PART - V
CONCLUDING CHAPTERS
CHAPTER - IX

INHERENT POWERS: A SUMMING UP OF THE CONCEPT AND ITS APPLICATION

i. Juristic Perceptions

The doctrine of inherent powers acquire significance because the principles of criminal justice administration are not exhaustively dealt with in the Code of Criminal Procedure. Rather it is impossible for a Code to be exhaustive. According to R.V. Kelkar,

"In prescribing rules of procedure legislature undoubtedly attempts to provide for all cases that are likely to arise, but it is not possible that any legislative enactment dealing with the procedure however carefully it may be drafted would succeed in providing for all cases that may possibly arise in future. Lacunae are sometimes discovered in procedural law and it is to cover such lacunae and to deal with cases where such lacunae are discovered that procedural law invariably recognises the existence of inherent powers"¹.

The above jurist's view sounds the general understanding that the objective is to meet the exigencies of any situations, the court has inherent power to mould the procedure to enable it to pass such orders as the ends of justice may require². As the

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². Id. at p. 1.6
Procedure Code is not exhaustive, so is the inherent powers under section 482, Cr.P.C. also. The views of the jurists and the judges concur to say that the principle is given only partial statutory recognition.³

"Inherent Jurisdiction, to prevent abuse of the process" and "to secure the ends of justice", are incapable of definition and enumeration and capable at the most of test, according to well established principles of criminal jurisprudence. 'Process' is a general word meaning in effect anything done by the court. The framers of the Code could not have provided with provisions to cover all cases and to prevent abuse of the process of court. It is for the court to take a decision.⁴

ii. **Some Questions Emerging on Summing Up**

In a summing up one has to refer to the origin, existence, expansion, application and limitations of the inherent powers of the High Court. It is significant to note the respectability earned by the doctrine. The extent to which inherent powers have contributed to the prestige of judiciary depend on the general bearing it has on the entire foment of judicial process. Similarly the transcendental greatness of the judicial process as a whole reflects on the doctrine of inherent powers also. A realistic opinion would concede that all is not well with judiciary either, in India. We have it on record when the high priest of Indian legal profession, Shri Nani A. Palkhivala bemoans the decline and the fall of the prestige of judiciary. Shri Palkhivala projects justice and Rule

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4. Ref. supra n. 1 at p. 300
of Law as two human virtues. On the subject the jurist expresses his opinion thus:

"Justice and the Rule of Law are perhaps two of the noblest concepts evolved by the wit of man".5

The author refers to ancient Roman and Indian Jurisprudence and recalls the admirable quality maintained in justice administrations. But there is a precipitative diminution and sharp erosion of values in the province of judicial process.

In ancient Rome Justice was akin to a Goddess; in India it was related to the concept of Dharma. High standards were set for those engaged in administration of justice. On the ancient tradition an eminent writer says:

".....the standards set for judges and magistrates are very high; they are to be learned, religious, devoid of anger, and as impartial as humanly possible....... The Arthasastra advises that the honesty of judges should be periodically tested by agents provocateurs, while Vishnu Smriti prescribes banishment and forfeiture of all property for a judge found guilty of corruption or injustice- the most severe penalty a brahman could incur under the sacred Law".6

The prescriptions in Arthasastra and Vishnu Smriti may look incompatible with the modern Rule of Law concept. But it asserts the dignified approach of the society towards administra-

tion of justice. Under the guise of Rule of Law one should not be allowed to ride along adjudication as if mounted on an unruly horse.

Shri Palkhivala ridicules the lack of seriousness in the adjudicatory process. What was formerly a cathedral is today a casino. According to him, law is imperfect even if it were made by a committee of archangels. But this is not justification for converting justice administration into a great gamble. He says,

"The court is no longer looked upon as a cathedral but as a casino: if you are dissatisfied with the trial court's judgment, you double the stakes and go to the Division Bench, if you are dissatisfied with the Division Bench judgment, you treble the stakes and go to the Supreme Court".7

It is against the above background the appreciation of the concept of inherent powers is to be made. So, in a critical evaluation of the inherent powers of the High Court under section 482 of the Code of Criminal Procedure, 1973 some relevant questions crop up which press for answers. Firstly, whether this power has come to stay in the province of criminal jurisprudence? The second question is whether inherent power is associated to discretion and equity? The third question is whether a spiritual and philosophic character is attained by the inherent powers? There are other relevant question also. One is the assessment of inherent power is as illustrative of realism, another question regarding affinity of constitutional and inherent powers. Yet another question is regarding the amplitude of inherent powers.

7. Supra n. 5
structuring of inherent powers is a central question, next significant question is regarding the amplitude of inherent powers. Question regarding the inherent powers of the Supreme Court is of overwhelming nature. Another question is regarding the abuse of inherent powers. Question arise regarding the personality of the judge. Last but not least significant of this enumeration of questions is in respect of future possibilities of inherent powers.

iii. Inherent Powers: A Strong and Stable Jurisdiction in Criminal Jurisprudence

Viewed from many angles, it is but imperative that High Courts should have inherent powers in the administration of criminal justice. In the previous chapters, the discussions overwhelmingly tend to the direction that inherent powers of the High Court are a reality. The questions to be answered in this context are the pros and cons of the inherent powers of the High Court. When the performance of the High Court is assessed in retrospect in the application of inherent powers the merits and demerits are to be appreciated.

The points central to the questions posed above give a sort of balance-sheet of the performance of the court in exercising inherent powers. It can very well be said at the outset itself, that inherent powers have come to stay in the province of criminal jurisprudence. Even before statutory recognition was given the Judicial recognition was accorded on inherent powers. When the inherent powers were incorporated as part of the criminal procedure through section 561-A the High Courts began to exercise
the power with all dignity and decorum. This is evident from the innumerable opportunities given to the High Court to consider the legality or otherwise of proceedings pending before subordinate criminal courts. The public confidence in the administration of criminal justice is to some extent consolidated by the judiciary through the decisions involving the application of inherent powers. Aggrieved persons come to the High Court with grievances afflicted by experience of injustice. They challenge FIRs, charge-sheets, complaint and other proceedings. Undergoing trial for no reason can itself be excruciating for a person. If the allegations prima-facie do not constitute an offence, there is no meaning in protracting the trial proceedings. But, at the same time, the High Court must be fully conscious of the fact that inherent powers are not to be resorted to in cases where a decision is to be taken on evidence. Similarly if the complaint prima-facie discloses the ingredients of offences alleged, the High Court would be loathe to interfere. Since, the history of inherent powers is traced back to the very beginning of the administration of criminal justice, the system cannot work without inherent powers of the court. In the earlier chapters it was found that statutory recognition given to inherent powers in 1923 was only a positive stage in the evolution of the concept of inherent jurisdiction. With the Code of Criminal Procedure, 1973 through

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8. The earlier decision shows that this power was used very seldom. The High Courts never allowed themselves to drift away from the main stream of the judicial process. See, Rameswar Khiroriwalla v. Emperor, AIR 1928 Calcutta 367; Local Government v. Gulam Jilani, AIR 1925 Nagpur 228; Edmond Few v. Emperor, AIR 1939 Lahore 224; Dahu Rawt and others v. Emperor, AIR 1933 Calcutta 870; Nazir Mohammed Khan v. Hara Singh Bedi, AIR 1926 Lahore 146.

9. Criminal Law Amendment Act 1923
section 482 preserving the inherent powers the jurisdiction earned a permanent place in the province of criminal jurisprudence, and the increasing dependency on it. With the bonds established with constitutional principles and judicial review on the grounds for challenging a proceedings pending in a trial where the inherent jurisdiction has received a new force and weight. Today the interpretation by the Supreme Court and the High Court of the inherent jurisdiction is done in the company of interpreting the constitutional principles. All apprehensions of the inherent powers getting bogged down by the technicalities and special procedure in criminal law like a revision and review have vanished. The accepted principle that the question of curtailing jurisdiction of the Supreme Court or High Court as conferred by the constitution does not arise in India, is applicable in the case of the High Courts inherent jurisdiction also.\textsuperscript{10} Courts must have power to do justice and the laws passed shall not be interpreted to dwindle the esteem of the court. Even laws specially containing the 'finality clause' and 'ousting clause' do not totally erase jurisdiction of the court in the light of Article 136, 226 and 227\textsuperscript{11} Even in England where parliament is supreme there is a strong presumption against exclusion of supervisory jurisdiction of superior courts.\textsuperscript{12}

