



**LAW COMMISSION
OF INDIA**

FORTY-SEVENTH REPORT

ON

**THE TRIAL AND PUNISHMENT OF
SOCIAL AND ECONOMIC OFFENCES**

**GOVERNMENT OF INDIA
MINISTRY OF LAW AND JUSTICE**

No.F.1(5)/71-L.C.

P.B. Gajendragadkar,

Shastri Bhavan,

New Delhi-1.

Dated 28th February, 1972.

My dear Minister,

I am forwarding herewith the Forty-seventh Report of the Law Commission on the trial and punishment of social and economic offences.

Yours sincerely,

(P.B. GAJENDRAGADKAR)

Hon'ble Shri H.R. Gokhale,

Minister of Law & Justice,

Government of India,

New Delhi.

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REPORT ON THE TRIAL AND PUNISHMENT OF SOCIAL AND ECONOMIC OFFENCES

CHAPTER 1

INTRODUCTORY

1.1. This Report deals with the question of effective implementation of the material provisions of certain Acts. These offences may briefly be described as social and economic offences. The broad question which has been referred to the Commission can be thus stated¹—

Reference
to the
Commis-
sion.

“The Government of India had under consideration the question of effectively dealing with certain anti-social and economic offences. There are certain special Acts intended for the benefit of general public and the offences under such Acts are anti-social in nature. There are special legislations as Essential Commodities Act, Prevention of Food Adulteration Act, Drugs (control) Act, Imports & Exports (control) Act, Foreign Exchange Regulation Act, etc. These anti-social offences also extend to deliberate evasion of taxes and the question that arises for consideration is how drastically and swiftly penal action can be taken to prove a deterrent against commission of such offences. The present trend of legislation and also the judicial approach to such offences appears to be that these offences are treated lightly and the punishments are not adequate having regard to the gravity of such offences. The Government of India would like to have a well-considered opinion of the law Commission as regards desirability of dealing with adequately and swiftly such anti-social and economic offences.”

1.2. This Report accordingly concerns itself with the question of dealing adequately and swiftly with those offences. As we point out in a later chapter², we thought it necessary to widen the scope of our inquiry by including within its purview questions about investigation, prosecution, trial and punishment in respect of proceedings taken under these Acts. We wish to make it clear that we are not dealing with contents or structure of these Acts.

Scope of
the Report.

1.3. It may be stated here that the question whether social and economic offences should be included in the Indian Penal Code has been considered at length in a Report of one of the

Previous
Report.

1. Letter of the Minister of Law and Justice dated 4th October, 1971 to the Chairman, Law Commission.

2, Para. 2.1, *infra*.

earlier Law Commissions¹, and it is outside the scope of this Report.

Social and economic offences.

1.4. By now, the concept of anti-social acts and economic offences has become familiar to those acquainted with the progress of the criminal law and its relationship to the achievement of social objectives. Still, it may not be out of place to draw attention to some of the salient features of these offences.

Briefly, these may be thus summarised :—

(1) *Motive* of the criminal is avarice or rapaciousness (not lust or hate).

(2) *Background* of the crime is non-emotional (unlike murder, rape, defamation etc.). There is no emotional reaction as between the victim and the offender.

(3) *The Victim* is usually the State or a section of the public, particularly the consuming public (*i.e.* that portion of the which consumes goods or services, buys shares or securities or other intangibles). Even where there is an individual victim, the more important element of the offence is harm to society.

(4) Mode of operation of the offender is *fraud*, not force.

(5) Usually, the act is deliberate and wilful.

(6) Interest protected is two-fold—

(a) Social interest in the *preservation of*—

(i) the property or wealth or health of its individual members, and national resources, and

(ii) the general *economic system* as a whole, from

(i) exploitation, or

(ii) waste by individuals or groups.

(b) social interest in the *augmentation* of the wealth of the country by enforcing the laws relating to taxes and duties, foreign exchange, foreign commerce, industries and the like.

Offences without individual victims.

1.5. The most important feature of these offences is the fact that ordinarily they do not involve an individual direct victim but are punished because they harm the whole society. This constitutes the primary reason why special efforts have to be made to enforce them. If a man or woman is robbed, assaulted or cheated, there is some person who is interested in getting the offender prosecuted, and because the act is a physical one.

1. 29th Report of the Law Commission (Social and economic offences).

having an immediate and direct impact, both individual and social vengeance are likely to be aroused. This element is, however absent when, for example essential commodities are hoarded, or foreign exchange is illegally taken out of the country or prohibited goods are imported. No doubt, some social offences do involve a 'victim'. For example, when adulterated food is sold, the immediate consumer is harmed. But the criminal act is potentially capable of harming a large number of persons and that is the principal object behind punishing it.

It is not, of course, suggested that offences falling within the general criminal law are not to be regarded as anti-social acts; and in a sense every crime is anti-social because the State, when it prosecutes, does so on behalf of the society. What is intended to be emphasised is, that the injury to society predominates in the case of some acts, while it may be in the case of others.

1.6. The Law Commission had, in an earlier Report¹, occasion to deal with the following categories of offences, while considering the question whether provisions as to social and economic offences should be transferred to the Penal Code:—

Categories of social and economic offences.

- (1) Offences calculated to prevent or obstruct the economic development of the country and endanger its economic health.
- (2) Evasion of taxes .
- (3) Misuse of position by public servants.
- (4) Offences in the nature of breaches of contracts, resulting in the delivery of goods not according to specifications.
- (5) Hoarding and Black-marketing.
- (6) Adulteration of food and drugs.
- (7) Theft and Misappropriation of public property and funds.
- (8) Trafficking in licences, permits etc.

For the purposes of the present Report also, it is not necessary to go beyond the above offences. In fact, some of the categories mentioned above—*e.g.* categories (3), (4), (7) and (8)—do not present problems of enforcement with much frequency and seriousness so as to require much attention.

1.7. It is well known that while most of the offences under the Penal Code rule out absolute liability, the same is not true of many offences under the special laws. Considerations of the need of enforcement have led to the creation of absolute

Offences of strict liability.

1. 29th Report of the Law Commission.

liability. Some of the acts punishable under special laws may be regarded as "public welfare offences", "regulatory offences" or "civil offences", while some of the acts can be regarded as akin to traditional crimes.

White-collar crimes.

1.8. Another aspect to which attention can be usefully drawn is that many—but not all—of the offences in question are "white-collar crimes". Without entering into details of the definition of "white-collar crime", one may, for the purpose of the present Report, describe it as a crime committed in the course of one's occupation by a member of the upper class of society. A manufacturer of drugs who deliberately supplies sub-standard drugs is, for example, a white collar criminal. So is a big corporation guilty of fraudulent evasion of tax. A person who illegally smuggles (for his personal use) costly television sets, is not a white collar criminal in the above sense, there being no connection between his occupation and the crime committed by him. Nor is a pensioner who submits a false returns of income. But all of them are guilty of social or economic offences. In short, social offences are offences which affect the health or material welfare of the community as a whole, and not merely of the individual victim. Similarly, economic offences are those which affect the country's economy, and not merely the wealth of an individual victim.

Socio-economic offences form intersecting circle with white collar crimes and offences of absolute liability.

1.9. Socio-economic offences and white-collar crimes could thus be intersecting circles.¹ Again, socio-economic offences and crimes of strict liability also could be represented by intersecting circles.

Special features of economic crimes.

1.10. The importance of suppressing social and economic crimes in any modern society is obvious. The transition from a rural and simple society to an industrialised and complex one entails regulation by or under law of activities having an economic import. The same process of transition from a simple to complex and a rural to urban society also necessitates an increasing attack on malpractices which were previously unknown, but which now emerge as a result of the process. The process gives rise to a two-fold increase in such malpractices—increase in the number of socio-economic malpractices and increase in their variety. Thus, newer forms of harmful activities not known previously—such as, unfair competition—raise their heads. And malpractices which would previously have been of a simple, recurring, monotonous type, now assume diverse and varying manifestations. Adulteration of foods and drugs is an example in point.

1. Para. 1.8, *Supra*.

1.11. This has happened in every modern society. In a developing economy, it assumes still greater importance, because conduct which, though criminal, could previously have been overlooked—e.g. petty smuggling—has now to be dealt with more seriously. Just as in war, every inch of territory has to be defended, whatever the risk, so in an economic crisis or in a massive effort to build up a society with a sound and healthy social structure, the purity of every grain has to be protected and every dot of evil has to be wiped out.

The reason why offences against laws enacted to combat such evils do not find adequate response in the social consciousness is psychological. Our minds are familiar with conventional offences like murder, rape and theft—offences where a *tangible* person or property of an individual is attacked. But it takes time to realise the seriousness of non-conventional crimes where *intangible* property, in the sense of economic resources of the *community* are involved, or where the harm caused is indirect and remote, and there is no immediate tangible object of the harm visible to the mind. Neither the offender nor the society adequately realises the harm, because of the absence of an immediate victim.

1.12. The procedure which we followed in preparing this Report was in brief, as follows :—

Procedure adopted.

After a preliminary study, we had prepared a Questionnaire on the subject, setting out the important points arising from the reference and soliciting views on those points with reference to the major Acts.¹ The questionnaire was sent out to the State Governments, Bar Associations, Faculties of Law in different Universities, commercial bodies and other interested persons and institutions. We also got prepared a draft Report on the subject. We then held oral discussions with Members of Parliament, Government officers, members of the Bar, commercial bodies academic lawyers and others interested in the subject. The discussion were held by the full Commission at Bombay and Delhi, and one of our Members (Mr. Justice V. R. Krishna Iyer) held discussions at Madras, Ernakulam and Trivandrum. Chairman discussed some aspects of the problem under our inquiry with the representatives of the Indian Chambers of Commerce and Industry at Calcutta. Thereafter, a revised draft Report was prepared and discussed. It was again discussed and revised, and finalised.

We wish to express our thanks to all those who helped us by communicating their views orally or in writing. It is not considered convenient to refer to each shade of view while discussing the various points, mainly because the Acts involved are numerous and so are the shades of opinion. But we ought to state that before formulating our conclusions, we have taken into account each of these shades of view.

As to the major Acts, see para. 2.3, *infra*.

Before we conclude this Introductory Chapter, we ought to place on record our warm appreciation of the assistance which we have received from our Secretary, Shri P. M. Bakshi. At the commencement of the inquiry, Mr. Bakshi prepared a Working Paper in which he posed the major problems which called for our decision. Then a Questionnaire was drafted and, as we have already indicated, it was widely circulated. Mr. Bakshi joined us in our discussions with all persons who helped us by meeting us, and took very comprehensive notes of the discussions. After the recording of evidence was over, we discussed the problems posed in the Working Paper, initially prepared by Mr. Bakshi, and came to provisional conclusions on the major issues involved in the inquiry. It was in the light of these conclusions that a draft was prepared by Shri Bakshi for further discussions. This draft was considered by us fully and carefully and we reached and recorded our final conclusions on the major issues (involved in the present inquiry). Then, Mr. Bakshi prepared a final draft for our consideration and acceptance. This draft was again examined by us before it was finalised.

We are conscious that some of the major recommendations we have made in our Report are radical in character and they constitute a departure from the traditional concept of criminal jurisprudence. Everyone of the recommendations made by us has, however, been carefully examined by us and the pros and cons of the problem involved have been fully scrutinised. In our view, the implementation of the recommendations we have made may go a long way in helping our country to face effectively the challenge posed by the socio-economic offences with which the Report is concerned.

Whilst we were engaged on this inquiry, the Hon'ble Minister for Law and Justice indicated to the Chairman that the Union Government would very much appreciate if the present case could be forwarded as early as possible, and, on behalf of the Commission, the Chairman had assured the Hon'ble Minister that the Commission hoped to be able to make its report by the end of February, 1972. We would like to add that we have been able to carry out our assurance mainly because of the very valuable help which Mr. Bakshi has given us.

CHAPTER 2

SCOPE OF THE INQUIRY

2.1. Before we proceed to indicate our broad approach in respect of social and economic offences, and our views as to the detailed amendments needed in the existing laws on the subject, we would like to say a few words about the scope of the present inquiry.

Introductory.

Although we started with the broad object of discussing the question of trial and punishment of the offences in question, we felt that justice could not be done to the subject without also entering into some consideration of the stages of investigation and prosecution. These stages are vitally linked up with trial. It is the material gathered during investigation that forms the basis of the prosecution. It is obvious, therefore, that defects in the law affecting the efficiency of the stages preceding trial would affect the quality of the trial.

Moreover, having regard to the importance of these offences, it appeared advisable to broaden the scope of our inquiry, so as to include steps prior to the judicial process. Accordingly, we have kept before us the entire subject of criminal process, in relation to the enforcement of the laws in question.

This has enabled us to consider various criticisms in relation to the enforcement of social and economic legislation, such as, that the investigation into the commission of such offences is not prompt or efficient; that the presentation of the case against the offender in Court is not effective; that, for lack of proper and adequate evidence, or owing to purely technical objections, convictions are often not recorded, and that, in some cases, where convictions are recorded, the sentences imposed are inadequate.

2.2. At the same time, certain limitations as to the scope of the present inquiry have also to be emphasised. These limitations flow from the fact that this Report is primarily concerned with the narrow question of dealing effectively with the specified offences through the criminal process. In the first place, therefore, questions of the content of the substantive provisions of the various Acts are outside the ambit of this Report. Secondly, since the emphasis is on the process of a criminal prosecution, an examination of the imposition of penalties by administrative adjudication has not been undertaken, except where some point of importance arose during our oral discussions and appeared to require special consideration. Thirdly, even as regards the penal provisions which properly fall within the subject-matter of the

Scope of the inquiry.

Report, we have dealt with only such matters as appeared to be of importance from the broad angle of effective implementation of the laws concerned. Therefore, the fact that we have not made recommendations for amendment in the penal provisions in certain points of detail, should not be taken as implying that they are not capable of improvement in their form or content, whether on independent considerations of merit or on considerations of uniformity.

Major Acts dealt with.

2.3. Another limitation which should be pointed out is that this Report will not go into all the Acts concerning social and economic offences. For convenience, we shall deal only with the following major Acts :—

- (1) The Central Excises and Salt Act, 1944.
- ✓(2) The Foreign Exchange Regulation Act, 1947.
- (3) The Prevention of Food Adulteration Act, 1954.
- (4) The Essential Commodities Act, 1955.
- (5) The Wealth Tax Act, 1957.
- (6) The Income-tax Act, 1961.
- (7) The Customs Act, 1962.
- (8) The Gold Control Act, 1968.

[On one or two points, we have, however, recommended amendments in some other Acts¹.]

This limitation was unavoidable if the inquiry was not to become cumbersome.

Scope of the recommendation as to direct taxation laws.

2.4. Having regard to what we state later², our recommendations in respect of the direct tax laws (Income-tax Act and Wealth Tax Act) are confined to certain points which were specially forwarded to us at Ministerial level.

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1. E.g. (a) the Imports and Exports (Control) Act, 1947;
 - (b) the Drugs Act;
 - (c) the Criminal Procedure Code;
 - (d) the Indian Penal Code;
 - (e) the Passports Act;
 - (f) the Criminal Law Amendment Act, 1952.

2. Paras. 3.35 and 3.36, *infra*.

CHAPTER 3

OUR APPROACH

3.1. We would, at this stage, like to indicate broadly the approach which we have adopted in dealing with the subject of the inquiry. Introductory.

3.2. A few general aspects of criminal law need to be adverted to at the outset.

Criminal law, though it is only a part of the system of social control, is yet an important part. Two of its aspects assume importance—

(i) it carries a special kind of stigma,

(ii) it carries a distinct range of sanctions. It is these two aspects which underlie almost all the important safeguards that are traditionally associated with criminal law.

First, as regards stigma, the word 'crime' has a symbolic meaning for the public. The criminal law is deeply imbued with the idea of stigma; labelling an act as criminal goes beyond merely ensuring effectiveness of the law.

3.3. The meaning and shades of "stigma" have varied in history. It has been stated¹ that the Greeks originated the term "stigma" to refer to bodily signs designed to expose something unusual and bad about the moral status of the signifier. "The signs were cut or burnt into the body and advertised that the bearer was a slave, a criminal, or a traitor—a blemished person, ritually polluted, to be avoided, especially in public places". (Later, in Christian times, two layers of metaphor were added to the term: the first referred to the bodily sign of holy grace that took the form of eruptive blossoms on the skin; the second, a medical allusion to this religious allusion, referred to bodily signs of physical disorder). Today, however, the term is widely used in something like the original literal sense, but is applied more to the disgrace itself than to the bodily evidence of it.

3.4. Next, as regards the sanctions, the coercive part of the law—which is reflected in the laws, 'sanctions'—finds its strongest fulfilment in the criminal law, because of the direct use of force in respect of the liberty or property of the convicted offender.

1. Erving and Goffman, *Stigma: Notes on the Management of Spoiled Identity*, (1963) (Prentice Hall, New Jersey), pages 32-39, cited in Radzinowicz and Wolfqang, *Crime and Justice*, (1971), Vol. 1, pages 25-26.

3.5. The sanctions of all laws of every kind will be found to fall under two great heads: those who disobey them may be forced to indemnify a third person either by damages or by specific performance, or they may themselves be subjected to some suffering¹.

3.6. It is the stigma and the sanctions—the likelihood of loss of reputation and suffering to the persons against whom they are put into use—which are at the basis of the safeguards² which we have referred to above.

3.7. In a modern industrialized society the regulation of human conduct by means of the criminal law extends to every phase of life³. But the ordinary principles apply whether the crime is traditional or new.

3.8. One of the illustrations of this approach of the law is the principle of *mens rea*. "The intent and the act must both concur to constitute the crime⁴."

For example, a civil action for assault would rest upon the invasion of a person's "right to live in society without being put in fear of personal harm;" and can often be sustained by proof of a negligent act resulting in unintentional injury. But an indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence⁵.

3.9. Again, since the outcome of a criminal trial may result in the defendant's loss of liberty or even life, the courts evolved a rule which casts upon the prosecution of heavy burden of proof. As has been observed⁶—"No rule of criminal law is of more importance than that which requires the prosecution to prove the accused's guilt beyond reasonable doubt. In the first place this means that it is for the prosecution to prove the defendant's guilt and not for the latter to establish his innocence; he is presumed innocent until the contrary is proved. Secondly, they must satisfy the jury of his guilt beyond reasonable doubt. In civil cases where a plaintiff sues a defendant, he who shows that on a balance of probabilities the evidence is in his favours wins the day. In criminal cases, however, the Crown cannot succeed on a mere balance of probabilities. If there is any reasonable doubt whether the accused is guilty, he must be acquitted. An acquittal therefore either means that the jury believe the accused and are satisfied of his innocence, or that,

1. Hall and Mueller, *Criminal Law and Procedure*, (1965), page 1.

2. Para. 3.2, *supra*.

3. Hall and Mueller, *Criminal Law and Procedure*, (1965), page 175.

4. Hall and Mueller, *Criminal Law and Procedure*, (1965), page 143.

5. Hall and Mueller, *Criminal Law and Procedure*, (1965), page 181.

6. Fitzgerlad, *Criminal Law and Punishment*, (1962), page 192.

while not satisfied that he is innocent, they do not feel sure of his guilt. In England, there is no middle verdict such as the Scottish verdict of 'not proven' to cover this sort of situation ; 'not guilty' is the only alternative to a conviction."

3.10. The principle of legality (*nullum crimen sine lege*), the rule for construing criminal statutes in favour of the citizen, and several other rules peculiar to criminal law furnish illustrations of this approach which, as we have said, could be, primarily, attributed to two aspects of the criminal law,—the stigma attaching to a conviction, and the suffering resulting from punishment.

3.11. Notwithstanding our awareness of the aspects of criminal law discussed above, we have thought it necessary to consider whether, in the case of social and economic offences under the major Acts, a different approach is not called for, particularly when the country is in the grip of an economic crisis, and the fruits of a hard won freedom may be lost if the foundation is not laid for economic stability.

3.12. Two very important aspects of social and economic offences have to be emphasised in this context—the gravity of the harm caused to society and the nature of the offences themselves. The gravity of the harm is not easily apparent ; but is, nevertheless, undeniable. The nature of the offences is peculiar, in the sense that they are planned and executed in secrecy by shrewd and dexterous persons with sophisticated means. The public welfare is gravely affected ; but detection is unusually difficult.

3.13. These offences, affecting as they do the health and wealth of the entire community, require to be put down with a heavy hand at a time when the country has embarked upon a gigantic process of social and economic planning. With its vastness in size, its magnitude of problems and its long history of poverty and subjugation, our Welfare State needs weapons of attack on poverty, ill nourishment, and exploitation that are sharp and effective in contrast with the weapons intended to repress other evils. The legislative armoury for fighting socio-economic crimes, therefore, should be furnished with weapons which may not be needed for fighting ordinary crimes. The damage caused by socio-economic offences to a developing society could be treated on a level different from ordinary crimes. In a sense, anti-social activities in the nature of deliberate and persistent violations of economic laws could be described as extra-hazardous activities, and it is in this light that we approach the problem.

Need for stringent action.

3.14. Since the casualty is the nation's welfare, it is these offences which really deserve the name of 'public welfare' offences.

Concept of public welfare.

Sayre's view as to 'public welfare' offences.

3.15. Long ago, Sayre¹ cited and classified a large number of cases of 'public welfare offences' and concluded that they fall roughly into subdivisions of (1) illegal sale of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sale of misbranded articles, (4) violations of antinarcotic Acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor-vehicles laws, and (8) violations of general police regulations, passed for the safety health or well-being of the community.

Need for widening the concept of public welfare offences.

3.16. The time has come when the concept of 'public welfare offences' should be given a new dimension and extended to cover activities that affect national health or wealth on a big scale. Demands of the economic prosperity of the nation have brought into being risks of a volume and variety unheard of, and if those concerned with the transactions and activities in this field were not to observe new standards of care and conduct, vital damage will be caused to the public welfare. In the field of health, for example, the wide distribution of goods has become an instrument of wide distribution of harm. When those who disperse food, drink and drugs, do not comply with the prescribed standard of quality, integrity, disclosure and care, public welfare receives a vital blow. In the economic field, again, freshly discovered sources of harm require the imposition of a higher type of precautions, without which there would be vital damage to the fabric of the country and even to its very survival.

Justification for treating social and economic offences differently from conventional crimes.

3.17. These cases do not fit neatly in the accepted categories of crimes. They represent harm of greater magnitude than the traditional crimes and of a nature different from them. Unlike the traditional crimes, they are not in the shape of positive aggressions or invasions. They may not result in direct or immediate injury; nevertheless, they create a danger which, or the probability of which, the law must seek to minimise. Whatever the intent of the violator, the injury is the same. Hence, if legislation applicable to such offences, as a matter of policy, departs from legislation applicable to ordinary crimes in respect of the traditional requirements as to *mens rea* and the other substantive matters as well as on points of procedure, the departure would, we think, be justifiable.

Hope about appeal of above approach.

3.18. We hope that our approach will appeal to and to be shared by all agencies concerned with the investigation, prosecution, trial and punishment of these offences.

Important changes.

3.19. It would, we think, be convenient if we, at this stage, indicate illustrations from some of the important recommendations which flow from the above approach.

1. Sayre, "Public Welfare Offences", 33 Col. L. Rev. 55, 73, 84, cited in *Morissette v. U.S.*, (1951) 342 U.S. 244, 262, footnote 20.

3.20. First we should refer to an important change pertaining to *mens rea*. Having regard to the considerations mentioned above, we have recommended placing the burden of disproving *mens rea* on the accused. After very careful consideration, we have come to the conclusion that the social interest in the prosecution and conviction of those guilty of anti-social acts would be protected by the amendment which we propose. At the same time, the substantive provision would not, in its formulation, be so unreasonable as to attach culpability (and, consequentially to impose punishment), where there is no intention to evade its provisions and no want of reasonable care.

Mens rea—
Burden of
proof
shifted.

3.21. Departures from the common-law tradition, mainly under statutes in the nature of police regulations were reviewed and their rationale appraised by Chief Justice Cooley¹, in these terms:—

Chief
Justice
Cooley's
observa-
tions.

“I agree that as a rule there can be no crime without a criminal intent ; but this is not by any means a universal rule. . . . Many statutes which are in the nature of police regulations, as this, impose criminal penalties irrespective of any intent of violate them ; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible.”

3.22. In the English Court of Criminal Appeal, Donovan J. had the following observations to make while dealing with the Hire-Purchase and Credit Sale Agreement (Control) Order, 1956² :—

“The object of the order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster on the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibition of acts which might increase the risk in, however, small a degree. Indeed, that would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that article I of the order should receive a literal construction and that the ruling of Diplock, J. was correct.”

3.23. Again, Chief Justice Taft, in overruling a contention that there can be no conviction on an indictment which makes

Chief
Justice
Taft's view.

1. *People v. Roby*, 52 Mich. 577, 579, 18 N.W. 365, 366 (1884) cited in *Morissette v. U.S.*, (1951) 342 U.S. 246, 257.

2. *R. v. St. Margarets Ltd. H.O.*, (1958) 2 All E.R. 289, 293 (C.C.A.).

no charge of criminal intent but alleges only making a sale of a narcotic forbidden by law, wrote¹ :

“While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it. . . ., there has been a modification of this view in respect of prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the Court. . . .”

Of course, he referred to ‘regulatory measures’ in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of crime ‘*mala in se*’. But the common element between regulatory offences (on the one hand) and the offences with which this Report is concerned (on the other hand) is that of public welfare.

Increase in maximum punishment.

3.24. Consistently, with our approach in dealing with the menace to social health and wealth posed by socio-economic offences, we are also recommending an increase in punishment for the principal offences under most of the Acts. In doing so, our main object is to give adequate expression to the social disapproval of such crimes. One of the objects of punishment is the emphatic denunciation of the crime by the community, and we believe that this denunciation could be achieved only if the gradation of punishments is so devised as to evoke in the public mind an intelligent reaction, and this in its turn would be facilitated if the scales of punishment exhibit a modicum of uniformity based on rational considerations. Too many scales and variations in the quantum of punishment lead to a failure of this object. The increase of the maximum punishments will also make the offence cognizable and non-bailable and that we regard as a welcome consequence.

Minimum punishment and appeal on the question of sentence.

3.25. There is a complaint that courts are not awarding adequate punishment for many of these offences. This complaint has taken two shapes. First, it is stated, that though imprisonment is awarded, the term awarded is not appropriate to the gravity of the crime, so that a small period (say six months) is mechanically regarded as sufficient. Secondly, it is stated, that the discretion to award fine only or to award imprisonment below the minimum, is improperly exercised, so that in a very large number of cases the offenders are let off with a fine or with a short term of imprisonment *below the minimum*. As our Report will indicate this complaint cannot be rejected as totally baseless.

1. *United States v. Balint*, 258 U.S. 250, 251-252.

3.26. Several possible alternatives could be thought of to solve this problem. For example,—

- (i) increase of the maximum punishment ;
- (ii) increase of the minimum punishment ;
- (iii) removal of the relaxing power of the court ;
- (iv) imposition of restrictions on the discretion of the court to relax without totally removing it ;
- (v) provision for appeal on the ground of inadequacy of the sentence.

We have made certain proposals in the nature of (iv) above. Further, in our view, the solution at (v) above, though it may appear to be mild, is worth trying. No doubt, even after the insertion of such a provision, appeals praying for enhancement of sentence under the amended provision may not necessarily be successful in every case. The very existence of such a provision, is however, likely to keep in check any tendency of the lower magistracy to be unduly liberal in sentencing. We are, therefore, reiterating¹ the recommendation made in this behalf by the previous Commission.

3.27. Our next important recommendation is to provide for the trial of these offences by Special Judges of a senior cadre, and it is further our intention that such cases should be assigned only to one particular Judge in an area, so that he may develop the expertise necessary for the purpose, also require familiarity with the special features of these offences. The administration and enforcement of these offences requires much more than a knowledge of general criminal law and procedure. It presupposes an acquaintance with some of the nuisance, a grasp in depth of the under-currents of the world of racketeers and other special features of organised crime.

Special courts.

3.28. Appeals from convictions by these courts should lie to the High Court². Our object is to secure the speedy disposal of the appeals, as well as to ensure uniformity in the interpretation of the relevant laws.

Appeals to lie to the High Court.

3.29. Finally, we should refer to an important recommendation which we are making, regarding preventive detention. Our advice has been sought on the question whether persons suspected of large scale smuggling of goods or violations of foreign exchange law should be brought within the Act providing for preventive detention³.

Preventive detention.

1. Para. 7.48, *infra*.

2. This is achieved once the offences are brought within the Criminal Law Amendment Act, 1952. (See section 9 of that Act).

3. The Maintenance of Internal Security Act, 1971.

3.30. While we do not regard preventive detention as in harmony with the democratic spirit, we are not unmindful of the considerations which weighed with the Constitution-makers when they authorised preventive detention—the paramount need of safeguarding certain conditions without which the country could not survive. The various topics mentioned in the specific legislative entries—such as, the defence of India, foreign affairs, security of India, security of state, maintenance of public order, and maintenance of supplies and services essential to the community—show the kind of dangers which the Constitution-makers had in mind. The common governing principle behind the specifically enumerated dangers was the survival of the nation.

3.31. That the survival of the nation may be jeopardised as much by an acute 'scarcity of essential' goods or services as by war or rebellion, is evident.

Threats to the national economy arising from a violation of the restrictions imposed in the interest of conserving foreign exchange could constitute an equally serious danger to the survival of the nation. Economic bankruptcy can pose as serious a problem as political insecurity ; it could, conceivably, be productive of distress more severe in magnitude and to a large number of persons.

3.32. We are, therefore, of the view that so long as preventive detention exists as a permissible measure for fighting certain evils, it would be justifiable to use it as a weapon against large-scale evasion of the Customs Act or the Foreign Exchange Act. There is reason to believe that smuggling on a large scale is being carried on by persons against whom, for reasons other than the inefficiency of the enforcement staff, it has not been and may not be possible to procure such evidence as would lead to a conviction in a court of law.

3.33. Accurate figures of evasion cannot, in the very nature of things, be expected, and estimates of evasion of the laws relating to customs duties and foreign exchange are bound to be imprecise. Nevertheless, having regard to the fact that raids carried on during the last two years or so have resulted in the seizure of startlingly large stocks of smuggled goods, one can reasonably imagine the violation of both customs and foreign exchange laws must be going on in an organised manner, and that, as against each case detected and proved, there must be many others which go undetected.

3.34. We should also state here that we understand from responsible officers that smuggling carried on systematically on the borders provides a respectable outpost for espionage. It would thus appear that the three sinister activities—smuggling, spying and sabotage—could be found in company with each

other. These considerations have weighed with us in recommending an amendment of the Constitution to make the position clear in this respect.

3.35. Before we conclude this chapter, we would like to mention one matter which formed the subject-matter of our discussion during the whole of this inquiry.

Desirability of detailed study pointed out.

We have already indicated¹ that the problem referred to us by the Government lay within a very narrow compass, and we decided to broaden the scope of the enquiry to some extent in order to do justice even to the narrow problem referred to us. At the end of the enquiry, we felt that time has now arrived when Government should take suitable steps to study in depth the important question of evolving one common code dealing comprehensively in one place with all social and economic offences. We venture to think that it would be useful to make a similar study in regard to different tax laws. As our report indicates, we have evolved a rule of evidence pertaining to the shifting of onus in respect of socio-economic offences, but have refrained from recommending that the said rule should be applied to the tax laws on the ground that the tax laws are far too complex and complicated and lack stability. We feel that it is necessary that a study in depth of the tax laws should be made with a view to codifying all the laws in one common code which would be simple, clear and stable. These questions however fall outside the purview of our enquiry. Nevertheless, we thought it was our duty to invite the attention of the Government to them.

3.36. It is also necessary to refer to one matter, namely, the suggestions referred to us for enhancing the penalties and punishments leviable under the tax statutes, as we felt that we ought to make some general observations. We understand that another Commission headed by Mr. K. N. Wanchoo, former Chief Justice of India, has been entrusted with the task of considering in depth and comprehensively the problem pertaining to the amendment of the provisions of the Income-tax Act, and that the said Commission has already made an exhaustive report in that behalf.

Observations as to taxation laws—Points referred to Wanchoo Commission.

The Report has not yet been published. Nevertheless, some of the questions pertaining to the effective enforcement of the penal provisions of the tax statutes, which have been referred to us in a limited form, must have been considered by the Wanchoo Commission ; and that makes our task in dealing with the problem referred to us somewhat difficult and embarrassing. However, since a reference has been made to us with regard to the suggestion to enhance the penalties and punishments under the tax statutes, we shall make our recommendations very briefly, in respect of the points for our consideration.

1. Chapter 2s, *supra*.

CHAPTER 4

MEASURES SO FAR ADOPTED

Measures
so far
adopted.

4.1. The problem of dealing effectively with social and economic offences is not a new one. From time to time, the legislature, being concerned with the need for proper enforcement of a particular enactment on the subject, has devoted its attention to the measures necessary in that connection.

Amend-
ments in
the Foreign
Exchange
Act.

4.2 Thus, in the Foreign Exchange Regulation Act, 1947 several amendments have been made from time to time dealing with the topics referred to below :—

Punishment :

For contravention of certain sections of the Act, departmental penalty was authorised by section 23(1A), inserted by Act 39 of 1957 (amended later by Act 55 of 1964).

Confiscation :

Confiscation was provided for, by section 23(1B) inserted by later amendment.

Higher powers of Magistrates :

Higher powers were conferred on Magistrates in relation to fine by section 23(2), inserted by Act 34 of 1950. [Section 23(2) and (3) were re-numbered as (3) and (4) respectively]

Search and Similar powers :

(i) Sections 19A to 19F dealing with various powers of enforcement officers (including search-examination etc.) were inserted by Act 55 of 1964 (Sections 19A and 19B were re-numbered as sections 19C-H, of the same Act).

(ii) Sections 19I-19J were inserted by a later amendment.

(iii) Provisions of the Customs Act were applied by section 2 A (inserted by Act 8 of 1952), which was amended by Act 55 of 1965 to substitute a reference to section 11 of the Customs Act, 1962, which had been passed in the meantime.

Special rules of evidence :

(i) Where foreign exchange is acquired by a person (other than an authorised dealer) for a particular purpose,

under permission granted under the Act, the burden of proving that it was used for the purpose for which permission to acquire it was granted, was thrown on that person by section 24(2), inserted by Act 8 of 1952.

(ii) Presumption as to documents in certain cases was inserted by addition of section 24A, by Act 8 of 1952.

4.3. The History of amendments in the Prevention of Food Adulteration Act, 1954 is also of interest. As regards *punishment* extensive amendments were made in the Act, which included an amendment of section 16(1) which constitutes the main penal provision in the Act. The maximum punishment was increased from one to six years, and a minimum of six months imposed.

Amend-
ments in
Food
Adultera-
tion Act.

As regards *mens rea*, section 19(2) was amended by Act 49 of 1964. Under the section, a written warranty is a defence to the vendor if certain requirements are satisfied. Under the amended section, it is also necessary that the vendor should have stored the article properly.

4.4. Again, in the Essential Commodities Act, 1955, amendments have been made from time to time to deal effectively with the various offences under the Act.

Amend-
ments in
the
Essential
Commodi-
ties Act.

Mens rea :

Section 7(1) was amended by Act 36 of 1967, so as to bring in absolute liability.¹

Punishment :

Maximum terms of imprisonment was increased from three years to five years by amendment of section 7(1) (b) by Act 36 of 1967, and similar amendment of section 7(2) made by the same Act.

Confiscation :

Sections 6A to 6E relating to confiscation were added by Act 25 of 1966.

Stoppage of business :

Power of the Court regarding stoppage of business was inserted in section 7 (3) by Act 36 of 1967.

Summary trial :

The Central Government was given power, by section 12 A inserted by Act 47 of 1964, to direct by notification that contravention of the specified orders shall be tried summarily. In a summary trial so authorised, the competent

1. See para. 4.8, *infra*.

Magistrate was empowered to pass a sentence of imprisonment for a term not exceeding one year.¹

Search and similar powers :

Section 3(2) (j) was amended by Act 17 of 1961, to make certain clarifications regarding the provisions that could be made in the rules by way of powers of various nature.

