affidavit dated 12-12-2018 mentioning the status of the appointments to the post of Chief Information Commissioner as well as Information Commissioners.
>
> *2*. It is stated by the learned Additional Solicitor General that insofar as the post of Chief Information Commissioner is concerned, pursuant to the advertisement, 64 applications were received. It is further informed that insofar as the posts of Information Commissioners are concerned, 4 posts were advertised and 280 applications were received. It is mentioned that advertisement was uploaded on the Department of Personnel and Training (DoPT) website.
>
> *3*. The learned Additional Solicitor General also submits that the Selection Committee, as per Section 12 of the Right to Information Act, 2005, held a meeting on 11-12-2018 on which date the recommendation in respect of appointment of Chief Information Commissioner has been finalised and it is expected that the person shall be appointed soon. Insofar as posts of Information Commissioners are concerned, having regard to a large number of applications, process could not be completed on that day. It is further stated at the Bar that this shall also be accomplished soon.
>
> *4*. We are informed that three more posts of Information Commissioners are lying vacant. It would be appropriate to initiate the process of filling up these posts as well by issuing an advertisement at the earliest.
>
> *5*. Mr Prashant Bhushan, learned counsel appearing for the petitioners, submits that Para 5 of the advertisement for the post of Chief Information Commissioner reads as under:
>
> > 'The salary, allowances and other terms and conditions of service of the Chief Information Commissioner shall be as may be specified at the time of appointment of the selected candidate.'
>
> *6*. His submission is that the RTI Act mentions salary, allowances and other terms of the Chief Information Commissioner to be appointed and the stipulation could not have been in vague terms as stated there. This is the aspect that shall be considered on the next date of hearing.

1 *Anjali Bhardwaj* v. *Union of India*, 2018 SCC OnLine SC 3174
7 *Anjali Bhardwaj* v. *Union of India*, 2018 SCC OnLine SC 3175

7. He further submits that similar clause is put in the advertisement pertaining to Information Commissioners. This aspect also will be considered on the next date of hearing.

8. However, we may take on record the statement of the learned Additional Solicitor General that the RTI Act itself mentions the terms and conditions on which appointments of Chief Information Commissioner and Information Commissioners in the Central Information Commission are to be made.

9. The respondents shall put on the website the names of the Search Committee, the names of the candidates who have been shortlisted as well as the criteria which is followed for selection. We may again record the statement of the learned Additional Solicitor General that the selection criteria is prescribed in the RTI Act itself which is being followed. Still, that can be put on the website.

STATE OF KARNATAKA:

10. In the affidavit filed on behalf of the State of Karnataka it is mentioned that there is only one vacancy of the State Information Commissioner ("SIO") which has been advertised. However, in the meantime, the High Court of Karnataka has stayed the appointment process.

STATE OF MAHARASHTRA:

11. In the affidavit filed on behalf of the State of Maharashtra it is mentioned that the post of State Chief Information Commissioner ("SCIC") has already been filled. It is also stated that steps have been taken for filling up the post of one State Information Commissioner ("SIC") and that would happen soon. It is further stated that there are two posts of SIC which have fallen vacant now and in respect of these two posts process for filling up the posts through advertisement will be initiated positively within four weeks.

12. They shall also disclose on the website the particulars on the same lines as directed in the case of Union of India.

STATE OF WEST BENGAL:

13. The learned counsel appearing for the State of West Bengal submits that SCIC has already been appointed. She further states that one SIC is already in place and one more SIC has been appointed. In this way, as of now, one SCIC and two SICs are holding the office. As per the RTI Act up to ten SICs can be appointed. We are not sure as to whether the entire work can be dealt with by only one SCIC and two SICs.

14. The State of West Bengal shall file an affidavit stating the requirement of SICs. The information shall also be provided in respect of the applications under the RTI Act which are being filed, the applications which are pending as well as the appeals which are pending before SICs and for how long they are pending. The pendency shall also be disclosed. An affidavit in this behalf shall be filed within two weeks.

STATE OF ANDHRA PRADESH:

15. The learned counsel for the State of Andhra Pradesh has handed over affidavit dated 12-12-2018. As per this affidavit, three persons are

appointed as SIC. It is also stated that though the post of SCIC was also advertised but nobody could be appointed and it is not decided to issue fresh advertisement in this behalf. Insofar as SCIC is concerned, he has mentioned that advertisement was issued on 24-8-2018 and the last date for receiving the applications was extended up to 10-10-2018. Thirty-one applications have been received and it is proposed to hold Selection Committee's meeting soon. We expect that such meeting shall take place as soon as possible and within one month SCIC shall also be appointed.

16. It is also stated that, in the meantime, Mr M. Ravi Kumar, who is working as SIC, is placed as In-charge for the post of SCIC so that the Commission may function.

17. An affidavit shall also be filed on the same lines as directed in the case of the State of West Bengal before the next date of listing. They shall also disclose on the website the particulars on the same lines as directed in the case of Union of India.

STATE OF TELENGANA:

18. Insofar as State of Telengana is concerned, affidavit has not been filed in compliance with the directions given by this Court on the last date of hearing. The learned counsel states that it was because of the reason that there were elections of the Legislative Assembly which concluded and results came only on 11-12-2018. He, therefore, seeks, and is granted, two weeks' time to file an affidavit.

19. In the affidavit to be filed not only it would be indicated as to how many SICs are functioning, the affidavit shall also disclose the steps which are taken to fill up the posts and how many posts are required to be filled. In case the State of Telengana has taken a decision not to fill ten posts of SIO, justification thereof shall be provided in the form of an affidavit by disclosing the information in the same manner in which it has been directed in respect of the State of West Bengal.

STATE OF ODISHA:

20. As per the earlier affidavit filed on behalf of the State of Odisha, the State has decided to function the Information Commission with one SCIC and three SICs. It is stated that SCIC and two SICs are already working and there is one post of SIC for which advertisement shall be issued very shortly.

21. Mr Prashant Bhushan, learned counsel, submits that there are huge arrears before the Information Commission in the State of Odisha and there is no justification to have only three Information Commissioners.

22. The State of Odisha shall also file an affidavit on the same lines as directed in the case of the State of West Bengal before the next date of listing. They shall also disclose on the website the particulars of selection, etc. on the same lines as directed in the case of Union of India.

STATE OF GUJARAT:

23. The learned counsel for the State of Gujarat states that she has received information from the State only two days ago and she shall be filing the affidavit within one week. However, she orally informs that as per the information received, in the State of Gujarat, the Information

Commission consists of one SCIC and four SICs. She further submits that SCIC and one SIC are functioning. Three vacancies for the post of SIC have already been advertised and the process is on. According to her, applications have been received and are pending before the Selection Committee.

24. We expect the Selection Committee to complete the process at the earliest, preferably before the next date of hearing.

25. They shall also disclose on the website the particulars of selection, etc. on the same lines as directed in the case of Union of India.

STATE OF KERALA:

26. The learned counsel for the State of Kerala states that one SCIC and four SICs are functioning. Five posts of SICs could not be filled because of pendency of some writ petition(s) in the Kerala High Court.

27. List the matter on 22-1-2019."

31. Pursuant to the aforesaid direction, the Union of India filed the status report on 29-1-2019 at the time of hearing of the matter. It is stated in this report that the selection criteria is prescribed in the RTI Act itself which is being followed, which also mentions the terms and conditions on which appointments of each Chief Information Commissioner and Information Commissioners in the CIC are to be made. The report further records as under:

"2. The files relating to appointment of Chief Information Commissioner (F. No. 4/13/201-IR) and Information Commissioners (F. No. 4/9/2018-IR) in Central Information Commission have been put on the website of DoPT (dopt.gov.in/rti/proactive-disclosure/selection of Information Commissioners) except personal information of the applicants which has been exempted under Section 8(1)(*j*) of the Right to Information Act. These files contain a list of applicants, the names of the members of Search Committee, Agenda for the Search Committee, minutes of the Search Committee. Copies of the Gazette of India notifying the appointment of Chief Information Commissioner and Information Commissioners in the Central Information Commission w.e.f. 1-1-2019 are enclosed. The terms of appointment in respect of newly appointed Chief Information Commissioner and Information Commissioners in Central Information Commission will be regulated as per the Right to Information Act. The procedure for selection of Information Commissioners is given in Section 12(3) of the Right to Information Act which has been followed for the newly appointed Chief Information Commissioner and Information Commissioners. Photocopy of Section 12(3) of the Right to Information Act is enclosed.

3. The advertisement in respect of 4 Information Commissioners in the Central Information Commission, against the present vacancies, has been uploaded on the website on DoPT on 4-1-2019 and the last date of receipt of applications for the same is 25-1-2019. The advertisement has

been published in the 4 leading newspapers, *The Hindu* and *Times of India* (in English); *Dainik Bhaskar* and *Hindustan* (in Hindi) and their editions throughout India by the Bureau of Outreach and Communication."

32. The aforesaid report reveals that some appointments have been made. At the same time, appointment process in respect of 4 Information Commissioners in CIC has been initiated. In this backdrop, three aspects on which the arguments were raised by the learned counsel for the petitioner and which need to be addressed are the following:

32.1. Timely filling up of the vacancies to ensure that the work of the Information Commissioners does not suffer.

32.2. Transparency in the mode of appointments.

32.3. Terms and conditions on which these appointments are to be made should be clearly stated.

33. The learned counsel for the petitioners made it clear that the petitioners were not challenging the appointments already made. However, they want transparency and full disclosure of information depicting: (*a*) definite criteria for such appointments, and (*b*) such criteria should be made public in advance.

34. The petitioners are right in their submissions that there have been undue delays in filling up of these vacancies. We expect that the vacancies shall be filled up, in future, well in time. Certain directions in this behalf, which are necessitated, are given at the end of this judgment.

35. Insofar as transparency of procedure is concerned, from the status report it becomes clear that the procedure is now adequately transparent. The Department of Personnel and Training has put on website information in respect of names of the applicants for these posts, names of the members of Search Committee, agenda for the Search Committee, minutes of the Search Committee, etc. It would be pertinent to point out at this stage that after the Search Committee sends its recommendations the Selection Committee has to make the final selection. The composition of the Selection Committee is provided in Section 12(3) of the Act which consists of:

(*i*) The Prime Minister, who shall be the Chairperson of the Committee;

(*ii*) The Leader of Opposition in the Lok Sabha;

(*iii*) The Union Cabinet Minister to be nominated by the Prime Minister.

The Statutory Committee, thus, consists of very high-ranking persons.

36. Having regard to the aforesaid, it cannot be said that there is no transparency in the appointment process, when all essential information in respect of each candidate is made available to the public at large. Information in respect of Members of Search Committee, agenda of their meetings and even the minutes of the Search Committee have also been put on website. The appointments made, finally, are also in public domain.

37. In this manner though one cannot find fault in the process of appointment, yet there is one aspect which needs to be highlighted.

a **38.** Section 12(5) of the RTI Act lays down the eligibility conditions for the Chief Information Commissioner as well as Information Commissioners. It reads as under:

> "**12.** ***Constitution of Central Information Commission.***— * * *
>
> (5) The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance."

b

As can be seen, any person of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance is qualified to become Chief Information Commissioner or Information Commissioner. The legislature in its wisdom widened the area of consideration by not limiting it to the serving or retired government employees alone. Persons of eminence in public life are made eligible. Field of knowledge and experience is also very much broadened as it can be either in law or science and technology or social service or management or journalism or mass media or administration and governance. Parliament, thus, intended that persons of eminence in public life should be taken as Chief Information Commissioner as well as Information Commissioners. Many persons who fit in the aforesaid criteria have been applying for these posts. However, a strange phenomenon which we observe is that all those persons who have been selected belong to only one category, namely, public service i.e. they are the government employees. It is difficult to fathom that persons belonging to one category only are always be found to be more competent and more suitable than persons belonging to other categories. In fact, even the Search Committee which shortlists the persons consist of bureaucrats only. For these reasons, official bias in favour of its own class is writ large in the selection process.

c d e f

39. It is by no means suggested that the persons who have ultimately been selected are not deserving for the post of Information Commissioners. It is, however, emphasised that there can be equally suitable persons from other walks of life as well who may be the aspirants for such posts. This Court, therefore, impresses upon the Search Committee, in future, to pick up suitable candidates from other categories as well. After all, the very purpose of providing wide range of suitability was to have members in CIC by giving representation to other classes as well. This would ensure wider representative character in the composition of CIC.