\textbf{iv. Discretion the Hallmark, Equity the Roots}

The roots of inherent powers are traced to equity\textsuperscript{13}. So the

\begin{itemize}
\item\textsuperscript{11} Shri. Kilhota Hollohan \textit{v}. Mr. Zachilhu, \textit{AiR} 1993 SC 412
\item\textsuperscript{12} G.P. Singh - Id. Ref. \textit{supra} n.10 p.483
\item\textsuperscript{13} Ref. \textit{supra} Ch. I
\end{itemize}
judges have in abundance the prerogative attached to equity-discretion. When inherent powers are discussed in the light of individual freedom, human rights, liberty, rule of law, fundamental rights, the scope of the powers is extended. So the inherent powers are interpreted in the light of equity despite the fact that section 482 Cr.P.C. saves the inherent powers. The construction of the inherent powers under section 482 Cr.P.C. can be said to be proceeding upon the equity of statute. This was postulated by Lord Westbury in an early decision *Hay v. Lord Provost of Perth*,14 This mode of construction is very common and consistent with the principle and manner according to which Acts of Parliament were framed.15 "Equity", said Coke, "is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief, or clause of the making of the same, shall be within the same remedy that the statute provided and the reason whereof is for that the law-makers could not possibly set down all cases in express terms"16

Equity has influenced law in England independent of Chancery. It played a role in certain branches of common law. Courts are enabled to extend the scope of its powers through interpretation of equity. Inherent powers are highly relevant in this context. The Mareva Injunction and Anton Pillor orders are examples of the above concepts. They are founded on the principle of inherent jurisdiction of the courts. "Both devices are equitable in

14. (1863) 4 Macq. H.L. (SC) 835
the original sense of the term, they are new procedures devised by judicial discretion, without precedent, to make the regular law function more effectively."17

In the final analysis it can be stated that in ensuring fairness to criminal trial the inherent powers are used in a variety of circumstances. Such circumstances include cases which call for justice, to be done. It can be to avoid technicality,18 to advance public interest19 to quash a dispute arising from a controversy having civil nature20 partner of the firm not in charge of the conduct of the business.21 It can be to check delay,22 it can be in case of doubtful identity of the accused23.

It can also be when allegations do not constitute an offence,24 or an action without legal base,25 wrong dismissal of a revision

19. The State v. Sadanandan, 1982 Cri.L.J. 1117 (Ker.)
23. Court suspecting Food Inspector to give supplementary complaint to fasten suit over the accused. Ramesh Kumar v. State of Haryana, 1982 Cri.L.J. No. 20
petition,\textsuperscript{26} when subordinate court exercise inherent powers\textsuperscript{27} or of Constitutional Significance,\textsuperscript{28} the High Court is also called upon to consider.

Investigation on allegations not constituting offence,\textsuperscript{29} relating to sentencing,\textsuperscript{30} proceeding without evidence,\textsuperscript{31} summoning of a witness,\textsuperscript{32} awarding compensation,\textsuperscript{33} relating to review,\textsuperscript{34} grant of Police Protection,\textsuperscript{35} restitution of property,\textsuperscript{36} improper conduct of court proceedings,\textsuperscript{37} expunging remarks,\textsuperscript{38} Chairman of a Company charge-sheeted,\textsuperscript{39} relating to Parole,\textsuperscript{40} accused party not filing complaint\textsuperscript{41}

The Ordinary understanding of inherent powers prevail. The powers are to be applied with circumspection and reticence.\textsuperscript{42}

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\item \textsuperscript{26} P.S. Singh v. S.M. Manikandan Delhi, 1982 Cri.L.J. 2352
\item \textsuperscript{28} Bamder Pradha v. State of Orissa, 1983 Cri.L.J. 527
\item \textsuperscript{29} Balagopal Goenka v. State of West Bengal, 1983 Cri.L.J. 570
\item \textsuperscript{30} Mani Snathosh v. State of Kerala, 1983 Cri.L.J. 1262 (Ker.)
\item \textsuperscript{31} Aigembar Jain Sabha v. State of H.P., 1984 Cri.L.J. 272
\item \textsuperscript{32} R. Srivinasa v. Shanmughan Vadivelu, 1984 Cri.L.J. 337 (Mad.) Om Prakash Saha v. Man Mohan Mohanty, 1984 Cri.L.J. 901
\item \textsuperscript{33} State of Maharashtra v. Padaj Kachara Sonawane, 1984 Cri.L.J. 1023
\item \textsuperscript{34} Deppak Thanwardas Balswami v. State of Maharashtra, 1985 Cri.L.J. 23
\item \textsuperscript{35} M. Sohanray v. Dy. Commissioner of Police, 1985 Cri.L.J. 132
\item \textsuperscript{36} Rajin Bharathi v. State of Bihar, 1985 Cri.L.J. 143
\item \textsuperscript{37} Krishna Sadar Gosh v. Govind Prasad Saraj, 1985 Cri.L.J. 1121
\item \textsuperscript{38} Vinod Kumar Jain v. J.P. Sharma 7 others, 1986 Cri.L.J. 884 (Del.); Pramodkumar Padhi v. Gokka and others, 1986 Cri.L.J. 1634
\item \textsuperscript{39} Dasari Narayan Rao v. R.D. Bhajumdas, 1986 Cri.L.J. 888
\item \textsuperscript{40} Viswanath Verma v. Commissioner of Police, 1986 Cri.L.J. 1800 (Del.)
\item \textsuperscript{41} M.P. Nagarajan Pillay v. M.P. Chacko, 1986 Cri.L.J. 2002
\item \textsuperscript{42} Gajan Kishore v. State and others, 1999 (1) Crimes 39 (Del.)
\end{itemize}
The parameter of the rarest of rare case stands. The petitioner should be allowed to raise his points before the cognizance taking Magistrate. The above is the normal attitude. But, in a case where there is abuse of the process of the court blatantly and patently, then inherent powers are relevant. The High Court shoots down the abuse through its power. A party to an agreement involving a package deal of divorce and withdrawal cannot show a volte face half way through. In that case the High Court should definitely interfere. The FIR can be quashed even the petition was filed Article 226 of the Constitution and section 482 Cr.P.C.

v. Spiritual and Philosophic Points to Ponder Over in a Summing Up

Giving a theoretical basis to the application of inherent powers, is difficult in the above circumstances. A symmetry or coherence in the mode of operation may be lacking. In connecting legal theory with practical aspects of life, Jeremy Waldron attempts to expose the earthly aspects of jurisprudence. Judicial reasoning or legal reasoning is the a prominent topic in the judicial process. Waldron refers to the realist movement in law. Judges at times articulate their own preferences rather than fol-

ollowing the logic of legal doctrines. This was the argument of the realist and this was a criticism on judges. While invoking the type of power contemplated under the catchphrase the 'inherent powers', the Judge may give expression to his own private thinking in preference to objective standards. This is evidenced by the responses of the Supreme Court in a number of cases, where the High Court exercised inherent powers under circumstances unwarranted for interference. So judging is a process which requires restraint, especially when invoking powers of summary nature as inherent powers. Ronald Dworkin's formulation of moral principles forming the structure of legal system is of help in this context.

"Dworkin develops a powerful theory about judges both in common law and in statutory interpretation and he comments it with a subtle theory of political legitimacy and obligation that requires the law to present itself to the citizen as a coherent force. Legal interpretation, he argues, is an active process whereby one seeks to make the best that one can in moral and political term of a body of legal materials."

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Inherent powers being what they are, take origin from equity. If this is so, morality has a great role in the application of inherent powers. In this context the personality of the judges count a lot. The deciding judge has a high degree of discretion also.

R.W.M. Dias discusses the quality and character of judges that leads us to the question of judicial impersonality. Where dis-

47. *Id.* at 195
creetion is allowed, being impersonal becomes a bit difficult. Question of impersonality raises the aspect of values. A point of importance is raised in this context, that every one thinks that a Judge is also a human being subjected to:

"......likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge"\(^{48}\)

But the judges wielding such high profile power are to guard with a missionary zeal the prestige of justice.

"As long as it is believed that judges are merely mechanical appliers of laws it is proper that they should be immune from criticism. Indeed, one reason why the judiciary has been able to preserve its aloofness for so long is this belief. Another reason has been the Judge's refusal to enter into areas which clearly and obviously involve policy considerations. They are being forced to do so increasingly in modern conditions, and when, in addition to that, it is realised that policy and discretion, in whatever degree, are inseparable from the judicial process, then their conduct is at once open to comment and criticism"\(^{49}\)

This is because, the questions raised are regarding the social and political prejudices of judges.

\(^{49}\) *Ibid.*
"Some exercise of discretion, be it large or small, is unavoidable in the very nature of the judicial process. The point that needs to be stressed is that there is a difference between allowing this discretion to be guided by one's personal likes and dislikes and by one's sense of current values assessed as objectively as possible".\(^50\)

Since the values are subjected to individual thinking, subjectivity cannot be excluded altogether.

"In the first place, if subconscious influences are taken into account, as indeed they should be, then account should be taken of all such influences including those that tend to counteract and minimise prejudice. One of these is fidelity to rules, principles and doctrines. Even if a judge were to have some prejudice and wants to give effect to it, he has to do so as plausibly as possible within the framework of rules; the leeways of doing so are not unlimited and this does operate as a brake on personal prejudice".\(^51\)

In some instances, an unconscious adverse influence is perceptible on the judges.

