9
CONSTITUTIONAL LAW-I

(FUNDAMENTAL RIGHTS)

S N Singh[*]

I INTRODUCTION

THE YEAR 2013 shall always be remembered for the role played by the Supreme Court of India in enforcing various fundamental rights such as right to information and personal liberty and election laws thereby protecting the Indian democracy from illegalities, corruption and criminalization of politics through public interest litigation (PIL). In fact, the judiciary did what the executive really never intended, and what the legislature failed, to do. The highlights of public interest cases relating to elections raising several constitutional issues particularly fundamental rights decided by the Supreme Court during the year can be summarised thus: The members of Parliament and state legislatures convicted for offences inviting punishment of more than two years will loose their membership and remain disqualified for contesting any elections for six years after serving the jail term notwithstanding the provision of section 8(4) of the Representation of the People Act, 1951 (the RP Act) which was struck down by the court as being unconstitutional and *ultra vires* article 102 of the Constitution;[1] politicians confined in prison or in the lawful custody of the police (except in case of preventive detention) cannot contest elections as they have no right to vote in an election under

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* LL.M., Ph.D., Advocate, Supreme Court of India. Comments and suggestions on this survey may be sent at: s_nsingh@hotmail.com

1 *Lily Thomas* v. *Union of India*, AIR 2013 SC 2662: 2013 (8) SCALE 469 (PIL under art. 32); also see *Basant Kumar Chaudhary* v. *Union of India*, 2013 (8) SCALE 486. The efforts of the government to negate the decision did not succeed as neither the amendment to the RP Act could be passed by the Parliament nor the Ordinance sent to the President for promulgation to nullify it could succeed. The first casualties of the decision were three prominent politicians whose seats were declared vacant in October, 2013 and they became disqualified to contest elections for six years after completing their term of imprisonment: One former Union Minister and now M.P. from Rajya Sabha, Rasheed Masood convicted for corruption in medical admissions while he was a minister and awarded four years imprisonment and two M.Ps. from Lok Sabha from Bihar convicted for the infamous fodder scam in Bihar and awarded five years imprisonment - Lalu Prasad Yadav (the then Chief Minister of the State of Bihar and presently President of RJD) and Jagdish Sharma.

section 62(5) of the RP Act,[2] a person filing nomination papers must fill in all columns of the nomination paper form failing which the nomination is liable to be rejected as an elector has a right to full and complete information about the candidate,[3] the electronic voting machine (EVM) must have a button for recording "none of the above" (NOTA) vote,[4] the EVM should have voter verifiable paper audit trail (VVPAT) system to acknowledge that a vote has been cast[5] and regulating the contents of election manifesto released by the political parties.[6] In the same connection, the order passed by the central information commission putting the political parties within the purview of the Right to Information Act, 2005 also needs to be noted. Never in the past, had the judiciary come up with such heavy hands in one year on a single issue and that too in electoral matters. In fact, the executive was given a strong tool to improve the entire democratic process which the political parties had been apparently professing to bring about but never

2 *Chief Election Commissioner* v. *Jan Chaukidar* (*Peoples Watch*) (2013) 7 SCC 507: 2013 (8) SCALE 487. This decision has been nullified by Parliament by passing the Representation of the People (Amendment and Validation) Act, 2013 with effect from the date of the decision i.e. 10th July 2013. The amendment has inserted a new Proviso after the existing Proviso to sub-section (5) of s. 62 of the RP Act which reads: "Provided further that by reason of the prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector." An application for reviewing the decision was dismissed by the Supreme Court in view of the newly added proviso to sec. 62(5) of the R.P. Act : *Ramesh Dalal* v. *Union of India*, 2013 (15) SCALE 25. The validity of this amendment was upheld by Delhi High Court in *Manohar Lal Sharma* v. *Union of India*, W.P. (C) No. 7459/ 2013, decided on 06.02.2014 observing that the impugned Amendment and Validation Act, 2013 was consistent with the principle of universal and equal suffrage and the presumption of innocence of the accused until proven guilty.

3 *Resurgence India* v. *Election Commission of India*, 2013 (11) SCALE 348 (PIL under art. 32).

4 *Peoples' Union for Civil Liberties* v. *Union of India* (2013) 10 SCC 1: 2013 (12) SCALE 165 (PIL under art. 32). After this decision, this option was provided for the first time in the EVMs by the Election Commission in the assembly elections held in the State of Chhatisgarh on 11 Nov. 2013 followed by assembly elections held in Nov. – Dec., 2013 in the States of Madhya Pradesh, Rajasthan and Sikkim and the National Capital Territory of Delhi. It may be noted that unless NOTA decision leads to re-poll in case NOTA marks the highest votes, the decision would be meaningless.

5 *Dr. Subramanian Swamy* v. *Election Commission of India*, 2013 (12) SCALE 575 (PIL under art. 226 followed by SLP and also a PIL under art. 32). Consequent upon this decision,, rule 49-A, inserted by the Conduct of Election (Amendment) Rules, 2013 (w.e.f. 14.08.2013) provides that "a printer with a drop box of such design, as may be approved by Election Commission, may also be attached to a voting machine for printing a paper trail of the voter, in such constituency or constituencies or parts thereof as the Election Commission may direct."

6 *S. Subramaniam Balaji* v. *The Government of Tamil Nadu*, 2013 (8) SCALE 249 : (2013) 9 SCC 659.

made real efforts to do it. If compulsory voting, right to re-call elected representatives and state funding of the elections are also included in this process, the electoral ills would considerably stand wiped out. Sadly, the executive and legislature did not embark upon any such exercise till the end of the year.

One of the most significant decisions of the year related to rights to equality and privacy guaranteed under articles 14, 15 and 21 of the Constitution. By this decision, a two-judge bench of the apex court upheld the constitutional validity of section 377 of the Indian Penal Code, 1860 (IPC) overruling the decision of a division bench of Delhi High Court which had declared that section unconstitutional.[7] Section 377, IPC criminalizes voluntary carnal intercourse against the order of nature with any man, woman or animal.

In the previous years, the Supreme Court had taken upon itself the task of filling in the vacuum created by absence of law on a subject by issuing directions/ guidelines in exercise of powers under articles 32 and 142 of the Constitution for the protection of fundamental rights of citizens.[8] During the current year also, general guidelines/directions were issued by the apex court in matters of bail to the accused under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act),[9] directions for ensuring safety and protection of Amarnath

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7 *Suresh Kumar Koushal* v. *NAZ Foundation*, 2013 (204) DLT 533 : (2014) 1 SCC 1 : AIR 2014 SC 563.

8 Some of the significant areas included: regulating inter-country and intra-country adoptions [*Lakshmi Kant Pandey* v. *Union of India* (1984) 2 SCC 244]; raising the limit of compensation payable to victims of vehicular accidents [*M.K. Kunhimohammed* v. *P.A. Ahmedkutty*, AIR 1987 SC 2158]; streamlining the procedure for the issuance of caste (social status) certificates [*Kumari Madhuri Patil* v. *Addl. Commr., Tribal Development* (1994) 6 SCC 241 as modified in *Dayaram* v. *Sudhir Batham*, AIR 2012 SC 333]; regulating collection, storage and supply of blood for blood transfusions [*Common Cause* v. *Union of India* (1996) 1 SCC 753]; enforcing prohibition of child labour [*M.C. Mehta* v. *State of T.N.* (1996) 6 SCC 756]; preventing sexual harassment of women at workplace [*Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011]; protection in cases of arrest [*D.K. Basu* v. *State of W.B.*, AIR 1997 SC 610]; prison justice and prison reforms for nine major problems afflicting the system: (1) overcrowding; (2) delay in trial; (3) torture and ill-treatment; (4) neglect of health and hygiene; (5) insubstantial food and inadequate clothing; (6) prison vices; (7) deficiency in communication; (8) streamlining of jail visits; and (9) management of open-air prisons [*Rama Murthy* v. *State of Karnataka*, AIR 1997 SC 1739]; insulating central bureau of investigation and other investigating agencies from any extraneous influence for effective investigation to ensure equality and protect personal liberty [*Vineet Narain* v. *Union of India*, AIR 1998 SC 889]; punishment for contempt of court [*S.C. Bar Assn.* v. *Union of India*, AIR 1998 SC 1895]; rights of prisoners - under-trials, detenus, convicts [*Kalyan Chandra Sarkar* v. *Rajesh Ranjan*, AIR 2005 SC 972] and preventing ragging in educational institutions [*University of Kerala* v. *Council of Principals of Colleges* (2006) 8 SCC 304 read with (2010) 1 SCC 353].

9 *Thana Singh* v. *Central Bureau of Narcotics* (2013) 2 SCC 590, 603.

pilgrims,[10] regulating plying of *jugaads* on the roads,[11] and registration of first information report (FIR) in case a complaint relates to cognisable offence(s).[12] It must be remembered that the purpose of issuing directions/guidelines is to supplement the law in case of vacuum and not to supplant it. A direction is not meant to operate in conflict with law and, therefore, despite very wide wording of article 142, the Supreme Court cannot pass a direction which is in conflict with law.[13] The directions are issued by the court as it has no power to direct the legislature to enact a law on account of the application of the theory of separation of powers between three organs of the state.[14]

Another area of interest during the year was the judicial response to the rights of minorities under articles 29 and 30 of the Constitution. The debate here related not only to the extent of autonomy given to the minorities to establish and administer educational institutions of their choice but to the conferment of several types of monetary benefits on them, denying the same to those falling outside that category, i.e. majority of the population. What is the rationale as well as legality of giving the minorities reservations in admissions to educational institutions and in appointments to public services and conferring on them monetary benefits of various kinds such as scholarship, financial assistance, loans and other banking facilities, *etc.* and whether these benevolent measures of the executive bestowed solely on the basis of "religion" are constitutionally permissible? It may be re-called that in 2010, a seven-judges bench of the Andhra Pradesh High Court, by a majority of six to one, had declared unconstitutional 4 per cent reservation given to socially and economically backward classes of Muslims excluding creamy layer in admissions to educational institutions and posts in public services by the A.P. Reservation in favour of Socially and Educationally Backward Classes of Muslims Act, 2007.[15] A three-judge bench of the Supreme Court (K.G. Balakrishnan CJI and J.M. Panchal & Dr. B.S. Chauhan JJ), while referring to a constitution bench the appeal against the A.P. High Court decision, allowed 4 per cent reservation, as an *interim* measure till the disposal of the case, to 14 categories of persons covered under the Act of 2007.[16] The direction was to list the matter in the second week of August, 2010 but unfortunately the case was not decided till the end of the year 2013. Keeping such burning issues pending for long does no good either to the state or to the supporters/opponents of reservation. The court is expected to

10 *In re Amarnath Shrine* (2013) 3 SCC 247.

11 *Chairman, R.S.R.T. Corpn*. v. *Santosh*, AIR 2013 SC 2150 : (2013) 7 SCC 94.

12 *Lalita Kumari* v. *Govt. of U.P.*, 2013 (13) SCALE 559 : AIR 2014 SC 187. .

13 *S.C. Bar Assn.* v. *Union of India*, AIR 1998 SC 1895 : (1998) 4 SCC 408, para. 50. It has also been held that directions/guidelines are issued only where there is total legal vacuum and judicially unmanageable and unenforceable directions/orders cannot be issued: *Pravasi Bhalai Sangathan* v. *Union of India*, AIR 2014 SC 1591.

14 See *Union of India* v. *Prakash P. Hinduja* (2003) 6 SCC 195; *Supreme Court Employees' Welfare Assn.* v. *Union of India*, AIR 1992 SC 1546; *State of H.P.* v. *Parent of a Student of Medical College* (1985) 3 SCC 169.

15 *T. Murlidhar Rao* v. *State of AP*, 2010 (2) ALT 357 (LB).

16 *State of A.P*. v. *T. Damodar Rao*, 2010 (3) SCALE 344 : (2010) 3 SCC 462.

settle the entire law at the earliest to re-enforce public confidence particularly among the minority community. A few cases reported during the year 2013 considered various other issues pertaining to minorities and their rights under articles 29 and 30 of the Constitution of India.[17]

Some of the significant issues pertaining to the enforcement of fundamental rights raised during the current year were: 'authorities' against whom fundamental rights can be enforced;[18] reservation of 3 per cent seats in educational institutions and posts in appointments in public services in favour of persons with disabilities;[19] reservations in speciality and superspecialty faculty positions;[20] women's issues such as eve teasing,[21] sexual harassment,[22] right of women to live with dignity,[23] and closure of dance bars[24] and the appointment of information commissioners under the Right to Information Act, 2005.[25]

The year 2013 will also be remembered for the passing of the Lokpal and Lokayuktas Act, 2013 by Parliament which had been hanging since 1968. This legislation meets long standing demand for establishing an independent body for eradicating corruption at all levels of the administration. During the current year, some significant legislations relating to life and livelihood were passed by Parliament pursuant to directions issued and decisions rendered by the Supreme Court in the past. These were: the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (w.e.f. 9.12.2013), which aims at preventing, prohibiting and redressing sexual harassment of women at workplace;[26]

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17 *DAV College Trust and Management Society* v. *State of Maharashtra*, AIR 2013 SC 1420 : 2013 (4) SCALE 624; *State of Karnataka* v. *Associated Management of* (*Govt. Recognised U.E.M.*) *Primary & Secondary*, AIR 2013 SC 2930 : 2013 (8) SCALE 290 : JT 2013 (10) SC 579; *Bhartiya Janata Party* v. *State of West Bengal*, AIR 2013 Cal. 215; *Adam B. Chaki* v. *Govt. of India*, AIR 2013 Guj. 66; *K. Devaiah* v. *State of A.P.*, 2013 (2) ALT 600; *Shantiniketan Education Trust* v. *State of Gujarat*, AIR 2013 Guj. 210; *Madan Lal Bansal* v. *Union of India*, 2013 (5) ALJ 686; *Joseph Sriharsha and Mary Indraja Educational Society* v. *State of A.P.*, AIR 2013 A.P. 168; *Committee of Management, National Inter College, Pilikothi* v. *State of U.P.*, C.M. W.P. No. 30670 decided on 1.6.2012.

18 *Balmer Lawrie & Co. Ltd.* v. *Partha Sarathi Sen Roy* (2013) 8 SCC 345 and *Jatya Pal Singh* v. *Union of India* (2013) 6 SCC 452.

19 *Union of India* v. *National Federation of the Blind*, 2013 (12) SCALE 588.

20 *Faculty Association of AIIMS* v. *Union of India* (2013) 11 SCC 246 : JT 2013 (10) SC 526 :

21 *Deputy Inspector General of Police* v. *S. Samuthiram*, AIR 2013 SC 14.

22 *Medha Kotwal Lele* v. *Union of India*, AIR 2013 SC 93 : (2013) 1 SCC 297, 311, 312.

23 *Vajresh Venkatray Anvekar* v. *State of Karnataka*, AIR 2013 SC 329.

24 *State of Maharashtra* v. *Indian Hotel & Restaurant Assn.*, AIR 2013 SC 2582.

25 *Namit Sharma* v. *Union of India* (2013) 1 SCC 745. The directions issued in this case were re-called in *Union of India* v. *Namit Sharma*, 2013 (11) SCALE 85 : AIR 2014 SC 122.

26 *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241. In this case, in the absence of enacted law to provide for effective enforcement of the basic human right of gender equality

the National Food Security Act, 2013 (w.e.f. 05.07.2013), which aims at providing subsidised food grains to two-third of the country's 1.2 billion people;[27] the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which seeks to provide fair compensation to those whose land is taken away and rehabilitation of those affected by land takeover;[28] the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 (w.e.f. 06.12.2013), which aims at elimination of dry latrines and manual scavenging and the rehabilitation in alternate occupations of those engaged in this task;[29] and the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 providing for protection of livelihood rights, social security of street vendors and regulation of urban street vending in the country.[30]

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and guarantee against sexual harassment and abuse, more particularly against sexual harassment of women at workplaces, the court, in exercise of the power under art. 32 of the Constitution, had laid down guidelines and norms for all workplaces and other institutions, until a legislation was enacted for the purpose. This was to be treated as law declared by the court under art. 141 of the Constitution. It may be noted that Gender Sensitisation and Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal), Regulations, 2013 were framed on 17th July 2013 as per order dated 17th July 2013 passed in Writ Petition (Civil) No. 162 of 2013 - *Ms. Binu Tamta* v. *High Court of Delhi* vide Supreme Court of India No. F.26/ 2007-SCA(I) dated August 6, 2013, published in *Gazette of India*, Part I, section 1 dated 21st September, 2013, p. 543, No. 38. The Chief Justice of India appointed the date of publication of these regulations in the official *gazette* as the date on which they shall come into force. Women in the Supreme Court, whether they are its employees or not have the right to relief under the regulations. Gender Sensitisation and Internal Complaints Committee constituted under the regulations with 7 to 13 members will deal with complaints under the regulation.

27 *Centre for Environment & Food Security* v. *Union of India* (2011) 5 SCC 676.

28 See cases such as *Narmada Bachao Andolan* v. *State of M.P.,* AIR 2011 SC 1989; *State of M.P*. v. *Narmada Bachao Andolan* (2011) 7 SCC 639 relating to resettlement and rehabilitation of displaced persons on acquisition of their land with reference to right to life under art. 21; cases which created a lot of controversy regarding land acquisition as per the procedure prescribed under the Land Acquisition Act, 1897 in some of which land acquired under the Act was quashed for following a summary procedure or that the procedure followed was held to be invalid, e.g. *Radhey Shyam* v. *State of U.P.* (2011) 5 SCC 553.

29 See *Safai Karamchari Andolan* v. *Union of India,* 2011 (1) SCALE 708.

30 The Bill was passed in the Lok Sabha on 6 September 2013 and by the Rajya Sabha on 19 February 2014. The bill received the assent of the President of India on 4 March 2014. The Act came into force with effect from 1 May 2014. The Supreme Court in *Gainda Ram* v. *MCD* (2010) 10 SCC 715 had directed the appropriate government to enact a law before 30.6.2011 on the basis of the Bill proposed by the government or on the basis of any amendment thereof so that the hawkers may precisely know the contours of their rights. The direction was in exercise of power to protect the fundamental rights of the citizens.

II 'STATE' UNDER ARTICLE 12

Are the fundamental rights enforceable against the state only? Can all or any of them be enforced against private persons/bodies/organisations? Can the fundamental rights be enforced against bodies/authorities which are not 'State' under article 12? The judicial response on the issue has been jig-jag which has created a lot of confusion and there is an urgent need to re-visit the entire gamut of case law on the subject. By and large, the court has looked to various aspects of the body/institution allegedly violating a fundamental right; it has not considered any case from the point of view of the fundamental right(s) alleged to have been violated. The question has been answered by the Supreme Court individually in some of alleged violations of the fundamental rights such as the right to equality, right to life and personal liberty, right against exploitation including trafficking in human beings, rights of minorities, *etc.* when the alleged violator was a statutory corporation, a registered society or a government company. In fact, at no point of time, there was much controversy regarding the status of statutory bodies which have throughout been considered to be 'State' under article 12.[31] There is, however, a decision by Uttarakhand High Court[32] according to which a university established by a state legislation was not 'State' under article 12. The court failed to consider that the university is providing not only an important public service like education, it has also powers to make delegated legislation such as statutes, ordinances, rules and regulations which have statutory force and binding on all. So far as the government companies are concerned, one case has been decided in which the principles laid down in *R.D. Shetty* and other cases were applied.[33] The real controversy has been with regard to application of the principles in case of registered societies where the courts have applied them in individual cases as per the judges' own perception.[34] There is a long list of cases showing shifting attitude of the apex court in interpreting "other authorities" under article 12 keeping in view the changing socio-economic scenario when the fundamental right was claimed against a statutory corporation, a registered society or a government company.[35]

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31 *Ramana Dayaram Shetty* v. *International Airport Authority of India*, AIR 1979 SC 1628; *Rajasthan SEB* v. *Mohan Lal*, AIR 1967 SC 1857.

32 *Arun Kumar* v. *ICFAI University*, AIR 2009 (NOC) 2860 (UTR.). For a brief comment on this case, see S N Singh, "Constitutional Law – I (Fundamental Rights)", XLV *ASIL* 125 at 127 (2009).

33 *Som Prakash Rekhi* v. *Union of India* (19881) 1 SCC 449.

34 *Ajay Hasia* v. *Khalid Mujib* (19881) 1 SCC 722; *Tekraj Vasandi* v. *Union of India* (1988) 1 SCC 236; *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology* (2002) 4 SCC 111; *Lt. Governor of Delhi* v. *V.K. Sodhi* (2007) 15 SCC 136; *State of U.P.* v. *Radhey Shyam Rai* (2009) 5 SCC 577*; Sindhi Education Society* v. *The Chief Secretary of NCT of Delhi* (2010) 8 SCC 49; *Tata Memorial Hospital Workers Union* v. *Tata Memorial Hospital*, AIR 2010 SC 1285.