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40. The learned counsel for the petitioners also made a grievance that there was no specific condition of service stipulated in the advertisement while inviting applications for the post of Information Commissioners. The learned

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Additional Solicitor General, however, submitted that insofar as salary and allowances as well as terms and conditions of appointment are concerned that is statutorily provided in sub-section (5) of Section 13. This sub-section reads as under:

> "**13.** ***Term of office and conditions of service.***— * * *
>
> (5) The salaries and allowances payable to and other terms and conditions of service of—
>
> (*a*) the Chief Information Commissioner shall be the same as that of the Chief Election Commissioner;
>
> (*b*) an Information Commissioner shall be the same as that of an Election Commissioner:
>
> Provided that if the Chief Information Commissioner or an Information Commissioner, at the time of his appointment is, in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or under the Government of a State, his salary in respect of the service as the Chief Information Commissioner or an Information Commissioner shall be reduced by the amount of that pension including any portion of pension which was commuted and pension equivalent of other forms of retirement benefits excluding pension equivalent of retirement gratuity:
>
> Provided further that if the Chief Information Commissioner or an Information Commissioner if, at the time of his appointment is, in receipt of retirement benefits in respect of any previous service rendered in a Corporation established by or under any Central Act or State Act or a government company owned or controlled by the Central Government or the State Government, his salary in respect of the service as the Chief Information Commissioner or an Information Commissioner shall be reduced by the amount of pension equivalent to the retirement benefits:
>
> Provided also that the salaries, allowances and other conditions of service of the Chief Information Commissioner and the Information Commissioners shall not be varied to their disadvantage after their appointment."

41. In view of the aforesaid provision, it is clear that any candidate who aspires to become Chief Information Commissioner knows as to what would be the salary and allowances and what would be other terms and conditions of service. At the same time, it is always advisable to make express stipulation of terms and conditions of service in the public notice/notification and also on website.

State of West Bengal

42. In respect of the WB SIC, the petitioners' grievance is that it is currently functioning with just two Information Commissioners. Since 2015, for a period of nearly twelve months i.e. from November 2015 to July 2016 and from April 2017 to July 2017, the SIC was non-functional and did not hear any appeals or complaints as there was only one Information Commissioner during this time. It is also stated that more than 8000 appeals and complaints were pending as on

31-10-2017 and it is taking an inordinately long time for appeals and complaints to be disposed of by the SIC.

a **43.** In the reply-affidavit filed on behalf of the State, it is mentioned that earlier SIC was functioning with one SCIC and one Information Commissioner. On 18-7-2018, the State Government decided to appoint another Information Commissioner. Advertisement in this behalf was published on 3-8-2018. Thereafter, on 6-8-2018 a committee was constituted for making recommendations for appointment to the post of Information Commissioner. b This Committee held this meeting on 16-11-2018 wherein all 33 applications received by the due date were considered and it was resolved to appoint one Shri Raj Kanojia, IPS (Retd.), and he has since been appointed vide Notification dated 22-11-2018. He has assumed charge on 19-12-2018.

44. Insofar as pendency of appeals and complaints is concerned, it is c mentioned that as on 1-1-2018, 8627 cases were pending before the WB SIC. Further, appeals and complaints received from January 2018 to November 2018 were 1932. Number of appeals and complaints disposed of from January to November 2018 is 2879. Thus, at the end of November 2018, the number of pending appeals and complaints has gone down to 7680.

45. The aforesaid figures given by the State may show that the pendency d is brought down. However, it is still very high and the rate of attrition is quite slow. What is more important is that many cases could be decided after a long period. In fact, the petitioners have alleged that some cases took more than 10 years before they could be heard and disposed of. Therefore, the strength of one SCIC and two Information Commissioners is quite inadequate and it has the tendering to frustrate the very purpose of seeking the information by e the applicants. It can also be legitimately inferred that when the applicants are not able to get information for a long period because of non-disposal of their appeals or complaints, they are deterred or discouraged to seek information or to pursue their RTI applications.

46. The purpose of right to information cannot be allowed to be frustrated f by having thoroughly inadequate strength of Information Commissioners in the SIC. The Act, after all, enables the Government to have SIC with one SCIC and up to 10 Information Commissioners. It, therefore, becomes the statutory and constitutional obligation of the State Government to have adequate number of Information Commissioners for quick and speedy disposal of appeals and complaints. We are, therefore, of the opinion that the State Government should g immediately consider creating more posts of Information Commissioners. We suggest that at least three more such posts should be created. Decision in this behalf shall be taken by the State Government within one month and the newly created posts shall be filled up within six months thereafter.

State of Andhra Pradesh

h **47.** In respect of the State of Andhra Pradesh, the petitioners have stated in the writ petition that after the bifurcation of the State in the year 2014

and creation of a separate State of Telengana, for several months the SIC of Andhra Pradesh continued to function as the Information Commission for both the States. However, the Commission became defunct in May 2017 after the retirement of serving Information Commissioners. In August 2017, the High Court of Judicature at Hyderabad directed that Information Commissions be set up in Telengana and Andhra Pradesh. The Andhra Pradesh Government issued an order for constituting the SIC for Andhra Pradesh in August 2017, but till date not a single Commissioner has been appointed to the Commission. The SIC of the State of Andhra Pradesh is yet to become functional. For over 10 months, people seeking information from public authorities under the jurisdiction of the AP SIC have had no recourse to the independent appellate mechanism prescribed under the RTI Act and their right to information is violated.

48. In response, affidavit of the Additional Secretary to Government GA(AR) Department, AP Secretariat, is filed wherein it is mentioned that the Selection Committee met twice i.e. on 13-12-2017 and 12-1-2018. It selected three candidates for appointment to the post of Information Commissioners and file for approval was sent to the Governor of Andhra Pradesh on 6-8-2018, return whereof is awaited. This affidavit is dated 24-8-2018. We are informed that these three Information Commissioners have since been appointed.

49. The affidavit further states that another notification was issued calling upon applications for filling up of the post of SCIC and remaining Information Commissioners. It is, however, not mentioned as to when this notification inviting applications for SCIC and Information Commissioners was issued. It is also not understood as to why steps were not taken for filling up of the post of SCIC as the Chief, who is the head of the Commission, performs crucial role insofar as functions of the SIC are concerned. As per Section 15(4) of the Act, the general superintendence, direction and management of the affairs of the SIC vest in SCIC. We, therefore, get an impression that a very lackadaisical approach is adopted in filling up of this post and the AP SIC is virtually non-functional since May 2017. May be, with three Information Commissioners who have recently been appointed, AP SIC shall get activated, but to limited extent. However, that hardly serves the purpose and does not make the SIC fully functional.

50. We, therefore, impress upon the State of Andhra Pradesh to fill up the post of SCIC and also the remaining posts of Information Commissioners at the earliest and in any case within three months from the date of this judgment.

State of Telengana

51. In the affidavit filed by the State of Telengana, it is accepted that as on 23-1-2019, 10,102 appeals and complaints were pending before the Telengana SIC. Bifurcation thereof has also been given. The affidavit also discloses that between 23-10-2017 to 23-1-2019, 64.50% of the appeals/complaints received were disposed of.

52. It is further stated that Telengana SIC was constituted on 13-9-2017. A Chief Information Commissioner and State Information Commissioner have been appointed vide GOMs No. 228 and GOMs No. 227, both dated 15-9-2017. The appointment of the Chief Information Commissioner and State Information Commissioner has been made in transparent manner by constituting a committee vide GOMs No. 219, GA (GPM&AR) Dept. dated 13-9-2017 with the Chief Minister of Telengana as Chairperson, the Leader of the Opposition and the Deputy Chief Minister as Members for appointment of the Chief Information Commissioner and State Information Commissioner in Telengana SIC.

53. We find that the composition of Telengana SIC with only SCIC and one Information Commissioner is too inadequate having regard to the pendency and also the number of cases which are filed on monthly/yearly basis. In the earlier affidavit filed by the State of Telengana on 6-9-2018, it was stated that as on 13-9-2017, when the Commission was constituted, there were a total of 6825 pending cases. This figure rose to 9341 on 30-6-2018 and as on 23-1-2019, the pendency has increased to 10,102. In such a scenario, if sufficient number of Information Commissioners are not appointed, the pendency will keep increasing and piling up. Therefore, we feel that for proper functioning of the Telengana SIC, there should be at least four more Information Commissioners appointed, for the time being. This suggestion may be considered and decision in this behalf shall be taken by the State Government within one month and the newly created posts shall be filled up within six months from the date of this judgment.

State of Maharashtra

54. As per the petitioners, the MAH SIC is functioning without a SCIC since April 2017 and one of the Information Commissioner is given additional charge as SCIC. Further, the Commission is functioning with only 7 Information Commissioners. It is also mentioned that at the end of February 2018, more than 40,000 appeals and complaints were pending before the Commission.

55. In reply, the State Government has mentioned that there are 8 sanctioned posts i.e. 1 SCIC and 7 Information Commissioners. Out of these, three are lying vacant and these fell vacant on 1-6-2018, 4-11-2018 and 10-11-2018 respectively. It is mentioned that emergence of vacancies and appointment by selection is a continuous process. The Selection Committee had held its last meeting on 30-11-2018 wherein one candidate had already been recommended for appointment.

56. Pertinently, the respondent State has not denied pendency of 40,000 appeals and complaints as on February 2018. It has also not given any figures about the disposal of cases by the SIC. Though it is mentioned that the sanctioned strength is only 8 (and not 11 as contended by the petitioners), as of today, 2 Information Commissioner posts are to be filled. No doubt, these

posts became vacant only in November 2018. We expect that steps be taken in advance so that such posts are filled up immediately after they became vacant and they do not remain unfilled for long period. In this behalf, general directions are given at the end. Further, going by the pendency, which is huge, it would be appropriate if at this juncture the SIC has a total strength of 1 SCIC and 10 Information Commissioners. This suggestion may be considered and decision in this behalf shall be taken by the State Government within one month and the newly created posts shall be filled up within six months from the date of this judgment.

State of Gujarat

57*. In respect of this State, the petition avers that SCIC retired in January 2018 and the position is currently vacant. In the reply-affidavit it is mentioned that the post of SCIC has been filled up and one Shri D.P. Thaker has been appointed. It is also mentioned that there are two more vacant posts of Information Commissioners and to fill up these two vacancies advertisement was issued on 19-5-2018 and the applications have been received. It is further stated that these posts will be filled up as early as possible. The affidavit was filed on 21-1-2019. We expect that these two posts are also filled within one month as it is mentioned that the applications received were submitted to the Selection Committee as far back as on 11-6-2018.

State of Kerala

58. In respect of Kerala SIC, the petitioners state that it is functioning with a single Commissioner i.e. CSIC. It is notwithstanding the fact that as on 21-10-2017 nearly 14,000 appeals and complaints were pending with the Commissioner.