The stress given by the author is due to this amount of discretion available to the High Court Judge. In this context, the most vociferous remarks are made by Justice Cardozo. A High Court judge is in a Unique position and frame of mind, while exercising inherent powers. He should think not only of the case

50. Id. at p. 221
51. Ibid.
at hand, but the social aspects and public interest required. That is why Cardozo draws inspiration from all social sciences while expounding his views on judicial process. He deals with major streams of influence on a judge and thereby the adjudicatory system. Cardozo after putting jurisprudence in the centre of social sciences draws several circles of varying radii with the same centre drawing from other social sciences.

"The directive force of a principle may be exerted along the line of logical progression, this I will call the rule of analogy or the method of philosophy; along the line of historical development, this I will call the method of evolution, along the line of the customs of the community, this I will call the method of tradition, along the lines of justice, morals and social welfare, the mores of the day; and this I will call the method of sociology".52

About consistency, in the judicial activity, Cardozo suggests that it is too complex to be consistent.

"Principles are complex bundles. It is well enough to say that we shall be consistent, but consistent with what? Shall it be consistency with the origins of the rule, the course and tendency of development? Shall it be consistency with logic or philosophy or the fundamental conceptions of jurisprudence as disclosed by analysis of our own and foreign system?"53

Cardozo declares that rather than consistency the Society's

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53. Id. at p. 64
"The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence....I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favour of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance."  

To imbibe the above values a judge must have a personality with rounded perfection. Whatever be the extraneous influences, the personality of the Judge is the deciding factor. Therefore, Judges must have an extra-care in keeping the lamp of light.

"The future, gentlemen is yours. We have been called to do our parts in an ageless process. Long after I am dead and gone, and my little part in it is forgotten, you will be here to do your share, and to carry the torch forward. I know that the flame will burn bright while the torch is in your keeping".

The jurors must have high sense of morality when exercising powers which are inherent in the court. Philosophically speaking, inherent powers maintain the connection between Law and Justice and Morality and Justice and Morality and Law. According to Lon L. Fuller, concept of morality has occupied an impor-

54. Id. at pp. 66-67
55. Id. at pp. 179-180
56. Lon L. Fuller, The Morality of Law, Yale University - 1969
tant position in the speculations of law. Fuller examines the relevance of morality in the administration of justice in jurisprudence by drawing profusely from H.L.A. Hart, Oliver Wendal Holmes and others. When morality comes legality takes a back seat, and sentiments of wrong or right emerge. The quality of morality is infinite and justice administered without morality is half baked. Fuller refers to Oliver Wendal Holmes:

"Holmes' legal philosophy had as its Central theme the necessity for maintaining a sharp distinction between law and morals. Yet in the Path of the Law he wrote:

I do not say that there is not a wider point of-view from which the distinction between law and morals becomes of secondary importance, as all mathematical distinctions vanish in the presence of the infinite".57

While dealing with the legality and justice Fuller refers to Hart in ascertaining the inner morality of law:

"One deep affinity between legality and justice has often been remarked and is in fact explicitly recognised by Hart himself. This lies in a quality shared by both, namely, that they act by known rule. The internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration. These demands may seem ethically neutral so far as the external aims of law are concerned. Yet, just as law is a precondition for good law, so acting by known rule is a precondition for any meaningful

57. Id. at p. 152
appraisal of the justice of law. A lawless unlimited Power expressing itself solely in unpredictable and patternless inventions in human affairs could be said to be unjust only in the sense that it does not act by known rule. It would be hard to call it unjust in any more specific sense until one discovered what hidden principle, if nay, guided its interventions. It is the virtue of a legal order conscientiously constructed and administered that it exposes to public scrutiny the rules by which it acts".58

Fuller speaks as if affinity between legality and justice consisted simply of the fact that a rule articulate and may permit the public to judge of its fairness.

"In the criminal law, as in all law, questions about the action to be taken do not present themselves for decision in an institutional vacuum. They arise rather in the context of some established and specific procedure of decision: in a constitutional convention, in a legislature, in a prosecuting attorney's office, in a court charged with the determination of guilt or innocence, in a sentencing court, before a parole board; and so on".59

When power such as inherent power is saved for an apex court like the High Court, the only parameters which can enforce restraint and discipline on the High Court is consideration of justice, legality and morality. Otherwise, the decision of the High Court will also have the same flaws often detected in the decisions of the administrative authorities. As Ammon Rubinstin in

58. Id. at pp. 157-158
59. Id. at p. 180
his celebrated work *Jurisdiction and illegality - A study in Public Law*, suggested that the High Court which is a court of record having vested with inherent power, shall not resort to invalid procedure. This is because even the widest discretionary power is subject to certain limitations. Though, Rubinstein primarily had adjudicatory functions of administrative authorities in mind, while discharging public duty, the philosophy and theory enunciated by Rubinstein can be used as tools to understand the mechanism of inherent powers. While invoking inherent powers also, the High Court is examining the validity of action. While examining the validity High Court itself should not resort to invalid procedure. Any authority vested with right or power for exercising power must exercise the power within the sphere allotted to him by law.

In his work, Rubinstein explains a court of record. The justification for preserving the inherent powers of the High Court is that, it is a court of record. A court of record is defined thus:

"The rule was limited to courts of records. A court of record was defined as a court which had jurisdiction to fine and imprison or as a court with jurisdiction to try civil causes according to common law in matters involving forty shillings or more".  

Regarding the discretionary powers Rubinstein would say that

"exercise of discretionary power excludes jurisdiction. Where, there is absolute discretion, there is no scope for applying any yardstick like objectively correct discretion."  

61. Id. at p. 165
But there are limitations according to Rubinstein:

"However, powers which are totally discretionary will not be found in a system governed by the Rule of Law. Even the widest of discretionary powers is subject to certain limitations placed by law. These limitations may be numerous or few, limiting the subject matter, mode of exercise, or the type of sanction which can be imposed". ⁶²

The above discussions would suggest that giving correct size and shape to inherent power is impossible.

vi. Application of Inherent Powers is Illustrative of an Indian Variety of Realism

Realism is a new movement in jurisprudence, whether it is American or Scandinavian. American Realism was a Revolt against formalism ⁶³. Scandinavian Realism was an expression of individualism and abstract approach. ⁶⁴ Very close to the above two groups was the sociological jurisprudence. ⁶⁵ The realists, at first, promoted an experimental and constructive attitude to social life and thought. Later the jurimetricians and the behaviorists among them concentrated on developing actual techniques for helping the practitioner to understand and anticipate the trends of judicial decision. ⁶⁶ This has prompted one jurist to comment on Realism thus

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⁶². Ibid.
⁶⁴. Id. at p. 805
⁶⁵. Id. at p. 548
⁶⁶. Id. at p. 686
"Realist movement in law is with the aim to come to terms with move beyond currently entrenched mass and looking at central topics in the Philosophy of language and mind". 67

In India while invoking the inherent jurisdiction the higher judiciary has been less formalistic and more realistic. There is an increasing tendency to relegate technicalities to the background and address the problem of abuse of the process and securing ends of justice. 68 Logical approach was discouraged. In the application of inherent powers for applying the principles the same is tested against the facts of the case at hand and then either applied or repelled. An instances is the question of invoking inherent powers where specific provision is made or specific prohibition is made. In both cases the moderate view is that inherent powers cannot be used. For instance interlocutory orders are not challenged under section 482 Cr.P.C. 69 Proceedings amounting to a second revision are not entertained under section 482 Cr.P.C. 70 But, in both cases the High Courts and Supreme Court find leeways to interfere with the proceedings pending before the trial court on interpretation of the complex concepts like abuse of the process and infraction of justice. 71

Another factor which has contributed to the dynamism of inherent powers is their close proximity to the sphere of constitu-

68. Madhu Limaye, AIR 1978 SC 47; Raj Kapoor, AIR 1980 SC 258; Pepsi Foods, 1998SCC (Cri) 1400 etc.
69. Ref. supra Ch. V, n. 13
70. Krishnan v. Krishnaveni, AIR 1497 SC 987
71. Ref. supra Ch. V n. 40
tionalism. Constitution and constitutionalism have positively influenced the inherent jurisdiction of the High Court. Constitutionalism has enhanced the scope of the inherent power of the Supreme Court also. This in turn has had its impact on the High Courts.

A philosophic base constituted by components like Rule of Law, Natural Justice, Substantial Justice, Judicial Activism, historical factors, has consolidated to lay a strong foundation of inherent powers. On this foundation the High Court and Supreme Court have built a superstructure. The Gothic spirit of justice is given utterance through the Indian Mind.