Offences to be cognizable and bailable :

All offences under the Act were made cognizable and bailable by section 10A, inserted by Act 36 of 1967.

Amendments in the Income-tax Act.

4.5. In the Income Tax Act, 1961, the offence of making a false statement in any verification under the Act or delivering a false statement or account was, by an amendment in 1964, subjected to minimum punishment.

Provision as to publication.

4.6. The provision in the Income-tax Act (section 287) relating to publication of the names of assessee and other particulars relating to proceedings under the same Act, was also revised in 1964. Similarly, elaborate provisions as to search and seizure were inserted in the Customs Act, when the law was revised in 1962.

Measures adopted to far in various enactments.

4.7. A survey of the various enactments relevant to social and economic offences shows that one or more of the following provisions of a special character have been made:—

Substantive ingredients of the offence :

(1) Elimination or modification of the requirement of *mens rea*.

Punishment :

- (2) Imprisonment to be mandatory.
- (3) minimum period of imprisonment.
- (4) Public censure.
- (5) Confiscation.
- (6) Stoppage of business or cancellation of licence.

Jurisdiction of courts :

(7) Higher powers of Magistrates.

Powers & Procedure :

- (8) Summary trial .
- (9) Search and similar powers.

¹ See paragraphs 4.27 and 4.28, *infra*.

Evidence:

(10) Special rules of evidence.

A few words about each of these would not be out of place.

4.8. One form in which the legislative desire to secure effective enforcement of social and economic legislation finds expression is a specific provision which eliminates or modifies the requirement of *mens rea*, in respect of particular offences. For example, the Prevention of Food Adulteration Act provides, that it will be no defence in a prosecution for an offence¹ pertaining to the sale of any adulterated or misbranded article of food to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him. The vendor is, however, protected if he has obtained the article of food with a written warranty in the prescribed form from the manufacturer, distributor or dealer, and if he further proves that the article, while in his possession, was properly stored and that he sold it in the same state as he purchased it.

Elimination or modification of the requirement of *mens rea*.

An amendment made in 1967 in the Essential Commodities Act takes the matter further. Contravention of an order under the Act is, and has always been, punishable. But the wording of the relevant section², until 1967, was, "if any person contravenes any order made under section 3". This was interpreted as not excluding *mens rea*.³ In 1967, the language was altered so as to read—"if any person contravenes *whether knowingly, intentionally or otherwise* any order made under section 3". The amended wording appears to be wide enough to eliminate the requirement of *mens rea* for all practical purposes. Whether such a drastic provision is needed in other laws, or whether it is desirable even in the Essential Commodities Act, is a matter which need not be discussed at this stage. The amendment is referred to here only as illustrating the anxiety of the legislature to deal effectively with the violation of orders under the Essential Commodities Act, and the drastic step taken as a result of that anxiety.

4.9. Very often, Parliament, in order to indicate its emphatic disapproval of a particular anti-social conduct, has, in the relevant enactment, prescribed a mandatory punishment of imprisonment, the object being to avoid the possibility of the offender being sentenced to mere fine. By way of illustration, it is sufficient to refer to the provision in the Essential Commodities Act⁴, whereunder contravention of an order under section 3 of that Act is punishable with imprisonment (up to the specified term), and the offender "shall also be liable to fine". This makes

Mandatory imprisonment.

1. Section 19(1), Prevention of Food Adulteration Act, 1954.

2. Section 7(1), Essential Commodities Act, 1955.

3. *Nathu Lal v. State of Madhya Pradesh*, A.I.R. 1966 S.C. 43.

4. Section 7(1)(a), Essential Commodities Act, 1955.

the punishment of imprisonment mandatory. There is, of course, the usual proviso, that, for reasons to be recorded, the court may refrain from imposing the sentence of imprisonment.

Minimum punishment.

4.10. A further provision in connection with punishment is one for a minimum *period of imprisonment* which is found in many enactments dealing with social and economic offences.

There are, in the Penal Code, only five sections which prescribe a minimum penalty. Waging war against the State (section 121) and murder (section 302), are punished with death or imprisonment for life. Under section 303, a person committing murder while undergoing a life sentence has to be sentenced to death. A minimum sentence of seven years' imprisonment is provided in section 397 for a dacoit or robber using a deadly weapon, or causing or attempting to cause grievous hurt, and in section 398 for a dacoit or robber being armed with a deadly weapon.

But, as noticed by the Law Commission in a previous Report¹, "during recent years, several enactments have been passed by the State Legislature or Parliament providing for minimum sentences. It is true that in some of these enactments the discretion of the court has not been completely fettered. Though the section provides for a minimum sentence, the court has been given the liberty, for sufficient reasons to be recorded, to award lower sentence".

Instances of provisions for minimum punishment in other Acts.

4.11. Instances of such legislation are : section 5 of the Prevention of Corruption Act, 1947 (as amended in 1958), the Prevention of Food Adulteration Act, 1954, the Suppression of Immoral Traffic in Women and Girls Act, 1956, and the Bombay Prohibition Act, 1949. The principal reason for such provisions "appears to be a feeling that courts seldom award sentences which would have a deterrent effect, particularly in certain types of offences which are necessary to be "dealt with sternly in the interests of society".²

Questionnaire on Penal Code.

4.12. In the questionnaire on the Penal Code issued by the previous Law Commission,³ the following question was put :—

"The Code lays down only the maximum punishment for offences, and no minimum punishment except in very few cases. Are you in favour of laying down a minimum term of imprisonment for any offences? If so, for what offences?"

Most of the opinions expressed on the question were strongly opposed to laying down any minimum punishment. In particular, members of the judiciary at all levels regarded any such

1. 14th Report (Reform of Judicial Administration), Vol. 2, page 840.

2. 14th Report, Vol. 2, page 838.

3. Questionnaire on the Penal Code (See 42nd Report)

amendment as totally unnecessary. Some of them were not happy about the working of the provisions made in special laws for imposing a minimum sentence.

4.13. The Law Commission had, in a previous Report¹, observed :—

“The determination of what should be the proper sentence in a particular case has always been left to the court for the very weighty reason that no two cases would ever be alike and the circumstances under which the offence was committed and the moral turpitude attaching to it would be matters within the special knowledge of the court which has tried the case. There can be no rule of general application laying down a specific quantum of punishment that should be inflicted in the case of a particular offence. A sound judicial discretion on the part of the trial judge in awarding punishment can alone distinguish between case and case and fit the punishment to the crime in each individual case.

Recommendation in 14th Report as to minimum punishment.

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However, the placing of restrictions on judicial discretion in the matter of the award of a sentence is, on principle, to be deprecated as a general practice. ... Instances might have occurred occasionally where judges have failed to award sentences proportionate to the gravity of the offences. This cannot, however, warrant the assumption that the judiciary as a whole has failed to adequate sentences or overlooked the need for passing deterrent sentences in appropriate cases.”

4.14. In its Report on the Penal Code² the Commission said—

“We agree with the above view and consider that, save in exceptional cases, there should not be any provision for minimum sentences in the Penal Code.”

4.15. To what has been stated above³, we should add that⁴ where absolute liability is inserted for an offence, the imposition of a minimum punishment raises important questions. Where liability is more likely to be absolute than not, it would be illogical to compel the court, even if it punishes an accused person, to impose some fixed or minimum penalty, without allowing a discretion to the Court not to impose that penalty, for reasons to be recorded in writing. This reasoning applies to mandatory imprisonment also. We shall have occasion to refer again to this aspect later.⁵

1. 14th Report, Vol. 2, pages 838, 841.

2. 42nd Report (Penal Code), para. 3.30.

3. See paragraphs 4.10 to 4.14, *sup ra*.

4. See also Chapter 7, *infra*.

5. Chapter 7, *infra*.

Public
censure.

4.16. It is a peculiar feature of white-collar crimes that most of them are committed by persons belonging to the upper strata of society. Members of such classes, while they would not mind a sentence of fine, would certainly be deterred by threats of damage to their reputation. The punishment of public censure has, therefore, been considered effective in such cases,—there also being the additional considerations that the exposure of a person who indulges in *mala fide* practices harmful to the society and punishable by law—for example, a manufacturer who wilfully manufactures adulterated articles of food—can affect him in a pecuniary manner, and also put on guard the members of the public.

Modern
precedents.

4.17. Quite a few penal codes of the present day provide for the giving of publicity to the fact of conviction and sentence. Thus, the Colombian Penal Code provides for “special publication of the sentence as an accessory to penal servitude or imprisonment”¹. The publication is made in an unofficial periodical of the township in which the offence was committed or the convicted person resides. It is made at the expense of the convicted or injured person; and if he fails to pay the cost, it is done by proclamation.

Social censure is one of the prescribed punishments in the U.S.S.R. According to the Russian Penal Code², “social censure shall consist in a public expression by the court of censure of the guilty person and, if necessary, in bringing this to the notice of the public through the press or other means”.

Indian
Precedent.

4.18. In India, this form of punishment is not unknown. Under the Prevention of Food Adulteration Act³, “if any person convicted of an offence under this Act commits a like offence afterwards, it shall be lawful for the court before which the second or subsequent conviction takes place to cause the offender’s name and place of residence, the offence and the penalty imposed to be published at the offender’s expense in such newspapers or in such other manner as the court may direct”. A similar provision for publishing the name of a defaulting assessee is made in the Income Tax Act⁴.

4.19. The Foreign Exchange Act⁵ enacts that rules under the Act may—

“(c) provide, subject to such conditions as may be prescribed, for the publication of the names and other particulars of persons who have been found guilty of any contravention of the provisions of this Act, or of any rule, order or direction made thereunder.”

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1. Article 42, 52 and 54, Colombian Penal Code.
 2. Articles 21(9) and 33, R.S.F.S.R. Penal Code.
 3. Section 16(2), Prevention of Food Adulteration Act, 1954.
 4. Section 287, Income-tax Act, 1961.
 5. Section 27(2)(c), Foreign Exchange Regulation Act, 1947.

The Gold Control Act¹ has a provision for publicity (modelled on a similar one in the Customs Act).²

4.20. It may also be noted that one of the forms of punishment provided in the Hindu Criminal Law, was social censure arising out of the wide publication of the guilt of the offender and his identity. Thus, in Narada Smṛiti (about 6th century A.D.), parading a convict on an ass along public streets was provided as one of the punishments, for a Brahmin committing the offence of 'sahasa' (violence). The relevant verse³ can be translated thus—

“10. Shaving his head, banishing him from the town, branding him on the forehead with a mark of the crime of which he has been convicted, and parading him on an ass, shall be his punishment.”

4.21. Though such a punishment would be a 'degrading' form of punishment which is prohibited by the International Covenant on Civil and Political Rights,⁴ and is otherwise uncivilised and barbarous, publicity and social censure can be achieved by providing for publication of the names of the offenders in respect of certain crimes.

4.22. One meets with a variety of forms of publication of the particulars of the offence as a punishment. In the Prevention of Food Adulteration Act, for example, it is ordered by the Court. In the Income-tax Act, on the other hand, the power is given to the Central Government⁵. One of the Provincial Acts⁶ had a provision under which a dealer convicted of black marketing could be required to fix a board outside his place of business, announcing the fact of his conviction. In all these cases, the common element is to bring to the society's knowledge, and to impress upon the convict, in a *forceful* manner, the guilt which led to his conviction. On the other hand, some foreign Codes employ public censure as a substitute for imprisonment. The provision in the East German Code⁷ may be quoted—

“37. (1) Public reprimand is pronounced if a lesser crime has not caused any major harmful effect or, in spite of heavy damage, the offender, whose guilt is of a minor nature, demonstrates that from now on he will conduct himself in a responsible manner.

Public reprimand.

1. Section 71, Gold Control Act, 1968.

2. Section 120, Customs Act, 1962.

3. Narada Smṛiti, Sacred Books of the East, Vol. XXXIII, Chapter 14, Sloka (10).

4. Article 7, International Covenant on Civil and Political Rights.

5. Section 287, Income-tax Act, 1961.

6. West Bengal Black Marketing Act, 1948, section 20.

7. The East German Penal Code, section 37. The text is taken from Law and Legislation in the G.D.R. (1968) No. 2, page 34.

(2) By means of a public reprimand the court expresses to the offender its disapproval of his action with a view to exhorting him conscientiously to fulfil his duties towards socialist society.

(3) The court may state in the sentence that the penalty is not to be recorded."

So far as the present context is concerned, it is, in our view, appropriate to employ it as a form of censure, and leave the question to the discretion of the Court rather than to the Central Government.

Confiscation.

4.23. Offences involving fraudulent economic gains obviously justify a provision for confiscation of the property so gained. The offender should not be allowed to retain the profits of criminality and this consideration has prevailed with the legislature in prescribing the punishment of confiscation for many economic offences.

Under the Gold Control Act, for example, any gold in respect of which any provision of the Act or any rule made thereunder has been, or is being, or is attempted to be, contravened, shall be liable to confiscation. There are, in the same Act, specific provisions also for confiscation.

Thus, confiscation of (i) any package etc. which contains gold liable to confiscation, (ii) gold mixed with other goods from which it cannot be separated, and (iii) gold which has changed its form (provided the gold itself is liable to confiscation) is provided for.

4.24. We may also refer to the provision in the Foreign Exchange Regulation Act¹, under which, a court trying a contravention of a provision of the Act, as well as an authority adjudging penalty for such confiscation is empowered to direct that any currency etc. goods or other property in respect of which the contravention has taken place, shall be confiscated.

The Essential Commodities Act² has also a provision for forfeiture of property by the Court.

Stoppages of business.

4.25. Impelled by the desire to prevent a persistent offender from harming the public by repeating his anti-social act, the legislature has, occasionally, provided for prohibiting a person from carrying on a particular business for a specified period. An example is furnished by the Essential Commodities Act, 1955,³ under which, if a person convicted of an offence under sub-section (1) of section 7 (which relates to contravention of an order under section 3), is convicted for a second or subsequent

1. Section 23(1), Foreign Exchange Regulation Act, 1947.

2. Section 7(1)(b) Essential Commodities Act.

3. Section 7(3), Essential Commodities Act, 1955.

time of an offence constituted by contravention of an order in respect of an essential commodity, then the convicting court shall, in addition to any penalty which may be imposed on him under that sub-section "by order direct that that person shall not carry on any business in that essential commodity for such period, not being less than six months, as may be specified by the court in the order".

4.26. One device adopted by the Legislature to speed up the trial of economic offences is the insertion of a provision enhancing the powers of Magistrates in relation to punishment. For example, the Foreign Exchange Regulation Act¹ provides that it shall be lawful for any Magistrate of the first class, specially empowered in this behalf by the State Government, and for any presidency magistrate, to pass a sentence of fine exceeding rupees two thousand, on any person convicted of an offence punishable under section 23 of the Act.

Higher powers of Magistrate.

4.27. More important in the context of speeding up of trial is the provision for summary trial which is found, though not very frequently, in socio-economic legislation. The Essential Commodities Act furnishes an example.² The relevant provision empowers the Central Government to issue a notification to the effect that contravention of any order made under section 3 of the Act in relation to a particular essential commodity should be tried summarily.

Summary trial.

4.28. The number of special orders in respect of which notifications were so issued by the Central Government authorising summary trial since³ 1964 and upto December, 1969 [as mentioned in Notification GSR 1842, dated 24th December, 1964 of the Ministry of Food & Agriculture (Department of Food)]. [No. 203, Genl. 1881864 by II] exceeds a hundred. There is also another notification on the subject, bearing the same No. (GSR 1842), which is quoted below :—

Orders issued under section 12A, Essential Commodities Act.

"MINISTRY OF FOOD & AGRICULTURE

(Department of Food)

NOTIFICATION

New Delhi, the 24th December, 1964

G.S.R. 1842.—In pursuance of section 12A of the Essential Commodities Act, 1955 (10 of 1955) and in supersession of the notification of the Government of India in the Ministry of Home Affairs No. G.S.R. 1607 dated the 5th November, 1964, the Central Government hereby specifies all orders made under

1. Section 23(2), Foreign Exchange Regulation Act, 1947.

2. Section 12A, Essential Commodities Act, 1955. (At present, this provision is in force upto December, 1971). But it is understood that a Bill has been introduced to make it permanent.

3. Section 12A, Essential Commodities Act, was inserted in 1964.

section 3 of the said Act in relation to foodstuffs, including edible oilseeds and oils, to be special orders for purposes of summary trial under the said section 12A.

[No. 203 (Genl) (18)/770/64-PY. II]"

[It is rather difficult for an ordinary citizen to keep in touch with various notifications issued under the entire Act; and one can also appreciate the difficulty that must have been experienced by the prosecuting staff, particularly in the mufassil, in this respect. That, however, is a separate question.]¹

Search and seizure.

4.29. Effective prosecution requires effective investigation; and effective investigation, in its turn, requires an array of powers. Since the general powers for search and seizure contained in the Code of Criminal Procedure are restrictive in nature, either by reason of the classes of officers who can exercise those powers, or by reason of the conditions precedent required before the powers can be exercised or by reason of other restrictive requirements, it has become necessary to make similar provisions as to search and seizure in most of the enactments dealing with social and economic offences. The most comprehensive perhaps is the group of provisions in the Foreign Exchange Regulation Act², conferring power to call for information, to search premises, to arrest, to examine persons, to summon persons to give evidence, to produce documents, custody of documents, inspection and connected matters. A recent one is the provision in the Income tax Act³.

Special rules of evidence.

4.30. Difficulty of proof that exists in respect of some of the offences has naturally led to the insertion of provisions which modify the burden of proof, or create rebuttable presumptions or enact other special rules of evidence. A striking example of a presumption is furnished by the Customs Act⁴, which has the following provision :—

“123. (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.”

1. Question of publicity of statutory rules and orders.

2. Section 19, 19A, 19B, 19C, 19D, 19E, 19F, 19G, 19H, 19I, 19J, Foreign Exchange Regulation Act, 1947.

3. Section 132, Income-tax Act, 1961. See A.I.R. 1970 S.C. 292, holding that the Criminal Procedure Code applies.

4. Section 123, Customs Act, 1962.

CHAPTER 5

CAUSES OF DEFECTIVE ENFORCEMENT

5.1. As the foregoing survey shows, the statute book already contains a variety of provisions¹ illustrating the attempts made to deal effectively with social and economic offences. No doubt, provision of a particular type, while occurring in one enactment, may not be found in another enactment. The question whether it should not be extended to the other enactment could, therefore, be usefully considered. That is one approach² adopted in this Report.³

Variety of provisions made to deal effectively with social and economic offences.

5.3. The causes of defective enforcement of social and economic legislation are manifold. They might exist in the particular law, or they may be found in some other law forming part of the general legal system,—both these are ‘legal’ causes. But the causes may sometimes not be concerned with the content of the legal system, and may be found elsewhere,—these may be termed “extra-legal” causes.

Causes of defective enforcement.

Again, in so far as the defect is connected with the legal system, it may be positive defect,—some existing provision which creates difficulties; or, it may be a negative defect,—the absence of some beneficial provision which could remove a felt difficulty.

Moreover, the legal defect, whether positive or negative, may concern the substantive law, the procedural law or the rules of evidence.

Finally, the stage at which the defect operates may be legislative (in the formulation of the law), executive (in implementation), judicial (at the stage of trial); or the defect may be connected with sentencing. In this context, it may be pertinent to state that one could distinguish between two different meanings of words used to denote criminal sanctions. “Punishment” should mean the *authorisation by the legislature* of the employment of criminal sanctions; while “sentencing” should mean the application by the judiciary of the criminal sanctions authorised by the Legislature. The Legislature provides the sword for general use, but the judiciary unsheaths the sword and uses it in particular cases.

1. Para. 4.8, *supra*.

2. For detailed analysis, *See* Chapter 6, *infra*.

3. For recommendations, *see* Chapter 15, *infra*.

5.3. Taking all these aspects into account, but at the same time, confining ourselves to important defects only, we could state that the defects in the enforcement of a particular piece of social or economic legislation could assume one of the following shapes:

- (a) Absence of a legislative provision punishing the particular conduct which is considered to be harmful;
- (b) Non-applicability of the particular regulatory provision though contained in the parent Act, because of absence of the relevant statutory notification;
- (c) Non-enforcement of the law because of failure to detect or failure to investigate the offence;
- (d) Faulty investigation or delay in investigation.
- (e) Inefficiency in the actual conduct of the case;
- (f) Procedural flaws which cause delay in trial, or even failure of prosecution (e.g. absence of requisite sanction);
- (g) Want of evidence;
- (h) Inadequacy of the punishment provided in the law;
- (i) Inadequacy of the sentence actually awarded, although the range of punishment as given in the law may be adequate;
- (j) Administrative difficulties, such as want of adequate enforcement staff required for detecting investigating, prosecuting and otherwise dealing with the offences under the relevant Act.

(a)
Absence of
a legisla-
tive pro-
vision
punishing
the parti-
cular con-
duct which
is consi-
dered to be
harmful.

A few examples will illustrate the categories.

5.4. A prosecution may fail because the situation is outside the Act in *point of stage* of the criminal activity or in point of time, or in point of the facts.

5.5. Thus, preparation to commit an offence is not, in general, punishable. Seizure of a truck with paddy in the Punjab Territory was, for that reason held to be illegal, as there was no "export" within the meaning of the relevant order under the Essential Commodities Act.¹

5.6. In a Madras case², the situation was held to be outside the substantive provisions of the Foreign Exchange Act, and hence the prosecution failed. The following observations in the judgment are of interest :—

"In respect of the third point, namely, whether the prosecution of the petitioners under section 4(1) of the Act is

1. *Malkiat Singh v. State of Punjab*, A.I.R. 1970 S.C. 713; (1970) Cr.L.J. 750.

2. *M.R. Pratap v. Director of Enforcement*, (1969) Cr. L.J. 1582, 1594, para. 59 (Krishna swamy Reddy J.).

untenable, I find the same in favour of the petitioners. We have already noted that under section 4(1) of the Act, 'acquiring foreign exchange' is made an offence by the Amendment Act 55 of 1964 which came into effect from 1-4-1965. The offence, in the complaint, was alleged to have been committed before 1-4-1965 when section 4(1) on respect of this offence was not in force. The enquiry under section 4(1) of the Act has to be dropped by the lower court."

5.7. Again, in an Allahabad case¹, under sections 8 and 3(2)(d), Essential Commodities Act, the truck driver was transporting grain from one place to another place in the same district without a licence for transport. It was held that unless it was shown that such transport without licence constituted an offence under Act, the driver could not be convicted under section 8, even if he admitted that he had committed the mistake. In order to convict a person even on his plea of guilty, it is necessary for the prosecution to prove that allegations made against him, which he is alleged to have admitted as correct, constitute an offence under the law.

5.8. A Gujarat case² under section 16(1)(a), Prevention of Food Adulteration Act, illustrates failure of prosecution because of absence of *mens rea*. It was held that the prosecution must first establish knowledge on the part of the accused that the Food Inspector is to take the sample of food from him in his capacity as a Food Inspector and in discharge of his duty as such.

5.9. It may also happen that the relevant notification is not proved in court. In a Kerala case³ relating to sale of rice beyond the controlled price, the notification fixing the price was not in proof. It was held that the conviction was not sustainable.

(b) non-use of the particular 'regulatory' provision though contained in the parent Act, because of absence of the relevant statutory notification.

5.10. A recent Andhra case⁴ illustrates the failure of a prosecution because of failure to produce the notification conferring authority to initiate a prosecution under the Customs Act, section 135, and Defence of India Rules, 1962, Rule 126 P (2). (There were other defects also in the case, but they are not relevant for our purpose).

1. 1965 All. Cri. R. 88; 1965 All. W.R. (H.C.) 71, cited in the Yearly Digest.

2. *Teja Mohan v. Mangabhai*, A.I.R. 1970 Guj. 209.

3. 1966 Ker. L.T. 638; (1966) Madras L.J. (Cri.) 806, cited in the Yearly Digest for 1966.

4. *P.P. v. Babulal*, A.I.R. 1971 A.P. 345, 346.

Suspected contraband gold had been seized in that case, but the notification under Rule 126(j)(4) and 126(x), Defence of India Rules, authorising the person who sanctioned the prosecution to do so, was not produced. The acquittal by the Magistrate was, therefore, upheld by the High Court.

(c) Non-enforcement of the law because of failure of report or failure to investigate the offence.

5.11. Sometimes, there is no detection or investigation and this may be the principal cause of failure of enforcement.

(d) Faulty investigation delay in investigation (including administrative inefficiency)

5.12. Faulty investigation is frequently responsible for failure of prosecution. For example, the right of the accused to get a sample examined under section 13(2) and 13(5) of the Prevention of Food Adulteration Act by the Director of Central Food Laboratory, may be defeated by inordinate delay in prosecution. If the sample becomes decomposed and hence impossible of analysis, the accused is deprived of his valuable right, and the conviction cannot be sustained¹.

5.13. The finality and conclusiveness of the report under section 13 of the Prevention of Food Adulteration Act is only to the extent that the sample as sent to the Central Food Laboratory contained what the report disclosed and in the proportions stated therein. The accused will still be entitled to lead evidence to show that the article of food in question is not adulterated food. The factors which he can rely upon in such cases, include the delay in analysis of the sample and its impact on the result obtained².

5.14. In an Allahabad case³, it was observed—

“The Prevention of Food Adulteration Act does not prescribe any time limit within which prosecutions may be launched. But it cannot be denied that articles of food are liable to deterioration and decay with lapse of time. Moreover, it is cardinal and fundamental principle of Criminal jurisprudence that if an offence has been committed the prosecution must be instituted without the least delay. The Mahapalika have not invited any attention to anything on the record to explain the delay. In most of the cases the prosecution was launched over a year after the date of the offence. In some cases, it has been launched more than two years after.

1. *Corporation of Delhi v. Ghisa Ram*, A.I.R. 1967 S.C. 970; (1967) 2 S.C.R. 116.

2. *Corporation of Delhi v. Om Prakash*, 1970 Cr.L.J. 1047, 1050 (Delhi).

3. *Chaturbhuj v. The State*, A.I.R. 1968 All. 31, 36, para 34 (Satish Chandra J.).

It is reasonable to expect an explanation to explain such a delay. Even if it may not be possible to hold that the prosecution is invalid because of delay, this is a material circumstance on the question of sentence.”

5.15. In a Punjab case¹, the accused was tried under section 16(1)(i) of the Prevention of Food Adulteration Act. It was clear from the evidence that there were a number of shops in the close proximity of the accused's shop, and there were also other persons near about the shop at the time when the sample was taken by the Food Inspector at about 3. P. M. But the Food Inspector did not even care to ask any of those persons to witness the transaction, and one of the two persons taken by the Food Inspector as a witness was his peon, who could not be said to be an “independent” person, and the other person stated that he actually reached after the sample had been taken by the Food Inspector.

It was held that the provisions of sub-section (7) of section 10 had not been complied with. The provision was mandatory, and therefore, the accused was entitled to an acquittal.

5.16. Prosecution under the Prevention of Food Adulteration Act may thus fail because of defective reports of the public analysts², or delay in the examination of samples³, or because the procedure prescribed by the Act for taking samples is not followed⁴.

5.17. On the other hand, a Bombay case⁵ illustrates the success of a prosecution.

The accused/petitioner was a dealer in foodgrains. A sample of bajari was sent for analysis, and the report of the public analyst stated that ergot was found. The report was written on form III, rule 7(3). In the certificate with which the report began, the Analyst stated that the sample had been properly sealed, and that he found the seal intact and unbroken. The accused was charged under section 16(1)(a)(i) of the Prevention of Food Adulteration Act read with rule 7(1). He was convicted of the offence. On revision, before the High Court, it was contended for the accused that rule 7(1) had not been complied with, in that there was nothing to indicate that the Analyst compared the seals on the container with the impression sent separately. Secondly, it was contended that there was no evidence to show that the specimen impression of the seal was separately sent by the Food Inspector.

1. *Ram Sarup Tara Chand v. The State*, A.I.R. 1965 Pun. 366 (J.S. Bedi J.).

2. *State v. Gunjilal*, A.I.R. 1964 Punj. 475.

3. *Municipal Corporation of Delhi v. Surja Ram*, (1965) 2 Cr. L.J. 571.

4. *Food Inspector v. P. Kannan*, A.I.R. 1964 Ker. 261.

5. *K. Rajaram v. Koranne*, A.I.R. 1968 Bom. 247, 249.

5.18. As to these points, the court held that since the report of the public Analyst was in form No. III, it need not mention that the Analyst had compared the seal on the packet with the specimen seal sent separately; the form simply required a statement to the effect that the sample was properly sealed and intact¹.

5.19. The second argument on behalf of the accused was that the report of the Analyst did not indicate the percentage of ergot. In this case the prosecution was under section 2(1)(f) of the Act. Regarding this sub-clause of section 2, the Court said :

“The expression “otherwise unfit for human consumption” is wide and of general character. It is necessary to note that clause (iii) of A. 18.06 speaks of grain having been affected internally. It is in this case only that the question of the percentage becomes relevant. If the damage is due to internal affection or purification, then the question of percentage may have significance.”

It was held that what had happened was that the grains of ergot, which are similar in size to the grains of bajari and darker in colour, had got themselves inextricably mixed up with bajari. Since they were separate from the grains of bajari, there was no question of any “internal affection”. At the same time, such bajari was unsuitable for human consumption. Hence the conviction was upheld.

(e) Flaws
in actual
conduct
of the case.

5.20. Flaws in the actual conduct of the case may often result in failure of prosecution. For example, the Director's report under section 13(3), Prevention of Food Adulteration Act, is final. But, if material circumstances in the report are not put to the accused in the examination of the accused, the trial is vitiated².

Lack of
legal
expertise

5.21. It should be noted that in contested cases, where the Inspector of the Department is pitted against a professional lawyer skilled in the procedure of court work (and perhaps also more familiar with the particular practices and foibles of the magistrates before whom the less forensically able inspectors to incur the displeasure of the court by lack of familiarity with some of the legal refinements or by the unnecessary labouring of points which are not in issue. In extreme cases, this lack of legal expertise may, even result in an unjustified acquittal, where, for example, the inspector is temporarily thrown off his step by a clever if rather specious legal point or procedural manoeuvre.

1. The court followed *State v. Umacharan*, A.I.R. 1966 Ori. 81 and disagreed with *State of Gujarat v. Shantaben*, A.I.R. 1964 Guj. 136 and *Mary Lasrado v. State of Mysore*, A.I.R. 1966 Mysore 244.

2. *Municipal Committee v. Om Prakash*, I.L.R. (1969) 2 Punj. 57, 68 to 72 (Sodhi and Koshal JJ.).

5.22. Then, there are procedural flaws which cause delay in trial or even failure of prosecution. Absence of requisite sanction¹ is a familiar example.

Thus, in a Kerala case², a notification under section 20(1) of the Prevention of Food Adulteration Act had been issued in 1959, stating 'The Government hereby authorise Food Inspectors appointed under the Act to institute prosecutions for offences under the Act'. It was held that the authorisation given under the notification was only in favour of *existing Food Inspectors*, and not also in favour of Food Inspectors to be appointed in future under the Act. Hence the Food Inspector of M. Panchayat, which came into existence only in 1964, could not be said to be a person authorised to institute a prosecution under section 20(1).

5.23. As was held in a Rajasthan case³, a Magistrate while taking cognizance of an offence under the Prevention of Food Adulteration Act on a complaint filed against specified individual or individuals, cannot issue process and initiate prosecution against other persons.

Also, power to institute prosecution under the Prevention of Food Adulteration Act does not include power to consent to the filing of a prosecution⁴.

5.24. In a Patna case, which went up to the Supreme Court⁵, a dealer was charged for storing foodgrains without entering them in the stock register. There was seizure of the stock-book and other registers. But there was delay in filing the complaint. Conviction of the accused was mainly on the ground of tampering with the record while in the possession of the Supply Officer. It was not proved that tampering was in the interest of the dealer or was at his instance. Other records also did not prove the prosecution case. It was held that the conviction was improper.

5.25. The Supreme Court has held in another case that although section 6-A, Essential Commodities Act authorises confiscation of the seized foodgrains if the Deputy Commissioner is satisfied that there was a contravention of an order made under section 3 of the Act, that confiscation should be preceded by the issue of a show-cause notice under section 6-B, which should inform the owner of the foodgrains or the person from whom they were seized, about the grounds on which he proposed to make the confiscation. The Deputy Commissioner should also

(f) Procedural flaws which cause delays in trial or even failure of prosecution.

1. The position regarding sanction is a matter which furnishes ample scope for study. See Chapter 11 *infra*.

2. *Abdulla Haji v. Food Inspector, Muliyar*, (1967) I.L.R. 2 Ker. 340; (1967) Cr.L.J. 1718 (Ker.).

3. *Bijai Lal v. State*, A.I.R. 1965 Raj. 597.

4. *Arvindbhai v. Hargovind*, A.I.R. 1971, Guj. 20 (January) (review case-law).

5. *Ganga Prasad v. State of Bihar*, (1970) Cr.L.J. 895; A.I.R. 1970 S.C. 989.

give the person to whom that notice is issued, an opportunity of making a representation in writing within a reasonable time to be specified in the notice against the grounds of confiscation, and an additional opportunity of being heard in the matter. These are the three essential preliminary steps which are made indispensable by section 6-B, and it is plain that some of these steps were not taken by the Deputy Commissioner before he made the impugned confiscation order¹.

5.26. In a case² which went up to the Supreme Court, there was, under section 132(8), Income-tax Act (as amended by the Finance Act of 1969), search and seizure of documents. The documents seized were retained by the authorities for a period of nineteen months, without recording any reason for retaining the same beyond the period of 180 days, and without obtaining the approval of the Commissioner, as required by section 132(8). It was held that such retention of document was without the authority of law, and they should be released.

5.27. In another case³ which went up to the Supreme Court, an enquiry under section 23D(1), Foreign Exchange Act was instituted by the issue of a show-cause notice, but a complaint was made to the court without having any material which could lead to the opinion that the Director of Enforcement would not be in a position to impose adequate penalty. It was held, that as the complaint was filed without complying with the proviso it was invalid.

(g) Want of evidence.

5.28. A prosecution may fail for want of evidence.

A Supreme Court judgment⁴ illustrates how a prosecution under the Essential Commodities Act may fail for want of evidence. It was a charge of storage of an essential commodity for business, in violation of the Manipur Foodgrains Dealers Licensing Order (1958), clauses 3(2), 3(1). But the fact that the storage was for the purpose of business, was not proved by independent evidence. It was held that there could be no conviction under section 7, on the basis of mere presumption under clause 3(2) of the Order, without evidence of the *purpose of storage* as above.

5.29. Failure to maintain account-books properly was the subject-matter of the charge in a Rajasthan case⁵. It was held that the offence fell under section 3(2)(i) read with section 7(1)(a)(i), Essential Commodities Act. It was a non-cognizable offence,

1. *Manur Madhya Kamath and Co. v. The State of Mysore*, (1970) M.L.J. (Cr.) 61, cited in the yearly Digest 1970, Column 1415-1416.

2. *Commissioner of Income-tax v. Jawaharlal Rastogi*, 78 I.T.R. 486; A.I.R. 1970 S.C. 1951.

3. *Rayala Corporation (Pvt.) Ltd. v. Director of Enforcement, New Delhi*, (1969) 2 S.C.C. 412; (1970) 1 S.C.A. 100; (1970) 1 S.C.R. 639; A.I.R. 1970 S.C. 494.

4. *Manipur Administration v. M. Nilla Chandra Singh*, (1964), 5 S.C.R. 574; (1964) 2 S.C.J. 444; 1964 (2) Cr.L.J. 495; A.I.R. 1964 S.C. 1533, 1535, 1536.

5. *Gyasiram v. The State*, A.I.R. 1964 Raj. 237, 239, para. 9.

and must be tried as a summons case. Hence, the trial should proceed as a summons case. (In this particular case, the trial had proceeded only upto the stage of charge. Hence the charge was quashed, and the Magistrate directed to proceed as in a summons case).