59*. In reply-affidavit, filed on behalf of the State of Kerala, it is, however, stated that Kerala SIC consists of a CSIC and 5 Information Commissioners. However, at present, there is only one CSIC. Therefore, 5 vacancies of Information Commissioners remain unfilled. In this behalf, it is mentioned, that for filling up of these vacancies Notification dated 11-10-2017 was issued inviting applications. In response, 192 applications were received, Selection Committee considered these applications and ultimately 4 Information Commissioners were appointed to assume charge on 11-5-2018. However, in the meantime, few writ petitions came to be filed in the Kerala High Court because of which recruitment to the remaining one post of Information Commissioner has not been processed. It is, however, admitted that 10,582 appeals and 4155 complaints were pending before the Commission as on 31-7-2018. In view thereof we expect the State Government to ensure timely appointment to the Commission in future.

* **Ed.**: Paras 57 and 59 corrected vide Official Corrigendum No. F.3/Ed.B.J./25/2019 dated 3-4-2019.

State of Karnataka

60. Karnataka SIC is functioning with 5 Commissioners, namely, 1 CSIC and 4 Information Commissioners. As on 31-10-2017, 33,000 appeals and complaints were pending.

61. In the counter-affidavit, it is mentioned that Notification for filling up of the posts of CSIC and 2 Information Commissioners was issued on 7-8-2018 against which 419 applications have been received. It is further stated that the meeting of the Selection Committee constituted under Section 15 of the RTI Act is awaited. This affidavit was filed on 8-12-2018. Last date for receiving the application was 22-9-2018. It appears that after receipt of the applications, for three months nothing happened. In these circumstances, we impress upon the Selection Committee to undertake the selection process so that the posts are filled within two months from today.

62. Furthermore, having regard to the alarming pendency of the complaints and appeals before the Karnataka Information Commission, it would be appropriate to consider increasing the strength of Information Commissioner. In our view, the Commission needs to function with full strength, namely, 1 CSIC and 10 Information Commissioners and we recommend accordingly. This recommendation be considered and decision thereon be taken within one month. Thereafter, process should be initiated and completed within six months from the date of this judgment.

State of Odisha

63. The Odisha SIC had been functioning with 3 Commissioners, including the Chief as on the date of filing of the petition, whereas more than 10,000 appeals and complaints were pending as on 31-10-2017. In the counter-affidavit, it is stated that the Odisha Commission was constituted vide Notification dated 29-10-2005 with one CSIC and one Information Commissioner. Subsequently, two more posts of Information Commissioners were created on 5-4-2010 and 9-7-2012, respectively. At present, the strength of Odisha SIC is 1 CSIC and 3 Information Commissioners. One post of Information Commissioner is lying vacant since 27-5-2015. It is further stated that advertisement for filling up of these posts is issued and the last date for receipt of the application was 31-1-2019. The Selection Committee is also constituted to fill up the posts. We expect the said posts to be filled up within two months.

64*. Insofar as pendency of cases is concerned, the respondent accepted that as on the date of filing of the affidavit i.e. 18-1-2019, 1998 complaint cases and 9764 appeals were pending before the Commission. The respondents have also filed the chart containing receipt and disposal of the complaint cases as well as appeals. In the year 2018, only 522 complaints were disposed of. Likewise 2500 appeals were disposed of. It shows that there is a necessity for

* **Ed.**: Para 64 corrected vide Official Corrigendum No. F.3/Ed.B.J./25/2019 dated 3-4-2019.

more Information Commissioners and to begin with, at least, three more posts of Information Commissioners should be created. We are, therefore, of the opinion that the State Government should immediately consider creating more posts of Information Commissioners. Decision in this behalf shall be taken by the State Government within one month and the newly created posts shall be filled up within four months from the date of this judgment.

State of Nagaland

65. The petitioners have averred in the petition that Nagaland SIC has been functioning without SCIC since September 2017. No counter-affidavit is filed on behalf of the State of Nagaland. Since the grievance in the petition is only about non-appointment of CSIC, we direct the State Government to take immediate steps for filling up of the said posts, so that posts are filled up within six months from today.

66. ***General directions for CIC and SCICs***

66.1. Insofar as transparency in appointment of Information Commissioners is concerned, pursuant to the directions given by this Court, the Central Government is now placing all necessary information including issuance of the advertisement, receipt and applications, particulars of the applicants, composition of Selection Committee, etc. on the website. All States shall also follow this system.

66.2. Insofar as terms and conditions of appointment are concerned, no doubt, Section 13(5) of the RTI Act states that the CIC and Information Commissioners shall be appointed on the same terms and conditions as applicable to the Chief Election Commissioner/Election Commissioner. At the same time, it would also be appropriate if the said terms and conditions on which such appointments are to be made are specifically stipulated in the advertisement and put on website as well.

66.3. Likewise, it would also be appropriate for the Search Committee to make the criteria for shortlisting the candidates, public, so that it is ensured that shortlisting is done on the basis of objective and rational criteria.

66.4. We also expect that Information Commissioners are appointed from other streams, as mentioned in the Act and the selection is not limited only to the government employee/ex-government employee. In this behalf, the respondents shall also take into consideration and follow the below directions given by this Court in *Union of India* v. *Namit Sharma*[8]. (SCC p. 388, para 39)

> "*39. … 39.3.* We direct that only persons of eminence in public life with wide knowledge and experience in the fields mentioned in Sections 12(5) and 15(5) of the Act be considered for appointment as Information Commissioner and Chief Information Commissioner.
>
> *39.4.* We further direct that persons of eminence in public life with wide knowledge and experience in all the fields mentioned in Sections 12(5)

8 (2013) 10 SCC 359

and 15(5) of the Act, namely, law, science and technology, social service, management, journalism, mass media or administration and governance, be considered by the Committees under Sections 12(3) and 15(3) of the Act for appointment as Chief Information Commissioner or Information Commissioners.

39.5. We further direct that the Committees under Sections 12(3) and 15(3) of the Act while making recommendations to the President or to the Governor, as the case may be, for appointment of the Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to citizens as part of their right to information under the Act after the appointment is made."

66.5. We would also like to impress upon the respondents to fill up vacancies, in future, without any delay. For this purpose, it would be apposite that the process for filling up of a particular vacancy is initiated 1 to 2 months before the date on which the vacancy is likely to occur so that there is not much time-lag between the occurrence of vacancy and filling up of the said vacancy.

67. We would like to place on record that the aforesaid directions are given keeping in view the salient purpose which the RTI Act is supposed to serve. This Act is enacted not only to subserve and ensure freedom of speech. On proper implementation, it has the potential to bring about good governance which is an integral part of any vibrant democracy. Attaining good governance is also one of the visions of the Constitution. It also has vital connection with the development. All these aspects are highlighted above.

68. The writ petition stands disposed of in the aforesaid terms. However, the liberty is given to the petitioners to approach the Court again, either by way of filing interlocutory application in this petition or preferring another writ petition, if the occasion so demands.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GEORGIA ET AL. *v.* PUBLIC.RESOURCE.ORG, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18–1150. Argued December 2, 2019—Decided April 27, 2020

The Copyright Act grants monopoly protection for "original works of authorship." 17 U. S. C. §102(a). Under the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of the works they create in the course of their official duties.

The State of Georgia has one official code—the Official Code of Georgia Annotated (OCGA). That Code includes the text of every Georgia statute currently in force, as well as a set of non-binding annotations that appear beneath each statutory provision. The annotations typically include summaries of judicial opinions construing each provision, summaries of pertinent opinions of the state attorney general, and a list of related law review articles and other reference materials. The OCGA is assembled by the Code Revision Commission, a state entity composed mostly of legislators, funded through legislative branch appropriations, and staffed by the Office of Legislative Counsel.

The annotations in the current OCGA were produced by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the Commission. Under the agreement, Lexis drafts the annotations under the supervision of the Commission, which specifies what the annotations must include in exacting detail. The agreement also states that any copyright in the OCGA vests in the State of Georgia, acting through the Commission.

Respondent Public.Resource.Org (PRO), a nonprofit dedicated to facilitating public access to government records and legal materials, posted the OCGA online and distributed copies to various organizations and Georgia officials. After sending PRO several cease-and-desist letters, the Commission sued PRO for infringing its copyright in the OCGA annotations. PRO counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the

public domain. The District Court sided with the Commission, holding that the annotations were eligible for copyright protection because they had not been enacted into law. The Eleventh Circuit reversed, rejecting the Commission's copyright assertion under the government edicts doctrine.

Held: The OCGA annotations are ineligible for copyright protection. Pp. 5–18.

(a) The government edicts doctrine developed from a trio of 19th-century cases. In *Wheaton* v. *Peters*, 8 Pet. 591, the Court held that no reporter can have a copyright in the Court's opinions and that the Justices cannot confer such a right on any reporter. In *Banks* v. *Manchester,* 128 U. S. 244, the Court held that judges could not assert copyright in "whatever work they perform in their capacity as judges"—be it "the opinion or decision, the statement of the case and the syllabus or the head note." *Id.,* at 253. Finally, in *Callaghan* v. *Myers,* 128 U. S. 617, the Court reiterated that an official reporter cannot hold a copyright interest in opinions created by judges. But, confronting an issue not addressed in *Wheaton* or *Banks*, the Court upheld the reporter's copyright interest in several explanatory materials that the reporter had created himself because they came from an author who had no authority to speak with the force of law.

The animating principle behind the government edicts doctrine is that no one can own the law. The doctrine gives effect to that principle in the copyright context through construction of the statutory term "author." For purposes of the Copyright Act, judges cannot be the "author[s]" of "whatever work they perform in their capacity" as lawmakers. *Banks*, 128 U. S., at 253. Because legislators, like judges, have the authority to make law, it follows that they, too, cannot be "authors." And, as with judges, the doctrine applies to whatever work legislators perform in their capacity as legislators, including explanatory and procedural materials they create in the discharge of their legislative duties. Pp. 5–9.

(b) Applying that framework, Georgia's annotations are not copyrightable. First, the author of the annotations qualifies as a legislator. Under the Copyright Act, the sole "author" of the annotations is the Commission, 17 U. S. C. §201(b), which functions as an arm of the Georgia Legislature in producing the annotations. Second, the Commission creates the annotations in the discharge of its legislative duties. Pp. 9–11.

(c) Georgia argues that excluding the OCGA annotations from copyright protection conflicts with the text of the Copyright Act. First, it notes that §101 lists "annotations" among the kinds of works eligible for copyright protection. That provision, however, refers only to "annotations . . . which . . . represent an original work of *authorship*."

(Emphasis added.) Georgia's annotations do not fit that description because they are prepared by a legislative body that cannot be deemed the "author" of the works it creates in its official capacity. Second, Georgia draws a negative inference from the fact that the Act excludes from copyright protection works prepared by Federal Government officials, without establishing a similar rule for State officials. §§101, 105. That rule, however, applies to all federal officials, regardless of the nature and scope of their duties. It does not suggest an intent to displace the much narrower government edits doctrine with respect to the States.

Moving on from the text, Georgia invokes what it views as the official position of the Copyright Office, as reflected in the Compendium of U. S. Copyright Office Practices. The Compendium, however, is a non-binding administrative manual and is largely consistent with this Court's position. Georgia also appeals to copyright policy, but such requests should be addressed to Congress, not the courts.

Georgia attempts to frame the government edicts doctrine to focus exclusively on whether a particular work has the force of law. But that understanding cannot be squared with precedent—especially *Banks*. Moreover, Georgia's conception of the doctrine as distinguishing between different categories of content with different effects has less of a textual footing than the traditional formulation, which focuses on the identity of the author. Georgia's characterization of the OCGA annotations as non-binding and non-authoritative undersells the practical significance of the annotations to litigants and citizens. And its approach would logically permit States to hide all non-binding judicial and legislative work product—including dissents and legislative history—behind a paywall. Pp. 11–18.

