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CONSTITUTIONAL LAW—I
(FUNDAMENTAL RIGHTS)

*M P Raju**

I INTRODUCTION

INDIAN CONSTITUTIONAL law has taken few unprecedented giant steps during the year 2006 by way of purposive interpretation of some of the fundamental rights by the Supreme Court of India. While the constitutional concept of equality was given a thorough analysis and interpretation by the court, other fundamental rights received only reiteration of the earlier interpretations.

In *M. Nagaraj* v. *Union of India*[1] the Supreme Court through a constitution bench of five judges categorically declared that fundamental rights are available by reason of the basic fact that we are members of human race. A right becomes a fundamental right because it has foundational value. Fundamental right is a limitation on the power of state. It is not to be regarded as a gift from state to its citizens but possessed by individuals independently by reason of the basic fact that they are members of human race. The understanding of fundamental rights was given a boost by placing them at a very high pedestal and declaring them as foundational.

II DEFINITION OF "THE STATE"

The meaning of "State" under article 12 of the Constitution not only determines the width of the applicability of the fundamental rights but their content also. Even other legal rights may get coloured by the fact that the party against whom they are claimed happened to be 'State' under article 12.

Effects of employer being state or non-state

When an employer is clothed with the status of 'state' within the meaning of article 12, the employees are expected to enjoy more rights and protection including the protection of the fundamental rights in addition to the protections under the Industrial Disputes Act, 1947. But this needn't always

* Advocate, Supreme Court of India and author of books including, Minority Rights: Myth or Reality (2002), Uniform Civil Code: A Mirage (2002), Education: A Mission in Jeopardy (2005)

1 (2006) 8 SCC 212.

be the case. When the employer is state, the employee may lose even the protection which is otherwise available to him under the labour laws which are admittedly welfare oriented. In *Municipal Council, Samrala* v. *Raj Kumar*[2] the Supreme Court set aside the order of reinstatement as improper since the appointment was not made in compliance of statute, statutory rules or in conformity with articles 14 and 16 of the Constitution. The labour court as also the high court had found that termination was in violation of section 25-F of the Industrial Disputes Act and directed reinstatement with 25 percentage back wages. The Supreme Court, however, held that the municipal council being a "state" within the meaning of article 12 of Constitution, employment of a person must be done in terms of the provisions of statute and rules framed thereunder. As the municipal council had not complied with the requirements as laid down in the statute and rules or even otherwise the same was not in conformity with articles 14 and 16 of Constitution, the court held that the case was covered by the second part of section 2(oo)(bb) of the Act and set aside the reinstatement as unjustified.

'State' and state government

All entities which fall within the meaning of state under article 12 need not necessarily be treated as state government.[3]

While the term "state" may include a state government as also statutory or other authorities for the purposes of part-III (or part-IV) of the Constitution, the term "state government" in its ordinary sense does not encompass in its fold either a local or statutory authority.

Whether a co-operative society is state

In *M.D., Bhadra Shahakari S.K. Niyamita* v. *President, Chitradurga Mazdoor Sangh*[4] it was held that a co-operative sugar factory registered under the Co-operative Societies Act did not fall within the definition of 'state' under article 12; hence a writ petition filed against it was not maintainable.

To determine whether a co-operative society is a state within the meaning of article 12, the following relevant questions are required to be considered, namely: (1) How the society was created; (2) whether it enjoys any monopoly character; (3) do the functions of the society partake of statutory functions or public functions?; and (4) can it be characterized as public authority? The answers to these questions would clarify the deep and pervasive control of state over a cooperative society.[5]

The board of trustees for port of Calcutta constituted under sections 3 and 29(1)(d), the Major Port Trusts Act, 1963 was held to be a "state" within the meaning of article 12.[6]

2 (2006) 3 SCC 81. Also see *National Fertilizers Ltd.* v. *Somvir Singh,* 2006 (5) SCC 493.
3 *Shrikant* v. *Vasantrao,* 2006 (2) SCC 682.
4 (2006) 8 SCC 552.
5 *S.S. Rana* v. *Registrar, Co-Operative Societies,* 2006 (4) SCALE 638.
6 *Everest Industries Ltd.* v. *Board of Trustees for the Port of Calcutta,* 2006 (9) SCALE 706.

In *State of Karnataka* v. *All India Manufacturers Organisation*,[7] it was held that interference by constitutional courts is permissible even in purely contractual matters, when one of the contracting parties is state within the meaning of article 12. When one of the contracting parties is "state", it does not cease to enjoy the character of "state" only because it is a contractual matter and therefore is subjected to all the obligations that "state" has under the Constitution. When the state's acts of omission or commission are tainted with extreme arbitrariness and *mala fides*, it is certainly subject to interference by constitutional courts in the country.[8]

III RIGHT TO EQUALITY

With regard to right to equality in its various aspects, the most important verdict during the year under survey is the decision in *M. Nagaraj*.[9] This decision of the Supreme Court on the issue of reservation in public employment has made unprecedented responses from political leaders as well as reputed jurists as reflected in the media. Much of the reactions appear to have been caused by some misunderstandings. It may even prove as a model how a judgment can be best misunderstood.