The historical factors and forces lent their hands to keep the flag of inherent powers float in heavenly heights. Story of institutions, legislations, doctrines and principles add credence to this point. It is relevant in this context to recall the development of judicial institutions in India leading to the climactic event of establishment of the chartered High Court. The High Court became a strong institution to wield inherent powers. The Charter of 1865 itself had glimpses of inherent powers. Later when the Code of Criminal Procedure was enacted in 1898 High Courts remained the most powerful courts in India. So when partial

72. Ref. supra Ch. III generally
73. Ref. supra Ch. III n. 30
74. Ref. supra Ch. III n. 38
75. Ref. supra Ch. III n. 20
76. Decision from 1925-1999
77. Ref. supra Ch. I generally
78. Ref. Ch. I n. 68
79. Ref. Ch. I n. 49-51
80. Ref. Ch. I n. 35-36
statutory recognition was given to inherent power the High Courts became the obvious choice as a preservatory of the powers.\textsuperscript{81} Later when the legislation underwent amendment, repeal and reenactment inherent powers remained in tact, and remained with the High Court. The call for recognising the inherent power of the subordinate courts was ignored.\textsuperscript{82} High Courts and the Supreme Court have earned a lasting and honourable place to the inherent powers in the criminal justice system.\textsuperscript{83} Criminal Procedure Code and the Constitution recognises the premier power in the administration of justice. Among the doctrines which have played a conducive role are the principle of Equity, Rule of Law, Judicial Review, Right to life and Liberty, Justice, etc.

vii. \textbf{Constitution and Inherent Powers}

On the third question it is clear that great prominence has been given to the ideas of inherent powers of the High Court after the inception of the Indian Constitution. The Constitution had its impact on the administration of justice. The provisions of fundamental rights, and establishment of the Supreme Court with vast powers, under the Constitution, developed a healthy climate for inherent jurisdiction to evolve. The Supreme Court has got its own arsenal of inherent powers recognised by the Constitution. The High Courts with their ascertained place in the constitutional scheme, with powers of judicial review influence the mechanics of inherent powers. The period after the inauguration of Indian Constitution India witnessed several issues relat-

\textsuperscript{81} S. 561-A Criminal Law Amended Act.
\textsuperscript{82} S. 482 Code of Criminal Procedure, 1973
\textsuperscript{83} Ref. supra Ch. VIII, generally.
ing to the administration of justice being discussed in the light of the provisions of the Constitution of India. The interpretation of the provisions of the Constitution regarding equality, right to life, and personal liberty, underlined the need of inherent powers of the court. Instances are not scarce, where High Courts and the Supreme Court have been called upon to apply inherent powers in cases the trials of which have been protracted and investigation not completed. Now, a watershed area has been reached where inherent powers under Criminal Procedure Code, and plenary powers under the Constitution, meet and mingle to form a 'jurisprudence of realism underlined by pragmatism'. The line of thinking which commenced with Madhu Limaye case, has been taken to the hilt in Pepsi Foods, decision where the court has held that the High Court has got inherent powers to treat a petition filed under Article 227 of the Constitution as one filed under section 482 of the Code of Criminal Procedure. Similarly, several provisions of statutory offences have been tested against the provision of the Constitution while examining their legality. This has helped the court in developing an area of activity for application of inherent powers. So, it can very well be said that the Indian Constitution has positively influenced the inherent jurisdiction of the High Court in criminal justice system.

Indian constitution is ascertained to be a very living thing. Inherent powers of the Supreme Court and the High Court have added vigor to the life of the constitution by prolific interpretations. Though the hardware is substantively that of the common

84. Gobind Das, *Supreme Court in Quest of Identity*, (1987) at p. v
law tradition of the English, in plasticity and flexibility Indian constitution has even overreached the British constitution. In Britain there is criticism about too much strain on the constitution. Lord Hailsham's criticism of the over centralised and over worked constitutional edifice says that the very political structure of the country is in peril.\(^6\) The jurist observe that "There is plenty of life.... if we can avoid being stampeded in to chaos in compatible with its essential nature and genesis"\(^7\) In contrast the Indian Constitution has accommodated great human and liberal values in its interpretations. This has trickled down to the administration of criminal justice. The Supreme Court has of late held that in a petitions under section 482 Cr.P.C. exemplary costs can be ordered.\(^8\) This trend comes from new dimensions of interpretations of the constitutional provisions where the courts intially started to grand exemplary cost and compensation cost as a palliative in writ proceedings.\(^9\)

viii. **Amplitude Attained by Inherent Powers**

The fourth question is regarding the amplitude in jurisdiction achieved by the High Court through the application of inherent powers. Going through the cases decided by the High Court and examined by the Supreme Court, one finds that the application of inherent powers has increased in extent and reach. The volume of cases has increased on the onehand, and a number of offences under the Indian Penal Code, as well as Statutory of-

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87. Ibid.
fences, have been subjected to the application of inherent jurisdiction. In all High Courts among the criminal miscellaneous petitions filed, a large chunk is in respect of the applicability of inherent powers. Moreover, High Courts have often used the inherent power not only to give effect to orders passed under the Code or prevent abuse of the process of the court, or otherwise to secure the ends of justice, as narrated in section 482; but, also, other categories of references of illusory and circular nature as suggested by Prof. Julius Stone, have been identified. Thus a petition for bail, a petition for specific direction, a petition for expunging remarks, plea for return of articles, petition for compensation, etc. have broadened an ambit of inherent powers with the interplay of inherent powers of the High Court and the Supreme Court, the jurisdiction is further amplified.

The latest thinking of the Supreme Court in respect of inherent powers is in tune with the dynamism shown by the apex court in asserting its inherent powers. In *Supreme Court Advocates Association v. Union of India* the Supreme Court has attempted to indoctrinate everybody of its inherent powers. The court philosophises on it. The same interest is shown by the Supreme Court in Pepsi Food's case also. The Supreme Court has demolished the distinction in nomenclature of the petition filed under Articles 226 and 227 on the Constitution and under section 482 Cr.P.C. The requirement of justice was given priority over technicalities.

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A jurisprudential advancement is effected by the Supreme Court in *Mary Angel and others v. State of Tamil Nadu*\(^\text{91}\). The court in this milestone decision held that the Supreme Court had power to pass orders for costs including exemplary costs. The decision is a pointer to the High Court as to look to which direction to serve the ends of justice. If a frivolous and vexatious petition is filed under section 482 Cr.P.C. the High Court had every power to impose exemplary cost of rupees ten thousand\(^\text{92}\). This is not withstanding the provisions contained in sections 148 (3), 342 and 359 Cr.P.C. The accused in this case adopted a dilatory tactics preventing the Sessions court from proceeding with the case\(^\text{93}\).

"In our view section 482 Cr.P.C. stands independently from other provisions of the code and it expressly saves inherent powers of the High Court by providing that 'nothing in this code' shall limit or affect the inherent power of the High Court. The spirit of *Madhu Limaye, Raj Kapoor, Bhajan Lal, Pepsi*, etc. is taken to the dizzy heights of criminal justice.

**ix. Structuring Inherent Powers**

While one concedes that inherent powers have come to stay which have achieved constitutional status and that, the inherent jurisdiction is amplified, the question whether the power is structured cannot be answered in a positive manner. The Supreme Court gets an opportunity to consider cases decided by the High Court applying inherent powers only if one takes the

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91. *Supra* n. 88  
92. *Id.* at p. 666  
93. *Id.* at p. 665
matter to the apex court under Article 136 of the Constitution. But, with the opportunity received, the Supreme Court has made an earnest attempt to establish certain norms in the invocation of inherent powers. The decisions in R.K. Kapoor, Mohammed Naim, Muniswami, Raj Kapoor, Madhu Lemaye, Rogthagi, Bhajanlal, Krishnaveni, Pepsi Foods, are instances to show that the Supreme Court has while deciding cases also has attempted to establish normative standards at the application of inherent powers. But, when an objective assessment is done, one has to concede that inherent powers are not structured properly. One finds conclusive factors in this respect, going through the decision of the High Court. There are, broad principles already laid down and well accepted, for instances, there is no inherent powers for reviewing a decision; there is no inherent power for the subordinate courts. No inherent power for achieving indirectly that which cannot be obtained directly.

x. **Infirmities in applying Inherent Powers by the High Court**

There is no inherent power for evaluating evidence. But, the High Courts are not consistent or uniform in their attitude to issues.

