PART VI

MISCELLANEOUS TOPICS

CHAPTER XXXVII

OBLIGATIONS

SYNOPSIS

A. SUCCESSION TO OBLIGATIONS

Arts. 294 to 297 deal with succession by the Central Government and State Governments to the property, rights, liabilities etc. of the various Governments functioning in India in the pre-Constitution era.

To appreciate the significance of these Constitutional provisions, it is necessary to remember that before 1947, India was a part of the British Empire; India was then partitioned into India and Pakistan, and India became a republic in 1950, with the inauguration of the new Constitution. Also, before 1947, India was divided into British India and the Princely India.

The British India was divided into several administrative units known as the Governors' Provinces. These Provinces became Part A States under the new Constitution. The Princely India consisted of a number of States under the Indian rulers and by merger out of these States were formed several Part B States in the new Constitution. In course of time, the nomenclature, Part A and Part B States, has been dropped from the Constitution, and all States have been placed on an

equal footing,[1] but Arts. 294 and 297 still use the old nomenclature—States of Part A and Part B.

By virtue of Art. 294(*a*), all property and assets which were vested in His Majesty (i.e., British King), immediately before the commencement of the Constitution, for the purposes of the Government of the Dominion of India, or a Governor's Province, became vested in the Union and the corresponding State under the present Constitution.

Article 294(*b*) vests in the Government of India, and the corresponding State, all rights, liabilities and obligations of the Government of the Dominion of India, or of a Governor's Province, whether arising out of contract or otherwise.

Article 294 declares which property would vest in the Union and which would vest in the State Government. In determining the property, assets, rights, liabilities and obligations of the Government immediately before the Constitution, the adjustments made as a result of the partition of India into India and Pakistan were to be taken into account. The assumption of the liabilities under Art. 294(*b*) does in no way derogate from the legislative power either of Parliament or a State legislature under the Constitution.[2]

The application of these constitutional provisions is illustrated by *Krishan Saran v. State of Uttar Pradesh.*[3] The right to run a ferry in a village across the Ganges was conferred on the petitioner by the East India Co. in 1781. The obligation and engagement thus incurred by the Company were assumed by the Government of India under the Government of India Act, 1858, and then by the State concerned under the new Constitution. Therefore, the right granted by the Company in respect of the ferry continued to operate unless taken away or destroyed by some valid law.[4]

Under Art. 295(1)(*a*) and Art. 295(1)(*b*), all property and assets, and all rights and obligations, contractual or otherwise, which were vested in or imposed on any Indian State (corresponding to a Part B State), immediately before the commencement of the Constitution, became vested in the Union, if the purpose for which the property and assets were held, or obligations imposed, fell within the Union List. The provisions of Arts. 295(1)(*a*) and (*b*) were subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

Under Art. 295(2), the Government of each Part B State, as from the commencement of the Constitution, succeeded to all property, assets, rights, liabilities and obligations, vested in the corresponding Indian State, whether arising out of contract or otherwise, other than those referred to in Art. 295(1).

The wordings of Art. 295, not only denote a transference of the rights, liabilities and obligations to the Government of India, or to the State Government concerned, but also bind it to the obligations transferred to it and it is duty bound to discharge them. A few examples of the working of these constitutional provisions may be furnished here.

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1. *Supra*, Chap. V.
2. *Umeg Singh v. State of Bombay*, AIR 1955 SC 540 : (1955) 2 SCR 164.
3. AIR 1957 All 455.
4. Also see, *Union of India v. Mundra Salt and Chemical Industries*, AIR 2001 SC 203 : (2001) 1 SCC 222.

(i) Railways belong to the Union List (Entry 22, List I)[5] and, therefore, the liability of Madhya Bharat (a State) in respect of the Scindia State Railway (an enterprise run by the erstwhile Gwalior State—a Princely State), became the liability of the Government of India under the new Constitution. Hence, a suit for wrongful dismissal of an employee of the Scindia State Railway before its transfer to the Centre lay against the Union of India.[6]

(ii) The plaintiff retired from the service of Navanagar State (a Princely State) in 1937, but his pension was sanctioned by the State only in 1948. Thereafter, Navanagar was merged with Saurashtra and the Saurashtra Government agreed to continue his pension. The plaintiff, however, sued the Saurashtra Government for arrears of pension for the period of 1937 to 1948. His claim was rejected on the ground that he could not have sued Navanagar State for the arrears, as under the rules then prevailing in that State, pension could not be claimed as a matter of right. Accordingly, it was held that the Saurashtra Government was under no liability under Art. 295(2) to pay the arrears.[7]

An obligation flowing to the Centre or a State under Art. 295, can be nullified or abrogated by passing a law either by Parliament, or the State Legislature, as the case may be, provided there is nothing in the Constitution against enactment of such a law.[8]

The Maharajah of Gwalior by an order on 18-1-47 exempted from income-tax for 12 years a company set up by Birla Brothers in the State. In 1948, Gwalior merged with Madhya Bharat, and in 1950-51, assessment proceedings were started against Birla Bros., as the law levying income taxation was extended to Madhya Bharat.

The company's claim for exemption in terms of the Maharajah's order was negatived by the Supreme Court. The Court ruled that there was nothing in the Constitution restraining the power of Parliament to levy income-tax in the State. Art. 295(1) only provided that liabilities and obligations of the Government of India would be the same as in the case of the princely State which originally entered into contract. Therefore, the Government of India would have the same defences to such a contract as the previous Indian State would have had, and, if the contract could be affected by legislation previously, it could be equally affected after Art. 295(1)(*b*). The fact that the obligation of the Ruler of Gwalior under the said agreement devolved eventually on the Centre, by virtue of Art. 295(1)(*b*), did not take away the power of Parliament to pass a valid law within its competence, which did not transgress any constitutional limits, even though it might completely supersede the obligation arising out of the said agreement.[9]

The process of integration of the several princely States with the Indian Union passed through several stages. Before 1947, these States were under the suzerainty of the British Crown. This suzerainty came to an end with the passage of the Indian Independence Act, 1947, by the British Parliament. Thereafter, these States acceded to the Indian Union through instruments of accession. As most of

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5. *Supra*, Ch. X.
6. *Union of India v. Tej Narain,* AIR 1957 MB 108.
7. *Somchand Karamchand v. Saurashtra,* AIR 1953 Sau. 21.
8. *Supra*, Ch. X.
9. *Union of India v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*, AIR 1964 SC 1903 : (1964) 7 SCR 892.

the princely States were small and were not viable as such, they were merged *inter se* to form bigger units. Thereafter, these bigger units formed Part B States under the new Constitution as stated above.

Before 1947, many princely States had granted various concessions and assumed various obligations. After the inauguration of the Constitution of India in 1950, questions arose how far the respective Part B States, or the Centre, were liable for these obligations. The courts took the view that the merger of the princely States *inter se*, was an 'act of state';[10] a new sovereignty was created thereby which could have repudiated the obligations of the previous princely States. Against this new sovereignty, only such rights could be availed of as were recognised by it expressly or impliedly. When the Constitution came into force, only such previous obligations and liabilities could be enforced against a Part B State, or the Central Government, as the case may be, as had been recognised, and not repudiated, in the pre-Constitution era by the concerned Government.

