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preclude detailed legislative prescriptions, [16] broad delegation tends to be sustained. In the instant case the management of many complicated aspects of the public service is involved. The rights of public servants in regard to security of tenure are in certain matters safeguarded by Article 311(2) of the Constitution. While it is true that the reputation and future welfare of the person involved are deeply affected by a dismissal proceeding, it would be scarcely feasible to enact substantive limitations in the governing statutes. To strike down such regulatory provision made by the executive authority would be unrealistic and harmful. The Supreme Court, therefore, seems to have exercised a sound judgment, even if it has failed to find a logically satisfactory ground upon which to rest it.

P. L. R.

Director of Rationing v. Corporation of Calcutta [1]: Governmental immunity from the operation of penal statutes.

A question that has often confronted the legal world is whether a State is bound by its own statute unless it is expressly or by necessary implication excluded, or whether it is excluded from the operation of a statute unless the statute expressly or by necessary implication bound it. The Supreme Court of India was invited to answer this question in *Director of Rationing* v. *Corporation of Calcutta* [1].

The relevant facts were these :

The respondent, the Corporation of Calcutta made an application for summons under Sec. 488 of Bengal Act III of 1923, which was substituted by West Bengal Act XXXIII of 1951, against the appellant, the Director of Rationing and Distribution, representing the department of the Government of West Bengal. The offence complained of was the using of certain premises within the limits of the Calcutta Corporation for storing rice without obtaining a licence from the Corporation of

16. *Mckinley* v. *U.S.* (1919) 249 U.S. 397; *Yakus* v. *U.S.* (1944) 321 U.S. 414; *Bowles* v. *Willingham* (1944) 321 U.S. 503; *St. Louis, I.M. & S.R. Co.* v. *Taylor* (1908) 210 U.S. 281; *Fahey* v. *Mallonee* (1947) 332 U.S. 245; cf. The Indian Supreme Court's decision in *Pannalal Binjraj* v. *Union of India* (A.I.R. 1957 S.C. 397). Here Section 5 (7A) of The Indian Income-tax Act, which authorises The Central Board of Revenue to transfer a case from any one Income-tax Officer to another in India, was challenged on the ground that it invested the executive with unguided arbitrary power. Bhagwati J. for the court held the provision valid not because he read any policy into it but because it was necessary in the interests of "administrative convenience."

1. [1961] I S.C.J. 406.

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Calcutta as required by Sec. 386 of the *Calcutta Municipal Act*, 1923.[2] In storing the rice, the appellant had acted in his official capacity under the West Bengal Government Rationing Scheme.

The trial magistrate relying upon a decision of the Calcutta High Court in the case of *Corporation of Calcutta* v. *Sub-Postmaster, Dharmatala Post Office*[3] held that the provisions of Sec. 386 neither in terms nor by necessary implication bound the Government and acquitted the accused.

On appeal, a Division Bench of the Calcutta High Court (Guha Ray J. delivering the judgment) held that the decision in *Corporation of Calcutta* v. *Sub Post-Master*[4] was distinguishable as one decided before the Constitution of India. The learned judge pointed out that the decision of the Madras High Court in *Bell* v. *The Municipal Commissioners for the City of Madras*[5] which laid down that the State was bound by a statute unless it was excluded from its operation either expressly or by necessary implication, was more in consonance with the law in India, after 1950. The Court, therefore, came to the conclusion that Sec. 386 of the Act bound the State. It set aside the order of acquittal and sent the case back to the trial magistrate for disposal according to law. Thereupon the case was brought to the Supreme Court on special leave to appeal under Art. 136 of the Constitution.