The court in the instant case was dealing with a group of cases wherein the general category persons challenged the validity of four amendments to the Constitution dealing with reservation in government services.[10] These amendments were meant to reintroduce reservation in promotions in favour of scheduled castes (SCs) and scheduled tribes (STs), to exclude unfilled carry-forward vacancies from those of a particular year while fixing the ceiling of 50 per cent, to provide for relaxation in qualifying marks and standards of evaluation in the cases of SCs/STs and to provide for consequential seniority in promotions based on reservation, respectively. These amendments brought in changes in articles 16 and 335 of the Constitution. All the amendments are concerned with the SCs and STs except the second one, i.e., the 81st amendment, which relates to the OBCs also.

These amendments were intended to remove some of the restrictions brought in by the Supreme Court in the matter of reservations through few of its judgments including *Mandal Commission I*.[11] In the *Mandal* judgment, the court had declared that reservation in promotion even in the case of SCs and STs was violative of the equality principle and hence was not permissible. As per its direction the then prevalent policy of reservation in promotions had to

7 (2006) 4 SCC 683.

8 *Gujarat State Financial Corporation* v. *M/s Lotus Hotels Pvt. Ltd.* 1983 (3) SCC 379, was referred to.

9 *Supra* note 1.

10 These amendments are the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000, and the Constitution (Eighty-fifth Amendment) Act, 2001.

11 2002 Supp (3) SCC 217.

stop after five years, i.e. by the year 1996. So Parliament amended the Constitution by introducing a provision article 16(4A) providing for reservation in promotions in favour of SCs/STs (77th amendment). Again because of the ceiling of 50 per cent on the vacancies of a year in *Mandal* case and the directions for post-based reservation in *R.K. Sabharwal*[12] difficulty arose in filling up the unfilled carry forward reserved vacancies. To cure this difficulty article 16(4 B) was introduced with a provision to count the carry forward vacancies separately from those of that particular year while considering the ceiling of 50 per cent (81st amendment). Again in *Vinod Kumar*[13] the Supreme Court declared that in view of the stress on efficiency of administration in article 335 no relaxation of qualifying marks or less standard of evaluation will be permissible even in the cases of SCs/STs. Faced with this problem article 335 was amended providing for such relaxations (82nd amendment). Again the Supreme Court in *Ajit Singh*[14] ruled that the SCs/STs who get promotions based on reservation will not get seniority flowing from such promotions but will become junior to their erstwhile general category seniors when they get promoted even if subsequently. To cure this enigma, article 16(4 A) was again amended providing for consequential seniority in promotions based on reservation (85th amendment). These amendments were challenged in *Nagaraj* on the ground that they violate the principle of equality which is a basic feature of the Constitution and thus destroys the basic structure. They also alleged that since these amendments were meant to reverse, neutralise or destroy the effects of the respective judgments of the Supreme Court, they are violative of the principles of judicial review, separation of powers and the respect for rule of law which are all basic features and constitute basic structure of the Constitution.

The Supreme Court upheld all the constitutional amendments on a finding that they did not violate any of the basic features or structure of the Constitution. Thus, as a whole, the court gave its approval of the reservation policy and the measures intended through these amendments. However, it directed that individual cases arising out of different enactments and provisions for reservation would be decided by smaller benches according to the facts and circumstances of each case.

Many of the fears expressed from different quarters seem to stem from some observations and guidelines put forward by the court for the implementation of these constitutional provisions and the reservation policy in pursuance thereto. Some of these guidelines and observations directly follow from the subject matter of these cases and the interpretation of the amendments which were in issue.

For example, the stress on the duty of the government to ascertain the backwardness of the classes in whose favour reservations are provided directly fall from the constitutional provisions. Similar is the requirement of

12 *R.K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745.
13 *S. Vinodkumar* v. *Union of India*, (1996) 6 SCC 580.
14 *Ajit Singh (II)* v. *State of Punjab*, (1999) 7 SCC 209.

being satisfied with inadequate representation of these classes in the services. The third requirement that the reservation should be in consonance with the maintenance of efficiency of administration, though not available expressly under article 16, it has been interpreted to include in view of its mention in article 335. These three conditions precedent have been reiterated time and again by several decisions of the Supreme Court. In the instant judgment also the duty of the state to ascertain the existence of these have been well discussed.