35 See the observations of N. Santosh Hegde J in *Zee Telefilms Ltd.* v. *Union of India* (2005) 4 SCC 649: "In the year 1967 in the case of *Rajasthan SEB* v. *Mohan Lal* a Constitution Bench of this Court held that the expression "other authorities" is wide enough to include within it *every authority created by a statute on which powers are*

But the court has not come out with clear verdict when it comes to violation of a fundamental right by an individual. In *M.C. Mehta* v. *Union of India*,[36] the Supreme Court left open the question whether compensation under article 32 can be awarded against a private sector company for violating the fundamental right under article 21. At the same time, we get a large number of cases which establish that the court has intervened in cases of violation of various fundamental rights by private bodies/entities in multifarious fact situations. In *Ahmedabad St. Xaviers College Society* v. *State of Gujarat*,[37] a nine-judge bench had taken the view that "the conditions of employment of teachers was a regulatory measure conducive to uniformity, efficiency and excellence in educational courses and did not violate the fundamental right of the minority institutions under Article 30." Relying on this judgment, the right to equality was enforced against a private minority school in *Frank Anthony Public School Employees' Assn.* v. *Union of India.*[38] Similarly, in *J.P. Unni Krishnan* v. *State of A.P.*,[39] the apex court had subjected the private educational institutions to the discipline of article 14. Likewise, in *People's Union for Democratic Rights* v. *Union of India*,[40] it was held that if a contractor did not pay minimum wages to its workers as fixed under the Minimum Wages Act, 1948, a writ petition was maintainable under article 32 of the Constitution against the guilty, be it the government or a private person. P.N. Bhagwati J in this case had observed:[41]

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conferred to carry out governmental or quasi-governmental functions and functioning within the territory of India or under the control of the Government of India…. Almost a decade later another Constitution Bench of this Court somewhat expanded this concept of "other authority" in the case of *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421. In this case the Court held that bodies like Oil and Natural Gas Commission, Industrial Finance Corporation and Life Insurance Corporation which were created *by* statutes, because of the nature of their activities do come within the term "other authorities" in Article 12 even though in reality they were really constituted for commercial purposes…. From the above, it is to be noticed that because of the change in the socio-economic policies of the Government this Court considered it necessary by judicial interpretation to give a wider meaning to the term "other authorities" in Article 12 so as to include such bodies which were created *by* an Act of legislature to be included in the said term "other authorities"…. This judicial expansion of the term "other authorities" came about primarily with a view to prevent the Government from bypassing its constitutional obligations by creating companies, corporations, etc. to perform its duties…. (I)n … *Ajay Hasia* the Court went one step further and held that a society registered under the Societies Registration Act could also be an instrument of State for the purpose of the term "other authorities" in Article 12."

36 AIR 1987 SC 1086.

37 (1974) 1 SCC 717 : AIR 1974 SC 1389 : (1975) 1 SCR 173.

38 (1986) 4 SCC 707.

39 (1993) 1 SCC 645.

40 (1982) 3 SCC 235.

41 *Id.* at 252- 53, 260.

> Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24…. It is Article 23 with which we are concerned and that Article is clearly designed to protect the individual not only against the State but also against other private citizens. Article 23 is not limited in its application against the State but it prohibits "traffic in human being and begar and other similar forms of forced labour" practised by anyone else. The sweep of Article 23 is wide and unlimited and it strikes at "traffic in human beings and begar and other similar forms of forced labour" wherever they are found…. The prohibition against "traffic in human beings and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice.X X X
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> Before leaving this subject, we may point out with all the emphasis at our command that whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. Of course, the person whose fundamental right is violated can always approach the court for the purpose of enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of the fundamental right of such person, particularly when he belongs to the weaker section of humanity and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him.

In *Union Carbide Corpn. Ltd.* v. *Union of India*,[42] a foreign company carrying on business in India was held answerable to the violation of fundamental right to life under article 21. In a large number of public interest cases, the court did not ask as to whether the guilty was a state or any private person or organisation. For instance, for the enforcement of the fundamental right of industrial workers under article 21, the court intervened under article 32 in a public interest litigation to enforce labour welfare legislations which were being violated by the employers in a big way.[43] Almost all cases relating to environmental protection involved private parties but the court intervened in all of them even without questioning whether the violators were 'State' or its agency or instrumentality because environmental protection was considered to be a part of right to life and everyone has a right to

42 (1991) 4 SCC 584.

43 *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 SCC 161.

clean environment, potable water and clean air.[44] In matters pertaining to the actions of *khap panchayats* against religious rituals and couples marrying against the wishes of their family members, the court has intervened on several occasions.[45]

The judiciary is not 'State' under article 12[46] but a judicial decision/order may sometimes be violative of the fundamental rights though here again the court is not consistent in its approach. In *Ram Deo Chauhan* v. *Bani Kanta Das*,[47] A.K. Ganguly J observed:

> The assumption … that there can be no violation of a person's human rights by a judgment of this Court is possibly not correct.
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> This Court in exercise of its appellate jurisdiction has to deal with many judgments of the High Courts and the Tribunals in which the High Courts or the Tribunals, on an erroneous perception of facts and law, have rendered decisions in breach of human rights of the parties and this Court corrects such errors in those judgments. The instances of this Court's judgment violating the human rights of the citizens may be extremely rare but it cannot be said that such a situation can never happen.
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> We can remind ourselves of the majority decision of the Constitution Bench of this Court in *ADM, Jabalpur* v. *Shivakant Shukla* [(1976) 2 SCC 521]. The majority opinion was that in view of the Presidential Order dated 27-6-1975 under Article 359(1) of the Constitution, no person has the locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ to enforce any right to personal liberty of a person detained under the then law of preventive detention (Maintenance of Internal Security Act of 1971), on the ground that the order is illegal or mala fide or not in compliance with the Act.
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> The lone dissenting voice of Khanna, J. in *ADM, Jabalpur* case interpreted the legal position differently ….
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> There is no doubt that the majority judgment of this Court in *ADM, Jabalpur* case violated the fundamental rights of a large number of people in this country.

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44 See cases relating to pollution of the river Ganga; shifting/re-location of industries in Delhi; plying of CNG vehicles in Delhi; protection of Taj; controlling sound pollution; leakage of oleum gas from Shri Ram Food & Fertilizer Industries Ltd., etc.: *M.C. Mehta* v. *Union of India*, AIR 1987 SC 1086, AIR 2002 SC 1696, (2006) 3 SCC 399, AIR 1997 SC 734 ; *Indian Council for Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1446*; Narmada Bachao Andolan* v. *Union of India*, AIR 2000 SC 3751 ; *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388.

45 See e.g. *Arumugam Servai* v. *State of T.N*. (2011) 6 SCC 405.

46 *Smt. Ujjam Bai* v. *State of U.P*., AIR 1962 SC 1621; *Basheshar Nath* v. *C.I.T*., 1959 Supp. (1) SCR 528.

47 (2010) 14 SCC 209 at 224; also see *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602; S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVI *ASIL* 159 (2010).

On the other hand, one may note the observations to the *contra* made by Dr. B.S. Chauhan J in *Poonam* v. *Sumit Tanwar*,[48] without any reference to the above case:

> (A) writ lies only against a person if it is a statutory body or performs a public function or discharges a public or a statutory duty, or is "State" within the meaning of Article 12 of the Constitution.
>
> It is a settled legal proposition that the remedy of a person aggrieved by the decision of the competent judicial tribunal is to approach for redress a superior tribunal, if there is any, and that order cannot be circumvented by resorting to an application for a writ under Article 32 of the Constitution. Relief under Article 32 can be for enforcing a right conferred by Part III of the Constitution and only on the proof of infringement thereof. If by adjudication by a court of competent jurisdiction the right claimed has been negatived, a petition under Article 32 of the Constitution is not maintainable. *It is not generally assumed that a judicial decision pronounced by a court may violate the fundamental right of a party. Judicial orders passed by the court in or in relation to proceeding pending before it are not amenable to be corrected by issuing a writ under Article 32 of the Constitution.* (Emphasis supplied)

The following observation of N. Santosh Hegde J, speaking for majority of a constitution bench, in *Zee Telefilms Ltd*. v. *Union of India*,[49] may also be noted on the issue of availability of article 21 against individuals and persons other than 'State':

> There is no doubt that Article 19(1)(*g*) guarantees to all citizens the fundamental right to practise any profession or to carry on any trade, occupation or business and that such a right can only be regulated by the State by virtue of Article 19(6). Hence, it follows as a logical corollary that any violation of this right will have to be claimed only against the State and *unlike the rights under Articles 17 or 21, which can be claimed against non-State actors including individuals*, the right under Article 19(1)(*g*) cannot be claimed against an individual or a non-State entity.

In connection with the responsibility of the state in protecting the fundamental rights of citizens when they are violated by others in society, the following observations made by a division bench of the apex court in *Ram Jethmalani* v. *Union of India*[50] are noteworthy:

> The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the

48 (2010) 4 SCC 460 at 464.

49 (2005) 1 SCC 649 at 480.

50 (2011) 8 SCC 1 at 36.

> rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. *The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.* (Emphasis supplied)

This question was once again considered during 2013 by the Supreme Court in some cases. One was a public interest litigation relating to right to privacy being violated by snooping through foreign based internet companies by United States national intelligence agency (NSA) while two other cases related to a government companies. If foreign based internet companies violate the Indian citizens' right to privacy by snooping, can the Supreme Court enforce that right by directing the Union of India to protect the citizens' right? The question arose thus: It was widely reported in the press that nine U.S. based internet companies were sharing world wide data with NSA through its secret surveillance program PRISM. A public interest litigation was filed under article 32 of the Constitution praying the court to direct the Union of India, which was the sole respondent in the petition, *inter alia* to take urgent steps to safeguard the government's sensitive internet communications which were "record" under the Public Records Act, 1995 in the interest of national security and also to ensure privacy of data of millions of Indian citizens under article 21 of the Constitution which was being unlawfully compromised by the foreign companies operating in India. A division bench of the apex court, while disposing of the petition without notice to the respondent, held:[51]

> This Writ petition has been filed under Article 32 of the Constitution of India complaining of breach of privacy rights of persons in India and breach of contracts by US Internet Companies and US Intelligence Agencies. The petitioner has cited decisions of this Court in *PUCL* v. *Union of India* (1997) 1 SCC 301 and *Ram Jethamalani* v. *Union of India* (2011) 8 SCC 1 to submit that right to privacy is part of the right of a person under Article 21 of the Constitution of India. Our jurisdiction under Article 32 of the Constitution is confined to enforcement of

51 *S.N. Singh* v. *Union of India*, W.P. (C) No. 381/2013 decided on 27.06.2013.

> fundamental rights including the right under Article 21 of the Constitution. A Constitution Bench of this Court has held in *P.D. Sundaram* v. *Central Bank of India*, AIR 1952 SC 59 that fundamental rights and in particular Article 21 of the Constitution are guarantees against the State and not against private individuals. In this writ petition, although reliefs have been claimed for directions to the State it is not the case of the petitioner that the State is doing any act by which fundamental rights of any person is being affected. Persons may have the right to privacy against private individuals and private organisations other than the State but then this right will not be covered under Article 21 of the Constitution. Hence, the remedy is not a writ petition under Article 32 of the Constitution before this Court. The petitioner may, therefore, move any other forum for the enforcement of the right of privacy of persons.

It may be remembered that in *P.D. Shamdasani* v. *Central Bank of India Ltd.*[52] relied upon by the court, the issue related to fundamental right to property under articles 19(1)(f) and 31 of the Constitution and the question of violation of right to personal liberty under article 21 was not before the court. The following observations of Patanjali Shastri CJ are noteworthy:[53]

> Neither Art. 19(1)(f) nor Art. 31(1) on its true construction was intended to prevent wrongful individual acts or to provide protection against merely private conduct ….
>
> Even assuming that Cl. (1) has to be read and construed apart from Cl. (2), it is clear that it is a declaration of the fundamental right of private property in the same negative form in which Art. 21 declares the fundamental right to life and personal liberty. There is no express reference to the State in Art. 21. But could it be suggested on that account that that article was intended to afford protection to life and personal liberty against violation by private individuals. The words "except by procedure established by law" plainly exclude such a suggestion.

This case was relied upon in *Vidya Verma* v. *Dr Shiv Narain Verma*,[54] in which a petition was filed for a writ of habeas corpus under art. 21. A constitution bench of five judges, speaking through Bose J, pointed out that state was not a party to the habeas corpus petition filed by the petitioner against the respondent who was her father. The question arose whether the Supreme Court could issue a writ of habeas corpus against a private party. Relying on the observations made in *P.D. Shamdasani*, Bose J held:[55]

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52 AIR 1952 SC 59.

53 *Id.* at 59-60.

54 AIR 1956 SC 108 : (1955) 2 SCR 983.

55 *Id.* at 109-110 (of AIR).

> In *A.K. Gopalan* v. *State of Madras*[56] four of the six learned Judges … held that the word "law" in Article 21 referred to State-made law and not to law in the abstract…. Patanjali Sastri, J. … said that as a rule constitutional safeguards are directed against the State and its organs and that protection against violation of rights by individuals must be sought in the ordinary law; and S.R. Das, J. dealing with the question of preventive detention said … that Article 21 protects a person against preventive detention by the executive without the sanction of a law made by the legislature.
>
> This principle was applied to Articles 19(1)(*f*) and 31(1) by a Bench of five Judges in *P.D. Shamdasani* v. *Central Bank of India* [AIR 1952 SC 59] who held that violation of rights of property by a private individual is not within the purview of these Articles, therefore, a person whose rights of property are infringed by a private individual must seek his remedy under the ordinary law and not under Article 32. Article 21 was not directly involved….
>
> They held that the language of Article 31(1) was similar and decided that Article 31(1) did not apply to invasions of a right by a private individual and consequently no writ under Article 32 would lie in such a case. For the same reasons we hold that the present petition which is founded on Article 21 does not lie under Article 32.

What would be the answer of the court if a 'person' does not perform his statutory or public duty, say a private trust running a college affiliated to a university established by law which is required under the law to give effect to the directives/decisions of the university? Can the court refuse to issue a writ of mandamus against the trust for its failure to perform its statutory duty? Under article 226 of the Constitution of India, the High Court can issue any of the writs including the writ of mandamus against any 'person' or 'authority' including the government for enforcing the fundamental rights.[57] The court in that case had clearly held:[58]

> The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is

56 (1950) SCR 88.

57 See *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani* (1989) 2 SCC 691; also see *Praga Tools Corpn*. v. *C.A. Imanual* (1965) 3 SCR 536.

58 (1989) 2 SCC 691 at 700.

> imposed, if a positive obligation exists mandamus cannot be denied. X X X
>
> Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226.

The application of the equality clause to private educational institution, whether aided or un-aided by the State, in the form of protective discrimination under article 15(5) of the Constitution of India clearly indicates that the right conferred under that clause can be enforced by a writ filed under article 32 of the Constitution. Thus, even though article 14 is a mandate to the State not to deny to any person equality before law or equal protection of laws throughout the territory of India and article 19(1)(g) guarantees freedom to every citizen to practise any profession or to carry on any occupation, trade or business, the Supreme Court under article 32 cannot refuse to enforce the rights of those for whose benefit clause (5) to article 15 has been enacted. Needless to say that this provision had been upheld by the Supreme Court in *Ashoka Kumar Thakur* v. *Union of India*[59] and the constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009 giving effect to the provisions of clause (5) of article 15 was upheld in *Society for Un-Aided P. School of Rajasthan* v. *Union of India*.[60] This clearly establishes that even the right to equality can be claimed against private persons/organisations to a limited extent in so for as admission to educational institutions is concerned. Thus, the scope of right to equality has considerably been expanded by insertion of clause (5) to article 15 of the Constitution.

Article 12 of the Constitution of India was introduced in the Draft Constitution as article 7. In order to understand what the framers of the Constitution thought about the enforcement of fundamental rights, it is pertinent to note the following statement of Dr. B.R. Ambedkar which described the scope of this article and the reasons for including it in Part III:[61]

> The object of the fundamental rights is twofold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority - I shall presently explain what the word 'authority' means - upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the fundamental rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even Village Panchayats and Taluk Boards, in fact, every authority which has

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59 (2008) 6 SCC 1.

60 AIR 2012 SC 3445.

61 VII *Constituent Assembly Debates* 610 (1948).

> been created by law and which has got certain power to make laws, to make rules, or make bye-laws.
>
> If that proposition is accepted - and I do not see anyone who cares for fundamental rights can object to such a universal obligation *being imposed upon every authority created by law* - then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as 'the State', …; or, to keep on repeating every time, 'the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority'. It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. *The wisest course is to have this comprehensive phrase and to economise in words*.

Government companies – whether 'State'

The status of a 'government company'[62] as an 'authority' under article 12 of the Constitution has to be considered in the light of the above statement. This question was considered in minute details by a three-judge bench of the Supreme Court in *Som Prakash Rekhi* v. *Union of India*[63] with reference to Bharat Petroleum Corporation Ltd. which was the successor of Burmah Shell Oil Storage Ltd. which had been nationalised through the Burmah Shell (Acquisition of Undertakings in India) Act, 1976. V.R. Krishna Iyer J, relying on tests laid down in *Ramana Dayaram Shetty* v. *International Airport Authority of India*,[64] held that a government company was an instrumentality of state and, therefore, covered within the concept of state under article 12. The learned judge pointed out the consequences of excluding a government company from the purview of article 12 thus:[65]

62 A government company is defined under section 617 of the Companies Act, 1956 [now sec. of the Companies Act, 2013 (No. 18 of 2013)] as a company in which the central government or the state government(s) or both central and state government(s) hold not less than 51 per cent of the paid up share capital.

63 (1981) 1 SCC 449.

64 *Ramana Dayaram Shetty* v. *International Airport Authority of India* (1979) 3 SCC 489. These tests were: (*1*) "[O]ne thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government."; (*2*) "[W]here the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character."; (*3*) "It may also be a relevant factor … whether the corporation enjoys monopoly status which is State-conferred or State-protected." ; (*4*) "[E]xistence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality."; (*5*) "If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government"; (*6*) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

65 (1981) 1 SCC 449 at 479.

> Imagine the possible result of holding that a government company, being just an entity created *under* a statute, not *by* a statute, it is not "State" Having regard to the directive in Article 38 and the amplitude of the other articles in Part IV Government may appropriately embark upon almost any activity which in a non-socialist republic may fall within the private sector. Any person's employment, entertainment, travel, rest and leisure, hospital facility and funeral service may be controlled by the State. And if all these enterprises are executed through Government companies, bureaus, societies, councils, institutes and homes, the citizen may forfeit his fundamental freedoms *vis-a-vis* these strange beings which are Government *in fact* but corporate *in form.* If only fundamental rights were forbidden access to corporations, companies, bureaus, institutes, councils and kindred bodies which act as agencies of the administration, there may be a breakdown of the rule of law and the constitutional order in a large sector of Governmental activity carried on under the guise of "jural persons". It may pave the way for a new tyranny by arbitrary administrators operated from behind by Government but unaccountable to Part III of the Constitution. We cannot assent to an interpretation which leads to such a disastrous conclusion unless the language of Article 12 offers no other alternative.
>
> The common sense signification of the expression "other authorities under the control of the Government of India" is plain and there is no reason to make exclusions on sophisticated grounds such as that the legal person must be a statutory corporation, must have power to make laws, must be created *by* and not *under* a statute and so on. The jurisprudence of third world countries cannot afford the luxury….

This question was again considered during the current year by the Supreme Court in *Balmer Lawrie & Co. Ltd.* v. *Partha Sarathi Sen Roy*,[66] in which the appellant government company was carrying on business in diverse fields through strategic business units, which had no monopoly in any business, but involved in providing leather chemicals and tea blending and packaging, manufacture of packaging materials such as steel drums and LPG gas cylinders, grease and lubricants and were also providing air freight services, ocean freight services, and project cargo management and "logistic services". The respondents challenged the termination of their services by the appellant company by giving them three months' notice as provided in clause 11(a) of the letter of appointment.[67] The

66 (2013) 8 SCC 345.

67 Cl. 11(*a*) of the letter of appointment read as under:

"The Company shall have the right, at its sole discretion, to terminate your services by giving you three calendar months' notice in writing and without assigning any reason. The Company also reserves the right to pay you in lieu of notice, a sum by way of compensation equal to three months' emoluments consisting of basic salary, dearness allowance, house rent assistance and bonus entitlements, if any, after declaration of bonus."

appellant's contention was that it was not "State" under article 12 and, therefore, it was not amenable to writ jurisdiction of the court. More than 61.8 per cent shares in the appellant company were held by IBP, a government company. The court did not notice *Som Prakash* decision which directly covered the point but it referred to, and relied upon, the seven-judge bench decision in *Pradeep Kumar Biswas*,[68] *Zee Telefilms Ltd*.[69] and a few other leading cases.[70]

In *Pradeep Kumar Biswas*, it was held that, while examining the issue, the court must bear in mind, "whether in the light of the *cumulative facts* as established, the body is *financially, functionally and administratively* dominated by or is under the control of the Government. Such control must be *particular* to the body in question and must be *pervasive*". The court further held that "financial support of the State, coupled with an *unusual degree of control* over the management and policies of a body, may lead to an inference that it is a "State". Mere regulatory control whether under statute or otherwise would not serve to make a body a State. Additionally, other factors such as, whether the company/corporation performs important public functions, whether such public function(s) are closely related to governmental function, and whether such function(s) are carried out for the benefit of the public, etc. are also considered."

In *Zee Telefilms Ltd.*, the question was whether the board of cricket control of India (BCCI) was "State" under article 12. The court noted these facts of the case: (*1*) The board was not created by a statute; (*2*) No part of the share capital of the board was held by the government; (*3*) Practically no financial assistance was given by the government to meet the whole or entire expenditure of the board; (*4*) The board did enjoy a monopoly status in the field of cricket but such status was not state-conferred or state-protected; (*5*) There was no existence of a deep and pervasive state control. The control if any was only regulatory in nature as applicable to other similar bodies. This control was not specifically exercised under any statute applicable to the board. All functions of the board were neither public functions nor were they closely related to governmental functions; and (*6*) The board was not created by transfer of a government-owned corporation. It was an autonomous body. The majority of three judges speaking through K.S. Hegde J held that BCCI was not an agency or instrumentality of state. The court, pointing out the changing scenario of socio-economic development in the country, observed:[71]

> (T)here can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of courts to interpret the same to fulfil the needs and aspirations of the people depending on the needs of the time. It is noticed earlier in this judgment that in Article 12 the term 'other authorities' was introduced at the time of framing of the

68 *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology* (2002) 5 SCC 111.

69 *Zee Telefilms Ltd.* v. *Union of India* (2005) 4 SCC 649.