On the one hand, the relevance of inherent powers of the High Court in the administration of Criminal Justice is conceded and on the other hand, the infirmities and imperfection in the application of this power are realised. The reasons are to be found from the history of inherent powers during the past several decades as well as other legal and procedural bottlenecks in the exercise of inherent powers.94 The number of cases calling for the appli-

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94. Ref. supra Ch. VI, generally
cation of inherent powers is galore. Similarly, the subject matter for the exercise of inherent powers is also extended.\textsuperscript{95} The jurisprudence of inherent powers has received a diversification because of the impact of the Indian Constitution. One reason for the High Court to find it unwieldy is the overgrowth of the jurisdiction. There are other infirmities, invoking inherent powers for quashing a complaint or proceedings can be termed as a lateral, collateral, or even preliminary attack.\textsuperscript{96} When a proceedings is quashed, that is the end of it. Viewed from this angle, the power of the High Court quashes the proceedings on the threshold itself. The consequence is that the Prosecution or the complainant is deprived of the opportunity to adduce evidence and prove their allegations beyond reasonable doubts. There is therefore no real adjudicatory process in the conventional sense of the term. The High Court on a prima-facie approach takes the decision. The only thing expected of the High Court is to consider whether on the materials supplied to the trial court, can it be possible for the prosecution to initiate action against the accused. On the same materials, the trial court proceeds on the belief that there is \textit{prima-facie} case, the High Court applying a different parameter under a different jurisdiction considers the same materials to come to the conclusion whether a \textit{prima-facie} case exists. Therefore, if the High Court decides that there is no \textit{prima-facie} case, the proceedings are halted. Naturally, the question arises whether the use or abuse of the process of the Court necessitates the involvement of the High

\textsuperscript{95} Ref. \textit{supra} Ch. VII generally

\textsuperscript{96} Jehan Singh \textit{v.} Delhi Administration, \textit{AIR} 1974 SC 1146
Court and whether ends of justice can be secured. The fear expressed in this context is that there is every possibility for arbitrariness and unbridled exercise of power. There is a possibility for miscarriage of justice. There is possibility for whims, fancies and caprices of the individual judges, having a sway over the decision making process. Thus, the question of evidence becomes a crucial factor in the inherent power/jurisdiction. The High Court decides without evidence and the High Court's decision prevents parties to adduce evidence. This is the most vulnerable area in the application of inherent powers. The Supreme Court in a number of cases have found fault with the High Court for invoking the inherent powers on this count. Either the High Court would have elaborately considered the materials at hand as if, sifting the evidence from a mass of facts or the High Court would have embarked on an enquiry on the basis of conjectures to come to a conclusion. Evidence is the core of adjudication. In a situation where evidence is either not available or is not required to be considered, the decision taken by the court would be of a sensitive nature. Then, another infirmity of the High Court is the lack of proper norms or guidelines in the exercise of inherent powers. In this matter, the opinion of the Supreme Court is that, it is a near impossibility to lay down norms and rules because what the legislature cannot anticipate in advance the Supreme Court may not be able to do. The rationale for inherent powers, being saved and preserved in section 482 of the Code of Criminal Procedure, 1973, is grounded in the reality that it is impossible for any organ to lay down in advance, the situation for invoking inherent powers. Unforeseen and unimaginable situations may arise. Then the only solution is for the judge to bank heavily on his sense of juris-
prudence, his commonsense, his positive sense, or his discretion - to quote Prince Hamlet, "Let your own discretion be your tutor". Another area of difficulty posed before the High Court in invoking inherent powers is the conflict it has with other provisions in the Criminal Procedure Code as well as other legislations. For instance, it is even now an unsettled proposition whether inherent powers can be exercised after availing a revision under sections 397(1) of the Code. Then the question of review is there. Here the Supreme Court opines that the High Court cannot review its judgment or decisions. But in the interest of justice the Supreme Court itself reviews decisions. Therefore, in a future case, a situation can arise where the Supreme Court will have to concede, for the purpose of serving the ends of justice that the High Court can exercise inherent powers even to review or recall or reconsider its decision. The connotation of review are multiple rather than complex. Review is the power of the court which made the decision the cancel, withdraw, alter, or otherwise modify it. Article 137 of the constitution confers on the Supreme Court the power to review any judgment or order. One opinion says that the reason for expressly barring review under section 362 Cr.P.C. would be that the head of the executive Government possesses the power of pardon which can be exercised where the courts commit illegalities in the method of punishment. But the executive is subjected to judicial review. The power of judicial review here is regarded as inherent in nature. So, the power un-

der section 482 Cr.P.C. is invoked to have judicial review of criminal cases in the interest of justice. In rare and deserving cases with all restrictions and reticence the High Court can exercise the power to review the judgments or orders. About the connection between the judicial review, Constitutional and inherent powers. Similarly, contradictory situations arise in the matter of an order passed under Section 341 of the Code of Criminal Procedure. Viewed from all these angles, it becomes clear that application of inherent powers for quashing a complaint or an FIR is not an easy or unimpeded job. The High Courts are to be very alert and it works under obvious limitations, even though the section provides that nothing in the Code could affect or limit the exercise of inherent powers.

There are several legal propositions which prevent the High Court from invoking inherent powers. One is that if the procedure Code prescribes a specific provision for a situation, inherent powers cannot be applied overreaching that provision. For example there is a provision for sentences to run concurrently for a person undergoing imprisonment. In Bhaskar v. State the Kerala High Court held that inherent powers could not be exercised to direct that the sentences in two separate cases be directed to run concurrently. It would amount to a review of the earlier judgment. This is also an area where the High Court send out confusing signals. Instances are there when the High Court allowed the running of the sentences concurrently, and the dominant opinion is that under section 482 Cr.P.C. the High

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100. 1978 KLT 6
Court can order running of the sentences concurrently. Where there is an express provision baring a special remedy inherent powers could not be used. Similarly, review of a judgment and second revision of a trial court order are barred; so is the invocation of inherent powers against interlocutory orders. The principle is that contained in the maxim expressio unis est exclusio alterius meaning express mention of one thing implies exclusion of another thing. This includes the power under section 482 Cr.P.C. also. Similarly, for every High Court territorial jurisdiction is limited. In *Chellappan v. Chandula* it was held that the High Court in Kerala has no jurisdiction to exercise its powers under section 482 Cr.P.C. to quash proceedings pending in a court outside the State. Under the guise of invoking inherent powers the High Court cannot "invade areas set apart for specific purposes under the Code". In *State of Kerala v. Sadanandan* it was held that the High Court has no inherent powers to remand an accused to police custody. The court dismissed the application filed on behalf of the State relying on the decision of the Supreme Court already holding the field. Even when the High Court dismisses an application under section 482 of the procedure Code it does not mean that the court does not have the power. For instance in cases where other remedies are available the inherent powers cannot be invoked. In *Kunjikannan &

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103. S. 397 Cr.P.C.
104. 1980 KLT 84
105. 1984 KLT 747
another v. A.S.I. of Police\textsuperscript{107} it was held that the inherent powers of the High Court are always there inspite of any provisions or absence of any provisions. Otherwise there may arise an occasion where the High Court becomes powerless in extreme cases. In the above cases the court quashed the charge sheet alleging violation of sections 7 & 8 of the Kerala Gaining Act (Act 20 of 1960) There are occasions when the High Court has to act positively because in the course of judicial process there may arise curious and unique situations. A sessions court makes a reference to the High Court under section 482 of the Procedure code seeking the directions whether a judicial officer can pronounce a judgment written by his predecessor. Accepting the reference the Kerala High Court, \textit{In Re District and Sessions Judge, Tellicherry}\textsuperscript{108} held that courts may have to deal with contingencies not contemplated by the framers of the Code. Absence of specific provisions should not fetter the hands of the Court in meting out justice which is absolutely essential in certain circumstances.

In the Procedure Code where provisions are made for specific eventualities there is no scope for invoking inherent powers. Granting of bail is regulated by the provisions of the procedure Code. A Full Bench of Kerala High Court held in \textit{Mammootty and others v. Food Inspector and others}\textsuperscript{109} that the High Court could not grant bail to a person who has been acquitted by trial court and convicted by the High Court in appeal. Inherent powers could only be exercised within the frame work of the law and not in violation of law. It was also held that while exercising in-

\textsuperscript{107} 1985 KLT 484
\textsuperscript{108} 1986 KLT 62
\textsuperscript{109} 1986 KLT 113
herent powers the court has to guard against passing of an or-
der which could conflict with the provision of the Code. A relief
however equitable cannot be granted in contravention of the
law\textsuperscript{110}. Equity does not permit to act against law\textsuperscript{111}.

Another area where it is difficult for the High Court to invoke
inherent powers is investigation by Police. It is the statutory func-
tion of the Police. In \textit{Johny Joseph v. State of Kerala}\textsuperscript{112} relying
on the decisions of the Supreme Court in \textit{AIR 1985 SC 1668}\textsuperscript{113}
and \textit{AIR 1982 P&H 372}\textsuperscript{114} it was held that the High Court sel-
dom interferes with investigation and trial. There must be spe-
cific and judicially acceptable circumstances to warrant inter-
ference. A Full Bench of the Kerala High Court held that except-
ing in exceptional cases where non interference would result in
miscarriage of justice the court and the judicial process should
not interfere at the stage of the investigation of offences. In an
application under section 482 of the Procedure Code alleging
action under section 154 & 157 was challenged. The offence
involved was under section 304 I.P.C. On the earlier petitions
the police did not register FIRs. Crime was registered on sec-
ond application. The Full Bench relying on the Supreme Court
decisions held that it was not a ground for quashing the pro-
cedings\textsuperscript{115}. The law which is settled in this respect is that an

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\textbf{112.} 1986 KLT 445

\textbf{113.} \textit{Eastern Spinning Mills' case}

\textbf{114.} \textit{Vinod Kumar v. State}

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interlocutory order passed when investigation is still pending, cannot be challenged by invoking inherent powers\textsuperscript{116}.