5.30. A Supreme Court case¹ under section 8(1) and 23-A, Foreign Exchange Act illustrates the need for sufficient evidence. In that case, adjudication proceedings were quashed for want of evidence.

5.31. A recent Andhra Pradesh case² illustrates failure of a prosecution because of want of proof. (There were other defects also, but they are not material). In that case, suspected contraband gold had been seized from the accused, but there was no proof that it was contraband. The prosecution relied on the presumption in section 123(1), Customs Act, 1962, whereunder where any goods to which the section applies are seized under the Act "in the reasonable belief" that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized. In this case, it was not proved that the officer who had seized the goods was competent to do so. Apart from that, however, there was another defect,—the seizing officer had simply *suspected*, and did not have *reason to believe*, that the accused was carrying smuggled goods. Following a Bombay case³, which had emphasised that the officers must have acted in reasonable belief, the High Court upheld the acquittal.

5.32. The punishment provided in the law may be inadequate. Such a situation, of course, requires legislative action.

(h) Inadequacy of the punishment provided in the law.

5.33. The punishment awarded may be mild. Such a situation, obviously, does not necessitate any statutory amendment.

(i) Inadequacy of the sentence actually awarded although, the range of punishment as given in the Act may be adequate.

1. *Hind Trading Co. v. Union of India*, A.I.R. 1970 S.C. 1858; 1863, Para. 12-13 (Certiorari issued).

2. *P.P. v. Babulal*, A.I.R. 1971 A.P. 345, 346.

3. *M.G. Abrol v. Amichand*, A.I.R. 1961 Bom. 227 (Shah,J.).

(j) Administrative difficulties, such as, want of adequate enforcement staff required, for detecting, investigating, prosecuting and otherwise dealing with the offences under the relevant Act.

5.34. There may be administrative difficulties in enforcement of the particular Act such as want of adequate enforcement staff required for detecting, investigating, prosecuting and otherwise dealing with offences under the Act.

5.35. In conclusion, it may be stated that the most significant feature of the prosecution process, is undoubtedly the difference between the Departmental inspector's view of the case and that which, in the event, he is able to give to the magistrate. The inspector's view of the case is obviously coloured by his involvement in what may have been a lengthy series of visits and discussions with the accused and by his knowledge of the past history of the dealings with the accused over the previous five or six years. The magistrate, on the other hand, is only permitted to hear the details of the particular incident with which the proceedings are concerned, and in addition he must pay some attention at least to the mitigating circumstances which defence counsel will put before him.

CHAPTER 6

EXISTING POSITION WITH REFERENCE TO IMPORTANT ENACTMENTS

6.1. It will now be convenient to analyse the position under the existing laws, with reference to provisions of the nature referred to above¹.

Detailed discussion of existing position with reference to important enactments.

The analysis will be confined to important enactments², in order to avoid cumbersomeness.

(1) *Elimination or modification of mens rea*

- | | |
|--|--|
| (a) Central Excises Act, 1944. | —No such provision. |
| (b) Foreign Exchange Regulation Act, 1947. | —No legislative provision. But courts have modified the <i>mens rea</i> ³ . |
| (c) Prevention of Food Adulteration Act, 1954. | —Section 19 (Modification). |
| (d) Essential Commodities Act, 1955. | —Section 7(1) (Elimination). |
| (e) Wealth Tax Act, 1957. | —No such provision. |
| (f) Income-tax Act, 1961. | —No such provision. |
| (g) Customs Act, 1962. | —See sections 112(a), 114, 117, 134(a), 134(b), 136(1). |
| (h) Gold Control Act, 1968. | —No such provision. |

(2) *Mandatory imprisonment*

- | | |
|-------------------------------|---------------------|
| (a) Central Excises Act, 1944 | —No such provision. |
|-------------------------------|---------------------|

1. Para. 4.7, *supra*.

2. (a) Central Excises Act, 1944.

(b) Foreign Exchange Regulation Act, 1947.

(c) Prevention of Food Adulteration Act, 1954.

(d) Essential Commodities Act, 1955.

(e) Wealth Tax Act, 1957.

(f) Income-tax Act, 1961.

(g) Customs Act, 1962.

(h) Gold Control Act, 1968.

3. *State of Maharashtra v. M. H. George*, A.I.R. 1965 S.C. 722, 732 and 740, paras. 15, 40 (Majority view).

- (b) Foreign Exchange Regulation Act, 1947. —No such provision.
- (c) Prevention of Food Adulteration Act, 1954. —Section 16.
- (d) Essential Commodities Act, 1955 —Section 7(1)(a) (i) and (ii).
- (e) Wealth Tax Act, 1957. —No such provision.
- (f) Income-tax Act, 1961. —Section 277.
- (g) Customs Act, 1962. —Section 135(i).
- (h) Gold Control Act, 1968. —Section 85.

(3) *Minimum punishment*

- (a) Central Excises Act, 1944. —No such provision.
- (b) Foreign Exchange Regulation Act, 1947. —No such provision.
- (c) Prevention of Food Adulteration Act, 1954. —Section 16(1).¹
- (d) Essential Commodities Act, 1955. —No such provision.
- (e) Wealth Tax Act, 1957. —Section 36(2), proviso.
- (f) Income-tax Act, 1961. —Section 277.
- (g) Customs Act, 1962. —Section 135(1) proviso.
- (h) Gold Control Act, 1968. — (i) Section 85;
(ii) Sections 86–87;
(iii) Section 89
(Second conviction).

(4) *Public censure*

- (a) Central Excises Act, 1944. —No such provision.
- (b) Foreign Exchange Regulation Act, 1947. —Section 27(2)(c) (By rules).
- (c) Prevention of Food Adulteration Act, 1954. —Section 16(2).
- (d) Essential Commodities Act, 1955. —No such provision.
- (e) Wealth Tax Act, 1957. —Section 42A.
- (f) Income-tax Act, 1961. —Section 287.
- (g) Customs Act, 1962. —No such provision.
- (h) Gold Control Act, 1968. —No such provision.

(5) *Confiscation*

- (a) Central Excises Act, 1944. —Section 10 (Forfeiture by court), section

1. See *City Corporation v. K.J. Mathew*, A.I.R. 1968 Ker. 139.

12 (application of provisions of Customs Act), section 28, (confiscation), section 23 (adjudication).

- (b) Foreign Exchange Regulation Act, 1947. —Section 23(1B).
- (c) Prevention of Food Adulteration Act, 1954. —Section 18.
- (d) Essential Commodities Act, 1955 —Sections 6A to 6D and section 7(1)(b).
- (e) Wealth Tax Act, 1957. —No such provision.
- (f) Income-tax Act, 1961. —No such provision.
- (g) Customs Act, 1962. —Sections 111, 113, 115, 118, 119(2).
- (h) Gold Control Act, 1968. —Section 92 (Forfeiture) sections 71, 72, 73 (Confiscation).

(6) *Stoppage of business or cancellation of licence*

- (a) Central Excises Act, 1944. —No such provision.
- (b) Foreign Exchange Regulation Act, 1947. —No such provision.
- (c) Prevention of Food. —Section 16(1D) (Cancellation of licence).
- (d) Essential Commodities Act, 1955 —Section 7(3) (Stoppage of business).
- (e) Wealth Tax Act, 1957. —No such provision.
- (f) Income-tax Act, 1961. —No such provision.
- (g) Customs Act, 1962. —No such provision.
- (h) Gold Control Act, 1968. —No such power with the court.

(7) *Higher powers of Magistrates*

- (a) Central Excises Act, 1944. —No such provision.
- (b) Foreign Exchange Regulation Act, 1947. —Section 23(2).
- (c) Prevention of Food Adulteration Act, 1954. —Section 21.
- (d) Essential Commodities Act, 1955. —Section 12.
- (e) Wealth Tax Act, 1957. —No such provision.
- (f) Income Tax Act, 1961. —No such provision.
- (g) Customs Act, 1962. —No such provision.
- (h) Gold Control Act, 1968. —No such provision.

(8) *Summary trial*

- (a) *Central Excises Act, 1944.*
Specific summary trial is not prescribed. But under section 12, the Customs Act can be applied¹.
- (b) *Foreign Exchange Regulation Act, 1947.*
Specific summary trial is not prescribed.
- (c) *Prevention of Food Adulteration Act, 1954.*
Specific summary trial is not prescribed.
- (d) *Essential Commodities Act, 1955.*
Section 12A of the Essential Commodities Act deals with summary trial.

Section 12-A, power to try summarily

(1) If the Central Government is of opinion that a situation has arisen where, in the interests of production, supply or distribution of any essential commodity or trade or commerce therein and other relevant considerations, it is necessary that the contravention of any order made under section 3 in relation to such essential commodity should be tried summarily, the Central Government may, by notification in the Official Gazette specify such order to be a special order for purposes of summary trial under this section, and every such notification shall be laid, as soon as may be after it is issued, before both Houses of Parliament.

(2) Where any notification issued under sub-section (1) in relation to a special order is in force, then, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), all offences relating to the contravention of such special order shall be tried in a summary way and by a Magistrate of the first class specially empowered in this behalf by the State Government or by a Presidency Magistrate, and the provisions of section 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trial :

Provided that, in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year.

(3) Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1898 (5 of 1898), there shall be no appeal by a convicted person in any case tried summarily under this section in which the Magistrate passes a sentence of imprisonment not exceeding one month, or of fine not exceeding two hundred rupees, or both, whether or not any

1. See, however, *Collector of Customs v. A.S. Bawa*, A.I.R. 1968 S.C. 13, 15, 15 Para 8 and 11 (1968) I.S.C.R. 82, as to the scope for applying the Customs Act.

order of forfeiture of property or an order under section 517 of the said Code is made in addition to such sentence, but an appeal shall lie where any sentence of imprisonment or fine in excess of the aforesaid limits is passed by the Magistrate.

(4) Where any notification is issued under sub-section (1) in relation to special order, all cases relating to the contravention of such special order and pending on the date of the issue of such notification shall, if no witnesses have been examined before the said date, be tried in a summary way under this section and if such case is pending before a Magistrate who is not competent to try the same in a summary way under this section, it shall be forwarded to a Magistrate so competent.

(e) *Wealth Tax Act, 1957.*

Specific summary trial is not prescribed.

(f) *Income-tax Act, 1961.*

Specific summary trial is not prescribed.

(g) *Customs Act, 1962.*

Section 138—Offences to be tried summarily—

Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Chapter other than an offence punishable under clause (i) of section 135 may be tried summarily by a Magistrate.

(h) *Gold Control Act, 1968.*

Section 98—Offences to be tried summarily—

Notwithstanding anything contained in the Code of Criminal Procedure, 1898—

(i) no magistrate other than a Presidency Magistrate or Magistrate of the first class shall try an offence against this Act;

(ii) every offence against this Act may be tried summarily by a Magistrate.

(9) *Search and similar powers*

- | | |
|--|--|
| (a) The Central Excises Act, 1944 | —Sections 13 to 23 and rules under section 27. |
| (b) Foreign Exchange Regulation Act, 1947. | —Sections 19 to 19J and section 25A. |
| (c) Prevention of Food Adulteration Act, 1954. | —Section 10. |
| (d) Essential Commodities Act, 1955. | —Section 3(2)(h) and (j). |
| (e) Wealth Tax Act, 1957 | —Section 37A. |
| (f) Income-tax Act, 1961 | —Section 132. |

- (g) Customs Act, 1962 —Sections 100, 101,
103, 105, 106.
(h) Gold Control Act, 1968 —Sections 58 to 70.

(10) *Special rules of evidence*

- (a) Central Excises Act, 1944 —No such provision.
(b) Foreign Exchange Regulation Act, 1947. —Section 24 and 24A.
(c) Prevention of Food Adulteration Act, 1954. —Section 13.
(d) Essential Commodities Act, 1955 —Section 14.
(e) Wealth Tax Act, 1957 —No such provision.
(f) Income-tax Act, 1961 —No such provision.
(g) Customs Act, 1962 —Section 139.
(h) Gold Control Act, 1968 —Section 99.

CHAPTER 7

DESIRABILITY OF AMENDMENTS—SUBSTANTIVE POINTS COMMON TO ALL THE ACTS CONSIDERED

7.1. Before dealing with changes needed in each individual Act, we should deal with certain matters of the general nature applicable to all or most of the Acts.

General matters common to all Acts considered.

7.2. Of such questions, the most important is that of *mens rea*.

Mens rea.

7.3. Traditional criminal jurisprudence requires that before criminal liability be imposed, a certain mental element of the offender must be proved. The most familiar name used to denote this mental element in crime is '*mens rea*'. Some vagueness exists as to the exact range and ambit of this expression. But the general concept is fairly well established, namely, that a person ought not to be punished for an act in the absence of a culpable state of mind with reference to the act.

Mens rea and burden of proof.

7.4. The validity of the general principle of *mens rea* is not disputed today. Illustrations could be drawn from some of the criminal codes of other countries. Thus, the Russian Penal Code enacts.¹

"3. Only a person guilty of committing a crime, that is, who intentionally or negligently commits a socially dangerous act provided for by law, shall be subject to criminal responsibility and punishment.

Basis of criminal responsibility.

Criminal punishment shall be applied only by judgement of a court."

7.5. It is also well-established that the burden of proving the required mental element is on the prosecution which, in accordance with the general rule applicable to criminal proceedings, is required to prove its case beyond reasonable doubt.

7.6. Necessities of the time have, however, witnessed the emergence of a category of offences—sometimes called 'public welfare offences'—where the element of *mens rea* has undergone modification or even suffered elimination. A controversy is going on amongst academic writers as to how far such a departure is justified even in the case of public welfare offences; and

1. Article 3, R.S.F.S.R. Penal Code.

judicial disagreement on the question how far a particular statutory offence requires *mens rea* to be read into legislative language silent on the point, has enriched the law reports during recent years.

7.7. We have already drawn attention to the need for dealing with economic offences¹ in a manner different from traditional crimes.

7.8. Another aspect of practical importance should also be emphasised. Although the actual facts of a particular case relating to an economic offence may appear to possess only a minor significance, there is, behind the curtain, a ring of associates engaged in committing a number of crimes. These crimes it is difficult to prove before the court in conformity with the traditional standard of proof. The moral conviction of responsible enforcement officers is difficult to be translated into legal conviction of the minds of the judicial agencies operating in the traditional manner. The mental element undoubtedly exists. But it is difficult to prove it. The act that has caused damage has been unearthed; the mind behind it remains unproved. Such a situation, we think, is productive of grave harm.

7.9. It is for these reasons, that we have thought of a solution which, while preserving the requirement of *mens rea* a requirement which we would be loth to dispense with² in any act carrying serious punishment—throws the burden of proof on the accused. Petty cases causing minor injuries are not worth the trouble of creating a special rule as to burden of proof. But acts causing substantial damage justify a departure, to the extent indicated above.

7.10. In formulating the test as to constitutional validity of presumptions in criminal cases, the Supreme Court of the U.S.A. has considered, as against the magnitude of the disadvantage created by the operation of a presumption, the comparative convenience test. The test was first formulated by Justice Cardozo in a dictum in *Morrison v. California*³, when he wrote:

“The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on the defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. ...For a transfer of the burden,

1. Chapter 3, *supra*.

2. See also para. 4.15, *supra*.

3. *Morrison v. California*, (1933) 291 U.S. 82, 88-91.

experience must teach that the evidence held to be inculpatory has at least a sinister significance,....., or if this at time be lacking, there must be in any event a manifest *disparity in convenience of proof and opportunity for knowledge*, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, Section 79. The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula one can do no more than adumbrate them; sharper definition must await the specific case as it arises."

7.11. The considerations which have weighed with us are not dissimilar. Stringent provisions are necessary to deal effectively with economic offences at the present time. The same considerations that have justified the imposition of restrictions on the normal business activities, furnish the justification for measures aimed at proper enforcement of those restrictions. The situation is one of a semi-crisis, a general threat to national wealth and welfare. The balance of convenience therefore makes it imperative to adopt this approach.

In this context, a recent English provision is of interest¹ :—

"(2) Subject to sub-section (3) below, in any proceedings for an offence to which this section applied it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged."

The effect of this provision is that, in the specified offence, the prosecution are required to prove that the accused committed the *actus reus* of the particular offence. It is then for the accused to prove that he committed the *actus reus* 'innocently'. This method of introducing an element of 'fault' into drugs offences was discussed in the House of Lords in two cases.²⁻³

7.12. In conformity with the aforesaid test, we shall suggest suitable amendments to the relevant Acts wherever appropriate⁴. From this amendment, however, we propose to exclude

1. Section 28(2), Misuse of Drugs Act, 1971 (c. 38).

2. *Warner v. Metropolitan Police Commissioner*, (1969), 2 A.C. 256.

3. *Sweet v. Parsley*, (1970) A.C. 132; (1969) 1 All E.R. 347.

4. Chapter 15, *infra*.

the taxation laws, mainly for two reasons, first that they are far too complex and complicated, and second that they are changed frequently. After these laws become stable and simple, the matter may be examined.

7.13. In the United States, Mr. Justice Jackson, himself once Chief Counsel for the Bureau of Internal Revenue, referred to federal taxation as "a field beset with invisible boomerangs". Judge Learned Hand grieved that the provisions of the income-tax statutes "dance before my eyes in a meaningless procession : cross-reference to cross-reference, exception upon exception couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time."¹

Considerations such as these have weighed in our minds in excluding for the present, tax laws from the operation of the formula as to onus which we have suggested.

Quantum
of punish-
ment.

7.14. The question of the quantum of punishment for the various offences has engaged our serious attention. The maximum period of imprisonment for an offence deserving condemnation could, in theory, be limitless (and so also could be the lowest limit). The longest term is life imprisonment—though not met with in the Acts with which we are concerned. So, one could come downwards from life imprisonment to any period, or go upwards from one day to any period. For practical reasons, however, such a wide range is not met with. Even life imprisonment, when awarded, works out because of remissions etc., to eight to ten years. For the present purpose, the possible range of imprisonment can, therefore, be taken as 6 months to ten years.

Principles
as to
grounds for
extra-
ordinary
punish-
ment.

7.15. Now, the principles are not much in dispute. Bentham has observed² :—

"11. As to the grounds upon which it may be proper to have recourse to extraordinary punishment; these herein before hinted at viz—1. any extraordinary mischievousness on the part of the offence, when it is so great as may make it necessary and worthwhile to hazard an extraordinary expense in point of punishment for the sake of purchasing the better chance of combating it with effect ; 2. the deficiency of the punishment in point of certainty as resulting from the difficulty of detection : which difficulty depends in great measure, as is evident, upon the nature of the offence ; 3. the presumption which the offence may afford

1. Ernest J. Brown, "Tax decisions of Judge Magruder", (1958-59), 71 Harvard L. Rev., 1225.

2. Bentham, Principles of Legislation, (1971), Chapter 17, page 212, paragraph 11.

of the offender's having already been guilty of other offences of the like nature ; 4. the accidental advantage in point of quality of punishment not strictly meted in point of quantity; 5. the use of a punishment of a particular quality in the character of a moral lesson; 6. an extraordinary want of sensibility on the part of the offender to the force of such standing tutelary motives as are opposed to the offence whether on the part of the law itself, or on the part of the other auxiliary sanctions."

7.16. Controversies can arise in the practical application of these principles. Such controversy could arise because of the differences in the relative importance which one attaches to *the particular offence* as well as because of difference as regards the relative importance which one attaches to the various objectives of punishment.

Importance of various objectives of punishment.

7.17. The most satisfactory course from the practical point of view would be to see if the existing punishments compare unfavourably with those for analogous offence, or are excessively disproportionate to the permanent public resentment felt at the particular offence, or reflect inadequately the gravity as represented by the threat to public welfare.

Comparison with punishment for analogous offences & desirable.

7.18. Now, there is one important direction in which the punishments under the various Acts require to be altered. At present, the punishments under most Acts (except the Customs Act) are expressed in terms which uniformly apply to a contravention irrespective of the amount involved. For example, the punishment for evasion of excise duty under section 9, Excise Act is the same whether the amount of the duty evaded is one thousand rupees or one lakh of rupees. We are of the view that there is a case for rationalisation in this respect.¹ Since the object in punishing economic offences is to prevent harm caused to the national economy, a pecuniary test would be justifiable; and the severity of the *maximum* punishment could be made to depend on the relative seriousness of the harm caused as expressed in monetary term. Of course, this does not mean that in each individual case, the court should have regard *only* to the pecuniary assessment of the damage caused. Legislative prescription of maximum punishment, and judicial dispensation of the sentence within that maximum are not necessarily governed by the same considerations. The former is general and abstract; the latter is particular and concrete; what we are dealing with at the moment is only the former.

Maximum punishment-Recommendation to introduce pecuniary test.

7.19. Fortunately, there is, in this context, a provision available in the Customs Act² which with one modification, furnishes a useful precedent. Under that Act, the maximum

1. Actual amendments will be indicated later under each Act.

2 Section 135, Customs Act, 1962.

punishment is five years if the amount of duty evaded is Rs. one lakh or more, and two years in other cases. The maximum of five years should, we think be increased to seven years, and the maximum of two years should be increased to three years. In the Penal Code, the maximum generally met with are one, two, three, seven, ten and fourteen years. The classification of offences under the Second Schedule of the Criminal Procedure Code is also framed with reference to the maxima of three years and seven years. Further, in order that the maximum punishment may find its reflection in the public mind, it is desirable that the scheme should, as far as possible, be uniform. In the present case, the increase from five years to seven years is not likely to cause hardship, having regard to the nature and gravity of the harm caused.

7.20. We, therefore, propose to recommend the revision of the maximum punishment on the above lines, where the pecuniary test can be appropriately applied having regard to the subject-matter of the enactment.

We are further of the view that in the case of a second or subsequent conviction also, minimum punishment should be provided for.

There is also a question regarding the minimum fine, to be considered. It has been suggested to us during oral discussions that where the offence results in ill-gotten gains on the part of the offender, the minimum fine should be linked up with the amount of the ill-gotten gains. We agree with this approach, and recommend that the amount of fine shall not be less than the amount of such ill-gotten gains, except for reasons to be recorded.

The actual amendment to be made in each individual Act, in conformity with the above test, will be indicated later.¹

Mandatory imprisonment and minimum term of imprisonment.

Some aspects of judicial attitudes in Sentencing.

Importance of reform

7.21. The next important question of general significance is of mandatory imprisonment and minimum term of imprisonment.

7.22. During recent times, thinking about sentencing has assumed significance, and, though thought in this respect has been devoted mainly to the traditional crimes, yet expression of views about social and economic offences is not totally wanting. Realisation of the fact that these crimes affect the welfare of the entire community, and though veiled under the garb of respectability, in truth reflect a dangerous mentality, is met with in the judgement of some of the appellate courts.

7.23. So far as traditional crimes are concerned, the values of reform and rehabilitation are gathering increased importance. With the acceptance of the view that environmental pressures

1. See Chapter 15, below.

or disordered states of mind might impede the offender's ability to calculate rationally the risks of pleasures and pain involved in criminal conduct, the judiciary has come to recognise varying degrees of guilt for the same offence.

and rehabilitation in traditional crimes.

7.24. But, in the field of anti-social crimes, the deterrent aspect has been given its due importance. The objective sought need not be the same in the case of all offences,—this is the assumption made by those who emphasise that the protection of society requires an assertion of the deterrent value of punishment.

Importance of deterrence aspect in anti-social crimes.

As Judge William J. Campbell, an American federal court judge, has pointed out,¹ where rehabilitation is the prime concern, the treatment should be tailored to the individual; in extreme cases of anti-social offenders, prolonged confinement assures the protection of society. Where, however, the violation of law is a matter of principle,..... "there is no question of rehabilitation.....they (offenders) must be sentenced as examples; otherwise, human nature being what it is, we would most assuredly be faced with great number of less stable citizens seeking ways and means to avoid military service." Even retribution is allowed as an objective of sentencing where the crime is ".....revolting and incomprehensible to the group."²

7.25. At the same time, one has to bear in mind that each case depends on its own facts. There may be cases requiring heavy punishment; there may be cases where a light punishment is enough. And there may be cases where practically no punishment is merited.

Each case dependent on its facts.

7.26. Reported cases furnish examples of each category. To notice a very recent English case,³ the convicted person, aged 67, had pleaded guilty to five counts for making false statements with intent to defraud the revenue. He was a travelling salesman, and had over a period of ten years, misrepresented his travelling expenses. He had underpaid £420 of tax. Now he had paid this tax, and had no previous convictions. He was in poor health, and had been supporting an aged mother, and an invalid sister. Sentence of nine months' imprisonment was upheld, and it was also determined that suspension was not necessary.

Recent English case as to false statement to defraud the revenue.

1. Judge William J. Campbell, "Developing Systematic Sentencing Procedures", (September 1954), 18, Federal Probation, pages 3 to 9, cited in Green, Judicial Attitudes to sentencing (1961), page 2.

2. Judge William J. Campbell. "Developing Systematic Sentencing Procedures", (September 1954), 18, Federal Probation pages 3 to 9, cited in Green Judicial Attitudes to sentencing.

3. *R. v. Richardes*, (1971) Cr. L.R. 176, cited in (1971) March Current Law, under "Criminal Law" (Item 62).

English case as to export of currency.

7.27. In another English case,¹ the accused was convicted of attempting to export Bank of England Notes with intent to evade the prohibition on exportation imposed by section 22 of the Exchange Control Act, 1947, contrary to section 56(2) of the Customs and Excise Act, 1952. He had been caught while attempting to export 30,000 pounds; and previously also he had smuggled one lakh twenty thousand pounds out of the country. He was sentenced to a term of imprisonment such as would result in his immediate discharge, and to a fine of 25,000 pounds or 12 months' imprisonment in default.

The Court of Appeal, refusing the application for leave to appeal against sentence, concluded "This court has paid the greatest attention to all these matters which have been so persuasively urged by counsel on behalf of the applicant. When all is said and done, however, the offences to which this man pleaded guilty are *very grave offences carried out on a very large scale*. He must have known the risks which he was running when he agreed to smuggle and did smuggle large quantities of currency out of England. He must have known that offences of this kind are *particularly grave from the public point of view*, because of the injury which they do to this country's economy, affecting every man, woman and child living there. It is said that a large part of the money found its way back. That may be so. £20,000 never left the country, because he was caught. That may well be so. £68,750 of the amount that he did take out has, however, never returned. These offences were carried out over a long period and were all part of a carefully prepared and daringly executed plan. In sentencing the accused, the learned judge, after imposing the fine of £25,000 said :

"This is done not only to hurt you, but as an example to others who may be attempting to do the same thing and who may well be doing the same thing, in an attempt to dissuade them.

The learned judge imposed this sentence obviously as a deterrent sentence. It seems to the court that no one can criticise the learned judge for considering that offences of this kind ought to be deterred by the severe sentences which, in the view of this court, they richly merit."

English case as to traffic in forged notes.

7.28. In another English case², it was held that four years' imprisonment was not an excessive sentence for a trafficker in forged notes, nor was imprisonment for 18 months to two years excessive for a person who utters one or two forged notes.

Need for deterrent

7.29. Borrowing what the Court of appeal,³ said in a case relating to an offence under the Official Secrets Act, one can

1. *R. v. Goswami*, (1962) 2 All. E.R. 24, 30.

2. *R. v. Caugie*, (1969) 3 All. E.R. 950.

3. *R. v. Britten* (1968) 1 All. E.R. 517 (C.A.).

state that a person who commits many offences in pursuance of a system or policy, deserves greater punishment than one who commits only one offence. And further, as the dangers of mass destruction increase, so does the need for sentences of deterrent length.

sentences where mass of people affected.

7.30. In an Andhra case,¹ the High Court, while allowing the appeal against acquittal and finding the accused guilty under section 16(1)(a)(i) and section 7 read with section 2(i) (a)(1) of the Prevention of Food Adulteration Act, noted the contention of the advocate for the accused that the accused was a very poor man having only one buffalo, and was a petty milk vendor who had no previous conviction. The High Court sentenced him only to Rs. 100/- fine (in default, two months' rigorous imprisonment).

Andhra case under Prevention of Food Adulteration Act.

7.31. In a Kerala case² relating to section 16(1)(a)(i), Prevention of Food Adulteration Act, the Magistrate had, without assigning any reasons, imposed a sentence below the minimum. The High Court had to enhance the sentence in revision.

Madras case under the same Act.

7.32. In an Orissa case³ under section 7(1) (a) (ii) of the Essential Commodities Act, the Magistrate had imposed a sentence of fine only, stating—"accused is Railway employee aged 55 years and is on verge of retirement and no previous conviction alleged against him, a sentence of fine will meet ends of justice."

Orissa case under Essential Commodities Act.

The High Court held that this was *not a sufficient justification for not awarding imprisonment.*

However, as there was no notice for enhancement, the High Court did not interfere with the sentence and impose a substantive sentence of imprisonment. (But the High Court reduced the fine from Rs. 500/- to Rs 200/- in default, simple imprisonment for one month).

7.33. In 1960, the Supreme Court in a case under the Drugs Act, 1940 observed that where large quantities of spurious drugs had been manufactured by the accused and passed off as goods manufactured by a firm of repute, he was guilty of an anti-social act of a very serious nature, and the punishment of rigorous imprisonment for 3 months with a fine of Rs. 500/- was more lenient than severe.⁴

Supreme Court case under Drugs Act.

7.34. Abhyankar, J. observed in a Bombay case⁵, under section 5, Imports and Exports Control Act :

Bombay case under Imports Act.

"A serious view must therefore be taken of such offences which show a distressingly growing tendency. The argument

1. *Public Prosecutor v. K. N. Raju Matha Sashya*, (1970) Cr.L.J. 393, 396, para. 10 (Annantharayanan Ayyar, J.).

2. *Subbayyan v. State*, A.I.R. 1968 Ker. 330.

3. *Gurumurthy v. State*, (1968) Cr.L.J. 533; A.I.R. 1968 Orissa 72.

4. *Chimanlal v. State of Maharashtra*, A.I.R. 1963 S.C. 665.

5. *State v. Drupadi*, A.I.R. 1965 Bom. 6, para 11.

that the accused comes from a respectable or high family rather emphasises the seriousness of the malady. If members belonging to high status in life should show scant regards for the laws of this country which are for public good, for protecting our foreign trade or exchange position of currency difficulties, the consequential punishment for the violation of such laws must be equally deterrent. The offences against Export and Import restrictions and customs are of the species of 'economic' crimes which must be curbed effectively."

Trivial cases justifying no punishment.

7.35. On the other hand, there could be cases where the case is so trivial as to justify no punishment.

Andhra case under Food Act.

7.36. In an Andhra case¹ of sale of adulterated food to the Food Inspector, the appeal against acquittal was accepted, and the respondent was held guilty under section 16(1) read with section 7 and section 2(1) (a) and (1) of the Prevention of Food Adulteration Act. But the High Court passed a sentence only of fine of Rs. 200/- (in default 3 months' rigorous imprisonment), because the accused was a first offender and appeared to be a petty milk vendor.

Madras case under Food Act.

7.37. In a Madras case², under the Prevention of Food Adulteration Act relating to an aerated water (the complaint being that there was excess of saccharine), the excess was found to be negligible. The High Court said—

"The learned Chief Presidency Magistrate, in relation to the nature of the offence committed by the revision petitioner, has observed as follows :—

"The accused must therefore be found guilty in a purely technical sense. In my view this prosecution has served no purpose and is in fact wholly unnecessary. When the report of the Analyst disclosed nothing serious at all, the sanctioning authority at least could have exercised discretion properly and allowed the matter to be dropped instead of launching on a prosecution which is clearly pointless. I am afraid it is prosecutions such as this that create an impression of harassment and contribute to bringing the law into disrepute. It is wholly unnecessary to impose any other punishment, in the circumstances of this case, except to admonish the accused. Admonished accordingly."

"With these observations, the learned Chief Presidency Magistrate must have applied section 95, Indian Penal Code, and acquitted the petitioner as, even though it may be an offence, it cannot be deemed to be an offence

1. *Public Prosecutor v. K.N. Raju*, (1970) Cr.L.J. 388, 393, para. 1 (Andhra Pradesh) (Chinnappa Reddy, J.).

2. *B.K. Varma v. Corporation of Madras*, (1970) 1 M.L.J. 407, 409 (Krishnaswamy Reddy, J.).

under law by virtue of section 95, Indian Penal Code. In the result, the conviction is set aside and the revision petitioner is acquitted."

7.38. In a Patna case,¹ an appeal had been preferred with special leave under section 417(3) of the Code of Criminal Procedure against the acquittal of the respondent, who was put on trial for an offence under section 16(1) (a) of the Prevention of Food Adulteration Act, 1954. The shopkeeper had been acquitted by the Magistrate, but, on appeal the Patna High Court convicted him. However, taking into consideration that it was the respondent's first offence under the Act, and that more than 3 1/2 years had elapsed since the date of occurrence, the High Court imposed a fine of Rs. 250/-, in default three months' simple imprisonment.

Patna
case under
Food Act.

7.39. In Patna case,² under the Prevention of Food Adulteration Act, there was an appeal by special leave under section 417 (3) of the Criminal Procedure Code by the Chairman, Jugsalai Notified Area Committee, against a judgment and order of a first class Magistrate *acquitting* the respondent of the charge under section 16(1) of the Prevention of Food Adulteration Act, 1954. The accused was a tea vendor, and he had been charged with selling adulterated milk. The Patna High Court set aside the order of acquittal passed by the court below, and the respondent was convicted under section 16 (1) (a) (i) of the Act. The court observed that since the offence was technical in nature a sentence of Rs. 5/- would meet the ends of justice, and in default to undergo simple imprisonment for one week.

Another
Patna
case.

The court also observed that though the respondent had been found guilty of an offence and convicted and sentenced, it was not a case at all where the Food Inspector should have insisted on taking a sample of milk from the respondent, or the authorities of the Notified Area Committee should have sanctioned the prosecution. It has resulted in nothing but waste of court's time and public money in the hands of the Committee. The money in the hands of the Notified Area Committee being public money should not be wasted in such a manner.

7.40. In a Madras case,³ the accused was running a grocery shop and was in possession of adulterated groundnut oil, which the Food Inspector purchased from him. The trial court acquitted him on the ground that the prosecution had not proved that the groundnut oil was kept as food intended for human consumption. On appeal, the Madras High Court held that on the facts it was intended to be sold for human consumption. So far as the punishment was concerned, the respondent was fined Rs. 250/-

Madras
case under
Food Act.

1. *Jamshedpur Notified Area Committee v. Durga Prasad*, (1969), Cr.L.J. 704 (Patna) (Case of first offence).

2. *Jugsalai Municipality v. Mukhram*. A.I.R. 1969 Pat. 155, 160.

3. *Public Prosecutor v. Mayakrishnan*, (1970) 1 Mad. L.J. 275 (D.B.).

in default to undergo simple imprisonment for six weeks. Time for payment was fixed at three weeks.

Applications for enhancement not frequent.

7.41. From the paucity of reported cases as to enhancement, it would appear that applications for enhancement are not frequent.

It may be noted that the Law Commission has, in its Report¹ on the Criminal Procedure Code recommended a provision for an appeal at the instance of the State Government (in case of conviction) on the ground of inadequacy of sentence. One would hope that the prosecuting agencies and the State Governments will make increasing use of this provision when enacted.

Public welfare prime consideration.

7.42. The prime consideration in proper sentencing is the public welfare. Two major problems that face the sentencing Judge are—

(a) to what extent and for what time does the community welfare require protection from the offender with respect to the offence; and

(b) what sentence will permit the offender to take his place in society as a useful citizen at the earliest time consistent with protection of the public.

Protection of the community requires incarceration.

7.43. The protection of the community from confirmed and habitual criminal not reasonably susceptible or rehabilitation as useful citizens requires the incarceration of such offenders for maximum periods. The protection of the community also requires that, to the extent a given sentence may be expected to serve as an effective deterrent to the commission of similar offences by others, this element should be given great weight in the determination of the proper sentence. The public welfare also requires, in general, the maximum use of probation and institutionalised training in respect to offenders who are not confirmed criminals and who manifest a capacity for probable return to the community as useful citizens.

The sentencing judge must, therefore, determine the proportionate worth, value and requirements of *each of these elements* in imposing a sentence in each case.