70 E.g. *Ramana Dayaram Shetty* v. *International Airport Authority of India* (1979) 3 SCC 489.

> Constitution with a limited objective of granting judicial review of actions of such authorities which are created under the statute and which discharge State functions. However, because of the need of the day this Court in *Rajasthan SEB* [AIR 1967 SC 1857] and *Sukhdev Singh* [(1975) 1 SCC 421] *noticing the socio-economic policy of the country thought it fit to expand the definition of the term 'other authorities' to include bodies other than statutory bodies*. This development of law by judicial interpretation culminated in the judgment of the seven-Judge Bench in *Pradeep Kumar Biswas*. It is to be noted that in the meantime the socio-economic policy of the Government of India has changed [see *BALCO Employees' Union* v. *Union of India* (2002) 2 SCC 333] and the State is today distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, *the situation prevailing at the time of Sukhdev Singh is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of 'other authorities' in Article 12 by judicial interpretation at least for the time being*. It should also be borne in mind that as noticed above, in a democracy *there is a dividing line between a State enterprise and a non-State enterprise*, which is distinct and the *judiciary should not be an instrument to erase the said dividing line* unless, of course, the circumstances of the day require it to do so." (Emphasis supplied)

S.B. Sinha J, speaking for the minority, took a contrary view. According to the learned judge:[72]

Broadly, there are three different concepts which exist for determining the questions which fall within the expression "other authorities":

> (*i*) The corporations and the societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution wherefor the capital, infrastructure, initial investment and financial aid, etc. are provided by the State and it also exercises regulation and control thereover.
>
> (*ii*) Bodies created for research and other developmental works which are otherwise governmental functions but may or may not be a part of the sovereign function.
>
> (*iii*) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the Government.

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71 *Zee Telefilms Ltd.* v. *Union of India* (2005) 4 SCC 649 at 683.

72 *Id.* at 694-95.

> There cannot be same standard or yardstick for judging different bodies for the purpose of ascertaining as to whether any of them fulfils the requirements of law therefor or not.

In *Balmer Lawrie & Co. Ltd.*, the court drew a distinction between sovereign and other functions of the state and held that all the welfare activities of the state were not to be treated as sovereign functions.[73] Dr. B.S. Chauhan J, on behalf of the division bench, observed:[74]

> Every governmental function need not be sovereign. State activities are multifarious. Therefore, a scheme or a project, sponsoring trading activities may well be among the State's essential functions, which contribute towards its welfare activities aimed at the benefit of its subjects, and such activities can also be undertaken by private persons, corporates and companies. Thus, considering the wide ramifications, sovereign functions should be restricted to those functions, which are primarily inalienable, and which can be performed by the State alone. Such functions may include legislative functions, the administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon, etc. Therefore, mere dealing in a subject by the State, or the monopoly of the State in a particular field, would not render an enterprise sovereign in nature. X X X
>
> A public authority is a body which has public or statutory duties to perform, and which performs such duties and carries out its transactions for the benefit of the public, and not for private profit. Article 298 of the Constitution provides that the executive power of the Union and the State extends to the carrying on of any business or trade. A public authority is not restricted to the Government and the legislature alone, and it includes within its ambit, various other instrumentalities of State action. The law may bestow upon such organisation the power of eminent domain. The State in this context, may be granted tax exemption, or given monopolistic status for certain purposes. The "State" being an abstract entity, can only act through an instrumentality or an agency of natural or juridical persons. The concept of an instrumentality or agency of the Government is not limited to a corporation created by a statute, but is equally applicable to a company, or to a society. In a given case, the court must decide, whether such a company or society is an instrumentality or agency of the Government, so as to determine whether the same falls within the meaning of the expression "authority", as mentioned in Article 12 of the Constitution, upon consideration of all relevant factors.

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73 *N. Nagendra Rao & Co*. v. *State of A.P.* [(1994) 6 SCC 205], *Chief Conservator of Forests* v. *Jagannath Maruti Kondhare* [(1996) 2 SCC 293] and *Bangalore Water Supply & Sewerage Board* v. *A. Rajappa* [(1978) 2 SCC 213].

74 *Balmer Lawrie & Co. Ltd.* v. *Partha Sarathi Sen Roy* (2013) 8 SCC 345 at 358.

The court was conscious of the difficulty in providing any uniform definition of the term when it observed:[75]

> In light of the aforementioned discussion, it is evident that it is rather difficult to provide an exhaustive definition of the term "authorities", which would fall within the ambit of Article 12 of the Constitution. This is precisely why only an inclusive definition is possible. It is in order to keep pace with the broad approach adopted with respect to the doctrine of equality enshrined in Articles 14 and 16 of the Constitution, that whenever possible courts have tried to curb the arbitrary exercise of power against individuals by centres of power, and therefore, there has been a corresponding expansion of the judicial definition of the term "State", as mentioned in Article 12 of the Constitution.
>
> In light of the changing socio-economic policies of this country, and the variety of methods by which government functions are usually performed, the court must examine, whether an inference can be drawn to the effect that such an authority is in fact an instrumentality of the State under Article 12 of the Constitution. It may not be easy for the court, in such a case, to determine which duties form a part of private action, and which form a part of State action, for the reason that the conduct of the private authority may have become so entwined with governmental policies, or so impregnated with governmental character, so as to become subject to the constitutional limitations that are placed upon State action. Therefore, the court must determine whether the aggregate of all relevant factors once considered, would compel a conclusion as regards the body being bestowed with State responsibilities.

Thus, in order to decide whether the appellant company was "State" within the meaning of article 12 of the Constitution, the company must be under the deep and pervasive control of the government. The court held:[76]

> In order to determine whether an authority is amenable to writ jurisdiction except in the case of habeas corpus or quo warranto, it must be examined, whether the company/corporation is an instrumentality or an agency of the State, and if the same carries on business for the benefit of the public; whether the entire share capital of the company is held by the Government; whether its administration is in the hands of a Board of Directors appointed by the Government; and even if the Board of Directors has been appointed by the Government, whether it is completely free from governmental control in the discharge of its functions; whether the company enjoys monopoly status; and whether

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75 *Id.* at 358-59.

76 *Id.* at 360-61.

> there exists within the company, deep and pervasive State control. The other factors that may be considered are whether the functions carried out by the company/corporation are closely related to governmental functions, or whether a department of the Government has been transferred to the company/corporation, and the question in each case, would be whether in light of the cumulative facts as established, the company is financially, functionally and administratively under the control of the Government. In the event that the Government provides financial support to a company, but does not retain any control/ watch over how it is spent, then the same would not fall within the ambit of exercising deep and pervasive control. Such control must be particular to the body in question, and not general in nature. It must also be deep and pervasive. The control should not, therefore, be merely regulatory.

Relying on *W.B. SEB* v. *Desh Bandhu* Ghosh,[77] the court held that the service rule to terminate the services by giving notice or salary in lieu of notice was in violation of the rules of natural justice and such a power amounted to 'hire and fire rule' which the court disapproved. The court held:[78]

> Where the actions of an employer bear public character and contain an element of public interest, as regards the offers made by him, including the terms and conditions mentioned in an appropriate table, which invite the public to enter into contract, such a matter does not relegate to a pure and simple private law dispute, without the insignia of any public element whatsoever. Where an unfair and untenable, or an irrational clause in a contract, is also unjust, the same is amenable to judicial review. The Constitution provides for achieving social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the law. Thus, it is necessary to strike down an unfair and unreasonable contract, or an unfair or unreasonable clause in a contract, that has been entered into by parties who do not enjoy equal bargaining power, and are hence hit by Section 23 of the Contract Act, and where such a condition or provision becomes unconscionable, unfair, unreasonable and further, is against public policy. Where inequality of bargaining power is the result of great disparity between the economic strengths of the contracting parties, the aforesaid principle would automatically apply for the reason that, freedom of contract must be founded on the basis of equality of bargaining power between such contracting parties, and even though ad idem is assumed, applicability of standard form of contract is the

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77 (1985) 3 SCC 116; see also *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly* (1986) 3 SCC 156; *DTC* v. *Mazdoor Congress*, AIR 1991 SC 101; *K.C. Sharma* v. *Delhi Stock* Exchange, AIR 2005 SC 2884; *Punjab National Bank* v. *Astamija* Dash, AIR 2008 SC 3182.

78 (2013) 8 SCC 345 at 361-62.

> rule. Consent or consensus ad idem as regards the weaker party may therefore, be entirely absent. Thus, the existence of equal bargaining power between parties becomes largely an illusion. The State itself, or a State instrumentality cannot impose unconstitutional conditions in statutory rules/regulations vis-à-vis its employees in order to terminate the services of its permanent employees in accordance with such terms and conditions.

On the question whether the court should examine only those facts and circumstances that existed on the date on which the cause of action arose, or whether subsequent developments were also to be taken into consideration, the apex court had already held in *Rajesh D. Darbar* v. *Narasingrao Krishnaji Kulkarni*[79] as follows:

> The impact of subsequent happenings may now be spelt out. First, its bearing on the right of action, second, on the nature of the relief and third, on its importance to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts.… Subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage. *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri* (AIR 1941 FC 5) falls in this category. Courts of justice may, when the compelling equities of a case oblige them, shape reliefs - cannot deny rights - to make them justly relevant in the updated circumstances. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the court, even in appeal, can take note of such supervening facts with fundamental impact. This Court's judgment in *Pasupuleti Venkateswarlu* v. *Motor & General Traders* (AIR 1975 SC 1409) read in its statutory setting, falls in this category. Where a cause of action is deficient but later events have made up the deficiency, the court may, in order to avoid multiplicity of litigation, permit amendment and continue the proceeding, provided no prejudice is caused to the other side. All these are done only in exceptional situations and just cannot be done if the statute, on which the legal proceeding is based, inhibits, by its scheme or otherwise, such

79 *Rajesh D. Darbar* v. *Narasingrao Krishnaji Kulkarni* (2003) 7 SCC 219 at 221.

> change in the cause of action or relief. The primary concern of the court is to implement the *justice of the legislation*. Rights vested by virtue of a statute cannot be divested by this equitable doctrine (see *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha*, AIR 19237 PC 252). (Emphasis supplied)

The court noted that the appellant was a government company managed under the guidance of the Ministry of Petroleum and Natural Gas which exercises administrative control over it. The central government does not provide any financial or budgetary support to the company which is a profitable company and meets its own working capital requirements, as well as its fixed capital requirements through internal funds generated by the redeployment of own profits and also by borrowing funds from financial institutions. The grant given by the government to the company was in fact very limited. The conduct, discipline and review rules applicable to the officers of the appellant company showed that government directives on the subject had been made applicable with certain modifications. Other features of the company and its working was narrated by the court thus:[80]

> The company is not only a Government of India enterprise, but is also under the administrative control of the Ministry of Petroleum, Chemicals and Fertilizers, Government of India. Its Directors are appointed mainly from the government service. Article 26-AA of the articles of association lays down that the President of India shall be entitled to issue from time to time, such directives or instructions, as may be considered necessary in regard to the administration of the business and affairs of the Company. Article 7-A thereof, provides that the President of India shall, subject to other existing provisions, be entitled to appoint one or more Directors in the Company for such period, and upon such terms and conditions, as the President of India may from time to time decide are required. In view of the provisions of Section 617 of the Companies Act, 1956, a "government company" has been defined by way of an inclusive definition, as that which is a subsidiary of a government company. The appellant Company has also been receiving grant-in-aid from the Oil Industry Development Board by way of a grant and not as a loan. Some products of the Company are in fact monopoly products, whose procurement and distribution are within the direct control of the Ministry of Petroleum which is under the Central Government. All matters of policy and also, the management issues of the appellant Company are governed by the Central Government. The Central Government has control over the appointment of Additional Directors, Directors and their remuneration, etc. is also determined by the Presidential directives, and the same is applicable to deciding the residential accommodation of the Managing Director, his conveyance, vigilance, issues regarding the welfare of weaker sections, etc. The functioning of the appellant Company is of great public importance. Majority of its shares are held

80 (2013) 8 SCC 345 at 365-67.

by a government company. Its day-to-day business and operations do not depend on the actions and decisions taken by the Board of Directors, in fact the said decisions are taken under either the Presidential directives, or in accordance with the instructions issued by the Administrative Ministry or the Finance Ministry. Its basic function is related to the oil industry, which is generally handled by the government companies. The appellant Company cannot take any independent decisions with respect to the revision of pay scales that are applicable to its employees, and the same are always subject to the approval of the Administrative Ministry. The annual budget of the Company is also passed only if the same is approved by the Administrative Ministry.

It is evident from the material on record that all the whole-time Directors of the appellant Company are appointed by the President of India, and such communications are also routed through the Administrative Ministry. The appellant Company is under an obligation to submit its monthly, as well as its half-yearly performance reports to the Ministry of Petroleum, Government of India. The Company has also promoted the use of Hindi language in the course of official work in consonance with the circulars/guidelines that have been issued by the Government of India. The appellant Company and IBP Company Limited, had a common Chairman. The remuneration structure of the employees of the appellant Company, is also in conformity with those which are applicable to Indian Oil Corporation and IBP as has been fixed by the Bureau of Public Enterprises, Government of India. The reservation policy as enshrined in the directive principles of the Constitution has also been implemented as per the directions of the Central Government in the appellant Company.

In order to determine whether the appellant Company is an authority under Article 12 of the Constitution, we have considered factors like the formation of the appellant Company, its objectives, functions, its management and control, the financial aid received by it, its functional control and administrative control, the extent of its domination by the Government, and also whether the control of the Government over it is merely regulatory, and have come to the conclusion that the cumulative effect of all the aforesaid facts in reference to a particular company i.e. the appellant, would render it as an authority amenable to the writ jurisdiction of the High Court.

In the light of the above analysis, the court did not approve the "hire and fire" policy adopted by the appellant company, and the terms and conditions of appointment were held to be unjustifiable and arbitrary which could not be enforced. In such a fact situation, clause 11 of the appointment letter was held to be violative of article 14 of the Constitution and, therefore, the contract of employment was also held to be void.

This case shows the laxity of not only of the counsel for both the parties but also the court in not noticing the decision directly on the point given by a larger bench three decades earlier despite all research and internet facilities available with everyone.

Status of a government company converted into private sector

Another significant question that came before the apex court was whether a government company after its disinvestment continues to be 'State' under article 12 was considered in *Jatya Pal Singh* v. *Union of India*.[81] Till 1946, India's external telecommunication was being operated by a private company known as Indian Radio and Telecommunication Co. Ltd. which was taken over in 1947 by the government along with its employees on the terms and conditions as they had with the private company. The government created a department in the Ministry of Telecommunications known as Overseas Communication Service (OCS) that dealt with communication of Indian subjects with the rest of the world. The OCS Department continued till 31.3.1986. The OCS Department was thereafter converted into a public sector corporation named as VSNL. Accordingly, w.e.f. 1.4.1986, all international telecommunication services of the country stood transferred to VSNL. All the employees were deemed to have been transferred to VSNL on the existing terms and conditions till their case for absorption or otherwise was decided by VSNL. VSNL finally absorbed *en masse* the erstwhile employees of OCS with effect from 1.1.1990. Between 1992 and 2000, the Government of India divested a portion of its shareholding in VSNL by sale of equity to certain funds, banks and financial institutions controlled by the government in 1992 and to the general public in 1999. On 13.2.2002, the Government of India, which till then held 52.97% of shares in VSNL, divested 25% shares in favour of Panatone Finvest Ltd. (comprising of four companies of the Tata Group) and 1.85% in favour of its employees after following due process in accordance with its disinvestment policy. This brought the shareholding of the Government of India to 26.12%. Tata Group also made a public offer for acquiring a further 20% of the share capital of VSNL, from the public in terms of the SEBI (Substantial Acquisition of Share and Takeover) Regulations, 1997. Consequently, the total holding of the Tata Group in VSNL increased to 44.99% of the paid-up share capital in 2002. Subsequent to the disinvestment in 2002, the name of VSNL being a Tata Group company was changed to "Tata Communications Ltd." (TCL). Presently, Tata Group holdings in VSNL was about 50.11%. As per the shareholding agreement and share purchase agreement, the Government of India mandated the Tata Group to ensure that none of the employees should be retrenched for a period of one year. Tata Group by a letter dated 14.4.2002 decided that it shall cause VSNL not to retrench any of the employees of VSNL for a period of two years from 13.2.2002. On 5.2.2004, VSNL was granted a non-exclusive licence by the Government of India pursuant to the disinvestment. Prior to the disinvestment, VSNL enjoyed the monopoly in respect of international long distance service (ILDS), which ceased with effect from 5.2.2004. Thereafter, other telecom licensees like Reliance, Airtel, Idea, Aircel, HFCL and government companies like MTNL and BSNL became competitors in respect of ILDS.

81 (2013) 6 SCC 452.

On 16.7.2007 and 4.10.2007, the services of 20 managerial employees were terminated as per the terms of appointment letter after paying them 3 months' salary in lieu of notice by issuing identical orders. The High Court dismissed the writ petitions as well as letters patent appeals challenging the termination orders.

On appeal, the Supreme Court pointed out that the six principles laid down in *Ramana Dayaram Shetty*[82] had been consistently followed in subsequent decisions. The court also relied on the following conclusions given in *Pradeep Kumar Biswas*:[83]

> Fresh off the judicial anvil is the decision in *Mysore Paper Mills Ltd.* v. *Officers' Assn.*[84] which fairly represents what we have seen as a continuity of thought commencing from the decision in *Rajasthan Electricity Board* in 1967 up to the present time. It held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government is 'an authority' within the meaning of Article 12.
>
> The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be—whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

In the present case, the court held that on the basis of the aforesaid tests, the TCL could not be said to be the 'other authority' within article 12 of the Constitution. The shareholding of the Union of India did not satisfy principles 1 and 2 laid down in *Ramana Dayaram Shetty*. Principle 3 was also not be satisfied as TCL did not enjoy a monopoly status in ILDS. Moreover, the domestic market was open competition between the numerous operators such as MTNL, Airtel, Idea, Aircel, *etc*. Principle 4 was also not applicable as the Government of India did not exercise

82 *Supra* note 64. The court quoted the following observations made in para. 31 of *Pradeep Kumar Biswas*, *supra* note 68 at 131-32:

> The tests to determine whether a body falls within the definition of 'State' in Article 12 laid down in *Ramana* with the Constitution Bench imprimatur in *Ajay Hasia* form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited.

83 *Supra* note 68 at 133-34.

84 (2002) 2 SCC 167.

deep and pervasive control either in the management or policy-making of TCL which was purely a private enterprise. Moreover, even the government companies like MTNL and BSNL were competitors of TCL, in respect of ILDS. The court was, therefore, of the firm opinion that the High Courts were fully justified in rejecting the claim of the appellants that TCL would be amenable to writ jurisdiction of the High Court by virtue of being the 'other authority' within the purview of Article 12 of the Constitution of India.

The court also rejected the submission made on behalf of the appellants that even after absorption in VSNL, the appellants continued to enjoy the protection available to them in OCS as government servants. Moreover, merely because TCL was performing the functions which were initially performed by OCS was not held to be sufficient to hold that it was performing a public function. The functions performed by VSNL/TCL were not of such nature which could be said to be public functions. The operators provide a service to the subscribers upon payment of commercial charges. In order to hold that a body is performing a public function, "the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so", the court ruled. In the present case, all telecom operators were providing commercial service for commercial considerations which was not different from the activities of a bookshop selling books or any other amenity which facilitated dissemination of information or data through any medium. The court rejected the submission of the appellants that the activities of TCL were in aid of enforcing the fundamental rights under article 19(1)(*a*) of the Constitution. The recipients of the telecom service voluntarily enter into a commercial agreement for receipt and transmission of information. The function performed by VSNL/TCL could not be put on the same pedestal as the function performed by private institution in imparting education to children. It has been repeatedly held by the apex court that private education service were in the nature of sovereign function which were required to be performed by the Union of India. Right to education was a fundamental right for children up to the age of 14 years as provided under article 21-A. The court, therefore, held that reliance placed by the appellants on *Anadi Mukta*[85] was of no avail as that case concerned with the non-payment of salary to the teachers by Andi Mukta Trust. In those circumstances, it was held that the Trust was duty-bound to make the payment and, therefore, a writ in the nature of mandamus was issued. Dismissing the appeals, the court held that if the services of the appellants had been terminated in contravention of the terms of the agreement, they could seek redressal by taking recourse to the normal remedies available under law.

The court did not go into the question of those bodies which have been created by a law enacted by a legislature. Time has come when the apex court must re-consider the existing principles laid down in numerous cases to decide whether the fundamental rights can be claimed only against the 'State' and its agencies/ instrumentalities or against anyone who violates the fundamental rights. How

85 *Supra* note 57.

does it matter to a person/citizen as to who is violating his/her right; what is of significance to consider is whether in a country governed by rule of law, the fundamental rights of an individual can be allowed to be violated, with the state looking from a distance and conniving with the violator? The question has become very significant in view of present era of privatisation and world-wide globalization. And also, because a very large number of institutions in the private sector are being created conferring on them wide powers to make statutes, ordinances, rules and regulations in exercise of statutory powers to regulate/affect the employees, students, *et al*.

III RIGHT TO EQUALITY

Equal pay for equal work

The Constitution of India does not contain expressly the principle of "equal pay for equal work" but the same was considered to be a constitutional goal.[86] The apex court applied this principle in *Arindam Chattopadhyay* v. *State of West Bengal*.[87] In this case, the appellants had been recruited as assistant child development project officers (ACDPOs) but the state government posted them to work as child development project officers (CDPOs) in child development projects. They were, however, given pay for the post of ACDPOs. After about four years, they approached the administrative tribunal claiming the pay of CDPOs. Which was not allowed. On the appeal, the apex court granted the appellants the pay of CDPOs. G.S. Singhvi J held:[88]

> (W)e find that although the appellants were recruited as ACDPOs, the State Government transferred and posted them to work as CDPOs in ICDS Projects. If this would have been a stopgap arrangement for few months or the appellants had been given additional charge of the posts of CDPO for a fixed period, they could not have legitimately claimed salary in the scale of the higher post i.e. CDPO. However, the fact of the matter is that as on the date of filing of the original application before the Tribunal, the appellants had continuously worked as CDPOs for almost 4 years and as on the date of filing of the writ petition, they had worked on the higher post for about 6 years. By now, they have worked as CDPOs for almost 14 years and discharged the duties of the higher post. It is neither the pleaded case of the respondents nor has any material been produced before this Court to show that the appellants have not been discharging the duties of the post of CDPO or the degree of their responsibility is different from other CDPOs. Rather, they have tacitly admitted that the appellants are working as full-fledged CDPOs since July 1999. Therefore, there is no legal or other justification for denying them salary and allowances of the post of CDPO on the pretext that they have not been promoted in accordance with the Rules. The

86 *Randhir Singh* v. *Union of India*, AIR 1982 SC 879 : (2013) 4 SCC 152.