\textbf{xi. Inherent Powers of the Supreme Court}

While evaluating the applicability of the inherent powers by the High Court, an important consideration is the impact of the Supreme Court and its inherent powers. The Supreme Court of India has its own variety of inherent powers. Vast and various jurisdiction conferred on the Supreme Court make it enable to wield immense power. The Supreme Court for what it is, inherent powers are a necessity. In the matter of dealing with contempt the Supreme Court relies on its inherent powers. Several other areas emanate where the Supreme Court is to exercise inherent powers.\textsuperscript{117}

In the interest of justice, even in the absence of a specific provision, like Section 482 of Code of Criminal Procedure, the Supreme Court can exercise inherent powers similar to those saved under section 482 of the Code of Criminal Procedure. The style and rhythm of adjudication is defined and demonstrated by the Supreme Court to be followed by the High Court and subordinate courts. In this context, the Supreme Court gets an opportunity to comment upon the inherent powers of the High Court; together, the Supreme Court has effected a positive impact on the High Court. Where executive and legislature have failed in meeting the requirements in tune with public opinion, the Supreme Court is not to remain idle or powerless, but to meet the ends of justice through its inherent powers. The modern administrative

\textsuperscript{116} Mohan Pai v. State of Kerala, 1987 (1) KLT 625
\textsuperscript{117} D.K. Basu, infra n. 135, AIR 1997 SCC 610
state, which has firmed up its control over all the activities in the name of welfare, has given the Supreme Court situations where inherent powers are required. It is an area where the Supreme Court's inherent powers have executive and legislative actions. Layers and layers have accumulated around the concept of judicial review in complex situations. It can be the power of the court to consider a motion adopted by the legislature, a decision of the President in considering a mercy petition, the factors to be considered while Article 356 is to be enforced, etc. Then on the other hand, there are the compulsions over the Supreme Court even to monitor investigation of very serious cases, till the stage of filling charge-sheet\textsuperscript{118}. So, the shine and sheen of the inherent powers of the Supreme Court have illuminated the inherent powers of the High Court. The constitutional provisions and their impact under Article 226 and 227 are considered to be akin to the ingredients of section 482 of the Code of Criminal Procedure.

The constitutional provision declaring the inherent power of the Supreme Court is contained in Article 142.\textsuperscript{119} The provision have been subjected to intense interpretation. The Supreme Court's powers has been discussed at various levels of judicial and juridical nature.\textsuperscript{120} It is of great topical importance with the court's dynamic entry into the fields occupied by Government.\textsuperscript{121}

\textsuperscript{118.} Vinod Kumar and others v. Municipal Corporation Delhi, 1980 Cri.L.J. (NOC) 261 (Del.)
\textsuperscript{119.} Article 142 on the Constitution:- Enforcement of decrees and orders of Supreme Court and orders as to discovery etc.
\textsuperscript{120.} Re V.C. Mishra, S.B.A. v. Union of India, Dr. K.N. Chandrasekhara Pillay, P.P. Rao, J.S. Verma, A.M. Ahammedi, K.K. Venugopal
\textsuperscript{121.} Vineet Narayan's case
In the 1980s a great charisma accrued on Article 21 through a benevolent and broad interpretation. In the 1990, the Supreme Court tightened its hold not only over India's jurisprudence, but also over India's polity. Inherent powers of the superior courts and the issue of contempt of the court of record functioned as potent inputs in the cauldron of judicial review.

Article 142 is considered to be a source of additional power and not of jurisdiction. A distinction is drawn between Jurisdiction and Power.

"Jurisdiction means the authority to adjudicate a dispute. Power means the ability to alter the rights and liabilities of persons." Reference is made to jurisdiction under Articles 32, 131, 132 to 136 and 138. Jurisdiction is derived either from the constitution or laws made by the legislature. So the concept of jurisdiction is a legislative function. So, the nature of this power excludes power to add or abridge the jurisdiction of the court. Court is to work in cooperation with legislature. Court's work cannot be considered obstructive of long cherished view of the House of Lords and the Supreme Court.

The criticism against the inconsistency in interpretation is due

122. Article 142: P.P. Rao, 'Is The Power To Do Complete Justice Subject To Rule of Law?' 1994-96 Indian Advocate, p.1
123. Ibid.
124. Ibid.
to the apprehension whether it is in consonance with the Rule of Law concept\textsuperscript{127}. The interpretative history of Article 142 is one of being inconsistent. In \textit{K.M. Nanavati v. State of Bombay},\textsuperscript{128} the view was that the power was not limited or fettered. In \textit{Premchand Garg v. Excise Commissioner}\textsuperscript{129} a constitution bench held that the Supreme Court could not make an order plainly inconsistent with a statutory provision, let alone any constitutional provision. \textit{A.R. Antulay v. R.S. Nayak}\textsuperscript{130} larger bench of seven Judges, approved \textit{Premchand Gany v. Excise Commissioner} case's decision. It is in consonance with Rule of Law concept. "Rule of Law" the pride of Great Britain negates invasion by one agency into the territory of another\textsuperscript{131}. This discipline of law led to \textit{Keshavanada Bharati}\textsuperscript{132} and further to \textit{Smt. Indira Nehru Gandhi v. Raj Narayan}.\textsuperscript{133}

Expansion of interpretation of Article 142 took a \textit{U-turn in Delhi Judicial Service Association v. State of Gujarat},\textsuperscript{134} Three judges distinguished constitution bench decisions in \textit{Premchand Garg} and the larger bench \textit{A.R. Antulay}. Interpretation centered around "complete justice". The reference made by the Supreme Court while deciding \textit{Delhi Judicial Service Association} the court adverted to decisions earlier to \textit{Premchand Garg} and subsequent to \textit{A.R. Antulay}\textsuperscript{135}. The decisions were \textit{Harbans Singh v. U.P.}.

\textsuperscript{127} Ref. \textit{supra} n 123 at p. 3
\textsuperscript{128} \textbf{(1961)} 1 SCR 497
\textsuperscript{129} \textbf{(1963)} Supp. 1 SCR 885
\textsuperscript{130} \textbf{(1998)} Supp. 1 SCR 56
\textsuperscript{131} Ref. \textit{supra} n 123 at p.4
\textsuperscript{132} \textbf{(1973)} Supp. SCR 1
\textsuperscript{133} \textbf{(1976)} 2 SCR 347
\textsuperscript{134} \textbf{(1991)} 3 SCR 936
\textsuperscript{135} Ref. \textit{supra} n 123

The main criticism against Delhi Judicial Service Association's case, is that it contains a wide preposition. This preposition suffer from infirmities. The court is alleged to have not completely understood the ratio in A.R. Antulay and that reliance on case law misplaced.

Reference is made to Union Carbide Corporation v. Union of India. Here also the court failed to understand correctly the ratio of A.R. Antulay. The dictum in Delhi Judicial Service Association's case and Union Carbide Corporation case, burdened the judicial thinking. Further we have Mohd. Anis v. Union of India, and Vinaya Chandra Mishra. In Supreme Court Bar Association v. Union of India, introspection is effected. The later decision is without loosing the sheen of the Supreme Court's inherent powers. The recent trend is that the power to do complete justice is recognised in respect of the High Court also. B.C. Chaturvedi v. Union of India. The different voices with which the Supreme Court speak on Article 142 prompts one to feel the

136. (1982) 3 SCR 235
137. (1976) 3 SCR 1005
138. (1988) 1 SCC 75
139. (1978) 2 SCR 277
140. (1988) 4 SCC 387
141. (1966) 3 SCR 682
142. (1991) 4 SCC 584
143. 1994 Supp. (1) SCC 145
144. (1995) 2 SCC 584
145. (1995) 4 SCALE 759
146. (1995) 6 SCC 749
necessity to have all the questions settled by a larger Bench of 7 judges so that the nature and ambit of power under Article 142 does not remained in the realm of uncertainty. Trend is against Rule of Law as evidenced by *Jaisingshani v. Union of India.*

There is the other view of the matter also. The Supreme Court is held in high esteem for the rapid strides it has made in the dispensation of justice. This is reflected in the following words,

"The Supreme Court without being concerned any more about the political might of the state.... in the country."

**xii. Abuse of Inherent Powers**

The negative aspect of inherent powers in the administrations of criminal justice is those generating from lack of consistency, uniformity and the standards of invoking inherent powers. For instance, inherent powers wrongly used can affect the stream of justice. If only the matter is taken to the Supreme Court, a further opportunity to save and secure ends of justice will be obtained. The reality is that only a fraction of cases decided by the High Court reaches the Supreme Court for its final word. In those cases where the Supreme Court interfered and tested the decision of the High Court, cleaning the way of the trial court to proceed, untrammeled by what happened in the High Court or in the Supreme Court. This leads to delay which is again not forming part of the ends of justice. Unconscionable delay will lead only to deflate justice. The witnesses would have their memory

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147. *(1967)* 2 SCR 703.

faded and a remoteness injected to the proceedings can convert into a lethargy to those involved to lead a proceedings to a purposeless end. In this case, the State had filed a leave to appeal. While granting leave, the High Court issued notice to the accused to show-cause why he should not be sent for trial. This was by invoking the inherent powers. Supreme Court is of the view that High Court was wrong in doing so without hearing the concerned person. Arbitrary exercise of inherent powers make the position of the High Court unenviable. In *State of Bihar & another v. K.J.D. Singh*\(^{149}\) Supreme Court held that the inherent powers were not to be exercised arbitrarily. The High Court should not cut-short the normal process of criminal trial except in exceptional cases. Appreciating evidence at a pretrial stage or quashing proceedings at the threshold is not permissible under inherent powers. Regarding this aspect, Supreme Court has been steadily maintaining the record. In the above case, reliance was made on the decisions\(^{150}\) like *R.P. Kapur v. State of Punjab* and *Janata Dal v. H.S. Choudary*. If the High Court usurp the jurisdiction of the trial court, that again is an abuse of the process of the court. In *Radhashyam Khemka v. State of Bihar*,\(^{151}\) the Supreme Court held that the High Court cannot convert itself into a trial court and it should not conduct a powerful trial. Here the reasoning of the High Court and Supreme Court tallied as the High Court had dismissed the application under section 482 Cr.P.C.