After the Constitution came into force, the concerned Government could have abrogated the previous liabilities and obligations but only by acting within the terms of the Constitution. If the previous obligation had a statutory basis, the new successor Government could have passed a law if it had competence to do so under the Constitution. If the previous obligation was based in an agreement or administrative order, then the same could be abrogated either by an administrative order or law depending upon the circumstances of each case.

A was an employee of Wadhwan, a princely State. A Wadhwan law fixed the age of superannuation at 60. Wadhwan merged with Saurashtra in June, 1948. Saurashtra became a Part B State in 1950 when it retired A at the age of 55. A's claim for compensation for premature retirement was upheld by the Supreme Court.[11] A had a right under the Wadhwan law to remain in service till the age of 60 years. On merger, the State of Saurashtra, before 1950, could have repudiated the obligation as an 'act of state', but that was not done. The new State did not repeal the Wadhwan law. A's right was carried over after the new Constitution. A became an Indian citizen under the Constitution, and the state could not then repudiate its liability towards A as an 'act of state,' as there can be no 'act of state' between a State and its citizens.[12] A's rights could only be defeated by legislation, which had not been enacted.

The Supreme Court adopted a similar approach in *Virendra Singh v. State of U.P.*[13] In 1948, a Ruler of an Indian State granted a few villages to the petitioner. After the State acceded to the Indian Union, the Government sought to revoke the grant by an executive order. The Supreme Court held that the grant could be revoked only by law and not by executive order because, after the enforcement of the new Constitution, there could be no 'act of state' between the Sovereign and its own subjects.

Dalmia Dadri Cement Co., obtained some concessions in 1938 from the Ruler of Jind. In 1948, Jind merged with several other States to form a bigger unit known as the Patiala Union. By a law promulgated by it, the Union abrogated all laws operating in all the former States, and made the laws prevailing in the

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10. See below, Sec. B, for explanation of this concept.
11. *Bholanath J. Thaker v. Saurashtra*, AIR 1954 SC 680 : (1955) 1 LLJ 355.
12. *Infra*, Sec. B.
13. AIR 1954 SC 447 : (1955) 1 SCR 415.

Patiala State uniformly applicable throughout the Union. The Union then became a Part B State of the Indian Union and the Income-tax Act became applicable to it.

The Company claimed exemption from payment of income tax by virtue of the concession originally granted to it by the Jind Ruler. The Supreme Court rejected the contention because when the State merged, a new sovereignty was created; the rights granted by the States could be enforced against the Patiala Union only if it recognised them by conduct or an affirmative declaration. The Patiala Union did not affirm the contract between the company and the Jind Ruler. On the other hand, it abrogated all those rights by abrogating all old laws prevailing in the various States and applying the Patiala laws throughout. The Patiala Union not having assumed the obligation, it could not pass it to the Part B State or the Central Government and so the company was liable to be taxed.

The company had also argued that the law of the Patiala Union abrogating previous rights was inconsistent with the merger covenant signed by the State Rulers to form the Union. The Supreme Court ruled that the merger covenant was a matter between independent sovereigns, an 'act of state' pure and simple, and no resident of any of the merging States could enforce any of its terms in the municipal courts of the Union. The newly formed Sovereign was free to recognise or not the rights of the subjects of the merging States.[14]

A resident of Dholpur, a Princely State, secured a permit to export chuni in 1947 and deposited Rs. 30,000 as advance for export duty. He could export only a part of it till December, 1947, when the permit expired. He was entitled to the refund of the proportionate export duty for the quantity of chuni not exported under the Dholpur Law. In the meantime, Dholpur merged with the Matsya Union which was again merged with the United State of Rajasthan which then became a Part B State of Rajasthan on Jan. 26, 1950. The respondent filed a suit for refund of money against Rajasthan, and the Supreme Court upheld his contention.[15] The Court held that when the new State continued all the old laws until altered or repealed, it must have intended to respect all rights, and assume all liabilities, arising under the old laws. Under Art. 295(2), the liability ultimately fell on Rajasthan.

The basic difference between *Shyam Lal* and *Dalmia Dadri* was that in the latter case, the old laws were repealed and, thus, repudiated, while in the former, the old laws were continued and nothing was done to repudiate the past obligations.

B. ACT OF STATE

In many cases, mentioned above, the courts have utilised the concept of 'act of state' to free the Government from any liability. It is, therefore, necessary to have some idea of this concept.

Under the English law, an act of state is an act of the Government as a matter of policy performed in the course of its relations with another foreign State, or

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14. *Dalmia Dadri Cement Co. v. Commr., Income-tax,* AIR 1958 SC 816 : 1959 SCR 729.
Also see, *Amar Singhji v. State of Rajasthan,* AIR 1955 SC 504 : (1955) 2 SCR 303; *Amarchand Butail v. Union of India,* AIR 1964 SC 1658.

15. *State of Rajasthan v. Shyam Lal,* AIR 1964 SC 1495 : (1964) 7 SCR 174. Also, *Sudhansusekhar v. Orissa,* AIR 1961 SC 196 : (1961) 1 SCR 779.

during its relations with the subjects of that State, unless they are temporarily within the allegiance of the British Crown.

An act of state is an act of a Sovereign against another Sovereign, or an alien outside its territory. It is a sovereign act which is not grounded in law. As an act of state derives its authority not from municipal law, but from *ultra*-legal or *supra*-legal means, municipal courts have no power to examine its propriety or legality. There is legal immunity in respect of acts done by the State against an alien outside its territory.[16] An act of state cannot be questioned, or made the subject of legal proceedings. in a municipal Court. But there cannot be an act of state by the government against its own citizens.[17]

The principles were applied in India in a number of cases in the pre-Constitution era. In *Nabab of Carnatic v. East India Co.*,[18] a suit brought by the Nabab against the East India Company for an account of rents of his territories while in Company's possession under a political treaty between the Company and the Nabab, was dismissed as it was a matter between two Sovereigns, the Company having acted throughout in its political capacity.

In *East India Co. v. Syed Ally*,[19] the resumption by the Madras Government of a *jagir* granted by the former Nabab of Carnatic before the date of cession to the East India Co., was held to be an act of sovereign power and so exempt from the jurisdiction of the courts.

In *Secretary of State v. Kamachee Boyee Sahaba*,[20] a claim was made to the properties seized by the East India Company on the death of Raja of Tanjore without heirs. The Privy Council held that as the act was an act of state which was not grounded in municipal law, the courts had no jurisdiction in the matter, for transactions between independent States were governed by laws other than the municipal law.

In *Ex-Raja of Coorg v. East India Co.*,[21] the Company had made war against the Raja of Coorg, annexed his territory, and taken his property. The Raja filed a suit against the Company but it was dismissed on the ground that the Company had acted in its sovereign capacity.

There can be no act of state between a State and its subjects. An act done by a State against its citizens is not immune from judicial scrutiny; its legality and validity must be tested under the municipal law and in municipal courts.[22]

The above-mentioned principle can be illustrated by reference to *Forester v. Secretary of State*.[23] The Government of India on the death of Begum Sumroo, resumed property formerly belonging to her. The legality of this action was questioned by her heirs. It appeared that the Begum had not acquired the position of a Sovereign, that she was a British subject at the time of her death, and that the seizure of territories was not by arbitrary power belonging to a Sovereign, but was resumption, under colour of legal title, of lands previously held from the

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16. *Eshugbayi Eleko v. Govt. of Nigeria*, 1931 AC 662; *Johnstone v. Pedlar*, (1921) 2 AC 262.
17. *B.K. Mohapatra v. State of Orissa*, AIR 1988 SC 24 : 1987 Supp SCC 553.
18. 30 ER 391 and 521 (1791-93).
19. 7 MIA 555 (1827).
20. 7 MIA 476.
21. 54 ER 642 (1860).
22. *P.V. Rao v. Khusaldas*, AIR 1949 Bom. 277, 287.
23. I.A. Supp. Vol., 10.

