REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7796 OF 1997

GVK INDS. LTD. & ANR. …APPELLANTS

VERSUS

THE INCOME TAX OFFICER & ANR. …RESPONDENTS

JUDGEMENT

B.SUDERSHAN REDDY,J:

1. In any federal or quasi federal nation-state, legislative powers are distributed territorially, and legislative competence is often delineated in terms of matters or fields. The latter may be thought of as comprising of aspects or causes that exist independently in the world, such as events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological,

environmental or physical spheres. The purpose of legislation would be to seek the exertion of the State power to control, modulate, transform, eliminate or engender such aspects or causes or the effects or consequences of such aspects or causes. While the purpose of legislation could be seen narrowly or purely in terms of intended effects on such aspects or causes, obviously the powers have to be exercised in order to enhance or protect the interests of, the welfare of, the well-being of, or the security of the territory, and the inhabitants therein, for which the legislature has been charged with the responsibility of making laws. Paraphrasing President Abraham Lincoln, we can say that State and its government, though of the people, and constituted by the people, has to always function "for" the people, indicating that the mere fact that the state is organized as a democracy does not necessarily mean that its government would always act "for" the people. Many instances of, and vast potentialities for, the flouting of that norm can be easily visualized. In Constitutions that establish nation-states as sovereign democratic republics, those expectations are also transformed into limitations as to how, in what manner, and for what purposes the collective powers of the people are to be used.

2. The central constitutional themes before us relate to whether the Parliament's powers to legislate, pursuant to Article 245, include legislative competence with respect to aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India. It is obvious that legislative powers of the Parliament incorporate legislative competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within India, subject to the division of legislative powers as set forth in the Constitution. It is also equally obvious and accepted that only Parliament may have the legislative competence, and not the state legislatures, to enact laws with respect to matters that implicate the use of state power to effectuate some impact or effect on aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India.

3. Two divergent, and dichotomous, views present themselves before us. The first one arises from a rigid reading of the ratio in *Electronics Corporation of India Ltd., v. Commissioner of Income Tax & An'r.*,[1] (*"ECIL")* and suggests that Parliaments powers to

[1] (1989) (2) SCC 642-646

legislate incorporate only a competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, solely within India. A slightly weaker form of the foregoing strict territorial nexus restriction would be that the Parliament's competence to legislate with respect to extra-territorial aspects or causes would be constitutionally permissible if and only if they have or are expected to have significant or sufficient impact on or effect in or consequence for India. An even weaker form of the territorial nexus restriction would be that as long as some impact or nexus with India is established or expected, then the Parliament would be empowered to enact legislation with respect to such extra-territorial aspects or causes. The polar opposite of the territorial nexus theory, which emerges also as a logical consequence of the propositions of the learned Attorney General, specifies that the Parliament has inherent powers to legislate "for" any territory, including territories beyond India, and that no court in India may question or invalidate such laws on the ground that they are extra-territorial laws. Such a position incorporates the views that Parliament may enact legislation even with respect to extra-territorial aspects or causes that have no impact on, effect in or

consequence for India, any part of it, its inhabitants or Indians, their interests, welfare, or security, and further that the purpose of such legislation need not in any manner or form be intended to benefit India.

4. Juxtaposing the two divergent views outlined above, we have framed the following questions:

(1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?

(2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

5. It is necessary to note the text of Article 245 and Article 1 at this stage itself:

> ***"Article 245. Extent of laws made by Parliament and by the Legislatures of States*** *– (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.*
>
> *(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."*
>
> ***"Article 1. Name and territory of the Union*** *– (1) India, that is Bharat, shall be a Union of States. (2) The States and the territories thereof shall be as specified in the First Schedule. (3) The territory of India shall comprise –*
>
> *(a) The territories of the States;*
>
> *(b) the Union territories specified in the First Schedule; and*
>
> *(c) such other territories as may be acquired*."

II

Meanings of some phrases and expressions used hereinafter:

6. Many expressions and phrases, that are used contextually in the flow of language, involving words such as "interest", "benefit", "welfare", "security" and the like in order to specify the purposes of laws, and their consequences can, have a range of

meanings. In as much as some of those expressions will be used in this judgment, we are setting forth below a range of meanings that may be ascribable to such expressions and phrases:

"aspects or causes" "aspects and causes":

> *events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, in the social, political, economic, cultural, biological, environmental or physical spheres, that occur, arise, exist or may be expected to do so, naturally or on account of some human agency*.

"extra-territorial aspects or causes":

> *aspects or causes that occur, arise, or exist, or may be expected to do so, outside the territory of India*.

"nexus with India", "impact on India", "effect in India", "effect on India", "consequence for India" or "impact on or nexus with India"

> *any impact(s)on, or effect(s) in, or consequences for, or expected impact(s) on, or effect(s) in, or consequence(s) for: (a) the territory of India, or any part of India; or (b)the interests of, welfare of, wellbeing of or security of inhabitants of India, and Indians in general*, that arise on account of *aspects or causes.*

"benefit to India" or "for the benefit of India", "to the benefit of India", "in the benefit of India" or " to benefit India" or "the interests of India", "welfare of India", "well-being of India" etc.:

protection of and/or enhancement of the interests of, welfare of, well-being of, or the security of India (i.e., the whole territory of India), or any part of it, its inhabitants and Indians.

III

Factual Background as to how the matter arose before us.

7. The Appellant by way of a writ petition filed in Andhra Pradesh High Court had challenged an order of the Respondents which decided that the Appellant was liable to withhold a certain portion of monies being paid to a foreign company, under either one of Sections 9(1)(i) or 9(1)(vii)(b) of the Income Tax Act (1961). The Appellant had also challenged the vires of Section 9(1)(vii)(b) of the Income Tax Act (1961) for want of legislative competence and violation of Article 14 of the Constitution. The High Court having upheld that Section 9(1)(i) did not apply in the circumstances of the facts of the case, nevertheless upheld the applicability of Section 9(1)(vii)(b) on the facts and also upheld the constitutional validity of the said provision. The High Court mainly relied on the ratio of the judgment by a three judge bench of this court in *ECIL*. Hence, the appeal.

8. The matter came up for consideration before a two judge bench of this Court. In light of the far reaching issues of great constitutional purport raised in this matter, the fact that such issues had been raised previously in *ECIL*, the referencing of some of those issues by the three judge bench in *ECIL* to a constitutional bench, and the fact that the civil appeals in the ECIL case had also been withdrawn, a two judge bench of this Court vide its order dated November 28, 2000, also referred the instant matter to a constitutional bench. On July 13, 2010, the matter again came up for consideration before another three judge bench of this court, and vide its order of the same date, this matter came to be placed before us.

9. It is necessary for purposes of clarity that a brief recounting be undertaken at this stage itself as to what was conclusively decided in *ECIL*, and what was referred to a constitutional bench. After conclusively determining that Clauses (1) and (2) of Article 245, read together, impose a requirement that the laws made by the Parliament should bear a nexus with India, the three judge bench in ECIL asked that a constitutional bench be constituted to consider whether the ingredients of the impugned provision, i.e.,

Section 9(1)(vii) of the Income Tax Act (1961) indicate such a nexus. In the proceedings before us, the appellant withdrew its challenge of the constitutional validity of Section 9(1)(vii)(b) of the Income Tax Act (1961), and elected to proceed only on the factual matrix as to the applicability of the said section. Nevertheless, the learned Attorney General appearing for the Respondent pressed upon this Constitutional Bench to reconsider the decision of the three judge bench in the ECIL case. In light of the constitutional importance of the issues we agreed to consider the validity of the requirement of a relationship to or nexus with the territory of India as a limitation on the powers of the Parliament to enact laws pursuant to Clause (1) of Article 245 of the Constitution.

10. A further clarification needs to be made before we proceed. The issue of whether laws that deal entirely with aspects or causes that occur, arise or exist, or may be expected to do so, within India, and yet require to be operated outside the territory of India could be invalidated on the grounds of such extra-territorial operation is not before us. The text of Clause (2) of Article 245, when read together with Clause (1) of Article 245 makes it sufficiently clear that the laws made by the Parliament

relating to aspects or causes that occur, arise or exist or may be expected to occur, arise or come into existence within the territory of India may not be invalidated on the ground that such laws require to be operated outside the territory of India. We will of course deal with this aspect to the extent that it is required for a proper appreciation of Clause (1) of Article 245, and to the extent the permissibility of such extra-territorial operation has been sought to be, by the learned Attorney General, extrapolated into a power to make any extra-territorial laws.