906 F. 3d 1229, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which BREYER, J., joined as to all but Part II–A and footnote 6. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 18–1150

GEORGIA, ET AL., PETITIONERS *v.* PUBLIC.RESOURCE.ORG, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 27, 2020]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Copyright Act grants potent, decades-long monopoly protection for "original works of authorship." 17 U. S. C. §102(a). The question in this case is whether that protection extends to the annotations contained in Georgia's official annotated code.

We hold that it does not. Over a century ago, we recognized a limitation on copyright protection for certain government work product, rooted in the Copyright Act's "authorship" requirement. Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties.

We have previously applied that doctrine to hold that non-binding, explanatory legal materials are not copyrightable when created *by judges* who possess the authority to make and interpret the law. See *Banks* v. *Manchester*, 128 U. S. 244 (1888). We now recognize that the same logic applies to non-binding, explanatory legal materials created *by*

a legislative body vested with the authority to make law. Because Georgia's annotations are authored by an arm of the legislature in the course of its legislative duties, the government edicts doctrine puts them outside the reach of copyright protection.

I

A

The State of Georgia has one official code—the "Official Code of Georgia Annotated," or OCGA. The first page of each volume of the OCGA boasts the State's official seal and announces to readers that it is "Published Under Authority of the State."

The OCGA includes the text of every Georgia statute currently in force, as well as various non-binding supplementary materials. At issue in this case is a set of annotations that appear beneath each statutory provision. The annotations generally include summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and a list of related law review articles and similar reference materials. In addition, the annotations often include editor's notes that provide information about the origins of the statutory text, such as whether it derives from a particular judicial decision or resembles an older provision that has been construed by Georgia courts. See, *e.g.*, OCGA §§51–1–1, 53–4–2 (2019).

The OCGA is assembled by a state entity called the Code Revision Commission. In 1977, the Georgia Legislature established the Commission to recodify Georgia law for the first time in decades. The Commission was (and remains) tasked with consolidating disparate bills into a single Code for reenactment by the legislature and contracting with a third party to produce the annotations. A majority of the Commission's 15 members must be members of the Georgia

Senate or House of Representatives. The Commission receives funding through appropriations "provided for the legislative branch of state government." OCGA §28–9–2(c) (2018). And it is staffed by the Office of Legislative Counsel, which is obligated by statute to provide services "for the legislative branch of government." §§28–4–3(c)(4), 28–9–4. Under the Georgia Constitution, the Commission's role in compiling the statutory text and accompanying annotations falls "within the sphere of legislative authority." *Harrison Co.* v. *Code Revision Comm'n*, 244 Ga. 325, 330, 260 S. E. 2d 30, 34 (1979).

Each year, the Commission submits its proposed statutory text and accompanying annotations to the legislature for approval. The legislature then votes to do three things: (1) "enact[ ]" the "statutory portion of the codification of Georgia laws"; (2) "merge[ ]" the statutory portion "with [the] annotations"; and (3) "publish[ ]" the final merged product "by authority of the state" as "the 'Official Code of Georgia Annotated.'" OCGA §1–1–1 (2019); see *Code Revision Comm'n* v. *Public.Resource.Org, Inc.*, 906 F. 3d 1229, 1245, 1255 (CA11 2018); Tr. of Oral Arg. 8.

The annotations in the current OCGA were prepared in the first instance by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the Commission. The agreement between Lexis and the Commission states that any copyright in the OCGA vests exclusively in "the State of Georgia, acting through the Commission." App. 567. Lexis and its army of researchers perform the lion's share of the work in drafting the annotations, but the Commission supervises that work and specifies what the annotations must include in exacting detail. See 906 F. 3d, at 1243–1244; App. 269–278, 286–427 (Commission specifications). Under the agreement, Lexis enjoys the exclusive right to publish, distribute, and sell the OCGA. In exchange, Lexis has agreed to limit the price it may charge for the OCGA and to make an unannotated

version of the statutory text available to the public online for free. A hard copy of the complete OCGA currently retails for $412.00.

B

Public.Resource.Org (PRO) is a nonprofit organization that aims to facilitate public access to government records and legal materials. Without permission, PRO posted a digital version of the OCGA on various websites, where it could be downloaded by the public without charge. PRO also distributed copies of the OCGA to various organizations and Georgia officials.

In response, the Commission sent PRO several cease-and-desist letters asserting that PRO's actions constituted unlawful copyright infringement. When PRO refused to halt its distribution activities, the Commission sued PRO on behalf of the Georgia Legislature and the State of Georgia for copyright infringement. The Commission limited its assertion of copyright to the annotations described above; it did not claim copyright in the statutory text or numbering. PRO counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the public domain.

The District Court sided with the Commission. The Court acknowledged that the annotations in the OCGA presented "an unusual case because most official codes are not annotated and most annotated codes are not official." *Code Revision Comm'n* v. *Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1356 (ND Ga. 2017). But, ultimately, the Court concluded that the annotations were eligible for copyright protection because they were "not enacted into law" and lacked "the force of law." *Ibid.* In light of that conclusion, the Court granted partial summary judgment to the Commission and entered a permanent injunction requiring PRO to cease its distribution activities and to remove the digital copies of the OCGA from the internet.

The Eleventh Circuit reversed. 906 F. 3d 1229. The Court began by reviewing the three 19th-century cases in which we articulated the government edicts doctrine. See *Wheaton* v. *Peters*, 8 Pet. 591 (1834); *Banks* v. *Manchester*, 128 U. S. 244 (1888); *Callaghan* v. *Myers*, 128 U. S. 617 (1888). The Court understood those cases to establish a "rule" based on an interpretation of the statutory term "author" that "works created by courts in the performance of their official duties did not belong to the judges" but instead fell "in the public domain." 906 F. 3d, at 1239. In the Court's view, that rule "derive[s] from first principles about the nature of law in our democracy." *Ibid.* In a democracy, the Court reasoned, "the People" are "the constructive authors" of the law, and judges and legislators are merely "draftsmen . . . exercising delegated authority." *Ibid.* The Court therefore deemed the "ultimate inquiry" to be whether a work is "attributable to the constructive authorship of the People." *Id.*, at 1242. The Court identified three factors to guide that inquiry: "the identity of the public official who created the work; the nature of the work; and the process by which the work was produced." *Id.*, at 1254. The Court found that each of those factors cut in favor of treating the OCGA annotations as government edicts authored by the People. It therefore rejected the Commission's assertion of copyright, vacated the injunction against PRO, and directed that judgment be entered for PRO.

We granted certiorari. 588 U. S. ___ (2019).

II

We hold that the annotations in Georgia's Official Code are ineligible for copyright protection, though for reasons distinct from those relied on by the Court of Appeals. A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author. Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered

the "authors" of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.

A

We begin with precedent. The government edicts doctrine traces back to a trio of cases decided in the 19th century. In this Court's first copyright case, *Wheaton* v. *Peters*, 8 Pet. 591 (1834), the Court's third Reporter of Decisions, Wheaton, sued the fourth, Peters, unsuccessfully asserting a copyright interest in the Justices' opinions. *Id.*, at 617 (argument). In Wheaton's view, the opinions "must have belonged to some one" because "they were new, original," and much more "elaborate" than law or custom required. *Id.*, at 615. Wheaton argued that the Justices were the authors and had assigned their ownership interests to him through a tacit "gift." *Id.*, at 614. The Court unanimously rejected that argument, concluding that "no reporter has or can have any copyright in the written opinions delivered by this court" and that "the judges thereof cannot confer on any reporter any such right." *Id.*, at 668 (opinion).

That conclusion apparently seemed too obvious to adorn with further explanation, but the Court provided one a half century later in *Banks* v. *Manchester*, 128 U. S. 244 (1888). That case concerned whether Wheaton's state-court counterpart, the official reporter of the Ohio Supreme Court, held a copyright in the judges' opinions and several nonbinding explanatory materials prepared by the judges. *Id.*, at 249–251. The Court concluded that he did not, explaining that "the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note" cannot "be regarded as their author or their proprietor, in the sense of [the Copyright Act]." *Id.*,

at 253. Pursuant to "a judicial *consensus*" dating back to *Wheaton*, judges could not assert copyright in "whatever work they perform in their capacity as judges." *Banks*, 128 U. S, at 253 (emphasis in original). Rather, "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all." *Ibid.* (citing *Nash* v. *Lathrop*, 142 Mass. 29, 6 N. E. 559 (1886)).

In a companion case decided later that Term, *Callaghan* v. *Myers*, 128 U. S. 617 (1888), the Court identified an important limiting principle. As in *Wheaton* and *Banks*, the Court rejected the claim that an official reporter held a copyright interest in the judges' opinions. But, resolving an issue not addressed in *Wheaton* and *Banks*, the Court upheld the reporter's copyright interest in several explanatory materials that the reporter had created himself: headnotes, syllabi, tables of contents, and the like. *Callaghan*, 128 U. S., at 645, 647. Although these works mirrored the judge-made materials rejected in *Banks*, they came from an author who had no authority to speak with the force of law. Because the reporter was not a judge, he was free to "obtain[ ] a copyright" for the materials that were "the result of his [own] intellectual labor." 128 U. S., at 647.

These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the "author" of the works they prepare "in the discharge of their judicial duties." *Banks*, 128 U. S., at 253. This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi). *Ibid.* It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters. Compare *ibid.* with *Callaghan*, 128 U. S., at 647.

The animating principle behind this rule is that no one can own the law. "Every citizen is presumed to know the law," and "it needs no argument to show . . . that all should

have free access" to its contents. *Nash*, 142 Mass., at 35, 6 N. E., at 560 (cited by *Banks*, 128 U. S., at 253–254). Our cases give effect to that principle in the copyright context through construction of the statutory term "author." *Id.*, at 253.[1] Rather than attempting to catalog the materials that constitute "the law," the doctrine bars the officials responsible for creating the law from being considered the "author[s]" of "*whatever work* they perform in their capacity" as lawmakers. *Ibid.* (emphasis added). Because these officials are generally empowered to make and interpret law, their "whole work" is deemed part of the "authentic exposition and interpretation of the law" and must be "free for publication to all." *Ibid.*

If judges, acting as judges, cannot be "authors" because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either. Courts have thus long understood the government edicts doctrine to apply to legislative materials. See, *e.g.*, *Nash*, 142 Mass., at 35, 6 N. E., at 560 (judicial opinions and statutes stand "on substantially the same footing" for purposes of the government edicts doctrine); *Howell* v. *Miller*, 91 F. 129, 130–131, 137–138 (CA6 1898) (Harlan, J., Circuit Justice, joined by then-Circuit Judge Taft) (analyzing statutes and supplementary materials under *Banks* and *Callaghan* and concluding that the materials were copyrightable because they were prepared by a private compiler).

Moreover, just as the doctrine applies to "whatever work [judges] perform in their capacity as judges," *Banks*, 128

[1] The Copyright Act of 1790 granted copyright protection to "the author and authors" of qualifying works. Act of May 31, 1790, §1, 1 Stat. 124. This author requirement appears in the current Copyright Act at §102(a), which limits protection to "original works of *authorship*." 17 U. S. C. §102(a) (emphasis added); see also §201(a) (copyright "vests initially in the author or authors of the work").

U. S., at 253, it applies to whatever work legislators perform in their capacity as legislators. That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills. These materials are part of the "whole work done by [legislators]," so they must be "free for publication to all." *Ibid.*

Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.

B

1

Applying that framework, Georgia's annotations are not copyrightable. The first step is to examine whether their purported author qualifies as a legislator.

As we have explained, the annotations were prepared in the first instance by a private company (Lexis) pursuant to a work-for-hire agreement with Georgia's Code Revision Commission. The Copyright Act therefore deems the Commission the sole "author" of the work. 17 U. S. C. §201(b). Although Lexis expends considerable effort preparing the annotations, for purposes of copyright that labor redounds to the Commission as the statutory author. Georgia agrees that the author is the Commission. Brief for Petitioners 25.