Government by a subject under a particular tenure, on the alleged determination of that tenure. It was held that, as the seizure of land was under colour of title, it could not be an act of state and the questions raised in the suit were cognizable by a municipal Court.

These principles have been applied in independent India as well. Acquisition of territory by a sovereign State for the first time is an act of state, and it does not matter whether the acquisition has been brought about by conquest or cession.[24] An inhabitant of the acquired territory can have only such rights as the new Sovereign recognizes and the rights he had under the preceding rule avail him nothing. The merger of princely States with India is an act of state.[25]

The above-mentioned principle was applied in the *Dalmia Dadri* case noted above.[26] In *Saurashtra v. Memon Haji Ismail*,[27] the administration of the princely State of Junagadh, was taken over by the Government of India, and some property previously gifted by the former Nabab of Junagadh was resumed. The Supreme Court held that Junagadh was a sovereign State when its administration was assumed by the Indian Government and the State subjects were aliens and not Indian citizens at the time, and, therefore, the resumption of the property was an act of state, for which no action could be brought in a Court.

Certain rights created by a princely State in the State forests on the eve of its merger with the Indian Union were repudiated by the Government of Bombay which took over the administration of the State. The Supreme Court held in *State of Gujarat v. Vora Fiddali*[28] that merger was an act of state and the grantees under the previous ruler did not carry with them, on a change of sovereignty, any inchoate rights as against the new Sovereign.

The State of Bharatpur established a mandi at Bharatpur, and agreed to grant to the prospective buyers of plots a concession of 25 per cent in the customs duty on all goods imported from outside into the mandi and sold for consumption within the State as well as on export of goods from the mandi. The appellant purchased a plot in the mandi in 1946. Thereafter the State of Bharatpur merged with the Matsya Union which then merged with the Rajasthan State which abolished all free mandis. Thereupon, the appellant filed a suit to recover the excess amount of customs duty paid to the Rajasthan Government. The Supreme Court decided against the appellant.[29] The Court ruled that the successor State did not automatically inherit the rights and obligations of the merged State. The contractual obligations of the preceding State could bind the succeeding sovereign State only if it recognised, either expressly or impliedly, those obligations.

Accession of one State to another is an 'act of state' and the subjects of the former State may claim protection of only such rights as the new Sovereign recognises as enforceable in its municipal courts. Even if an obligation was recognized by the new Government, the Legislature would still be competent to enact a

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24. *Promod v. State of Orissa,* AIR 1962 SC 1288 : (1962) 1 Supp SCR 405.
25. *B.K. Mohapatra v. State of Orissa,* AIR 1988 SC 24 : 1987 Supp SCC 553.
26. *Supra,* footnote 14.
Also see, *Virendra Singh v. State of Uttar Pradesh,* AIR 1954 SC 447 : (1955) 1 SCR 415; *State of Madras v. Rajagopalan,* AIR 1955 SC 817 : (1955) 2 SCR 817.
27. AIR 1959 SC 1383 : (1960) 1 SCR 537.
28. AIR 1964 SC 1043 : (1964) 6 SCR 461.
29. *Firm Bansidhar Premsukhdas v. State of Rajasthan,* AIR 1967 SC 40 : 1966 Supp SCR 81.

law altering the terms and conditions of a previous contract, or of a grant under which the liability of the Government arose. The legislative competence of Parliament, or of the State Legislatures can only be circumscribed by an express prohibition contained in the Constitution itself. Without there being any provision in the Constitution prohibiting legislation on the subject, there is no fetter on the plenary powers of the legislature to legislate on the topics enumerated in the relevant lists.[30]

Accordingly, in *Maharaja Shree Umaid Mills Ltd. v. Union of India*,[31] it was held that there is nothing in Article 295 of the Consitution which prohibits Parliament from enacting a law altering the terms and conditions of a contract, or of a grant, under which the liability of the Government of India arises, or to impose excise duty or income tax in territories which became Part B States, and no such prohibition can be read into Article 295 by virtue of some contract entered into with any person by the then ruler of an Indian State.[32] This means that Art. 295 speaks only of devolution of the liability; it does not act as a limitation upon the legislative competence of the Union or a State Legislature.

C. ESCHEAT

According to Art. 296, any property in India which, "if this Constitution had not come into force", would have vested in His Majesty, or the Ruler of an Indian State by escheat, lapse or *bana vacatia* for want of a rightful owner, shall vest in a State, if the property is situated there, and in the Union, in any other case. Accordingly, location of the property is the primary rule to determine whether the property vests in the Centre or a State.

By a proviso to Art. 296, the rule of *situs* has been made to give way to the rule of user. If any property which, at the date when it would have accrued by escheat, lapse or *bona vacatia*, was in the possession or control of the Government of India or of a State, shall, according as the purposes of its user were purposes of the Union or of a State, vest in the Union or in that State.

The Article does not say what property would accrue to the Government by lapse, escheat or *bona vacatia*. What it does is to maintain the *status quo* prevailing in India before the Constitution. The words 'if this Constitution had not come into force' signify that the Constitution itself envisages no change in the laws regarding escheat, lapse or *bona vacatia*.

On failure of heirs, natural or legal, the property of the deceased reverts to the State as *bona vacatia*.[33] Before the Government puts forward a claim of escheat, onus lies heavily on it to prove the absence of any heir of the deceased anywhere in the world.[34] The doctrine of *bona vacatia* applies to a dissolved company whose assets, if any, will be taken over by the state. It is not necessary to have any provision for that purpose in the Companies Act in view of Art. 296.[35]

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30. *Jagannath Baksh Singh v. United Provinces*, AIR 1949 PC 127; *Umeg Singh v. State of Bombay*, AIR 1955 SC 540 : (1955) 2 SCR 164; *supra*, Ch. X.
31. AIR 1963 SC 953 : 1963 Supp (2) SCR 515.
32. See, BHIMSEN RAO, *Act of State Doctrine in India*, 12 *JILI* 304 (1970).
33. *Phuman Singh v. State of Punjab*, AIR 1961 Punj. 200.
34. *State of Bihar v. Radha Krishna Singh*, AIR 1983 SC 684 : (1983) 3 SCC 118.
35. *In re U.N. Mandal's Estate*, AIR 1959 Cal. 490.

The Government takes by *escheat* all property—movable or immovable—for want of an heir or successor. This is an incident of sovereignty and rests on the ultimate ownership of the state of all property within its jurisdiction.

The Supreme Court has explained the concept of escheat in *Sheo Nand.*[36] Escheat literally means "to revert to the state". This event happens in default of heirs or devisees. When there is no owner of property, it vests in the state and this is known as *bona vacatia*. Consequently, the property of an intestate dying without leaving lawful heirs, and the property of a dissolved corporation pass to the Government as *escheat* or *bona vacatia*.[37]

Certain statutes also make provisions regarding *Escheat.* For example, S. 29 of the Hindu Succession Act provides that if an intestate has left no heir qualified to succeed, such property shall devolve on the Government subject to the obligations and liabilities to which an heir would have been subject.