IV

The ratio in ECIL:

11. The requirement of a nexus with the territory of India was first explicitly articulated in the decision by a three judge Bench of this court in ECIL. The implication of the nexus requirement is that a law that is enacted by the Parliament, whose "objects" or "provocations" do not arise within the territory of India, would be unconstitutional. The words "object" and "provocation", and their plural forms, may be conceived as having been used in ECIL as synonyms for the words "aspect" and "cause", and their plural forms, as used in this judgment.

12. The issue under consideration in ECIL was whether Section 9(1)(vii)(b) of the Income Tax Act (1961) was unconstitutional on the ground that it constitutes a law with respect to objects or provocations outside the territory of India, thereby being ultra-vires the powers granted by Clause (1) of Article 245. Interpreting Clauses (1) and (2) of Article 245, Chief Justice Pathak (as he then was) drew a distinction between the phrases "make laws" and "extraterritorial operation" – i.e., the acts and functions of making laws versus the acts and functions of effectuating a law already made.

12. In drawing the distinction as described above, the decision in ECIL considered two analytically separable, albeit related, issues. They relate to the potential conflict between the fact that, in the international context, the "principle of Sovereignty of States" (i.e., nation-states) would normally be "that the laws made by one State can have no operation in another State" (i.e., they may not be enforceable), and the prohibition in Clause (2) of Article 245 that laws made by the Parliament may not be invalidated on the ground that they may need to be or are being operated extra-territorially.

13. The above is of course a well recognized problem that has been grappled with by courts across many jurisdictions in the world; and in fact, many of the cases cited by the learned Attorney General attest to the same. Relying on the ratio of *British Columbia Railway Company Limited v. King*,[2] the principle that was enunciated in ECIL was that the problems of inability to enforce the laws outside the territory of a nation state cannot be grounds to hold such laws invalid. It was further held that the courts in the territory of the nation-state, whose legislature enacted the law, ought to nevertheless order that a law requiring extra-territorial operation be implemented to the extent possible with the machinery available. It can of course be clearly appreciated that the said principle falls within the ambit of the prohibition of Clause (2) of Article 245. The same was stated by Chief Justice Pathak (as he then was) thus:

> *"Now it is perfectly clear that it is envisaged under our constitutional scheme that Parliament in India may make laws which operate extra-territorially. Art. 245(1) of the Constitution prescribes the extent of laws made by the Parliament. They may be made for the whole or any part of the territory of India. Article 245(2) declares that no law made by the Parliament*

[2] [1946] A.C. 527

> *shall be deemed to be invalid on the ground that it would have extra-territorial operation. Therefore, a Parliamentary statute having extra-territorial operation cannot be ruled out from contemplation. The operation of the law can extend to persons, things and acts outside the territory of India"*[3] (emph. added).

14. However, the principle enunciated above does not address the question as to whether the Parliament may enact a law "for" a territory outside the boundaries of India. To enact laws "for" a foreign territory could be conceived of in two forms. The first form would be, where the laws so enacted, would deal with or be in respect of extra-territorial aspects or causes, and the laws would seek to control, modulate or transform or in some manner direct the executive of the legislating State to act upon such extra-territorial aspects or causes because: (a) such extra-territorial aspects or causes have some impact on or nexus with or to India; and (b) such laws are intended to benefit India. The second form would be when the extra-territorial aspects do not have, and neither are expected to have, any nexus whatsoever with India, and the purpose of such legislation would serve no purpose or goal that would be beneficial to India.

[3] Supra note 1.

15. It was concluded in ECIL that the Parliament does not have the powers to make laws that bear no relationship to or nexus with India. The obvious question that springs to mind is: "what kind of nexus?" Chief Justice Pathak's words in ECIL are instructive in this regard, both as to the principle and also the reasoning:

> "*But the question is whether a nexus with something in India is necessary. It seems to us that unless such nexus exists Parliament will have no competence to make the law. It will be noted that Article 245(1) empowers Parliament to enact laws for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subserve the object, and that object must be related to something in India. It is inconceivable that a law should be made by parliament which has no relationship with anything in India."*[4] (emphasis added).

16. We are of the opinion that the distinction drawn in ECIL between "make laws" and "operation" of law is a valid one, and leads to a correct assessment of the relationship between Clauses (1) and (2) of Article 245. We will have more to say

[4] Supra note 1.

about this, when we turn our attention to the propositions of the learned Attorney General.

17. We are, in this matter, concerned with what the implications might be, due to use of words "provocation", "object", "in" and "within" in connection with Parliament's legislative powers regarding "the whole or any part of the territory of India", on the understanding as to what aspects and/or causes that the Parliament may legitimately take into consideration in exercise of its legislative powers. A particularly narrow reading or understanding of the words used could lead to a strict territorial nexus requirement wherein the Parliament may only make laws with respect to objects or provocations – or alternately, in terms of the words we have used "aspects and causes" – that occur, arise or exist or may be expected to occur, arise or exist, solely within the territory of India, notwithstanding the fact that many extra-territorial objects or provocations may have an impact or nexus with India. Two other forms of the foregoing territorial nexus theory, with weaker nexus requirements, but differing as to the applicable tests for a finding of nexus, have been noted earlier.

V

The Propositions of the learned Attorney General:

18. It appeared that the learned Attorney General was concerned by the fact that the narrow reading of Article 245, pace the ratio in ECIL, could significantly incapacitate the one legislative body, the Parliament, charged with the responsibility of legislating for the entire nation, in dealing with extra-territorial aspects or causes that have an impact on or nexus with India. India has a parliamentary system of governance, wherein the Executive, notwithstanding its own domain of exclusive operation, is a part of, and answerable to, the Parliament. Further, given that the Executive's powers are co-extensive with that of the Parliament's law making powers, such a narrow reading of Article 245 could significantly reduce the national capacity to make laws in dealing with extra-territorial aspects that have an impact on or nexus with India. Clearly, that would be an anomalous construction.

19. In attacking such a construction, the learned Attorney General appeared to have moved to another extreme. The

written propositions of the learned Attorney General, with respect to the meaning, purport and ambit of Article 245, quoted verbatim, were the following:

1. *"There is clear distinction between a Sovereign Legislature and a Subordinate Legislature.*

2. *It cannot be disputed that a Sovereign Legislature has full power to make extra-territorial laws.*

3. *The fact that it may not do so or that it will exercise restraint in this behalf arises not from a Constitutional limitation on its powers but from a consideration of applicability.*

4. *This does not detract from its inherent rights to make extra-territorial laws.*

5. *In any case, the domestic Courts of the country cannot set aside the legislation passed by a Sovereign Legislature on the ground that it has extra-territorial effect or that it would offend some principle of international law.*

6. *The theory of nexus was evolved essentially from Australia to rebut a challenge to Income Tax laws on the ground of extra-territoriality.*

7. *The principle of nexus was urged as a matter of construction to show that the law in fact was not extra-territorial because it had a nexus with the territory of the legislating State.*

8. *The theory of nexus and the necessity to show the nexus arose with regard to State Legislature under the Constitution since the power to make extra-territorial laws is reserved only for the Parliament"*.

21. In as much as the issues with regard to operation of laws enacted by the various state legislatures are not before us, we decline to express our opinion with respect to historical antecedents of nexus theory in the context of division of powers between a federation and the federal provinces. Given the fact that the learned Attorney General has not further refined or explicated the propositions as set forth above, we are compelled to assume that he intended us to take it that the Parliament should be deemed to have the powers and competence as set forth below, which arise out of a rigorous analysis of his propositions, and consequently examine them in light of the text of Article 245.

22. The main propositions are that the Parliament is a "sovereign legislature", and that such a "sovereign legislature has full power to make extra-territorial laws." They can be analysed in the following two ways:

(i) As a matter of first level of assessment, the phrase "full power to make extra-territorial laws" would implicate the competence to legislate with respect to extra-territorial aspects or causes that have an impact

on or nexus with India, wherein the State machinery is directed to achieve the goals of such legislation by exerting force on such extra-territorial aspects or causes to modulate, change, transform, eliminate or engender them or their effects. At the next level, such powers would also implicate legislative competence to make laws that direct the state machinery, in order to achieve the goals of such legislation, to exert force on extra-territorial aspects or causes that do not have any impact on or nexus with India to modulate, change, transform, eliminate or engender them or their effects. We take it that the learned Attorney General has proposed that both the forms outlined above are within the constitutionally permissible limits of legislative powers and competence of the Parliament.