Before the Supreme Court the question for determination was whether the appellant (Director of Rationing) had committed any offence by not taking out a licence before storing rice in the premises No. 259, Chitpur Road, Calcutta. The appellant contended that the law in India both before and after the Constitution was that the State was not bound by a statute unless it was bound expressly or by necessary implication. He further contended that the Act in question did not make any express provision binding the Government and there was nothing in the Act to show a necessary implication to the contrary. He,

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2. Sec. 386(1): "No person shall use or permit to be used any permises for any of the following purposes without or otherwise than in conformity with the terms of a licence granted by the Corporation in this behalf, namely, (a) any of the purposes specified in schedule XIX".
3. (1948) 54 C.W.N. 429 followed the decision in *Province of Bombay* v. *Municipal Corporation*, L.R. 73 I.A. 271.
4. 54 C.W.N. 429. In the last but one paragraph of the judgment of the High Court (R. P. Mookerjee and K. C. Gupta JJ.), the learned judges have stated that had they not been bound (as they felt) by a Privy Council judgment, they would have arrived at a different conclusion: 54 C.W.N. 429 at 434.
5. (1902) I.L.R. 25 Mad. 457.

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in other words, asserted that the Act could operate with reasonable efficacy without being held to be binding on the Government.

On the other hand the respondent contended that under the Constitution as recognized by Art. 300 a State is a legal person subject to rights and duties like any other person and that the State is bound by a statute unless expressly excluded and that such exemption could not be implied at all and secondly, that since the commencement of the Republican Constitution there being no Crown to which prerogatives could be attributed the argument based on prerogative was inapplicable. Any exemption from the operation of the statute must be expressly spelt out in the statute and could not be implied therefrom. Alternatively it was argued that when the State embarked upon a business, it did so not in its sovereign capacity, but as a legal person, subject to the same rights and liabilities as any other person. Finally it was urged that in this particular case the circumstances showed a necessary implication for the exclusion of the presumption in favour of the non-applicability of statutes to the State.

Chief Justice Sinha, delivering the judgment, observed that it was a well established rule in English Common Law that the King was not bound by a statute unless he was expressly named or unless he was bound by necessary implication or unless, the statute being for the public good, it would be absurd to exclude the King from it. According to the learned Chief Justice, whatever might have been the historical origin of the rule, it had been adopted in our country on grounds of public policy as a rule of interpretation of statutes. The learned Chief Justice also referred to various American decisions [6] to show that the rule was not peculiar to a monarchical form of government.

Sarkar, J., in a separate judgment after quoting learned writers and leading decisions [7] also came to the conclusion that the English rule that "the Crown is not bound by the provisions of any statute unless

6. *United States of America* v. *United Mine Workers of America*, 91 L. Ed. 884; *United States of America* v. *Reginald P. Wittek*, 93 L. Ed. 1406; *Jess Larson* v. *Domestic and Foreign Commerce Corporation*, 93 L. Ed 1628.

7. *Craies on Statutes* (5th Ed.) page 392; *Attorney-General* v. *Donaldson*, (1842) 10 M & W 117, 123; *Roberts* v. *Ahern*, (1904) 1 C. L.R. 406, *United States* v. *United Mine Workers of America*, 91 L. Ed. 884, 902, *United States* v. *The State of California*, 80 L. Ed. 567, 574, *Bell* v. *The Municipal Commissioners for the City of Madras*, (1902) L.R. 25 Mad. 45. *Mersey Docks* v. *Cameron*, 11 H.L.C. 443, 508; *Coomber* v. *Justice of Berks*, (1883) 9 A. C. 61, *Cooper* v. *Hawkins*, L.R. (1904) 2 K.B. 164.

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it is directly or by necessary implication referred to applied to India even after the commencement of the Constitution, as it was really a rule of construction of statutes and was not dependent on royal prerogatives".

Wanchoo, J., on the other hand, differed in his reasoning from the learned Chief Justice and Sarkar, J., but came to the same conclusion. According to the rule of construction based on the royal prerogative which was a survival of the medieval theory of the divine right of Kings based on the concept that the sovereign was absolutely perfect resulting in the maxim that "the King can do no wrong" was today inapplicable to India. He pointed out that in course of time this royal prerogative was curtailed and limited even in England. He further stated that the English common law as such was never applied in India except in the territories covered by the original side of the three chartered High Courts, namely, Calcutta, Bombay and Madras. After India became a democratic Republic where Rule of Law prevailed, to apply to Indian statutes a construction based on the Royal prerogative as known to the common law of England would be, according to Mr. Justice Wanchoo, doing violence to the ordinary principle of construction of statutes. He also examined the American cases [8] and came to the conclusion that it was not correct to state it as a settled rule of construction in the United States that State was not bound by a statute unless it was so bound expressly or by necessary implication. Following this reasoning, the learned judge came to the conclusion that in India after independence the State, whether the Union Government or the federal unit, was bound by the law unless there was an express exemption or an exemption by necessary implication. But the learned judge found in the circumstances of the case a necessary implication that the statute was not applicable. The sanction for the violation of this provision of the statute was a fine, but according to him, to fine the State was meaningless because it was like the right hand paying to the left. As a result he allowed the appeal.