87 AIR 2013 SC 1535.

88 *Id.* at 1541; see also *Gopal Chawla* v. *State of M.P*., 2013 (13) SCALE 507.

> convening of the Promotion Committee or taking other steps for filling up the post of CDPO by promotion is not in the control of the appellants. Therefore, they cannot be penalised for the Government's failure to undertake the exercise of making regular promotions.

Colourable exercise of power

What cannot be done directly, cannot be done indirectly is a well known saying and it is applicable to all state actions. If a power is conferred for one purpose, it cannot be exercised to achieve any other ulterior purpose. This kind of exercise of power would amount to colourable exercise of power and may at times even be treated as malafide exercise of power.[89] The doctrine of colourable legislation, however, does not involve any question of bona fides or mala fides on the part of the legislature.[90] In *Patasi Devi* v. *State of Haryana*,[91] the appellant's land, surrounded on all sides by land of private colonisers, was notified for acquisition by the state government under sections 4 and 6 of the Land Acquisition Act, 1894, for development of a residential sector. The court noted that earlier also the land acquired by the state for residential sector was transferred to private colonisers. The appellant challenged the acquisition on several grounds. It was contended that the land belonging to another coloniser which had been similarly acquired had been released but not that of the appellant; that the real purpose of acquisition was to hand over the land to a private coloniser who was constructing a residential colony known as "Sun City" adjoining the land belonging to the appellant; and that the appellant's land should have been released as per the government policy as she had raised construction prior to the issue of the notification. On a close perusal of records, the Supreme Court found that possession of the land belonging to the appellant had not been taken over and the power of acquisition had been exercised for a colourable purpose of transferring the land to the private coloniser. The court, quashing the impugned acquisition order, observed:[92]

> (W)e are satisfied that the acquisition of the appellant's land is vitiated due to colourable exercise of power by the State Government. No doubt, the notifications issued under Sections 4 and 6 of the Act recite that the land was acquired for a public purpose, namely, development of Sector 36, Rohtak, but the real object of the acquisition was to benefit a colonizer i.e. Respondent 6, who had undertaken to develop the area into a residential colony. X X X
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> (I)t was not denied that the appellant's land is surrounded by the land of Respondent 6, who was developing residential colony under the name and style of "Sun City" and earlier also the land acquired for the

89 See *Collector (District Magistrate), Allahabad* v. *Raja Ram*, AIR 1985 SC 1622; *Pratap Singh* v. *State of Punjab* (1964) 4 SCR 733 : AIR 1964 SC 72

90 *K.C. Gajapati Narayan Deo* v. *State of Orissa*, 1954 SCR 1 : AIR 1953 SC 375.

91 AIR 2013 SC 856.

92 *Id.* at 860-61.

> development of Sector 36, Rohtak was transferred to Respondent 6. This shows that in the guise of acquiring land for a public purpose, the State Government had acquired the land for being handed over to the private coloniser. In other words, the State Government had misused the provisions of Sections 4 and 6 of the Act for making land available to a private developer. We may hasten to add that if the land was to be acquired for a company, then the official respondents were bound to comply with the provisions contained in Chapter 7 of the Act, which was admittedly not done in the instant case.

Discrimination – 'reasonable classification' test

It may be remembered that in *D.S. Nakara* v. *Union of India*,[93] a constitution bench of the Supreme Court had clearly held that all pensioners have equal right to get the benefit of liberalised pension scheme and two memoranda issued by the central government fixing cut off dates for the purpose were struck down by the court as being unconstitutional with the direction that the liberalised pension scheme would become operative to all pensioners governed by the Central Civil Services (Pension) Rules, 1972 irrespective of the date of retirement. Unfortunately, a division bench in *Kallakkurichi Taluk Retired Officials Assn.* v. *State of T.N.*,[94] did not notice *D.S. Nakara* decision. In this case, an order dated 1.6.1988 issued by the state government, giving a lower component of dearness pay to those employees who had retired on or after 1.6.1988 as against those who had retired prior to that date, was challenged as violation of articles 14 and 16 of the Constitution. At the outset, the court rightly pointed out that while deciding arbitrariness and discrimination, the quantum of benefit or loss was immaterial. It observed:[95]

> (I)t needs to be understood that the quantum of discrimination, is irrelevant to a challenge based on a plea of arbitrariness under Article 14 of the Constitution of India. Article 14 of the Constitution of India ensures to all equality before the law and equal protection of the laws. The question is of arbitrariness and discrimination. These rights flow to an individual under Articles 14 and 16 of the Constitution of India. The extent of benefit or loss in such a determination is irrelevant and inconsequential. The extent to which a benefit or loss actually affects the person concerned, cannot ever be a valid justification for a court in either granting or denying the claim raised on these counts.
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> (I)t is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. Article 16 of the Constitution of India permits a valid classification…. A valid classification is based on a just objective. The result to be achieved by the just objective presupposes, the choice of some for differential

93 AIR 1983 SC 130 : (1983) 1 SCC 305.

94 (2013) 2 SCC 772.

95 *Id.* at 794.

> consideration/treatment, over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective. And secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. Legalistically, the test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Whenever a cut-off date (as in the present controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification (or valid discrimination) must necessarily be satisfied.

The controversy in the above case related to calculation of pension of retired state government employees. The court noted that all the government orders issued by the state government from time to time, dealt with the quantum of "dearness allowance" to be treated as "dearness pay" for the calculation of pension. The object sought to be achieved by adding "dearness pay" to the wage of a retiree, while determining pension payable to him, was to remedy the adverse effects of inflation. "Any classification without reference to the object sought to be achieved, would be arbitrary and violative of the protection afforded under Article 14 of the Constitution of India, it would also be discriminatory and violative of the protection afforded under Article 16 of the Constitution of India," the court ruled. Setting aside the impugned government's order, the court observed:[96]

> Having given our thoughtful consideration to the controversy in hand, it is not possible for us to find a valid justification for the State Government to have classified pensioners similarly situated as the appellants herein (who had retired after 1-6-1988), from those who had retired prior thereto. Inflation, in case of all such pensioners, whether retired prior to 1-6-1988 or thereafter, would have had the same effect on all of them. The purpose of adding the component of "dearness pay" to wages for calculating pension is to offset the effect of inflation. In our considered view, therefore, the instant classification made by the State Government in the impugned Government Order dated 9-8-1989 placing employees who had retired after 1-6-1988 at a disadvantage, vis-à-vis the employees who had retired prior thereto, by allowing them a lower component of "dearness pay", is clearly arbitrary and discriminatory, and as such, is liable to be set aside as violative of Articles 14 and 16 of the Constitution of India.

The court set aside the impugned government order in so far as it had extended to employees who retired on or after 1.6.1988, a lower component of "dearness pay", as against those who had retired prior to that date, being violative of articles 14 and 16 of the Constitution.

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96 *Id.* at 797.

The classification between different category of physically handicapped persons was likewise held to be discriminatory. In *Deaf Employees Welfare Assn.* v. *Union of India*,[97] the giving of transport allowance/facility to blind and orthopaedically handicapped by the government while denying the same to deaf and dumb persons was held to be discriminatory by the apex court. The court noted that under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Disabilities Act), "persons with disabilities" means persons suffering from not less than 40% of "any disability", as certified by the medical doctor. When a person had any of the disabilities mentioned in section 2(*i*) as certified by a doctor, he was entitled to the benefits of all the schemes and benefits provided by the state without further discrimination among the persons with varied or different types of disabilities. The court pointed out that in the matter of affirmative action, there could not be further discrimination between a person with disability of "blindness" and a person with disability of "hearing impairment" as no such discrimination was envisaged under the above legislation. All the categories of persons mentioned in section 2(*i*) had their own disadvantages, peculiar to themselves. A "visually impaired person" cannot be equated with "hearing impaired person" and *vice versa*. The court further held:[98]

> The hearing impaired person also would not be able to hear the sound of horn and passing vehicles and, at times, will have to seek the assistance of other co-passengers or strangers on the road. We find it difficult to subscribe the view that disability, as envisaged under Section 2(*i*) of the Act, with respect to the hearing impaired persons, is less than the disability of a blind person. No such discrimination has ever been made or visualised among the persons with disabilities mentioned in Section 2(*i*) of the Act as they form a class by themselves. A further discrimination amongst themselves is clearly violative of Article 14 of the Constitution of India.
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> Deaf and dumb persons have an inherent dignity and the right to have their dignity respected and protected is the obligation on the State. Human dignity of a deaf and dumb person is harmed when he is being marginalised, ignored or devalued on the ground that the disability that he suffers is less than a visually impaired person which, in our view, clearly violates Article 21 of the Constitution of India. Comparison of disabilities among "persons of disabilities", without any rational basis, is clearly violative of Article 14 of the Constitution of India. In our view, the recommendation made by the Ministry of Health and Family Welfare for extending the benefit of transport allowance to the government

97 2013 (15) SCALE 240; See also *Haryana State Industrial Development Corpn.* v. *Udal*, AIR 2013 SC 3111 in which the apex court held as discriminatory the state government's decision to determine compensation for land touching highway by considering rate at which land was allotted by the appellant along with annual increase at 15 per cent while fixing only 12 per cent annual increase for other land.

98 2013 (15) SCALE 240 at 248-49.

> employees suffering from hearing impairment in equal with blind and orthopaedically handicapped government employees is perfectly legal and is in consonance with Articles 14 and 21 of the Constitution of India.
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> Under such circumstances, we are inclined to allow this writ petition and direct the respondents to grant transport allowance to deaf and dumb persons also on a par with blind and orthopaedically handicapped employees of the Central and the State Governments and other establishments wherever such benefits have been extended to the blind and orthopaedically handicapped employees.

It may be pointed out here that sub-classification among various kinds of physical disabilities cannot be discriminatory in all the circumstances. Thus, if a limited number of seats for admission in any educational institution or posts in public services are available, some classification between different categories of physical disability, besides marks obtained in the qualifying examination/test, can legitimately be evolved as has been done under section 33 of the Disabilities Act which mandates that every appropriate government "shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from (*i*) blindness or low vision; (*ii*) hearing impairment; and (*iii*) locomotor disability or cerebral palsy, in the posts identified for each disability."

In *State of Maharashtra* v. *Indian Hotel & Restaurants Assn*.,[99] performance of dances in eating houses, permit rooms and beer bars in indecent manner was sought to be curbed by inserting in 2005 sections. 33-A and 33-B to the Bombay Police Act, 1951. Section 33A prohibited holding of dance of all kinds in any eating house, permit room or beer bar and prescribed punishment of imprisonment of upto three years and/or fine of upto rupees two lakhs. Section 33B, however, contained an exemption clause as follows:-

> (N)othing in Section 33-A shall apply to the holding of a dance performance in a drama theatre, cinema theatre and auditorium; or sports club or gymkhana, where entry is restricted to its members only, or a three-starred or above hotel or in any other establishment or class of establishments, which, having regard to (*a*) the tourism policy of the Central or State Government for promoting the tourism activities in the State; or (*b*) cultural activities, the State Government may, by special or general order, specify in this behalf.

The question was whether the blanket exemption given by sec. 33-B in respect of "a dance performance in a drama theatre, cinema theatre and auditorium; or sports club or gymkhana, where entry is restricted to its members only, or a three-

99 AIR 2013 SC 2582 : (2013) 8 SCC 519; also see *Dharmendra Kirthal* v. *State of U.P.*, AIR 2013 SC 2569.

starred or above hotel or in any other establishment or class of establishments, which, having regard to (*a*) the tourism policy of the Central or State Government for promoting the tourism activities in the State; or (*b*) cultural activities, the State Government may, by special or general order, specify in this behalf" was a valid classification under art. 14 of the Constitution vis-à-vis prohibition imposed by sec. 33-A. While holding sec. 33-B to be unconstitutional, S.S. Nijjar J observed:[100]

> We are of the firm opinion that a distinction, the *foundation* of which is classes of the establishments and classes/kind of persons, who frequent the establishment and those who own the establishments cannot be supported under the constitutional philosophy so clearly stated in the Preamble of the Constitution of India and the individual articles prohibiting discrimination on the basis of caste, colour, creed, religion or gender.
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> The Preamble of the Constitution of India as also Articles 14 to 21, as rightly observed in the Constitution Bench judgment of this Court in *I.R. Coelho* [(2007) 2 SCC 1], form the heart and soul of the Constitution. Taking away of these rights of equality by any legislation would require clear proof of the justification for such abridgment. Once the respondents had given prima facie proof of the arbitrary classification of the establishments under Sections 33-A and 33-B, it was the duty of the State to justify the reasonableness of the classification.

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100 *Id.* at 579 (of SCC). The court relied upon the following observations of the court in *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*, AIR 1958 SC 538 at 547-48:

"(*a*) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(*b*) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(*c*) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(*d*) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(*e*) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(*f*) that while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, *if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation*."

The state failed to satisfy the court about the reasonableness of the impugned provision. The court further held:[101]

> We fail to see how exactly the same dances can be said to be morally acceptable in the exempted establishments and lead to depravity if performed in the prohibited establishments. Rather it is evident that the same dancer can perform the same dance in the high class hotels, clubs, and gymkhanas but is prohibited of doing so in the establishments covered under Section 33-A. We see no rationale which would justify the conclusion that a dance that leads to depravity in one place would get converted to an acceptable performance by a mere change of venue. The discriminatory attitude of the State is illustrated by the fact that an infringement of Section 33-A(1) by an establishment covered under the aforesaid provision would entail the owner being liable to be imprisoned for three years by virtue of Section 33-A(2). On the other hand, no such punishment is prescribed for establishments covered under Section 33-B. Such an establishment would merely lose the licence. Such blatant discrimination cannot possibly be justified on the criteria of reasonable classification under Article 14 of the Constitution of India.

Prescribing different age of retirement for the same category of employees is discriminatory

In *State of U.P.* v. *Dayanand Chakrawarty*,[102] the Supreme Court upheld the high court's decision striking down the Uttar Pradesh Jal Nigam Employees (Retirement on Attaining Age of Superannuation) Regulations, 2005 which had prescribed two separate age of retirement amongst same classes of employees on the ground of being discriminatory. Under regulation 3 of the impugned regulations, the "age of superannuation of every employee who was employed in the Engineering Department of the Local Self-Government under Section 37(1) of the Uttar Pradesh Water Supply and Sewerage Act, 1975, and has been transferred to the Corporation and is employed in the Corporation, will be 60 years" while under regulation 4, the "age of superannuation of the employees different from those under Rule 3 above, will be 58 years. But the age of superannuation of the Group 'D' employees who have been employed prior to 5-11-1985, will be 60 years." The court noted that during the pendency of the appeal, the state government had already made the retirement age as 60 for all employees.

Hostile discrimination in land acquisition

In a few cases, the Supreme Court quashed the land acquisition made by the state government of Haryana on the ground of hostile discrimination. In *Usha Stud and Agricultural Farms Private Ltd.* v. *State of Haryana*,[103] the court found

101 (2013) 8 SCC 519 at 580.

102 (2013) 7 SCC 595.

103 AIR 2013 SC 1282; see also *Patasi Devi* v. *State of Haryana*, AIR 2013 SC 856; *Rajasthan State Industrial Development & Investment Corpn.* v. *Subhash Sindhi Coop. Housing Society* (2013) 5 SCC 427.z

that the state had issued five separate declarations under section 6(1) of the Land Acquisition Act, 1898 for acquisition of 91.98 acres of land in a village. Subsequently, land belonging to five companies was released and an agreement was entered into between the appellant and Haryana Urban Development Authority for release of the appellant's land on certain conditions. Before actually releasing the appellant's land, a fresh notification was issued for acquisition of land including the land belonging to the appellant. The acquisition was again challenged before the court. While the matter was pending before the court, land belonging to other owners was released but not that belonging to the appellant. The Supreme Court held this action of the state as a hostile discrimination against the appellant and quashed the acquisition of the appellant's land. This decision was followed in *Women's Education Trust* v. *State of Haryana*,[104] in which land of the appellants and other persons were lying in the green-belt. After acquisition notification, the lands belonging to other parties were released but not the land belonging to the appellant. The Supreme Court quashed the state action on the ground of hostile discrimination.

Payment of honorarium from state exchequer to imams/muazzins is discriminatory but not the scholarship paid to the students of minority community

It is a well known fact that the political parties have always been using religion and caste as an appeasement policy for political mileage.[105] Reservations in admissions to educational institutions and posts in public employment have been tried by various state governments from time to time. Two cases of the state benevolence towards the Muslims were reported from two different High Courts during the current year. In *T. Murlidhar Rao* v. *State of AP*.[106] The Supreme Court in appeal allowed the reservation, as an interim measure till the disposal of appeal (which is still pending) to 14 categories of persons covered the Andhra Pradesh High Court by a majority of six to one had quashed four per cent reservation for the backward Muslims under the A.P. Reservation in favour of Socially and Educationally Backward Classes of Muslims Act, 2007.

In *All India Imam Organization* v. *Union of India*,[107] the imams had approached the Supreme Court under article 32 of the Constitution for the enforcement of fundamental right against their exploitation by wakf boards and had prayed for direction to central and state wakf boards to treat the petitioners as

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104 AIR 2013 SC 2488.

105 See, e.g. the observations made by a constitution bench in *E.V. Chinnaiah* v. *State of A.P.* (2005) 1 SCC 394 while striking down the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 on the grounds of violation of article 14 and lack of competence.

106 2010 (2) ALT 357 (FB). The Supreme Court in appeal allowed the reservation, as an interim measure till the disposal of appeal (which is still pending) to 14 categories of persons covered under the Act excluding creamy layer: *State of A.P.* v. *T. Damodar Rao*, 2010 (3) SCALE 344 : (2010) 3 SCC 462.

107 (1993) 3 SCC 584. The imams are incharge of religious activities of mosques.

employees of the board and to pay them basic wages for survival. They had pointed out glaring disparity between the nature of work and amount of remuneration. The court held that the imams had the fundamental right to live with human dignity under article 21. It was contended by the waqf board that the imams were appointed by the mutawallis and they were not the employees of the board. The court, rejecting the argument, held that board could not escape from its responsibility as the mutawallis too under section 36 of the Waqf Act, 1995 were under its supervision and control. Sahai J held that imams were entitled to remuneration and he rejected the argument of the board that their financial position was not such that they could meet the obligations of paying the imams. The argument that the number of mosques was so large that it would entail heavy expenditure which the boards of different states would not be able to bear was also rejected by the court.

One case[108] decided by Calcutta High Court during the current year raised the question of discriminatory action of the state of West Bengal by which it had decided to grant honorarium of Rs. 2500/- and Rs. 1000/- to the imams and muazzins, respectively, of different mosques in that state payable through waqf board. The court, quashing the impugned government's decision, held the same as discriminatory *viv-a-vis* other communities and in contravention of articles 14 and 15(1) of the Constitution. Pranab Kumar Chattopadhyay J, on behalf of the division bench, observed:[109]

> The State Government cannot spend any money for the benefit of few individuals of a particular religious community ignoring the identically placed individuals of the other religious communities since the State cannot discriminate on the ground of religion in view of Article 15(1) of the Constitution of India.
>
> The State Government by providing funds for making payment of honorarium to the Imams and Muazzins has acted in clear violation of the provisions enshrined under Articles 14 and 15(1) of the Constitution of India.
>
> (T)he impugned decision of the State Government for giving honorarium to the Imams and Muazzins are based on no material far less to speak of proper materials. If any decision is taken by the Government on irrelevant consideration and without proper materials then the said decision will be arbitrary in nature and offend Article 14 of the Constitution of India.

The court also refused to buy the argument that the expenditure could be considered to be for a 'public purpose' as contemplated by article 282 of the Constitution which permits the union or a state to make "any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws." The

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108 *Bhartiya Janata Party* v. *State of West Bengal*, AIR 2013 Cal. 215.

109 *Id*. at 224-25.

court held that no purpose could be considered to be public purpose if the same offended the constitutional provisions of articles 14 and 15(1). Moreover, the payment of honorarium to imams/muazzins served the interest of only few individuals and not the general interest of the concerned community as a whole.

A different note was struck by 3:2 majority in *Adam B. Chaki* v. *Govt. of India*.[110] In this case, the constitutional validity of pre-metric scholarship scheme, effective from April, 2008, framed by the Government of India for the welfare of students of minorities was challenged on the ground that the scheme was discriminatory under article 14 of the Constitution of India. Under the aforesaid scheme, the students of minorities as notified under section 2(c) of the National Commission for Minorities Act, 1992, who had secured not less than 50 per cent of marks in the previous final examination and whose parents'/guardians' annual income did not exceed one lac rupees, were eligible for scholarship. The number of scholarships being fixed, poverty was to be given weightage and not the marks. The states were required to share 25 per cent burden of the total expenditure under the scheme. The validity of the scheme had been upheld by a division bench of Gujarat High in *Vijay H. Patel* v. *Union of India*.[111] Despite that decision, the state government did not enforce the scheme which led to the filing of yet another petition (the present case) in 2011 seeking direction from the court to implement the scheme.[112] During the pendency of the said petition, another petition was filed before the Gujarat High Court by two persons, one scheduled caste (SC) and another other backward class (OBC) challenging the scheme on the ground of discrimination contending that they were more backward than the persons for whom the scheme was formulated (minorities) and for them no such scheme had been formulated by the government. During the pendency of these two petitions, the Government of India formulated another identical scheme for post-matriculate course for the minorities and its constitutional validity was upheld by a division bench of Bombay High Court in *Sanjay Gajanan Punalekar* v. *Union of India*.[113]

In the backdrop of two decisions of Gujarat and Bombay High Courts referred above upholding both the schemes formulated for the students of the minorities, writ petition (PIL) no. 20/2011 (present case) was heard by a division bench which disagreed with the views of both Gujarat and Bombay High Courts referred to above and instead relied upon the Supreme Court decision in *State of Rajasthan* v. *Thakur Pratap Singh*.[114]

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110 AIR 2013 Guj. 66 (Writ petition (PIL) no. 20/2011).