(ii) The same proposition can also be viewed from the perspective of the goals that such "extra-territorial laws" seek to accomplish, and the relationship of such goals to the territory for which such laws are intended to affect, as well as India. Modern jurisprudence, and not just international law or international ethics, does not support the view that legislative commands that are devoid of justice can be given the status of being "law". The extent of abuse of the theory of "rule of law", in its absolutist sense, in history, and particularly in the 20th Century, has effectively undermined the legitimacy of the notion that whatever the purpose that law seeks to achieve is justice. Consequently, we will assume that the learned Attorney General did not mean that Parliament would have powers to enact extra-territorial laws with respect to foreign territories that are devoid of justice i.e., they serve no benefits to the denizens of such foreign territories. Arguably India, as a nation-state, has not been established, nor has it developed, with an intent to be an expansionary or an imperialist power on the international stage; consequently we will also not be examining the proposition that the extra-territorial laws enacted the Parliament, and hence

> "for" that foreign territory, could be exploitative of the denizens of another territory, and yet be beneficial to India in its narrow sense. A valid argument can also be made that such an exploitative situation would be harmful to India's moral stature on the international plane, and also possibly deleterious to international peace, and consequently damaging to India's long run interests. To the extent that extra-territorial laws enacted have to be beneficial to the denizens of another territory, three implications arise. The first one is when such laws do benefit the foreign territory, and benefit India too. The second one is that they benefit the denizens of that foreign territory, but do not adversely affect India's interests. The third one would be when such extra-territorial laws benefit the denizens of the foreign territory, but are damaging to the interests of India. We take it that the learned Attorney General has proposed that all three possibilities are within constitutionally permissible limits of legislative powers and competence of the Parliament.

23. The further proposition of the learned Attorney General, is that courts in India do not have the powers to declare the "extra-territorial laws" enacted by the Parliament invalid, on the ground that they have an "extra-territorial effect", notwithstanding the fact: (a) that such extra-territorial laws are with respect to extra-territorial aspects or causes that have no impact on or nexus with India; (b) that such extra-territorial laws do not in any manner or form work to, or intended to be or hew to the benefit of India; and (c) that such extra-territorial laws might even be detrimental

to India. The word "extra-territorial-effect" is of a much wider purport than "extra-territorial operation", and would also be expected to include within itself all the meanings of "extra-territorial law" as explained above. The implication of the proposed disability is not merely that the judiciary, under our constitution, is limited from exercising the powers of judicial review, on specific grounds, over a clearly defined set of laws, with a limited number of enactments; rather, it would be that the judiciary would be so disabled with regard to an entire universe of laws, that are undefined, and unspecified. Further, the implication would also be that the judiciary has been stripped of its essential role even where such extra-territorial laws may be damaging to the interests of India.

24. In addition the learned Attorney General has also placed reliance on the fact that the Clause 179 of the Draft Constitution, was split up into two separate clauses, Clause 179(1) and Clause 179(2), by the Constitution Drafting Committee, and adopted as Clauses (1) and (2) of Article 245 in the Constitution. It seemed to us that the learned Attorney General was seeking to draw two inferences from this. The first one seemed to be that the Drafting

Committee intended Clause 179(2), and hence Clause (2) of Article 245, to be an independent, and a separate, source of legislative powers to the Parliament to make "extra-territorial laws". The second inference that we have been asked to make is that in as much as Parliament has been explicitly permitted to make laws having "extra-territorial operation", Parliament should be deemed to possess powers to make "extra-territorial laws", the implications of which have been more particularly explicated above. The learned Attorney General relied on the following case law in support his propositions and arguments: *Ashbury v. Ellis*[5], *Emmanuel Mortensen v. David Peters*[6], *Croft v. Dunphy*[7], *British Columbia Electric Railway Company Ltd. V. The King*[8], *Governor General in Council v. Raleigh Investment Co. Ltd.*[9], *Wallace Brothers and Co. v. Commissioner of Income Tax, Bombay*[10], *A.H. Wadia v. Commissioner of Income Tax, Bombay*[11] and *State v. Narayandas Mangilal Dayame,*[12] *Rao Shiv Bahadur v. State of*

[5] [1893] A.C. 339
[6] *[1906] 8 F (J.) 93*
[7] [1933] A.C. 156
[8] [1946] A.C. 527
[9] [1944] 12 ITR 265
[10] [1948] 16 ITR 240
[11] [1949] 17 ITR 63
[12] AIR 1958 Bom 68.

Vindhya Pradesh,[13] *Clark v. Oceanic Contractors Inc.,*[14] *Shrikant Bhalchandra v. State of Gujarat,*[15] and *State of A.P. v. N.T.P.C.*[16]

VI

Constitutional Interpretation:

25. We are acutely aware that what we are interpreting is a provision of the Constitution. Indeed the Constitution is law, in its ordinary sense too; however, it is also a law made by the people as a nation, through its Constituent Assembly, in a foundational and a constitutive moment. Written constitutions seek to delineate the spheres of actions of, with more or less strictness, and the extent of powers exercisable therein by, various organs of the state. Such institutional arrangements, though political at the time they were made, are also legal once made. They are legal, *inter-alia,* in the sense that they are susceptible to judicial review with regard to determination of *vires* of any of the actions of the organs of the State constituted. The actions of such organs are also justiciable, in appropriate cases, where the values or the scheme of the Constitution may have been transgressed. Hence

[13] AIR 1953 SC 394
[14] [1983] A.C. 130
[15] (1994) 5 SCC 459
[16] (2002) 5 SCC 203

clarity is necessary with respect to the extent of powers granted and the limits on them, so that the organs of the State charged with the working of the mandate of the Constitution can proceed with some degree of certitude.

26. In such exercises we are of the opinion that a liberal and more extensive interpretative analysis be undertaken to ensure that the court does not, inadvertently and as a consequence of not considering as many relevant issues as possible, unnecessarily restrict the powers of another coordinate organ of the State. Moreover, the essential features of such arrangements, that give the Constitution its identity, cannot be changed by the amending powers of the very organs that are constituted by it. Under our Constitution, while some features are capable of being amended by Parliament, pursuant to the amending power granted by Article 368, the essential features – the basic structure – of the Constitution is beyond such powers of Parliament. The power to make changes to the basic structure of the Constitution vests only in the people sitting, as a nation, through its representatives in a Constituent Assembly. (See

Keshavanadna Bharati v. State of Kerala[17] and I.R. Coelho v. State of Tamil Nadu[18]). One of the foundational elements of the concept of basic structure is it would give the stability of purpose, and machinery of government to be able to pursue the constitutional vision in to the indeterminate and unforeseeable future.

27. Our Constitution charges the various organs of the state with affirmative responsibilities of protecting the interests of, the welfare of and the security of the nation. Legislative powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are granted in order to ensure that legislative and executive powers are used within the bounds specified in the Constitution. Consequently, it is imperative that the powers so granted to various organs of the state are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the State in discharging their constitutional responsibilities. Powers that have been granted, and implied by, and borne by the Constitutional text have to be perforce admitted. Nevertheless, the very essence of

[17] (1973) 4 SCC 225
[18] (2007) 2 SCC 1

constitutionalism is also that no organ of the state may arrogate to itself powers beyond what is specified in the Constitution. Walking on that razors edge is the duty of the judiciary. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the government; but restraint cannot imply abdication of the responsibility of walking on that edge.

28. In interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. However, in light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation – they are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution. Our Constitution is both long and also an intricate matrix of meanings, purposes and structures. It is only by locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to

discern its true meaning, purport and ambit. As Prof. Laurence Tribe points out:

> *"[T]o understand the Constitution as a legal text, it is essential to recognize the… sort of text it is: a constitutive text that purports, in the name of the people….., to bring into being a number of distinct but inter-related institutions and practices, at once legal and political, and to define the rules governing those institutions and practices."* (See: Reflections on Free-Form Method in Constitutional Interpretation) [19]

29. It has been repeatedly appreciated by this Court that our Constitution is one of the most carefully drafted ones, where every situation conceivable, within the vast experience, expertise and knowledge of our framers, was considered, deliberated upon, and appropriate features and text chosen to enable the organs of the State in discharging their roles. While indeed dynamic interpretation is necessary, if the meaning necessary to fit the changed circumstances could be found in the text itself, we would always be better served by treading a path as close as possible to the text, by gathering the plain ordinary meaning, and by sweeping our vision and comprehension across the entire

[19] 108 Harv. L. Rev. 1221, 1235 (1995).

document to see whether that meaning is validated by constitutional values and scheme.