The legislative power to enact legislation relating to Escheat falls under entries 35 and 44 in the State List and entry 32 in the Union List.[38]

D. THINGS OF VALUE IN TERRITORIAL WATERS

Article 297 asserts India's sovereign rights over sea-wealth.[39] Originally, Art. 297 merely Stated that all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, of India vest in the Union and are held for the purposes of the Union.

The genesis of this Article may be said to lie in the dispute which arose in America between the California State and the Central Government as to whether territorial waters belonged to the Centre or the maritime States. California had granted leases of petroleum and other minerals deposited in the sea-bed in territorial waters. The Centre claimed that the sea-bed with all its minerals vested in it and, therefore, the State had no right to deal with them.

The Supreme Court decided the controversy in favour of the Centre mainly on the ground that the protection and control of the territorial waters was a function of the national external sovereignty. The Court held that California was not the owner of the territorial belt, and that the Centre, rather than the State, had full dominion and power over the lands, minerals and other products therein.[40] In *U.S. v. State of Texas,*[41] the Supreme Court held that the Centre and not the State had the right to oil and other products under the bed of the ocean below low water mark off the shores of Texas.[42]

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36. *Sheo Nand v. Dy. Director of Consolidation, Allahabad,* AIR 2000 SC 1141 : (2000) 3 SCC 103.

37. *P. Leslie & Co. v. V.O. Wapshare,* AIR 1969 SC 843 : (1969) 3 SCR 203.
Also see, *Bombay Dyeing and Mfg. Co. v. State of Bombay,* AIR 1958 SC 328 : 1958 SCR 328; *Supdt. and Remembrancer of Legal Affairs, State of West Bengal v. Corpn. of Calcutta,* AIR 1967 SC 997 : (1967) 2 SCR 170.

38. See, *supra,* Ch. X.

39. V.S. MANI, *India's Maritime Zones and International Law,* (1979) 21 *JILI* 336.

40. *U.S. v. State of California,* 332 US 18 (1975).
Also, *U.S. v. State of Louisiana,* 339 US 699 (1950).

41. 339 US 707 (1950).

42. *DOWLING and EDWARDS, AMERICAN CONST. LAW,* 213 (1954).

The bases of the Centre's paramount rights in these cases were the national interests, national responsibilities, and national concerns. Consequent upon these decisions, the U.S. Congress enacted the Submerged Land Act, 1953, which vested in, and assigned to, the States the 'title to and ownership of' their respective portions of the submerged land and resources in land and water.[43]

The framers of the Indian Constitution apprehended that in future the maritime States might raise the issue that anything underlying the ocean within the territorial waters vested in them. In order to negative the possibility of any such contention being raised in future, the Constitution-makers put Art. 297 in the Constitution[37] which enacted precisely the law laid down by the U.S. Supreme Court in the cases mentioned above.

It is one of the moot points of International Law as to what exactly is the extent of territorial waters. Because of this uncertainty, the Constitution did not prescribe the extent of territorial waters. On the 22nd March, 1956, the President by a proclamation prescribed the limits of territorial waters at six nautical miles measured from the appropriate base-line. But a fresh proclamation was issued by the President on December 3, 1956. It recited that whereas International Law recognises that on the high seas adjacent to its territorial water, a coastal State may exercise the control necessary to prevent and punish the infringement within its territorial waters of its customs, fiscal, immigration and sanitary regulations, control has been assumed up to a distance of 12 nautical miles from the base line from which the width of the territorial waters is measured.

By another proclamation concerning fishing activities in the high seas adjacent to territorial waters, control was assumed within a distance of 100 nautical miles from the outer limits of territorial waters.

By another proclamation, dated the 30th August, 1955, full and exclusive sovereign rights of India were declared by the President on the continental shelf. The proclamation stated that whereas valuable natural resources are known to exist on the sea-bed and in the sub-soil of the continental shelf and the utilisation of such resources is being made practicable by modern technological progress; and whereas it is established by international practice that for the purpose of exploring and exploiting such resources in an ordinary manner, every coastal State has sovereign right over the sea-bed and sub-soil of the continental shelf adjoining its territory; accordingly, India has, and always had, full and exclusive sovereign right over the sea-bed and sub-soil of the continental shelf adjoining its territory and beyond its territorial waters.

The words "all lands, minerals and other things of value underlying the ocean" in the constitutional provision are of great significance. One of the moot points of International Law is whether there is any difference between what may be called surface rights, mineral rights and soil rights. Article 297 asserts that all lands, minerals and other things of value underlying the ocean vest in the Union.

The Madras High Court considered the interesting question whether the Chank fisheries[44] in the territorial waters of Sivaganaga vest in the Centre or the Madras

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43. VIII *CAD*, 889-892.

44. *A.M.S.S.V.M. Co. v. State of Madras*, AIR 1954 Mad 291: *P.S.A. Susai v. Director of Fisheries*, (1965) II MLJ 35. For a critique of the case see, M.K. NAWAZ AND LAKSHMI JAMBHOLKAR, *The Chank Fisheries Case Revisited*, 13 *JILI* 494 (1973).

Government. The Court voted in favour of the State on the following three grounds, v*iz.*:

(i) Entry 21, List II, is 'Fisheries'[45] while entry 57 in List I, runs as "Fishing and fisheries beyond territorial waters".[46]

Reading the two entries together, the State has been held to have competence to legislate generally on fisheries, and that only the fisheries and fishing rights beyond territorial waters fall outside the State jurisdiction. Therefore, a State law regulating the use of fisheries in territorial waters would fall within the State sphere and Art. 297 does not affect this position. The rights of the Centre over territorial waters are subject to the legislative powers of the States. Even if territorial waters vest in the Centre under Art. 297, entry 21 in List II, is sufficient to clothe the States with power to enact laws in respect of fisheries in territorial waters.

(ii) Before 1950, these fisheries vested in the Province of Madras and so under Art. 294, these must now vest in the corresponding State and not in the Centre.[47]

(iii) The High Court opined that under Art. 297, territorial waters do not vest in the Centre. What this provision vests in the Centre is what underlies the ocean within territorial waters and not the territorial waters themselves.

According to the High Court, the two concepts—territorial waters and the seabed—do not stand in the same position. For the purpose of the vesting under Art. 297, the dividing line lies between the bed of the ocean and the waters above it and that what does not underlie the bed of the ocean would be outside the purview of Art. 297.

This view of the High Court is arguable. The framers of the Constitution took the view that "anything above land goes with the land. If there is a tree above the land, the tree goes with the land. Water is above the land and so it goes with the land."[48] The framers, therefore, thought that the word 'land' in Art. 297 would denote not only land but also water over it, and by declaring that land within territorial waters belonged to the Centre, the Article would also impliedly declare that the territorial waters over this land belonged to the Centre.

However, the question of ownership of territorial waters does not appear to be of much practical significance. It is purely a Federal-State question and not one of International Law according to which the territory of India not only includes its physical territory but also territorial waters. The valuable resources within territorial waters have been vested in the Centre. The laws of a State within its legislative sphere will operate on the territorial waters adjacent to it. The question of ownership thus appears to be of academic interest.