The Commission is not identical to the Georgia Legislature, but functions as an arm of it for the purpose of producing the annotations. The Commission is created by the legislature, for the legislature, and consists largely of legislators. The Commission receives funding and staff designated by law for the legislative branch. Significantly, the annotations the Commission creates are approved by the legislature before being "merged" with the statutory text

and published in the official code alongside that text at the legislature's direction. OCGA §1–1–1; see 906 F. 3d, at 1245, 1255; Tr. of Oral Arg. 8.

If there were any doubt about the link between the Commission and the legislature, the Georgia Supreme Court has dispelled it by holding that, under the Georgia Constitution, "the work of the Commission; *i.e.*, selecting a publisher and contracting for and supervising the codification of the laws enacted by the General Assembly, including court interpretations thereof, *is within the sphere of legislative authority*." *Harrison Co.*, 244 Ga., at 330, 260 S. E. 2d, at 34 (emphasis added). That holding is not limited to the Commission's role in codifying the statutory text. The Commission's "legislative authority" specifically includes its "codification of . . . court interpretations" of the State's laws. *Ibid.* Thus, as a matter of state law, the Commission wields the legislature's authority when it works with Lexis to produce the annotations. All of this shows that the Commission serves as an extension of the Georgia Legislature in preparing and publishing the annotations. And it helps explain why the Commission brought this suit asserting copyright in the annotations "on behalf of and for the benefit of" the Georgia Legislature and the State of Georgia. App. 20.[2]

2

The second step is to determine whether the Commission creates the annotations in the "discharge" of its legislative "duties." *Banks*, 128 U. S., at 253. It does. Although the annotations are not enacted into law through bicameralism and presentment, the Commission's preparation of the an-

[2] JUSTICE THOMAS does not dispute that the Commission is an extension of the legislature; he instead faults us for highlighting the multiple features of the Commission that make clear that this is so. See *post*, at 16 (dissenting opinion).

notations is under Georgia law an act of "legislative authority," *Harrison Co.*, 244 Ga., at 330, 260 S. E. 2d, at 34, and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws. Georgia and JUSTICE GINSBURG emphasize that the annotations do not purport to provide authoritative explanations of the law and largely summarize other materials, such as judicial decisions and law review articles. See *post*, at 3–4 (dissenting opinion). But that does not take them outside the exercise of legislative duty by the Commission and legislature. Just as we have held that the "statement of the case and the syllabus or head note" prepared by judges fall within the "work they perform in their capacity as judges," *Banks*, 128 U. S., at 253, so too annotations published by legislators alongside the statutory text fall within the work legislators perform in their capacity as legislators.

In light of the Commission's role as an adjunct to the legislature and the fact that the Commission authors the annotations in the course of its legislative responsibilities, the annotations in Georgia's Official Code fall within the government edicts doctrine and are not copyrightable.

III

Georgia resists this conclusion on several grounds. At the outset, Georgia advances two arguments for why, in its view, excluding the OCGA annotations from copyright protection conflicts with the text of the Copyright Act. Both are unavailing.

First, Georgia notes that §101 of the Act specifically lists "annotations" among the kinds of works eligible for copyright protection. But that provision refers only to "annotations . . . which . . . represent an original work of *authorship*." 17 U. S. C. §101 (emphasis added). The whole point of the government edicts doctrine is that judges and legislators cannot serve as authors when they produce works in their official capacity. While the reference to "annotations"

in §101 may help explain why supplemental, explanatory materials are copyrightable when prepared by a private party, or a non-lawmaking official like the reporter in *Callaghan*, it does not speak to whether those same materials are copyrightable when prepared by a judge or a legislator. In the same way that judicial materials are ineligible for protection even though they plainly qualify as "[l]iterary works . . . expressed in words," *ibid.*, legislative materials are ineligible for protection even if they happen to fit the description of otherwise copyrightable "annotations."

Second, Georgia draws a negative inference from the fact that the Act excludes from copyright protection "work[s] prepared by an officer or employee of the United States Government as part of that person's official duties" and does not establish a similar rule for the States. §101; see also §105. But the bar on copyright protection for federal works sweeps much more broadly than the government edicts doctrine does. That bar applies to works created by all federal "officer[s] or employee[s]," without regard for the nature of their position or scope of their authority. Whatever policy reasons might justify the Federal Government's decision to forfeit copyright protection for its own proprietary works, that federal rule does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States. That doctrine does not apply to non-lawmaking officials, leaving States free to assert copyright in the vast majority of expressive works they produce, such as those created by their universities, libraries, tourism offices, and so on.

More generally, Georgia suggests that we should resist applying our government edicts precedents to the OCGA annotations because our 19th-century forebears interpreted the statutory term author by reference to "public policy"—an approach that Georgia believes is incongruous with the "modern era" of statutory interpretation. Brief for Petitioners 21 (internal quotation marks omitted). But we

are particularly reluctant to disrupt precedents interpreting language that Congress has since reenacted. As we explained last Term in *Helsinn Healthcare S. A.* v. *Teva Pharmaceuticals USA, Inc.*, 586 U. S. ___ (2019), when Congress "adopt[s] the language used in [an] earlier act," we presume that Congress "adopted also the construction given by this Court to such language, and made it a part of the enactment." *Id.,* at ___ (slip op., at 7) (quoting *Shapiro* v. *United States*, 335 U. S. 1, 16 (1948)). A century of cases have rooted the government edicts doctrine in the word "author," and Congress has repeatedly reused that term without abrogating the doctrine. The term now carries this settled meaning, and "critics of our ruling can take their objections across the street, [where] Congress can correct any mistake it sees." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015).[3]

Moving on from the text, Georgia invokes what it views as the official position of the Copyright Office, as reflected in the Compendium of U. S. Copyright Office Practices (Compendium). But, as Georgia concedes, the Compendium is a non-binding administrative manual that at most

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[3] JUSTICE THOMAS disputes the applicability of the *Helsinn Healthcare* presumption because States have asserted copyright in statutory annotations over the years notwithstanding our government edicts precedents. *Post*, at 11–12. In JUSTICE THOMAS's view, those assertions prove that our precedents could not have provided clear enough guidance for Congress to incorporate. But that inference from state behavior proves too much. The same study cited by JUSTICE THOMAS to support a practice of claiming copyright in non-binding *annotations* also reports that "many states claim copyright interest in their *primary* law materials," including statutes and regulations. Dmitrieva, State Ownership of Copyrights in Primary Law Materials, 23 Hastings Com. & Entertainment L. J. 81, 109 (2000) (emphasis added). JUSTICE THOMAS concedes that such assertions are plainly foreclosed by our government edicts precedents. *Post*, at 4. That interested parties have pursued ambitious readings of our precedents does not mean those precedents are incapable of providing meaningful guidance to us or to Congress.

merits deference under *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). That means we must follow it only to the extent it has the "power to persuade." *Id.,* at 140. Because our precedents answer the question before us, we find any competing guidance in the Compendium unpersuasive.

In any event, the Compendium is largely consistent with our decision. Drawing on *Banks*, it states that, "[a]s a matter of longstanding public policy, the U. S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, *or similar types of official legal materials*." Compendium §313.6(C)(2) (rev. 3d ed. 2017) (emphasis added). And, under *Banks*, what counts as a "similar" material depends on what kind of officer created the material (*i.e.*, a judge) and whether the officer created it in the course of official (*i.e.*, judicial) duties. See Compendium §313.6(C)(2) (quoting *Banks*, 128 U. S., at 253, for the proposition that copyright cannot vest "in the products of the labor done by judicial officers in the discharge of their judicial duties").

The Compendium goes on to observe that "the Office may register annotations that summarize or comment upon legal materials . . . unless the annotations themselves have the force of law." Compendium §313.6(C)(2). But that broad statement—true of annotations created by officials such as court reporters that lack the authority to make or interpret the law—does not engage with the critical issue of annotations created *by judges or legislators* in their official capacities. Because the Compendium does not address that question and otherwise echoes our government edicts precedents, it is of little relevance here.

Georgia also appeals to the overall purpose of the Copyright Act to promote the creation and dissemination of creative works. Georgia submits that, without copyright protection, Georgia and many other States will be unable to

induce private parties like Lexis to assist in preparing affordable annotated codes for widespread distribution. That appeal to copyright policy, however, is addressed to the wrong forum. As Georgia acknowledges, "[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred* v. *Ashcroft*, 537 U. S. 186, 212 (2003). And that principle requires adherence to precedent when, as here, we have construed the statutory text and "tossed [the ball] into Congress's court, for acceptance or not as that branch elects." *Kimble*, 576 U. S., at 456.

Turning to our government edicts precedents, Georgia insists that they can and should be read to focus exclusively on whether a particular work has "the force of law." Brief for Petitioners 32 (capitalization deleted). JUSTICE THOMAS appears to endorse the same view. See *post*, at 4. But that framing has multiple flaws.

Most obviously, it cannot be squared with the reasoning or results of our cases—especially *Banks*. *Banks*, following *Wheaton* and the "judicial consensus" it inspired, denied copyright protection to judicial opinions without excepting concurrences and dissents that carry no legal force. 128 U. S., at 253 (emphasis deleted). As every judge learns the hard way, "comments in [a] dissenting opinion" about legal principles and precedents "are just that: comments in a dissenting opinion." *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 177, n. 10 (1980). Yet such comments are covered by the government edicts doctrine because they come from an official with authority to make and interpret the law.

Indeed, *Banks* went even further and withheld copyright protection from headnotes and syllabi produced by judges. 128 U. S., at 253. Surely these supplementary materials do not have the force of law, yet they are covered by the doctrine. The simplest explanation is the one *Banks* provided: These non-binding works are not copyrightable because of who creates them—judges acting in their judicial capacity.

See *ibid.*

The same goes for non-binding legislative materials produced by legislative bodies acting in a legislative capacity. There is a broad array of such works ranging from floor statements to proposed bills to committee reports. Under the logic of Georgia's "force of law" test, States would own such materials and could charge the public for access to them.

Furthermore, despite Georgia's and JUSTICE THOMAS's purported concern for the text of the Copyright Act, their conception of the government edicts doctrine has *less* of a textual footing than the traditional formulation. The textual basis for the doctrine is the Act's "authorship" requirement, which unsurprisingly focuses on—the author. JUSTICE THOMAS urges us to dig deeper to "the root" of our government edicts precedents. *Post*, at 5. But, in our view, the text *is* the root. The Court long ago interpreted the word "author" to exclude officials empowered to speak with the force of law, and Congress has carried that meaning forward in multiple iterations of the Copyright Act. This textual foundation explains why the doctrine distinguishes between some authors (who are empowered to speak with the force of law) and others (who are not). Compare *Callaghan*, 128 U. S., at 647, with *Banks*, 128 U. S., at 253. But the Act's reference to "authorship" provides no basis for Georgia's rule distinguishing between different categories of content with different effects.[4]

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[4] Instead of accepting our predecessors' textual reasoning at face value, JUSTICE THOMAS conjures a trinity of alternative "origin[s] and justification[s]" for the government edicts doctrine that the Court *might* have had in mind. See *post*, at 5–7. Without committing to one or all of these possibilities, JUSTICE THOMAS suggests that each would yield a rule that requires federal courts to pick out the subset of judicial and legislative materials that independently carry the force of law. But a Court motivated by JUSTICE THOMAS's three-fold concerns might just as easily have read them as supporting a rule that prevents the officials responsible for

Georgia minimizes the OCGA annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. See OCGA §§21–2–131, 16–6–2, 16–6–18, 16–15–9 (available at www.legis.ga.gov). Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal. See §§21–2–131, 16–6–2, 16–6–18, 16–15–9 (available at https://store.lexisnexis.com/products/official-code-of-georgia-annotated-skuSKU6647 for $412.00).

If everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A State could monetize its entire suite of legislative history. With today's digital tools, States might even launch a subscription or pay-per-law service.

There is no need to assume inventive or nefarious behavior for these concerns to become a reality. Unlike other forms of intellectual property, copyright protection is both instant and automatic. It vests as soon as a work is captured in a tangible form, triggering a panoply of exclusive

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creating binding materials from qualifying as an "author." Regardless, it is more "[]consistent with the judicial role" to apply the reasoning and results the Court voted on and committed to writing than to speculate about what practical considerations our predecessors "may have had . . . in mind," what history "may [have] suggest[ed]," or what constitutional concerns "may have animated" our government edicts precedents. *Ibid.*

rights that can last over a century. 17 U. S. C. §§102, 106, 302. If Georgia were correct, then unless a State took the affirmative step of transferring its copyrights to the public domain, all of its judges' and legislators' non-binding legal works would be copyrighted. And citizens, attorneys, non-profits, and private research companies would have to cease all copying, distribution, and display of those works or risk severe and potentially criminal penalties. §§501–506. Some affected parties might be willing to roll the dice with a potential fair use defense. But that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial. Cf. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 552, 560–561 (1985). The less bold among us would have to think twice before using official legal works that illuminate the law we are all presumed to know and understand.

Thankfully, there is a clear path forward that avoids these concerns—the one we are already on. Instead of examining whether given material carries "the force of law," we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.

* * *

For the foregoing reasons, we affirm the judgment of the Eleventh Circuit.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 18–1150

GEORGIA, ET AL., PETITIONERS *v.* PUBLIC.RESOURCE.ORG, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 27, 2020]

JUSTICE THOMAS, with whom JUSTICE ALITO joins, and with whom JUSTICE BREYER joins as to all but Part II–A and footnote 6, dissenting.

According to the majority, this Court's 19th-century "government edicts" precedents clearly stand for the proposition that "judges and legislators cannot serve as authors [for copyright purposes] when they produce works in their official capacity." *Ante*, at 11. And, after straining to conclude that the Georgia Code Revision Commission (Commission) is an arm of the Georgia Legislature, *ante*, at 9–10, the majority concludes that Georgia cannot hold a copyright in the annotations that are included as part of the Official Code of Georgia Annotated (OCGA). This ruling will likely come as a shock to the 25 other jurisdictions—22 States, 2 Territories, and the District of Columbia—that rely on arrangements similar to Georgia's to produce annotated codes. See Brief for State of Arkansas et al. as *Amici Curiae* 15, and App. to *id.*, at 1. Perhaps these jurisdictions all overlooked this Court's purportedly clear guidance. Or perhaps the widespread use of these arrangements indicates that today's decision extends the government edicts doctrine to a new context, rather than simply "confirm[ing]" what the precedents have always held. See *ante*, at 5. Because I believe we should "leave to Congress the task of deciding whether the Copyright Act needs an upgrade," *American*

Broadcasting Cos. v. *Aereo, Inc.*, 573 U. S. 431, 463 (2014) (Scalia, J., dissenting), I respectfully dissent.

I

Like the majority, I begin with the three 19th-century precedents that the parties agree provide the foundation for the government edicts doctrine.

In *Wheaton* v. *Peters*, 8 Pet. 591 (1834), the Court first regarded it as self-evident that judicial opinions cannot be copyrighted either by the judges who signed them or by a reporter under whose auspices they are published. Congress provided that, in return for a salary of $1,000, the Reporter of Decisions for this Court would prepare reports consisting of judicial opinions and additional materials summarizing the cases. *Id.*, at 614, 617 (argument). Wheaton, one of this Court's earliest Reporters, argued that he owned a copyright for the entirety of his reports. He contended that he had "acquired the right to the opinions by judges' gift" once they became a part of his volume. *Id.*, at 614 (same). The Court ultimately remanded on the question whether Wheaton had complied with the Copyright Act's procedural requirements. *Id.*, at 667–668. In doing so, it observed in dicta that "the court [was] unanimously of [the] opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." *Id.*, at 668.

Fifty-four years later, the Court returned to the same subject, suggesting a doctrinal basis for the rule that judicial opinions and certain closely related materials cannot be copyrighted. In *Banks* v. *Manchester*, 128 U. S. 244 (1888), the state-authorized publisher of the Ohio Supreme Court's decisions, Banks & Brothers, sued a competing publisher for copyright infringement. The competing publisher reproduced portions from Banks' reports, including Ohio Supreme Court decisions, statements of the cases, and syllabi,

all of which were originally prepared by the opinion's authoring judge. This Court held that these materials were not the proper subject of copyright. In reaching that conclusion, the Court grounded its analysis in its interpretation of the word "author" in the Copyright Act. It anchored this interpretation in the "public policy" that "the judge who, in his judicial capacity, prepares the opinion or decision [and other materials]" is not "regarded as their author or their proprietor, in the sense of [the Copyright Act], so as to be able to confer any title by assignment." *Banks*, 128 U. S., at 253. The Court supported this conclusion by stating that "there has always been a judicial consensus . . . that no copyright could[,] under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties." *Ibid.* (emphasis deleted). And the Court observed that this rule reflected the view that the "authentic exposition and interpretation of the law . . . is free for publication to all," which in turn prevents a judge from qualifying as an author. *Ibid.*

Importantly, the Court also briefly discussed whether the State of Ohio could directly hold the copyright. In answering this question, the Court did not suggest that States were categorically prohibited from holding copyrights as authors or assignees. Instead, the Court simply noted that the State fell outside the scope of the Act because it was not a "resident" or "citizen of the United States," as then required by statute, and because it did not meet other statutory criteria. *Ibid.* The Court felt it necessary to observe, however, that "[w]hether the State could take out a copyright for itself, or could enjoy the benefit of one taken out by an individual for it, as the assignee of a citizen of the United States or a resident therein, who should be the author of a book, is a question not involved in the present case, and we refrain from considering it." *Ibid.*

Finally, in *Callaghan* v. *Myers*, 128 U. S. 617 (1888), the

Court addressed the limits of the government edicts doctrine. In that case, the Court settled another dispute between a publisher of court decisions and an alleged infringer. The plaintiff purchased the proprietary rights to the reports prepared by the Illinois Supreme Court's reporter of decisions, Freeman, including the copyright to the reports. Unlike in *Banks*, these reports also contained material authored by Freeman. *Callaghan*, 128 U. S., at 645. The alleged infringers copied the judicial decisions and Freeman's materials. In finding for the plaintiff, this Court reiterated that "there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges." *Id.*, at 647 (citing *Banks*, 128 U. S. 244). But the Court concluded that "no [similar] ground of public policy" justified denying a state official a copyright "cover[ing] the matter which is the result of his intellectual labor." *Callaghan*, 128 U. S., at 647.

II

These precedents establish that judicial opinions cannot be copyrighted. But they do not exclude from copyright protection notes that are prepared by an official court reporter and published together with the reported opinions. There is no apparent reason why the same logic would not apply to statutes and regulations. Thus, it must follow from our precedents that statutes and regulations cannot be copyrighted, but accompanying notes lacking legal force can be. See *Howell* v. *Miller*, 91 F. 129 (CA6 1898) (Harlan, J.) (explaining that, under *Banks* and *Callaghan*, annotations to Michigan statutes could be copyrighted).

A

It is fair to say that the Court's 19th-century decisions do not provide any extended explanation of the basis for the government edicts doctrine. The majority is nonetheless

content to accept these precedents reflexively, without examining the origin or validity of the rule they announced. For the majority, it is enough that the precedents established a rule that "seemed too obvious to adorn with further explanation." *Ante*, at 6. But the contours of the rule were far from clear, and to understand the scope of the doctrine, we must explore its underlying rationale.

In my view, the majority's uncritical extrapolation of precedent is inconsistent with the judicial role. An unwillingness to examine the root of a precedent has led to the sprouting of many noxious weeds that distort the meaning of the Constitution and statutes alike. Although we have not been asked to revisit these precedents, it behooves us to explore the origin of and justification for them, especially when we are asked to apply their rule for the first time in over 130 years.

The Court's precedents suggest three possible grounds supporting their conclusion. In *Banks*, the Court referred to the meaning of the term "author" in copyright law. While the Court did not develop this argument, it is conceivable that the contemporaneous public meaning of the term "author" was narrower in the copyright context than in ordinary speech. At the time this Court decided *Banks*, the Copyright Act provided protection for books, maps, prints, engravings, musical and dramatic compositions, photographs, and works of art.[1] Judicial opinions differ markedly from these works. Books, for instance, express the thoughts of their authors. They typically have no power beyond the ability of their words to influence readers, and they usually are published at private expense. Judicial opinions, on the other hand, do not simply express the thoughts of the judges who write or endorse them. Instead, they elaborate

[1] See 1 Stat. 124; 2 Stat. 171; ch. 16, 4 Stat. 436; 11 Stat. 138–139; 13 Stat. 540; 16 Stat. 212.

and apply rules of law that, in turn, represent the implementation of the will of the people. Unlike other copyrightable works of authorship, judicial opinions have binding legal effect, and they are produced and issued at public expense. Moreover, copyright law understands an author to be one whose work will be encouraged by the grant of an exclusive right. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 579 U. S. ___, ___ (2016) (slip op., at 6). But judges, when acting in an official capacity, do not fit that description. The Court in *Banks* may have had these differences in mind when it concluded that a judge fell outside the scope of the term "author." 128 U. S., at 253.

History may also suggest a narrower meaning of "author" in the copyright context. In England, at least as far back as 1666, courts and commentators agreed "that the property of all law books is in the king, because he pays the judges who pronounce the law." G. Curtis, Law of Copyright 130 (1847); see also *Banks & Bros.* v. *West Publishing Co.*, 27 F. 50, 57 (CC Minn. 1886) (citing English cases and treatises and concluding that "English courts generally sustain the crown's proprietary rights in judicial opinions"). Blackstone described this as a "prerogative copyrigh[t]," explaining that "[t]he king, as the executive magistrate, has the right of promulging to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council." 2 W. Blackstone, Commentaries on the Laws of England 410 (1766) (emphasis deleted); see also *Wheaton*, 8 Pet., at 659–660. This history helps to explain the dearth of cases permitting individuals to obtain copyrights in judicial opinions. But under the Constitution, sovereignty lies with the people, not a king. See The Federalist No. 22, p. 152 (C. Rossiter ed. 1961); *id.*, No. 39, at 241. The English historical practice, when superimposed on the Constitution's recognition that sovereignty resides in the people, helps to explain the

Court's conclusion that the "authentic exposition and interpretation of the law . . . is free for publication to all." *Banks*, 128 U. S., at 253.

Finally, concerns of fair notice, often recognized by this Court's precedents as an important component of due process, also may have animated the reasoning of these 19th-century cases. As one court put it, "[t]he decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. . . . Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions." *Nash* v. *Lathrop*, 142 Mass. 29, 35, 6 N. E. 559, 560 (1886) (cited in *Banks*, 128 U. S., at 253–254); see also *American Soc. for Testing and Materials* v. *Public.Resource.Org*, *Inc.*, 896 F. 3d 437, 458–459 (CADC 2018) (Katsas, J., concurring).

B

Allowing annotations to be copyrighted does not run afoul of any of these possible justifications for the government edicts doctrine. First, unlike judicial opinions and statutes, these annotations do not even purport to embody the will of the people because they are not law. The General Assembly of Georgia has made abundantly clear through a variety of provisions that the annotations do not create any binding obligations. OCGA §1–1–7 states that "[a]ll historical citations, title and chapter analyses, and notes set out in this Code are given for the purpose of convenient reference and do not constitute part of the law." Section 1–1–1 further provides that "[t]he statutory portion of the codification of Georgia laws . . . is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion of such codification shall be merged with annotations . . . and other materials . . . and shall be published by authority of the state." Thus, although the materials

"merge" prior to publication in the "official" code, the very provision calling for that merger makes clear that the annotations serve as commentary, not law.