30. However, it can also be appreciated that given the complexity and the length of our Constitution, the above task would be gargantuan. One method that may be adopted would be to view the Constitution as composed of constitutional topological spaces. Each Part of the Constitution deals with certain core functions and purposes, though aspects outside such a core, which are contextually necessary to be included, also find place in such Parts. In the instant case Chapter 1, Part XI, in which Article 245 is located, is one such constitutional topological space. Within such a constitutional topological space, one would expect each provision therein to be intimately related to, gathering meaning from, and in turn transforming the meaning of, other provisions therein. By locating the transformative effects within such constitutional topological space, we would then be able to gather what the core, and untransformed features are. However, this method needs to be carefully used – constitutional topological spaces are not to be taken as water tight compartments, which when studied in isolation would return

necessarily unerring truths about the Constitution. The potential that a transformative, or even a confirmative, understanding can emerge directly from any other part of the Constitution is something that we must always be cognizant of. Nevertheless, to the extent that the Constitution has been arranged in a particular manner by our framers, thereby giving us some guide posts for navigation of the text and its implications for our socio-political lives, such constitutional topological spaces, when primarily used for validation of unambiguous textual meanings, would ease our epistemological burdens.

VII

Textual Analysis of Article 245:

31. Prior to embarking upon a textual analysis of Clauses (1) and (2) of Article 245, it is also imperative that we bear in mind that a construction of provisions in a manner that renders words or phrases therein to the status of mere surplussage ought to be avoided.

32. The subject in focus in the first part of Clause (1) of Article 245 is "the whole or any part of the territory of India", and the

object is to specify that it is the Parliament which is empowered to make laws in respect of the same. The second part of Clause (1) of Article 245 deals with the legislative powers of State legislatures.

33. The word that links the subject, "the whole or any part of the territory of India" with the phrase that grants legislative powers to the Parliament, is "for". It is used as a preposition. The word "for", when ordinarily used as a preposition, can signify a range of meanings between the subject, that it is a preposition for, and that which preceded it:

> *"-prep 1 in the interest or to the benefit of; intended to go to; 2 in defence, support or favour of 3 suitable or appropriate to 4 in respect of or with reference to 5 representing or in place of….. 14. conducive or conducively to; in order to achieve…" (*See*:* Concise Oxford English Dictionary)[20]

34. Consequently, the range of senses in which the word "for" is ordinarily used would suggest that, pursuant to Clause (1) of Article 245, the Parliament is empowered to enact those laws that are in the interest of, to the benefit of, in defence of, in

[20] 8th Ed., OUP (Oxford, 1990).

support or favour of, suitable or appropriate to, in respect of or with reference to "the whole or any part of the territory of India".

35. The above understanding comports with the contemporary understanding, that emerged in the 20th Century, after hundreds of years of struggle of humanity in general, and nearly a century long struggle for freedom in India, that the State is charged with the responsibility to always act in the interest of the people at large. In as much as many extra-territorial aspects or causes may have an impact on or nexus with the nation-state, they would legitimately, and indeed necessarily, be within the domain of legislative competence of the national parliament, so long as the purpose or object of such legislation is to benefit the people of that nation state.

36. The problem with the manner in which Article 245 has been explained in the ratio of ECIL relates to the use of the words "provocation", and "object" as the principal qualifiers of "laws," and then specifying that they need to arise "in" or "within" India. The word "provocation" generally implies a cause - i.e., an inciting or a motivating factor - for an action or a reaction that seeks to control, eliminate, mitigate, modulate or otherwise

transform both the independently existing aspects in the world and also their effects which had provoked or provokes the action or reaction. "Provocation" may also be used, in a proactive sense, to signify the end or goal sought to be achieved rather than in the reactive sense – as a response to independently occurring aspects in the world. Similarly, the word "object" can mean any aspect that exists independently in the world, of which a human agency takes cognizance of, and then decides to take some action. In this sense the word "object" would carry the same meaning as "provocation" in the first sense of that word delineated above. The word "object" can also mean the end goal or purpose to be achieved by an action or a reaction to an independent aspect or cause in the world. In legal discourse, particularly in the task of interpreting statutes, and the law, the said words could be used in both the senses. The tools of "purposive interpretation" and the "mischief rule" ought to come to mind.

37. Consequently, the ratio of ECIL could wrongly be read to mean that both the "provocations" and "objects" – in terms of independent aspects or causes in the world - of the law enacted

by Parliament, pursuant to Article 245, must arise solely "in" or "within" the territory of India. Such a narrowing of the ambit of Clause (1) of Article 245 would arise by substituting "in" or "within", as prepositions, in the place of "for" in the text of Article 245. The word "in", used as a preposition, has a much narrower meaning, expressing inclusion or position within limits of space, time or circumstance, than the word "for". The consequence of such a substitution would be that Parliament could be deemed to not have the powers to enact laws with respect to extra-territorial aspects or causes, even though such aspects or causes may be expected to have an impact on or nexus with India, and laws with respect to such aspects or causes would be beneficial to India.

38. The notion that a nation-state, including its organs of governance such as the national legislature, must be concerned only with respect to persons, property, things, phenomenon, acts or events within its own territory emerged in the context of development of nation-states in an era when external aspects and causes were thought to be only of marginal significance, if at all. This also relates to early versions of sovereignty that

emerged along with early forms of nation-states, in which internal sovereignty was conceived of as being absolute and vested in one or some organs of governance, and external sovereignty was conceived of in terms of co-equal status and absolute non-interference with respect to aspects or causes that occur, arise or exist, or may be expected to do so, in other territories. Oppenheim's International Law[21] states as follows:

> *"The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power…. The 20th century has seen the attempt, particularly through the emergence in some instances of extreme nationalism, to transpose this essentially internal concept of sovereignty on to the international plane. In its extreme forms such a transposition is inimical to the normal functioning and development of international law and organization. It is also inappropriate….. no state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states. Thus the relationship of states on the international plane is characterized by their equality, independence, and in fact, by their interdependence."*

39. On account of scientific and technological developments the magnitude of cross border travel and transactions has increased

[21] Vol 1, "PEACE" 9th ed., page 125, 9 (Longman Group, UK, 1992).

tremendously. Moreover, existence of economic, business, social and political organizations and forms, of more or less determinate structure, and both recognized and unrecognized, that operate across borders, implies that their activities, even though conducted in one territory may have an impact on or in another territory. Externalities arising from economic activities, including but not limited to large scale exploitation of natural resources, and consequent pressure on delicate global environmental balance, are being recognized to be global in scope and impact. Global criminal and terror networks are also examples of how events and activities in a territory outside one's own borders could affect the interests, welfare, well-being and security within. Many other examples could also be adduced. For instance, the enablement, by law, of participation of the State in many joint, multilateral or bilateral efforts at coordination of economic, fiscal, monetary, trade, social, law enforcement activities, reduction of carbon emissions, prevention or mitigation of war in another region or maintenance of peace and security, etc., may be cited as additional examples of such inter-territorial dependence.

40. Within international law, the principles of strict territorial jurisdiction have been relaxed, in light of greater interdependencies, and acknowledgement of the necessity of taking cognizance and acting upon extra-territorial aspects or causes, by principles such as subjective territorial principle, objective territorial principle, the effects doctrine that the United States uses, active personality principle, protective principle etc. However, one singular aspect of territoriality remains, and it was best stated by Justice H.V. Evatt: "The extent of extra-territorial jurisdiction permitted, or rather not forbidden, by international law cannot always be stated with precision. But certainly no State attempts to exercise jurisdiction over matters, persons, or things with which it has absolutely no concern." (See Trustees Executors & Agency Co Ltd v. Federal Commissioner of Taxation[22]). The reasons are not too far to grasp. To claim the power to legislate with respect to extra-territorial aspects or causes, that have no nexus with the territory for which the national legislature is responsible for, would be to claim dominion over such a foreign territory, and negation of the principle of self-determination of the people who are nationals of such foreign

[22] (1933) 49 CLR. 220 at 239

territory, peaceful co-existence of nations, and co-equal sovereignty of nation-states. Such claims have, and invariably lead to, shattering of international peace, and consequently detrimental to the interests, welfare and security of the very nation-state, and its people, that the national legislature is charged with the responsibility for.

41. Because of interdependencies and the fact that many extra-territorial aspects or causes have an impact on or nexus with the territory of the nation-state, it would be impossible to conceive legislative powers and competence of national parliaments as being limited only to aspects or causes that arise, occur or exist or may be expected to do so, within the territory of its own nation-state. Our Constitution has to be necessarily understood as imposing affirmative obligations on all the organs of the State to protect the interests, welfare and security of India. Consequently, we have to understand that the Parliament has been constituted, and empowered to, and that its core role would be to, enact laws that serve such purposes. Hence even those extra-territorial aspects or causes, provided they have a nexus with India, should be deemed to be within the domain of

legislative competence of the Parliament, except to the extent the Constitution itself specifies otherwise.

42. A question still remains, in light of the extreme conclusions that may arise on account of the propositions made by the learned Attorney General. Is the Parliament empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India, and furthermore could such laws be bereft of any benefit to India? The answer would have to be no.