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8. *United States of America* v. *United Mine Workers of America, etc.*, 91 L.Ed. 884; *United States of America* v. *Reginald P. Wittek*, 93 L.Ed. 1406; *Jess Larson* v. *Domestic and Foreign Commerce Corporation*, 93 L.Ed. 1628, *H. Snowden Marshal* v. *People of the State of New York*, 65 L. Ed. 315; *Guaranty Trust Company of New York* v. *U.S.A.*, 82 L. Ed. 1229. This case thus brings out clearly the danger in making too easy quotations from foreign law reports without carefully examining the facts to which the foreign courts applied the law. This reviewer agrees with Wanchoo, J., in the interpretation of the American decisions.

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It is difficult to subscribe to the reasoning adopted and decision given by the Supreme Court in this case. On the whole the reasoning adopted by Wanchoo, J., seems to be more in tune with modern jurisprudence and political concepts than the reasoning adopted by the learned Chief Justice and Sarkar, J. But it is the more funortunate that he who demolished the greater obstacles involved in the reasonings of his brethren should have fallen before a lesser one and that too self-created!

It is generally admitted today on all hands that the so-called rule of construction in favour of immunity of states from the operation of statutes which had its origin in the medieval theory of divine right of kings is not appropriate to modern jurisprudence. It also must be admitted that with the release of progressive forces in society the concept of royal prerogative has undergone considerable changes.

> As a learned writer has observed [9]: "With the great extension in the activities of the state and the number of servants employed by it, and with the modern idea expressed in the Crown Proceedings Act that the State should be accountable in wide measure to the law, the presumption should be that a statute binds the Crown rather than it does not".

When the legal position in the United States is examined it is difficult to come to a clear conclusion (as the learned Chief Justice has come to) that there is a settled rule of construction in that country that a statute does not bind the State unless it is provided expressly or by necessary implication. An important case relied upon by the learned Chief Justice as well as Sarkar, J., is *United States of America* v. *United Mine Workers*. It is true that in this case in the judgment of Vinson, C. J., we find [10] that "there is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect". But it seems that the true reason for the judgment in that case was not his rule of construction to which a passing reference was made but the fact that on a careful consideration of the words of the statute the court came to the conclusion that the United States was not bound. Similarly, in *United States of America* v. *Reginald P. Wittek* [11] (cited by Sinha, C.J.) the Supreme Court did say that a general statute imposing

9. Glanville Williams, *Crown Proceedings*, p. 53. Cf. *Halsbury's Laws of England*, 3rd Ed. Vol. 7, p. 223, f.n.(s) *Attorney-General* v. *De. Keyser's Royal Hotel* [1920] A.C. 508, Bell, *Crown Proceedings*, p. 24.
10. 91 L. Ed. 884, 902.
11. 93 L. Ed. 1406

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restrictions does not impose them upon the Government itself without a clear expression or implication to that effect, but this decision was based mainly on the terms, the surrounding circumstances and the legislative history of the statute concerned. Again, Sarkar, J. has relied upon *United States* v. *California* [12] but with great respect to the learned judge it may be submitted that this case does not warrant the conclusion which the learned judge has drawn from it. In that case Mr. Justice Stone, while delivering the opinion of the court observed, [13] "Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. We can perceive no reason for extending it so as to exempt a business carried on by a State from the otherwise applicable provisions of an act of Congress, all embracing in scope and national in its purpose, which is capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial".

We find in *Green* v. *United States*, [14] that Mr. Justice Bradley, delivering the opinion of the court, observed as follows:

> "It is urged that the Government is not bound by a law unless expressly named. We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions".