As additional evidence that the annotations do not represent the will of the people, the General Assembly does not enact statutory annotations under its legislative power. See Ga. Const., Art. III, §1, ¶1 (vesting the legislative power in the General Assembly). To enact state law, Georgia employs a process of bicameralism and presentment similar to that embodied in the United States Constitution. See Ga. Const., Art. III, §5; Art. V, §2, ¶4. The annotations do not go through this process, a fact that even the majority must acknowledge. *Ante*, at 10; Ga. S. 52, Reg. Sess., §54(b) (2019–2020) ("Annotations . . . except as otherwise provided in the Code . . . are not enacted as statutes by the provisions of this Act").

Second, unlike judges and legislators, the creators of annotations are incentivized by the copyright laws to produce a desirable product that will eventually earn them a profit. And though the Commission may require Lexis to follow strict guidelines, the independent synthesis, analysis, and creative drafting behind the annotations makes them analogous to other copyrightable materials. See Brief for Matthew Bender & Co., Inc., as *Amicus Curiae* 4–7.

Lastly, the annotations do not impede fair notice of the laws. As just stated, the annotations do not carry the binding force of law. They simply summarize independent sources of legal information and consolidate them in one place. Thus, OCGA annotations serve a similar function to other copyrighted research tools provided by private parties such as the American Law Reports and Westlaw, which also contain information of great "practical significance." *Ante*, at 17. Compare, *e.g.*, OCGA §34–9–260 (annotation for *Cho Carwash Property*, *L. L. C.* v. *Everett*, 326 Ga. App. 6, 755 S. E. 2d 823 (2014)) with Ga. Code Ann. §34–9–260 (Westlaw's annotation for the same).

The majority resists this conclusion, suggesting that without access to the annotations, readers of Georgia law will be unable to fully understand the true meaning of Georgia's statutory provisions, such as provisions that have been undermined or nullified by court decisions. *Ante*, at 17. That is simply incorrect. As the majority tacitly concedes, a person seeking information about changes in Georgia statutory law can find that information by consulting the original source for the change in the law's status—the court decisions themselves. See *ante*, at 17. The inability to access the OCGA merely deprives a researcher of one specific tool, not to the underlying factual or legal information summarized in that tool. See also *post*, at 4 (GINSBURG, J., dissenting).[2]

C

The text of the Copyright Act supports my reading of the

[2]The majority contends that, rather than seeking to understand the origins of our precedents, we should simply accept the text of the opinions that the Justices "voted on and committed to writing." *Ante*, at 16–17, n. 4. But that begs the question: What does the text of the relevant opinions tell us? The answer is not much. It is precisely this lack of explication that makes it necessary to explore the "judicial *consensus*" and public policy referred to in *Banks* v. *Manchester*, 128 U. S. 244, 253 (1888). Instead, the majority attempts to dissect the language of our prior opinions in the same way it would interpret a statute, an approach we have repeatedly cautioned against. See *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 515 (1993); *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979). The proper approach is to "read general language in judicial opinions . . . as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 540 U. S. 419, 424 (2004); see also *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821) (Marshall, C. J., for the Court) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").

precedents.[3] Specifically, there are four indications in the text of the Copyright Act that the OCGA annotations are copyrightable. As an initial matter, the Act does not define the word "author," 17 U. S. C. §101, or make any reference to the government edicts doctrine. Accordingly, the term "author" itself does not shed any light on whether the doctrine covers statutory annotations. Second, while the Act excludes from copyright protection "work[s] prepared by an officer or employee of the United States Government as part of that person's official duties," §101; see also §105, the Act contains no similar prohibition against works of state governments or works prepared at their behest. "Congress' use of explicit language in one provision cautions against inferring the same limitation" elsewhere in the statute. *State Farm Fire & Casualty Co.* v. *United States ex rel. Rigsby*, 580 U. S. ___, ___ (2016) (slip op., at 7) (internal quotation marks omitted); *Pacific Operators Offshore, LLP* v. *Valladolid*, 565 U. S. 207, 216 (2012). Third, the Act specifically notes that annotations are copyrightable derivative works. §101. Here, again, the Act does not expressly exclude from copyright protection annotations created either by the State or at the State's request. Fourth, the Act provides that an author may hold a copyright in "material contributed" in a derivative work, "as distinguished from the preexisting material employed in the work." §103(b); see also *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U. S. 340, 359 (1991). These aspects of the statutory text, taken together, further support the conclusion that the OCGA annotations are copyrightable.

For all these reasons, I would conclude that, as with the

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[3] As the majority explains, *ante*, at 9, the annotations were created as part of a work-for-hire agreement between the Commission and Lexis. See 17 U. S. C. §201(b). Because no party disputes the validity of the contract, I express no opinion regarding whether the contract established an employer/employee relationship or whether the Commission may be considered a "person" under §201(b).

privately created annotations in *Callaghan*, Georgia's statutory annotations at issue in this case are copyrightable.

III

The majority reads this Court's precedents differently. In its view, the Court in *Banks* held that judges are not "authors" within the scope of the Copyright Act for "whatever work they perform in their capacity as judges," 128 U. S., at 253, so the same must be true for legislators, see *ante*, at 8–9. Accordingly, works created by legislators in their legislative capacity are not "original works of authorship," §102, and therefore cannot be copyrighted. This argument is flawed in multiple respects.

A

Most notably, the majority's textual analysis hinges on accepting that its construction of "authorship," *i.e.*, all works produced in a judge's or legislator's official capacity, was so well established by our 19th-century precedents that Congress incorporated it into the multiple revisions of the Copyright Act. See *ante*, at 12–13. Such confidence is questionable, to say the least.

The majority's understanding of the government edicts doctrine seems to have been lost on dozens of States and Territories, as well as the lower courts in this case. As already stated, the 25 jurisdictions with official annotated codes apparently did not view this Court's precedents as establishing the "official duties" definition of authorship. See Brief for State of Arkansas et al. as *Amici Curiae*.[4] And if

[4] According to one study published in 2000, approximately half of States owned copyright in official state statutory compilations, court reports, or administrative regulations. Dmitrieva, State Ownership of Copyrights in Primary Law Materials, 23 Hastings Com. & Entertainment L. J. 81, 83, 97–105 (2000). The majority attempts to undermine this study by emphasizing that some of these States owned copyright in primary law materials. *Ante*, at 13, n. 3. This misunderstands the point.

"our precedents answer the question" so clearly, *ante*, at 14, one wonders why the Eleventh Circuit reached its conclusion in such a roundabout fashion. Rather than following the majority's "straightforward" path, *ante*, at 5, the Eleventh Circuit looked to the "zone of indeterminacy at the frontier between edicts that carry the force of law and those that do not" to determine whether the annotations were "sufficiently law-like" to be "constructively authored by the People." *Code Revision Comm'n* v. *Public.Resource.Org*, *Inc.*, 906 F. 3d 1229, 1233, 1242, 1243 (2018). The District Court likewise does not appear to have viewed the question as well settled. In a cursory analysis, it determined that the annotations were copyrightable based on *Callaghan*. *Code Revision Comm'n* v. *Public.Resource.Org*, *Inc.*, 244 F. Supp. 3d 1350, 1356 (ND Ga. 2017). It is risible to presume that Congress had knowledge of and incorporated a "settled" meaning that eluded a multitude of States and Territories, as well as at least four Article III judges. *Ante*, at 13. Cf. *Rimini Street*, *Inc.* v. *Oracle USA*, *Inc.*, 586 U. S. ___, ___–___ (2019) (slip op., at 9–10).

This presumption of congressional knowledge also provides the basis for the majority's conclusion that the annotations are not "original works of authorship." See *ante*, at 11–12 (discussing §101). Stripped of the fiction that this Court's 19th-century precedents clearly demonstrated that "authorship" encompassed all works performed as part of a legislator's duties, the majority's textual argument fails.

I do not claim that this evidence demonstrates that the States necessarily interpreted the government edicts doctrine correctly. I merely point out that these divergent practices seriously undercut the majority's claim that its interpretation of "authorship" was well settled and universally understood. On this score, the majority has no answer but to insinuate that the lawmakers of over half the Nation's jurisdictions disregarded federal law and the Constitution to pursue their own agendas in the face of supposedly clear precedent.

The majority does not confront this criticism head on. Instead, it simply repeats, without any further elaboration, its unsupported conclusion that "[t]he Court long ago interpreted the word 'author' to exclude officials empowered to speak with the force of law, and Congress has carried that meaning forward in multiple iterations of the Copyright Act." *Ante*, at 16. This wave of the "magic wand of *ipse dixit*" does nothing to strengthen the majority's argument, and in fact only serves to underscore its weakness. *United States* v. *Yermian*, 468 U. S. 63, 77 (1984) (Rehnquist, J., dissenting).[5]

B

In addition to its textual deficiencies, the majority's understanding of this Court's precedents fails to account for the critical differences between the role that judicial opinions play in expounding upon the law compared to that of statutes. The majority finds it meaningful, for instance, that *Banks* prohibited dissents and concurrences from being copyrighted, even though they carry no legal force. *Ante*, at 15. At an elementary level, it is true that the judgment is the only part of a judicial decision that has legal effect. But it blinks reality to ignore that every word of a judicial opinion—whether it is a majority, a concurrence, or a dissent—expounds upon the law in ways that do not map neatly on to the legislative function. Setting aside summary decisions, the reader of a judicial opinion will always gain critical insight into the reasoning underlying a judicial holding by reading all opinions in their entirety. Under-

[5] The majority's approach is also hard to reconcile with the recognition in *Wheaton* v. *Peters*, 8 Pet. 591 (1834), that annotations prepared by the Reporter of Decisions could be copyrighted. Wheaton was paid a salary of $1,000, and it is difficult to say whether this salary funded his work on the opinions or his work on the annotations. See *id.*, at 614, 617 (argument).

standing the reasoning that animates the rule in turn provides pivotal insight into how the law will likely be applied in future judicial opinions.[6] Thus, deprived of access to judicial opinions, individuals cannot access the primary, and therefore best, source of information for the meaning of the law.[7] And as true as that is today, access to these opinions

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[6] For instance, this Court has not overruled *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), which pronounced a test for evaluating Establishment Clause claims. But a reader would do well to carefully scrutinize the various opinions in *American Legion* v. *American Humanist Assn.*, 588 U. S. ___ (2019), to understand the markedly different way that this precedent functions in our current jurisprudence compared to when it was first decided. Moreover, sometimes a separate writing takes on canonical status, like Justice Jackson's concurrence regarding the executive power in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 634–638 (1952) (opinion concurring in judgment and opinion of the Court); see also *Katz* v. *United States*, 389 U. S. 347, 360–361 (1967) (Harlan, J., concurring) (reasonable expectation of privacy Fourth Amendment test). Still other times, the reasoning in an opinion for less than a majority of the Court provides the explicit basis for a later majority's holding. See, *e.g.*, *McKinney* v. *Arizona*, 589 U. S. ___, ___ (2020) (slip op., at 5) (discussing *Ring* v. *Arizona*, 536 U. S. 584, 612 (2002) (Scalia J., concurring)); *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (incorporating into the majority the Eighth Amendment "evolving standards of decency" test first announced in *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)). Even "'comments in [a] dissenting opinion,'" *ante*, at 15, sometimes reemerge as the foundational reasoning in a majority opinion. See, *e.g.*, *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. ___ (2019) (discussing *Nevada* v. *Hall*, 440 U. S. 410, 433–439 (1979) (Rehnquist, J., dissenting)); *Lawrence* v. *Texas*, 539 U. S. 558, 578 (2003) ("JUSTICE STEVENS' [dissenting] analysis, in our view, should have been controlling in *Bowers* [v. *Hardwick*, 478 U. S. 186 (1986),] and should control here"). These examples, and myriad more, demonstrate that the majority treats the role of separate judicial opinions in an overly simplistic fashion.