43. The word "for" again provides the clue. To legislate for a territory implies being responsible for the welfare of the people inhabiting that territory, deriving the powers to legislate from the same people, and acting in a capacity of trust. In that sense the Parliament belongs only to India; and its chief and sole responsibility is to act as the Parliament of India and of no other territory, nation or people. There are two related limitations that flow from this. The first one is with regard to the necessity, and the absolute base line condition, that all powers vested in any organ of the State, including Parliament, may only be exercised for the benefit of India. All of its energies and focus ought to only

be directed to that end. It may be the case that an external aspect or cause, or welfare of the people elsewhere may also benefit the people of India. The laws enacted by Parliament may enhance the welfare of people in other territories too; nevertheless, the fundamental condition remains: that the benefit to or of India remain the central and primary purpose. That being the case, the logical corollary, and hence the second limitation that flows thereof, would be that an exercise of legislative powers by Parliament with regard to extra-territorial aspects or causes that do not have any, or may be expected to not have nexus with India, transgress the first condition. Consequently, we must hold that the Parliament's powers to enact legislation, pursuant to Clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India.

44. For a legislature to make laws for some other territory would be to act in a representative capacity of the people of such a territory. That would be an immediate transgression of the condition that the Parliament be a parliament for India. The word "for", that connects the territory of India to the legislative powers

of the Parliament in Clause (1) of Article 245, when viewed from the perspective of the people of India, implies that it is "our" Parliament, a jealously possessive construct that may not be tinkered with in any manner or form. The formation of the State, and its organs, implies the vesting of the powers of the people in trust; and that trust demands, and its continued existence is predicated upon the belief, that the institutions of the State shall always act completely, and only, on behalf of the people of India. While the people of India may repose, and continue to maintain their trust in the State, notwithstanding the abysmal conditions that many live in, and notwithstanding the differences the people may have with respect to socio-political choices being made within the country, the notion of the collective powers of the people of India being used for the benefit of some other people, including situations in which the interests of those other people may conflict with India's interests, is of an entirely different order. It is destructive of the very essence of the reason for which Parliament has been constituted: to act as the Parliament for, and only of, India.

45. The grant of the power to legislate, to the Parliament, in Clause (1) of Article 245 comes with a limitation that arises out of the very purpose for which it has been constituted. That purpose is to continuously, and forever be acting in the interests of the people of India. It is a primordial condition and limitation. Whatever else may be the merits or demerits of the Hobbesian notion of absolute sovereignty, even the Leviathan, within the scope of Hobbesian logic itself, sooner rather than later, has to realize that the legitimacy of his or her powers, and its actual continuance, is premised on such powers only being used for the welfare of the people. No organ of the Indian State can be the repository of the collective powers of the people of India, unless that power is being used exclusively for the welfare of India. Incidentally, the said power may be used to protect, or enhance, the welfare of some other people, also; however, even that goal has to relate to, and be justified by, the fact that such an exercise of power ultimately results in a benefit – either moral, material, spiritual or in some other tangible or intangible manner – to the people who constitute India.

46. We also derive interpretational support for our conclusion that Parliament may not legislate for territories beyond India from Article 51, a Directive Principle of State Policy, though not enforceable, nevertheless fundamental in the governance of the country. It is specified therein that:

> ***"Article 51. Promotion of international peace and security***-*"State shall endeavour to –*
> *(a)to promote international peace and security;*
> *(b)maintain just and honourable relations between nations;*
> *(c)foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and*
> *(d)encourage settlement if international disputes by arbitration."*

47. To enact legislation with respect to extra-territorial aspects or causes, without any nexus to India, would in many measures be an abdication of the responsibility that has been cast upon Parliament as above. International peace and security has been recognised as being vital for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in Article 51. It is one matter to say that because certain extra-territorial aspects or causes have an impact on or nexus with India, Parliament may enact laws with respect to such

aspects or causes. That is clearly a role that has been set forth in the Constitution, and a power that the people of India can claim. How those laws are to be effectuated, and with what degree of force or diplomacy, may very well lie in the domain of pragmatic, and indeed ethical, statecraft that may, though not necessarily always, be left to the discretion of the Executive by Parliament. Nevertheless, that position is very different from claiming that India has the power to interfere in matters that have no nexus with India at all. To claim such powers, would be to make such powers available. Invariably available powers are used, and in this case with a direct impact on the moral force of India, and its interests, welfare and security, by shattering the very concepts that under-gird peace between nations. By recognizing international peace to be sine qua non for India's welfare and security, the framers have charged the State, and all of its organs, with responsibility to endeavour to achieve the goals set forth in Article 51. To claim the power to legislate for some other territories, even though aspects or causes arising, occurring or existing there have no connection, to India would be to demolish the very basis on which international peace and security can be premised.

48. For the aforesaid reasons we are unable to agree that Parliament, on account of an alleged absolute legislative sovereignty being vested in it, should be deemed to have the powers to enact any and all legislation, de hors the requirement that the purpose of such legislation be for the benefit of India. The absolute requirement is that all legislation of the Parliament has to be imbued with, and at the core only be filled with, the purpose of effectuating benefits to India. This is not just a matter of the structure of our Constitution; but the very foundation.

49. The arguments that India inherited the claimed absolute or illimitable powers of the British parliament are unacceptable. One need not go into a lengthy or academic debate about whether in fact the British parliament always did, or as a matter of absolute necessity needs to, possess such powers. There is a healthy debate about that, casting serious doubts about the legal efficacy of such arguments. (See Chapter 2: "The Sovereignty of Parliament – in Perpetuity?", by A.W. Bradley in The Changing Constitution, Ed. Jowell & Oliver[23] and Studies in Constitutional Law by Colin R. Munro[24]). It is now a well accepted part of our

[23] 2nd Ed. Clarendon Press, Oxford (1989)
[24] 2nd Ed. Butterworths, OUP (2005).

constitutional jurisprudence that by virtue of having a written constitution we have effectively severed our links with the Austinian notion that law as specified by a sovereign is necessarily just, and the Diceyan notion of parliamentary sovereignty. It is the Constitution that is supreme, with true sovereignty vesting in the people. In as much as that true sovereign has vested some of their collective powers in the various organs of the state, including the Parliament, there cannot be the legal capacity to exercise that power in a manner that is not related to their interests, benefits, welfare and security.

50. We now turn our attention to other arguments put forward by the learned Attorney General with regard to the implications of permissibility of making laws that may operate extra-territorially, pursuant to Clause (2) of Article 245. In the first measure, the learned Attorney General seems to be arguing that the act and function of making laws is the same as the act and function of "operating" the law. From that position, he also seems to be arguing that Clause (2) of Article 245 be seen as an independent source of power. Finally, the thread of that logic

then seeks to draw the inference that in as much as Clause (2) prohibits the invalidation of laws on account of their extra-territorial operation, it should be deemed that the courts do not have the power to invalidate, - i.e., strike down as ultra vires -, those laws enacted by Parliament that relate to any extra-territorial aspects or causes, not withstanding the fact that many of such aspects or causes have no impact on or nexus with India.

51. It is important to draw a clear distinction between the acts & functions of making laws and the acts & functions of operating the laws. Making laws implies the acts of changing and enacting laws. The phrase operation of law, in its ordinary sense, means the effectuation or implementation of the laws. The acts and functions of implementing the laws, made by the legislature, fall within the domain of the executive. Moreover, the essential nature of the act of invalidating a law is different from both the act of making a law, and the act of operating a law. Invalidation of laws falls exclusively within the functions of the judiciary, and occurs after examination of the vires of a particular law. While there may be some overlap of functions, the essential cores of the functions delineated by the meanings of the phrases "make

laws" "operation of laws" and "invalidate laws" are ordinarily and essentially associated with separate organs of the state – the legislature, the executive and the judiciary respectively, unless the context or specific text, in the Constitution, unambiguously points to some other association.

52. In Article 245 we find that the words and phrases "make laws" "extra-territorial operation", and "invalidate" have been used in a manner that clearly suggests that the addressees implicated are the legislature, the executive and the judiciary respectively. While Clause (1) uses the verb "make" with respect to laws, thereby signifying the grant of powers, Clause (2) uses the past tense of make, "made", signifying laws that have already been enacted by the Parliament. The subject of Clause (2) of Article 245 is the law made by the Parliament, pursuant to Clause (1) of Article 245, and the object, or purpose, of Clause (2) of Article 245 is to specify that a law so made by the Parliament, for the whole or any part of territory of India, should not be held to be invalid solely on the ground that such laws require extra-territorial operation. The only organ of the state which may invalidate laws is the judiciary. Consequently, the text

of Clause (2) of Article 245 should be read to mean that it reduces the general and inherent powers of the judiciary to declare a law ultra-vires only to the extent of that one ground of invalidation. One thing must be noted here. In as much as the judiciary's jurisdiction is in question here, an a-priori, and a strained, inference that is unsupported by the plain meaning of the text may not be made that the powers of the legislature to make laws beyond the pale of judicial scrutiny have been expanded over and above that which has been specified. The learned Attorney General is not only seeking an interpretation of Article 245 wherein the Parliament is empowered to make laws "for" a foreign territory, which we have seen above is impermissible, but also an interpretation that places those vaguely defined laws, which by definition and implication can range over an indefinite, and possibly even an infinite number, of fields beyond judicial scrutiny, even in terms of the examination of their vires. That would be contrary to the basic structure of the Constitution.[25]

[25] Supra note 18.