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149. 1994 SCC (Cri) 63
150. AIR 1960 SC 860 and 1993 SCC (Cri) 36
151. 1997 SCC (Cri) 591
The History of the inherent jurisdiction in criminal justice system shows that justice is the prime objective. While considering the application under section 482 Cr.P.C., the High Court must be governed first by the interest of justice and only then by the intricacies of law. Consideration of facts and law shall not be too rigid to produce an outright and unjust solution. For instance, an interlocutory order cannot be challenged in revision as the same is barred by section 392(2) Cr.P.C. Since it is expressly barred in the ordinary course, inherent powers should also not be invoked. So, if a stand still situation arises, in the interest of justice, the High Court must make a positive approach. In Lalith Mohan Mandal & others v. Binoy Chandra Nath\(^\text{152}\) an order passed under section 141 Cr.P.C. was challenged. Such an order was not revisable and so the High Court declined to interfere. The Supreme Court adopted an affirmative stand. It was also when inherent power could be gainfully used. According to the Supreme Court, the High Court must apply its mind for being satisfied whether interest of justice is secured. Here, the Supreme Court allowed the appeal and remanded the matter to the High Court for fresh disposal.

Power under section 482 Cr.P.C. is most successfully used when it can be utilised for issuing positive directions. This is also in the interest of justice as held by the Supreme Court in Sajan K. Varghese v. State of Kerala, and others.\(^\text{153}\) A film producer went bankrupt. He also had a financing company which had fallen on bad days. A big budget feature film was being
produced and its production was halfway through. By invoking inherent powers, the High Court directed the party to hand over unfinished negative of films to another person to complete it, to safeguard the interest of the creditors.

While exercising inherent powers, the High Court shall not overstep the limit. In *Dy. Commissioner of Police, Delhi v. Jas Pal Singh Gill*, the Supreme Court cancelled bail granted to a person alleged of offences under sections 3, 5, and 9 of official secret Act, 1923 read with section 120 I.P.C. Charges related to offences of passing on defence secrets to foreign agent. The Supreme Court held that since the charges against the accused were *prima-facie* made out, High Court was not justified in enlarging the accused on bail. Similarly, passing oral orders to conduct the proceedings of the court is not in tune with the restraint recognised for invoking inherent powers. In *Naresh Sreedhar v. State of Maharashtra*, the oral order of the High Court prohibiting publication of trial proceedings was dismissed by the Division Bench of the High Court. The Supreme Court held that, the High Court had jurisdiction to hold trials in camera, or part of the trial in camera, to prohibit excessive publication of a part of the proceedings of the court in order to secure the ends of justice.

Issuing positive directions means invoking inherent powers for constructive purpose. This is because the power is in-built, in the institution of the court. In *Palani Vel v. State of Tamilnadu and others*, The petition was filed for compensation. The High
Court amended the prayers. The Supreme Court criticised the attitude of the High Court because when there was express provision under section 357(1) Cr.P.C. inherent powers cannot be invoked. But, the Supreme Court made a realistic approach by holding that, though the petition is made under section 482 Cr.P.C. the High Court could have considered it as one under section 357(1) and act accordingly. This is to mitigate the rigor of technicality. Too much of technicality will make justice administration rigid. In *Rajpathy v. Bachan and another*\(^{157}\), the Supreme Court held that technicality must give way to the feasibility of justice.

Inspite of the fact that inherent powers in criminal justice system is in play for considerably long time even after legislative recognition was obtained, the rule is not capable of being stated with certainty and precision. Countless occasions come to the High Court and the decision could not reflect the consistency or a lasting rationale. The reasons for this phenomenon as well as the result for of this phenomenon have advantages as well as disadvantageous.

When section 561-A was introduced in the Code in 1923 through the Criminal Law amended Act, it was not an attempt to prescribe the parameters precisely. The rule stated is not inflexible. The High Court has a wide spectrum to move about while exercising inherent powers. In *Chammnad Oil Manufacturing Co. v. Circle Inspector of Police, Puthoor*\(^{158}\), the Kerala High Court held that there is no inflexible rule in respect of the
governance of

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157. 1980 SCC (Cri) 927
158. 1974 (1) KLT 161
inherent powers. The thinking of the Highest judicial fora, the Privy Council and the Supreme Court endorsed this. The Privy Council in Emperor v. Nazir Ahammed, and the Supreme Court in R.P. Kapur v. State of Punjab, had expressed this view. One aspect in this context is the power of the High Court to consider repeated applications, invoking inherent powers. Depending upon the situation, the High Court can adopt varying stands, holding that on the one hand repeated applications amounts to abuse of the process of the court, and on the other hand, holding that there is nothing which prevent filing a second petition on the very same ground. This position of the High Court also equips it to take decisions in the interest of justice.

According to J.A. Jolowic, an action against the abuse of the process of the court has come to occupy a definite territory in jurisprudence.

"If the need for the power to deal with an abuse of process is clear, it is also clear that it must be exercised only on extreme cases".

The above observation is because, there is no detailed trial. There is denial of proper hearing. It means there is conflict of

159. AIR 1945 PC 18
160. AIR 1960 S.C. 866
162. Dr. A.M. Berry v. Revi Arora and others, 1992 Cri.L.J. 1327 (Del).
164. Id. at. p. 79
principles. Therefore, a balanced approach taking care of both the privilege of the court and the position of the accused person must be adopted. "Abuse of the process of the court must be prevented but, the right to a hearing must be preserved".\textsuperscript{165}

The British legal system has developed rules regulating action against abuse of the process. But the modern rules are identical as the concept of inherent jurisdiction, incorporating virtually the whole of inherent jurisdiction.\textsuperscript{166}

A negative development in the course of action against an abuse of the process of the court is that the Judges at times become overzealous and they use it to cases pending in a court.

Similarly when a person file an application to withdraw a pending action, the interest of the courts leads to decline the application. J.A. Jolowic is a bit critical of the attitude of the Judges sounding a warning that it can even risk the administration of justice.

"Taken at face value - and that is how the language of the Judges of our highest court should be taken - this gives a greatly extended and even a strained meaning to 'abuse of the process of the court'. The power to put a stop to an abuse of process, exists to protect the administration of justice, and its exercise is not justified by a general appeal to public policy"\textsuperscript{167}

Regarding the tendency not to accept the application for

\textsuperscript{165} Id. at p. 77
\textsuperscript{166} Id. at p. 48
\textsuperscript{167} Id. at p. 92
dismissing the action, the author refers to Lord Scarman

"Lord Scarman was surely correct when he said in *Gillick v. West Norfolk AHA*, if there are as in the present case, an abuse of the process of the court, the house cannot overlook it, even if the parties are prepared to do so".168

This opinion from the bench has agitated the minds of jurists like the author. It has generated an apprehension that matters even lead to abuse from the bench,

"It is time for a fresh look to be taken at the power of the court to bring proceedings to an end by branding them as an abuse of the process of the court. However excellent their intention, the courts must not abuse their power. The warnings issued by the Judges of the late 19th and early 20th Centuries must be reactivated. If they are not, the courts power to strike out a pleading or dismiss an action, as an abuse of process, will come to do more harm than good to the administration of justice which it exist to defend."169

The above remarks about the abuse of inherent powers from the bench is significant in the estimation of the Supreme Court when the High Courts, go berserk while invoking inherent jurisdiction.170 In *Rajesh Bajaj v. State NCT of Delhi and others*171 for quashing a complaint alleging offence under section 415 and 420 IPC the Supreme Court has vehemently criticised the High

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168. *Id.* at p. 93
Court. The Supreme Court's castigation runs like this:

"The High Court seems to have adopted a strictly hyper-technical approach and sieved the complaint through a cullender of finest gauzes for testing the ingredients under section 415 IPC."\(^{172}\)

According to the Supreme Court it can be done in trial, not at investigation stage. Even early occasions also the Supreme Court has not spared of occasions to sound alarm when the High Court ride on the inherent powers like an 'unruly horse'. The observations in \textit{Mangilal and others v. State of Madhya Pradesh}\(^{173}\) on inherent powers referring to landmark decisions in the common law realm the Supreme Court laments the lack of judicial restraint and opines that a judge must be of a sterner stuff.\(^{174}\)