Proper sentence a compromise.

7.44. A proper sentence is a composite of many factors, including the nature of the offence, the circumstances—extenuating or aggravating—of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional and social record of the offender, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of a return of the offender to a normal life in the community, the

1. 41st Report, Vol. 2, page 147, clause 387.

possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, for such a deterrent in respect to the particular type of offence involved.

7.45. The variables in each case, including the accused's prior criminal record, his background and the condition of his health, the prospect of rehabilitation and many other factors are unpredictable, and it is for this reason that a discretion should preferably vest with the judicial officer.

Factors variable and unpredictable.

7.46. Sentences which are merely mathematically identical for violations of the same statute are improper, unfair and undesirable. Indeed, mathematically identical sentences may in substance be themselves disparate.

Mathematical identity not desirable

7.47. For these reasons, we do not think that the discretion of the court to award a sentence below the minimum should be totally abolished. In fact, even some of the officers concerned with enforcement of the Acts agreed that it was impossible to conceive of every possible situation which might operate in mitigation.

Discretion to be retained.

7.48. At the same time, and notwithstanding our hesitation to introduce provisions limiting the discretion of the court to award a punishment below the minimum, we are constrained to recommend provisions as to certain specific matters, having regard to the general complaint voiced in that regard. It has been represented to us, during the oral discussions which we have held with responsible officers, that a very mild punishment is awarded by the courts on the ground that—

Recommendation to exclude certain grounds of mitigation.

- (1) the case is one of first conviction, or
- (2) that the matter has been already dealt with by severe departmental penalty, or
- (3) that the convicted person is a young man of, say, twentyfive years, or
- (4) that the offender is merely a carrier.

7.49. We are of the view that, *by themselves whether singly or together*, none of these grounds should be regarded as sufficient for awarding a punishment below the minimum. The first ground¹, namely, that the case is one of first conviction, turns out to be unsatisfactory in the case of social and economic offences, because what has been detected and brought before the court is, more often than not, a surface manifestation of a poisonous spring of habitual misconduct running underground. Detection is particularly difficult in the case of social and economic offences. Gathering of information leading to prosecution is equally difficult, and conviction in much more so. Whatever may be the position as regards conventional crimes, the odds

1. Para. 7.48, *supra*.

here are that it was by sheer luck and the offender has escaped detection for other crimes.

7.50. As regards the second ground prior award of departmental penalties,—which is sometimes regarded as sufficient *in itself* to justify a mild punishment in the criminal trial, we wish to point out that the very object of a criminal prosecution is to invoke punishments which could not have been imposed in administrative adjudication. No doubt, successive imposition of administrative penalties and criminal prosecutions may be found to be unnecessary in many cases, and could even be avoided to prevent hardship. But these matters would be taken note of by the appropriate agency when initiating or sanctioning a prosecution. They should not weigh with the court in awarding punishment.

7.51. The next ground of mitigation which requires to be dealt with is that of youth of the offender. We have been told that courts have regarded this as a mitigating factor even where the accused was aged 25 years or so. We are of the view that this ought not to be so. No doubt, where a case falls within the Probation of Offenders Act, 1958, the provisions of that Act are to be complied with¹. But, in cases outside the Act, there is justification for treating the young of the convicted person as in itself justifying a punishment *below the minimum*.

7.51 A. We are also of the view that the minimum punishment should not be relaxed merely on the ground that the offender is merely a 'carrier.' Such a plea is often taken, and succeeds in cases under the Customs Act and the like. While it could be argued in general that a person whose contribution to an offence is as an originator of the offence should receive a higher punishment than a person who is a mere go-between, practical considerations as well as the special nature of the offences in question, require that even he should be given a substantial punishment.

7.52. There is another aspect to be discussed. Criminal responsibility attracts "measures" to meet it. If the punishable act has caused no harmful effects, punishment may be mild. If it has caused some harm but the offender can repair the damage done to society, probation would be appropriate. If the harm is serious, imprisonment, would, of course, be required. These considerations are implicit in most codes, and are stated explicitly in some of the foreign Codes². In the present context, it becomes desirable to provide that if the harm is nominal, the provision for minimum punishment should not be binding.

7.53. In the light of the above discussion, we recommend the insertion of suitable Explanations on the following lines in the relevant provision in the various Acts.

1. The question whether probation itself should be excluded is dealt with separately (Chapter 10, *infra*).

2. E.g. articles 25, 28, 33, 38 etc. of the G.D.R. Penal Code.

"Explanation¹.—The following are not, by themselves, special and adequate reasons for awarding a sentence of imprisonment for less than six months, namely,

(a) the fact that the accused has been convicted for the first time of an offence under this Act, or

(b) the fact that in proceedings under this Act other than a prosecution, the accused has been ordered to pay a penalty or his goods have been ordered to be confiscated or other penal action has been taken against him for the same offence, or

(c) youth of the accused :

Provided that nothing in this Explanation shall be construed as affecting in any way the provisions of the Probation of Offenders Act, 1958, or of section 562 of the Code of Criminal Procedure or of any enactment relating to children or any special provision of law applicable to juvenile offenders.

Explanation 2.—The fact that the offence has caused no substantial harm to society or to any individual is a special and adequate reason for awarding a sentence of imprisonment less than six months."

7.54. The specific amendments which we are recommending² will meet a few situations. But we would like to reiterate here our grave concern at some of the grossly inadequate sentences which we have come across in cases relating to economic offences.

Inadequacy of sentences—Observations regarding.

7.55. It is unfortunately true that some courts do not appreciate the gravity of economic crimes. We came across, for example, a case decided by the Chief Presidency Magistrate of a Presidency town, in which a leading businessman and two other directors of a company were convicted, on a charge of violation of the Provisions of the Foreign Exchange Regulation Act, 1947 and awarded a mild punishment.

The charge was of holding shares in a foreign company between March 29, 1957 and July 31, 1959, without the necessary permission of the Reserve Bank. Each of them was sentenced to pay a fine of Rs. 1,000 or, in default, to undergo rigorous imprisonment for three months. The company, which was tried for the same offence, was also fined Rs. 1,000/-.

The Magistrate, while sentencing the accused, said that the offence seemed to be rather technical in nature. He said that the shares in question were acquired before the 1957 amendment to the Foreign Exchange Regulation Act, 1947 which for the first time introduced the provision about the Reserve Bank's permission. The shares had not been dealt with or disposed of since their acquisition, and their dividends were received through the

1. This form is suitable for a provision worded like section 135, Proviso (1), Customs Act. The form may require change in other cases.

2. Para. 7.53. *supra*.

Reserve Bank. The shares in question were also of a subsidiary company.

Further, the defence advocate had stated that the directors failed to obtain the permission after the coming into force of the amendment, as they were advised by their solicitors that no permission was necessary as the shares had been acquired before the amendment. As the shares had not been dealt with or disposed for all these years, and as the accused seem to have failed to obtain the permission of the Reserve Bank of India on account of erroneous legal belief, the offence was regarded as technical.

7.56. We are, with respect, constrained to observe that the reasons given for awarding a mild sentence in this case, disclose a failure to appreciate adequately the adverse effect of the violations of the Foreign Exchange Act on the national economy. The relevant statutory provision prohibits the acquisition, "holding" and disposal of shares in a foreign company, and there was no basis for supposing that shares acquired before the amendment were exempt from its operation. The fact that the dividends were received through the Reserve Bank was also not relevant to a charge of holding the shares without its permission, and so were most of the other considerations relied on for awarding a mild punishment.

CHAPTER 8

CORPORATIONS AND THEIR OFFICERS

8.1. An important type of white-collar crime is that committed by Corporations. Since a Corporation has no physical body on which the pain of punishment could be inflicted, nor a mind which can be guilty of a criminal intent, traditional punishments prove ineffective, and new and different punishments have to be devised. The real penalty of a corporation is the diminution of respectability, that is, the stigma. It is now usual to insert provisions to the effect that the Director or Manager who has acted for the corporation should be punished¹. But it is appropriate that the corporation itself, should be punished. In the public mind, the offence should be linked with the name of the corporation, and not merely with the name of the Director or Manager, who may be a non-entity. Punishment of fine in substitution of imprisonment in the case of a corporation could solve the problem in one aspect²; but, at the same, it is necessary that there should be some procedure, like a judgment of condemnation, available in the case of an anti-social or economic offence committed by a corporation. This will be analogous to the punishment of public censure proposed for individuals³.

Corporations.

8.2. Of course, confiscation and similar penalties will continue. Acquisitive corporate crime, like acquisitive personal crime, will persist if the criminal is permitted to retain the fruits of his illegal activity. The criminal law, therefore, generally does not tolerate such retention. If acquisitive corporate crime is to be deterred, the corporation, like any other acquisitive criminal should be deprived of all the fruits of its illegal activity.

Attachment of Illegal Profits.

8.3. In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the Penal Code also⁴, but it is likely to arise more frequently in the case of economic laws. We, therefore, recommend

Punishment of Corporations.

1. Para. 8.4, *infra*.

2. Para. 8.3, *infra*.

3. Taxation laws are proposed to be excluded from this amendment.

4. See discussion in 41st Report of the Law Commission, (Code of Criminal Procedure), Vol. 1, page 190-191, para. 24.7.

that the following provision should be inserted in the Penal Code as, say, section 62:—

“(1) In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.

(2) In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.

(3) In this section, ‘corporation’ means an incorporated company or other body corporate, and includes a firm and other association of individuals.”

Liability
of principal
offenders.

8.4. The question of corporate liability has two aspects; the liability of the corporation itself and the liability of the principal officers, such as Managing Directors. The latter aspect will now be dealt with.

8.5. In England, two formulae have been adopted in this respect. According to the first formula, any Director, Manager, Secretary or other officer of the company with whose consent or connivance the offence is committed, is declared to be implicated in the offence. The burden of proof in this case lies on the prosecution. In most cases, the officer is also made responsible where the offence is attributable to, or facilitated by his “neglect” or “negligence” or “culpable neglect” “of duty” or “reckless neglect of duty”¹.

8.6. While, in the above formula, the burden lies with the prosecution, the second formula shifts the burden to the officer, to disprove his complicity. There has been some criticism of English formula. For example, the Borrowing etc. Act² has the following provision:—

“(1) No proceedings for an offence under this Act shall be instituted in England except by or with the consent of the Director of Public Prosecutions.....

(4) Where an offence under this Act has been committed by a body corporate (other than a local authority), every person who at the time of the Commission of the offence was a director, general manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity shall be deemed to be guilty of that offence, unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.”

1. The wording varies.

2. The Borrowing (Control and Guarantees) Act, 1946, Schedule, Paragraph 3.

This provision came in for the following judicial comment¹:—

“First of all, I have to bear in mind that this is a penal statute. It indeed, I suppose represents the high-water mark of the Parliamentary invasion of the traditional rights of the subjects of this realm. Not only does it impose upon offenders substantial penalties—no objection could be taken to that—but what is so serious from the point of view of the subject is, that where a body corporate has been found to be an offender, then every director, general manager, secretary or other similar officer of the body corporate, including a person who was purporting to act in those capacities, is deemed to be guilty unless he proves that the offence was committed without his consent or connivance, thereby reversing the usual and traditional rule of English law that a man is innocent until he is proved guilty. But not only that; for proof that he is innocent will not avail an accused person, because he must further show that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and in all the circumstance. However, that is what Parliament had thought fit to enact, and I abide, of course, by it. Nevertheless it is what Mr. Lindon described as a highly penal statute.”

8.7. In the Model Penal Code of the American Law Institute², the wording employed covers (i) persons who “perform or cause to be performed”, in the name of the corporation, any conduct, as also (ii) “any agent” of the corporation having “primary responsibility for the discharge of the duty imposed by law upon a corporation”. In the former case, positive conduct would be required, while in the latter case, it must be a “reckless” omission to perform the required act. The relevant provisions are as follows:—

“(4) As used in this Section:

(a) “corporation” does not include an entity organised as or by a governmental agency for the execution of a governmental programme;

(b) “agent” means any director, officer, servant, employee or other person authorised to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) “high managerial agent” means an officer of a corporation or an unincorporated association or, in the case of a partnership, a partner, or any other

1. *London and Country Commercial Properties Investment Ltd. v. Attorney General* (1953) 1 W.L.R. 312, 318 (Chancery Division) (Upjohn J.).

2. Section 2.07, sub-section (4) and (6), Model Penal Code, which are relevant to Corporations.

agent of a corporation or association having duties or such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(6) (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offence by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorised by law when a natural person is convicted of an offence of the grade and the degree involved."

8.8. The legislative precedent currently adopted in India, combines two different kinds of formulae. A recent example is furnished by the provision in the Gold Control Act¹ quoted below:—

"93. *Offences by companies.* (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

1. Gold Control Act, 1968, Section 93.

Explanation—For the purpose of this section:—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm, means a partner in the firm."

8.9. At present, the position as to such provisions in the major Acts with which this Report is concerned is as follows:—

- (1) Central Excises Act, 1944. —No such provision.
- (2) Foreign Exchange Regulation Act, 1947. —Section 23-C.
- (3) Prevention of Adulteration Act, —Section 17.
- (4) Essential Commodities Act, 1955. —Section 10.
- (5) Wealth Tax Act, 1957. —No such provision.
- (6) Income-tax Act, 1961. —No such provision.
- (7) Customs Act, 1962. —Section 140.
- (8) Gold Control Act, 1968. —Section 93¹.

8.10. A small point relating to the Imports and Exports Act may be noted at this stage here. The Act is not one of those listed above, but the point was raised during oral discussions. The Committee² on Prevention of Corruption (Santhanam Committee) suggested the following amendments to section 5 of the Imports and Exports (Control) Act, 1947:—

Points relating to Imports and Exports Act.

(a) To make the offenders liable to be Punished with imprisonment for a term which may extend to two years and also with fine, with a further provision that the imprisonment shall in no case be for a period of less than six months, unless the court decides, for special and adequate reasons to be recorded in the judgment, to impose a shorter term of imprisonment; and

(b) To make a separate provision making principal office-bearers also liable for offences committed by the company or partnership concern or any other incorporated body or association and to provide that the burden of proving the innocence shall be on them.

8.11. Action has already been taken on the first recommendation.

1. See para. 8.8, *supra*.

2. Report of the Santhanam Committee, (1963), page 65, para. 7.25.

Clause
recom-
mended.

8.12. As regards the second recommendation, the necessary amendment has not been enacted. Presumably, it must have been felt at that time that the amendment may cause hardship, since the day to day handling of imported goods is not necessarily looked after by the principal officer. We, however, think that it is necessary to have a fresh look at the matter. Though the absence of such a provision may not lead to any great practical difficulty, because the director or other principal officer would still be liable for abetment¹, we are of the view that to impress upon the directors² the importance of complying with the relevant Acts, a provision is needed and we recommend an amendment accordingly.

Applica-
tion for
license
signed by
Chairman
or Manag-
ing
Director—
liability of
those
officers.

8.13. We are further of the view that in the case of offences under some of the Acts, namely the Foreign Exchange Regulation Act, the Imports and Exports Control Act and the Drugs and Cosmetics Act³ where a licence or permission is granted to a corporation as a result of an application in writing made on behalf of the corporation, it is desirable that the Chairman or Managing Director of the corporation should undertake criminal liability for offences connected with the transaction to which the licence or permission relates. Such a provision might appear to be unusual. But we think that it is necessary in order to prevent contraventions of the regulatory provisions of the Acts under which such licence or permission is granted.

8.14. This could be achieved by inserting two conclusive presumptions. Under the first, it shall be presumed that the offence was committed with the consent or connivance of the Chairman or Managing Director, if he has signed the application for licence or permission.

Under the second presumption, even where the Chairman or Managing Director has not signed the application, he should be deemed to have signed it. This becomes necessary to cover cases where the application is signed by a lower officer of the corporation.

8.15. We do not think that such presumptions would go beyond the permissible limits under article 19(1)(g) of the Constitution, with respect to the right of a person to carry on a business etc. The presumptions, though conclusive, would, we venture to suggest, be regarded as reasonable restrictions in the interest of the general public within article 19(6) of the Constitution.

Our attention was drawn, in this connection, to a judgment of the Supreme Court, relating to a provision of the Gold Control Act.

1. *Abdul Aziz v. State of Maharashtra*, A.I.R. 1963 S.C. 1470; (1964) 1 S.C.R. 830

2. Amendment to be drafted.

3. The Imports etc. Act and the Drugs etc. Act are not included in the general ambit of this Report. But this point is discussed as being of special importance.

Section 88 of the Gold Control Act was challenged¹ in that case. Section 88 read thus (at that time):

“(1) A dealer or refiner who knows or has reason to believe that any provision of this Act or any rule or order made thereunder has been or is being contravened, by any person employed by him in the course of such employment, shall be deemed to have abetted an offence against this Act.

(2) Whoever abets, or is deemed under sub-section (1) to have abetted, an offence against this Act, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.”

8.16. The Supreme Court observed:—

“This section extends the scope of the vicarious liability of the dealer and makes him responsible for the contravention of any provision of the Act or rule or order by any person employed by him in the course of such employment. The rational basis in law for the imposition of vicarious liability is that the person made responsible may prevent commission of the crime and may help to bring the actual offender to book. In one sense the dealer is punished for the sins committed by his employee. It may perhaps be said if the dealer had been more alert to see that the law was observed the sin might not have been committed. But the section goes further and makes the dealer liable for any past contravention perpetrated by the employees. It is evident that the dealer cannot reasonably be made liable for any past misconduct of his employee in the course of the employment and whom he can reasonably be expected to influence or control. The maxim qui facit per alium facit per se (he who acts through another acts through himself) is not generally applicable in criminal law. But in section 88 it has been extended beyond reasonable limits. We are, therefore, of opinion that section 88 imposes an unreasonable restriction on the fundamental right of the petitioners and is unconstitutional.”

8.17. In our opinion, the provision which we are proposing is distinguishable, inasmuch as the Chairman or Managing Director is not to be responsible for the past misconduct of any other person.

8.18. Accordingly, we recommend that in the section relating to liability of individual officers of corporation in the Foreign

1. *Harak Chand v. Union of India*, A.I.R., 1970 S.C. 1453, 1466, para. 21 (Ramaswami, J.).

Exchange Act and in the Drugs Act¹, two Explanations² should be inserted, as follows:—

Explanations to be inserted in the Foreign Exchange Act and the Drugs Cosmetics Act, 1946 in the section relating to liability of officers of corporation.

“*Explanation 2.*—Where a person, being the Chairman or Managing Director of a company has, on behalf of the company, signed an application for licence³ under this Act, any contravention of the conditions of that licence shall, so long as such person holds an office in the company, be conclusively presumed to have been committed with his consent or connivance.

Explanation 3.—Where an application for licence under this Act is signed by an officer of a company other than the Chairman or Managing Director, it shall, for the purposes of this section, be deemed to have been signed also by the Chairman and the Managing Director of the Company.”

8.19. There is one point in connection with the Directors of Companies, on which a provision is required to be inserted. Punishment of Directors under the usual provision making them individually liable results in their imprisonment or fine under that provision. But, in addition, it should be permissible for the Court to order that the person convicted shall be disqualified from holding office as Director of the company, for a specified period.

A suggestion to that effect was made during our oral discussions, and we accept the suggestion. The point was made with reference to the Foreign Exchange Act and the Imports and Exports Control Act, but we think that the amendment could usefully extend to all the major Acts with which this Report is concerned, besides the Imports and Exports Control Act.

8.20. The Companies Act has a variety of provisions dealing with the disqualification imposed on a person from holding office as a Director, on his being convicted by court of an offence⁴. Further, under an amendment inserted in 1963, the Central Government has power to make a reference to the High Court of cases against managerial personnel in certain circumstances; and one of the circumstances in which this power can be exercised is the fact that the business of the company is conducted

1. The Drugs and Cosmetics Act, 1940.

2. In the Imports Act, similar Explanations will, as recommended in para. 8.13, be inserted while adding the new clause under para. 8.12.

3. In the case of the Foreign Exchange Act, the word “permission” would be appropriate instead of “licence”.

4. Sections 203(1)(a), 267(c), 274(1)(d) & (f), 283(1)(e), 336(c) and 385(1)(c) of the Companies Act, 1956.

and managed for a "fraudulent or unlawful purpose or in a manner prejudicial to public interest"¹. It should be noted that the provisions as to disqualification fall broadly in three categories; first, conviction of an offence in connection with the promotion, formation or management of the company²; secondly, conviction of an offence involving moral turpitude³; and thirdly, carrying on the business of the company for an unlawful purpose⁴.

8.21. It appears to us that for the present purpose, the most appropriate provision is the one⁵ under which, where a person is convicted of any offence in connection with the promotion, formation or management of a company, 'the court' may make an order that that person shall not, without the leave of the court, be a director or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, for such period not exceeding five years as may be specified in the order. By definition⁶, the expression 'the court' includes the convicting court, as well as any court having jurisdiction to wind up the company as respects which the offence was committed. So far as the leave referred to in the section is concerned, it is provided⁷ that the expression 'court' means any court having jurisdiction to wind up the company as respects which leave is sought. There are separate provisions⁸ as to the vacation of office held by the convicted person. In order that all these detailed provisions could be availed of without repeating them, it would be convenient if the case of a person convicted of an offence under the various enactments⁹ with which this report is concerned, is included in the main provision¹⁰ in the Companies Act (which at present relates to conviction of an offence in connection with the promotion, formation or management of a company).

8.22. We, therefore, recommend that section 203(1)(a) of the Companies Act should be amended by inserting, at the end of clause (a), the following:—

"or of any offence under the following Acts punishable with imprisonment for more than three years, namely,—

[The 8 major Acts and the Imports and Exports Control Act could be mentioned here.]"

-
1. Section 388B(1)(d), Companies Act.
 2. Section 203(1)(a), Companies Act.
 3. Section 267(c), Companies Act.
 4. Section 388B(1)(d), Companies Act.
 5. Section 203(1)(a), Companies Act.
 6. Section 203(2), Companies Act.
 7. Section 203(2)(b), Companies Act.
 8. Section 274(1)(b) and sections 283(1)(j), Companies Act.
 9. The Imports Act has also to be added.
 10. Sections 203(1)(a), Companies Act.

CHAPTER 9

DESIRABILITY OF AMENDMENTS AS TO JURISDICTION, PROCEDURE AND LIMITATION

Introductory.

9.1. A study of the relevant material concerning the prosecution of persons for the economic offences in question, including statistics of convictions and the judgments of the Courts, led us to the tentative belief, even during our earliest deliberations, that these offences could not be dealt with adequately except by special courts constituted more or less exclusively for trying them. A Judge entrusted with the trial of offences generally, we felt, finds it difficult to see these offences in the proper perspective of their impact on the nation's life. Probably, while trying traditional offences against the person or against property, in the discharge of his duties, when he comes to try an economic offence which does not, after all, result in harm to any specific individual or his property, it is easy for him to lapse into a feeling that he is not confronted with any serious offence or with one that represents a serious danger to the community.

Judicial attitudes.

9.2. That this has been so, is amply demonstrated by the way in which an otherwise unaccountable leniency has often been shown in sentencing persons convicted for these offences. Even where the law has prescribed the minimum sentences for imprisonment, to be waived only in exceptional circumstances in the discretion of the Court, the accused have been let off on such grounds¹ e.g., that the accused 'appears to be' of young age, the accused is only a carrier, this is only his first offence, the accused is an old man, the accused has already been fined heavily in the Departmental proceedings, the accused has made a confession of his guilt, the accused has incurred considerable expenditure in defending himself, the accused is a family-man, and so on. It is hardly necessary to add that these considerations do not constitute judicially valid grounds for not awarding the minimum sentence prescribed by law.

In the matter of conviction also, there has often been an unduly excessive indulgence in favour of the accused. In one case where the accused, notorious for his record of economic offences, had concealed and withheld from the Reserve Bank of India information regarding his ownership of shares in foreign companies and thus committed the offence of 'holding' such foreign shares without the knowledge of the Reserve Bank, the Court treated the offence as merely a technical one and let him off with a fine of Rs. 10,000, which, of course, for him was as good as acquittal.

1. See Chapter 7, *supra*.

9.3. The appointment of special courts for the trial of these offences will not only enable the judges who try these offences to develop a sense of perspective and expertise but will also have several additional advantages. The very appointment of such courts will highlight the social importance of such prosecutions. It will also enable the judiciary to develop a new perception and a new and appropriate attitude of concern for such offences. And, above all, if properly armed with an expeditious procedure, these special courts will be able to create the suitable social climate in which the reprehensible antisocial character of these offences will be more adequately brought home to both the general public and the offenders themselves.

Special
Courts—
Advantages
of.

9.4. During our discussions with members of the public, the Bar, and government officials, there was almost unanimous support for the general proposition that the economic offences in question should be tried by special courts empowered to follow a special speedy procedure.

9.5. We examined various patterns for the establishment of these special courts. One pattern is provided by special tribunals which have been constituted from time to time for the trial of terrorist crimes or other offences disturbing the security of the country, like the one established under the Criminal Law Amendment Act, 1908. Another is provided by the special tribunals contemplated by the Defence of India Act. The so-called "section 30 Magistrates" (to be replaced by the Chief Judicial Magistrates and Additional Chief Judicial Magistrates under the recent Cr. P.C. Bill¹, afford yet another pattern of courts specially empowered to try certain class or classes of offences². But neither of these patterns appeared to us to be satisfactory for the present purpose.

Various
patterns
of special
courts
considered.

9.6. We view the economic offences under consideration as constituting a serious new challenge to the economic integrity and well-being of society. We share the view of all those who had to deal with these offences, that the existing legal weapons as such are not adequate to protect society from those engaging in their commission. We feel that new instruments and procedure must inevitably be devised.

Economic
offences
constituting
serious
threats.

9.7. The new instrument which we propose is a special court which will have exclusive jurisdiction to try these offences. In order to be effective, the special court must not take up any other work, and must develop perception and expertise in the trial of these offences only. In order to be effective, its judgments should be subject to not more than one appeal only, to the High Court, both on questions of fact and on questions of law. The court must have power not only to convict and punish an accused

New
Instrument
necessary.

1. See—(a) the 41st Report of the Law Commission.

(b) The Cr.P.C. Bill, 1970, Commission.

2. As to the Criminal Law Amendment Act, 1952, see para. 9.8, *infra*.

person of the offence specifically charged, but also for an offence under an Act dealing with similar offences for which he has not been specifically charged, provided that the rules of natural justice have been duly observed, and he is afforded a fair opportunity to defend himself in respect of such charge. It should have power to impose any punishments prescribed by law for the offences of which the accused before it is found guilty.

Variety of provisions needed.

9.7A. We suggest that these courts should be manned by senior and experienced Judicial Officers of the rank of the Sessions Judge. And, above all, it must follow a special and speedy procedure for the trial of these offences. This procedure, of course, must satisfy the requirements of a fair and impartial trial. But, subject to this, it should be specially devised to cut down delays and various ingenious forensic stratagems to escape the clutches of law and delay, if not frustrate, the administration of justice. Thus, this procedure should avoid the cumbersome and needlessly repetitive process of committal, and should permit the special court to take cognizance of offences without committal. In other words, the special court should follow substantially the procedure for the trial of warrant cases. The procedure should permit the transfer of cases from one special court to another, and should provide that the special court to which a case is transferred shall not be bound to resummon or re-hear witnesses unless it is satisfied that such a course is necessary in the interests of justice. It should have power to refuse to summon witnesses. Provision should be made that it will not be bound to adjourn a trial for any reason unless such adjournment is necessary in the interests of justice. The special court should not be required to adjourn proceedings for the purpose of securing the attendance of a legal practitioner if it is of the opinion that such adjournment would cause unreasonable delay. It should have powers to deal with refractory accused, and to proceed with the trial in the absence of an accused who, by his voluntary act, renders himself incapable of appearing before the court or resists his production before it or behaves before it in a persistently disorderly manner. It should have power to refuse to summon any witness if it is satisfied that the evidence of such witness will not be material.

9.7B. The courts trying such offences should have power to direct that proceedings be started against another person not charged before it, if it is satisfied¹ that he is *prima facie* guilty of any offence punishable under the act or acts in question, and on such an order being passed, the person concerned will be tried accordingly.

Right of accused not affected.

9.8. The above provisions, calculated to make enforcement of law and justice more effective and speedy are, it will be noticed, carefully drawn to steer clear of the right of the accused to a fair trial based upon a full opportunity of making his defence with the help of a lawyer. This right is not only guaranteed to him in

1. This point is developed in Chapter 11, *infra*.

article 22 of the Constitution, but is one that ought to be respected in any civilised system of administration of justice. In fact, the procedure outlined above is not novel, nor is it being suggested for the first time after the commencement of the Constitution. Many of its features are to be found in the Criminal Law Amendment Act passed by Parliament for the trial of offences relating to bribery and corruption¹.

Again, a procedure with all these features had been adopted by the various States for the speedy trial of certain offences in certain cases, presumably because the State Governments felt that there was an abnormal growth of incidence of certain offences and failure to try them speedily and to punish them effectively would shake the faith of the general public in the administration of justice itself. It is true that the West Bengal Special Courts Act, 1950, which laid down such a procedure, was struck down as unconstitutional by the Supreme Court in *Anwar Ali's case*². But, then, the ground on which the Court struck down the West Bengal legislation was not that the procedure was unfair or otherwise reprehensible, but on the ground that the impugned Act authorised the State Government to pick and choose individuals arbitrarily for trial by the special procedure. In later cases³ where no such arbitrary picking and choosing was involved, the Supreme Court upheld such procedure. In fact, in *Kedar Nath's case*⁴, the Supreme Court even permitted picking and choosing of individuals and thus considerably watered down the authority of the decision in *Anwar Ali's case*, if not altogether destroyed it.

9.9. We, therefore, propose that Parliament should enact a comprehensive law authorising the setting up of special courts and laying down a special procedure for the effective and speedy prosecution of all the economic offences under reference on the lines indicated above. The proposed law may conveniently be drafted by adopting the pattern and the provisions of the West Bengal Special Courts Act, 1950, *mutatis mutandis*, with the difference that the provisions struck down by the Supreme Court in *Anwar Ali's case*⁵ authorising the picking up of individual cases may be dropped, and necessary modifications may be introduced to carry out the suggestions regarding procedure made elsewhere in this Report⁶. This law may be titled the Special Courts (Economic Offences) Act, and may be left flexible enough to permit additions to the list of the economic offences to be tried by the Special Courts which it authorises to be set up.

Recommendation
as to
Special
Courts.

It should apply to offences under all the major Acts with which this Act is concerned,—except the Wealth Tax Act and the Income-tax Act. When the taxation laws are simplified,

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1. The Criminal Law Amendment Act, 1952.
 2. *State of West Bengal v. Anwar Ali*, A.I.R. 1952 S.C. 75; (1952) S.C.R. 284.
 3. *Kathi Raning Rawat v. State of Saurashtra*, A.I.R. 1952 S.C. 123.
 4. *Kedar Nath Bajoria v. The State of West Bengal*, A.I.R. 1953 S.C. 404 to 407.
 5. *State of West Bengal v. Anwar Ali*, A.I.R. 1952 S.C. 75; (1952) S.C.R. 284.
 6. See particularly remaining paragraphs of this Chapter and Chapter 11, *infra*.

they could be brought within the scope of the new Act creating Special Courts which we have recommended above.

Procedural recommendations common to various Acts how to be implemented.

9.9A. In our discussion of the amendments of a procedural nature¹ which we have recommended at various places in this Report, as amendments common to more than one Act, we have stated that the necessary provisions be inserted in the relevant Acts. But, if a Special Courts Act is passed, as recommended by us², then that act will include those provisions.

Consequential amendment in provisions as to summary trials and other procedural provisions.

9.9B. The recommendation for the trial of these offences by special Judges appointed under the new Act, will render it necessary to make consequential changes in a few procedural provisions; in the various Acts, and some of them—e.g., the provisions as to summary trials—may even become totally obsolete, framed as they are with reference to trials before Magistrates. It has not been considered necessary to discuss all these changes in this Report; but those will have to be carried out.

Disclosure of case by the accused.

9.10. One special aspect in which we should like to go beyond the scheme of the West Bengal Act³ in order to secure effective trial of the offences in question, may now be mentioned.

9.11. Under the existing procedure applicable to criminal trials, the prosecution is expected to disclose its case in detail from the very outset,—as is evident from the elaborate legislative provisions governing the form and content of the charge as contained in the Code of Criminal Procedure, and from the right conferred by that Code on the accused to a copy of all statements and documents which led to the initiation of the proceedings. But the accused is entitled to keep totally silent until he enters on his defence. The statutory provision requiring the court to question the accused for the purpose of explaining the evidence against him⁴ does not operate until the examination of the prosecution witnesses is over. Whether this position in general should be disturbed in ordinary criminal trials is not a matter with which we are now concerned; but it is, in our opinion, necessary to treat social and economic offences on a different footing. Considerable amount of time, money and energy are usually spent in the investigation and prosecution of these offences, and it is but proper that the prosecution should know the essentials of the case of the accused so that, if necessary, the prosecution can prepare itself to meet the pleas raised by the accused. Fair trial pre-supposes that both parties should be aware of the case which they have to meet. We are not unaware of the balance of advantage which the State has against the accused in a criminal prosecution. Nor do we under-rate the importance of the

1. For a convenient collection, see Summary at the end of this Report, Part relating to Amendments common to more than one Act.

2. Para. 9.9, *supra*.

3. Para. 9.9, *supra*.

4. Section 342, Cr.P.C.

constitutionally guaranteed privilege against self-determination. But we think that a provision calling upon the accused to make a statement of his case after the charge is framed and copies of the statements and documents supplied to him, would not be repugnant to either of these two considerations. There will be neither compulsion nor pressure towards self-incrimination. There will merely be an opportunity to the accused to make a disclosure of his defence, at a stage earlier than that contemplated by section 342, Code of Criminal Procedure.

9.12. It is of interest to note in this connection that in England, the accused is now required to raise a plea of *alibi* at the very outset¹.

9.13. The position in Scotland² is of greater interest.

The defence is obliged to give notice not less than two days before the second diet (that is, the trial diet) of any special defence (*alibi*, self-defence, insanity, asleep when crime committed, or crime committed by another person named and designed). If the accused intends to attack the character of a person whom he is charged with injuring, say to accuse of immorality a woman whom he is alleged to have raped, or to accuse a person whom he is said to have assaulted of quarrelsome disposition, he must likewise give notice of this line of defence. Further, three days before the trial the defence must provide particulars of witnesses and productions (other than those on the Crown list) on which the defence intends to rely.

[The accused in Scotland³ is cited to appear at two diets, the first not less than six days after service of the indictment, the second not less than nine days after the first diet. The first diet, in any event, in solemn procedure is always in the sheriff court when the sheriff receives the plea of the pannel (or accused). A plea in bar of trial should be stated at this stage. The sheriff notes the plea, recording any preliminary pleas, and also whether the accused pleads "guilty" or "not guilty". If he pleads "guilty" there may be resort to special procedure to expedite passing sentence. The second diet, according to the gravity of the alleged crime, takes place either in the sheriff court or before the High Court; and if in the latter, the High Court may review the proceedings of the first diet before the sheriff.

9.20. Although what we are recommending goes further than the English⁴ and the Scottish⁵ provisions, we believe that is justified on principle, having regard to the nature of the offences under inquiry and the magnitude of the danger posed to the national economy by them.

1. Section 11, Criminal Justice Act, 1967 (English).

2. T.B. Smith, Scotland, The Development of its Laws and Constitution (1962), p. 224.

3. T.B. Smith Scotland, The Development of its Laws and Cnstitution 1962 page 225.

4. Para. 9.18, *supra*.

5. Para. 9.19, *supra*.

We, therefore, recommend the insertion of a provision on the following lines:—

(1) In every trial for an offence under this Act, the court shall, after the charge is framed,—

(a) direct the prosecution to furnish to the accused (or, where there are more accused than one, to each of them separately), a copy of the charge and of the documents upon which the prosecution proposes to rely and of which copies have not been already furnished to the accused, and

(b) for the purpose of ascertaining the case of the accused, call upon the accused to make a statement orally or in writing signed by him, touching upon all the facts set out in the charge and in the documents of which copies have been furnished to the accused:

Provided that where the court has dispensed with the personal attendance of the accused, the court may permit him to present a written statement signed by him through his pleaders.