53. Clause (2) of Article 245 acts as an exception, of a particular and a limited kind, to the inherent power of the judiciary to invalidate, if ultra-vires, any of the laws made by any organ of the State. Generally, an exception can logically be read as only operating within the ambit of the clause to which it is an exception. It acts upon the main limb of the Article – the more general clause - but the more general clause in turn acts upon it. The relationship is mutually synergistic in engendering the meaning. In this case, Clause (2) of Article 245 carves out a specific exception that a law made by Parliament, pursuant to Clause (1) of Article 245, for the whole or any part of the territory of India may not be invalidated on the ground that such a law may need to be operated extraterritorially. Nothing more. The power of the judiciary to invalidate laws that are ultra-vires flows from its essential functions, Constitutional structure, values and scheme, and indeed to ensure that the powers vested in the organs of the State are not being transgressed, and that they are being used to realise a public purpose that subserves the general welfare of the people. It is one of the essential defences of the people in a constitutional democracy.

54. If one were to read Clause (2) of Article 245 as an independent source of legislative power of the Parliament to enact laws for territories beyond India wherein, neither the aspects or causes of such laws have a nexus with India, nor the purposes of such laws are for the benefit of India, it would immediately call into question as to why Clause (1) of Article 245 specifies that it is the territory of India or a part thereof "for" which the Parliament may make laws. If the power to enact laws for any territory, including a foreign territory, were to be read into Clause (2) of Article 245, the phrase "for the whole or any part of the territory of India" in Clause (1) of Article 245 would become a mere surplassage. When something is specified in an Article of the Constitution it is to be taken, as a matter of initial assessment, as nothing more was intended. In this case it is the territory of India that is specified by the phrase "for the whole or any part of the territory of India." "*Expressio unius est exclusio alterius"*- the express mention of one thing implies the exclusion of another. In this case Parliament has been granted powers to make laws "for" a specific territory – and that is India or any part thereof; by implication, one may not read that the Parliament

has been granted powers to make laws "for" territories beyond India.

55. The reliance placed by the learned Attorney General on the history of changes to the pre-cursors of Article 245, in the Draft Constitution, in support of his propositions is also inapposite. In fact one can clearly discern that the history of changes, to Clause 179 of the Draft Constitution (which became Article 245 in our Constitution), supports the conclusions we have arrived at as to the meaning, purport and ambit of Article 245. The first iteration of Clause 179 of the Draft Constitution read, in part, as follows: "Subject to the provisions of this Constitution, the Federal Parliament may make laws, including laws having extra-territorial operation, for the whole or any part of the territories of the Federation……" Clearly the foregoing iteration shows that what was under consideration were the entire class of laws that the Parliament was to be empowered to make "for the whole or any part of the territories of the Federation…..", and included within that class were the laws "having extra-territorial operation." Subsequently Clause 179 of the Draft Constitution was split into two separate clauses 179 (1) and 179(2). The learned Attorney

General's arguments suggest that the conversion of Draft Clause 179 into two separate draft clauses, 179(1) and 179(2), should be interpreted to mean that the framers of the Constitution intended the two clauses to have a separate existence, independent of each other. We are not persuaded. The retention of the phrase "extra-territorial operation" as opposed to the phrase "extra-territorial laws" implies that the drafters were acutely aware of the difference between the meaning of the phrase "operation of law" and the "making of law". Further, by beginning Clause (2) of Article 245 with the phrase "No law made by the Parliament…", it is clear that the drafting committee intended to retain the link with Clause (1) of Article 245. (See: The Framing of India's Constitution, by The Project Committee, Chairman B. Shiva Rao)[26] Thus we cannot view Clause (2) of Article 245 as an independent source of legislative powers on account of the history of various iterations of the pre-cursor to Article 245 in the Constituent Assembly.

VIII

Analysis of Constitutional Topological Space: Chapter 1, Part XI:

[26] Vol. 3, Universal Law Publichsing Co.

56. We now turn to Chapter 1 Part XI, in which Article 245 is located, to examine other provisions that may be expected to transform or be transformed by the meaning of Article 245 that we have discerned and explained above. In particular, the search is also for any support that may exist for the propositions of the learned Attorney General that the Parliament may make laws for any territory outside India.

57. As is well known, Article 246 provides for the division of legislative competence, as between the Parliament and the State legislatures, in terms of subjects or topics of legislation. Clauses (1), (2) and (3) of Article 246 do not mention the word territory. However, Clause (4) of Article 246 specifies that Parliament has the power to "make laws for any part of the territory of India not included in a State" with respect to any matter, notwithstanding that a particular matter is included in the State List. In as much as Clause (1) of Article 245 specifies that it is for "the whole or any part of the territory of India" with respect of which Parliament has been empowered to make laws, it is obvious that in Article 246 legislative powers, whether of Parliament or of

State legislatures, are visualized as being "for" the territory of India or some part of it.

58. Article 248 provides for the residuary power of legislation. However, in this instance, the Constitution speaks of the powers of Parliament in terms of the subject matters or fields of legislative competence not enumerated in Concurrent and State lists in the Seventh Schedule, etc. Article 248 does not mention any specific territory. Nevertheless, in as much as it retains the link to Article 246, it can only be deemed that the original condition that all legislation be "for" the whole or some territory of India has been retained.

59. It would be pertinent to note, at this stage that List I – Union List of the Seventh Schedule clearly lists out many matters that could be deemed to implicate aspects or causes that arise beyond the territory of India. In particular, but not limited to, note may be made of Entries 9 through 21 thereof. Combining the fact that the Parliament has been granted residuary legislative powers and competence with respect to matters that are not enumerated in Concurrent and State Lists, vide Article 248, the fact that Parliament has been granted legislative powers

and competence over various matters, as listed in List I of the Seventh Schedule, many of which may clearly be seen to be falling in the class of extra-territorial aspects or causes, vide Article 246, and the powers to make laws "for the whole or any part of the territory of India", vide Article 245, we must conclude that, contrary to the rigid reading of the ratio in ECIL, Parliament's legislative powers and competence with respect to extra-territorial aspects or causes that have a nexus with India was considered and provided for by the framers of the Constitution. Further, in as much as Article 245, and by implication Articles 246 and 248, specify that it is "for the whole or any part of the territory of India" that such legislative powers have been given to the Parliament, it logically follows that Parliament is not empowered to legislate with respect to extra-territorial aspects or causes that have no nexus whatsoever with India. To the extent that some of the implications of learned Attorney General's propositions only reach such a limited reading of the legislative powers of the Parliament, which nevertheless are not as restricted as the narrow understanding of the ratio in ECIL may suggest, we are in partial agreement with the same.

60. When we look at Articles 249 (conditions under which Parliament may legislate with respect to matters in List II of Seventh Schedule, wherein the Council of States has deemed it to be in national interest to do so) and 250 (ambit of Parliamentary powers as inclusive of competence to legislate with respect to matters in the State List while a Proclamation of Emergency is in operation) we find that legislative powers of the Parliament are spoken of, in the said articles also, only in terms of as being "for the whole or any part of the territory of India". Article 253 deals with legislation that may be needed to give effect to various international agreements, and again the powers are specified only in terms of making laws "for the whole or any part of the territory of India." Nowhere within Chapter 1, Part XI do we find support for the propositions of the learned Attorney General that the Parliament may make laws "for" any territory other than the "whole or any part of the territory of India." To the contrary, we only find a repeated use of the expression "for the whole or any part of the territory of India." It is a well known dictum of statutory and constitutional interpretation that when the same words or phrases are used in different parts of the

Constitution, the same meaning should be ascribed, unless the context demands otherwise. In this case, we do not see any contextual reasons that would require reading a different meaning into the expression "for the whole or any part of the territory" in the context of Articles 249, 250 or 253, than what we have gathered from the text of Article 245.