Even though, only the above three requirements are considered and decided in the main body of the verdict, in recapping the conclusions at the end, two additional ones have also cropped up – the quantitative limit of 50 per cent ceiling, and the exclusion of creamy layer. Properly understood, these also are logical and in line with the previous decisions by higher benches. The total of all reservations should be limited to the 50 per cent of the total posts in a cadre is the requirement already put by the *Mandal* judgment and adopted in the Constitution indirectly by the 81st amendment introducing article 16 (4B). Similarly, the exclusion of creamy layer form the OBCs was introduced by *Mandal* decision. If this requirement of exclusion of creamy layer is understood to apply only in the case of OBCs and not to SC/STs then, no complaint can be raised against the present judgment as it is bound by the earlier nine judge verdict in *Mandal* case as expressly observed by this bench in the context of creamy layer itself. If the requirement of excluding the creamy layer is considered to be introduced in the cases of the SCs/STs, then myriads of problems, difficulties and absurdities may get invited. These observations may not be binding being *obiter dicta*, otherwise appropriate constitutional amendments may have to be brought in.

There are few other observations which are out of context and contrary to the very reasoning and conclusions of the present judgment itself. These may be quoted or misquoted by interested parties. Such adventures should be avoided in view of the well known method of analyzing and quoting from the judgments of the courts. Otherwise, such observations are likely to create reasonable fears among the people as already echoed by different political parties.

The judgment has to a great extent clarified the principle of testing the validity of constitutional amendments and the distinction between basic feature and basic structure. Travelling through the labyrinth of a host of decisions from the time of the first amendment including *Kesavanada Bharti*,[15] it has clarified the criteria to test the validity of a constitutional amendment. Only because an amendment may be contrary to a constitutional principle declared by the Supreme Court or it alters or restricts a fundamental right, it need not necessarily be destructive of the basic structure of the Constitution and thus invalid and beyond the competence of the constituent power of the Parliament. Even a constitutional principle to get the stature of being part of the basic

15 *Kesavanada Bharati* v. *State of Kerala*, (1973) 4 SCC 225.

structure, it has to first pass the test of basic feature and then being part of the basic structure. Even the alterations of the basic features need not destroy the basic structure of the Constitution. Such alterations should be destructive of the very identity of the Constitution, to be recognized as destructive of the basic structure so as to be not permissible within the power of amendment. In this endeavour, the court has found inspiration from the constitutional law of Germany.[16]

The judgment also has clarified the debate regarding the merit and efficiency in the context of reservations. It has agreed that merit is not a fixed absolute concept. The court has approvingly quoted the view of Amartya Sen,[17] that merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of 'merit' independent of our value system. The content of merit is context-specific. It derives its meaning from particular conditions and purposes. The impact of any affirmative action policy on 'merit' depends on how that policy is designed. The court also found that the attack on the ground of merit in the present case has taken place in an empirical vacuum. According to it the basic presumption, however, remains that it is the state who is in the best position to define and measure merit in whatever ways they consider it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. It also agreed that the concept of "extent of reservation" is not an absolute concept and like merit it is context-specific.

It has also reiterated the judicial approval on the concept of substantive equality which the court has now termed as equality in fact, egalitarian equality, proportional equality, etc. The judgment speaks of two kinds of equality: formal equality and proportional equality. " 'Formal equality' means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of 'proportional equality' expects the states to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy."

The court also reiterated that the provisions of reservation is not an exception to equality principle but a facet of the equality principle itself. Thus, reservation proper is a mandate of the egalitarian equality or the equality in fact. This restatement of the principle will clear a lot of doubts regarding the desirability of reservations and it has brought the concept of reservations from the margins and corollaries to the centre of the discussions on equality.

Above all, the very upholding of these amendments is not a mean achievement given the recent trend of the judiciary often frowning upon the reservation policy framed by the executive and the legislature. Once the dangerous and problematic observations are properly clarified or rectified, the present verdict will help the march of the Indian society in its pursuit for social

16 *M. Nagaraj, supra* note 1 at 243 para 26.

justice and equality, in addition to enriching the discipline of constitutional law.

Exclusion of creamy layer

Has the Supreme Court, in *Nagraj* directed the exclusion of creamy layer from the SCs/STs for the purpose of reservation in public employment at least in promotions? The impression created is that it has done so. But the judgment clearly has not made any such specific direction. Of course, there is a reiteration of direction by the *Mandal* judgment regarding the need to exclude the creamy layer while implementing reservation provisions. Nobody, not even the present judgment, has understood or interpreted the said direction to be applicable in the case of SCs and STs. It has been consistently understood by everybody that exclusion of creamy layer principle applies only to other backward classes (OBCs) and not to SCs/STs. If that is so and if the present judgment wanted to make the said principle applicable to SCs/STs also, it would have done so in specific terms.