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to make such statement or by making a false statement.

(4) The statement made by the accused or the failure to make a statement on all or any of the matters referred to sub-section (1) may be taken into consideration in such trial and put in evidence for or against him in any other inquiry into, or trial for any other offence which such statement may tend to show he has committed.

(5) Where the court has called upon the accused to make a statement under this section, the provisions of section 342 of Code of Criminal Procedure, 1898, shall not apply, except as regards matters which, in the opinion of the court, had not been raised and communicated to the accused previously and in respect of which the accused should be allowed an opportunity to explain the circumstances appearing against him.

(6) Where the accused has stated his case under this section, he shall not ordinarily be allowed to go beyond that case except with the leave of the court.

Review of
judgment.

9.21. There is one important question now to be dealt with, namely, review. Because of the restriction contained in the Criminal Procedure Code¹, a criminal court cannot in general

1. Section 369, Code of Criminal Procedure.

review its judgment, except to correct a clerical error. Controversies as to small details about the interpretation of the provision containing the above restriction are not relevant for the present purpose.

The law in England as to the review of criminal convictions is not different in substance. Broadly, the position is that—

(a) A Court has always the power to alter a sentence so long as the Court is in session¹.

That is to say, at assizes, the Judge who has passed a sentence may, at any subsequent date till the assizes are completed by signing of a document delivered to the gaoler as recording *the sentence* of the Court, alter the sentence either by reducing or even increasing it. Similar power can be exercised at Quarter Sessions.

(b) Once the judgment has been *entered on the record*, no Court can alter it².

9.22. We are of the view that this position requires to be changed in relation to the offence under the major Acts with which this Report is concerned. Whether the provision in the Criminal Procedure Code barring review requires modification in respect of other offences also, need not be discussed in the present Report.

9.23. It may be of interest to note that the Supreme Court has, under article 137 of the constitution and subject to the provisions of any law passed by the Parliament or rules made under article 145³, power to review "any judgement pronounced or order made by it"⁴. In pursuance of this article, the Supreme Court had made the following rule⁵ :—

"1. The Court may review its judgement or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record."

It is to be noted that the application is competent only to correct an error apparent on the face of the record. This would take in only one of the various grounds of review mentioned in Order 47, rule 1 of the Code of Civil Procedure, which deals generally with review by civil courts.

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1. Archbold (1966), para. 633.
 2. *R. v. Casey*, (1923) 23 Cr. App. Rep. 193.
 3. See Article 145(1)(e) of the Constitution as to rules.
 4. See A.I.R. 1957 S.C. 742.
 5. Order 40, Rule 1, Supreme Court Rules, 1966.

5 of 1908.

9.24. Order 47, Rule 1, Civil Procedure Code, 1908, is as follows :—

Applica-
tion for
review of
judgment.

- “1. (1) Any person considering himself aggrieved—
 (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
 (b) by a decree or order from which no appeal is allowed, or
 (c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matters or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being the respondent, he can present to the Appellate Court the case on which he applies for the review.”

9.25. It would also be of interest to note that in the U.S.A. a judgment of conviction rendered at the end of a criminal trial does not necessarily dispose of the case. In addition to permitting recourse to direct review of convictions for most offences, all American jurisdictions permit the defendant to attack his conviction by what have come to be known as “post-conviction” remedies in some circumstances. Such attack may be by *habeas corpus*, *coram nobis*, or some special procedure created by statute. In some cases, motions for new trial on the discovery of evidence or for correction of sentence, or to vacate judgment, are available after the time limit for appeal has expired.

9.26. While the general position as to the scope of review in criminal cases is outside the ambit of this Report, we are of the view that in respect of the offences with which this Report is concerned, there should be a power of review, having regard to the impact of these offences on the welfare of the nation.

9.27. We recommend that a provision similar to Order 47, Rule 1, Code of Civil Procedure should be introduced to permit review in respect of judgements in prosecutions under the Acts with which this Report is concerned. In making this recommendation, we do not wish to make a distinction between review at the instance of the prosecution and review at the instance of the accused.

The following section is suggested :—

“(1) Any person considering himself aggrieved—

(a) by the judgement or order of a criminal court in a prosecution under this Act from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a judgment in such prosecution from which no appeal is allowed, and who, from the discovery of new and important matters or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the judgment was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the judgment passed or order made against him, may apply for a review of judgement to the Court which passed the judgment or made the order.

(2) A party who is not appealing from a judgment or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of such appeal is common to the applicant and the appellant, or when, being the respondent, he can present to the Appellate Court the case on which he applies for the review.

(3) The Court to which an application is made for review of judgment shall, after giving the parties a reasonable opportunity of being heard, pass such orders as it thinks fit, and may, pending such hearing, stay execution of the judgment or order on such term as it thinks just.”

[The subsequent procedure will, of course, be regulated by provisions which will have to be drafted.]

9.28. While we are dealing with the question of procedural matters, we wish to refer to one point of limitation governing appeals against acquittals. Under the Criminal Procedure Code, an appeal against acquittal can be filed—

Period of
limitation
for appeals
against
acquittals.

(1) by the Public Prosecutor at the instance of the State Government¹;

(2) by the Public Prosecutor at the instance of the Central Government, if the offence has been investigated by the Delhi Special Police Establishment²;

(3) by the complainant with special leave of the High Court³.

1. Section 417(1), Criminal Procedure Code.

2. Section 417(2), Criminal Procedure Code.

3. Section 417(3), Criminal Procedure Code.

[The provisions on the subject, contained in section 417, Criminal Procedure Code, have been incorporated in the Criminal Procedure Code Bill,¹ without any modifications material for the present purpose.]

9.29. While appeal in the first two cases is as of right, appeal in the third case is only by special leave. An application for the grant of such special leave cannot be entertained by the High Court after the expiry of sixty days from the date of the order of acquittal.²

9.30. Now, this period of limitation (sixty days), while adequate for private complaints, is, in practice, likely to be inadequate for complaints made by public servants in their official capacity. Before a decision to make an application for leave can be taken, a number of formalities has to be undergone, such as, obtaining the administrative sanction of a higher authority, consultation with other officers, re-examination of the papers, and the like. While it is not our intention that any delay in these steps should be encouraged, we must recognise that realities of official routine justify some relaxation of the ordinary periods. The problem does not arise where the State Government directs an appeal—as in case (1) above³—or where the case was investigated by the Delhi Special Police Establishment and the Central Government directs an appeal—as in case (2) above.⁴ But there are cases arising out of complaints filed by public officers, not investigated by the Delhi Special Police Establishment, being cases in which the State Government is not interested, where the appeal against acquittal can be filed, if at all, under case (3) above. It is in these cases that the present position causes practical difficulty. We think that it would be better if the ordinary period (sixty days) is doubled for such cases. Though we are concerned with offences under specified Central enactments, we think that the amendment in this respect could usefully be made to cover all cases in which the complaint has been made “by a public servant acting or purporting to act in the discharge of his official duties⁵.”

9.31. Accordingly, we recommend that clause 388(4) of the Criminal Procedure Code Bill should be revised, so as to read as follows⁶ :—

“(4) No application under sub-section (3) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal, or, if the order of

1. Clause 388, Criminal Procedure Code Bill 1970.

2. Section 417(4), Criminal Procedure Code.

3. Para. 9.28, *supra*.

4. Para. 9.28, *supra*.

5. Cf. the words of section 200, proviso (aa), Criminal Procedure Code.

6. To be carried out in the Criminal Procedure Code.

acquittal is passed in any case instituted upon a complaint made by a public servant acting or purporting to act in the discharge of his official duties, then after the expiry of *one hundred and twenty days* from the date of that order of acquittal.”

9.32. It is needless to add that the period of limitation for *the appeal* remains unaffected by the above recommendation. The relevant provision¹ is as follows:—

Description of appeal	Period of limitation	Time from which period begins to run
114. Appeal from an order of acquittal		
(a) under sub-section (1) or sub-section (2) of section 417 of the Code of Criminal Procedure, 1898;	Ninety days	The date of the order appealed from.
(b) under sub-section (3) of section 417 of that Code.	Thirty days.	The date of the grant of Special leave.

Under the Limitation Act², the Court has power to condone the delay. The provision says—

“5. Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application with such period.

Extension of prescribed period in certain cases.

Explanation—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

9.33. The class of offences we are dealing with in this Report are grave in themselves, and the Offenders involved are ordinarily influential persons who could, if enlarged on bail, interfere with the investigation or could escape from the law. Therefore, suggestions have been made for making these offences non-bailable, which does not mean refusal of bail in all cases but grant of bail only at the discretion of the court.

1. Limitation Act, 1963, Article 114.

1. Section 5, Limitation Act, 1963.

9.34. Having due regard to the likelihood of the grant of bail defeating or delaying investigation or enabling the accused to obliterate evidence or escape from the country, the proposal to make these offences non-bailable appeared to us to be reasonable. As we are recommending, in this Report, an increase in the maximum punishment for the serious offences, they will become non-bailable, and that will be a welcome change. We are also recommending an amendment in the Essential Commodities Act¹ to remove the present provision to the effect that the offences under that Act shall be bailable.

9.35. We would also like to point out that the offenders involved in socio-economic crime have a mobility which beats the law unless the machinery of investigation and the courts are vigilant. It is, therefore, desirable that the courts, when granting bail to this class of offenders, should consider the imposition of a condition that the accused shall not leave the country and that his passport shall be impounded.² We are separately recommending an amendment the effect of which will be that a power will be vested in the passport authorities at the request of higher officers to withhold the issuance of or impound the existing passport of the accused.³ Provisions somewhat on these lines now exist in sections 6, 10 and 12 of the Passports Act, but those sections are restricted in their scope, and would not cover the precise situations to which we have adverted.

Provision
as to bail in
major
Acts.

9.36. For ready reference, we give below the provisions as to bail as found in the major Acts:—

(1) *Central Excises Act, 1944*.—Section 20 deals with the procedure to be followed by the officer-in-charge of police station. The officer-in-charge of a police station to whom any person is forwarded under section 19 shall either admit him to bail to appear before the magistrate having jurisdiction, or in default of bail forward him in custody to such magistrate.

(2) *Foreign Exchange Regulation Act, 1947*.—Under section 19B(3), where any officer of Enforcement has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers, and be subject to the same provisions as the officer-in-charge of a police station has, and is subject to, under the Criminal Procedure Code.

(3) *Essential Commodities Act, 1955*.—Section 10A provides that notwithstanding anything contained in the Code

1. See para 15.52, *infra*.

2. A power to impose conditions while granting bail has been recommended in the Law Commission's Report on sections 497-498, Cr.P.C. and also in its 41st Report on the Cr.P.C.

3. See para 15.35, *infra*.

of Criminal Procedure, 1898. every offence punishable under this Act shall be cognizable and bailable.¹

(4), (5) and (6)—*The Income-tax Act, the Wealth Tax Act, 1957 and the Prevention of Food Adulteration Act, 1954.*—These do not contain any specific provisions regarding bail.

(7) *Customs Act, 1962.*—Under section 104(3), where any officer of customs has arrested any person under subsection (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and the subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure, 1898.

(8) *Gold Control Act, 1968.*—Under section 68(2) of the Act, any officer who has arrested any person under this section shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has, and is subject to, under the Code of Criminal Procedure, 1898.

9.36A. We consider it necessary that in trials for these offences, both the prosecution and the accused should be heard as to the sentence to be passed. The Criminal Procedure Code Bill² provides for hearing the accused; but the provision in the present case should be as above.

Parties to
be heard as
to sentence.

9.37. The question of having a period of limitation for prosecutions for the offences in question has been raised by some commercial bodies. The reasons in favour of and against prescribing limitation for criminal prosecutions, are well known. The Law Commission had also occasion³ to consider the question of limitation with reference to offences under the Penal Code.

Limitation
for prose-
cutions.

9.38. As one author has pointed out⁴, “at one time or another, approximately 91 per cent of the adult population have committed crimes punishable with imprisonment. If they have escaped being convicted, it is due partly to their good luck and partly to other circumstances”. If, after a specified period, they are immune from prosecution, they would have peace in mind.

1. As to amendment of section 10A, Essential Commodities Act, see Chapter 15, *infra*.

2. Cr.P.C. Bill, 1970, clauses 241(2) and 256(2).

3. Sec 42nd Report (Indian Penal Code), page 341 et seq., Chapter 24.

4. James Brands “Criminal Law in the Seventies—Some Suggestions” (June 1970), New York State Bar Journal.

The main reasons for the existence of law of prescription for civil actions will apply with equal force for criminal proceedings also.

The Law of limitation is essentially a law of peace and repose. The person who has committed a crime and is not prosecuted for the crime for several years, must have mental peace and repose and should not be under continuous apprehension that at any time he may be criminally prosecuted. After some time, evidence in support of defence may also be lost.

9.39. At present, none of the major Acts with which this Report is concerned, contains a provision for limitation for prosecutions. Provisions as in section 40(2) of the Central Excise Act apply to *suits* challenging action under the Act, and not to prosecutions. The matters, however, is of some difficulty, and could be considered better after a decision is taken about amendment of the Penal Code¹ in this respect, and after the working of the amended provisions is observed.

Tender of
pardon
and
probation.

9.40. Besides the above points, a few other questions of a procedural nature arise, which are discussed separately.²

1. See 42nd Report Indian Penal Code, page 341, et seq., Chapter 24.

2. (a) Probation, Chapter 10.

(b) Pardon, Chapter 13.

(c) Sanction or complaint, Chapter 11.

CHAPTER 10

PROBATION

10.1. In this chapter we deal with some specific points affecting punishment and liability. Introductory.

10.2. There is a suggestion¹ that amendments should be introduced either in each of the Acts—the Income-tax Act, Wealth Tax Act, Gold Control Act, Customs Act, Excise Act—or in the Probation of Offenders Act itself, to bar the application of the Probation Act to the offenders under the above Acts. A concession (it is stated) may be made only in regard to offenders under 18 years of age, who may be allowed to be released on probation on bond for three years, subject to the other conditions in sections 4 and 6 of the Probation of Offenders Act. Somewhat similar suggestion has been made regarding the Foreign Exchange Act.²

10.3. After careful consideration we are satisfied that the suggestion should be accepted and in our view the suggested amendment is desirable in respect of offences under all the Acts with which this Report is concerned.

We appreciate that the suggested amendment would be in apparent conflict with current trends in sentencing. But ultimately, the justification of all sentencing is the protection of society. There are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way, because of the paramount need for the protection of society. We are, therefore, recommending suitable amendment in all the Acts, to exclude probation in the above cases.

“Whoever abets the commission of an offence punishable with imprisonment by a child under fifteen years of age, whether or not the offence is committed in consequence of the abetment, shall be punished with imprisonment of any description provided for that offence for a term which may extend to twice the longest term of imprisonment provided for that offence and shall also be liable to fine.”

We agree with the above recommendation, which is of particular value in the context of economic offences.

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1. Suggestion of a Ministry of the Government of India.
 2. Letter dated 28-12-1971.

10.4. Accordingly, we recommend the insertion of the following section in all the Acts :—

Amendment regarding Probation Act.

Section to be inserted in all the Acts.

Section 6 of the Probation of Offenders Act, 1958, shall, in relation to offences under this Act, be read as if for the words “twenty-one years of age”, the words “eighteen years of age” were substituted.

10.5. In the Law Commission’s Report on the Indian Penal Code¹, there is a recommendation for the insertion of a new section in the Code for dealing with abetment of offences by children. The relevant section (as recommended) is as follows:—

1. 42nd Report (Indian Penal Code), page 123, paragraphs 5.23 and 5.24.

CHAPTER 11

REQUIREMENT AS TO SANCTION OR COMPLAINT

11.1. A study of the provisions¹ restricting the power of the Court to take cognizance (or restricting the institution of a prosecution) in the major Acts with which this Report is concerned, shows that these provisions fall into the following broad classes:—

Requirement as to sanction, complaint or other provisions.

(a) Provisions requiring the *sanction* of a specified authority².

(b) Provisions requiring the *complaint* of (or a complaint filed with the consent of) the specified authority³.

(c) Provisions requiring the "*report*" of a specified authority⁴.

(d) Provisions requiring that the Court shall not take cognizance or that a prosecution shall not be instituted *except with the consent of specified authority* (or substantially to the same effect)⁵.

[Within each category, the provisions differ in matters of detail; but we are, for the present, concerned with the broad categories].

11.2. Now, the question whether a particular provision falls in one or other of the above categories possesses some practical importance. In cases under category (a), the procedure for trial, once a valid sanction has been obtained, will depend on the manner in which cognizance is taken by the court,—i.e., whether the cognizance was taken on a Police Report or otherwise. The fact that a sanction is required before a prosecution can be instituted is of no consequence in this regard. On

Significance of difference as to various requirement for taking cognizance.

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1. Sec Chart—Para. 11.5, *infra*.
 2. (a) Section 12, Central Excise Act, read with the Customs Act.
(b) Section 23(3), Foreign Exchange Regulation Act.
(c) Section 280(2), Income-tax Act.
(d) Section 137, Customs Act.
 3. (a) Section 23(3)(a)(b), Foreign, Exchange Regulation Act.
(b) Section 97(1), Gold Control Act.
 4. Section 11, Essential Commodities Act.
 5. (a) Section 20, Prevention of Food Adulteration Act.
(b) Section 36(3), Wealth Tax Act.
(c) Section 279(1), Income-tax Act.

the other hand, in cases in category (b), since a complaint is required, the court obviously cannot take cognizance on a police report, and the procedure at the trial will necessarily be the more cumbersome one prescribed for cases instituted otherwise than on a police report.

Position where report of officer required.

11.3. What is stated above regarding cases in category (a) applies to category (c) also, except that, where the officer who made the required 'report' is himself a police officer, the position could be different. When the report is of a police officer made after investigation, and the court takes cognizance thereon, then the procedure as for cases instituted on police report can be followed¹.

Position where prosecution required to be "at the instance" of a specified authority.

11.4. In cases under category (d), the requirement is that the prosecution should be "at the instance of the specified authority". This is usually complied with by filling a *complaint* made with the approval of the specified authority². Whether the wording rules out a *report* filed with sanction has not been decided.

As to the procedure that will govern the trial in cases under (d), the matter will depend on the manner of taking cognizance. But it should be noted that the manner of taking cognizance is subject to one important limitation—(1) In the case of a non-cognizable offence, the police cannot (without Magisterial orders) investigate, and cannot therefore give a report to the court. Hence cognizance by the court would have to be on a complaint. (2) In the case of a cognizable offence, cognizance can be on a complaint as well as on a police report³.

Chart showing previous requirement as to sanction or complaint.

11.5. The following chart may be of use in this connection :—

Provision as to sanction or complaint and allied provisions in the major Acts.

Act	Section	Sanction or complaint required.
1. Central Excises and Salt Act, 1944.	No specific provision; but section 12 empowers the Central Government to apply the Customs Act.	See second column.

1. (a) *State v. Rugha*, A.I.R. 1970 Punj. 502, 505;

(b) *Satyadeo v. State*, A.I.R. 1970 Pat. 161;

(c) *State v. Munafka*, A.I.R. 1968 Bom. 311.

2. See *Balia v. Rangachari*, A.I.R. 1969 S.C. 700, 701.

3. A Magistrate can take cognizance of an offence of his own, if vested with that power. But this is a rare case, and can be left out for the present purpose.

Act	Section	Sanction or complaint required.
2. Foreign Exchange Regulation Act, 1947.	23 (3)	<p>(i) Complaint in writing of Director of Enforcement is required for offences under section 23 (1).</p> <p>(ii) Complaint in writing of Director or authorised person required for offence under section 23 (1A) or section 23 F.</p> <p>(iii) Previous sanction required for offence under section 19-I(2).</p>
3. Prevention of Food Adulteration Act, 1954.	20	<p>Consent of Central or State Government or a local authority or a person, authorised in this behalf by general or special order, required. [No prosecution shall be instituted except by or <i>with written consent</i> of the]</p>
4. Essential Commodities Act, 1955.	11	<p>Report in writing of a public servant required, before a Court can take cognizance.</p>
5. Wealth Tax Act, 1957.	36 (3)	<p>Commissioner, Wealth Tax for an offence under section 36 (1), 36(2) or 36(2A). [A person shall not be proceeded against for an offence . . . <i>except at the instance of the Commissioner</i>].</p>

Act	Section	Sanction or complaint required.
6. Income-tax Act, 1961.	279 (1)	Commissioner of Income-tax for offences under sections 275A, 276 A, 276B, 277 or 278. [A person shall not be proceeded against for an offence (under the specified sections) except at the instance of the Commissioner].
6. Income-tax Act, 1961 (contd.).	280 (2)	Previous sanction of Central Government required for an offence under section 280 (1).
7. Customs Act, 1962.	137	(a) Previous sanction of Collector of Customs required for offences under sections 132 to 135. (b) Previous sanction of customs Collector of or Central Government required for offence under section 136.
8. Gold Control Act, 1968.	97 (1)	(i) Complaint in writing of competent Gold Control Officer required generally. (ii) Complaint in writing made with previous sanction of Central Government required, if the offence was committed by a Gold Control Officer.

11.6. Provisions relating to sanction sometimes create problems of procedure. This will be discussed under the relevant Act¹ wherever the point is of importance.

Problems of procedure created by provisions as to sanction.

11.7. It may not be out of place to refer to the English practice. The following is from a note published sometime ago in the Law Times²:—

English practice as to sanction of prosecutions.

“The Attorney-General (Sir Hartley Shawcross), went on to state in deciding whether or not to prosecute, the ultimate question was : *Would a prosecution be in the public interest including in that phrase, of course, in the interests of justice?* Usually it was merely a question of examining the evidence, since it was not in the public interest to put a man on trial whatever the suspicions when the evidence was insufficient to justify his conviction, or even to call upon him for an explanation. In some cases wider considerations were involved. For example it was not always in the public interest to go through the whole process of the criminal law if only a nominal penalty was likely to be imposed. Sometimes the considerations were wider still. A prosecution might involve a question of public policy, or national, or sometimes international, concern. In such cases the Attorney-General had not to make up his mind as a party politician; he must in a quasi-judicial way consider the effect of prosecution upon the administration of law and of government in the abstract rather than in any party sense. In considering these matters he had the advice of the Director of Public Prosecutions and very often of Treasury counsel as well. He had to acquaint himself with all the relevant facts including the effect which a prosecution, if successful, would have upon public morale and order, and with any other considerations affecting public policy. The one consideration which was altogether excluded was the repercussion of a given decision upon the Attorney-General's, or his party's or the Government's political fortunes. That was a consideration which never entered into account. Moreover, if the Attorney-General, the Director of Public Prosecutions, and the police all neglected their duties and did not prosecute where manifestly a prosecution should take place, there was a safeguard in that any private citizen could set the criminal law in motion.”

11.8. The question which person should have the official responsibility for invoking the criminal process, and what degree of discretion should be given to him, and whether he should have the exclusive right to initiate a prosecution, is answered in different ways in different countries. In India, the general rule is that any person can make a complaint to the competent

Dispensing with sanction for prosecution.

1. E.g. see, as to Customs Act, paragraphs 15.84 to 15.88, *infra*.

2. Note in (1951), 211 Law Times 71-72.

court¹ in respect of an offence. This general rule is subject to exceptions in specified cases. For offences under the general criminal law, (i.e., the Indian Penal Code), the exceptions are mostly to be found in the Criminal Procedure Code². For offences under special laws, the exceptions are to be found in the special laws³.

11.9. In England, private prosecutions are, as a rule, permissible, though recent trend is in the direction of an emphasis on public prosecutions. On the continent, public prosecution is the rule, and is indeed, in most cases, the only permissible mode.

11.10. In theory, thus the Indian system, so far as the general type of offences is concerned, is similar to the English pattern. In so far as the specially excluded offences are concerned, it is nearer to the Continental pattern.

11.11. We are not, at the moment, concerned with the position in general in this respect, either for offences under the Penal Code or for offences under the mass of special laws. Even as regards offences under the economic laws (with which this Report is concerned), the provisions requiring sanction of a specified authority are not intended to be disturbed. But the question which has caused us some anxiety is, should the requirement of sanction (whenever it exists) be an *imperative, indispensable one, non-compliance with which should invalidate the trial?*

11.12. The present position is that the absence of the required sanction (or the complaint of the specified person or failure to comply with a similar requirement), vitiates the trial whether or not a failure of justice has been occasioned thereby. We think that such defect should be treated on the same level as any other irregularity in the trial. Under the general provision in the Criminal Procedure Code⁴, the finding, order or sentence of a *court of competent jurisdiction* is not to be invalid merely on the ground of an error, omission or irregularity in the complaint, summons, charge etc. This provision should, in our view, be made applicable to the absence of a sanction for prosecution etc. We are aware that the present view is that the general provision referred to above does not apply to the absence of a sanction for prosecution etc. required by law, because the absence of a sanction takes away the very competence

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1. Section 4(1)(h) and section 190, Criminal Procedure Code.
 2. Chapter 15, sections 195 to 199B, Criminal Procedure Code.
 3. Paragraphs 11.1 to 11.7, *supra*,
 4. Section 537, Criminal Procedure Code.

of the Court¹. We would, however, like the position in this respect to be changed.

11.13. We, therefore, recommend that the following section should be inserted in all the acts with which this Report is concerned :—

New Section to be inserted in all the Acts.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no finding, sentence or order passed by a Court shall be reversed or altered by a Court of appeal, confirmation or revision on account of the absence of, or any error, omission or irregularity in, the sanction or consent², required for the prosecution for the offence which is the subject matter of the inquiry, trial or other proceedings under that Code for an offence under this Act, unless, in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether the absence of, or any error, omission or irregularity in, such sanction has occasioned a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

Explanation :—Reference in this section to a sanction or consent required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority, or that the complaint shall be by a specified person or with the sanction of a specified person or any requirement of a similar nature³.

11.14. We are also of the view that once a Court has taken cognizance, it should have power to direct investigation against a person who is not the original accused or to implicate him. The absence of the requisite sanction as regards that accused should not matter. We propose a provision which, of course, will be confined to the offences with which this Report is concerned. The subsequent procedure will be governed by section

Power to direct investigation or to implicate another person.

1. (a) A.I.R. 1955 S.C. 287, 292; 1955 S.C.R. 1177.

(b) A.I.R. 1964 S.C. 221.

(c) A.I.R. 1962 Bom. 263.

2. The words "Sanction" etc. may be suitably changed if the statutory requirement is differently worded.

3. The Explanation will not be needed in all Acts, but will be needed in Acts in which requirements of different types co-exist. See for example, the Income-tax Act.

351, Criminal Procedure Code. Accordingly, the following section be inserted in the Acts concerned :—

Section to be inserted in all the Acts.

Power to direct investigation or implicate another person.

(1) Where, in the course of an inquiry into or trial of an offence under this Act, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may—

(a) proceed against such person for the offence which he appears to have committed, notwithstanding the absence of any sanction or consent for prosecution¹ or complaint required in respect of that person; and the provisions of section 351 of the Code of Criminal Procedure, 1898, shall thereupon apply²; or

(b) direct an investigation into the guilt of such other person by the competent officer, and thereupon the officer directed by the Court shall proceed to investigate into the matter, and shall, for the purpose, have the same powers and follow the same procedure as he had or followed for the investigation into the guilt of the accused.

*Explanation :—*Reference in this section to a sanction or consent for prosecution or complaint required includes reference to any requirement that the prosecution shall be at the instance of a specified authority, or that the complaint shall be by a specified person or with the sanction of a specified person or any requirement of a similar nature³.

11.15. With reference to the requirement of the sanction of the Collector of Customs under section 137, Customs Act, a Minister of the Union Government has, during our oral discussions with him, stated that the present rigid provision causes difficulty in cases where the investigation is completed by an officer of a department different from the department whose officers are authorised to sanction the prosecution. It was suggested that this difficulty should be removed by a suitable amendment. Having regard to the high quarter from which the suggestion came to us, we assume that the Government would, as a matter of policy, be in agreement with the suggestion. The object behind the suggestion could be achieved by inserting at the end of section 137(1) of the Customs

1. Where the requirement is in terms of complaint etc., the wording will be modified

2. Section 351, Criminal Procedure Code corresponds to Criminal Procedure Code Bill, 1970, Clause 326.

3. The Explanation will not be needed in all Acts, but will be needed in Acts in which requirements of different types co-exist.

Act, the words "or of any other officer authorised by the Central Government in this behalf", and we recommend accordingly. After the amendment, the relevant provision will read as follows¹ :—

"137(1). No court shall take cognizance of any offence under section 132, section 133, section 134 or section 135, except with the previous sanction of the Collector of Customs *or of any other officer authorised by the Central Government in this behalf.*"

1. Section 137(1), Customs Act, 1962.

CHAPTER 12

PRESUMPTION AND EVIDENCE

Introductory.

12.1. We have dealt with a few matters pertaining to evidence in other Chapters¹. Here, we propose to deal with the scope of certain presumptions and the changes needed therein.

Use of presumptions under the Foreign Exchange Act for cases under the Customs Act, and *vice versa*.

12.2. Both section 24A, Foreign Exchange Act and section 139, Customs Act, enact a presumption as to the genuineness of documents seized from the custody or control of a person. But the presumption in respect of a document seized under one Act cannot be availed of when the prosecution is under the other Act. Since, in practice, the need for such use often arises, we think that this gap should be removed. The presumption could be made available to seizure under any other law.

Seizure from a person other than the accused.

12.3. Both in the Foreign Exchange Act and in the Customs Act, it is also desirable that the presumption should be applicable also where the documents are seized from a person other than the accused. We accordingly recommend, an amendment, to widen the scope of the relevant sections in both the Acts, in this regard.

Documents received from a place outside India.

12.4. We are also of the view that these presumptions should apply also to documents received, from a place outside India.

Insertion of presumption in Imports and Exports (Control) Act, 1947.

12.5. We are also of the view that in the Imports and Exports (Control) Act, 1947, a provision similar to section 139, Customs Act, as proposed to be revised in this Report should be inserted.

1. See Chapter 7 (Burden of disproving *mens rea*) and Chapter 14 (Statements in administrative adjudications).

CHAPTER 13

TENDER OF PARDON

13.1. A matter of procedure relevant to the offences concerned may be mentioned here. That is the question of tender of pardon.

Tender of
pardon.

The following extracts from the Report of the previous Law Commission (on the Code of Criminal Procedure) would be of interest¹ in this connection:—

"In a recent case² which came up before the Supreme Court in appeal, a woman who acted as a carrier in a conspiracy to smuggle gold into India had, in her statements made to the customs officials investigating the case, admitted her role as a participant in the crime. But instead of being included in the array of accused person and sent up for trial, she was examined as a witness against her former associates. The question arose whether she was a competent witness. While holding that she was, the Supreme Court observed:—

"It is, however, necessary to say that where section 337 or 338 of the Code applies, it is always proper to invoke those sections and follow the procedure there laid down. Where these sections do not apply, there the procedure of withdrawal of the case against an accomplice. To keep the sword hanging over the head of an accomplice and to examine him as a witness is to encourage perjury. Perhaps it will be possible to enlarge section 337 to take in certain special laws dealing with customs, foreign exchange etc. where accomplice testimony will always be useful and witnesses will come forward because of the conditional pardon offered to them."

"We have given our respectful consideration to this observation of the Supreme Court but it does not seem practicable to select from among the large number of special laws creating socio-economic offences those which are sufficiently grave to be brought within the scope of section 337. The result of such inclusion will be that every case pertaining to such an offence where tender of pardon is

1. 41st Report of the Law Commission (Criminal Procedure Code), Vol. 1, page 194, para. 24.17.

2. *Laxminat Choraria v. The State of Maharashtra*, A.I.R. 1968 S.C. 938, 945; (1968) 2 S.C.R. 624, 635.

made, will have to be tried by the Court of Session which may not be feasible.”

13.2. We have examined this question carefully and have naturally given due weight to the views expressed by our predecessor Commission. However we have, with respect, come to the conclusion that in respect of the offences with which we are concerned an amendment in this respect is called for. As a matter of interest, we may note that such a provision has so far been made only in the Income-tax Act, and there too the pardon is granted by the Government.

The relevant section is quoted below¹:—

“291. (1) The Central Government if, it is of opinion (the reasons for such opinion being recorded in writing) that with a view to obtaining the evidence of any person appearing to have been directly or indirectly concerned in or privy to the concealment of income or to the evasion of payment of tax on income it is necessary or expedient so to do, tender to such person immunity from prosecution for any offence under this Act or under the Indian Penal Code or under any other Central Act for the time being in force and also from the imposition of any penalty under this Act on condition of his making a full and true disclosure of the whole circumstances relating to the concealment of income or evasion of payment of tax on income.

(2) A tender of immunity made to, and accepted by, the person concerned, shall, to the extent to which the immunity extends, render him immune from prosecution for any offence in respect of which the tender was made or from the imposition of any penalty under this Act.

(3) If it appears to the Central Government that any person to whom immunity has been tendered under this section has not complied with the condition on which the tender was made or is wilfully concealing anything or is giving false evidence, the Central Government may record a finding to that effect, and thereupon the immunity shall be deemed to have been withdrawn, and any such person may be tried for the offence in respect of which the tender of immunity was made or for any other offence of which he appears to have been guilty in connection with the same matter and shall also become liable to the imposition of any penalty under this Act to which he would otherwise have been liable.”

13.3. If our suggestion regarding trial by Special Judges is accepted², it will not be necessary to have an express provision as the Criminal Law Amendment Act³ has an express provision in this regard.

1. Section 291, Income-tax Act, 1961.

2. See para. 9.11, *supra*.

3. Section 8(2), Criminal Law Amendment Act, 1952.

CHAPTER 14

ADMINISTRATIVE ADJUDICATIONS

14.1. Many of the Acts dealing with economic offences empower the enforcement officers to summon and examine witnesses. The statements made by these witnesses before such officers are not, however, admissible in evidence in the subsequent criminal prosecutions. We are of the view that these statements, if recorded by officers of sufficiently high status, to be determined by the Government should be admissible in such prosecutions, since they are very often the earliest officially recorded version of the facts.

Statements made in administrative adjudications.

14.2. Certain conditions and safeguards will, no doubt, be necessary. Reference in this connection may be made to the Evidence Act, which has a provision relating to the admissibility of a statement made in a previous judicial proceeding.

The relevant provision in the Evidence Act, is as follows :—

“33. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts there in stated.

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.”

1. Section 33, Evidence Act.

14.3. We think that the safeguards mentioned in the proviso to section 33 need not appear in the new provision which we contemplate. We are further of the view that the court should have a discretion to admit the statement in evidence, if the circumstances of the case so require, even where the maker of the statement is a witness in the proceedings before the Court.

Though such a discretion is not very frequently met with in Indian statute law, in this case it is necessary for obvious reasons.

Twenty years ago, Stone stressed¹ the importance of excluding similar conduct evidence (even though it is relevant otherwise than via disposition), where its effect was too prejudicial, in these words—"where the peg is so small and the linen so bulky and dirty that a jury will never see the peg, but merely yield to indignation at the dirt." Somewhat similar considerations make it desirable that the court should have this power, since the provision which we are recommending is itself new.

14.4. We, therefore, recommend that a provision on the following lines may be inserted in the relevant Acts :—

"A statement made and signed by a person in a proceeding under this Act before any officer authorised by law to record it, being an officer of a rank notified by the Central Government in this behalf, shall be relevant, for the purpose of proving, in a prosecution for an offence under this Act, the truth of the facts which it states,—

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case, and the Court is of opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice."

Appeals in
adminis-
trative
adjudica-
tions.