The words "for the purposes of the Union" in Art. 297 do not necessarily mean that the maritime States have been deprived of all and every kind of advantages accruing from the ocean. These words are flexible and do not militate against

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45. *Supra*, Ch. X.
46. *Ibid*.
47. *Supra*, Sec. A.
48. VIII *CAD*, 892.

some of the benefits being allotted to the maritime or coastal States by the Centre.[49]

For a very long time, the law of the sea has been debated in an international conference and consensus has emerged among the nations on three points :

(*i*) the limit of the territorial waters should extend to 12 miles;

(*ii*) the exclusive economic zone will extend to 200 miles; and

(*iii*) the continental shelf may go beyond 200 miles.

Accordingly, Art. 297 has been amended, and its scope enlarged, by the Constitution (Fortieth) Amendment Act, 1976, so as to enable Parliament to enact suitable legislation in terms of the international consensus.[50]

Article 297(1) now provides that all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

According to Art. 297(2), all other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

Further, Art. 297(3) provides that the limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

Thus, while originally, only territorial waters and the continental shelf were mentioned in Art. 297, now it refers, besides these concepts, to India's exclusive economic zone and other maritime zones. All things of value underlying the territorial waters or the continental shelf, the economic Zone of India, along with all other resources of the economic zone, vest in India for the purpose of the Union. Formerly, the extent of territorial waters and continental shelf were fixed through presidential proclamations. Now, the power vests in Parliament to specify the limits of (i) territorial waters, (ii) Continental shelf, and (iii) economic zone.

Under Art. 297, Parliament has enacted the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976. The main features of this Act are as follows:

(*i*) India has sovereignty over territorial waters which will extend to 12 nautical miles measured from the appropriate baseline but the Central Government may alter this limit keeping in view international law and state practice. Such a notification can be issued after its approval by both Houses of Parliament.

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49. Similar questions have arisen in Canada and Australia.

For Canada, see the Advisory Opinion of the Supreme Court of Canada handed down on the 7th November, 1967, in *In the Matter of Offshore Mineral Rights*.

For Australia see, O'CONNEL, *Problems of Australian Coastal Jurisdiction*, 42 *Australian Law JI.*, 39 (1968); *Lumb, The Off-Shore Petroleum Agreement & Legislation, ibid.*, 453; *State of New South Wales v. Commonwealth*, 50 ALJR 218; for a note on the case see, 50 ALJ 153 (1976).

50. For this Amendment, see, *infra*, Ch. XLII.

(*ii*) In the contiguous zone of 12 miles beyond the territorial waters, India will exercise jurisdiction over security, immigration, health, customs and other fiscal matters. The extent of contiguous zone can also be varied by the Central Government with the approval of Parliament.

(*iii*) India has sovereignty over its continental shelf which extends to 200 miles or the outer edge of the continental margin whichever is longer.

(*iv*) India's exclusive economic zone extends up to 200 nautical miles.[51] But the extent of the zone can be varied by the Centre with Parliament's approval.

(*v*) The sovereignty of India extends to the historic waters. The limit of such waters is to be specified by the Central Government.

E. BARRING COURTS' JURISDICTION IN DISPUTES ARISING OUT OF CERTAIN TREATIES

Article 363(1) bars all courts from having any jurisdiction in any dispute arising out of a pre-Constitution treaty, agreement, covenant, engagement or *sanad* executed between a Ruler of an Indian State and the Government of India, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of the Constitution relating to any such treaty etc.

This Article refers to the numerous agreements and covenants entered into between the then Government of India and the Rulers of the Indian States as a part of the arrangements by which the Indian States were incorporated with the rest of India before the inauguration of the new Constitution.

These arrangements and covenants were in the nature of treaties between two States and, as such, were 'acts of state' outside the purview of the municipal courts.[52]

There are two conditions for the application of Art. 363(1):

(*i*) the covenant with the Ruler must have been entered into before the coming into force of the Constitution, and

(*ii*) the covenant must continue in force after the commencement of the Indian Constitution.

Article 363(1) bars the jurisdiction of each and every Court. A few features of this provision have been already explained earlier.[53] A few more points regarding the Article may be noted here.

The Supreme Court has held that it could not entertain *inter alia* the following claims because of Art. 363(1) :

(i) a challenge by the Ruler of an Indian State, who had entered into a merger-agreement with the Government of India, that the agreement was void as being without consideration;[54]

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51. S.P. JAGOTA, *The Sea Around Us, The Illustrated Weekly, Dec. 19-25*, 1976, pp. 8-17.
52. *Supra*, Sec. B.
53. *Supra*, Ch. IV, Sec. C(iii)(d).
54. *State of Seraikella v. Union of India,* AIR 1951 SC 253 : 1951 SCR 474.

(ii) a challenge by the *jagirdars* of the erstwhile Indian States which had merged in the State of Bombay to the *vires* of a Bombay Act abolishing *jagirs* on the ground that the Act contravened the letters of guarantee which had been given to the Rulers.[55]

(iii) The Supreme Court has ruled that in view of Art. 363 "any dispute arising out of the Merger Agreement, or the Instrument of Accession, is beyond the competence of the Courts to enquire into."[56]

The only way to bring such cases before the Supreme Court is to invoke its advisory jurisdiction.[57]

The following matter has been held as not barred by Art. 363(1). The Ruler of Ratlam passed orders raising the rates at which the plaintiffs were to be paid for the supply of liquor to the warehouses in the Ratlam State. After the merger of the State, all the old laws were continued by the newly formed State of Madhya Bharat. This right subsisted even after the commencement of the Constitution in 1950, and the liability of Ratlam became the liability of the new State of Madhya Bharat under Art. 295(2).[58] As it was not a claim to enforce any right under the covenant of merger, Art. 363 did not apply. Art. 363 bars the jurisdiction of the courts only in respect of disputes *arising out* of the covenant.[59]

Article 363 does not come into picture in cases arising under the existing law.[60] The ex-Ruler of a merged State evicted the appellants who had been in occupation of his private land. A suit by the evicted tenants to be restored to possession, was held maintainable as it arose out of the action of eviction by the ex-Ruler and not out of the merger agreement.[61]

Execution of a money decree against an ex-Ruler was not barred as the dispute had nothing to do with the agreement of merger and so was not covered by Art. 363.[62]

PRIVY PURSES OF THE RULERS

As noted above, numerous agreements and covenants were entered into between the Government of India and the erstwhile Indian Rulers guaranteeing to them privy purses and other personal privileges in lieu of their accession to the Union of India. The Constitution originally contained three provisions guaranteeing the privy purses and Rulers' personal privileges.

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55. *Umeg Singh v. State of Bombay,* AIR 1955 SC 540 : (1955) 2 SCR 164. Also, *Raghubar Sarup v. State of Uttar Pradesh,* AIR 1959 SC 909; *Joginder Sen v. Union of India,* AIR 1967 HP 6.

56. *Maharaja Pravir Chandra Bhanj Deo Kakatiya v. State of Madhya Pradesh,* AIR 1961 SC 775 : (1961) 2 SCR 501. Also see, *State of Jammu & Kashmir v. Karan Singh,* AIR 1997 J&K 132.

57. *Supra,* Ch. IV, Sec. F.

58. *Supra,* Sec. A.

59. *State of Madhya Bharat v. Behramji,* AIR 1958 MP 71.

60. *Bholanath J. Thacker v. Saurashtra,* AIR 1954 SC 680 : (1955) 1 LLJ 355; *Lachhman Dass v. State of Punjab,* AIR 1963 SC 222 : (1963) 2 SCR 353.