111 Spl. Civil App. No. 2245/2008 decided on 20.03.2010, (2009) 3 Guj. L.R 2153.

112 AIR 2013 Guj. 66.

113 (2011) 4 Bom. C.R 377: 2011 (5) All MR 282.

114 AIR 1960 SC 1208. In this case, a notification was issued by the state government under section 15 of the Police Act, 1861 under which the Harijan and Muslim inhabitants of the villages, in which an additional police force was stationed, were exempted from the obligation to bear any portion of the cost of that force. The apex court quashed the notification on the ground of discrimination as it found no justification

Consequently, a reference was made by the division bench to a larger bench. In this background, the present case came to be decided by a five-judge bench. The majority, speaking through Akil Kureshi J, while upholding the constitutional validity of the impugned scheme, observed:[115]

> Articles 14, 15 and 16 are all different facets of concept of equality. In different forms, such articles guarantee equality of opportunity and equal treatment to all the citizens while specifically mandating that the State shall not discriminate against the citizens only on the grounds of religion, race, caste, sex, descent, place of birth or any of them. Like Article 14, neither Article 15(1) nor Article 16(1) prohibit reasonable classification. In other words, the clauses of Articles 15 and 16 respectively guaranteeing non-discrimination on the grounds alone of religion, race, caste, sex, place of birth or equality of opportunity for all citizens in matters of public employment prohibit hostile discrimination but not reasonable classification. As in Article 14, as well in Article 15(1), if it is demonstrated that special treatment is meted out to a class of citizens, not only on the ground of religion, race, caste, sex, place of birth or any of them, but due to some special reasons and circumstances, the enquiry would be, does such a classification stand the test of reasonableness and in the process, it would be the duty of the court to examine whether such classification fulfills the above noted twin conditions, namely, it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

The learned judge found enough justification to uphold the classification as being reasonable when he observed:[116]

> The Scheme … provides for scholarship to students belonging to

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for the exemption granted in it. The court noted that it was not the case of the state that "there were no persons belonging to the other communities who were peace-loving and law-abiding, though it might very well be, that according to the State, a great majority of these other communities were inclined the other way. If so, it follows that the notification has discriminated against the law-abiding members of the other communities and in favour of the Muslim and Harijan communities, - (assuming that every one of them was "peace- loving and law-abiding") on the basis only of "caste" or "religion". If there were other grounds they ought to have been stated in the notification. It is plain that the notification is directly contrary to the terms of Article 15(1) and that para 4 of the notification has incurred condemnation as violating a specific constitutional prohibition. In our opinion, the learned Judges of the High Court were clearly right in striking down this paragraph of the notification."

115 AIR 2013 Guj. 66 at 86. For this view, the court relied upon *State of U.P.* v. *Pradip Tandon*, AIR 1975 SC 563.

116 AIR 2013 Guj. 66 at 94-95.

> minorities notified under section 2(c) of the National Commission for Minorities Act, 1992. However, there were other criteria to be satisfied before a student would be granted such scholarship. Firstly, the annual income of his/her parents/guardians from all sources should not exceed Rs.1 lac. Secondly, such scholarship would be awarded to only those students who have secured not less than 50% marks in the previous final examination. Even after awarding such scholarship, continuance thereof would be subject to securing 50 per cent marks in the previous examination. 30 per cent of the scholarships would be ear-marked for girl students. In case, there were more number of students eligible than the available scholarships, inter-se selection would be on the basis of poverty and not marks. A student seeking to avail such scholarship would not be eligible for any other scholarship from any other source.

The learned judge also found enough material in the shape of the Sachar Committee Report on the educational and economic status of Muslims, to hold the view that the classification was reasonable and, therefore, the impugned scheme did not offend equality clause under articles 14 and 15(1) of the Constitution. The learned judge further held that the scheme could not be equated with any kind of reservation and it was merely an "affirmative action" and "not discriminatory" in nature.

J.B. Pardiwala J, on the other hand, representing the minority, rightly questioned as to in what manner Parsis, Christians, Buddhists and Sikhs rightly treated as minorities under the Act could be considered to be educationally and economically weak or backward and what was the material on record about them to be considered fit for the scheme. The Sachar Committee had reported only about Muslims and no other minority community. How could then the scheme apply to all minorities and the scheme could pass the test of reasonable classification, the learned judge questioned.

Significantly, the majority did not consider as to how all other educationally and economically backwards in the majority community excluded from the scheme stood at a different footing from the educationally and economically backwards in the minority community for whom the scheme was meant. The basic requirement of the scheme was that the student *must first belong to a minority community* and only thereafter other conditions of marks and income were to be seen. Why only students from the minority has not been answered by the majority. Had the scheme applied to all educationally and economically backward students, no objection could have possibly been taken but that was not done.

It is submitted here that the mess created by the majority judgment in the above case needs to be cleared by the apex court without any delay, particularly when an appeal against the decision is pending before it and the court has refused to stay the operation of decision. Similar other cases of reservation for Muslims in Andhra Pradesh pending since 2010 before the apex court, as pointed out above, need urgent attention of the court.

Giving seniority retrospectively violates equality clause

What is the purpose of giving weightage of past service – is it to decide *eligibility for promotion* to a higher post or it is to give *seniority for promotion* to a higher post? The question of giving weightage of past service had been decided in many cases by the Supreme Court which took contradictory stand.[117] It was, therefore, that the matter was placed before a full-bench of the apex court in *P. Sudhakar Rao* v. *U. Govinda Rao*.[118] In this case, supervisors, and some of them were not even eligible, were allowed promotion as junior engineers retrospectively by giving weightage to their past service and they were given seniority vis-à-vis junior engineers who were already working. This had resulted in making the existing junior engineers junior to the newly promoted supervisors as junior engineers which was not permissible. The court observed:[119]

> The facts of the appeals before us show that at least some of the Supervisors were given retrospective seniority on the date when they were not even eligible for appointment as Junior Engineers. The precedents referred to above show that this is impermissible. In addition …, there is no indication of the vacancy position, that is, whether the Supervisors could be adjusted in the grade of Junior Engineers from the date on which they were given notional retrospective seniority. There is also no indication whether the quota of vacancies for Supervisors was adhered to as on the date on which they were given notional retrospective seniority. The case law suggests that this is an important factor to be considered. Finally, it is quite clear that the grant of retrospective seniority to the Supervisors has adversely impacted on the promotion chances of the Junior Engineers by bringing them down in seniority. This too is impermissible.
>
> For the reasons aforesaid, we see no occasion for interfering with the view taken by the High Court to the effect that the grant of retrospective seniority to the Supervisors on their appointment as Junior Engineers violates Article 14 of the Constitution. The weightage of service given to the Supervisors can be taken advantage of only for the purpose of eligibility for promotion to the post of Assistant Engineer. The weightage cannot be utilised for obtaining retrospective seniority over and above the existing Junior Engineers.

No objection can possibly be raised against the decision on merits but it needs to be mentioned here that a similar matter was already pending[120] before a larger bench and it was not proper for the court to decide the issue; instead it

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117 See *Devi Prasad* v. *Govt. of A.P.,*1980 Supp SCC 206 and *State of A.P.* v. *K.S. Muralidhar* (1992) 2 SCC 241on one hand and *G.S. Venkat Reddy* v. *State of A.P.,*1993 Supp (3) SCC 425, *K Narayanan* v. *State of Karnataka* 1994 Supp (1) SCC 44 and *State of Gujarat* v. *C.G. Desai* (1974) 1 SCC 188 on the other.

118 AIR 2013 SC 2533 : (2013) 8 SCC 693.

119 *Id.* at 2547 (of AIR).

120 *Asis Kumar Samanta* v. *State of W.B.* (2007) 5 SCC 800.

should have referred the matter to the same bench for disposal rather than relying upon some cases to justify its approach where this had earlier happened.[121] If some cases had been decided after noticing that identical matter was pending before another bench, it was improper to decide the matter.

Arbitrariness

The correction of mistakes cannot be termed arbitrary. In *Vikas Pratap Singh* v. *State of Chhatisgarh*,[122] for the recruitment of subedars, platoon commanders and sub-inspectors, after inviting applications, preliminary test followed by written test was held and on the basis of merit appointment letters were issued to the selected candidates who joined the service. Subsequently, it was noticed that eights questions in one paper were wrong while model answer to eight questions in the other paper were found to be wrong. While eight wrong questions in the first paper were cancelled in exercise of powers under clause 14 of the relevant rules, there was re-evaluation of answer scripts of the other paper. A revised merit list was prepared whereby the appointments of the appellants were cancelled as they did not figure in the revised merit list. The court repelled the argument that the action of cancellation was arbitrary. H.L. Dattu J observed:[123]

> It is settled law that if the irregularities in evaluation could be noticed and corrected specifically and undeserving select candidates be identified and in their place deserving candidates be included in select list, then no illegality would be said to have crept in the process of re-evaluation. The respondent Board thus identified the irregularities which had crept in the evaluation procedure and corrected the same by employing the method of re-evaluation in respect of the eight questions, answers to which were incorrect and by deletion of the eight incorrect questions and allotment of their marks on pro rata basis. The said decision cannot be characterised as arbitrary. Undue prejudice indeed would have been caused had there been re-evaluation of subjective answers, which is not the case herein.

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121 *Pawan Pratap Singh* v. *Reevan Singh* (2011) 3 SCC 267

122 AIR 2013 SC 3414; see also merger of cadres is a policy decision and not an arbitrary decision: *B.S.G.S.S.T. Association* v. *Bihar Education Service Association*, AIR 2013 SC 487; splitting of marks allotted for interview in marks for certificates and interview without prior information was not unjust and arbitrary: *Rajya Sabha Secretariat* v. *Subhash Baloda*, AIR 2013 SC 2193; prescribing of cut off marks in the written test for qualifying in the viva voce examination during the process of written test was likewise held to be non-arbitrary: *Arunachal Pradesh Public Service Commission* v. *Tage Habung*, AIR 2013 SC 1601; *Rajesh Kumar* v. *State of Bihar*, AIR 2013 SC 2652.

123 AIR 2013 SC 3414 at 3419.

> In view of the aforesaid, we are of the considered opinion that in the facts and circumstances of the case the decision of re-evaluation by the respondent Board was a valid decision which could not be said to have caused any prejudice, whatsoever, either to the appellants or to the candidates selected in the revised merit list….

But the court found that since the appellants had not committed any fraud, mischief or misrepresentation and had served the state for over three years after having obtained training, the state was directed to appoint them at the bottom of the list of selected candidates.

IV EQUALITY OF OPPORTUNITY IN PUBLIC APPOINTMENT

Regularisation of contractual employees in service

Article 16 of the Constitution of India mandates that there shall be equality of opportunity for all citizens in matters relating to employment to any office under the state and there can be no discrimination in this matter only on the basis of religion, race, caste, sex, decent, place of birth or residence. This mandate, however, does not prohibit reservations envisaged under clause (4) for backward class of citizens and (4-A) of article 16 for promotion in favour of scheduled castes and scheduled tribes.[124] Besides reservations, which has always been a contentious issue before the courts, the controversy pertaining to regularisation of ad hoc/temporary/daily-wage/contractual employees in public services has been dragged to the court from time to time. The controversy was put at rest by a constitution bench decision of the apex court in *Secretary, State of Karnataka* v. *Uma Devi*.[125] In this case, the court had held that regularisation of employees working on ad hoc/temporary/daily-wage/contract basis was violative of the equality clause under articles 14 and 16 of the Constitution. The factors such as continuation for a considerable period of time, payment of equal pay to ad hoc/temporary/daily-wage/contractual employees, right to livelihood, doctrine of legitimate expectations, etc. had no application to the question of regularisation of such employees. The court had also drawn a distinction between regularisation and permanency. The court, however, made an exception as follows:[126]

> There may be cases where irregular appointments (not illegal appointments), as explained in *S.V. Narayanappa* [*State of Mysore* v. *S.V. Narayanappa*, AIR 1967 SC 1071], *R.N. Nanjundappa* [*R.N.*

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124 See *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477; *M. Nagaraj* v. *Union of India*, AIR 2007 SC 71; *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1.

125 (2008) 4 SCC 1.

126 *Id.* at 42.

> *Nanjundappa* v. *T. Thimmiah* (1972) 1 SCC 409] and *B.N. Nagarajan* [*B.N. Nagarajan* v. *State of Karnataka* (1979) 4 SCC 507] …, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such *irregularly* appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

In view of the above, the court, exercising its power under article 142 of the Constitution, further directed that certain categories of employees would be allowed to compete as and when regular recruitment was made waiving the age restriction imposed for recruitment and give some weightage to such employees for their having been engaged for work for a significant time.

Needless to mention that the apex court had directed that "the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such *irregularly* appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date", No action was, however, taken either by the Union of India or by any of the state governments or other agencies/instrumentalities of the state for whom the direction was meant. Further, *Uma Devi* did not place a blanket ban on regularisation in all cases as understood by many judges including one judge of the High Court of Delhi in about five dozen writ petitions decided by him during 2013 dismissing all

of them.[127] Significantly, the learned judge extracted seven paragraphs (within quotes and un-quotes), without indicating any page or specific paragraph from the decision in *Uma Devi*, by referring them as "ratio" of the decision which paragraphs do not find place in that judgment.[128]

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127 These writ petitions were filed during 1996 – 2013 and all of them were dismissed during 2013. The decisions/order are available on Delhi High Court website: delhihighcourt.nic.in.

128 These paragraphs, as quoted by the learned single in all the cases, were:

"(I) The questions to be asked before regularization are:- (a)(i) Was there a sanctioned post (court cannot order creation of posts because finances of the state may go haywire), (ii) is there a vacancy, (iii) are the persons qualified persons and (iv) are the appointments through regular recruitment process of calling all possible persons and which process involves inter-se competition among the candidates (b) A court can condone an irregularity in the appointment procedure only if the irregularity does not go to the root of the matter.

(II) For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional mandate flowing from Articles 14,16,309, 315, 320 etc is violated.

(III) In case of existence of necessary circumstances the government has a right to appoint contract employees or casual labour or employees for a project, but, such persons form a class in themselves and they cannot claim equality(except possibly for equal pay for equal work) with regular employees who form a separate class. Such temporary employees cannot claim legitimate expectation of absorption/regularization as they knew when they were appointed that they were temporary inasmuch as the government did not give and nor could have given an assurance of regularization without the regular recruitment process being followed. Such irregularly appointed persons cannot claim to be regularized alleging violation of Article 21. Also the equity in favour of the millions who await public employment through the regular recruitment process outweighs the equity in favour of the limited number of irregularly appointed persons who claim regularization.

(IV) Once there are vacancies in sanctioned posts such vacancies cannot be filled in except without regular recruitment process, and thus neither the court nor the executive can frame a scheme to absorb or regularize persons appointed to such posts without following the regular recruitment process.

(V) At the instance of persons irregularly appointed the process of regular recruitment shall not be stopped. Courts should not pass interim orders to continue employment of such irregularly appointed persons because the same will result in stoppage of recruitment through regular appointment procedure.

The learned judge was so much convinced about the "ratio" of *Uma Devi* that he not only refused to consider other issues raised in some of those cases, he did not even look into the prayer made in the petition[129] and thereby committed serious error by making conjectures about the prayers, *e.g*. in the first two sentences of his order/decision, the learned judge observed, "By this writ petition, petitioners including petitioner no.1 which is a union of contractual employees', seek the relief of quashing of the selection process for regular appointments initiated by respondent no.1 pursuant to the advertisement dated 6.11.2013. Petitioners also seek relief of their being regularized to their posts which they are holding, and which posts are contractual posts." Neither any prayer was made in the petition for quashing the selection process nor the posts held by the petitioner were contractual; the posts were permanent vacancies but the appointments made were contractual. Further, the learned judge refused to consider that the directions passed in *Uma Devi* were never co'

After *Uma Devi* decision, the Supreme Court was faced with similar problem in many subsequent cases.[130] In *Maharashtra SRTC* v. *Casteribe Rajya Parivahan Karamchari Sangthan*,[131] the Supreme Court distinguished *Uma Devi* and refused to apply it in a case which involved the issue as to whether the appellant

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(VI) If there are sanctioned posts with vacancies, and qualified persons were appointed without a regular recruitment process, then, such persons who when the judgment of *Uma Devi* is passed have worked for over 10 years without court orders, such persons be regularized under schemes to be framed by the concerned organization.

(VII) The aforesaid law which applies to the Union and the States will also apply to all instrumentalities of the State governed by Article 12 of the Constitution."

See *Delhi University Contract Employees Union* v. *University of Delhi*, W.P. (C) No. 7929/2013 decided on 16.12.2013.

129 Writ Petition No. 7929/2013 decided on 16.12.2013. The prayers made in the writ petition were: (i) regularization of contractual employees who were qualified for the post of junior assistant and had been working for last several years after having been selected after following the proper procedure; (ii) payment of full salary at the minimum of the scale of junior assistants instead of a small fixed honorarium; (iii) payment of bonus as per the Government of India decisions as accepted by the employer; (iv) grant of maternity benefits to female employees working on contract basis.

130 *University of Rajasthan* v. *Prem Lata Agarwal* (2013) 3 SCC 705; *Pondicherry Khadi & Village Industries Board* v. *K. Aroquia Radja* (2013) 3 SCC 780; *Debabrata Dash* v. *Jatindra Prasad Das* (2013) 3 SCC 658; *Nand Kumar* v. *State of Bihar* (2014) 5 SCC 300; *State of Karnataka* v. *G.V. Chandrashekar* (2009) 4 SCC 342; *Brij Mohan Lal* v. *Union of India* (2012) 6 SCC 502.

corporation, which had not made recruitment rules according to its standing orders, could resist regularization of its contractual workers on the basis of principles laid down in *Uma Devi* case. After extensively quoting from *Uma Devi*, the court held:[132]

> *Umadevi (3)* does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. *Umadevi (3)* cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established.

Another significant case on the issue of regularization vis-à-vis *Uma Devi* case was *Nihal Singh* v. *State of Punjab*.[133] In this case, special police officers had been appointed by virtue of section 17 of the Police Act, 1861[134] to deal with large-scale disturbances in the state of Punjab during 1980's. The appellants were ex-servicemen and registered with the employment exchange. The appointment were made by issuing appointment letters, one of which relating to the first appellant read as follows:-

> Nihal Singh s/o Shri Nidhan Singh r/o Kallah PS Sadar 7-7 is hereby appointed as a Special Police Officer under Section 17 of the Police Act, 1861, in the rank of SPO and is assigned special Constabulary No. 277. He shall be entitled to all privileges under the Police Act, 1861 and shall be under the administrative control of the undersigned in the matter of discipline, etc.
>
> He shall be paid Rs 35 per day by the bank concerned of posting as

131 (2009) 8 SCC 556. In this case, the court was dealing with the powers of the labour and industrial courts regarding unfair labour practices under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. In *University of Rajasthan* v. *Prem Lata Agarwal*, AIR 2013 SC 1265, the Supreme Court has held that the benefit of regularisation extended in *Uma Devi* cannot be given to those employees who had already retired from service.

132 (2009) 8 SCC 556 at 574.

133 AIR 2013 SC 3547 : (2013) 14 SCC 65.

134 Section 17 reads thus: "17. *Special police officers*.—When it shall appear that any unlawful assembly, or riot or disturbance of the peace has taken place, or may be reasonably apprehended, and that police force ordinarily employed for preserving the peace is not sufficient for its preservation and for the protection of the inhabitants and the security of property in the place where such unlawful assembly or *riot or* disturbance of the peace has occurred, or is apprehended, it shall be lawful for any police officer not below the rank of Inspector to apply to the nearest Magistrate to appoint so many of the residents of the neighbourhood as such police officers may require to act as Special Police Officers for such time and within such limits as he

honorarium from the date he actually takes over charge of his duty.

The request of the appellants for regularisation was turned down by the state on various grounds such as that they were not employees of the state as they had been working only for the banks; there were no posts and they were not appointed through regular selection process.

It may be noted that the appellants were recruited by the state and they were required to work as guards for the public sector banks. They were under the administrative control of the police department and entitled to all the privileges under the Police Act, 1861. Under section 18 of the Act, "Every special police officer so appointed shall have the same powers, privileges and protection, and shall be liable to perform the same duties and shall be amenable to the same penalties, and be subordinate to the same authorities, as the ordinary officers of police." In view of this, Chelameshwar J held:[135]

> It is obvious both from the said section and also the appointment orders, the appellants are appointed by the State in exercise of the statutory power under Section 17 of the Act. The appellants are amenable to the disciplinary control of the State as in the case of any other regular police officers. The only distinction is that they are to be paid daily wages of Rs 35 (which came to be revised from time to time). Further, such payment was to be made by the bank to whom the services of each one of the appellants is made available.
>
> From the mere fact that the payment of wages came from the bank at whose disposal the services of each of the appellants was kept did not render the appellants employees of those banks. The appointment is made by the State. The disciplinary control vests with the State. The two factors which conclusively establish that the relationship of master and servant exists between the State and the appellants.… It may be worthwhile mentioning here that under the law of contracts in this country the consideration for a contract need not always necessarily flow from the parties to a contract. The decision of the SSP to reject the claim of the appellants only on the basis that the payment of wages to the appellants herein was being made by the banks concerned rendering them disentitled to seek regularisation of their services from the State is clearly untenable.