14.5. The Acts relating to economic offences confer quasi-judicial powers on departmental agencies. Whether these agencies are individual officers, Boards or Tribunals is a matter of detail; but it is obvious that important points of dispute between the State and the citizen are decided by them. It is not our intention to go into the structure, powers and procedure of these agencies; but there is one matter of relevance for the present

1. Stone, "Exclusion of Similar Fact Evidence, 46, Harvard Law Review at page 984.

ose which we should mention. It relates to appeals in
 ect of these adjudications. There are certain points of
 rtance which have emerged during our own consideration
 he subject as a result of suggestions made at the discussion
 hich we held. The first is that the hierarchy of appeals under
 some of the Acts is likely to cause delay in adjudication, thereby
 also causing delay in any criminal prosecution that may ultimately
 have to be initiated. Secondly, the status and composition of
 the final appellate authority under some of the Acts is capable
 of improvement. And, thirdly, the Central Government has
 revisional powers under some of the Acts,—a position which is
 not conducive to inspiring confidence in the public and which
 does not appear to be inevitably required for the proper ad-
 ministration of these Acts. We are of the view that there is,
 in these three respects, need to re-consider the present position.
 In fact, the working of these agencies has received attention at
 the hands of several committees, Working Groups, Study Teams
 and the like. What is required now is an attempt to implement
 their recommendations.

14.6. To illustrate what we have stated above, we shall refer
 to the position under the Customs Act.

(a) Appeals from the orders or decisions of the officers
 below the rank of Collector of Customs go to an appellate
 collector¹.

(b) Appeals from the decisions or orders passed by the
 Collector of Customs lie to the Central Board of Customs
 and Excises².

(c) The Central Board of Customs and Excises may,
 either on the application of the aggrieved person or *suo*
motu, call for and examine the records of any proceeding,
 in which a customs officer has passed any decision or order,
 for the purpose of satisfying itself as to the legality or
 propriety of any such decision or order, and may pass
 such orders thereon as it deems fit³. But no order passed
 on appeal can be revised by the Board⁴.

(d) Any order passed by an appellate officer in appeal,
 any order passed in revision by the Board *suo motu*, and any
 order passed in revision by the Board on the application of
 the aggrieved party where the order envisages enhancement
 of penalty, fine in lieu of confiscation of goods, or duty,
 may be annulled or modified by the Central Government
 on the application of the person aggrieved⁵. Penalty or

1. Section 128(b), Customs Act.

2. Section 128(a), Customs Act.

3. Section 130(1), Customs Act.

4. Section 130(1), Customs Act.

5. Section 131, Customs Act.

fine in lieu of confiscation of goods cannot, however, be enhanced by the Central Government in revision, if it has already been enhanced on appeal or by way of revision¹; and in any other case, unless the party affected has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified².

While the number of *appeals* as of right under the above act is limited there is a multiplicity of proceedings for revision.

14.7. There might be other Acts where there may be multiplicity in appeals, though the scope for revision is limited. We do not go into a detailed examination of the scheme of each Act.

But we place it for the consideration of the Government³ whether, in the interests of speedy disposal of these proceedings and of effective and independent adjudication, a uniform scheme should not be adopted whereunder there will be one appeal on facts to an officer of sufficiently high status, with an application for revision to an independent tribunal on a point of law. Where the appeal on facts is itself to a Tribunal, the revision could lie to the High Court. But the final revisional authority should, in every case, be totally independent of the executive, and a multiplicity of appeals should be avoided.

1. Section 131(4)(a), Customs Act.
2. Section 131(4)(b), Customs Act.
3. Matter to be considered by Government.

CHAPTER 15

RECOMMENDATIONS AS TO INDIVIDUAL ACTS

15.1. We may now take up the major points relevant to particular Acts¹.

Central
Excise
and Salt
Act—Addi-
tion of
offence
as to un-
authorised
removal.

It has been stated that² under the present Central Excise Law, while unauthorised removal of excisable goods has to be departmentally adjudicated, prosecution under section 9 can be resorted to only for evasion of duty. The suggestion is to amend section 9 of the Central Excise and Salt Act, to provide for prosecution in cases of unauthorised removals also.

We accept the principle of the suggestion and recommend an amendment on the subject.

15.2. It has been suggested³ that the present punishment of imprisonment for a term upto six months or fine or both under section 9 of the Central Excise and Salt Act should be enhanced to a maximum term of imprisonment of 3 years and a minimum term of imprisonment of 6 months, and also fine. In cases in which the loss of duty is more than one lakh, a higher minimum of one year with a maximum of 7 years' imprisonment is also proposed to be provided for. In the case of second or subsequent convictions, higher minimum of two years is proposed. The discretion of the court not to award at least the minimum period of imprisonment will be limited to only such cases in which special circumstances exist and for adequate reasons to be recorded in writing.

Central
Excise
Act—
punish-
ment.

We are separately recommending⁴ an increase in the maximum punishment, which should suffice.

15.3. It has been suggested⁵ that a new section should be inserted to the effect that confiscation or penalty imposed in departmental proceedings under the Excise Act shall not prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of the Act, or under any other law.

Central
Excise
Act—
provision
to save
power of
confiscation.

1. The Acts are discussed in chronological order.
2. Suggestion of a Ministry of the Government of India.
3. Suggestion of a Ministry of the Government of India.
4. See para. 15.5, *infra*.
5. Suggestion of a Ministry of the Government of India.

We have no objection to such a clarification¹.

[In this connection, it may be noted that under the existing scheme, for a contravention of the provisions of the Customs Act, punishments can be awarded in departmental adjudications which entail confiscation of the offending goods etc. and imposition of penalty on the persons concerned in the offence. In addition, the accused can also be prosecuted in court. The Customs Act specifically² lays down that the award of any confiscation or penalty shall not prevent the infliction of any punishment by the court.]

Central
Excise
Act--
Public
Censure.

15.4. It has been suggested³ that a provision should be introduced under section 37 of the Central Excises and Salt Act, to provide specifically for making rules for giving publicity to the names and other particulars of persons who are guilty of contravention of the provisions of the Act, rules and other orders. We accept the principle of the suggestion.

Amend-
ment of
section 9,
Excise Act
as to
punish-
ment.

15.5. In accordance with our general recommendation for increase in the maximum punishment⁴, and provision for minimum imprisonment and fine, it will be necessary to revise section 9 of the Central Excise Act⁵.

Section
relating
to burden
of proof
recom-
mended.

15.6. In accordance with our general recommendation of shifting the burden of proof⁶, it will be necessary to insert a section in the Central Excise Act relating to burden of proof of *mens rea*.

Conse-
quential
amend-
ment of
section 9
(c), Central
Excise
Act.

15.7. In consequence of the above amendment⁷, section 9(c) of the Central Excise Act will require amendment, to remove words which will become redundant. Our recommendation therefore is—In section 9(c) of the Central Excise and Salt Act, 1944, the words “the burden of proving which shall be upon him”, shall be omitted.

Recom-
mendation
as to the
Foreign
Exchange
Act.

15.8. In the Foreign Exchange Regulation Act, the following provisions are absent from the penal and connected sections:—

- (i) Modification of *mens rea*.
- (ii) Mandatory imprisonment.
- (iii) Minimum period of imprisonment.
- (iv) Stoppage of business.
- (v) Summary trial.

1. Compare section 127, Customs Act.
2. Section 127, Customs Act, 1962.
3. Suggestion of a Ministry of the Government of India.
4. Chapter 7.20, *supra*.
5. Actual amendment will be indicated separately.
6. Para. 7.12, *supra*.
7. Para. 15.6, *supra*.

Of these, No. (i) has been covered by judicial interpretation¹.

Nos. (ii) and (iii) will be dealt with later².

It may also be stated that many cases under the Act are dealt with by penalties imposed by the Director of Enforcement or officers subordinate to him³.

As regards No. (iv)—Stoppage of business,—the matter will be discussed separately⁴.

No. (v)—summary trial in the sense known to the Criminal Procedure Code—may be inappropriate, as complicated questions of law or fact are often involved in prosecutions under the Foreign Exchange Act. Instead, the procedure which we are recommending would serve the purpose of quick disposal⁵.

15.9. A few other points may also be dealt with. Section 23, Foreign Exchange Act provides that if the case is adjudicated by the Director of Enforcement, the maximum penalty of 3 times the value of the foreign exchange involved or Rs. 5,000/-, whichever is more, may be imposed, and that if the offender is prosecuted before a Court, the punishment that can be awarded is imprisonment upto a maximum of two years, or fine, or both.

Foreign Exchange Regulation Act, 1947—Increase in departmental penalty considered.

It has been suggested⁶ that the punishment in the departmental adjudication should be enhanced to a penalty upto 5 times the foreign exchange involved. Further, the section, it has been suggested, should be reworded suitably so as to provide for the imposition of a penalty of more than Rs. 5,000/-. These provisions, it is further stated, should apply equally even when the offence is detected in Indian currency.

We accept the suggestion in principle.

15.10. It has been stated⁷ that in the case of offences under the Foreign Exchange Act, tried by a Court, for serious offences like over-invoicing and under-invoicing of goods, making or receiving compensatory payments, non-repatriation of foreign exchange earned abroad, and maintaining of an account abroad without the Reserve Bank's approval, there should be a minimum imprisonment of 6 months where the amount involved is Rs. 1 lakh or more, with the proviso that a lesser punishment than the minimum so prescribed could be awarded by the Court where the Court is convinced that such action is necessary and for reasons to be recorded in writing.

Foreign Exchange Act—Suggestion for minimum punishment considered.

1. See *State of Maharashtra v. M.G. George*, A.I.R. 1965 S.C. 722.

2. See paragraphs 15.10 and 15.33, *infra*.

3. Section 23(1), Foreign Exchange Regulation Act, 1947.

4. See paragraph 15.21, *infra*.

5. We are separately recommending special courts, which will achieve the object of speed without being unfair to the accused. (Paras. 9.9. and 9.10, *supra*).

6. Suggestion of a Ministry of the Government of India.

7. Suggestion of a Ministry of the Government of India.

We are separately proposing an increase in punishment under the Act¹, which will suffice.

Observations of Study Team.

15.11. The Study Team on Leakage of Foreign Exchange² has made certain observations relevant to prosecutions, which we quote :—

“9.7. Under the provisions of the Customs Act, a person involved in under-invoicing of export goods is punishable with imprisonment for a term which may extend to two years or with fine or with both. (A higher punishment is provided for commodities which are notified under section 123 of the Customs Act but those commodities are not the one which are exported). In the Foreign Exchange Regulation Act also the punishment provided is the same. Since the maximum punishment is two years only, and no minimum punishment is prescribed, (minimum punishment is for commodities which are notified under section 123 of the customs Act), it has been noticed that offenders are let off with imprisonment for a small period or with nominal fines. We would suggest that such offences should be made punishable to sentence of imprisonment in all cases, and any fine imposable by the court should be in addition to imprisonment and not as an alternative to imprisonment. For cases of under-invoicing/over-invoicing involving loss of foreign exchange of Rs. 1 lakh or more, a minimum sentence of six months' imprisonment should also be prescribed and the maximum, we recommend, should be raised to five years. In order to ensure that the persons are not prosecuted in petty cases or for offences of a technical nature, it would be desirable for the Customs Department and the Enforcement Directorate to lay down certain guidelines for deciding as to the cases in which prosecution should be launched.”

The question of laying guidelines for deciding as to the cases in which prosecution should be launched, requires consideration³. We think that the recommendation quoted above is a sensible one, and we would invite Government to give effect to it.

Foreign Exchange Act— Conspiracy and Abetment.

15.12. It was stated⁴ in one of the suggestions made to us that the Foreign Exchange Regulation Act, at present, does not take cognizance of the acts of conspiring, counselling or procuring another person to contravene its provisions, and thus leaves out the important category of professional racketeers who are behind most of the offences committed. The suggestion.

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1. Para. 15.33, *infra*.
 2. Report of the Study Team on Leakage of Foreign Exchange through Invoice Manipulation (Ministry of Finance) (1971), page 95, para. 9.7.
 3. The matter could be dealt with by administrative instructions.
 4. Letter dated 28-12-1971.

therefore, is to amend the Act so as to make it an offence to conspire, counsel or procure another person for contravening the provisions of the Act.

15.13. The position in this respect has been examined by us.

The main penal provision in the Foreign Exchange Act is in section 23(1) and section 23 (1A), which punish contravention of various provisions of the Act.

Acts amounting to conspiracy with, counselling, or procuring another person to commit an offence, are not *specifically* dealt with in the Foreign Exchange Act¹.

15.14. But conduct in the nature of conspiracy, procuring or counselling would almost invariably amount to abetment.

The abettor is liable to be punished under the Penal Code. The relevant sections² of that Code are not confined to abetment of offences under the Code; they are wide enough to apply to abetment of offences under other laws also.³

15.15. We do not, therefore, as at present advised, see any serious lacuna even in the present law. Since the wording in the Penal Code is clear, an amendment is not needed.

1. Position as to express provision regarding abetment in the major Acts is as below—

(a) Central Excise Act	Section 9(d).
(b) Foreign Exchange Act	Nil.
(c) Prevention of Food Adulteration Act	Nil
	But section 16(1)(a) applies whether the act is done by a person "himself or by any other person".
(d) Essential Commodities Act	Section 8.
(e) Wealth Tax Act	Section 36(2A) (Limited provision).
(f) Income-tax Act	Section 287 (Limited provision).
(g) Customs Act	The main provision—section 135(a) applies to a person who is "in any way knowingly concerned in any fraudulent evasion or attempt at evasion" etc.
(h) Gold Control Act	Section 88(2) (Limited provision).

2. Sections 109 and 116, Indian Penal Code.

3. See definition of "offence" in section 40, Indian Penal Code.

Preparation to commit certain offences under the Foreign Exchange Act and the Customs Act.

15.16. Another matter of substantive nature that requires to be considered is that of preparation to commit certain offences. In general, in countries which follow the Anglo-American system, law does not punish preparation for an offence. An attempt to commit an offence is punishable, but the attempt must be sufficiently proximate to the crime intended, and this 'proximity rule' finds its negative form in the rule that mere preparation is not enough.

Authorities are, no doubt, not very clear as to what is an attempt;¹ but it is not necessary for the present purpose to pursue that matter.

15.17. The position taken in some foreign Codes is different in this respect.

It would be of interest to refer to the provision in the Russian Penal Code,² quoted below:—

"Article 15. *Responsibility for preparation of crime and for attempted crime.*—Acquiring or arranging the means or instruments, or other intentional creation of conditions for the commission of a crime, shall be deemed preparation of a crime.

An intentional action immediately directed toward the commission of a crime shall be deemed an attempted crime, provided the crime is not brought to completion for reasons independent of the will of the guilty person.

Punishment for preparation of crime and for attempted crime shall be assigned in accordance with the article of the Special Part of the present Code which provides for responsibility for the given crime.

In assigning punishment the court shall take into account the character and degree of social danger of the actions committed by the guilty person, the degree to which the criminal intention is carried out, and the causes by reason of which the crime is not brought to completion."

15.18. Academic opinion on the question is conflicting. Some writers support a provision punishing preparatory acts. On the other hand, the remark of Holmes, J. is often emphasised, namely, "As the aim of the law is not to punish sins, but to prevent certain external results, the act must come *pretty near* to accomplishing that result before the law will notice it³." And the query has been raised—"Is it not a cardinal principle of our law that the successful criminal is always more severely

1. See the Law Commission of India, 42nd Report (Indian Penal Code), pages 131 to 138, paras. 5.41 to 5.43.

2. Article 15, R.S.F.S.R. Penal Code.

3. Holmes J. quoted in Book review in (1954), 70 L.Q.R. 551.

punished than one who, equally guilty ethically, has failed in his efforts? And, just as the completed crime merits a heavier penalty, so an 'attempter' who has got beyond the stage of incitement and mere preparation is regarded by the law as a worse offender than one who has never been 'on the job' at all."

15.19. Whatever be the merits of the general rule, it seems to us that in the context of some of the offences with which we are concerned, the law could make a departure from its general approach.

In cases under the Customs Act and the Foreign Exchange Act, having regard to the gravity of the harm, the adoption of a stringent approach is needed. Where an act is done with the fixed intention of committing a crime and by way of preparation for it, it should be treated as criminal. For example, where a person is about to leave the shores of India with Indian currency in his pocket, with the definite object of violating the Foreign Exchange Act, it is better that he is stopped. An amendment punishing such acts would enable the enforcement authorities to prevent crimes under these Acts before its consummation.

15.20. Accordingly, we recommend that the following section should be inserted in the Foreign Exchange Act and in the Customs Act:—

"If a person makes preparation to commit an offence under this Act, and from the circumstances of the case it may be reasonably inferred that if not prevented by circumstances independent of his will, he is determined to carry out his intention to commit the offence he shall be punishable with imprisonment for three years, or with fine, or with both."

15.21. Besides the punishments provided in the Foreign Exchange Act, we think that the court should have power to order stoppage of a particular business which facilitates violations of the Act.

Foreign
Exchange
Act—
Stoppage
of business
recom-
mended.

We think that the power should be exercisable only on second conviction. We, therefore, recommend the insertion of the following section in the Foreign Exchange Act:—

"Where a person having been convicted of an offence under this Act, is again convicted of another offence under this Act, and the Court by which such person is convicted is satisfied that in order to prevent repetition of the offence by him such a direction is necessary, the Court may, in addition to any penalty which may be imposed on him under this Act, by order direct that that person shall not carry on such

1. Book review in (1954), 70 L.Q.R. 551.

business which is likely to necessitate or facilitate the commission of an offence under this Act, for such period, not exceeding three years as may be specified by the Court in the order¹.”

Prosecutions as well as departmental proceedings.

15.22. The above points relate to prosecutions proper. The study Team on Leakage² of Foreign Exchange made the following observations regarding adjudications and prosecutions under the Foreign Exchange Act :—

“...like the Customs Act, there should be a provision that for an offence under the Foreign Exchange Regulation Act, both adjudication by the Director of Enforcement and conviction by a court of law are possible. The two should not be alternatives as at present. We would also suggest that in more and more cases, prosecution should also be launched apart from adjudication so as to have a deterrent effect. At present, the Enforcement Directorate does not have the necessary expertise and staff for pursuing prosecution cases. Organisational changes in this respect are also therefore, necessary. While some important cases calling for prosecution will get referred to the Economic Offences Wing of the C.B.I., the Enforcement Directorate itself should have the wherewithal to deal with the majority of prosecution cases.”

We understand that this question³ is being considered separately. Moreover, we express our agreement with the above recommendation.

Foreign Exchange Act— Recovery of penalties.

15.23. It appears that some difficulty is felt in the realisation of penalties imposed in administrative adjudications under the Foreign Exchange Act. The problem could arise under other Acts also; but the power to confiscate goods is, in practice, sufficient for customs and excise cases, and the Income-tax Act has a self-contained schedule for recovery, so that the problem would not be of a serious magnitude under that Act.

To meet any possible difficulty a suitable provision is needed in the Foreign Exchange Act so that the amount ordered to be paid as penalty shall, on an order made in that behalf by a Magistrate on application made to him, be recoverable by the Magistrate as fine. We discuss below this question in some detail.

15.24. Three principal types of provisions seem to have been employed in State laws to achieve recovery of state or municipal taxes (or penalties) through proceedings before magistrates.

1. Cf. section 7(3). Essential Commodities Act, 1955.
2. Study Team on Leakage of Foreign Exchange through Invoice Manipulation (Ministry of Finance) Report, (1971), page 97, para. 9.12.
3. Question of providing for simultaneous prosecution and departmental adjudication under the Foreign Exchange Act.

(1) General provision for recovery through Magistrate, (2) provision for recovery through Magistrate by a particular mode, (3) order by Magistrate on conviction.

15.24-A. First, one finds a general provision under which the collecting officer has merely to apply to a magistrate, and the magistrate has then to recover the tax or other amount due "as if it were a fine imposed by him". An example of this is furnished by section 13(3) of the Mysore General Sales Tax Act¹.

15.25. The second type may also be illustrated. While, in the provision of the first category, the process of recovery by the magistrate is not limited to a particular mode, there is another type of provision in which the magistrate, on an application being made to him, has jurisdiction to take steps for recovery but only by a particular process—e.g. distress and sale of immovable property. Thus, section 234 of the Ajmer Mewar Municipalities Regulation authorises a machinery to recover all taxes due to the Municipal Committee by an application made to a magistrate having jurisdiction, by distress and sale of any *immovable property* within his jurisdiction². A provision for distress and sale of *movable property* is found in section 161(2) of the Bombay District Municipal Act³.

15.26. While, in the above two cases, it is not necessary that there should be a prosecution before the magistrate, there is a third type of provision which operates only when the magistrate convicts a person for contravention of the provision of the particular Act. On such conviction, the Magistrate becomes competent to direct recovery of the tax, fee or other amount evaded as fine. Such a provision is contained in section 19(4) of the Kerala General Sales Tax Act⁴. A similar provision is contained in section 15(h) of the Madras General Sales Tax Act, 1939, extracted below⁵ :—

"Any person who—

(g) fails to pay the amounts specified in section 8B sub-section (2), within the prescribed time, or

(h) Wilfully acts in contravention of any of the provisions of this Act, shall, on conviction by a Presidency Magistrate or a Magistrate of the First Class, be liable to a fine which may extend to one thousand rupees, and in the case of a conviction under clause (b), (d), (f) or (g), the Magistrate shall specify in the order the tax, fee or other amount, which the person

1. See *State v. G.L. Udayavar*, (1963) 14 S.T.C. 628.

2. See *Dargha Committee v. State of Rajasthan*, A.I.R. 1962 S.C. 274.

3. See *In re Din Bai*, A.I.R. 1919 Bom. 93.

4. See *Subramaniam v. Commissioner of Police*, A.I.R. 1964 Madras 185, 187, paragraph 5 (reviews cases).

5. *P.V. Muhammed v. Collector of Palghat*, A.I.R. 1967 Kerala 254, 255.

convicted has failed or evaded to pay or has wrongfully collected, and the tax, fee or amount so specified shall be recoverable as if it were a fine."

15.27. The first type of provision¹ which is the most comprehensive would be useful in the present case. We, therefore, recommend the insertion of a provision on the following lines, in the Foreign Exchange Act :—

Section to be inserted in the Foreign Exchange Act

"Any tax assessed, penalty levied or any other amount due under this Act from a person may, without prejudice to any other mode of collection, be recovered, on application to any Magistrate, by such Magistrate, as if it were a fine imposed by him²."

Benami transfers.

15.28. In order that the suggested remedy concerning recovery is not thwarted, it may become necessary to check transfers of property benami, in anticipation of recovery proceedings. We do not make any recommendations in this regard, as the subject requires separate study in relation to the entire field of taxation law.

Tender of pardon under Foreign Exchange Act.

15.29. The Study Team on the Leakage of Foreign Exchange made the following recommendation³ as to the tender of pardon for offences under the Foreign Exchange Act :—

"9.14. Foreign Exchange contraventions involving invoice manipulations are serious offences, but difficult to establish before a court of law. Quite often, in important and big cases it is difficult to prosecute these cases successfully without the help of an accomplice who may not be forthcoming to help the authorities, unless they are in a position to tender pardon to the accomplice. Section 337 of the Criminal Procedure Code, provides for tendering of pardon in the case of any offence punishable with imprisonment extending upto seven years and some of the offences under the Indian Penal Code. Since the contravention of the Foreign Exchange Law, or the Customs Act, do not fall in any of these categories, this provision would not apply to them. We suggest that in the interest of justice, and with a view to making it possible to obtain the evidence of a person who is supposed to have been directly or indirectly concerned in or privy to the offence, power should be available for tendering pardon to such persons in court cases relating to contravention of Customs and Foreign Exchange laws. Since the Code of Criminal Procedure is otherwise applicable

1. Para. 15.24, *supra*.

2. This could be inserted as section 23FF, Foreign Exchange Act.

3. Report of the Study Team on Leakage of Foreign Exchange through Invoice Manipulation (Ministry of Finance) (1971), page 98, para. 9.14.

to these proceedings, sections 337, 338, 339 and 339A may be suitably amended for conferring this power in relation to customs and foreign exchange offences.”

We have discussed this question (tender of pardon) generally separately¹, and do not consider necessary to repeat what we have stated already.

15.30. The Study Team on Leakage of Foreign Exchange² made the following recommendation as to documents :—

Presumption regarding documents.

“9.18. It has been noticed that in complicated and important cases where prosecutions are launched, documents obtained from abroad from various sources are tendered as evidence. These documents are vital for proving the case. However, according to the provisions of the Evidence Act, the execution of the documents has to be proved first, before these are admitted in evidence. For that purpose, it becomes necessary to call for witnesses from abroad, which, apart from being disproportionately expensive, is alone not always practicable. In the matter of establishing the offences of under-invoicing and over-invoicing the evidence which can be collected from abroad will be of particular importance, and if such evidence were to be shut out merely for technical reasons of admissibility, it would make the task of the investigation agencies even more difficult. We, therefore, suggest that the provisions of the Customs Act and Foreign Exchange Regulation Act should be suitably amended to provide for admissibility, as evidence in court, of the documents received from abroad, and for raising similar presumption in respect of them, as are now raised under section 139 of the Customs Act and section 24A of the Foreign Exchange Regulation Act in respect of the documents which are either produced before the Customs Officers or Enforcement Officers, or are seized by them.”

The principle of the suggestion appears to be acceptable. Further, the relevant section—section 24A,—should apply to documents seized under other laws also³.

15.31. It has been stated⁴ that Enforcement Officers under the Foreign Exchange Act may be empowered to seize or confiscate vehicles or containers except in cases where they have been used without the knowledge or fault of the owner or his agent. We accept the suggestion, and recommend an amendment accordingly.

Foreign Exchange Act—Amendment regarding seizure recommended.

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1. Chapter 13, *supra*.
 2. Report of the Study Team on Leakage of Foreign Exchange through Invoice Manipulation (Ministry of Finance) (1971), page 99, para. 9.18.
 3. See para. 12.2, *supra*.
 4. Suggestion of a Ministry of the Government of India.

Foreign Exchange Act—
Suggestion for confiscation where offence is committed in Indian currency.

15.32. It has been suggested¹ that the Foreign Exchange Act should be amended to provide for confiscation where the currency in respect of which an offence is committed has been converted into, say, rupees. We accept the suggestions, which appears to be a useful one².

Amendment of section 23(1), Foreign Exchange Act as to punishment.

15.33. In accordance with our general recommendation for increase in the maximum punishment³ (on the basis of the pecuniary test), and for minimum imprisonment and fine, it will be necessary to revise section 23(1) of the Foreign Exchange Act.⁴

Mens rea and burden of proof under Foreign Exchange Act.

15.34. We have made a general recommendation as to the burden of proof⁵ regarding *mens rea*. There is some difficulty in giving effect to this recommendation in the Foreign Exchange Act, and it is necessary to examine the case law.

It is generally assumed that offences under the Foreign Exchange Act do not require *mens rea*. There is a Supreme Court judgment⁶ dealing with the question how far ignorance of a notification under the Foreign Exchange Act, is a defence. The accused in that case was charged with being in possession of 34 kilos of gold, which he had not declared as required by a notification issued under the Foreign Exchange Regulation Act. The defence plea was that the accused could not have known of the notification published in India three days before he left Zurich.

Ayyangar, J., speaking for the majority, felt that in the interpretation of an Act intended to deal with a grave economic situation, the object of the Act, *viz.*, conservation of foreign exchange, could not be overlooked. He was not prepared to read conditions in the Act if that would frustrate its purpose.

The majority view⁷ was thus elaborated—

“When one turns to the main provision whose contravention is the subject of the penalty imposed by Section 23(1-A) *viz.*, Section 8(1) in the present context, one reaches the conclusion that there is no scope for the invocation of the rule of *mens rea*. It lays an absolute embargo upon persons who without the special or general permission of the Reserve Bank and after satisfying the conditions, if any, prescribed by the Bank, bring or send into India any gold etc., the absoluteness being emphasised, as we have already pointed

1. Suggestion of a Ministry of the Government of India.

2. Amendment to be drafted.

3. Para. 7.20, *supra*.

4. Actual amendment will be indicated separately.

5. Para. 7.12, *supra*.

6. *State v. M.H. George*, A.I.R. 1965 S.C. 722, paras. 40, 41.

7. *State v. M.H. George*, A.I.R. 1965 S.C. 722, para. 35.

out, by the terms of Section 24(1) of the Act. No doubt, the very concept of "bringing" or "sending" would exclude an involuntary bringing or an involuntary sending. Thus, for instance, if without the knowledge of the person a packet of gold was slipped into his pocket, it is possible to accept the contention that such a person did not "bring" the gold into India within the meaning of Section 8(1). Similar considerations would apply to a case where the aircraft on a through flight which did not include any landing in India has to make a forced landing in India—owing, say, to engine trouble. But if the bringing into India was a conscious act and was done with the intention of bringing it into India, the mere bringing constitutes the offence and there is no other ingredient that is necessary in order to constitute a contravention of Section 8(1) than that conscious physical act of bringing. If, then, under Section 8(1) the conscious physical act of "bringing" constitutes the offence, Section 23(1-A) does not import any further condition for the imposition of liability than what is provided for in Section 8(1). On the language, therefore, of Section 8(1) read with Section 24(1) we are clearly of the opinion that there is no scope for the invocation of the rule that besides the mere act of voluntarily bringing gold into India any further mental condition is postulated as necessary to constitute an offence of the contravention referred to in Section 23(1-A)."

Subba Rao, J. (in his dissenting judgment) seems to have included within the concept of *mens rea* the ignorance of law.

It was in the context of *ignorance of the notification* that the question of *mens rea* was at issue. But the observations in both the majority and in the minority judgments go far, and deal with the concept of *mens rea* in its generality. We ourselves would read the majority judgment as excluding *mens rea* in its generality, and we agree with it. That is why we do not think it necessary to recommend any rule shifting the burden of proof as to the absence of *mens rea* in respect of the Foreign Exchange Act.

15.35. One of the suggestions¹ made to us with reference to the Foreign Exchange Act related to cancellation of the passport of a person convicted of a serious offence under the Act—the intention, of course, being that such action could be appropriately used where the offence is one who may repeat such offence if he is permitted to go out of India.

Foreign
Exchange
Act—
Cancell-
ation of
Passports.

We found the suggestion to be of interest. The matter, however, does not involve an amendment of the Foreign Exchange Act. The Passports Act itself confers powers on the Passport authority to revoke a passport in the specified circumstances. The relevant portion of the provision in the Passports Act is quoted below.²

1. Oral discussions with Shri Jethamalani, Bar Council of India (4-1-1972).

2. Section 10(3)(c)(d) and (e), Passports Act, 1967 (16 of 1967).

“10. (3) The passport authority may impound or cause to be impounded or revoke a passport or travel documents—

... ..

(c) if the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public;

(d) if the holder of the passport or travel document has, at any time after the issue of the passport or travel document, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;

(e) if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document, are pending before a criminal court in India.

... ..”

We recommend that there should be no hesitation in exercising this power in suitable cases.

Cancellation of passport during investigation.

15.36. In one respect however, the power of cancellation of passports must be augmented. Where the presence of the accused is required for investigation for any offence, there should be a power to cancel the passport.¹ There should of course, be a certificate to that effect by a senior officer, in order to avoid harassment in small cases. We recommend the addition of the following clause in section 10(3), Passports Act to achieve the above object :—

“(ee) if an officer of such rank as the Central Government may notify in this behalf certifies that an investigation in respect of an offence alleged to have been committed by the holder of the passport or travel document is pending before any authority in India and that the continued presence in India of the holder of the passport or travel document is necessary in the interest of the efficient conduct and completion of the investigation.”

Section 19D, Foreign Exchange Act.

15.36-A. The Foreign Exchange Act, contains extensive powers of search. We need not discuss them in detail, but some points raised during oral discussions require consideration.

1. Position in England is controversial. See *Ghani v. Jones*, (1969), 3 All E.R. 1700 (C.A.).

First, we shall take up the section relating to power to search premises, which is as follows¹ :— considered.

“19-D. *Power to search premises*—(1) If an Officer of Enforcement, not below the rank of Assistant Director of Enforcement, has *reason to believe* that any document which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place he may authorise any Officer of Enforcement to search for and seize or may himself search for and seize such documents.

(2) The provisions of the Code of Criminal Procedure, 1898, relating to searches under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word ‘Magistrate’, wherever it occurs, the words “Director of Enforcement or other officer, exercising his powers” were substituted.”

15.36-B. Some difficulty, it seems, is caused by the words ‘reason to believe’, which occur in sub-section (1) ; and the question that has arisen is, how far the belief of the concerned officer is subject to scrutiny by the courts. It has been suggested that the wording should be changed so as to eliminate such scrutiny.

15.36-C. It must, however, be stated that questions of constitutional validity of the power of search as granted by provisions containing above expression are, by their nature, difficult ones. This will be apparent from a study of—

- (1) the provisions as to searches in other Acts.
- (2) Judicial decisions as to the validity of such provisions in other Acts.
- (3) The extent to which those decisions hinge on expressions such as ‘reason to believe’, ‘is of opinion’, ‘has reasonable grounds for believing’ and the like.
- (4) The extent to which safeguards provided in section 165, Cr. P.C. are to be read into those provisions.
- (5) The situation in which and the purpose for which the power of search under the particular provisions is to be exercised.

15.36-D. We, therefore, examined a number of decisions dealing with search, including :

- (1) *I.T.O. v. Seth Brothers*, 74 I.T.R. 836; A.I.R. 1970 S.C. 292. (Section 132, Income-tax Act).
- (2) *Balwant Singh v. Director of Inspection*, A.I.R. 1969 Delhi 91, 103, 110. (Section 132, Income-tax Act).

1. Section 19D, Foreign Exchange Act.

- (3) *Gopikishan v. Assistant Collector*, A.I.R. 1967 S.C. 1298, 1301, paras. 10-11 (Section 105, Customs Act).
- (4) *Pukhraj v. Kohli*, A.I.R. 1962 S.C. 1559, (Section 178A, Sea Customs Act, 1878).
- (5) *State of Rajasthan v. Rehman*, A.I.R. 1960 S.C. 210 (Section 18, Central Excise Act).
- (6) *Durga Prasad v. Gomes*, A.I.R. 1966 S.C. 1214. (Gold Control Rules and Sections 105 and 110 of the Customs Act).
- (7) *Board of Revenue v. R.S. Jhaver*, A.I.R. 1968 S.C. 59 (Madras General Sales Tax Act).
- (8) *Bai Radha v. State of Gujrat*, A.I.R. 1970 S.C. 1396 (Section 15, Suppression of Immoral Traffic Act).
- (9) *Nil Ratan v. Lakshmi Narayan*, A.I.R. 1965 S.C. 1. (Section 19(3), Foreign Exchange Act before amendments).
- (10) *K.E. v. Vimalbai Deshpande*, 73 I.A. 144 (P. C.) (Rule 129(1), Defence of India Rules, 1939).
- (11) *Hindustan Motors v. T.N. Kaul* (decided on 25-3-71) (Unreported) (Calcutta High Court) (D.B.) (Section 19D, Foreign Exchange Act).
- (12) *Chic Fashions (West Wales Ltd. v. Jones*, (1968) 2 Q.B. 299 (C.A.).
- (13) *Ghani & others v. Jones*, (1969) 3 All. E.R. 1700 (C.A.).
- (14) *N.C.J. Mills C. v. Collector, Central Excise*, A.I.R. 1971 S.C. 454. (Section 12, Central Excise, & Salt Act, 1944, and sections 105(1) and 110(3) of Customs Act, 1962 in matters relating to search of premises).
- (15) *G.L. Gupta v. Assistant Collector, Customs*, A.I.R. 1971 S.C. 29. (Section 23-C(1), Foreign Exchange Regulation Act, 1947).
- (16) *Jayantlal v. Union of India*, A.I.R. 1971 S.C. 1193. (Sections 116(2), Gold (Control) Act, and rule 126(1) of the Gold Control Rules, 1963.)
- (17) *Union of India v. Tara Chand Gupta & Bros.*, A.I.R. 1971 S.C. 1559. (Section 3, Imports and Exports (Control) Act, 1947).
- (18) *Dwarka Nath v. Delhi Municipality*, A.I.R. 1971 S.C. 1844. (Section 23(1) (c), (f), (g) and (h), Prevention of Food Adulteration Act, 1954).