61. *Jagannath Behera v. Harihar Singh,* AIR 1958 SC 239 : 1958 SCR 1067.

62. *Thakoresaheb Khanji v. Gulam Rasul Chandbhai,* AIR 1955 Bom 449. Also, *Pratapsinhji v. State of Bombay,* AIR 1957 Bom 155.

(i) Art. 291 charged the privy purses payable to the Rulers on the Consolidated Fund of India,[63] and exempted the same from levy of income tax.

(ii) Art. 362 obligated Parliament and State Legislatures while making laws, and the Centre and the States while exercising their executive power, to have due regard to the assurances and guarantees made in the covenants or agreements with regard to the Rulers' personal rights etc.

(iii) Art. 366(22) provided that 'Ruler' of an Indian State would mean a prince, chief or other person by whom any such agreement or covenant was entered into and who, for the time being, was recognised by the President as the 'Ruler' of the State.

In course of time, the Central Government decided to abolish privy purses and other privileges of the Rulers. For this purpose, the Government of India moved a Constitution Amendment Bill in Parliament, but the same could not be enacted as it failed to secure the requisite majority in Rajya Sabha.[64]

The Government then took recourse to Art. 366(22) for this purpose. On September 7, 1970, the President issued an omnibus order under Art. 366(22) derecognising all the rulers. The validity of this order was challenged in the Supreme Court through a petition under Art. 32 in *Madhav Rao Scindia v. Union of India*.[65]

A question for consideration of the Court was whether it was barred from taking cognisance of the petition under Art. 363. The Court answered in the negative. It interpreted Art. 363 narrowly in accordance with the well known rule of interpretation of provisions barring jurisdiction of the courts that they must be strictly construed for the "exclusion of the jurisdiction of a civil Court, and least of all the Supreme Court, is not to be lightly inferred." The Court therefore held that the bar of Art. 363 applied only to Art. 362 which was a provision relating to a treaty, covenant etc. Art. 291 was free from the restraints of Art. 363 as its dominant purpose was to ensure payment of privy purses, charge them on Consolidated Fund and exempt them from income tax.

It was also held that Art. 366(22) would also be within the bar of Art. 363 so long as the President in recognising a Ruler was effectuating the provisions of the covenant or agreement. But, "where the President acts wholly outside the provisions of Art. 366(22), his action can be questioned because the bar applies on *bona fide* and legitimate action and not to *ultra vires* action." The Presidential Order withdrawing recognition of all rulers was held to be wholly outside Art. 366(22). The President was incompetent to withdraw recognition of all Rulers. "The continuity of a Ruler of an Indian State is obligatory so long as the Ruler is alive or a successor can be found." Accordingly, the Court held by a majority that the Presidential Order was *ultra vires*.[66]

Thereafter, Art. 363A was introduced in the Constitution by the Twenty-sixth Constitutional Amendment in 1971. With this, the recognition of the Indian Rul-

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63. *Supra*, Ch. II.
64. For Constitution Amending Process, see, *infra*, Ch. XLI.
65. AIR 1971 SC 530 : (1971) 1 SCC 85.
66. See also, *infra*, Ch. XL and XLII.

ers by the President came to an end. Along with this, privy purses payable to the Indian Rulers also came to an end.[67]

F. CONTINUANCE OF THE PRE-CONSTITUTION LAWS

The Government of India Act, 1935, was repealed by Art. 395 of the Constitution, but the laws in force in India immediately before the commencement of the Constitution, were continued in force under Art. 372(1) until altered, repealed or amended by a competent legislature or other authority.[68] The term 'law in force' includes a law passed or made by a legislature, or other competent authority, in India before the commencement of that Constitution, and not previously repealed even though it might not have been put into operation.

The effect of the above provision is to continue the entire body of law as prevailing in India before the Constitution came into force. Not only statutory law, but also non-statutory law like the Law of Torts,[69] Hindu Law, Mohammedan Law, customs having the force of law,[70] the common law of England which had been adopted as the law of India before the Constitution,[71] the Letters Patent of High Courts,[72] all were continued in force.

Laws which were of a temporary nature[73] were not to continue beyond the period for which they were enacted. Similarly, laws which had been previously repealed, or which had died a natural death, were not to be revived.[74] The word 'law' includes delegated legislation[75] and, therefore, regulations or orders having the force of law were also continued.[76] Art. 372 saved an order of legislative nature but not a mere administrative order.[77]

The Supreme Court has ruled in *Dena Bank*[78] that the rule of the Common Law that the right of the state to recover tax arrears from an assessee has a priority over the right of a private person to recover his unsecured private debt from

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67. See, *infra*, Ch. XLII, for the Amendment.

68. Art. 372(2) empowered the President to adapt and modify the pre-Constitution laws so as to bring them in accord with the provisions of the Constitution. The power was to subsist for three years after the Constitution. This constitutional provision made it possible to adapt the pre-Constitution laws within a short span of time without throwing a great burden on Parliament.

69. *Director of Rationing v. Corpn. of Calcutta,* AIR 1960 SC 1355 : (1961) 1 SCR 158; *infra*, Sec. H.

70. *Motesingh v. Chandra Bali,* AIR 1959 MP 212; *Gopalan v. State of Madras,* AIR 1958 Mad 539; *In the matter of Basanta Chandra Ghosh,* AIR 1960 Pat 430.

71. *Dir of Rationing v. Corp. of Cal., supra,* footnote 67; *B.S. Corp. v. Union of India,* AIR 1956 Cal 26.

72. *Nirmalchand v. Smt. Parmeshwari Devi,* AIR 1958 MP 333; *In re Ranganayakulu,* AIR 1956 AP 161; *In the matter of B.C. Ghosh,* footnote 70, *supra*.

73. *Explanation* III to Art. 372.

74. *State of U.P. v. Jagamander,* AIR 1954 SC 683 : 1954 Cri LJ 1736.

75. *Supra*, Ch. II, Sec. N.

76. *Edward Mills v. Ajmer,* AIR 1955 SC 25 : (1955) 1 SCR 735; *Seshadri, R.M. v. State of Madras,* AIR 1954 Mad 543; *In re Ranganayakulu,* AIR 1956 AP 161.

77. *Madhavrao v. Madhya Bharat,* AIR 1961 SC 298. Also see, *Edward Mills v. Ajmer,* AIR 1955 SC 25 : (1955) 1 SCR 735; *Atindra v. Gillot,* AIR 1955 Cal 543; *State of Madhya Pradesh v. Gokulchand,* AIR 1957 MP 145; *John K.O. v. State,* AIR 1956 TC 117; *Narsing Pratap Dev v. State of Orissa,* AIR 1964 SC 1793 : (1967) 7 SCR 112; *State of Madhya Pradesh v. Lal Rampal,* AIR 1966 SC 820.

78. *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co*., (2000) 5 SCC 694.

the assessee, being "law in force in British India under Art. 372(1) continues to operate even now. The common-law rule is founded on the rule of necessity and public policy.

In *Superintendent and Legal Remembrancer, West Bengal v. Corporation of Calcutta,*[79] the Supreme Court held by a majority that Art. 372 did not continue all the norms of interpretation applied by the courts in the pre-Constitution India, as distinguished from the principles of substantive law. The courts can now decide whether these norms should or should not apply to interpret the statutes in Independent India.