Again in *State of Ohio* v. *Guy T.H. Helvering*, [15] Mr. Justice Sutherland, delivering the opinion of the court, observed: [16]

> "Whenever a state engages in a business of a private nature it exercises non-Governmental functions, and the business though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress."

Similarly in *Snowden Marshal* v. *People of the State of New York*, [17] it was observed: "whether the priority enjoyed by the State of New

12. (1935) 80 L. Ed. 567.
13. *Ibid.* p. 574.
14. 19 L. Ed. 806, 807.
15. 78 L. Ed. 1307
16 *Ibid.* p. 1309.
17. 65 L. Ed. 317.

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York is a prerogative right or merely a rule of administration is a matter of local law". In the light of the above American judicial opinions one finds no reason to disagree with the following conclusions of an American writer on the point :

> "But in this country generally I should doubt whether this construction could be safely assumed as a general rule. The English precedents are based on the old feudal ideas of royal dignity and prerogative ; and where the terms of an act are sweeping and universal I see no good reason for excluding the Government, if not specially named, merely because it is Government." [18]

Even if the American rule is supposed to be in favour of the immunity of the State that is no reason why the Indian Supreme Court felt itself bound to import this doctrine unless it could be supported on sound reasoning and public policy. Undoubtedly our economic and social conditions are different from those of the United States. Ours as evidenced especially by the Directive Principles of State Policy is a socialistic pattern of society where the state has been taking over increasing part in the social and economic life of the community. Immunization of the State from liability in a society where the State is the greatest manufacturer and trader may be fraught with grave consequences.

Even before the Constitution came into force in our country in *Bell* v. *The Municipal Commissioner for the City of Madras*, [19] Bhashyam Ayyangar, J., observed: " the extent to which decisions in English Courts passed with reference to statutes of Parliament and the prerogatives of the Crown under the English law, will be a safe guide to the interpretation of Acts passed by the Indian Legislature and the prerogatives of the Crown in India will depend very much upon the policy and course of Indian legislation ".[20]

The learned judge continued : " Turning now to policy and course of Indian legislation which, I may say, for upwards of fifty years has been under direction and control of some of the most eminent English jurists and Parliamentary draftsmen—not to say that some of the more important measures were actually drafted and settled by eminent English Judges before being introduced into the Indian Legislative Council—it is noteworthy that as a general rule Government is specially excluded, whenever the legislature considered that certain provisions of an enactment should not bind the Government ".[21] This fact would be clear

18. Sedgwick, *Construction of Statutory and Constitutional Laws*, p. 27.
19. I.L.R. 25 Mad. 457.
20. *Ibid.* p. 473.
21. *Ibid.* p. 495.

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from a perusal of the provisions of some earlier enactments like the Indian Contract Act, 1872, Specific Relief Act, 1877 s. 9 Civil Procedure Code, Indian Registration Act, 1908, s. 90 etc.

Even if there were any justification to retain the English rule of the immunity of the State before the Constitution came into force, there is no such justification after India has become a Sovereign Democratic Republic. In this connection, the following words of Justice Wanchoo deserve notice: " In our country, the Rule of Law prevails and our Constitution has guaranteed it by the provisions contained in Part III thereof as well as by other provisions in other parts.[22] It is to my mind inherent in the conception of the Rule of Law that the State, no less than its citizens and others, is bound by the laws of the land. When the King as the embodiment of all power—executive, legislative and judicial—has disappeared and in our Republican Constitution, sovereign power has been distributed among various organs created thereby, it seems to me that there is neither justification nor necessity for continuing the rule of construction based on the Royal Prerogative ".[23]

In view of all that has been said above, it is quite proper to subscribe to the view of Mr. Justice Wanchoo that the proper rule of construction which should now be applied is that the Government, whether the Centre or the State, is bound by a statute unless it is exempted expressly or by necessary implication.