(19) *Asstt. Collector of Customs v. Charan Das Malhotra*. 1971(1) S.C.C. 697. (Sections 110 and 124 of Customs Act, 1962).

(20) *Badriprasad v. Collector of Central Excise*. 1971 (2) S.C.C. 1.
(Sections 6, 8 and 16. Gold (Control) Act. 1968).

(21) *P.P. v. Babulal* A.I.R. 1971 A.P. 345.
(Section 135, Customs Act, 1962)

(22) *M. Narayana v. S.H. Officer*. A.I.R. 1971 A.P. 29. (Sections 156, 4(1), 5(2) and 173, Criminal Procedure Code, and section 7(1)(a)(ii) and 10A, Essential Commodities Act, 1955).

(23) *K. Lakshminarayanan v. Commissioner of Income-tax*, A.I.R. 1971 Mad. 192.
(Section 256(2), Income-tax Act, 1961).

(24) *Mangilal v. Dy. Excise Officer*, A.I.R. 1971 Raj. 46.
(Section 256(2), Income-tax Act, 1961).

(25) *T. Jacob v. State*, A.I.R. 1971 Ker. 166. (Sections 7(1), 8 and 2 (f), and section 15(1) of the Suppression of Immoral Traffic in Women and Girls Act. 1956).

15.36-E. In England also, statutory powers to issue search warrants differ markedly in the conduct which they authorise. For examples, the Theft Act, 1968, enables a constable to seize the articles specified in the warrant or any other articles which he "reasonably believes to be stolen". Similarly, the Firearms Act, 1968, authorises the constable to whom it is issued to seize and detain any firearm or ammunition which he may find on, *inter alia*, the premises or place and in respect of which he has 'reasonable grounds for suspecting' that a firearms offence has been, is being, or is about to be committed. The like wording is employed in legislation dealing with drugs,¹ obscene publications², explosives³, and official secrets.⁴

15.36-F. Writing in 1967, Mr. D.A. Thomas, concluded⁵ that ".....the law consists of a mass of statutory provisions, to which judicial decisions add confusion rather than clarity." The decisions of the Court of Appeal in *Chic Fashions*

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1. Section 14, Dangerous Drugs Act, 1965.
 2. Section 3, Obscene Publications Act, 1959.
 3. (a) Section 73, Explosives Act, 1875.
(b) Section 55, Malicious Damage Act.
 4. Section 9, Official Secrets Act, 1911.
 5. D.A. Thomas, "The Law of Search and Seizure", (1970) Crim. L.R. 6, cited in L.H. Leigh, "Recent Developments on the Law of Search and Seizure: (1970, May) 33 Modern Law Rev. 268.

*(West Wales) Ltd. v. Jones*¹ and *Ghani and others v. Jones*² have rendered the law still less certain.

15.36-G. A study of decided cases shows that while the position cannot be asserted definitely, one could venture to put forth the following propositions as reflecting broadly the view taken in most cases.

(a) The expression 'reason to believe', does not mean *purely* the subjective satisfaction of the officer concerned.

(b) The existence of the belief and the existence of the reasons for the belief are justiciable.

(c) The sufficiency of the reasons is not, however, justiciable.

There is no doubt, that in the interests of efficient investigation of these grave offences, the scope for such controversies should be reduced to the minimum. Arbitrary, capricious or *mala fide* exercise of the power of search should not be countenanced. At the same time, practical considerations require that the power under the Foreign Exchange Act should be couched in terms less rigid than at present. After careful consideration, we have come to the conclusion that the words 'honestly believes' should be substituted in place of the words 'has reason to believe'.

15.36-H. We have not overlooked the fact that an amendment substituting a milder wording increases the vulnerability of the provision from the point of view of conflict with the fundamental rights guaranteed by article 19(1) (f) and (g) of the Constitution. But, having regard to the fact that the power is vested in an officer not below the rank of Assistant Director of Enforcement, we venture to take the view that the restriction will continue to be regarded as reasonable, even after the amendment which we have recommended. The provision, moreover, is linked up with usefulness or relevance of the document to proceedings under the Act,—though that requirement is itself indicated in terms which contemplate the subjective opinion of the officer concerned.

We, therefore, recommend an amendment of section 19D, Foreign Exchange Act, accordingly.

Foreign
Exchange
Act—Inter-
ception
of postal
articles.

15.36-I. There is another question connected with the powers of search under the Foreign Exchange Regulation Act. It relates to postal and telegraphic articles. A point has been made that the collection of important intelligence relating to illegal transactions involving foreign exchange would be facilitated if powers to intercept postal articles were available to senior officers.

1. *Chic Fashions (West Wales Ltd. v. Jones)*, (1968) 2 Q.B. 229.

2. *Ghani and others v. Jones*, (1968) 3 All E.R. 1700.

15.36-J. An examination of analogous provisions, in other Acts furnishes two kinds of provisions, on the subject. First, there are provisions conferring a power to intercept and detain articles in the course of transmission by post or telegraph. Secondly, there are provisions under which the competent officer can require the postal or telegraph authorities to *deliver*, to the specified officer, postal and telegraphic articles (meant for particular persons).

15.36-K. In this connection, two sections of the Code of Criminal Procedure are quoted below¹ :—

“94. (1) Whenever any Court or in any place beyond the limits of the towns of Calcutta and Bombay any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

Summons to produce document or other thing.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities.

1 of 1872.

95. (1) If any document, parcel or thing in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs.

Procedure as to letters and telegrams.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the orders of such District Magistrate, Chief Presidency Magistrate of Court.”

1. Sections 94-95, Code of Criminal Procedure, 1898.

15.36-L. The Post Office Act has a number of provisions authorising interception. It is sufficient to quote one¹.

Power to intercept notified goods during transmission by post.

"25. Where a notification has been published under section 19 of the Sea Customs Act, 1878, in respect of any goods of any specified description or where the import or export into or from India of goods of any specified description has been prohibited or restricted by or under any other enactment for the time being in force, any officer of the Post Office empowered in this behalf by the Central Government may search or cause search to be made, for any such goods in course of transmission by post, and shall deliver all postal articles reasonably believed or found to contain such goods to such officer as the Central Government may appoint in this behalf and such goods may be disposed of in such manner as the Central Government may direct. In carrying out any such search, such officer of the Post Office may open or unfasten, or cause to be opened or unfastened, any newspaper or any book, pattern or sample packet in course of transmission by post."

15.36-M. The interception of articles whose import or export is prohibited is thus covered by section 25, Post Office Act, quoted above. But it does not, unlike the Cr. P.C.², give power to direct *delivery* of postal articles. Moreover, the power thereunder does not vest in the Enforcement Officers acting under the Foreign Exchange Act. If, therefore, it is considered necessary that the Enforcement Officers should have the initiative and that the power should extend to directing *delivery*, then a comprehensive and self-contained provision in the Foreign Exchange Act would be needed.

15.36-N. We are, clearly, of the view that in the interests of effective enforcement of this important Act, it is desirable to confer this power on appropriate authority. We proceed to discuss below a few salient features of the power that could be conferred.

15.36-O. Any law-maker proposing a power of interception has, in order to create a picture of his proposal, necessarily to go into a few salient features, such as—

- (a) the situation in which the power will be exercisable;
- (b) the authority who will exercise the power, and the question of subjective or objective satisfaction of that authority;
- (c) the duration for which the interception will operate;
- (d) the other conditions governing the exercise of the power; and

1. Section 25, Post Office Act, 1898.

2. Section 95, Cr.P.C. (quoted *supra*). (page 3).

(e) the further disposition of the intercepted article.

These features have to be considered even where there is no question of fundamental rights.

15.36-P. Further, in view of the fact that the power to intercept letters and telegraphic messages may conceivably raise questions of interference with the freedom of speech and expression, it is advisable as a matter of abundant of caution to ensure that the restrictions are reasonable and in the interest of one of the considerations specified in article 19(2).

15.36-Q. It may be noted that section 25, Post Office Act, 1898¹, is connected with the restrictions under the Import and Export (Control) Act, 1947 or under section 11, Customs Act, 1962 or under similar laws.

The last sentence of section 25 does authorise the opening of many postal articles, *but not letters*. Hence, in practice, its coming into conflict with the freedom of speech is not likely. So far as the right to hold etc. property is concerned, most of these other Acts would fall within the ambit of the words, 'in the interest of general public' used in article 19(6) of the Constitution. In case the restrictions imposed in those other Acts are themselves held to be void, then section 25 of the Post Office Act will be void in relation to those restrictions.

15.36-R. But we are now dealing with a power with a wider ambit.

Since constitutional questions are bound to be raised, article 19(2) of the Constitution has to be considered. Interception of letters or telegrams at the instance of executive officers could be constitutionally justified with reference to article 19(2), if it amounts to 'incitement to an offence'. (There are other permissible heads of restriction in article 19(2); but they are not very appropriate for the present purpose).

15.36-S. As far as the reasonableness of the restriction is concerned, a number of points have to be borne in mind in connection with search, interception and similar powers. Chief amongst these are—

- (1) nexus between the purpose and object of the section, and the exercise of the power thereunder ;
- (2) indication as to when and in what circumstances the power is to be exercised ;
- (3) indication in respect of which persons and whose premises the power in question is to be exercised ;

1. Section 25, Post Office Act is quoted *supra*. (page 4).

(4) principles, which, according to the Legislature, afford a guidance for exercising the power by the executive ;

(5) opportunity to the persons affected or likely to be affected, to contest the exercise of the power ;

(6) provision to enable the aggrieved party to make a representation ;

(7) provision for notice before the power is exercised¹;

(8) provision for the return of articles seized, time limit set for any such return, and other connected safeguards.

15.36-T. Bearing these considerations in mind, we think that while it is desirable in the interest of prompt and effective investigation that the power to intercept postal and telegraphic articles should be conferred, certain safeguards are necessary, having regard to the constitutional provision and also having regard to the need to avoid undue harassment. The safeguards which we contemplate will be apparent from the very tentative draft which we give below.

15.36-U. Accordingly, we recommend that the following provision² be inserted in the Foreign Exchange Act :—

“(1) If any document, parcel or thing in the custody of the Postal or Telegraph authorities is, in the opinion of the Director of Enforcement or any officer not below the rank of Assistant Director authorised by him, wanted for the purpose of any investigation, inquiry or other proceeding under this Act in respect of an offence relating to foreign exchange the value whereof exceeds rupees one lakh or for the detection of any such offence, such officer may—

(a) require the Postal or Telegraph authorities, as the case may be, to deliver such document, parcel or thing to such person as such officer directs, or

(b) intercept, detain, open and examine any such document, parcel or thing, pending a requisition by him under clause (a).

(2) If the document consists of any message received for transmission by telegraph by the telegraph authorities, such officer may require the telegraph authorities not to transmit the message to the person to whom it is addressed, pending an order under sub-section (1).

(3) If any such document, parcel or thing is, in the opinion of any other Enforcement officer, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for

1. In the present case, No. (5), (6) and (7) would be impracticable.

2. This is a very tentative draft.

and to detain such document, parcel or thing pending the orders of any such officer as is mentioned in sub-section (1).

(4) The provisions of this section shall not apply in relation to any letter or telegram unless the letter or telegram amounts to incitement to commit an offence under this Act or constitutes evidence of such incitement.

(5) No document, parcel or thing shall be retained in the custody of such officer for a period exceeding fifteen days (excluding holidays) unless he has obtained the approval of the Director."

15.37. In the Prevention of Food Adulteration Act, the following provision is absent :—

(i) Summary trial.

In the absence of suggestions to that effect, a change is not necessary.

Prevention of Food Adulteration Act—Summary trial.

15.38. A doubt has been raised whether sub-standard foods¹ are covered by the definition of adulteration. The position, however, seems to be fairly clear. For example, in a Madras case², there was deficiency in the 'Reichert value' of ghee (*i.e.* value below a particular stipulated figure) *i.e.* the ghee was of a *sub-standard quality*, and such sub-standard quality was *by definition*, an act of adulteration. It was held that the Court cannot embark on an academic investigation about the Reichert value and its bearing upon the quantum of fat in ghee in different areas in the country. If the quality or purity of ghee falls below the standard prescribed by the rules, or if its constituents are in excess of the prescribed limits of variability, then the ghee is deemed to be adulterated within the meaning of section 2 of the Act. When the prescribed standard is not attained, the statute treats such ghee, by fiction, as an adulterated food, though in fact it is not so.

Sub-standard foods.

15.39. The Supreme Court³, while dealing with a case of adulteration of butter observed⁴:—

Supreme Court case.

"If the quality or purity of butter falls below the standard prescribed by the rules or its constituents are in excess of the prescribed limits of variability, it shall be deemed to be adulterated within the meaning of section 2 of the Act. If the prescribed standard is not attained, the statute treats such butter, by fiction as an adulterated food, though in fact it is not adulterated. To put it in other words, by reason of the fiction, it is not permissible for an accused to prove

1. Article on Food Adulteration in Times Weekly. (28th November, 1971) by Bhishma Desai.

2. *Corporation of Madras v. Arumugham*, A.I.R. 1966 Mad. 194, 196, paragraphs 6-7.

3. *M.V. Joshi v. M.U. Shimpi*, A.I.R. 1961 S.C. 1494, 1496 (Subba Rao, J.).

4. See also *Baborally Sardar v. Corporation of Calcutta*, A.I.R. 1966 S.C. 1569.

that though the standard prescribed is not attained, the article of food is in fact not adulterated. The non-conformity with the standard prescribed makes such butter an adulterated food.”

Cases as to sub-standard milk and drugs.

15.40. The Bombay High Court¹, in explaining the provision of section 2(i) (1), has also said that an article in respect of which any standard is prescribed or limits of variability of quantities of its constituents are prescribed shall be deemed to be adulterated if it does not conform to the standard so prescribed. Accordingly, butter containing more than 16% of moisture and less than 80% of milk fat as prescribed by the rules was deemed to be ‘adulterated’ within the meaning of the Act. In *Chimanlal v. State of Maharashtra*², the Supreme Court held that the appellant was guilty of an anti-social act of a very serious nature in manufacturing sub-standard drugs, which was against the object of the Drugs Act, 1940. We think that the position is quite clear, and needs no amendment.

Canned Foods

15.41. A doubt has been raised³, as to the applicability of the Food Adulteration Act to canned or processed food. But we regard the definition of “food” and the sub-standard provisions as wide enough, to include canned and processed foods. It may be noted that it has been held, that if ghee of S.G. Mark Brand is sold from sealed tins, and the ghee is found to be adulterated, the vendor is guilty of an offence under section 7. That the vendor was ignorant about the quality of ghee is no defence⁴ under section 19.

Supreme Court case

15.42. In one case⁵, the Supreme Court held that the accused persons had stored for sale condensed milk which was adulterated and, therefore they were guilty under section 16(1) (a) (i) of the Prevention of Food Adulteration Act, 1954. The defence of the appellants was based upon section 19(2) of the Act, namely that they had purchased the tins of condensed milk from another firm (whose appearance could not be obtained as they could not be traced), and that the goods were in the same condition as when they purchased them. On analysis of the contents of the condensed milk tins, it was found that it was sub-standard, as the fat content was below the minimum prescribed.

Therefore, the Court held that the condensed milk stored by the appellants for sale was adulterated, and there was a

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1. *Grip at v. Lingappa*, A.I.R. 1962 Bom. 104, 105.
 2. *Chimanlal v. State*, (1962) 1 S.C.R. 344, 347, 348 (Case under the Drugs Act).
 3. Article on Food Adulteration in Times Weekly, November 28, 1971, by Bhishma Desai.
 4. See (1954) M.P. Law Journal (Notes) 81, cited in the Digest for 1951 to 1965, under section 7(1), Prevention of Food Adulteration Act.
 5. *Barborally Sardar v. Corporation of Calcutta*, A.I.R. 1966 S.C. 1569, 1570, followed in *Silichar Municipal Board v. Mukul Chandra*, A.I.R. 1968 A & N 24, 26 (D.B.).

breach of the provisions of section 16(1)(a)(i). The Supreme Court held¹ :—

“In view of the provisions of section 19(1), it was not open to the appellants to contend that they were ignorant of the nature, substance and quality of the condensed milk sold by them. Sub-section (2) of section 19, however, furnishes a defence to a vendor ignorant of the nature, substance and quality of food sold by him provided he satisfies the requirements of that provision.”

15.43 In this case, it was found that there was no warranty in the prescribed form, and neither the label on the tins nor the cash-memo contained any warranty that the food was the same in nature, substance and quality as demanded by the vendor, and hence the accused has failed to establish the defence under section 19(2) of the Act. The Supreme Court pointed out that the fact that the vendors sold tins of condensed milk “in the same state as they purchased them” was by itself not sufficient to absolve them. Therefore, the conviction of the appellants under section 16(1)(a) of the Act by the Calcutta High Court was upheld.

Madhya Pradesh case.

In another case², the facts were as follows :—

“The accused sold ghee of S.G. Mark Brand which, on analysis was found to be adulterated. The plea of the accused was that he gave to the Food Inspector ghee of the very nature, substance and quality demanded by him, and that the tin from which he supplied the ghee was a sealed tin and he had no reason to think that the ghee contained in the sealed tin was not of the S.G. Mark. The trial Magistrate found that the ghee was adulterated, but he took the view that the ghee was not of the nature substance or quality which it purported to be or was represented to be. On appeal, the Madhya Pradesh High Court held that under section 2(i) (1) of the Act, an article of food was deemed to be adulterated “if the quality of purity of the article falls below the prescribed standard or the constituents are present in quantities which are in excess of the prescribed limits of variability”. Further, it was held that “the Act aimed at prohibition of sale of adulterated food in larger interests of maintenance of public health and with that aim prohibited totally, under section 7, the manufacture, sale, distribution or storage of any adulterated food...Section 19 of the Act laid down that it would be no defence to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him or that the purchaser was not prejudiced by the sale”.

1. *Barborally Sardar v. Corporation of Calcutta*, A.I.R. 1966 S.C. 1569, 1570.

2. *Municipal Council, Durg v. Gujarmal*, 1964 M.P.L.J., Note 81 (D.B.) cited in the Yearly Digest.

Tinned foods when mis-branded.

15.44 In addition to tinned foods being deemed 'adulterated' under section 2(i)(1), they can also be treated as misbranded under section 2(ix)(k).^{1—2}

Maximum punishment under the Prevention of Food Adulteration Act.

15.45. The maximum punishment under the Prevention of Food Adulteration Act does not require any radical change. There may, however, be scope for rationalisation of the punishment under the Act ; but such an inquiry would involve numerous matters of detail outside the scope of this Report.

Burden of proof of *mens rea*.

15.45A. We have recommended³ in general the insertion of a section relating to burden of proof. So far as the Prevention of Food Adulteration Act is concerned, section 19 achieves the object, and no further provision is needed.

Essential Commodities Act.

15.46. So far as the Essential Commodities Act is concerned, the following provisions found in several other enactments dealing with social and economic offences are absent :—

(i) Minimum imprisonment *on first conviction*.

(ii) Public censure.

Both these raise questions of *mens rea*, and as the following paragraphs⁴ will show, the Act is very stringent in that respect at present.

Mens rea under section 7 considered.

15.47. We now deal with the question of *mens rea*. After the amendment of 1947, the penal provision in the Essential Commodities Act has acquired a different character, by the elimination of *mens rea*. The relevant portion of section 7(1), of that Act, now reads—

“7. (1) If any person contravenes, *whether knowingly, intentionally or otherwise*, any order made under section 3—

(a) he shall be punishable—

(i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which may extend to five years and shall also be liable to fine ;

Provided that in the case of a first offence, if the Court is of opinion that a sentence of fine only will meet

1. *Varma v. Corporation of Madras*, (1970), 1 M.L.J. 407, 408.

2. *Jagneswar v. Gopal Chandra*, A.I.R. 1961 Tripura, 18, 21.

3. Para. 7.12, *supra*.

4. Para. 15.47, *et seq.*

the ends of justice, it may, for reasons to be recorded, refrain from imposing a sentence of imprisonment and in the case of a second or subsequent offence, the Court shall impose a sentence of imprisonment and such imprisonment shall not be less than one month ;”

[Clause (b) relates to forfeiture, and is not material for the point under discussion.]

15.48. Even the existing provisions for mandatory imprisonment contained in the Act¹, may prove to be harsh where the particular contravention charged was not committed “intentionally or knowingly”, but was committed “otherwise²”. One alternative to remedy this hardship would be to re-cast the penal provision in section 7(1)(a) so as to make a distinction between contraventions committed knowingly or intentionally (on the one hand) and other contraventions, (on the other hand). In the former, case, as mandatory imprisonment (as at present) with a minimum term (to be added) would be appropriate, with a relaxing power in the court to take care of exceptional cases. In the latter case, neither mandatory nor minimum term of imprisonment would be called for.

Mens rea
under the
Essential
Commodi-
ties Act.

15.49. However, we do not think it necessary to go to that length at the present stage. Experience of the working of the new section can be awaited for a year or so.

15.50. But we should, at this stage, refer to our general recommendation for shifting the burden of proof³, and point out that section 7 of the Essential Commodities Act goes beyond merely throwing the burden of proof on the accused, and practically eliminates *mens rea*. Government may consider whether the section should not be brought into line with our general recommendation.

15.51. The maximum period of imprisonment under the Essential Commodities Act requires increase from five to seven years. Here, of course the pecuniary test cannot be applied. But an increase is needed in view of the increased importance of checking these offences. Of course, the structure of the relevant section⁴ is capable of improvement in certain matters of detail also ; but such an inquiry would take us far beyond the scope of this Report.

Maximum
punish-
ment
under the
Essential
Commodi-
ties Act.

We, therefore, recommend that in section 7(1)(a)(ii) of the Essential Commodities Act, for the words “five years”, the words “seven years” should be substituted.

1. Section 7, Essential Commodities Act.

2. Paragraph 15.47, *supra*.

3. Para. 7.12, *supra*.

4. Section 7, Essential Commodities Act, 1955.

Bailability
under
Essential
Commodi-
ties Act.

15.52. Under section 10A, Essential Commodities Act, the offences under the Act are cognizable and bailable. This provision was not found in the Act as originally enacted and was inserted by a later amendment in 1967. We have not been able to discover, either from the Statement of Objects and Reasons to the Amending Bill of 1967 or from any other source, the reason why a special provision as to bail was considered necessary. Perhaps, it was thought that many offences under the Act would be committed by persons who could be safely released on bail. We are, however, of the view that the matter should be left to be governed by the general provision in the relevant Schedule to the Criminal Procedure Code under which, if the maximum punishment exceeds three years, the offence is non-bailable. We do not see any great hardship as likely to result from such a course, as the court has always a discretion to release the accused on bail even if the offence is non-bailable. Accordingly, we recommend that section 10A of the Essential Commodities Act should be revised so as to delete the words "and bailable".

Abetment
in Wealth
Tax Act.

15.53. As regards the Wealth Tax Act, we do not consider it necessary to discuss the amendments in detail, as what we are going to say regarding the Income-tax Act¹ is applicable to the Wealth Tax Act also.

Recom-
mendation
as to
Income-
tax Act.

15.54. In the Income-tax Act, the following provisions are absent :—

- (i) Elimination or modification of *mens rea* ;
- (ii) Confiscation ;
- (iii) Stoppage of business ;
- (iv) Higher powers of Magistrates ;
- (v) Special rules of evidence.

As regards point (i), no change is proposed as to *mens rea*,² or shifting the burden of proof, having regard to the complicated nature of the offences under the Act. For the same reason, provisions as to points (ii) to (v) would also not be appropriate for these offences.

Income-tax
and Wealth
Tax Act—
Increase
in—
Punish-
ment
considered.

15.55. It has been stated³ that under the Income-tax Act and the Wealth tax Act, the punishment on prosecution for the offence of tax evasion as also for abetment of tax evasion is, at present, rigorous imprisonment for a minimum of 6 months and a maximum of two years. The punishment is less severe for other offences under these Acts, such as, failure to furnish the return of income or produce accounts and documents called for by notice, as also failure to deduct tax at source and pay it

1. See paragraphs 15.54 to 15.76, *infra*.

2. Para. 7.12, *supra*.

3. Suggestion of a Ministry of the Government of India.

to the credit of the Government. It has been suggested that these provisions may be modified on the following lines :—

(a) For the offence of tax evasion and abetment of tax evasion under the Income-tax Act and Wealth tax Act, the minimum punishment may be raised to rigorous imprisonment for one year and the maximum be raised to rigorous imprisonment for 7 years.

(b) For the offence of failure to furnish the return of income or the return of net wealth, where called for by notice, the minimum punishment may be raised to rigorous imprisonment for one year and the maximum to rigorous imprisonment for 7 years. It is further stated that in view of the proposed increase in the term of imprisonment, there is no need for continuing the existing provision for the levy of a fine ranging from a minimum of Rs. 4/- to a maximum of Rs. 10/- per day for the period of default. There exist already provisions for penalty for late submission or non-submission of returns.

(c) For the offence of failure to pay, to the Government, the tax deducted at source under the Income-tax Act, the suggestion made is that the minimum punishment may similarly be increased to rigorous imprisonment for one year and the maximum to rigorous imprisonment for 7 years. The existing provision for fine at the rate of 15% per annum on the amount of the tax for the period of the delay, need not (if the suggestion is accepted) be continued, in view of the suggested increase in the term of imprisonment. There already exists provision for imposing interest at the rate of 9% and penalty.

15.56. As regards the first point¹, it seems to have been assumed that a person who makes a false statement in a return of income-tax commits an offence under sections 191 to 193, Indian Penal Code. This however, requires examination. While such a person can be prosecuted² under section 177³, Indian Penal Code, the position regarding section 191 is less certain.

Assumption as to applicability of sections 191-193, 195.

1. Paragraph 15.55(a), *supra*.

2. See *Baliah v. Rangachari*, A.I.R. 1969 S.C. 701 (On appeal from A.I.R. 1969 Mad. 145).

3. Section 177, Indian Penal Code reads as follows:—

“Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both:

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

(Illustrations omitted).

Giving
false
evidence.

15.57. Section 191¹ of the Indian Penal Code applies only when there is an obligation to state the truth, imposed by law or by oath or when a declaration is required by law. A verification is not an oath, and the Income-tax Act does not contain a provision requiring the assessee to state the truth in the return. The Act, read with the rules, does require a verification, but that is not enough to attract the first part of section 191. Of course, if the assessee makes a false statement *on oath before the Income-tax Officer*, sections 191-193 apply². If the verification is false, the sanction provided in section 177, Indian Penal Code also applies.

15.58. The latter part of section 191, which relates to a 'declaration', may apply, though even here the position, is not beyond controversy³.

Punish-
ment
for false
evidence.

15.59. Even if section 191 applies, it is not clear which part of section 193 will apply to a false statement in a return⁴.

1. Section 191, Indian Penal Code reads as follows:—

"191. Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know."

(Illustrations omitted).

2. Cf. the discussion in *Lalji Haridas v. State of Madras*, A.I.R. 1964 S.C. 1154 (On appeal from A.I.R. 1963 Bom. 70).

3. Cf. decisions as to verification of pleadings.

4. Section 193, Indian Penal Code reads as follows:—

"193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-martial is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

(Illustration omitted).

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice."

(Illustration omitted).

15.60. We have ourselves recommended¹ an increase in punishment based on the pecuniary test (and also minimum imprisonment), which will meet the requirements of justice².

Recommendation to increase the maximum punishment under Income-tax Act.

15.61. We should also refer to the Report of the Working Group on Direct Taxes³ of the Administrative Reforms Commission as to unnecessary examination of tax-payers :—

Restriction on unnecessary examination of tax-payers.

“...In this connection, a suggestion was made to us that a provision should be made in the Income-tax Act on the lines of section 7605(b) of the Internal Revenue Code of 1954 of the United States of America, reproduced below, which limits the number of times the account-books could be called for and examined—

(b) *Restrictions on Examination of Tax-payers.* No Tax-payer shall be subjected to unnecessary examination of investigations, and only one inspection of a tax-payer's books of accounts shall be made for each taxable year unless the tax-payer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the tax-payer in writing that an additional inspection is necessary.”

We should like to express our agreement with this view.

15.62. In the Report of the Working Group⁴ of the Administrative Reforms Commission, the following observations have been made as to prosecutions :—

Paucity of prosecutions.

“The performance of the Department has been so poor that the Public Accounts Committee was compelled to remark as follows in its 21st Report (1963-64)—Third Lok Sabha—

In para 7.12. of its Report, the Direct Taxes Administration Enquiry Committee observed that though the Direct Taxes Acts provide for prosecution and imprisonment in the cases of concealment of income, not a single person has been convicted for evasion during the last ten years, and recommended that unless it was brought home to the potential tax evader that attempts at concealment of income would not only not pay him but also actually land him in jail, there could be no

1. Para. 7.20, *supra*.

2. Amendment to be indicated separately.

3. Report of the Working Group on Central Direct Taxes Administration (Administrative Reforms Commission) (January, 1968) (Pages 24, 25, paragraph 2.25).

4. Report of the Working Group on Central Direct Taxes Administration (Administrative Reforms Commission) (January, 1968), pages 110-111.

effective check against evasion. The Committee are not a little surprised to find that even though this recommendation has been accepted, Government sent for prosecution not more than one person in whole of the country during 1961-62 and that case too was compounded."

We understand that the question has been actively taken up and so we do not propose to say anything more about it.

Tax laws—
abetment
by creating
false
vouchers.

15.63. It has been suggested that¹ the scope of the term 'abetment' in tax matters should be widened to include the creation of false vouchers, accounts and other records which may facilitate tax evasion by any other person.

We think that under the definition of 'abetment²' in the Penal Code, such acts would be covered, provided, of course, it is proved that the person charged has thereby *facilitated* evasion.

Supply of
material
for com-
mitting a
crime how
far consti-
tutes
abetment.

15.64. The question is allied to the question how far supply of tools or materials constitutes abetment of an offence. Though it is not possible to make a very categorical statement of the position in England about certain matters of detail, the case-law³ furnishes sufficient ground for putting forth a view that a person who, with intent to facilitate a crime, supplies materials or tools for the commission of the crime, 'aids its commission'. The distinction between misdemeanour and felony has been abolished in England⁴, and the provisions as to accessories before the fact are of no legal significance now.

Assistance in the crime even at an earlier stage will suffice, as where the accused assists someone who subsequently utters forged cheques to open a bank account in a false name⁵. One man may abet another by helping to set the stage even before the victim has been found. "If a man helps another in preparation for crimes of a certain nature with the intention that the other shall commit crimes of that nature, he may abet those crimes when they come to be committed⁶".

15.65. Whether a person who knowingly gives assistance, but hopes that the crime will not be committed is guilty as an abettor, is a question on which the authorities in England are not easy to reconcile. But this much is clear, namely, that if a person *intentionally* supplies materials for the commission of a crime, he aids and abets the crime.

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1. Suggestion of a Ministry of the Government of India.
 2. Section 107, clause thirdly, Indian Penal Code.
 3. See paragraphs 15.65 to 15.67, *infra*.
 4. The Criminal Law Act, 1967 (Eng.).
 5. *Thambiah v. R.* (1966) A.C. 37; (1965) 3 All E.R. 661, 665 (P.C.).
 6. *Thambiah v. R.* (1966) A.C. 37; (1965) 3 All E.R. 661, 665 (P.C.).

As Devlin J. said¹ in a case which is often cited :—

“A person who supplies the instruments for a crime or anything essential to its commission aids in the commission of it, and if he does so knowingly, and with intent to aid, he abets as well, and is therefore guilty of aiding and abetting.”

15.66. It was observed 200 years ago², that no man ought to furnish another “with the means of transgressing the law, knowing that he intends to make that use of them”.

15.67. The controversy, at present, is only as to whether knowingly facilitating the commission of a crime ought to be sufficient for complicity, if a true purpose to advance the criminal end is absent. There has been a difference of opinion as to the criteria that should measure criminal liability in this respect. According to one view, the abettor must have “a stake in the outcome”. According to another view, however, conduct which knowingly facilitates the commission of crimes is the proper object of preventive effort by the penal law (if there is no affirmative justification for that conduct).

15.68. The position in India, in this respect, should be regarded as more certain than in England, because the Indian Penal Code not only provides³ that a person who “intentionally aids, by any act or illegal omission, the doing” of anything, abets it, but also⁴ makes it clear that whoever “either prior to or, at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof”, is said to “aid the doing of that doing”. The Code⁵ has, further, a specific provision that to constitute the offence of abetment it is not necessary that the act abetted should be committed.

Position in
India.

15.69. It is also relevant to refer to a Supreme Court case⁶ in that the point was considered how far the acquittal of a person alleged to have committed the offence in consequence of abetment bars the conviction of abettor. It was stated that it cannot be held in law that a person cannot even be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettor’s guilt depends on the nature of the act abetted, and the manner in which the abetment was made. The offence of abetment is complete when the alleged abettor has instigated another, or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of

1. *National Coal Board v. Gamble*, (1959) 3 All E. R. 200.

2. *Lightfoot v. Tenant*, (1796) 126 E.R. 1059, 1062.

3. Section 107, clause thirdly, I.P.C.

4. Section 107, Explanation 2, I.P.C.

5. Section 107, Explanation, 2, I.P.C.

6. *Jamuna Singh v. State of Bihar*, A.I.R. 1967 S.C. 553 (Raghubar Dayal, J.).

abetment that the act abetted must be committed. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. It is only in this narrow circumstance that the abettor can be exempted from his guilt, otherwise, under the Indian law, for an offence of abetment, it is not necessary that the offence should have been committed.

15.70. A mere giving an aid by itself will not, of course, constitute an abetment of an offence¹, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of an offence².

15.71. It may be stated that the word 'offence' (as defined in section 40 of the Indian Penal Code) denotes a thing punishable under the Penal Code or under any special law or local law. Therefore, in the absence of any special provision regarding abetment in the special enactments, in view of section 40 of the Penal Code, the provisions of the Penal Code would apply.

Failure to pay tax-punishment suggested.

15.72. We may now refer to another suggestion relevant to taxation laws. It has been suggested³ that for the offence of failure, wilfully or without reasonable cause, to pay taxes which are assessed, provision may be made for a minimum punishment by way of imprisonment of the defaulter. This provision will (it is suggested) apply to all direct taxes except estate duty (for which a special procedure for consultation with the States will have to be undertaken according to the provisions of the Constitution). We see no objection in principle to the suggestion. But we do think that the provision should be confined to cases where the failure is wilful and without reasonable cause⁴⁻⁵. Further, we do not think that a minimum period of imprisonment is desirable for this offence.

15.73. In a Madras case⁶, the following observations relevant to section 23F, Foreign Exchange Regulation Act, were made :—

“Whether section 23F can stand as it is in the Statute, is not a question raised in this case. *It may be that this provision which makes mere failure to pay a penalty an offence without mens rea, (is) bad : but we are not concerned with it in these*

1. *Ram Nath v. King-Emperor*, A.I.R. 1925 All. 230.

2. *State v. Abdul Aziz*, A.I.R. 1962 Bom. 243 (Case under the Import and Export Control Act). (The case went on appeal to the Supreme Court. But this point was not disputed).

3. Suggestion of a Ministry of the Government of India.

4. Amendment to be drafted.

5. See also para. 15.76, *infra*.

6. *M.R. Pratap v. Director of Enforcement*, (1969) Cr.L.J. 1582, 1589, para. 35 (Madras).

petitions. The intention of the Legislature is clear, that a new offence has been introduced under section 23F probably considering the gravity of the offences committed in respect of foreign exchange. I am, therefore, of the view that the nature and the characteristic of proceedings provided under sections 23(1)(a) and 23D are civil proceedings, and that their nature and character were not changed by virtue of the introduction of section 23F of the Act and section 23(1)(a) does not become a criminal proceeding."

15.74. We have examined the matter at some length. A proposal that default in payment of tax should be treated as a criminal offence, does not, in our opinion, hit any particular provisions of the Constitution.