Article 372(1) continued the pre-Constitution laws subject to the provisions of the Constitution. Thus, no law is to be valid if it contravenes a Fundamental Right or any other provision of the Constitution.[80]

A pre-constitutional law enacted while concept of equality between two sexes was not known may no longer be valid because of the social and political values of the makers of the Constitution once it is accepted that they intended to apply equality in all spheres of life which as reflected in articles 14 and 15 of the Constitution. But here also absolute equality is not contemplated and it would be permissible for the State to make a classification on the ground of sex so long as classification is founded on a rational criteria and the societal conditions which prevailed in the early 20th century may not be a rational criteria in the 21st century.[81]

As regards the distribution of powers between the Centre and the States, however, the validity of a law is to be tested with reference to the competence of the enacting legislature under the scheme of distribution prevailing at the time the law was enacted and not under the new Constitution.[82] Thus, if a law was invalid when it was made, no question of its continuance after the Constitution arises.[83] If the pre-Constitution law was made by a competent legislature at the time, it will continue to subsist even if the enacting legislature loses its competence after the Constitution came into force, provided the law in question does not fall foul of any constitutional provision.[84]

In *State of Madras v. Menon,*[85] the Supreme Court held that such of the British statutes as applied to India before the Constitution, but the language of which did not accord with the new independent status of India, could not be regarded as being applicable after the Constitution. The question in the instant case was whether the Fugitive Offenders Act, 1881, was continued by Art. 372. The Court found that the scheme of the Act was that the British possessions which were contiguous to one another, and between whom there were frequent intercommunication, were treated as one integrated territory and a summary procedure was adopted to extradite per-

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79. *Infra,* footnote 92.

80. *Panch Gujar v. Amar Singh,* AIR 1954 Raj 100; *T.H. Vareed v. Travancore Cochin,* AIR 1956 SC 142, 145 : (1955) 2 SCR 1022, *S.I. Corporation v. Board of Revenue,* AIR 1964 SC 207; *Union of India v. Bellary Municipality,* AIR 1978 SC 1803; See also *District Registrar and Collector v. Canara Bank,* (2005) 1 SCC 496 : AIR 2005 SC 186.

81. *Anuj Garg v. Hotel Association of India,* (2008) 3 SCC 1 : AIR 2008 SC 663.

82. *Kanpur Oil Mills v. Judge, Sales Tax,* AIR 1955 All 99; *State of West Bengal v. Tarun Kumar,* AIR 1974 Cal 39; *B.V. Patankar v. Sastry,* AIR 1961 SC 272 : (1961) 1 SCR 591.

83. *Umaid Mills v. Union of India,* AIR 1963 SC 953 : (1963) Supp (2) SCR 575.

84. *S.I. Corpn. v. Board of Revenue,* AIR 1964 SC 207 : (1964) 2 SCR 280; See also *John Vallamattom v. Union of India,* (2003) 6 SCC 611 : AIR 2003 SC 2902.

85. AIR 1954 SC 517 : (1955) 1 SCR 280.

sons committing offences in this integrated territory. After India became a Sovereign Democratic Republic under the new Constitution, India could no longer be described as a British possession and so it could not be grouped amongst British possessions and, therefore, the Fugitive Offenders Act was no longer applicable. Art. 372 could not save this law because the grouping was repugnant to the concept of a Sovereign Democratic Republic.

The principle of priority of debts owed to state over private debts is not inconsistent with anything in the Republican Constitution. It is essential to the proper functioning of any state that the debts due to it should have a priority over debts owed to private individuals.[86]

The decisions of the Privy Council were binding on all courts in India, and the law declared by the Privy Council was the law, before the Constitution became operative on January 26, 1950. Under Art. 225, the law administered in any High Court on January 25, 1950, continues to be the same law as was administered by it prior to the Constitution subject to the provisions of the Constitution and of any law made by any competent legislature.[87]

Under Art. 372(1) also, the pre-Constitution laws remain in force until altered or repealed or amended by a competent legislature or authority. Therefore, the law declared by the Privy Council as well as the Federal Court remains binding on the High Courts even after January 25, 1950, until the Supreme Court rules otherwise.[88]

The position of the Supreme Court is somewhat different from this point of view. The decisions of the Privy Council and of the Federal Court are not binding on the Supreme Court though these decisions are of persuasive authority and are entitled to all respect and attention which they deserve. Thus, in *State of Bihar v. Abdul Majid*,[89] the Supreme Court refused to follow the Federal Court's decision in *State of Punjab v. Tara Chand*[90] and the Privy Council's decision in *High Commissioner for India v. Lall*.[91] Similarly, in the *Legal Remembrancer* case,[92] the Supreme Court disagreed with the view expressed by the Privy Council in *Province of Bombay v. Municipal Corporation.*[93]

Article 372(1) makes it clear that the pre-Constitution laws continued in force after the Constitution may be altered, amended or repealed by a competent legislature.

G. SUITS BY OR AGAINST THE GOVERNMENT

Article 300 lays down that the Government of India, or of the State, may sue or be sued by the name of the Union of India or of the State respectively. The Centre or a State can thus be sued as a juristic personality.

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86. *Builders Supply Corpn. v. Union of India,* AIR 1965 SC 1061 : (1965) 2 SCR 289.
87. *Supra,* Ch. VIII, Sec. C(ii).
88. *Pritam Singh v. State,* AIR 1950 SC 169 : 1950 SCR 453; *Calcutta Corporation v. Director of Rationing,* AIR 1955 Cal 282; *Chatturbhuj v. Moreshwar,* AIR 1954 SC 236 : 1954 SCR 817; *Bihar v. Abdul Majid,* AIR 1954 SC 245 : 1954 SCR 786; *Bombay v. Chhaganlal,* AIR 1955 Bom 1; *Srinivas v. Narayan,* AIR 1954 SC 379 : (1955) 1 SCR 1; *Radharani v. Sisir Kumar,* AIR 1953 Cal 524.
89. *Supra,* note 87. Also, *supra,* Ch. XXXVI, Sec. C.
90. AIR 1947 FC 23.
91. AIR 1948 PC 121.
92. AIR 1967 SC 997 : (1967) 2 SCR 170, *infra,* Sec. H.
93. 73 I.A. 271; see, *infra,* next Section.

As regards the extent of government liability, the Article declares that the Government of India, or of a State, may be sued "in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces, or the corresponding Indian States might have sued or been sued", if the Constitution had not been enacted. This, however, is subject to any law made by Parliament or a State Legislature.

Under this provision, the liability of the Centre or a State is co-terminous with that of the Dominion of India, or a Province, before the Constitution. Under S. 176 of the Government of India Act, 1935, this liability was co-extensive with that of the Secretary of State for India under S. 32 of the Government of India Act, 1915. The Act of 1915, in turn made it co-extensive with that of the East India Company prior to the Government of India Act, 1858. S. 95 the Act of 1858, declared that all persons would have and take the same suits, remedies and proceedings against the Secretary of State in Council for India as they could have against the East India Company.

The consequence of the above provisions is that in order to understand the extent of the present-day liability of a Government in India, it becomes necessary to know the extent to which the Company was liable before 1858.

To start with, the Company was purely a mercantile body. Gradually, it acquired territories in India and also the sovereign powers to make war and peace and raise armies.[94] As it was an autonomous corporation, having an existence of its own, and bearing no relationship of servant or agent to the British Crown, the immunity enjoyed by the Crown was never extended to it.[95]

H. STATUTORY LIMITATIONS ON STATE LIABILITY

A reference to Art. 300 shows that it is open to Parliament or a State Legislature to enact a law giving a right to sue in favour of, or against, the Government in a case in which such a right does not exist, or taking away or restricting an existing right to sue.