IX

Wider Structural Analysis:

61. Article 260, in Chapter II of Part XI is arguably the only provision in the Constitution that explicitly deals with the jurisdiction of the Union in relation to territories outside India, with respect to all three functions of governance – legislative, executive and judicial. Learned Attorney General did not point to this Article as lending particular support for his propositions. However, on closer examination, Article 260 appears to further support the conclusions we have arrived at with respect to Article 245. It provides as follows:

> ***"Article 260. Jurisdiction of the Union in relation to territories outside India*** *– The Government of India may by agreement with the Government of any territory not being part of the territory of India*

undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force."

62. It is clear from the above text of Article 260 that it is the Government of India which may exercise legislative, executive, and judicial functions with respect of certain specified foreign territories, the Governments of which, and in whom such powers have been vested, have entered into an agreement with Government of India asking it do the same. Indeed, from Article 260, it is clear that Parliament may enact laws, whereby it specifies the conditions under which the Government of India may enter into such agreements, and how such agreements are actually implemented.

63. Nevertheless, the fact even in the sole instance, in the Constitution, where it is conceived that India may exercise full jurisdiction – i.e., executive, legislative and judicial – over a foreign territory, that such a jurisdiction can be exercised only upon an agreement with the foreign government (thereby comporting with international laws and principles such as "comity of nations" and respect for "territorial sovereignty" of other

nation-states), and the manner of entering into such agreements, and the manner of effectuating such an agreement has to be in conformity with a law specifically enacted by the Parliament (whereby the control of the people of India over the actions of the Government of India, even extra-territorially is retained), implies that it is only "for" India that Parliament may make laws. The Parliament still remains ours, and exclusively ours. Though the Government of India, pursuant to Article 260, acts on behalf of a foreign territory, there is always the Parliament to make sure that the Government of India does not act in a manner that is contrary to the interests of, welfare of, well-being of, or the security of India. The foregoing is a very different state of affairs from a situation in which the Parliament itself acts on behalf of a foreign territory, as implicated by the expression "make extra-territorial laws". The former comports with the notions of parliamentary democracy in which the people ultimately control the Executive through their Parliament; while the latter indicates the loss of control of the people themselves over their elected representatives.

64. The text of Articles 1 and 2 leads us to an irresistible conclusion that the meaning, purport and ambit of Article 245 is as we have gathered above. Sub-clause (c) of Clause (3) of Article 1 provides that territories not a part of India may be acquired. The purport of said Sub-Clause (c) of Clause 3 of Article 1, pace *Berubari Union and Exchange of Enclaves, Re* [27]is that such acquired territory, automatically becomes a part of India. It was held in *Berubari*, that the mode of acquisition of such territory, and the specific time when such acquired territory becomes a part of the territory of India, are determined in accordance with international law. It is only upon such acquired territory becoming a part of the territory of India would the Parliament have the power, under Article 2, to admit such acquired territory in the Union or establish a new state. The crucial aspect is that it is only when the foreign territory becomes a part of the territory of India, by acquisition in terms of relevant international laws, is the Parliament empowered to make laws for such a hitherto foreign territory. Consequently, the positive affirmation, in the phrase in Clause (1) of Article 245, that the Parliament "may make laws for the whole or any part of the

[27] AIR 1960 SC 845.

territory of India" has to be understood as meaning that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional schema it is clear that the Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India.

x

Relevance of Case Law Cited by the learned Attorney General:

65. The learned Attorney General cited and relied on many decisions in support of his arguments. We find that none of the cases so cited have considered the issues of what the impact of constitutional text, wider constitutional topological and structural spaces, the representative capacity of a parliament and the like would be on the extent of powers of the parliament. Moreover, having gone through the cases, we do note that none stand for the proposition that the powers of a parliament are unfettered and that our Parliament possesses a capacity to make laws that have no connection whatsoever with India.

66. Nevertheless, we will address a few of the cases relied on by the learned Attorney General primarily for limited purpose of

locating their rationale and reasoning. In *Governor General in Council v. Raleigh Investments*[28], the key issue was about extra-territorial operation of a law, and not whether the law as made was with respect to aspects or causes outside the territory of British India and bearing no nexus with it. In this regard the Privy Council's observations about the Appellant's contention are pertinent: "The appellant's arguments….. comprised two contentions. It was first argued that these provisions were not extra-territorial. It was also argued that even if they should be found in any degree to operate extra-territorially, that would be no ground of holding them to be invalid, so far as municipal courts called upon to deal with them are concerned",[29] and finally "in our judgment therefore, the extent, if any, of extra-territorial operation which is to be found in the impugned provisions, is within the legislative powers given to the Indian Legislature by the Constitution Act."[30] It is clear that in the cited case, the Privy Council was dealing with the issue of extra-territorial operation of the law, and not extra-territorial law. In *Wallace Brothers v. CIT, Bombay City and Bombay Suburban District*[31] also the issue was

[28] Supra note 9
[29] Ibid, p. 273.
[30] Ibid, p. 284.
[31] Supra note 10

with regard to sufficiency of territorial connection, and it was held that the principle – sufficient territorial connection – not the rule giving effect to that principle – residence – is implicit in the power conferred by the Government of India Act, 1935. In *Emmanuel Mortenssen*[32], the Court of Justiciary upheld the jurisdiction of the local Sheriff with respect to the owners and operator of a trawler boat used for fishing inside the estuary. However, jurisdiction was not extended on the basis of parliamentary supremacy or of powers to enact extra-territorial laws. Rather, the principle enunciated was that an estuary, under international law, falls within the territory of Scotland, and that the North Sea Fisheries Convention of 1883 did not derogate from the foregoing general principle of international law. Consequently in as much as the operator or owner of that fishing trawler engaged in acts that were prohibited within the territorial limits over which the legislature that enacted the applicable statute had jurisdiction, the local sheriff exercised proper jurisdiction. *Croft v. Dunphy*[33] was with regard to domestic laws operating beyond the territorial limits, and it was recognized that a law which protects the revenue of the states may necessarily

[32] Supra note 6
[33] Supra note 7

have to be operated outside the territorial limits, but that such operation does not violate the principle that legislatures enact laws with respect to aspects or causes that have a nexus with the territory for which the legislature has the law making responsibility for. The control of smuggling activities and revenue collection were seen necessarily as related to the territorial interests, and it was in furtherance of such territorial interests, was extra-territorial operation permissible. In *State v. Narayandas*[34] the issue considered by the Bombay High Court was with regard to the vires of a law enacted by a state legislature declaring a bigamous marriage contracted outside the territory of the state to be unlawful. The main issue was with regard to the power of a state to legislate beyond its territory, and Chief Justice Chagla held that it could not. One paragraph in that decision that could be deemed to be supportive of the learned Attorney General's propositions is:

> "*Now under our present Constitution,* Parliament *has been given absolute powers. Therefore, today Parliament may enact an extra-territorial law. The only limitation on its powers is the practicability of the law. If an extra-territorial law cannot be enforced, then it is useless to enact it but no one can suggest today that a law is void or ultra-vires which is passed*

[34] Supra note 12.

by the Parliament on the ground of its extra-territoriality".

67. Clearly, the statements that under our Constitution Parliament has been given absolute powers, and therefore it can enact extra-territorial laws, are not in comport with present day constitutional jurisprudence in India that the powers of every organ of the State are as provided for in the Constitution and not absolute. We discern that the second half of the excerpt cited above provides the clue to the fact that Chief Justice Chagla was concerned more with laws that require an operation outside India, and not in terms of laws that have no connection with India whatsoever. At best the comment reveals the concern of the learned jurist about the Parliament having the competence to enact laws with respect to objects and provocations lying outside the territory, but whose effect is felt inside the territory. Hence, that broad statement does not derogate from the textual meaning, purport and ambit of Article 245 that we have expounded hereinabove.

XI

Conclusion:

68. There are some important concerns that we wish to share our thoughts on, before we proceed to answering the questions that we set out with. Very often arguments are made claiming supremacy or sovereignty for various organs to act in a manner that is essentially unchecked and uncontrolled. Invariably such claims are made with regard to foreign affairs or situations, both within and outside the territory, in which the government claims the existence of serious security risks or law and order problems. Indeed, it may be necessary for the State to possess some extraordinary powers, and exert considerable force to tackle such situations. Nevertheless, all such powers, competence, and extent of force have to be locatable, either explicitly or implicitly, within the Constitution, and exercised within the four corners of constitutional permissibility, values and scheme.

69. There are two aspects, of such extreme arguments claiming absolute powers, which are worrisome. The first one relates to a misconception of the concepts of sovereignty and of power, and a predilection to oust judicial scrutiny even at the minimal level, such as examination of the vires of legislation or other types of state action. The second one relates to predilections of counsel of

asking for powers that are undefined, unspecified, vague and illimitable be read into the constitutional text, as matter of some principle of inherent design or implied necessity.