The division bench refused to accept that the appointment of the appellants was irregular since the initial appointment had been made in accordance with the statutory procedure prescribed under the Act. The procedure had been resorted to at the highest level of the state, *i.e* decision to resort to the procedure under section 17 had been taken in a meeting between the advisor to the government of Punjab and senior officers of various banks in the public sector since it was not possible to provide required police to the banks. The public sector banks had

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shall deem necessary; and the Magistrate to whom such application is made shall,

undertaken to bear the entire financial burden. Chelameshwar J, therefore, observed:[136]

> It can be seen from the above that a selection process was designed under which the District Senior Superintendent of Police is required to *choose suitable ex-servicemen or other able-bodied persons* for being appointed as Special Police Officers in terms of Section 17 of the Act. It is indicated that the persons who are already in possession of a licensed weapon are to be given priority. X X X
>
> Such a procedure making recruitments through the employment exchanges was held to be consistent with the requirement of Articles 14 and 16 of the Constitution by this Court in *Union of India* v. *N. Hargopal*.[137]

The court noted that the recruitment of the appellants and other similarly situated persons had been made in the backdrop of terrorism in the state and immediate recruitment was required to be made. The normal procedure for recruitment could have been time consuming. Moreover, even after recruitment under the normal procedure of inviting applications and selecting suitable persons, the selected candidates had to be provided with weapons and given training to use them. This could not have been done on account of the prevailing situation. The court, therefore, held that the selection process in the present case was not arbitrary or unreasonable aimed at eliminating other eligible candidates.

The learned judge also brushed aside the argument that regularisation had financial implications as there were no posts against which the appellants could be regularised. In this respect, Chelameshwar J observed:[138]

> (T)t is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.
>
> The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within

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unless he sees cause to the contrary, comply with the application."

135 *Supra* note 133 at 73 (of SCC).

136 *Id.* at 76-77.

> the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is—the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.
>
> We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. *Umadevi (3)* judgment cannot become a licence for exploitation by the State and its instrumentalities.

In view of the above, the court held that the appellants were entitled to regularisation in the service of the state and it directed the state of Punjab to regularise the services of the appellants by creating necessary posts within a period of three months from the date of the judgment and allowed them all the benefits of services attached to the post which were similar in nature for those already in the cadre of the police services of the state.

It has to be remembered that despite the mandatory directions of the apex in *Uma Devi* case to start the process of selection within six months, neither the union nor the state government or any of its agencies/instrumentalities indicated in that decision took any steps towards stopping contracts/ad hoc appointments and regularising such employees who could have been given the benefit of regularisation. On the contrary, the practice of making contractual/ad hoc appointment on a very large scale against regular vacancies continues till today and the employees are at the receiving end. The High Courts and tribunals are blindly applying *Uma Devi* case in all cases coming before them for regularisation of contractual/ad hoc employees even if duly qualified persons are appointed against regular vacancies through advertisement (even if in a limited way) and have been working for more than ten years. This kind of applying precedent does not seem to be appropriate.

V RESERVATION

Admission of meritorious candidates belonging to reserved category not to be counted for reserved category seats

The question of reservation of seats in educational institutions and posts in public employments has always been a vexed question and the present author has already expressed the view that the reservation policy as a whole needs to be thoroughly re-examined as it has done no good to those classes of persons for

whom it is meant.[139] There are few cases reported in the current year which raised issues relating to reservation.

It is now well settled by judicial pronouncements that as a general rule, the reservation should not exceed 50% of seats or posts.[140] It is also well settled that if a candidate was entitled to be admitted on the basis of his own merit, such admission should not be counted against the quota reserved for scheduled caste or scheduled tribe or any other reserved category since that will be against the constitutional mandate enshrined in Article 16(4).[141] The apex court, after analysing all the cases, had observed:[142]

> (A) student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate.

The Supreme Court once again applied the same principle in *Samta Aandolan Samiti* v. *Union of India*.[143] The controversy in this case related to admissions to two courses in the All India Institute of Medical Sciences, New Delhi.

No right to get relaxation in marks for reserved category candidates

The Supreme Court, upholding the decision of Madras High Court, refused to quash the Tamil Nadu Teacher Eligibility Test (TNTET) - 2013 Notification/ Advertisement No.13/2013 dated 22nd May, 2013 issued by the Teachers Recruitment Board and also refused a direction to the Board to issue fresh

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137 (1987) 3 SCC 308.

138 *Supra* note 133 at 79-80.

139 See S N Singh, "Constitutional Law – I (Fundamental Rights)," XLVIII *ASIL* 173 at 186-91 (2012).

140 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217.

141 *Ritesh R. Sah* v. *Dr. Y.L.Yamul* (1996) 3 SCC 253.

notification extending the constitutional benefits of reservation to TNTET by assigning minimum qualifying cut off marks for each communal category, in accordance with the prevailing reservation rule and also for the consequential reliefs. The Madras High Court had refused to grant the reliefs prayed for on the ground that the question as to whether relaxation/concessional marks to be granted or not to be granted was a policy matter, to be taken by the state government, and the court cannot give a positive direction to the state so as to reduce the minimum marks to any reserved category while exercising powers under article 226 of the Constitution. The petitioner had contended that fixing 60% as uniform qualifying marks was illegal and violative of article 16(4) of the Constitution and the state should fulfil the constitutional obligation in allocating minimum qualifying marks based on communal reservation. The Supreme Court, while dismissing the appeal, held the question as to whether the cut off marks stipulated for the reserved category candidates have to be reduced or not, was entirely a matter for the state government to decide. The court exercising writ jurisdiction cannot grant such relaxation/concessional marks, as the same was the decision to be taken by the state government. The state/authorities concerned would fix the cut off marks after taking into consideration a variety of factors and court cannot substitute its view for that of the experts.[144]

Reservation in speciality and superspeciality courses/posts not permitted

The Supreme Court in *Indra Sawhney* v. *Union of India*,[145] had observed:

> It is, however, necessary to point out that the mandate … of Article 335 is to take the claims of members of SC/ST into consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of the article to say that the mandate is maintenance of efficiency of administration. Maybe, efficiency, competence and merit are not synonymous concepts; maybe, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with — and may, in some cases, excel - members of open competition. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are *anti-meritarian*. Merit there is even among the reserved

142 *Id.* at 261.

143 JT 2013 (15) SC 598.

> candidates and the small difference, that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency along with others. X X X X
>
> While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/ institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable. X X X
>
> (W)e are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professors - and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated August 13, 1990 cannot be stayed or withheld.
>
> We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Article 335.

In *Faculty Assn. of AIIMS* v. *Union of India*,[146] the question was whether reservation policy was inapplicable for making appointments to the entry level faculty post of Assistant Professor and to superspeciality posts in All India Institute of Medical Sciences, New Delhi. Applying the above principles, the constitution bench of the Supreme Court refused to accept the argument that there can be reservation in superspeciality posts/courses while observing thus:[147]

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144 *Prof. A. Marx.* v. *Government of Tamil Nadu,* 2013 (15) SCALE 257.

> In para 836 of the judgment in *Indra Sawhney* case, it was observed that while the relevance and significance of merit at the stage of initial recruitment cannot be ignored, it cannot also be ignored that the same idea of reservation implies selection of a less meritorious person. It was also observed that at the same time such a price would have to be paid if the constitutional promise of social justice was to be redeemed. However, after making such suggestions, a note of caution was introduced in the very next paragraph in the light of Article 15 of the Constitution. A distinction was, however, made with regard to the provisions of Article 16 and it was held that Article 335 would be relevant and it would not be permissible not to prescribe any minimum standard at all. Of course, the said observation was made in the context of admission to medical colleges and reference was also made to the decision in *State of M.P.* v. *Nivedita Jain* [(1981) 4 SCC 296], where admission to medical courses was regulated by an entrance test. It was held that in the matter of appointment of medical officers, the Government or the Public Service Commission would not be entitled to say that there would not be minimum qualifying marks for Scheduled Castes/Scheduled Tribes candidates while prescribing a minimum for others. In the very next paragraph, the nine-Judge Bench while discussing the provisions of Article 335 also observed that there were certain services and posts where either on account of the nature of duties attached to them or the level in the hierarchy at which they stood, merit alone counts. In such situations, it cannot be advised to provide for reservations. In the paragraph following, the position was made even more clear when Their Lordships observed that they were of the opinion that in certain services in respect of certain posts, application of rule of reservation may not be advisable in regard to various technical posts including posts in superspeciality in medicine, engineering and other scientific and technical posts.
>
> We cannot take a different view, even though it has been suggested that such an observation was not binding, being obiter in nature. We cannot ascribe to such a view since the very concept of reservation implies mediocrity and we will have to take note of the caution indicated in *Indra Sawhney* case. While reiterating the views expressed by the nine-Judge Bench in *Indra Sawhney* case, we dispose of the two civil appeals in the light of the said views.

Reservation for the blind

In *Union of India* v. *National Federation of the Blind*,[148] the apex court rejected the contention that the computation of reservation against the total vacancies in the cadre strength in group A and B posts in the state violated the rule of 50 per cent ceiling of reservation in favour of SC, ST and OBC as laid down in *Indra Sawhney* v. *Union of India*[149] because when the computation of reservation

145 1992 Supp (3) SCC 217 at 750-52, paras. 836-40.

146 (2013) 11 SCC 246.

against total vacancies in the cadre strength group C and D did not violate that ceiling, how could that violate the ceiling in group A and B posts. The court did not find any rationale for distinguishing between the manner of computation of reservation with regard to group A and B posts on one hand and manner of computation of reservation with regard to group C and D posts on the other. It was further held that the ceiling of 50% reservation applied only to reservation in favour of OBCs under article 16(4) of the Constitution whereas the reservation in favour of persons with disabilities was horizontal, under article 16(1). While dealing with the rule of 50% ceiling, the court in *Indra Saw*hney had used the example of 3% reservation in favour of persons with disabilities. In support of this view, the court relied upon the observations made in *Indra Sawhney*[150] case which, according to the court, had clearly brought out that "after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of the category to which they belong and, thus, the reservation for persons with disabilities per se has nothing to do with the ceiling of 50%." After detailed consideration of the entire issue pertaining to reservations for disabled persons, the court held that "computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz. "*computing 3% reservation on total number of vacancies in the cadre strength*" which is the intention of the legislature." Accordingly, certain clauses in the OM dated 29.12.2005, which were to the contrary, were struck down.

In order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, the court issued the following directions:[151]

> 1. We hereby direct the appellant herein to issue an appropriate order modifying the OM dated 29-12-2005 and the subsequent OMs consistent with this Court's order within three months from the date of passing of

147 *Id* at 258.

148 (2013) 10 SCC 772.

149 1992 Supp (3) SCC 217

150 *Id.* at 796, the court had held:

> *812*. … all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations—what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour

this judgment.

2. We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.

3. The appellant herein shall issue instructions to all the departments/ public sector undertakings/government companies declaring that the non-observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and the Nodal Officer in department/public sector undertakings/government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default.

VI FREEDOM OF SPEECH AND EXPRESSION

Right to information

The right to get information is a part of the freedom of speech and expression under article 19(1)(a) of the Constitution but this right is not absolute. The right is subject not only to the restrictions contained under clause (2) of article 19 but also the freedom can be claimed only to the extent it is available and possible, without affecting the fundamental right of others. In *Indian Soaps & Toiletries Makers Assn.* v. *Ozair Husain*,[152] the question was whether a citizen had a right of information in respect of food products, cosmetics and drugs available for human consumption and whether were of non-vegetarian or vegetarian origin. The Union of India had taken the stand that the information relating to ingredients of drugs, particularly those ingredients of non-vegetarian origin, should not be given "in the interest of general public". Further, it was not possible to distinguish the drugs whether they were life-saving or otherwise. That might depend on the condition of the patient. Moreover, the information claimed as a matter of right about the origin of the ingredients of a drug or cosmetic, a vegetarian might also claim information about the origin of a vegetarian ingredient, depending upon his food habit. There is also difficulty in treating a particular item as vegetarian or non-vegetarian. Food habits and religion play a vital role in making such habit. Jains are vegetarian but many of them do not eat vegetarian food such as potato, carrot, onion, garlic, *etc*. which are grown below the earth. Majority of Indians treat "honey" and "lactose" (milk derived sugar) as vegetarian but scientists treat them as "non-vegetarian" products. There are also non-vegetarians who are "eggetarian" i.e. they take only egg and no other non-vegetarian food like animal, fish or birds. There are also persons who treat egg as vegetarian food. Many of the non-vegetarians do not eat snakes, insects, frog or bird.

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of backward class of citizens remains—and should remain—the same.

151 *Id.* at 800.

The court agreed that in an individual case, the central government might feel difficulty in specifying the origin of a "vegetarian" or "non-vegetarian" ingredient, if a person wants to know the definite origin of such "vegetarian" or "non-vegetarian" ingredient on the basis of his food habit. The court, therefore, held that the direction issued by the High Court to the Union of India to amend the rules and provide the required information was set aside since the court had no jurisdiction to issue directions to the executive to make delegated legislation.

Freedom of press - media reporting

The orders of the Supreme Court prove almost complete freedom to the press and refused to pass restraint orders against them. In *Asharam Bapu* v. *Union of India*,[153] the petitioner had approached the Supreme Court under article 32 of the Constitution praying for "writ of mandamus or appropriate writ, order or direction, restraining the respondents as well as media from publishing any news report/ article in any manner whatsoever, adversely prejudicing the petitioner's right to fair trial and presumption of being innocent until proved guilty before the competent court of law or in alternative the petitioner has prayed for issue of writ of mandamus or appropriate writ(s), direction(s) directing postponement of publication of any news report/article in any manner whatsoever, adversely prejudicing the petitioner's right to fair trial and presumption of being innocent until proved guilty before the competent court of law at least till conclusion of the trial." After going through the media publications, the court refused to entertain the writ petition and pass any restraint order in view of several earlier decisions of the court.[154]

Screening of films

In *Vital Media v. State of Punjab*,[155] a petition was filed under art.[32] challenging the order of state government of Punjab banning the screening of the Punjabi film "Sadda Haq" in the state on the ground that it glorified extremism. The government had passed the order on the recommendations of an expert committee constituted by the government which, after viewing the film, was of the opinion that it was likely to hurt religious sentiments and cause breach of peace. Similar notifications were issued in Delhi and Chandigarh also. After perusing the report of the four-member committee appointed by it, which was against suspending the screening of the film, the Supreme Court asked the Central Board of Film Certification to consider by a date fixed by the court (19.04.2013) whether the "U" certificate granted to the film under section 5A of the Cinematograph Act, 1952 could be changed to "A". The committee had dismissed the apprehension of governments of Delhi, Punjab and the Union Territory of Chandigarh that the screening of the film was likely to cause breach of law and order. The committee had relied upon an earlier decision in *Union of India* v. *K M Shankarappa.*[156] It was agreed that the

152 (2013) 3 SCC 641; see also *N.U.S.J. Rama Rao* v. *Broadcasting Corpn. of India,* AIR 2013 AP 168; *Jatya Pal Singh* v. *Union of India* (2013) 6 SCC 452.

153 (2013) 10 SCC 37.

154 See *State of Maharashtra* v. *Rajendra Jawanmal Gandhi* (1997) 8 SCC 386; *M.P. Lohia* v. *State of W.B.* (2005) 2 SCC 686; *Manu Sharma* v. *State (NCT of Delhi)* (2010)

song "Baggi" shall not in any way be used either for promotional purposes or as a background to the film so that it was in no way be identified with the film. It may be noted that on the date of the order, the film had already been released in other parts of the country and pirated CDs of the film were circulating in the market. The court also ordered the makers, producers and distributors of the film to publish a disclaimer regarding the use of the promotional song, as far as the film is concerned. Likewise, in *Bata India Ltd.* v. *Prakash Jha Productions*,[157] the question related to the lyrics of a song in a film which the court found to be in poor taste and expressed the opinion that the reference to certain business houses could have been avoided. The court was, however, of the view that there did not "appear to be any intention in the song to besmirch the reputation of any particular business house or commercial enterprise and that the entire song has been written in a manner which attempts to depict the producer's view of the state of society today." The song "appears to have been written in the context of the theme of the film and ought not to be taken as any kind of aspersion against the persons named in the said song," the court opined. The court also held that the wordings of the song were not likely to be taken literally by the viewers. The court, agreeing with the views of Calcutta High Court, where the same question had been raised, directed that the song, when played, must run with the disclaimer, "Use of the names in the song are merely as example. No injury or disrespect is intended to any particular person or brand" and further directed that such disclaimer should also be included in the audio version and the same should be aired before the song is played.

VII FREEDOM TO CARRY ON TRADE AND BUSINESS

No path breaking case on the freedom of profession, occupation, trade or business was reported during the current year. A few cases reported during the year merely reiterate the existing legal position. Thus, it has been reiterated that no citizen has a fundamental right to trade in liquor and the state can prohibit it or create monopoly in its favour. If, however, state wants to grant licence for sale of liquor, it must exercise that discretion reasonably.[158] Likewise, it has also been held that no applicant has a fundamental right to prospecting licence or mining lease.[159]

What is a reasonable restriction which can be imposed in public interest under clause (6) of article 19 on the right to freedom of trade or business? The term "reasonable restriction" includes total prohibition as held by the Supreme Court in *Narendra Kumar* v. *Union of India*,[160] in which the court had upheld the constitutional validity of the Non-ferrous Metal Control Order, 1958, issued under the Essential Commodities Act, 1955. In *State of Maharashtra* v. *Indian Hotel &*

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6 SCC 1 and *Sahara India Real Estate Corpn. Ltd.* v. *SEBI* (2012) 10 SCC 603

155 2013 (6) SCALE 454.

156 (2001) 1 SCC 582.

157 (2013) 1 SCC 729.

158 *State of Kerala* v. *Kandath Distilleries*, AIR 2013 SC 1812; see also *State of Bihar* v. *Nirmal Kumar Gupta* (2013) 2 SCC 565; *Krishna Kumar Narula* v. *State of J. & K.*, AIR 1967 SC 1368.

Restaurants Assn.,[161] however, the Supreme Court held that total prohibition placed on eating houses, permit rooms and dance bars below rank of 3 starred hotels under section 31A of the Bombay Police Act, 1951, was violative of article 19(1)(g) of the Constitution because there were sufficient legislations, rules and regulations to regulate prohibited establishments.

The question of reasonable restriction in public interest that can be imposed under clause (6) of article 19 was decided by A.P. High Court in *Joseph Sriharsha and Mary Indraja Educational Society* v. *State of A.P*.[162] with reference to educational institutions. In this case, by two separate notifications dated 3.9.2012, the state government amended the A.P. Unaided Non-Minority Professional Institutions (Regulation of Admissions into Under-Graduate and Pharm-D (Doctor of Pharmacy) Professional Courses through Common Entrance Test) Rules, 2011 and the A.P. Unaided Minority Professional Institutions (Regulation of Admissions into Under-Graduate and Pharm-D (Doctor of Pharmacy) Professional Courses through Common Entrance Test) Rules, 2011 which, *inter alia*, provided that the selection for admission to category-B seats shall be conducted through a common web portal set up by the Chairman, A.P. State Council for Higher Education. The NRI quota was also reduced from 15% to 5%. The amended rules were challenged on the ground that they imposed unreasonable restrictions on the petitioner's fundamental right to carry on trade and business. It was pleaded that the procedure was unworkable as the applicants could choose any number of colleges/subjects thereby blocking seats making the admission process endless. The procedure was also alleged to be contrary to the decision given by the Supreme Court in *P.A. Inamdar* v. *State of Maharashtra*.[163] On the contrary, the state, claiming the amended rules to be valid, contended that the procedure was meant to be fair, transparent and non-exploitative thereby ensuring merit-based admissions. The procedure was claimed to be in public interest. In view of a very large number of engineering and pharmacy colleges, it was impossible to endure that category-B admissions were made fairly in a transparent manner.

While deciding the issues raised in the case, the court relied heavily on *T.M.A. Pai Foundation* v. *State of Karnataka*,[164] in which the apex court had laid down the broad parameters within which the state could regulate various aspects of private educational institutions. In that case, the majority, speaking through B.N. Kirpal, CJ, had observed:[165]

> The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an

159 *Geomin Minerals & Mk tg. (P) Ltd.* v. *State of Orissa* (2013) 7 SCC 571.

160 (1960) 2 SCR 375.

161 AIR 2013 SC 2582.

162 AIR 2013 AP 168.

163 AIR 2005 SC 3226.

> occupation, even if there is no element of profit generation. It is difficult to comprehend that education, *per se*, will not fall under any of the four expressions in Article 19(1)(*g*). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life.
>
> The right to establish and maintain educational institutions may also be sourced to Article 26(*a*), which grants, in positive terms, the right to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognized head of charity. Therefore, religious denominations or sections thereof, which do not fall within the special categories carved out in Articles 29(1) and 30(1), have the right to establish and maintain religious and educational institutions. This would allow members belonging to any religious denomination, including the majority religious community, to set up an educational institution. Given this, the phrase "private educational institution" as used in this judgment would include not only those educational institutions set up by secular persons or bodies, but also educational institutions set up by religious denominations; the word "private" is used in contradistinction to government institutions.

The court also held that private educational institutions were not completely immune from state regulation. With regard to the extent of state regulation of these institutions, B.N. Kirpal CJ observed:[166]

> The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions. X X X
>
> For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.
>
> Merit is usually determined, for admission to professional and higher

164 AIR 2003 SC 355 : (2002) 8 SCC 481.

> education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

The court was emphatic in holding that the same rules and regulations cannot apply to aided and un-aided institutions. In this connection, the learned judge had observed:[167]

> In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. X X X
>
> It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/ university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

In the light of the above observations, the High Court found that the restrictions imposed under the amended rules did not suffer from unreasonableness. The restrictions were aimed at ensuring fair, transparent and non-exploitative merit-based admissions. By conducting a common admission test, the right of the petitioners had not violated except that reduction of NRI seats from 15% to 5% had been done without adequate consultation and that was not justified. The court held:[168]

> (T)he main object of introducing the admission process through "common web portal" set up by the competent authority is to oversee admissions made by the unaided institutions and to ensure that the

165 *Id.* at 535 (of SCC).

166 *Id.* at 544 & 545-46.

admissions are made strictly on merit basis satisfying the triple tests of being fair, transparent and non-exploitative.