[7] *Banks* also stated that judicially prepared syllabi and headnotes cannot be copyrighted. 128 U. S., at 253. The majority cites these materials as further evidence of its broad rule, because the majority finds it beyond cavil that "these supplementary materials do not have the force of law." *Ante*, at 15. The majority feels it appropriate to assume—without any historical inquiry—that the words "syllabus" and "headnote" carried the same meaning, or served the same function, in 1888 as they do now.

was even more essential in the 19th century before the proliferation of federal and state regulatory law fundamentally altered the role that common-law judging played in expounding upon the law. See also *post*, at 2 (GINSBURG, J., dissenting).

These differences provide crucial context for *Banks*' reasoning. Specifically, to ensure that judicial "exposition and interpretation of the law" remains "free for publication to all," the word "author" must be read to encompass all judicial duties. *Banks*, 128 U. S., at 253. But these differences also demonstrate that the same rule does not *a fortiori* apply to all legislative duties.[8]

C

In addition to being flawed as a textual and precedential

Without briefing on this issue, I am not willing to make that leap. See *Hixson* v. *Burson*, 54 Ohio St. 470, 485, 43 N. E. 1000, 1003 (1896) ("reluctantly overrul[ing] the second syllabus" of a previous decision); *Holliday* v. *Brown*, 34 Neb. 232, 234, 51 N. W. 839, 840 (1892) ("It is an unwritten rule of this court that members thereof are bound only by the points as stated in the syllabus of each case"); see also *Frazier* v. *State*, 15 Ga. App. 365, 365–367, 83 S. E. 273, 273–274 (1914) (clarifying the meaning of a court-written headnote and emphasizing that to understand an opinion's meaning, the headnote and opinion must be read together); *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337 (1906) (acknowledging that some state statutes rendered headnotes the work of the court carrying legal force).

[8] Although legislative history is not at issue in this case, the majority also contends that its rule is necessary to fend off the possibility that "[a] State could monetize its entire suite of legislative history." *Ante*, at 17. Putting aside the jurisprudential debate over the use of such materials in interpreting federal statutes, many States can, and have, specifically authorized courts to consider legislative history when construing statutes. See, *e.g.*, Colo. Rev. Stat. §2–4–203(1)(c) (2019); Iowa Code §4.6(3) (2019); Minn. Stat. §645.16(7) (2018); N. M. Stat. Ann. §12–2A–20(C)(2) (2019); N. D. Cent. Code Ann. §1–02–39(3) (2019); Ohio Rev. Code Ann. §1.49(C) (Lexis 2019); 1 Pa. Cons. Stat. §1921(c)(7) (2016). Given the direct role that legislative history plays in the construction of statutes in these States, it is hardly clear that such States could subject their legislative histories to copyright.

matter, the majority's rule will prove difficult to administer. According to one group of *amici*, nearly all jurisdictions with annotated codes use private contractors that "almost invariably prepare [annotations] under the supervision of legislative-branch or judicial-branch officials, including state legislators or state-court judges." Brief for State of Arkansas et al. as *Amici Curiae* 16–17. Under the majority's view, any one of these commissions or counsels could potentially be reclassified as an "adjunct to the legislature." *Ante*, at 11. But the majority's test for ascertaining the true nature of these commissions raises far more questions than it answers.

The majority lists a number of factors—including the Commission's membership and funding, how the annotations become part of the OCGA, and descriptions of the Commission from court cases—to support its conclusion that the Commission is really part of the legislature. See *ante*, at 9–10. But it does not specify whether these factors are exhaustive or illustrative and, if the latter, what other factors may be important. The majority also does not specify whether some factors weigh more heavily than others when deciding whether to deem an oversight body a legislative adjunct.

And even when the majority does list concrete factors, pivotal guidance remains lacking. For example, the majority finds it meaningful that 9 out of the Commission's 15 members are legislators. *Ante*, at 9; see OCGA §28–9–2 (noting that the other members of the Commission include the State's Lieutenant Governor, a judge, a district attorney, and three other state bar members). But how many legislative members are needed for a commission to become a legislative adjunct? The majority provides no answers to any of these questions.

* * *

The majority's rule will leave in the lurch the many

States, private parties, and legal researchers who relied on the previously bright-line rule. Perhaps, to the detriment of all, many States will stop producing annotated codes altogether. Were that to occur, the majority's fear of an "economy-class" version of the law will truly become a reality. See *ante*, at 17. As Georgia explains, its contract enables the OCGA to be sold at a fraction of the cost of competing annotated codes. For example, Georgia asserts that Lexis sold the OCGA for $404 in 2016, while West Publishing's competing annotated code sold for $2,570. Should state annotated codes disappear, those without the means to pay the competitor's significantly higher price tag will have a valuable research tool taken away from them. Meanwhile, this Court, which is privileged to have access to numerous research resources, will scarcely notice. These negative practical ramifications are unfortunate enough when they reflect the deliberative legislative choices that we as judges are bound to respect. They are all the more regrettable when they are the result of our own meddling. Fortunately, as the majority and I agree, "'critics of [today's] ruling can take their objections across the street, [where] Congress can correct any mistake it sees.'" *Ante*, at 13 (quoting *Kimble* v. *Marvel Entertainment*, *LLC*, 576 U. S. 446, 456 (2015)).

We have "stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives," *Eldred* v. *Ashcroft*, 537 U. S. 186, 212 (2003), because "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," *Sony Corp. of America* v. *Universal City Studios*, *Inc.*, 464 U. S. 417, 429 (1984). Because the majority has strayed from its proper role, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 18–1150

GEORGIA, ET AL., PETITIONERS *v.* PUBLIC.RESOURCE.ORG, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 27, 2020]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

Beyond doubt, state laws are not copyrightable. Nor are other materials created by state legislators in the course of performing their lawmaking responsibilities, *e.g.*, legislative committee reports, floor statements, unenacted bills. *Ante*, at 8–9. Not all that legislators do, however, is ineligible for copyright protection; the government edicts doctrine shields only "works that are (1) created by judges and legislators (2) *in the course of their judicial and legislative duties*." *Ante*, at 9 (emphasis added). The core question this case presents, as I see it: Are the annotations in the Official Code of Georgia Annotated (OCGA) done in a legislative capacity? The answer, I am persuaded, should be no.

To explain why, I proceed from common ground. All agree that headnotes and syllabi for judicial opinions—both a kind of annotation—are copyrightable when created by a reporter of decisions, *Callaghan* v. *Myers*, 128 U. S. 617, 645–650 (1888), but are not copyrightable when created by judges, *Banks* v. *Manchester*, 128 U. S. 244, 253 (1888). That is so because "[t]he whole work done by . . . judges," *ibid.*, including dissenting and concurring opinions, ranks as work performed in their judicial capacity. Judges do not outsource their writings to "arm[s]" or "adjunct[s]," cf. *ante*, at 9, 11, to be composed in their stead. Accordingly, the

judicial opinion-drafting process in its entirety—including the drafting of headnotes and syllabi, in jurisdictions where that is done by judges—falls outside the reach of copyright protection.

One might ask: If a judge's annotations are not copyrightable, why are those created by legislators? The answer lies in the difference between the role of a judge and the role of a legislator. "[T]o the judiciary" we assign "the duty of interpreting and applying" the law, *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923), and sometimes making the applicable law, see Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383 (1964). See also *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). In contrast, the role of the legislature encompasses the process of "making laws"—not construing statutes after their enactment. *Mellon*, 262 U. S., at 488; see *Patchak* v. *Zinke*, 583 U. S. ___, ___ (2018) (plurality opinion) (slip op., at 5) ("[T]he legislative power is the power to make law."). The OCGA annotations, in my appraisal, do not rank as part of the Georgia Legislature's *lawmaking process* for three reasons.

First, the annotations are not created contemporaneously with the statutes to which they pertain; instead, the annotations comment on statutes already enacted. See, *e.g.*, App. 268–269 (text of enacted laws are transmitted to the publisher for the addition of commentary); *id.*, at 403–404 (publisher adds new case notes on a rolling basis as courts construe existing statutes).[1] In short, annotating begins

[1] For example, OCGA §11–2A–213 was enacted, in its current form, in 1993. See 1993 Ga. Laws p. 633. The case notes contained in the OCGA summarize judicial decisions construing the statute years later. See §11–2A–213 (2002) (citing *Griffith* v. *Medical Rental Supply of Albany, Ga., Inc.*, 244 Ga. App. 120, 534 S. E. 2d 859 (2000); *Bailey* v. *Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S. E. 2d 904 (1999)).

only after lawmaking ends. This sets the OCGA annotations apart from uncopyrightable legislative materials like committee reports, generated before a law's enactment, and tied tightly to the task of law-formulation.

Second, the OCGA annotations are descriptive rather than prescriptive. Instead of stating the legislature's perception of what a law conveys, the annotations summarize writings in which others express *their* views on a given statute. For example, the OCGA contains "case annotations" for "[a]ll decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia and all decisions of the federal courts in cases which arose in Georgia construing any portion of the general statutory law of the state." *Id.*, at 403. Per the Code Revision Commission's instructions, each annotation should "accurately reflect the facts, holding, and statutory construction" adopted by the court. *Id.*, at 404. The annotations are neutrally cast; they do not opine on whether the summarized case was correctly decided. See, *e.g.*, OCGA §17–7–50 (2013) (case annotation summarizing facts and holdings of nine cases construing right to grand jury hearing). This characteristic of the annotations distinguishes them from preenactment legislative materials that touch or concern the correct interpretation of the legislature's work.

Third, and of prime importance, the OCGA annotations are "given for the purpose of convenient reference" by the public, §1–1–7 (2019); they aim to inform the citizenry at large, they do not address, particularly, those seated in legislative chambers.[2] Annotations are thus unlike, for example, surveys, work commissioned by a legislature to aid in

[2] Suppose a committee of Georgia's legislature, to inform the public, instructs a staffer to write a guide titled "The Workways of the Georgia Legislature." The final text describing how the legislature operates is circulated to members of the legislature and approved by a majority. Contrary to the Court's decision, I take it that such a work, which entails no lawmaking, would be copyrightable.

determining whether existing law should be amended.

The requirement that the statutory portions of the OCGA "shall be merged with annotations," §1–1–1, does not render the annotations anything other than explanatory, referential, or commentarial material. See *Harrison Co.* v. *Code Revision Comm'n*, 244 Ga. 325, 331, 260 S. E. 2d 30, 35 (1979) (observation by the Supreme Court of Georgia that "inclusion of annotations in [the] 'official Code'" does not "give the annotations any official weight").[3] Annotations aid the legal researcher, and that aid is enhanced when annotations are printed beneath or alongside the relevant statutory text. But the placement of annotations in the OCGA does not alter their auxiliary, nonlegislative character.

* * *

Because summarizing judicial decisions and commentary bearing on enacted statutes, in contrast to, for example, drafting a committee report to accompany proposed legislation, is not done in a legislator's law-shaping capacity, I would hold the OCGA annotations copyrightable and therefore reverse the judgment of the Court of Appeals for the Eleventh Circuit.

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[3] That the Georgia Supreme Court described the Commission's work as "within the sphere of legislative authority" for state separation-of-powers purposes, *Harrison Co.* v. *Code Revision Comm'n*, 244 Ga. 325, 330, 260 S. E. 2d 30, 34 (1979), does not resolve the federal Copyright Act question before us. Cf. *Yates* v. *United States*, 574 U. S. 528, 537 (2015) (plurality opinion) ("In law as in life, . . . the same words, placed in different contexts, sometimes mean different things."); Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").