15.75. We have considered the position with reference to article 14 of the Constitution also. Though the proposed provision will put Government dues in a preferred position, the classification would appear to be reasonable, it being in the public interest to secure due payment of taxes. It is true that the legislation at issue in *State of Rajasthan v. Mukan Chand*¹, while providing for the reduction of the Jagirdar's debts (in view of the inability of the Jagirdar to pay debts in full after resumption) had made the provisions inapplicable to certain categories of debts due from the Jagirdars including debts due to the government or local authority. The court struck down the provision with regard to the exclusion of certain debts, as based on a discrimination not supported by any intelligible point.

15.76. But the position here is different. Decisions upholding the application of a special procedure for the recovery of government dues are well-known². *Prima facie*, a provision by which non-payment of the State dues alone is made a criminal offence, could, we think, be defended, with some force in the present state of the case-law.

The proposed provision should not, however, treat all defaulters alike. It would be difficult to justify the equal treatment of those who have deliberately refused to pay their tax-dues and those who, owing to misfortune, are unable to pay it.

We are accordingly recommending a provision penalising deliberate defaulters.

15.77. We may now take up the Customs Act. It has been stated³ that section 135, Customs Act, which provides for punishment by the court for offences of fraudulent evasion of duty or of any prohibition, has two parts :—

Customs,
Act, sec-
tion 135.

(a) for offences relating to goods to which section 123 applies such as gold, watches, diamonds, the punishment

1. *State of Rajasthan v. Mukan Chand*, A.I.R. 1964 S.C. 1633.

2. *Munna Lal v. Collector of Jhalawar*, (1961), 2 S.C.R. 962, A.I.R. 1961 S.C. 808.

3. Suggestion of a Ministry of the Government of India.

provided, in section 135(1) is a minimum of six months' imprisonment and a maximum of 5 years, and fine, when the value of such goods involved in the case exceeds Rupees one lakh. The Court has discretion to award a lesser sentence than the prescribed minimum, for special and adequate reasons to be recorded in writing;

(b) for other offences, the punishment provided in section 135(ii) is imprisonment extending upto two years or fine or both. Now, it has been suggested that the section should be amended as follows :—

“For offences punishable under section 135(i), the maximum period of imprisonment be raised from 5 years to 7 years, and the minimum from 6 months to one year.

(ii) For offences punishable under section 135(ii), the maximum period of imprisonment be raised from two years to three years, and it may also be provided that the fine, if any, imposed by the Court shall be in addition to the sentence of imprisonment and *not as an alternative to it*. The Court will have the discretion not to award the sentence of imprisonment, if it considers proper.

(iii) In addition, it is proposed to provide for longer period of imprisonment for second and subsequent offences under the Customs Act on the following lines :—

When a person who is prosecuted for an offence punishable under section 135(i) has been convicted earlier whether under section 135(i) or 135(ii), then the minimum sentence of imprisonment shall be for two years instead of one year.

When a person, who is prosecuted for an offence punishable under section 135(ii), has been convicted earlier whether under section 135(i) or section 135(ii), there will be minimum sentence of imprisonment of 6 months.

In both these cases, the Court will have the discretion to order imprisonment for a lesser period than the prescribed minimum, but only in special circumstances and for adequate reasons to be recorded.

Amend-
ment of
section
135, Cus-
toms Act
as to
punish-
ment.

15.78. In accordance with our general recommendation¹ for increase in the maximum punishment and for minimum imprisonment, it will be necessary to revise section 135 of the Customs Act.

That is, in our view, sufficient.

1. Para. 7.20, *supra*.

15.79. It has been suggested¹ that section 156, Customs Act, should be amended to provide for making rules for giving publicity to the names and other particulars of persons who are guilty of contraventions of the provisions of the Customs Act or of any rule or order or directions made thereunder, be introduced. Such a provision would be on the same lines as in section 27(2)(c) of the Foreign Exchange Regulation Act, 1947. This provision (it is stated) will put beyond doubt the authority already exercised on executive basis, by which the field formations have been instructed to give publicity to offences, including the names and particulars of offenders.

Customs Act—
Suggestion about public censure.

15.80. The Study Team on Leakage² of Foreign Exchange has made the following suggestion :—

“9.17. In the fight against fiscal and economic offences, it is not enough that the methods and machinery for detection of such offences should be improved and the punishment for proved cases made deterrent; it is also necessary that there is greater social awareness of the evils of such crimes, and as much social stigma attaches to them as to other crimes against society. The names of the persons who are proved to be guilty of under-invoicing/over-invoicing should be widely publicised. In the sphere of foreign exchange, by virtue of the powers conferred under section 27 of the Foreign Exchange Regulation Act, the Government have published rules which are called the Foreign Exchange Regulation (Publication of Names) Rules, 1970. These rules provide that the Director shall cause to be published in the official gazette the names and addresses and other particulars of persons of certain categories mentioned in the rules. These include persons who have been convicted by a court for contravention of any of the provisions specified in sub-section (1) of section 23, and also persons who have been adjudged by the Director for contravention of these provisions, provided the exchange involved is Rs. 10,000/- or more, or there has been a previous adjudication by the Director or conviction by a court in respect of the same person. In addition, the Government has been empowered to publish the names of any other persons who have been found guilty of any contraventions of the provisions of the Foreign Exchange Regulation Act or of any rule, order or direction made thereunder, if it is satisfied that it is necessary or expedient in the public interest so to do. We recommend that similarly rules should also be framed for publication of the names of offenders in customs cases relating to under-invoicing or over-invoicing in imports and exports. Further, we are also of the view that such persons should be debarred, for a specified period, from getting any facilities or concessions which are given

1. Suggestion of a Ministry of the Government of India.

2. Report of the Study Team on Leakage of Foreign Exchange through Invoice Manipulation, Ministry of Finance, (1971), page 99, Para. 9.17.

to importers or exporters under certain schemes, such as those relating to export cash assistance, and import entitlements under the Registered Exporters scheme.”

Recommendation to add public censure.

15.81. An amendment to the Customs Act of a general nature may be inserted to provide for public censure¹.

Preparation in certain cases under the Customs Act to be an offence.

15.82. We have already recommended² the insertion of a provision punishing preparation to commit an offence under the Customs Act in certain cases.

Recommendation regarding section 123, Customs Act.

15.83. We wish to refer to a small point concerning section 123(1), Customs Act, which throws on the accused the burden of proving that goods seized from him are not smuggled goods. We wish to point out that it does not cover cases where goods are not seized from the possession of a person, though they are proved to have been in his possession previously. We think that such a situation should also be covered because the principle behind the existing provision is equally applicable.

We, therefore, recommend that section 123(1), Customs Act, should be revised as follows :—

“123. (1) Where any goods to which this section applies—

(a) are seized under this Act in the reasonable belief that they are smuggled goods; or

(b) are proved to have been in the possession of any person before such seizure,

the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized or in whose possession they are proved to have been before the seizure, as the case may be.”

Burden of proof of *mens rea* under Customs Act.

15.83A. As recommended already³, a provision shifting the burden of proof may be inserted in the Customs Act. This will be in addition to section 123.

Procedure for trial under Customs Act.

15.84. We shall now refer to a few procedural points relevant to the Customs Act. Cognizance in Customs Cases is taken on complaint. As the Supreme Court has observed⁴:—

“The Customs Act (52 of 1962) invests the Custom Officer with the power to search premises, to stop and search conveyances and to examine persons, and also with the power

1. Amendment to be drafted.

2. Para. 15.20, *supra*.

3. Para. 7.12, *supra*.

4. *Ramesh Chandra v. U.P. State*, A.I.R. 1970 S.C. 940, para. 24.

to summon persons, to give evidence and to produce documents and (sic) seizure of goods, documents and things which are liable for confiscation. He is also invested with the power to release a person on bail. He is entitled to order confiscation of smuggled goods and impose penalty on persons proved to be guilty of infringing the provisions of section 137...the proceedings before a Magistrate can only be commenced by way of a complaint and not on a report made by a Customs Officer."

15.85. A suggestion¹ made with reference to the Customs Act states that even where a regular trial has to be adopted, the law should be simplified as is done in the cases reported by the police where the trial starts with the filing of the charge-sheet. Under the Customs Act evidence has to be led before a Magistrate before the charges are framed. This itself takes a pretty long time, which should be changed by change of procedure suggested above.

A somewhat similar point was made by an Inspector-General of Police, during oral discussions².

The matter may, therefore, be dealt with at some length.

15.86. Under the Criminal Procedure Code (as amended in 1955), two different procedures are provided for cases instituted on police report (on the one hand) and other cases³ (on the other hand). In the Report of the Law Commission⁴ on the Code of Criminal Procedure, a change has been proposed in the definition of 'complaint' in section 4(1)(h) of the Code, by proposing substitution of the words 'police report' for the words 'the report of a police officer', and a definition of "police report" has been proposed to be added as 'the report made by the police officer under section 173 (of the Code)'. This change has been proposed in order to dispel the existing confusion in respect of those reports which the *police officers* have submitted in cases of *unauthorised* investigation (e.g. on non-cognizable offences). *But this would not alter the status of complaints made by public servants.*

15.87. For reports submitted to courts under section 173 of the Code of Criminal Procedure, there is a shorter procedure of trial. According to it, the court is authorised to frame a charge immediately on the basis of the 'report' made to it under section 173, after examination of the documents submitted therewith. The reasoning behind this is that in such cases, after

1. Collector of Customs, Madras (Letter dated 17-11-1971).

2. Discussions at Madras with the Inspector General of Police, Madras (November 1971).

3. Contrast section 251A with sections 252 to 259, Criminal Procedure Code.

4. 41st Report of the Law Commission (Criminal Procedure Code), Vol. 1.

the rigorous investigation and recording of statements by the police, there is little necessity of examining witnesses before the charge.

There are many departments of the Government *apart from the police* having powers of search and seizure, powers of recording statements and investigation as have been conferred upon the police under the Code of Criminal Procedure. Under some Acts like the Customs Act, the powers of the departmental officers are even wider. But, if a prosecution is launched by them in respect of any offence under the respective Acts, the procedure of trial applicable to cases instituted on their 'complaint' (a departmental 'challan', as it is called) is the longer and more elaborate one given in sections 252 to 259 of the Code of Criminal Procedure. This procedure is much elaborate, as the court cannot frame charges in such cases unless witnesses are examined whose evidence, if not rebutted, would otherwise be sufficient to warrant a conviction to the accused. There is no doubt some justification for treating these complaints on a different footing from those filed by *private individuals*. They are more akin to the police "challans" under section 173 of the Code. Having been made after proper investigation by the public servants concerned—public servants exercising the same powers as the police—they can, with some justification, be treated as police reports, and the procedural advantage of section 251A should be made available to them. At the same time, the proposed change¹ might involve numerous consequential changes in the Criminal Procedure Code and cannot be conveniently drafted in this Report.

15.88. One practical aspect deserves to be considered, that statements made to such public servants may (if the complaints are treated as police reports) come to be regarded as 'confession to a police officer' within section 25, Evidence Act. It is to be noted that judicial decision on section 25, Evidence Act, have, while holding that confessions made to Customs Officers or Excise Officers, are not made to a police officer, relied, *inter alia*, on the fact that the concerned officers have no power to submit a report on which the Court can take cognizance. That, however, is a matter to be considered separately under the Evidence Act².

Amendment of section 139.

15.89. As already stated³, it is desirable to introduce a presumption as to foreign documents. This affects section 139 of the Customs Act. The section should apply to documents under other laws also⁴.

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1. Department can raise the point separately.
 2. To be considered under section 25, Evidence Act.
 3. Para. 15.30, *supra*,
 - ⁴ See para. 12.3, *supra*.

15.90. It has been suggested¹ that tampering with documents which are relevant to evidence under the Customs Act should be made a specific offence under the law. It appears that one of the sub-clauses of clause (72) of section 167 of the Sea Customs Act, 1878, specifically dealt with counterfeiting, falsifying, fraudulently altering or destroying any document, or any seal, signature or initials or other marks made or impressed by any officer of Customs in the transaction of any business relating to customs.

Tampering
with Customs
documents.

Section 132 of the Customs Act, 1962 has replaced the first sub-clause of clause (72) of section 167 of the Sea Customs Act, 1878 (with some modifications). Section 132 makes a false declaration, false statement or filing false documents or a betment thereof, an offence.

It is, however, seen that the previous provision relating to fraudulent alteration etc. has been dropped under the Act of 1962.

15.91. It is understood² that the relevant sub-clauses of section 167, clause (72) were deleted, as they were considered to be offences under the general provision in the Penal Code.

15.92. The law with regard to tampering with documents is contained in the Penal Code³. The definition of 'forgery' in the Code covers all possible situations. Further, the punishment in respect of forgery has, in the Law Commission's Report⁴ on the revision of the Penal Code, been proposed to be raised to three years' imprisonment or fine or both. In the circumstances, there is no need to make any provision in the Customs Act as to tampering with documents.

15.93. The Gold (Control) Act is the last of the Acts with which this Report is concerned. It has been stated⁵ that section 85 of the Gold (Control) Act covers a wide range of offences punishable with imprisonment of a minimum of six months and maximum of 3 years, and also with fine. It has been suggested that this section should be split up, and for offences relating to the manufacture, possession, acquisition and sale of primary gold punishable under section 85(i) to (iv), enhanced minimum and maximum punishments on the lines proposed for section 135 of the Customs Act, where the value of the primary gold involved is Rs. one lakh or more, should be provided. The punishment in those cases would be minimum of one year and maximum of 7 years' imprisonment, and also fine. Likewise, it has been suggested that the punishment for contravention of section 53(3)

Gold
(Control)
Act, 196
Punish-
ment.

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1. Collector of Customs, Madras. (Letter dated 17-11-1971).
 2. Customs Bill (No. 56 of 1962)—Notes on Clauses.
 3. Chapter 18, section 463, *et. seq.*, Indian Penal Code.
 4. 42nd Report of the Law Commission (Indian Penal Code), Chapter 18 under section 463.
 5. Suggestion of a Ministry of the Government of India.

[which enjoins that no licensed dealer, refiner or goldsmith, shall own or possess any gold, (primary gold, articles; ornaments which have not been included in the prescribed account)] should be stepped up. The suggested enhanced punishment is minimum imprisonment of one year and maximum of 7 years' imprisonment when the value of such unaccounted gold is Rs. one lakh or more.

Amendment of section 85, Gold (Control) Act as to punishment.

15.94. We think that it would be enough if, in accordance with our general recommendation for increase in the maximum punishment¹, (and for minimum imprisonment and fine) section 85 is amended.

Amendment of Gold (Control) Act as to burden of proof.

15.95. In accordance with our general recommendation² for shifting the burden of proof as to *mens rea*, it will be necessary to insert a section in the Gold (Control) Act relating to the burden of proof of *mens rea*.

Gold (Control) Act—Publicity.

15.96. It has been suggested³ that a provision be introduced under section 114 of the Gold (Control) Act for giving publicity to names and other particulars of persons found guilty of the contravention of the provisions of the Act, on the lines proposed under section 156 of the Customs Act, 1952.

We accept the principle of the suggestion⁴.

False statements in applications etc.

15.97. With reference to the making of false statements in an application, it was suggested during our oral discussions that it should be convenient if a specific provision on the subject is made in the Imports and Exports Control Act, instead of leaving the matter to be regulated by the relevant provision in the Indian Penal Code. We do not see any objection to such a provision. It may be stated that such a provision occurs in many Acts, though the maximum punishment varies from Act to Act. We list below a few of the pertinent provisions :—

Section 9(c), Central Excises Act, 1944—Supplying false information—six months.

Section 22 read with section 23(1A), Foreign Exchange Act—two years.

Section 16(1)(g), Prevention of Food Adulteration Act—False warranty.

Section 9, Essential Commodities Act—five years.

1. Para. 7.20, *supra*.

2. Para. 7.12, *supra*.

3. Suggestion of a Ministry of the Government of India.

4. Amendment is indicated separately.

Section 277, Income-tax Act.¹

Section 132, Customs Act.

Sections 86 and 87, Gold (Control) Act.

We recommend the insertion of a suitable provision on the subject. in the Imports and Exports (Control) Act.

1. See para. 15.60, *supra*.

CHAPTER 16

PREVENTIVE DETENTION

Introductory.

16.1 We now proceed to consider a politically and constitutionally sensitive subject which has been referred to us by Government. It relates to the problem of invoking the Preventive Detention Act against persons guilty of social and economic offences

Desirability of preventive detention.

16.2. Government have from time to time considered the desirability of subjecting to preventive detention persons habitually engaged in offences against the laws relating to customs, excise and foreign exchange. It has been realised, and rightly in our opinion, that the Preventive Detention Act, as it now stands, may not justify the detention of such persons. "Maintenance of supplies and services essential to the community" may not cover the cases of such persons unless a 'proximate relation' were to be established to the satisfaction of the court between the maintenance of such supplies and services on the one hand and the activities of these persons, say, for instance, smuggling, on the other. A further problem that has caused anxiety from time to time has been whether an amendment of the Preventive Detention Act will be sufficient for the purpose or whether nothing short of a constitutional amendment will suffice.

Preventive detention and the rules of law.

16.3. We believe that preventive detention is an anachronism in a democratic society like ours, based on the principle of the rule of law. The detention of individuals without trial for any length of time, howsoever short, is thoroughly inconsistent with the basic ideals of our Government. The Constitution indeed does not countenance any general power of preventive detention and both the Union and the State Governments have been empowered to make laws authorising such detention only for specified purposes. These powers have been given by way of necessity because it was felt that, howsoever repugnant the idea of preventive detention may be, in certain situations and for certain purposes it was advisable to resort to this extreme power rather than take the grave risks which the State will have to face in the absence of such power. We would naturally be reluctant to recommend extension of that power to any new areas. But, after careful consideration, we have come to the conclusion that, if preventive detention were ever justified, it would be for the purpose of preventing some of the offences under consideration, namely, offences against the regulations of foreign exchange, excise and customs. These offences acquire an ominous character

because of the immense impact they have on the well-being of the entire nation by virtue of their pernicious effect on vital national policies. In times of war and other emergencies they acquire a further and even more dangerous dimension because of the usual association of smuggling with espionage. We are, therefore, satisfied that the Union Government should not be without power to detain preventively hardened offenders against the laws of customs, excise and foreign exchange.

16.4. The next question is whether any statutory or constitutional amendment is required to give the Central Government such power. We are of opinion that the Preventive Detention Act as it now stands will be inadequate to cover the detention of such offenders. Obviously, such persons are not covered under the rubrics of defence, foreign affairs, security of India, security of State, maintenance of public order or the maintenance of supplies and services essential to the community. Although activities like smuggling may have an indirect impact on any or some of these matters, it is difficult to see how such relation can be regarded a direct and proximate relation in terms of the judicial standard laid down in *Rex v. Basudev*¹ and subsequent cases. The Preventive Detention Act, therefore, may have to be amended in order to give express authority for the detention of persons habitually engaged in anti-social activities in violation of the laws of customs, imports and exports, foreign exchange and the like.

Need for constitutional amendment.

16.5. That raises the further question about the legislative competence of Parliament to make such an amendment. Before the recent judgment of the Supreme Court in *Union of India v. H.S. Dhillon*², doubts would have been entertained about the competence of Parliament to extend preventive detention beyond the categories enumerated in Item 9 of List I and Item 3 of List III of the Seventh Schedule to the Constitution. It could have been argued that no such power could be read into entry 97 of List I, relating to residuary power, and clause (2) of article 248 relating to the same power. It could also have been argued that the residuary power does not cover preventive detention, inasmuch as the subject has been dealt with in express items in the two aforesaid entries.

Legislative competence.

16.6. However the majority opinion in the Supreme Court decision, above referred to³ makes that argument untenable since it lays down the proposition that item 97 of List I and article 248 cover not only those powers which are not expressly included in the Second and Third Lists, but also powers which are either not stated in any of the three Lists, or, even those which have been expressly withheld from Items in List I but not conferred in Lists II and III. Thus, the Court has held that the power to

Judgement in *Union of India v. H.S. Dhillon*.

1. *Rex v. Basudev*, A.I.R. 1950 F.C. 67; (1949) F.C.R. 657.

2. *Union of India v. H.S. Dhillon*, (1971) 2 S.C.C. 779.

3. *Union of India v. H.S. Dhillon*, (*supra*).

impose a tax on the capital value of agricultural land is available to Parliament as a residuary power, although, entry 86 of List I expressly excludes such power from the grant it makes to Parliament. The Court has also held that, since the power to impose a tax on agricultural land is not conferred in either List II or in List III, it must be read in the residuary power, notwithstanding the fact that Item 86 of List I expressly withholds it from the grant it makes.

The basic philosophy of the majority opinion is that there can be no vacuum of legislative power, and therefore any power not covered by all the three Lists taken together must be found in item 97 of List I as a residuary power. We are in general agreement with this philosophy of interpretation of the provisions of the Constitution dealing with the federal distribution of powers. There is ample support for it, as the majority opinion itself has pointed out, in the precedents of the other Commonwealth countries.

Majority
view
analysed.

16.7. This decision would apparently lend support to the view that Parliament, under its residuary powers, may authorise preventive detention for reason not enumerated in item 9 of List I and Item 3 of List II. In fact, the majority opinion has illustrated its point directly with the help of the provisions relating to preventive detention, and has expressed the opinion that entry 9 of List I and entry 3 of List III do not exhaust the legislative power over the subject of preventive detention. The Court has observed:

“We may illustrate this point with reference to some other entries. In Entry 9, List I, ‘Preventive Detention for reasons connected with defence, foreign affairs or the security of India’ the matter is not Preventive Detention but the whole entry. Similarly, in Entry 3, List III, ‘Preventive Detention for reasons connected with the security of the State, the maintenance of public order or the maintenance of supplies and services essential to the community’ the matter is not Preventive Detention but the whole entry. It would be erroneous to say that Entry 9, List I and Entry 3, List III deal with the same matter.”

16.8. There would, thus, seem to be basis in the majority opinion for the view that Parliament has the legislative competence to legislate on preventive detention for reasons not indicated in Item 9 of List I and Item 3 of List III.

Opposite
view
considered.

16.9. It is possible, however, to argue that there is a radical difference between wealth tax on agricultural land and preventive detention for smuggling. Taxation is a normal power inherent in Governments and it may be legitimately read as a residuary power; and that is what the majority decision in Dhillon's case has done. If the minority decision in the said case were accepted, it would lead to the constitutionally anomalous position that the power of taxation, which is inherent in every sovereign state,

is not available to Parliament or the State Legislatures in respect of income on agricultural land and the said income would stand outside the reach of the legislative power of Indian Republic. That clearly is an untenable position. That is why we are in agreement with the majority view.

16.10. But, preventive detention is not a power of that kind; in view of the provisions of clauses (1) and (2) of Article 22, neither Parliament nor the Legislature of a State would have any power to legislate on preventive detention but for the express provisions in the respective entries in the Seventh Schedule. Whereas, even if there had been no express entries about the wealth tax, the power to legislate on wealth tax could be legitimately read in the residuary power. Such an interpretation of a residuary power in respect of preventive detention is, in our opinion, impermissible, because preventive detention attributable to Entry 97 would directly violate clauses (1) and (2) of Article 22 and these clauses represent fundamental rights guaranteed to the citizens of India.

16.11. In fairness to the majority decision, we ought to add that the observations from the majority judgment, which we have quoted above, are *obiter dicta*, and the constitutional aspect of the matter pertaining to preventive detention does not appear to have been brought to the notice of the Court and has, therefore, not been considered. Thus, in our view, the position with regard to the power to legislate on preventive detention is substantially and radically different from the power to levy wealth tax.

16.12. We have carefully considered this question and have given due consideration to the general tenor of the majority decision in *Dhillon's Case* and the *obiter* observations made by Chief Justice Sikri who spoke for the majority in the said case. Our considered opinion is that, on the whole, it would be advisable for the Government to secure a constitutional amendment enlarging the contents of Item 9 in List I of the Seventh Schedule. We accordingly suggest that Item 9 of List I may be amended so as to read as follows :—

Recom-
mendation.

“Preventive Detention for reasons connected with Defences, Foreign Affairs, the security of India, the effective realisation of duties of Customs and Excise, or the conservation of Foreign Exchange; persons subjected to such detention.”

CHAPTER 17

INTERFERENCE BY WRITS WITH INVESTIGATION

Introductory.

17.1. In some of the replies to the Questionnaire issued by the Commission, as also during oral discussions with some officers, it was stated that the investigation of economic offences is sometimes hampered by writs issued by the High Courts which stay the proceedings of the investigating agencies until the matter is disposed of.

Categories of orders.

17.2. A study of summaries of sample cases forwarded by some of the officers at the request of the Commission, as also of a few reported decisions, relevant to the subject, shows that orders of Courts which were supposed to hamper investigation fell into the following main categories :—

(a) orders passed by the High Courts or Courts of Session on an interlocutory revision ;

(b) writs issued by the High Courts under article 226, not staying investigation as such, but restraining the executive officers from taking certain steps, such as search and the like ;

(c) writs issued by the High Courts restraining the entire process of investigation ;

(d) orders issued by the trial court itself, staying the trial until decision of some question of law in the High Court, being a question which would affect the proceedings in the trial court itself.

17.3. So far as category (a) is concerned, it should be stated that the question does not pertain to economic offences alone, but to the entire field of criminal procedure. It may be of interest to note that in the recent Bill on Criminal Procedure Code¹ there is a proposal to bar revision in respect of interlocutory orders.

So far as category (b) is concerned, the usual type of case presented is a petition questioning the legality of search. Since seizure of a document or other property and search of premises frequently involves questions of fundamental rights, it has been possible for the parties affected by the seizure or search to approach the High Court for the issue of appropriate writs on the basis of violation of this or that fundamental right.

1. Criminal Procedure Code Bill, 1970, Clause 407(1).

Interference with the whole process of investigation—category (c) above—one should think, should be a very rare situation. The situation has, however, arisen in one or two cases, not yet finally decided, and the following paragraphs seek to deal with the legal position in brief.

[Category (d) need not be discussed in detail.]

17.4. Attempts made in the past to invoke interference by the Court with the process of investigation by the police have not usually succeeded.

Inter-
ference
with
investiga-
tion.

Rulings¹ under Chapter 14 of the Criminal Procedure Code—particularly, section 159—have made it clear that the court cannot control or interfere with investigation by the police.

Same has been the fate of attempts to invoke the inherent power² of the court (section 561A, Criminal Procedure Code).

17.5. However, it is pertinent to refer to a recent Supreme Court judgement³. The actual decision was concerned with section 159, Criminal Procedure Code and was as follows :—

“The scheme of these sections⁴... clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the the police decides not to investigate the case that the Magistrate can intervene and either direct the investigation, or in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case. The power of the police to investigate has been made independent of any control by the Magistrate.”

But, dealing with the *mala fide* exercise of the power by the police, the Supreme Court made the following observations *obiter*—

“It appears to us that, though the Code of Criminal Procedure gives to the police unfettered powers to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the power of investigation has been exercised by a police officer *mala fide*, the High Court can always issue a writ of *mandamus* restraining the police officer from misusing his legal powers.”

1. *Khwaja Nazir Ahmad*, A.I.R. 1945 P.C. 18.

2. *Khwaja Nazir Ahmad*, A.I.R. 1945 P.C. 18.

3. *S.N. Sharma v. Bipin Kumar* A.I.R. 1970 S.C. 786, 788, 789.

4. Sections 156, 157 and 159, Criminal Procedure Code.

The Court added—

“The fact that the Code does not contain any other provision giving power to a Magistrate to stop investigation by the police cannot be a ground for holding that such a power must be read in section 159 of the Code.”

Case-law
examined.

17.6. We have also examined a number of decisions which relate to writs issued in connection with steps taken towards investigation or administrative adjudication. These decisions relate to search and seizure¹, admissibility of certain statements², custody of documents³ or extension of time⁴.

Amend-
ment not
recom-
mended.

17.7. In almost all these cases, writs were applied or issued on the ground that some fundamental right or other of the petitioner was violated or threatened to be violated. The writ was not directed at the process of investigation as such, but at particular steps forming part of the process. No doubt, the blocking of one step blocks the prompt completion of the investigation. But in a Constitution which guarantees fundamental rights, such situations are unavoidable. We do not think that a constitutional amendment to prohibit the issue of writs in such cases is called for.

Need for
bearing in
mind
importance
of
economic
offences.

17.8. Nevertheless, we must note that there is a complaint that the issue of writs prohibiting the taking or continuance of some steps necessary for completion of the investigatory process hampers investigation. We are free to confess that this complaint cannot be regarded as baseless. It is not for us to comment on the legality or propriety of the judicial orders passed in such cases. But we hope that while exercising their extraordinary jurisdiction to issue writs in these cases, courts will not overlook the need for speedy and unhampered investigation of these offences which cause grave harm to the whole nation. We would also like to emphasise that, in dealing with proceedings initiated before them by parties mainly not solely for stalling or delaying the investigation of offences alleged to have been committed by them, courts should bear in mind what the Privy Council laid down in a very pithy and emphatic manner when it observed that the function of the courts begins after the investigation is complete⁵.

1. (a) A.I.R. 1966 S.C. 1209;
(b) A.I.R. 1967 S.C. 1298;
(c) (1967) 71 Cal. W.N. 814;
(d) A.I.R. 1970 Cal. 212.
2. (a) A.I.R. 1970 S.C. 1065;
(b) A.I.R. 1970 S.C. 940.
3. A.I.R. 1962 S.C. 759.
4. A.I.R. 1968 Mysore 89.
5. Nazir Ahmed's case.

CHAPTER 18

MISCELLANEOUS

18.1. We have now come to the end of our Report, and shall mention a few miscellaneous matters. Conclusion.

18.2. Suggestions are often made that in order that the lower Magistracy may realise the seriousness of some of the social and economic offences, some method should be evolved of making the judiciary conscious of the grave damage caused to the country's economy and health by such anti-social crimes. The frequency and emphasis with which these suggestions have been made, and the support which they have received from very high officers has caused some anxiety to us. But we hope that the higher courts are fully alive to the harm, and we have no doubt that on appropriate occasions, such as, judicial conferences, the subject will receive attention. It is of utmost importance that all State instrumentalities involved in the investigation, prosecution and trial of these offences must be oriented to the philosophy which treats these economic offences as a source of grave challenge to the material wealth of the nation. Sentencing conferences.

18.3. We hope we shall not be misunderstood if we suggest that even the holding of periodical meetings on sentencing may be beneficial, not in the context of economic offences only, but in the evolution of a rational and consistent policy of sentencing. Experience of England is, by now, familiar to those interested in the subject.

A meeting of over 100 judges was held in the Royal Courts of Justice in London on January 7-8, 1965 to take part in exercises designed to increase the uniformity of sentencing. The Lord Chief Justice expressed the hope that the meeting would be a model for similar ones throughout the country¹.

Conferences between judges, magistrates and penal administrators are, in England, organised with increasing frequency in many parts of the country with an annual conference in London for judges of the Supreme Courts².

18.4. Besides holding councils on sentencing, it may be worthwhile to hold 'workshops' which would be less formal but equally useful and likely to give concrete results. Such workshops could, for example, be attended by all Special Judges or other officers concerned with economic offences.

1. Graham Parker, "Education of the Sentencing Judge", (1965) 15 I.C.L.Q. 206, 251.

2. Mclean and Wood, Criminal Justice and the Treatment of Offenders, (1969), page 90.

18.5. We need not emphasise that ultimately, the success of enforcement depends on the integrity and efficiency of the staff employed for the purpose. In making these observations we are stating the obvious. But we have gathered an impression that the number of officers in charge of enforcement of some of the laws in question is not adequate. Financial considerations, no doubt, come in the way, but increased expenditure in the direction of augmentation of the quality and number of the staff is likely to repay itself, if not likely to bring greater returns. In any case, as an experiential measure, it is worth trying in selected areas where the enforcement staff is found to be inadequate. Besides, for detecting offences of smuggling, particularly in the coastal areas and border areas, the Administration must employ more efficient and modern methods.

18.6. Since some of the amendments which we are proposing (e. g. the amendment in relation to recovery of penalties under the Foreign Exchange Act)¹ will involve additional administrative work, it is desirable that the strength of the staff at the appropriate level should be augmented, so that the reforms in the law may be adequately implemented.

Publicity. 18.7. Publicity is also of importance. To quote from 'the Report of a Working Groups²—

“apart from the integrity of officials entrusted with the responsibility of taking decisions in such matters as the grant of a permit to travel etc. the best safeguard against harassment, patronage and corruption, we feel, is inadequate publicity being given to the rules, regulations and procedure as also to the decisions taken both to grant and to reject. It is not enough to give fair decisions but it is equally necessary that the fairness of the decisions should be made well known and acknowledged. We recommend, therefore, that a satisfactory scheme for the publicity to the general rules and procedures and to individual decisions in this field should be worked out and adopted.”

Other sister Acts. 18.8. Our recommendations and discussions have been confined to the major Acts, and we have not dealt with sister Acts relating to subjects allied to these major Acts. It is needless to say that much of what we have said above could apply to them. We do not consider it necessary how far the other Acts could be amended on the lines of the amendments suggested by us in the major Acts. Wherever necessary, that question can be dealt with by the Ministry concerned.

Appendices. 18.9. The Appendices to this Report contain detailed data on various aspects³.

1. Para. 15.27, *supra*.

2. Report of the Working Group of the Administrative Reforms Commission on Customs & Excise Administration, (1968), (October), page 74, para. 12.14.

3. One of the Appendices shows our recommendations in the form of draft amendments. These are very tentative.

SUMMARY OF MAJOR RECOMMENDATIONS

1. *Central Excises and Salt Act, 1944.*

(1) Section 9 should be amended to increase the punishment. There should be a provision for minimum imprisonment¹ and minimum fine.

(2) A new section—section 9A—should be inserted to punish the unauthorised removal of excisable goods².

(3) Another section—section 9B—should be inserted to make it clear that confiscation shall not prevent punishment³.

(4) A new section section—10A—should be inserted to provide for public censure⁴.

2. *Foreign Exchange Regulation Act, 1947.*

(1) In section 19 D(1) of the Act, for the words 'has reason to believe' the words 'honestly believes' should be substituted⁵.

(2) A new section should be inserted in the Act to provide interception of postal articles and telegraphs.⁶

(3) By inserting section 19DD, power to seize containers⁷ should be provided for.

(4) In section 23(1), punishment should be increased.⁸ There should be a provision for minimum imprisonment, and minimum fine.

(5) By adding an Explanation under section 23C, a provision should be inserted to make the Chairman and Managing Director of a company criminally liable for transactions connected with a permission under the Act, applied for and obtained in the name of the Company.⁹

(6) A new section—section 23CC—should be inserted to provide for public condemnation of corporations convicted of offences under the Act.¹⁰

1. Paras. 15.5 and 15.7.

2. Para. 15.1.

3. Para. 15.3.

4. Para. 15.4.

5. Para. 15.36H.

(7) The departmental penalties under section 23(1) should be increased to five times the amount of foreign exchange involved (instead of three times, as at present).¹

(8) Another new section—section 23CCC—should be increased to give the court power to order the stoppage of a particular business on second conviction.²

(9) Another new section—section 23FF—should be inserted to provide that any tax, penalty etc. due under the Act may be recovered by a Magistrate as if it was a fine imposed by him.³

(10) Under another new section—section 23FFF—preparation to commit an offence under the Act should be punished in certain circumstances.⁴

(11) Section 24A of the Act should be extended to foreign documents and to documents seized under other laws, and to cases where the document was seized from a person other than the accused.⁵

(12) Guide-lines should be laid down as to the cases in which prosecutions may be instituted under the Foreign Exchange Act.⁶

(13) There should be no hesitation in exercising the power to impound or revoke a passport under section 10(3), Passports Act,⁷ in serious cases under the Foreign Exchange Act.

III. *Prevention of Food Adulteration Act, 1954*

(1) A new section—section 21B—should be inserted to provide for public condemnation of corporations convicted of offences under the Act.⁸

IV. *Essential Commodities Act, 1955*

(1) The maximum term of imprisonment under section 7(1)(a)(i) should be increased from five to seven years.⁹

(2) In section 10A, the words “and bailable” should be provided.¹⁰

(3) A new section—section 10B—should be inserted to provide for the public condemnation of corporations convicted of offences under the Act.¹¹

1. Para. 15.9.

2. Para. 15.21.

Para. 15.27.