The court further held:[169]

Having regard to the object with which the impugned notifications are issued …, particularly keeping in view the observations made in para-138 of P.A. Inamdar's case … that it would be permissible to regulate admissions by providing a centralised and single window procedure so as to secure merit based admissions on a transparent basis, we are of the view that the amended Rule … can neither be said to have encroached upon the autonomy of the unaided educational institutions in the matter of admissions to Category-B seats nor it has imposed unreasonable and unacceptable restrictions on their right to make admissions into the said seats. Hence there is no infringement of the rights of the petitioners guaranteed under Article 19(1)(g) or Article 30 of the Constitution of India.

Quashing the reduction of NRI quota from 15% to %, the court held:[170]

. (N)o reason has been assigned why the aforesaid NRI quota has been reduced to 5%. We think that this has been done without having any legally entertainable complaint not to speak of enquiry as regards mala fide utilisation of the funds collected from the NRI candidates or total regardless of merit. It has to be understood clearly that these unaided educational institutions are depending upon the tuition fees and the funds made available by the candidates alone. Therefore, consideration of survival and sustenance of the educational institution has also to be kept in mind. Further, undoubtedly the NRI quota is a substantial source of fund. Payment of commensurate salary to the teaching faculty and staff, providing good infrastructure facilities including hostel accommodation require a large amount of fund and the State Government is not coming forwards to inject any fund to support the educational institutions. It requires reasonable degree of leverage as envisaged by the Supreme Court. This, in our view, presuming for argument sake that the State has say in this regard, should not have been reduced without proper deliberation and discussion with the educational institutions and without understanding the difficulty. Accordingly, we hold that declare that the aforesaid reduction of the seats to 5% is unjustified and unfounded and the same is accordingly struck down and we restore the NRI quota to 15%.

VIII RIGHT TO PERSONAL LIBERTY

The right to personal liberty has been one of the most cherished fundamental rights of the citizens. By and large, the Supreme Court leaned in favour of protecting this right. In one offence, can several FIRs (first information report) be filed and

167 *Id.* at 547 & 549.

168 *Supra* note 162 at 182.

separate investigations be carried out was the question decided in *Amitbhai Anilchandra Shah* v. *Central Bureau of Investigation*.[171] In this case, filing of second FIR in respect of offences committed in the same transaction was held to be violative of the fundamental rights under arts. 14, 20 and 21 of the Constitution. In this case, after registration of FIR into alleged fake encounter killing of Sohrabuddin and his wife Kausarbi, the main witness in the case, Tulsiram Prajapati, was also killed in an alleged fake encounter and a fresh FIT was registered into this alleged fake encounter killing. The registration a fresh FIR and fresh investigation was challenged by filing a writ petition under article 32 of the Constitution.

Accepting the principle laid down in *Ram Lal Narang* v. *State (Delhi Administration)*,[172] that in certain cases a second FIR was permissible, P. Sathasivam J observed:[173]

> *Ram Lal Narang* was cited to be an authority carving out an exception to the general rule that there cannot be a second FIR in respect of the same offence. This Court, in the said decision, held that a second FIR would lie in an event when pursuant to the investigation in the first FIR, a larger conspiracy is disclosed, which was not part of the first FIR. In the case on hand, while entrusting the investigation of the case relating to the killing of Sohrabuddin and Kausarbi to CBI, this Court, by order dated 12-1-2010 (2010) 2 SCC 200, expressed a suspicion that Tulsiram Prajapati could have been killed because he was an eyewitness to the killings of Sohrabuddin and Kausarbi.
>
> CBI also filed an FIR on 1-2-2010 based upon the aforesaid judgment dated 12-1-2010 and conducted the investigation reaching to a conclusion that conspiracy to kill Sohrabuddin and Kausarbi and conspiracy to kill Tulsiram Prajapati were part of the same transaction inasmuch as both these conspiracies were entered into from the very outset in November 2005. Based upon its investigation, CBI filed a status report(s) before this Court and an affidavit in Writ Petition (Crl.) No. 115 of 2007 bringing to the notice of this Court that killing of Tulsiram Prajapati was also a part of the same transaction and the very same conspiracy in which killings of Sohrabuddin and Kausarbi took place and unless CBI is entrusted with the investigation of Tulsiram case, it will not be able to unearth the larger conspiracy covered in the first FIR. The fact that even as per CBI, the scope of conspiracy included alleged killing of Sohrabuddin and Kausarbi and alleged offence of killing of Tulsiram Prajapati and the same is unequivocally established by the order passed by this Court on 12-8-2010.

The learned judge further held:[174]

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169 *Id.* at 183.

170 *Id.* at 184-85.

171 AIR 2013 SC 3794 : (2013) 6 SCC 348.

> This Court accepting the plea of CBI in *Narmada Bai* (2011) 5 SCC 79 that killing of Tulsiram Prajapati is part of the same series of cognizable offence forming part of the first FIR directed CBI to "take over" the investigation and did not grant the relief prayed for i.e. registration of a fresh FIR. Accordingly, filing of a fresh FIR by CBI is contrary to various decisions of this Court. X X X
>
> In the case on hand, … in our opinion, the second FIR was nothing but a consequence of the event which had taken place on 25-11-2005/26-11-2005. We have already concluded that this Court having reposed faith in CBI accepted their contention that Tulsiram Prajapati encounter is a part of the same chain of events in which Sohrabuddin and Kausarbi were killed and directed CBI to "take up" the investigation. X X X
>
> (I)n the case on hand, initially CBI took a stand that the third person accompanying Sohrabuddin and Kausarbi was Kalimuddin. However, with the aid of further investigation, it unveiled that the third person was Tulsiram Prajapati. Therefore, only as a result of further investigation, CBI has gathered the information that the third person was Tulsiram Prajapati. Thus a second FIR in the given facts and circumstances is unwarranted: instead filing of a supplementary charge-sheet in this regard will suffice the issue.
>
> Administering criminal justice is a two-end process, where guarding the ensured rights of the accused under the Constitution is as imperative as ensuring justice to the victim. It is definitely a daunting task but equally a compelling responsibility vested on the court of law to protect and shield the rights of both. Thus, a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. Accordingly, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences. As a consequence, in our view this is a fit case for quashing the second FIR to meet the ends of justice.

While quashing the second FIR, the learned judge observed:[175]

> In the light of the specific stand taken by CBI before this Court in the earlier proceedings by way of assertion in the form of counter-affidavit, status reports, etc. we are of the view that filing of the second FIR and fresh charge-sheet is violative of fundamental rights under Articles 14, 20 and 21 of the Constitution since the same relate to alleged offence in respect of which an FIR had already been filed and the court has taken

172 AIR 1979 SC 1791.

173 *Supra* note 171 at 378 (of SCC).

> cognizance. This Court categorically accepted CBI's plea that killing of Tulsiram Prajapati is a part of the same series of cognizable offence forming part of the first FIR and in spite of the fact that this Court directed CBI to "take over" the investigation and did not grant the relief as prayed, namely, registration of fresh FIR, the present action of CBI filing fresh FIR is contrary to various judicial pronouncements which is demonstrated in the earlier part of our judgment.
>
> In view of the above discussion and conclusion, the second FIR dated 29-4-2011 being RC No. 3(S)/2011/Mumbai filed by CBI is contrary to the directions issued in judgment and order dated 8-4-2011 by this Court in *Narmada Bai* v. *State of Gujarat* and accordingly the same is quashed. As a consequence, the charge-sheet filed on 4-9-2012, in pursuance of the second FIR, be treated as a supplementary charge-sheet in the first FIR.

Right against self incrimination

In *Selvi* v. *State of Karnataka*,[176] the Supreme Court had held that involuntary administration of scientific techniques like narco-analysis, polygraph examination and the brain electrical activation profile (BEAP) tests and its results were of a "testimonial character" which amounted to self-incrimination and violative of article 20(3) of the Constitution. The protection of article 20(3) could be claimed when the statements were likely to lead to incriminate. In *Ritesh Sinha* v. *State of U.P.*,[177] the question was whether giving of voice sample was hit by article 20(3). In this case, the allegation was that one Dhoom Singh in connivance with the appellant was collecting money from people on the pretext of getting them job in police. The telephonic conversation between the two was recorded and the police wanted to verify whether the voice recorded was that of the appellant. Holding that article 20(3) was not attracted for voice recording, Ranjana P. Desai, J, observed:[178]

> Applying the test laid down by this Court in *Kathi Kalu Oghad*, AIR 1961 SC 1808, which is relied upon in *Selvi* (2010) 7 SCC 263, I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 20(3) of the Constitution. Voice sample is like fingerprint impression, signature or specimen handwriting of an accused. Like giving of a fingerprint impression or specimen writing by the accused for the purposes of investigation, giving of a voice sample for the purpose of investigation cannot be included in the expression "to be a witness". By giving voice sample the accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it with tape-recorded conversation, the

174 *Id.* at 381, 382 & 383.

175 *Id.* at 383.

176 (2010) 7 SCC 263. The court had relied upon *State of Bombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808.

> investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is asked to give voice sample, he is not giving any testimony of the nature of a personal testimony. When compared with the recorded conversation with the help of mechanical process, it may throw light on the points in controversy. It cannot be said by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives "identification data" to the investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Article 20(3) of the Constitution.

Rights of minor craniopagus twins (CTs)

In *Aarushi Dhasmana* v. *Union of India*,[179] the Supreme Court was faced with a very unusual plight of two craniopagus twins who were females aged 15 years. The court was in a great dilemma as to what to do in the matter since the mother and brother of the girls did not want operation, perhaps because they did not wish to loose any of the two girls and as per experience the chances of survival of both was just 25%; they merely wanted financial help for looking after both children as they were. The team of doctors sent from AIIMS on the directions of the court could not conduct any tests on account of resistance of the family members and the absence of medical facilities. The court's dilemma can be seen from the following observation:[180]

> The case of Saba and Farha gives rise to various questions about the rights of the minors, their right to life, their inter se rights, inherent value of lives, right to bodily integrity, balancing of interests, best interest standards, parents' views, courts' duty, doctors' duty, etc. The questions raised above are interconnected and interrelated and have their roots in medical law, family law, criminal law and human rights law. Should we go for the best interest of Saba and Farha, or either of them? Can a court override the wishes of the parents when we apply the best interest standard for saving the life of at least one?

The court held that the right to life guaranteed under article 21 also includes the right to bodily integrity. In the absence of medical report, the court was unable to say as to whether both girls could be saved or either of them. Both girls were dear but in a situation where both might die in the absence of surgical separation and in case of a surgical operation, one would survive, was there not a duty on the court to save at least one, the court asked to itself. Pointing out the duty of the court, it was observed:[181]

> There can also be conflict of interests between CTs that is Saba and

177 (2013) 2 SCC 357 : AIR 2013 SC 1132.

178 *Id.* at 372 (of SCC).

179 (2013) 9 SCC 475.

> Farha, in such situation the Court has to adopt a balancing exercise to find out the least detrimental alternative. We are not in a position to undertake that exercise in the instant case, because there is no medical report before us stating that if CTs are subjected to surgical operation, one of them might survive. If there is an authentic medical report before us that the life of one could be saved, due to surgical operation, otherwise both would die, we would have applied the "least detrimental test" and saved the life of one, even if the parents are not agreeable to that course. Every life has an equal inherent value which is recognised by Article 21 of the Constitution and the Court is duty-bound to save that life.

The court in this case found itself virtually helpless. It was even sad while passing the following order:[182]

> We are sorry to note that nobody is concerned with the pain and agony CTs are undergoing, not even the parents, what they want is financial help as well as palliative care. No positive direction can be given in the absence of an expert medical opinion indicating that either of them can be saved due to surgical operation or at least one. Considering the facts and circumstances of this case, we are, however, inclined to give the following directions:
>
> 1. Civil Surgeon, Medical Centre, Patna should periodically carry on the medical examination of both Saba and Farha and send periodical reports, at least quarterly to AIIMS and AIIMS would make their own suggestion based on the investigation which is being conducted by the medical team from Patna.
>
> 2. The State of Bihar is directed to meet the complete medical expenses for the treatment of both Saba and Farha and also would pay a consolidated amount of Rs 5000 monthly to look after both Saba and Farha.
>
> 3. CTs' condition as well as the treatment given to them be reported to this Court every six months.
>
> 4. The State of Bihar is directed to move this Court for further directions, so that better and more scientific and sophisticated treatment could be extended to Saba and Farha.

Right to speedy trial

It is well established that fair and speedy trial of a criminal case is a facet of the right to life and personal liberty. But it is also well established that trial cannot be quashed merely on the ground of delay.[183] In this regard, the conduct of the

180 *Id.* at 481.

accused is a very relevant factor. This principle was applied by the apex court in a few cases during the current year. In *Lokesh Kumar Jain* v. *State of Rajasthan*,[184] the allegation against the appellant was that while working as lower division clerk, a financial irregularity was committed by him during 1996-97. The report of auditor general had discovered an embezzlement of Rs 4,39,617. The original copies of the bills and documents were available in the office of the auditor general and in the office of directorate for the state literacy programme. Therefore, on the basis of report given by the auditor general, FIR was registered against the appellant in 2000. On the court's orders dated 18.11.2000, the police was directed to make further investigation of the case and the matter kept pending there since then. The appellant claimed to have met as well as represented several times to the police authorities and the departmental authorities but no action was taken by the authorities. Neither final report was submitted nor the challan was filed. Earlier report filed by the police had stated that the original copies of the bills and other documents were not available. The court noted that the identical charges could not be established in the departmental proceedings. The court also noted that during the investigation, the records in respect of the allegation were not produced before the police despite repeated reminders. No evidence came against the appellant from the file of the education department. In spite of the order dated 18.11.2000, for nine years, records relating to the case were not made available. The record was not available even till the date of hearing of the case. The court held that the silence of the respondent regarding availability of the original record or other evidence before the investigating agency showed that the delay was caused due to the inaction on the part of the respondent.

The court, therefore, quashing the FIR, held that "keeping investigation pending for further period will be futile as the respondent including the Directorate for the State Literacy Programme is not sure whether the original records can be procured for investigation and to bring home the charges. Considering the fact that delay in the present case is caused by the respondent, the constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution is thereby violated and as the appellant has already been exonerated in the departmental proceedings for identical charges, keeping the case pending against the appellant for investigation, is unwarranted …."

On the contrary, the court refused to quash criminal prosecution of the appellant in *Niranjan Hemchandra Sashittal* v. *State of Maharashtra*,[185] on the ground that the delay in the trial had been caused primarily because the appellant

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181 *Id.* at 482.

182 *Id.* at 484.

183 See *A.R. Antulay* v. *R.S. Nayak*, AIR 1992 SC 1701; *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822; *Imtiaz Ahmad* v. *State of U.P.*, AIR 2012 SC 642; S N Singh, Constitutional Law – I (Fundamental Rights)", XLXVIII *ASIL* 173 at 202 (2012)

184 (2013) 11 SCC 130; also see *Noor Mohammed* v. *Jethanand*, AIR 2013 SC 1217; *Babubhai Bhimabhai Bokhiria* v. *State of Gujarat*, AIR 2013 SC 3648; *Vipul Shital Prasad Agarwal* v. *State of Gujarat* (2013) 1 SCC 197; *Natasha Singh* v. *CBI* (2013) 5 SCC 741.

had himself prolonged the trial seeking adjournments and filing miscellaneous applications. The court was much concerned about corruption charge – acquiring assets worth Rs. 33.33 lacs in 1993 – against the appellant.

Effect of delay in deciding mercy petition

The effect of delay in the disposal of the mercy petitions has to be decided in the light of facts and circumstances of the concerned case and the nature of the offence. In *Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*,[186] the petitioner was charged with offences under sections 419, 420, 468 and 471, IPC, section 12 of the Passports Act, 1967 and sections 2, 3 and 4 of TADA for his activities including an attack on the car cavalcade of the President of Youth Congress, Maninderjit Singh Bitta, in Delhi on 10.9.1993. As a result of the blast caused by using 40 kg RDX, 9 persons were killed and 17 were injured. The designated court, Delhi found him guilty and sentenced him to death. The appeal filed by him as well as the review petition were dismissed by the Supreme Court.

After dismissal of the review petition, the petitioner submitted a petition dated 14.1.2003 to the President of India under article 72 of the Constitution and prayed for commutation of his sentence. During the pendency of the petition filed under Article 72, the petitioner filed curative petition which was dismissed by the Supreme Court on 12.3.2003. The petitioner's case was finally submitted to the President on 11.7.2005 with the recommendation that the mercy petition be rejected. But no decision was taken by the President. On 29.4.2011, the Ministry of Home Affairs sent a request to the President's secretariat to return the file of the petitioner. On 6.5.2011, the file was withdrawn from the President's secretariat for reviewing the petitioner's case. The matter was again examined in the Ministry of Home Affairs and on 10.5.2011, the then Home Minister opined that those convicted in the cases of terrorism did not deserve any mercy or compassion and accordingly recommended that the sentence of death be confirmed. The President accepted the advice of the Home Minister and rejected the mercy petition. The petitioner was informed about this decision of the President vide letter dated 13.6.2011 sent by deputy secretary (Home) to the jail authorities.

The petitioner approached the Supreme Court praying commutation of his death sentence on the ground of delay in the disposal of his mercy petition by the President of India and also questioning the President's decision rejecting his mercy petition. Dismissing the petition and rejecting the prayer of commutation, the court held:[187]

> Though the argument appears attractive, on a deeper consideration of all the facts, we are convinced that the present case is not a fit one for exercise of the power of judicial review for quashing the decision taken by the President not to commute the sentence of death imposed on the

185 AIR 2013 SC 1682 : (2013) 4 SCC 642; also see *Lalu Prasad* v. *State of Jharkhand* (2013) 8 SCC 593.

petitioner. Time and again …, it has been held that while imposing punishment for murder and similar type of offences, the Court is not only entitled, but is duty-bound to take into consideration the nature of the crime, the motive for commission of the crime, the magnitude of the crime and its impact on the society, the nature of weapon used for commission of the crime, etc. If the murder is committed in an extremely brutal or dastardly manner, which gives rise to intense and extreme indignation in the community, the Court may be fully justified in awarding the death penalty. If the murder is committed by burning the bride for the sake of money or satisfaction of other kinds of greed, there will be ample justification for awarding the death penalty. If the enormity of the crime is such that a large number of innocent people are killed without rhyme or reason, then too, award of extreme penalty of death will be justified. All these factors have to be taken into consideration by the President or the Governor, as the case may be, while deciding a petition filed under Article 72 or 161 of the Constitution and the exercise of power by the President or the Governor, as the case may be, not to entertain the prayer for mercy in such cases cannot be characterised as arbitrary or unreasonable and the Court cannot exercise power of judicial review only on the ground of undue delay.

(L)ong delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show any respect for human lives. Before killing the victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. The families of those killed suffer the agony for their entire life, apart from financial and other losses. It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights. X X X

It is true that there was considerable delay in disposal of the petition filed by the petitioner but, keeping in view the peculiar facts of the case,

> we are convinced that there is no valid ground to interfere with the ultimate decision taken by the President not to commute the sentence of death awarded to the petitioner into life imprisonment. We can take judicial notice of the fact that a substantial portion of the delay can well-nigh be attributed to the unending spate of the petitions filed on behalf of the petitioner by various persons to which reference has been made hereinabove.

A totally different view was taken in *Mahendra Nath Das* v. *Union of India*.[188] In this case, the appellant was prosecuted for an offence under section 302, IPC for killing Rajen Das, Secretary of Assam motor workers union on 24.12.1990. He was convicted by the sessions judge, vide judgment dated 11.11.1997 and was sentenced to life imprisonment. While he was on bail, the appellant allegedly killed Hare Kanta Das. He was convicted by the trial court and sentenced to death as the court held that the murder was most foul and gruesome. The High Court confirmed the conviction and sentence. The Supreme Court rejected his appeal

After the rejection of his appeal by the Supreme Court, the appellant submitted a petition to the President under article 72 of the Constitution and prayed for commutation of the sentence of death into life imprisonment. A similar petition was filed by him to the Governor of Assam under article 161 of the Constitution who rejected the same vide order dated 7.4.2000. The mercy petition addressed to the President was forwarded by the Government of Assam to the Ministry of Home Affairs sometime in June, 2000. After a lot of correspondence with the state government, the Ministry of Home Affairs prepared a note suggesting that the petition filed by the appellant may be rejected. On 20.6.2001, the then Home Minister recommended to the President that the mercy petition of the appellant should be rejected. The petitioner's case was submitted to the President on 19.4.2005 with the recommendation of the Home Minister that the mercy petition of the appellant may be rejected. The President considered the mercy petition and passed an order dated 30.9.2005 expressing the desire that the mercy petition be accepted.

The requisition for the return of the file was sent to the President's secretariat only on 7.9.2010. The President's secretariat returned the file on 24.9.2010. The Home Minister referred to the observations made by the court and recommended that the mercy petition may be rejected because there was no mitigating circumstance. The recommendations made by the Home Minister on 18.10.2010 were approved by the President on 8.5.2011. Thereafter, the appellant was informed about rejection of his petition.

The writ petition filed by the appellant questioning the rejection of his mercy petition was dismissed by the division bench of the High Court against which appeal was filed before the Supreme Court. The appellant's argument was that the delay of 12 years in the disposal of his mercy petition was sufficient for commutation

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186 (2013) 6 SCC 195.

of the sentence of death into life imprisonment. The Union of India explained the time gap by citing correspondence between the central government and the government of Assam, consideration of the case at different levels in the Ministry of Home Affairs, *etc.* However, the court found no explanation for the time gap of three years between 20.6.2001, *i.e.* the date on which the then Home Minister made recommendation for rejection of the mercy petition filed by the appellant, and September 2004, when the file again started moving within the Ministry and five years between 30.9.2005, *i.e.* the date on which the President opined that the mercy petition of the appellant be accepted and September, 2010, when the file was actually summoned back by the Ministry of Home Affairs. Surprisingly, the Home Minister in his recommendation did not even make a mention of the note of the President dated 30.9.2005. The omission to make a mention of the order passed by her predecessor and the note dated 30.9.2005 from the summary prepared for her consideration led the court to an inference that the President was kept in dark about the view expressed by her predecessor and was deprived of an opportunity to objectively consider the entire matter. The respondent did not plead or place any material before the court to show that the Government of India had placed the file before the then President for review of the order recorded by him on 30.9.2005 or the President who finally decided the appellant's petition on 8.5.2011 was requested to reconsider the decision of her predecessor. Therefore, the court held that the President was not properly advised and assisted in the disposal of the appellant's petition.