A number of statutes expressly enact provisions to immunize the Government from any liability thereunder. The list of such Acts is too long to be given here, but the modern tendency of the Government is to immunize itself through statutory formulae.

A formula of very common occurrence in the present day statutes is: "No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done under this Act." This formula does not, however, protect an *ultra vires* act from being challenged in a Court.[96] Even damages may be awarded against the Government for an act which is *mala fide* and an abuse of power and causes injury to an individual.[97]

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94. M.P. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 1—172 .

95. WADE & PHILLIPS, *CONSTITUTION LAW*, 623 et. seq. (1977).

96. *Union of India v. Ayed Ram,* AIR 1958 Pat 439; *Kamala Mills v. State of Bombay,* AIR 1965 SC 1942 : (1966) 1 SCR 64; *Bharat Kala Bhandar v. Dhamangaon Municipality,* AIR 1966 SC 249 : (1965) 3 SCR 499; *Dhulabhai v. State of Madhya Pradesh,* AIR 1969 SC 78 : (1968) 3 SCR 662.

97. *Prem Lal v. U.P. Government,* AIR 1962 All 233; *Bhiwandi Municipality v. K.S. Works,* AIR 1975 SC 529 : (1974) 2 SCC 596; *S.I. Syndicate v. Union of India,* AIR 1975 SC 460.

Rice was procured under an order passed under the Essential Commodities Act. The order was later found to be *ultra vires*. The Act contains the immunity clause mentioned above. Nevertheless, the High Court ruled that the Government must make good the loss caused to the concerned person as he was made to supply rice at less than the market price without legal authority. No question of good faith arises in the situation. The clause in question can protect only legal orders.[1]

An interesting question which has arisen in Independent India has been whether a statute would bind the State without expressly saying so. The Supreme Court discussed this question first in *Director of Rationing and Distribution v. Corporation of Calcutta*.[2]

Section 386(1)(*a*) of the Calcutta Municipal Act prohibited any person from storing rice, flour, etc., in any premises without a licence granted by the corporation. The Director of Rationing, West Bengal Government, was prosecuted by the corporation for storing foodgrains without obtaining a licence from the corporation. The question was whether the Government was bound by the said provision.?

In Britain, the maxim "King can do no wrong" operates. One of the results of this maxim is that the King is not bound by a statute unless he is expressly named, or unless he is bound by necessary implication, or unless the statute, being for the public good, it would be absurd to exclude the King from its purview.[3]

That was the law accepted in India also before independence and the arrival of the new Constitution, as was authoritatively laid down by the Privy Council in *Province of Bombay v. Municipal Corporation.*[4] The main question for consideration in the *Director of Rationing* case was whether this rule based on the concept of monarchy could still apply in the Republican India which had no monarchy. The Supreme Court ruled by a majority that the old rule continued to be valid for several reasons, *viz*.:

(i) There were no words in the Constitution to support the proposition that the position changed after the Republican form of Government had been ushered in by the Constitution.

(ii) The immunity of the Government from the operation of certain statutes and, particularly, statutes creating offences, was based upon the fundamental concept that the Government or its officers could not be a party to committing a crime—analogous to the 'prerogative of perfection' that the King can do no wrong—and had been adopted as a rule of statutory interpretation in India on the ground of public policy.

(iii) The rule was not peculiar to a monarchical system but applied even to a republican system such as that in the U.S.A.[5]

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1. *State of Gujarat v. Janta Pauva Factory*, AIR 1983 Guj 64.
2. AIR 1960 SC 1355 : (1961) 1 SCR 158.
3. STREET, *GOVERNMENTAL LIABILITY*, Ch VI.
4. 73 I.A. 271.
Also see, *Corporation of Calcutta v. Sub-postmaster, Dharamatala*, 54 CWN 429, in which this rule was followed. But in *State of Punjab v. Buyers Syndicate*, AIR 1958 Punj 456, the Punjab High Court did not follow this rule.
5. *U.S. v. United Mine Workers of America*, 91 L E d 884; *U.S. v. Reginald P. Wittek*, 93 L Ed 1406; *Jess Larson v. Domestic and Foreign Commerce Corp*., 93 L Ed 1628.

(iv) All pre-Constitution laws had been continued by Article 372.[6]

Accordingly, the rule of statutory interpretation that the State was not bound by a statute unless it was so provided in express terms, or by necessary implication, was still good law. Therefore, the Court held that the Director of Rationing could not be prosecuted as there was nothing in the statutory provision in question to suggest that the Government was bound by it by necessary implication.

The rule laid down in the *Rationing* case[7] was often criticised on the ground that it was difficult to apply[8] and was socially and politically objectionable.[9] The Law Commission suggested the adoption of the rule that the State would be bound by a statute in the absence of express words or necessary implication to the contrary.[10] The Supreme Court got another opportunity to review its earlier ruling in *Superintendent and Legal Remembrancer, State of West Bengal v. Corp. of Calcutta*.[11]

Under S. 218 of the Calcutta Municipal Act, 1881, every person who exercises or carries on in Calcutta any trade has to take out a license and pay the prescribed fees to the Corporation. The State of West Bengal was carrying on the trade of a daily market without obtaining a licence from the Corporation as was required under S. 218. The question arose whether the State was bound to take out a licence under S. 218.? The Supreme Court differing from its earlier ruling in the *Director of Rationing* case now held by a majority of 8 to 1 that the rule that the State would not be bound by a law unless expressly mentioned or by necessary implication was only a rule of construction and not a part of the substantive law and was not continued after the new Constitution. Art. 372 continued only the substantive law and not the norms of interpretation.[12]

The Court refused to apply the rule in the new context as there was no Crown in India. The archaic rule based on the prerogative of the Crown had no relevance to a democratic republic; it was inconsistent with the rule of law based on the doctrine of equality,[13] and it introduced conflicts and discrimination. Accordingly, S. 218 was held to bind the State of West Bengal as well. Thus, the rule was laid down that an Act would apply to citizens as well as the State unless it expressly or by necessary implication excepted the State from its operation.

The Supreme Court followed this ruling in *Union of India v. Jubbi.*[14] The Court held that the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953, would bind every landlord whether an individual or the Government. The Court pointed out that the Act sought to free the tenants of landlordism and ensure to them security of tenure. That being the paramount object of the legislature, it was hardly likely that it would make any discrimination between the State and the citizen in the matter of application of the Act. There was

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6. *Supra*, Sec. F.
7. The Court again followed the rule in *State of Punjab v. O.G.B. Syndicate Ltd.,* AIR 1964 SC 669 : (1964) 5 SCR 387.
8. GLANVILLE WILLIAMS, *CROWN PROCEEDINGS*, 49, 53.
9. FRIEDMAN, *LAW AND SOCIAL CHANGE*, Ch 12.
10. *FIRST REPORT*, 29-30.
11. AIR 1967 SC 997 : (1967) 2 SCR 170.
12. *Supra*, Sec. F.
13. *Supra*, Ch. XXI.
14. AIR 1968 SC 360 : (1968) 1 SCR 447.

nothing in the Act to indicate that the State was exempt from its purview. Thus, the claim of the respondent, a tenant of the Union Government, that he had acquired proprietary rights in the land under the Act in question was sustained.