\textbf{xiii. An Occasion to Study the Personality of the Judge}

Personality of the judge means judicial personality. When absolute discretionary power like the inherent powers are wielded by the judges they must take the interest of the whole court and the whole justice administration process. There should not be an occasion for poignant comments like,

"The judicial proceedings in this court relating to the administrating the High Court during that period would indicate that this went severely wrong in the High Court's administration in certain matters."\(^{175}\)

\(^{172}\) \textit{Ibid.}
\(^{173}\) JT 1994 (3) SCC 644.
\(^{175}\) \textit{Supra} n. 174 at p. 646
At times the High Court judge can go wild causing panic among the judicial fraternity as well as general public.\textsuperscript{176} It is not becoming of a judge to make disparaging remarks about the chief justice and other judges. In such a case the High Court judge would be acting outside his jurisdiction and the whole criticism of such exercise is comparable to an authority acting without jurisdiction. The concept of jurisdiction and illegality postulated by Rubenstein is pertinent in this context. The jurisdictional conundrum haunting the administrating law are precipitated in the case of invoking inherent powers also.\textsuperscript{177}

xiv. Future Possibilities

While analysing the jurisdiction of the High Court in the area of inherent powers, on the above grounds one confronts the future possibility of this jurisdiction also. The possibilities are immense, the High Court can use this power for positive directions to the trial courts for securing the ends of justice. The High Court shall not waver or vacillate in the exercise of inherent powers. The concept of the rarest of the rare cases can be adopted here. Power shall be applied only in very rare cases, because its application excludes evidence. In patently unjust and illegal proceedings, the High Court must interfere even if a codification is not possible on the face of not achieving perfection in codification, because inherent powers are conserved and saved. Certain norms can be evolved for the application of inherent powers. Regarding the requirements of inherent powers, in a system like Indian Criminal Justice Administration, it is neces-

\textsuperscript{176. State of Rajasthan v. Prakash Chand and others, AIR 1998 SC 1344}
\textsuperscript{177. Ref. supra n. 60}
sary that the High Court possess inherent powers to be used as a touchstone to detect fake and fabricated proceedings. By its long history, the High Court is the obvious candidate for wielding inherent powers. Crime rate is on the increase. So also crime range. In the confusion created thus, innocent people shall not be victimised. Inherent powers are therefore required to conduct a litmus test to find veracity of the complaint or proceedings.

With the contribution of the Supreme Court and High Courts in interpreting the inherent powers, the future of this jurisdiction is promising and prominent. In totality it can be said that the judicial process has evolved a policy for administration of criminal justice through applying inherent powers. When judges engage in policy making it is not appreciated. The opinion of two writers reflect thus

"The court performs three interrelated but distinguishable functions: they determine facts; they interpret authoritative legal text, and they make new public policy"178 The authors are of the view that courts are not supposed to act as policy makers, "The assertion that they do is generally treated as either harsh realism or a predicate to contemnation"179

The above view need not be universally correct. If the controversy regarding the judicial legislation can be successfully resolved to the extent to say that it is 'fairy tale' that judges do not legislate. In the interest of justice going by the adage, ne-

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179. Ibid.
cessity is the mother of invention, the judiciary may be compelled to frame policy. According to Justice V.R. Krishna Iyyer when justice is at cross roads judges cannot keep mum for want of rules or policy to govern the rules. He quotes Daniel Webster,

"Justice, Sir, is the greatest interest of man on earth; it is the ligament which holds civilised being and civilised nations together".\(^\text{180}\)

The relevance of justice among the community of men is so acute that judges while discharging a divine functions not only administer justice but also accumulate the inputs for justice administration like rules, laws and even policy. About poets P.B. Shelley declare, "Poets are the unacknowledged legislators of the world"\(^\text{181}\). It can be said with even greater confidence and conviction that judges are the acknowledged legislators of the world as they are struggling with mundane human problems and to administer justice. In criminal justice administrations inherent powers have given the courts and judges necessary support to perform the above function.

The landscape of jurisprudence is enriched with the fragrance of inherent powers. In future, functioning with proximity to the doctrine of judicial review, inherent powers have great possibilities for ensuring the Independence of Judiciary. The satiric comments of Lord Denning about the Chancellor's Foot would remain a harmless anecdote in the present day context of Rule of Law\(^\text{182}\). The judiciary as an institution has seasoned enough to


\(^{181}\) P.B. Shelley, *A Defence of Poesey*

\(^{182}\) Ref. *supra* Ch. 1 n. 29
withstand the "increasingly complex nuances about subtle government pressures"\textsuperscript{183}, Independence of judiciary does not mean merely a pack of judges indisposed to governmental pressures and not allowed to the micro and macro judicial functions of redressing the individual grievances and attending to social reconstructions: "The law can do much to ensure a fair balance between the conflicting demands and pressures"\textsuperscript{184}. Law devices safeguards to protect the individual. Even in the absence of specific laws individual is to be protected. Herein lies the relevance of inherent powers. Change is the sign of life; but the change must be in the correct direction. If the judiciary is armed with sufficient powers, even if "the state a modern Leviathan, absorbed the individual in his service"\textsuperscript{185} the citizen have solace under Rule of Law. In A.D.M. Jabalpur v. Shivakanth Shukla\textsuperscript{186} we had experienced result of both dependence and independence of judiciary. When the High Court largely banking on inherent powers to interpret the provisions of the constitution, ordered the release of the detenus the Supreme Court had slammed the doors on the hapless litigant as well as Rule of Law. But the apex court very soon change its track and we got the classic judgment in Menaka Gandhi's case.\textsuperscript{187} There ensued a most brilliant period in the chapter of administration of justice in India.

Inherent powers of the court has become a part of the basic

\textsuperscript{184.} W. Friedmann, "Law in a Changing Society" (1959), pp. 497-498
\textsuperscript{185.} Id. at p. 495
\textsuperscript{186.} AIR 1976 SC 1207
\textsuperscript{187.} AIR 1978 SC 597
concept of legal thought in India. While diagnosing the aspects of
the justice administration a fair procedure satisfying the Wedensbury
reasonableness is expected. 188 Associated Motion Picture Company
v. Wedensbury Corporation, 189 the inherent jurisdiction of the High
Courts with its huge credit of leeways developed over the years can
do justice. This is all the more significant in the procedural aspect.
One thinker comments on the virtues of fair procedure thus, "In its
just form, a fair procedure is all that is needed to generate a just
result.... These are procedures that do not admit of mistakes; no
one can complain about the outcome as unjust" 190 this is highly
relevant in the aspect of inherent powers. The court while prevent-
ing the abuse of the process of courts takes care of the interest of
the complainant, the prosecution, the accused and the above all the
interest of the court itself. The inherent powers if sagaciously applied
can convert the "vague intangibles" of the concept of law into
intelligible intangibles. This is pertinent context of improving the
difficulties in understanding the law and justice. In a collection of
highlights of legal opinions once scholar remarks, "The nature of
law is increasingly more difficult to understand as we study more
about it. "Law" means many things to many people." 191 "Vague
intangibles" mentioned above are the gaps and loopholes in the
body of law when the judges use their discretion. They may bank
on their sense of justice, sense of equity. Inherent powers, here,

188. [1948] 1 KB 223
189. Ibid.
190. George P. Fletcher, "Basic Concepts of Legal Thought", (1996), p. 81
Introduction, p. vii
act as a stable support mechanism to administer justice. Rule of Law, or Human Rights, or "Due Process is not a fair-whether or timid assurance. It must be respected in periods of calm and in times of trouble it protects aliens as well as citizens", says one commentator of law and justice.\(^{192}\)

The prestige of the court depends on its power. With power court moulds the structure of the society. Judicial application of law is not a mechanical process, "of fitting every case with a strait jacket of rule or remedy"\(^ {193}\). Law does not give strait jackets always to meet every situation. Superior courts must invoke power inherent in them to administer justice. What is required is a progressive realism. As observed by one jurist, Constitution is not be a catechism and judges are not priests reciting it.\(^ {194}\) Realism requires judges with understanding social growth including changes in political, economic and social dimensions. The above author quotes Brandis, who is quoted all over the world by all who have faith in their Constitution. "Our Constitution is not a strait jacket. It is a living organism. As such it is capable of growth - of expansion and of adaptation to new conditions"\(^ {195}\)

The Indian condition also gives a successful picture in the administration of justice. The Supreme Court and High Courts in India are more relying on their inherent powers rather than searching for "strait jacket". There is much "free scientific re-

\(^{193}\) Roscoe Pound, *An Introduction to the Philosophy of Law*, (1922), p. 49
\(^{195}\) Id. at p. 20
search" and "extraversion"196, to borrow the words of Julius Stone, by the Indian judiciary which has helped the precipitation of a realism in Indian jurisprudence. This realism is the inherent force of the inherent powers of the High Courts and the Supreme Court.

196. Ref. supra Ch. II.