In view of the above, the court was convinced that 12 years' delay in the disposal of the appellant's mercy petition was sufficient for commutation of the death sentence. The court, therefore, allowed the appeal and set aside the impugned order declaring the rejection of the appellant's mercy petition as illegal and quashed the same. The sentence of death awarded to the appellant was commuted into life imprisonment.

IX PREVENTIVE DETENTION

Right to bail

In *Supreme Court Legal Aid Committee* v. *Union of India*,[189] the Supreme Court had held that where an undertrial accused had been charged with an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) punishable with minimum imprisonment of ten years and a minimum fine of rupees one lac, the undertrial would be released on bail if he has been in jail for not less than five years on furnishing bail of rupees one lakh with two sureties for like amount.

In *Thana Singh* v. *Central Bureau of Narcotics*,[190] the accused, had been in jail for more than twelve years, awaiting trial for an offence under the NDPS Act

187 *Id.* at 248, 250.

188 (2013) 6 SCC 253.

and was consistently denied bail. The maximum punishment for the offence the accused was charged was twenty years and thus, the undertrial had remained in detention for a period exceeding one-half of the maximum period of imprisonment. He was, therefore, entitled to bail as per the above decision. The court noted the general state of affairs pertaining to trials of offences under the NDPS Act and observed thus:[191]

> The laxity with which we throw citizens into prison reflects our lack of appreciation for the tribulations of incarceration; the callousness with which we leave them there reflects our lack of deference for humanity. It also reflects our imprudence when our prisons are bursting at their seams. For the prisoner himself, imprisonment for the purposes of trial is as ignoble as imprisonment on conviction for an offence, since the damning finger and opprobrious eyes of society draw no difference between the two. The plight of the undertrial seems to gain focus only on a solicitous inquiry by this Court, and soon after, quickly fades into the backdrop.

After obtaining a first-hand account about the state of trials under the NDPS Act pending in all the states, the court laid down detailed guidelines and directions for observance by all concerned as the law declared under article 141 of the Constitution. This was done in exercise of power under article 32 for the enforcement of fundamental rights, especially under article 21. These directions related to adjournments, examination of witnesses, workload, narcotics laboratories, personnel, re-testing, monitoring, appointment of public prosecutors, and delays. For curtailing delays resulting from the provisions of section 207, Cr PC, the court directed that the filing of the charge-sheet and supply of other documents must also be provided in electronic form. This direction was, however, not to be treated as a substitute for hard copies of the same which are indispensable for court proceedings.

X CULTURAL AND EDUCATIONAL RIGHTS OF MINORITIES

On what basis the status of 'minority' should be decided? The majority in *Pai Foundation*,[192] had held that the minority, whether religious or linguistic, should be decided by taking the state as a unit because the states have been created on the basis of language. Both religious as well as linguistic minorities have been equated at par under art. 30. To decide the minority character of an institution, the relevant questions are that (i) the institution has been established by a minority; (ii) it is administered by the minority and (iii) the *intention* of the founder was to establish the institution as a minority institution as indicated in the instrument creating/establishing the institution or as reflected in the course of conduct in case there is no written instrument.[193] Does a minority institution lose its minority character merely because it admits students of the concerned minority community

189 (1994) 6 SCC 731.

190 (2013) 2 SCC 590.

191 *Id.* at 592.

192 *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481.

from other states or it admits students of non-minority community of the same or some other state? In *Pai Foundation*, the court had observed:[194]

> Article 30(1) make it clear that religious and linguistic minorities have been put on a par, insofar as that article is concerned. Therefore, whatever the unit—whether a State or the whole of India—for determining a linguistic minority, it would be the same in relation to a religious minority. India is divided into different linguistic States. The States have been carved out on the basis of the language of the majority of persons of that region. For example, Andhra Pradesh was established on the basis of the language of that region viz. Telugu. 'Linguistic minority' can, therefore, logically only be in relation to a particular State. If the determination of 'linguistic minority' for the purpose of Article 30 is to be in relation to the whole of India, then within the State of Andhra Pradesh, Telugu [speaking people] will have to be regarded as a 'linguistic minority'. This will clearly be contrary to the concept of linguistic States.

In *P.A. Inamdar* v. *State of Maharashtra*,[195] it was held:

> The term 'minority' is not defined in the Constitution. Kirpal, C.J. speaking for the majority in *Pai Foundation* took a clue from the provisions of the States Reorganisation Act and held that in view of India having been divided into different linguistic States, carved out on the basis of the language of the majority of persons of that region, it is the State, and not the whole of India, that shall have to be taken as the unit for determining a linguistic minority vis-à-vis Article 30. Inasmuch as Article 30(1) places on a par religions and languages, he held that the minority status, whether by reference to language or by reference to religion, shall have to be determined by treating the State as a unit. The principle would remain the same whether it is a Central legislation or a State legislation dealing with a linguistic or religious minority. Khare, J. (as His Lordship then was), Quadri, J. and Variava and Bhan, JJ. in their separate concurring opinions agreed with Kirpal, C.J. According to Khare, J., take the population of any State as a unit, find out its demography and calculate if the persons speaking a particular language or following a particular religion are less than 50% of the population, then give them the status of linguistic or religious minority. The population of the entire country is irrelevant for the purpose of determining such status. Quadri, J. opined that the word 'minority' literally means 'a non-dominant' group. Ruma Pal, J. defined the word 'minority' to mean 'numerically less'. However, she refused to take the State as a unit for the purpose of determining minority status as, in her opinion, the question of minority status must be determined with

193 *State of Kerala* v. *Very Rev. Mother Provincial* (1970) 2 SCC 417; *T. Varghese George v. Kora K. George* (2012) 1 SCC 369.

> reference to the country as a whole. She assigned reasons for the purpose. Needless to say, her opinion is a lone voice. Thus, with the dictum of *Pai Foundation*, it cannot be doubted that a minority, whether linguistic or religious, is determinable only by reference to the demography of a State and not by taking into consideration the population of the country as a whole.
>
> Such definition of minority resolves one issue but gives rise to many a questions when it comes to defining 'minority educational institution'. Whether a minority educational institution, though established by a minority, can cater to the needs of that minority only? Can there be an enquiry to identify the person or persons who have really established the institution? Can a minority institution provide cross-border or inter-State educational facilities and yet retain the character of minority educational institution?

In *Dayanand Anglo Vedic (DAV) College Trust & Management Society* v. *State of Maharashtra*,[196] by an order dated 26.10.2009, the respondents had withdrawn the linguistic minority status of the appellant institution which was earlier granted by an order dated 11.7.2008 on the ground that the earlier order granting recommendation was under the mistake that the trustees of the appellant were residing in the State of Maharashtra. In this case, the question was whether a member of a linguistic non-minority in one state can establish a trust or society in another state and claim minority status in that state.

The appellant society was formed in the year 1885 and registered under the Societies Registration Act, 1860 at Lahore and in the State of Punjab in 1948. It was running a large number of schools and colleges established by it all over India. Its aims and objects were to establish educational institutions to encourage the study of Hindi, classical Sanskrit and *Vedas* and also to provide instructions in English and other languages, Arts, Science, Medicine, Engineering, *etc.* The appellant started educational institutions at Solapur in the State of Maharashtra in 1940 and has schools and colleges at different places in that state. The persons speaking Hindi language and the followers of Arya Samaj in the State of Maharashtra were less than 50% of total population of the state. Being formed by the persons belonging to Arya Samaj and speaking Hindi language, the appellant claimed to be a linguistic minority within the purview of article 30 of the Constitution. On these facts, the appellant was granted linguistic minority status in the State of Maharashtra by the respondents for the academic years 2004-2005, 2005-2006 and 2006-2007, after full appreciation of the documents and hearing the appellant. Later on, the respondents issued a certificate to the appellant recognising the appellant society at Solapur as a linguistic minority institution for the academic year 2008-2009 also.

The appellant made an application requesting respondent to issue certificate of recognition in the name of the appellant New Delhi instead of Solapur. Instead

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194 *Supra* note 192 at 552.

of correcting the certificate, respondents passed an order dated 2.8.2008 cancelling the certificate dated 11.7.2008 issued to the appellant. The respondents by the aforesaid order cancelled the recognition of the appellant as a minority linguistic educational institution for the years 2004-2005 and 2006-2007 also. The ground for cancellation of recognition of the linguistic minority status of the appellant was that though the appellant trust was registered under the Bombay Public Trusts Act by the charity commissioner, Mumbai, majority of the trustees were not residents of the State of Maharashtra and, therefore, they could not be called a linguistic minority in that state.

The writ petition filed by the society was dismissed by the Bombay High Court. It may be noted that the withdrawal of recognition was based on the resolution passed by the Minority Development Department of the State of Maharashtra laying down the conditions and procedure for the grant of certificate of minority linguistic character of the institution. One of the conditions given in the resolution was that the educational institutions of such persons whose mother tongue was other Indian language than Marathi would be eligible to submit their application for recognition and that minimum two-third trustees of the management committee of the society or institution should be from the minority community concerned. Thus, two-third of the trustees of the management committee of the society should be from the minority community.

The court noted that while making application for recognition during 2007, the appellant had not correctly furnished the required information, inasmuch as it was not stated in ther application seeking recognition that the trustees/members of the board of directors, who were looking after the business of the society, were non-minority. The reason being that the persons or trustees, who managed the business of the society, were non-minority, *i.e*. residing in New Delhi and not in the State of Maharashtra. It was only when the appellant made application for correction of the certificate that it disclosed that the society was based at New Delhi and not at Sholapur.

The High Court had noticed that though the appellant claimed linguistic minority status, but all its trustees were residing in the area where majority language was Hindi and the state government had a right to correct the mistake if any certificate granting minority linguistic status was granted contrary to law. The High Court had held that as the appellant's trustees did not reside in the State of Maharashtra, where Hindi-speaking people were linguistic minority, the appellant trust/society could not claim to be a minority institution. Upholding the views of the High Court, M.Y. Eqbal, J observed:[197]

> We have no doubt that the view taken by the High Court is justified. The rights conferred by Article 30 of the Constitution to the minority are in two parts. The first part is the right to establish the institution of minority's choice and the second part relates to the right to administration of such institution. The word "establishment" herein means bringing into being of an institution and it must be by minority community….

195 (2005) 6 SCC 537 at 590.

> Similarly, in *S.P. Mittal* v. *Union of India* (1983) 1 SCC 51, this Court held that in order to claim the benefit of Article 30, the community must firstly show and prove that it is a religious or linguistic minority; and secondly, that the institution has been established by such linguistic minority.

M.Y. Eqbal, J indicated the requirements for the application of article 30 thus: [198]

> After giving our anxious consideration to the matter and in the light of the law settled by this Court, we have no hesitation in holding that in order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied firstly that the institution has been established by the persons who are minority in such State; and, secondly, the right of administration of the said minority linguistic institution is also vested in those persons who are minority in such State. The right conferred by Article 30 of the Constitution cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it non-minority in other place, can administer and run such institution.

In *Shantiniketan Education Trust* v. *State of Gujarat*,[199] the question was whether Hindi speaking persons in the State of Gujarat were to be considered minority. In this case, the appellants were running educational institutions and they had been conferred with minority status. They were later informed that as per the government resolution dated 14.11.1979, only three languages were treated as linguistic minority, *viz.* Urdu, Sindhi and Marathi and, therefore, Hindi was not treated as linguistic minority in the State of Gujarat and, therefore, the petitioners could not claim the status of linguistic minority. As Hindi was an official language and even in Gujarat the same was treated as official language, Hindi could not be treated as linguistic minority in the state.

The petitioners contended before the High Court that the communication of the respondent that Hindi was not to be treated as linguistic minority had taken away the protection of article 29 read with article 30 of the Constitution. It was contended that for claiming the status as linguistic minority, the population of the group should be less than 50% of the total population of the state and the state was to be considered as unit. As per the census of 1991, the population of Hindi speaking people was less than 50% in the State of Gujarat; group of Hindi speaking persons in the state was in minority in Gujarat and, therefore, Hindi was required to be declared as linguistic minority in that state.

M.R. Shah, J, speaking for the division bench, did not accept the views of the single judge that a minority group claiming to be minority must establish institutions only to promote their own language, culture and script. The learned judge observed:[200]

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196 (2013) 4 SCC 14.

197 *Id.* at 31.

198 *Id.* at 34.

> Considering the aforesaid decision of the Hon'ble Supreme Court and Article 30(1) of the Constitution of India, the view is taken by the learned Single Judge in the impugned judgment and order that while considering the claim by person or group of persons belonging genuinely to the group of Hindi linguistic as linguistic minority in the Gujarat State, it will be open for the officer concerned to examine the Constitution and functioning of each petitioner institutions and to find out as to whether the petitioner institutions are formed with an object to promote and preserve Hindi language, script and culture or not and if as the outcome of the inquiry it is found that the concerned petitioner institutions is formed with an object to promote and preserve Hindi as its language, culture and script, consequently status would be conferred upon such petitioners for such performance as minority institutions cannot be sustained. Such requirement would be violative of rights guaranteed to such linguistic minority persons guaranteed under Article 30(1) of the Constitution of India.

The learned judge, however, accepted the observations made by the single judge that while considering the claim of the petitioner institutions as linguistic minority (Hindi) in Gujarat, it was open for the state to examine facts of each institution and to ascertain whether such person or group of persons running the petitioners institutions were genuinely belonging to the Hindi linguistic group. Shah J, allowing the appeals, further held:[201]

> As observed by the Hon'ble Supreme Court in the case of P. A. Inamdar (supra) the objective underlying Article 30(1) is to see the desire of minorities being fulfilled that their children should be brought up properly and efficiently and acquire eligibility for higher university education and go out into the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions imparting higher instructions including general secular education. Therefore, objective underlying Article 30(1) of the Constitution of India is to enable such minority institutions religion or linguistic to give thorough, good, general education to children belonging to such minority. Therefore, a person or group of persons belonging genuinely to the group of Hindi linguistic claiming status as linguistic minority in the Gujarat State has to satisfy that their object is to establish such institution for the benefit of their own linguistic minority i.e. genuinely Hindi speaking persons so as to see that such Hindi speaking persons who are found to be in minority in the Gujarat State may compete with others. Therefore, the contention on behalf of the petitioners institutions that while claiming status as linguistic minority (Hindi) in the Gujarat State by establishing a institution, it need not be restricted predominantly for the benefit of genuinely Hindi speaking persons cannot be accepted. There objects should be to establish the

199 AIR 2013 Guj. 210.

> institution predominantly for the benefit of persons belonging to such linguistic minority (Hindi speaking persons). To that extent, the impugned judgment and order passed by the learned Single Judge deserves to be modified.

Prescribing medium of instruction

Can the state prescribe the medium of instruction in the schools was the question raised in *State of Karnataka* v. *Associated Managements of Primary & Secondary Schools.*[202] In this case, the government order prescribed that the medium of instruction from 1st to 4th standard in all schools recognised by the state government shall be either the mother tongue or Kannada from academic year 1994–1995. Permission was, however, granted to the students studying in 2nd, 3rd and 4th standards to continue in the medium of language they were studying at that time. The unauthorised schools not fulfilling the prescribed conditions were ordered to close down. Various linguistic and religious minorities, religious denominations, parents, parents' associations, children through their parents and educational institutions run by the majority filed writ petition before the High Court of Karnataka questioning the constitutional validity of the government orders dated 22.4.1994 and 29.4.1994 as being violative of articles 14, 19(1)(*a*), 21, 29(2) and 30(1) of the Constitution. The full bench of the High Court partly allowed the writ petitions upholding the government order and quashed certain clauses of the impugned order dated 29.4.1994 in its application to schools other than the schools run or aided by the government.

Realising the importance of the issue involved, the court, instead of deciding the issue, referred to matter to a larger bench observing thus:[203]

> The crux of the grounds raised in the petition was whether the mother tongue or the regional language could be imposed by the state as the medium of instruction at the primary education stage.
>
> The vital question involved in this petition has a far-reaching significance on the development of the children in our country who are the future adults. The primary school years of a child is an important phase in a child's education. Besides, it moulds the thinking process and tutors on the communication skills. Thus, primary education lays the groundwork for future learning and success. Succinctly, the skills and values that primary education instils are no less than foundational and serve as bases for all future learning. Likewise, the importance of a language cannot be understated; we must recollect that reorganisation of the States was primarily based on language. Further, the issue involved in this case concerns about the fundamental rights of not only the present generation but also of the generations yet to be born.

200 *Id.* at 216.

201 *Id.* at 217.

Considering the constitutional importance of these questions, we are of the firm view that all these matters should be heard by a Constitution Bench. With regard to the above, the following questions are relevant for consideration by the Constitution Bench which are as under:

> 1. What does mother tongue mean? If it referred to as the language in which the child is comfortable with, then who will decide the same?
>
> 2. Whether a student or a parent or a citizen has a right to choose a medium of instruction at primary stage?
>
> 3. Does the imposition of mother tongue in any way affect the fundamental rights under Articles 14, 19, 29 and 30 of the Constitution?
>
> 4. Whether government recognised schools are inclusive of both government aided schools and private and unaided schools?
>
> 5. Whether the State can by virtue of Article 350-A of the Constitution compel the linguistic minorities to choose their mother tongue only as medium of instruction in primary schools?
>
> 6. Apart from the abovesaid issues, the Constitution Bench would also take into consideration any other ancillary or incidental questions which may arise during the course of hearing of the case.
>
> With regard to the above, all the connected matters including petitions/ applications shall be placed before the Constitution Bench.

XI JUDICIAL REVIEW

No judicial intervention in government's economic/policy decision

It is well settled that there can be no judicial review of policy decisions.[204] Likewise, the court exercising powers under art. 32 of the Constitution cannot sit over the commercial or business decisions taken by the state or its agencies/ instrumentalities except when the prescribed procedure or statutory provisions had not been followed or the same was perverse or taken with ulterior motive or considerations.[205]

XII CONCLUSION

The court, as in the past, has been very clear, bold and firm in dealing with issues concerning violation of human rights of citizens, particularly vulnerable

202 (2013) 11 SCC 72; see also *Pramati Educational & Cultural Trust* v. *Union of India* (2013) 5 SCC 752.

203 *Id.* at 86.

204 See *B.S.G.S.S. Assn*. v. *Bihar Education Service Assn*., AIR 2013 SC 487 (merger of cadres); *Manohar Lal Sharma* v. *Union of India* (2013) 6 SCC 616 (policy of foreign direct investment (FDI) in single-brand product retail trading, multi-brand retail trading, air transport services, broadcasting carriage services and power exchanges); *Kachchh Jal Sankat Nivaran Samiti* v. *State of Gujarat*, AIR 2013 SC 2657 (allocation

sections of society such as women's, children and physically handicapped persons. The issues concerning women were prominently taken up to protect their human rights. Thus, in *Voluntary Health Assn. of Punjab* v. *Union of India*,[206] the court noticed that the directions passed by it in earlier cases[207] as well as the provisions of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and the Medical Termination of Pregnancy Act, 1971 were not being properly implemented by various states and union territories. The court was very firm in observing that a cosmetic awareness campaign to acquaint the masses about the above two legislations would never subserve the purpose and it issued directions to make the campaign more effective and purposeful. Likewise, the directions issued in *Inspector General of Police* v. *S. Samuthiram*,[208] prior to the enforcement of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 w.e.f. 9.12.2013 remain useful even after the enforcement of the Act to deal with eve teasing. In *Budhadev Karmaskar* v. *State of W.B.*,[209] the court considered the problems of sex workers. In *Shyam Narain* v. *State (NCT of Delhi)*[210] and *Vajresh Venkatray Anvekar* v. *State of Karnataka*,[211] the court was concerned with the dignity of women.

Supreme Court became "Sankat Mochan" for the citizens in protecting their fundamental rights. Thus, for instance, in *Mohd. Haroon* v. *Union of India*[212] the court took upon itself the task of monitoring the entire incident pertaining to Muzaffarnagar riots, 2013 in respect of relief of food, clothing, shelter, medicine and peaceful resettlement; in Amarnath Shrine, In re,[213] the court directions were aimed at providing medical facilities particularly for protecting or treating conditions such as dyspnoea, cardiac arrest and other heart related problems, protection of environment and waste disposal, provision for essential amenities, safety, security, health, *etc*. of Amarnath pilgrims

For vulnerable sections such as physically handicapped persons, the Supreme Court interpreted the law humanely, e.g. reservation for blind persons[214] and facilities for deaf and dumb persons[215]

As noted in the beginning of the survey, a commendable job was done by the court during the year in reforming the democratic process and eradicating many evils in the electoral system.

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of natural resources); *State of Kerala* v. *Kandath Distilleries,* AIR 2013 SC 1812 (policy framed by the government for sale of liquor).

205 *Arun Kumar Agrawal* v. *Union of India*, AIR 2013 SC 3127.

206 (2013) 4 SCC 1.

207 *Centre for Enquiry into Health and Allied Themes* v. *Union of India* (2001) 5 SCC 577 and *Centre for Enquiry into Health and Allied Themes* v. *Union of India* (2003) 8 SCC 398.

208 AIR 2013 SC 14 : (2013) 1 SCC 598.

209 (2013) 1 SCC 294.

210 (2013) 7 SCC 77.

211 (2013) 3 SCC 462.

212 (2013) 9 SCC 328.

213 (2013) 12 SCC 497.

214 *Union of India* v. *National Federation of the Blind,* (2013) 10 SCC 772.

215 *Deaf Employees Welfare Assn.* v. *Union of India*, 2013 (15) SCALE 240.