70. The modern concept of sovereignty emerged in a troubled era of civil wars within the territories of, and incessant conflict between, nation-states. At one end of the spectrum political philosophers such as Thomas Hobbes and Jean Bodin postulated the necessity of absolute power within the territory, arguing that failure of order was inimical to the well being of the people, and further arguing that if the governments were to not have such absolute powers invariably leads to internal disorder. While it is generally and uncritically argued that Hobbes and Bodin stood for blind political absolutism, when viewed from a historical perspective, they can also be seen as the starting points of human beings quest for greater accountability of states and governments, which were to be increasingly viewed as the repositories of collective powers of the people. Hobbes specifically recognized that governments would become unstable and lose their legitimacy if they failed to protect the welfare of the subjects. For Bodin, the absolute sovereign was tempered by

divine law (or "natural law"), and the customary laws of the community. Alan James states that "[f]rom this basis it could be argued that sovereignty lay not with the ruler but with the ruled. In this way the ultimate authority could be claimed for the people, with the government simply acting as their agent." (See: Sovereign Statehood – The Basis of International Society[35]). These seeds of accountability, carried within them the incipient forms of arguments that would inexorably lead to the modern notion of self-determination by the people: that each nation state, formed by the people, and answerable to the people through the organs of the State, would act in accordance with the wishes of the people – both in terms of ordinary moments of polity, and also in terms of constitutional moments, with the latter setting forth, in greater or lesser specificity, the acts that may or may not be done by the organs of the state.

71. The path to modern constitutionalism, with notions of divided and checked powers, fundamental rights and affirmative duties of the State to protect and enhance the interests of, welfare of, and security of the people, and a realization that

[35] Allen & Unwin, London (1986).

"comity amongst nations" and international peace were sine qua non for the welfare of the people was neither straight forward, nor inevitable. It took much suffering, bloodshed, toil, tears and exploitation of the people by their own governments and by foreign governments, both in times of peace and in times of war, before humanity began to arrive at the conclusion that unchecked power would sooner, rather than later, turn tyrannical against the very people who have granted such power, and also harmful to the peaceful existence of other people in other territories. Imperial expansion, as a result of thirst for markets and resources that the underlying economy demanded, with colonial exploitation as the inevitable result of that competition, and two horrific world wars are but some of the more prominent markers along that pathway. The most tendentious use of the word sovereignty, wherein the principles of self-determination were accepted within a nation-state but not deemed to be available to others, was the rhetorical question raised by Adolf Hitler at the time of annexation of Austria in 1938: "What can words like 'independence' or 'sovereignty' mean for a state of only six million?"[36] We must recognize the fact that history is

[36] De Smith, Stanley A.: "Microstates and Micronesia" (New York, NYU Press 1970), p. 19.

replete with instances of sovereigns who, while exercising authority on behalf of even those people who claimed to be masters of their own realm, contradictorily claimed the authority to exercise suzerain rights over another territory, its people and its resources, inviting ultimately the ruin of large swaths of humanity and also the very people such sovereigns, whether a despot or a representative organ, claimed to represent.

72. India's emergence as a free nation, through a non-violent struggle, presaged the emergence of a moral voice: that while we claim our right to self-determination, we claim it as a matter of our national genius, our status as human beings in the wider swath of humanity, with rights that are ascribable to us on account of our human dignity. Such a morality arguably does not brook the claims of absolute sovereignty to act in any manner or form, on the international stage or within the country. To make laws "for another territory" is to denigrate the principle of self-determination with respect to those people, and a denigration of the dignity of all human beings, including our own. The debates in the Constituent Assembly with regard to the wording of Article 51, which was cited earlier in this judgment, gives the true spirit

with which we the people of this country have vested our collective powers in the organs of governance. This is so particularly because they were made in the aftermath of World War II, arguably the most brutal that mankind has ever fought, and the dawn of the atomic age. In particular the statements of Prof. Khardekar, are worth being quoted *in extenso*:

> *"Mr. Austin, a great jurist, says that there is no such thing as international law at all – if there is anything it is only positive morality…. In saying that there may be positive morality I think even there he is wrong. If there were to be morality amongst nations, well we would not have all that has been going about. If there is a morality amongst nations today, it is the morality of robbers. If there is any law today it is the law of the jungle where might is right…… The part that India is to play is certainly very important because foundations of international morality have to be laid and only a country like India with its spiritual heritage can do it…… Therefore it is in keeping with our history, with our tradition, with our culture, that we are a nation of peace and we are going to see that peace prevails in the World."*[37]

73. In granting the Parliament the powers to legislate "for" India, and consequently also with respect to extra-territorial aspects or causes, the framers of our Constitution certainly intended that there be limits as to the manner in which, and the

[37] Constituent Assembly Debates Official Report, 1948-49, page 601 (Lok Sabha Secretariat, New Delhi).

extent to which, the organs of the State, including the Parliament, may take cognizance of extra-territorial aspects or causes, and exert the State powers (which are the powers of the collective) on such aspects or causes. Obviously, some of those limits were expected to work at the level of ideas and of morals, which can be inculcated by a proper appreciation of our own history, and the ideas of the framers of our constitution. They were also intended to have a legal effect. The working of the principles of public trust, the requirement that all legislation by the Parliament with respect to extra-territorial aspects or causes be imbued with the purpose of protecting the interests of, the welfare of and the security of India, along with Article 51, a Directive Principle of State Policy, though not enforceable in a court of law, nevertheless fundamental to governance, lends unambiguous support to the conclusion that Parliament may not enact laws with respect to extra-territorial aspects or causes, wherein such aspects or causes have no nexus whatsoever with India.

74. Courts should always be very careful when vast powers are being claimed, especially when those claims are cast in terms of

enactment and implementation of laws that are completely beyond the pale of judicial scrutiny and which the Constitutional text does not unambiguously support. To readily accede to demands for a reading of such powers in the constitutional matrix might inevitably lead to a destruction of the complex matrix that our Constitution is. Take the instant case itself. It would appear that the concerns of learned Attorney General may have been more with whether the ratio in ECIL could lead to a reading down of the legislative powers granted to the Parliament by Article 245. A thorough textual analysis, combined with wider analysis of constitutional topology, structure, values and scheme has revealed a much more intricately provisioned set of powers to the Parliament. Indeed, when all the powers necessary for an organ of the State to perform its role completely and to effectuate the Constitutional mandate, can be gathered from the text of the Constitution, properly analysed and understood in the wider context in which it is located, why should such unnecessarily imprecise arrogation of powers be claimed? To give in to such demands, would be to run the risk of importing meanings and possibilities unsupportable by the entire text and structure of the Constitution. Invariably such demands are made

in seeking to deal with external affairs, or with some claimed grave danger or a serious law and order problem, external or internal, to or in India. In such circumstances, it is even more important that courts be extra careful. The words of Justice Jackson in Woods v. Cloyd W. Miller Co.,[38] in dealing with war powers, may be used as a constant reminder to be on guard:

> *"I agree with the result in this case, but the arguments that have been addressed to us lead me to utter more explicit misgivings….. The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable "war power."….. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decisions to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed. Particularly when the war power is invoked to do things to the liberties of the people,… …. that only indirectly affect conduct of war and do not relate to the management of war itself, the constitutional basis should be scrutinized with care."*

75. The point is not whether and how India's constitution grants war powers. The point is about how much care should be exercised in interpreting the provisions of the Constitution. Very

[38] 333 U.S. 138

often, what the text of the Constitution says, when interpreted in light of the plain meaning, constitutional topology, structure, values and scheme, reveals the presence of all the necessary powers to conduct the affairs of the State even in circumstances that are fraught with grave danger. We do not need to go looking for powers that the text of the Constitution, so analysed, does not reveal.

76. We now turn to answering the two questions that we set out with:

> (1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?

The answer to the above would be yes. However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, – events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like -, that

occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, *only when* such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians.

It is important for us to state and hold here that the powers of legislation of the Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a-priori quantitative tests, such as "sufficiency" or "significance" or in any other

manner requiring a pre-determined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where the Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

(2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

The answer to the above would be no. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be

expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question 1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to Parliament to make laws "for the whole or any part of the territory of India", and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by Parliament with respect to extra-territorial aspects or causes that have no impact on or nexus with India would be ultra-vires, as answered in response to Question 1 above, and would be laws made "for" a foreign territory.

77. Let the appeal be listed before an appropriate bench for disposal. Ordered accordingly.

……..CJI.

……J.
[B. SUDERSHAN REDDY]

……J.

[K.S.RADHAKRISHNAN]

……J.
[SURINDER SINGH NIJJAR]

……J.
[SWATANTER KUMAR]

NEW DELHI
March 1, 2011.