But even Wanchoo, J., has not carried his reasoning to its logical conclusion. For after taking all the pains to show that the State is not immune from the ordinary principle of construction that " no one is exempt from the operation of a statute unless the statute expressly grants the permission, or the exemption arises [24] by necessary implication " the learned judge comes to the conclusion that there is a necessary implication that the State in India is exempt from the penal provisions of statutes. One can understand why, it is not possible to imprison the state, but one cannot appreciate why the state should not be condemned to pay a fine when that is the relevant penal sanction. If one department of the Government can take rent or such other fees from another department, if one public corporation can be subjected to financial liability to another public corporation there is no reason why one department of the state should not be made to pay a fine to another department. Moreover, pecuniary considerations like enriching

22. See *Virendra Singh & Ors.* v. *The State of Uttar Pradesh*, [1955] 1 S.C.R. 415.
23. [1961] S.C.J. at 418.
24. [1961] S.C.J. at 420.

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or depleting the public treasury can hardly be the object of such public health and conservancy legislation as was the subject-matter of litigation in this case. The deterrent aspect has to be predominant in providing sanctions for the enforcement of such legislation and fine, in this respect, is a very proper penal sanction. In this connection the following observations of Friedmann [25] are worth quoting :

> "At a time when Government departments and many independent corporations, directly or indirectly controlled by the Government, assume an increasing variety of functions and responsibilities in the social and economic life of nations, the exemption of either Government or Government Corporations from criminal liability generally is neither morally nor technically justified. As we have seen the main purpose of a fine is not primarily to hurt the defendant financially. It is to attach a stigma pronounced by independent law courts – on the breach of legal obligations which have been imposed in the interest of the community. If a modern giant industrial concern is fined for a statutory offence, this does not normally hurt an individual. But an accumulation of such convictions will deservedly impair the standing and reputation of such a concern."

Moreover, a perusal of the Calcutta Municipal Act makes it clear that the object of the provisions were not merely to control of cereals but also to provide for better and healthy storing of certain commodities. Section 386(1) (a) of the Calcutta Municipal Corporation Act, 1923,(s. 437 of the 1951) Act is as follows : "No person shall use or permit (or suffer) to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a licence granted by the Commissioner in this behalf namely purposes specified in Schedule XVIII."

Now, Schedule XVIII speaks of "storing, packing, pressing, cleaning, preparing or manufacturing, by any process whatever, any of the following articles in excess of the quantity prescribed for each such article by the Corporation in this behalf.....". The Schedule thereafter mentions a large number of commodities like grain, flour, rice, hemp, hides, soap, varnish, wool, waste paper, tar, sulphur, molasses, gun powder, etc. It is clear that one of the objects of the Act was the preservation of public health and protection against fire and similar accidents. It would be defeating the very purpose of such an Act if Government is excluded from its operation at a time when the Government may well be the greatest dealer or storer. If rice is stored in an

25. Friedmann, *Law in a Changing Society*, p. 197.

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insanitary place whether by a poor Calcutta trader or by the West Bengal Government or by the United Nations, the beubonic plague bascillae cannot distinguish the difference. If sulphur is stored in a dangerous way, fire will not pick and choose between Government stores and the humble ones which are not covered by the sovereign immunity. Unfortunately nobody argued this point. Discussion reached only up to the stage of food adulteration and Sarkar, J., found an answer to that argument. [26] But it is suggested that this aspect of the matter was the substance of the case. Sinha, C. J., says that this matter was not shown to him, [27] Sarkar, J., answers both points that were raised and which had some reference to it, [28] while Wanchoo, J., bypassed it.

If a department of Government violates a law to which a fine is attached as sanction and the responsible officer is duly punished by imposition of a fine, no matter what the amount of the fine is, it would amount to a censure on the officer concerned and would have not only deterrent effects on future offenders but also reformative effect on the very officer who indulged in such act.

It is presumably for this reason that the Madras High Court in *Bell's* case [29] upheld the imposition of the nominal fine of Re. 1/-.

S. B. P.

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26. *Cf.* [1961] S.C.J. at p. 416 para 1.
27. [1961] S.C.J. at 412, para 2.
28. *Viz.* (1) that since the Act under discussion had many provisions which expressly exempted the Governments the implication is that whenever there was no express exclusion the Government was also bound and (ii) the purpose of the Act was to prevent adulteration of foodstuffs and this object would be wholly defeated unless the Government was bound by it. Sec. [1961] S.C.J. 415-416.
29. *Bell* v. *The Municipal Commissioner for the City of Madras*, I.L.R. 25 Madras 475.

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