However, the principle of exclusion of creamy layer has been mentioned in the judgment and finds place specifically in the concluding findings and directions. Thus it will be difficult to conclude that the *Nagraj* judgment was not directed to apply the creamy layer exclusion in the context of the impugned constitutional amendments which exclusively deal with reservation in promotions in the case of SC/STs, except the one amendment regarding 50 percent ceiling which slightly touches upon OBCs also. It is altogether another thing to treat these directions of exclusion of creamy layer in the cases of SC/STs as *per incuriam* or *per ignorantiam*. It is true that such directions are in conflict with the specific findings and directions of a nine-judge bench in *Mandal I*[18] judgment and a five-judge decision in *E.V. Chinmaya* v. *State of A.P.*[19]

Other ghosts of *Nagraj*

The *Nagraj* verdict is capable of introducing other complicated problems regarding the question of reservation as also the constitutional amendments under challenge. This may haunt the smaller benches of the Supreme Court as also the high courts in future. The introduction of the concept of compelling reasons for the state introduced reservation in public employment is an indirect introduction of the United States jurisprudence of affirmative action. This would be a fertile ground on which the principle of strict scrutiny and the narrow tailoring would be developed in the Indian jurisprudence connected to the compelling state interest, though these concepts were totally rejected as alien to the concept of reservation under the Indian Constitution. There is also a danger of exempting the presumption of constitutionality in the cases of reservation.

17 Kenneth Arrow (ed.), *Meritocracy and Economic Inequality* quoted in *supra* note 1.
18 (1992) Supp 3 SCC 217.
19 (2005) 1 SCC 394.

While unnecessarily baptizing the impugned constitutional amendments as enabling provisions, the Supreme Court appears to be insinuating that reservations in furtherance of the constitutional amendments need not be given. The court may be trying to forget the concept of discretion plus duty in the context of reservations.

Similarly, the enumeration of compelling reasons and also the riders subject to which the amendments are upheld give an impression that the Supreme Court is bringing in its own amendments to the constitutional amendments under challenge. It also tempts one to ask the question whether the Supreme Court was upholding the amendments or was it reading down the amendments in order to uphold them. At any rate the *Nagraj* verdict is an important landmark in the march of Indian constitutional law. The verdict is at its best while it discusses the basic structure theory and is found faltering when it comes to the interpretation of reservation provisions.

Equality – a part of basic structure of the Constitution

In *M. Nagaraj* v. *Union of India*[20] the Supreme Court has reiterated that equality is a part of fundamental features or basic structure of the Constitution, as it is an essence of democracy. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. The rule of law and equality before the law are designed to secure among other things justice both social and economic.

According to the court, equality is the essence of democracy and, accordingly a basic feature of the Constitution. This test is very important. Free and fair elections *per se* may not constitute a basic feature of the Constitution. However, free and fair election as a part of representative democracy is an essential feature as held in *Indira Nehru Gandhi* v. *Raj Narain.*[21]

No right to equality in illegality

In *State of Punjab* v. *Balkaran Singh*[22] the Supreme Court reiterated the principle that no benefit of wrong could be granted on the principle of equality. Merely because a wrong decree was passed in favour of one officer it would not entitle others to claim the same benefit on the principle of equality under article 14 of the Constitution. If such a plea is accepted, it will result in equals being treated unequals.[23]

20 *Supra* note 1.
21 (1976) 2 SCR 347.
22 2006 (10) SCALE 288.
23 Also see *Union Bank of India* v. *M.T. Latheesh,* (2006) 7 SCC 350; *Vikrama Shama Shetty* v. *State of Maharashtra, South Eastern Coalfields Ltd.* v. *Prem Kumar Sharma,* AIR 2006 SC 2727.

Article 14 has no application or justification to legitimize an illegal and illegitimate action. Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit thereof. Such person cannot be discriminated to deny the similar benefit. The rational relationship and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead, nor the court can countenance that benefit had from infraction of law and must be allowed to be retained. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals, others cannot claim the same illegality or irregularity on the ground of denial thereof to them. [24]

Disparity cannot be ordered to be continued

In *B.J. Akkara* v. *Government of India*,[25] the court has taken the view that nobody can claim that the disparity that existed earlier must be continued. There was discrimination in stepping up and refixation of pension of army medical officers as per circular dated 7.6.1999. Clarification was given by subsequent circular dated 11.9.2001 directing authority to recalculate pension by excluding non-practising allowance from basic pay. This was challenged on the plea that by virtue of said clarificatory circular, the pension of medical officers and non-medical officers became equal and the disparity that existed earlier between them should be maintained. Rejecting the plea as unjustified and unacceptable the apex court held that when the purpose of stepping up pension was to ensure that all retirees of same rank got pension not less than the prescribed minimum, it would be unjust for a section to say that merely because they were earlier enjoying a higher pension than others of same rank, such disparity should be continued even after stepping up.

Discrimination in termination

In *State of Haryana* v. *Dilbagh Singh*,[26] the respondent's services were terminated in violation of sections 25-G and 25-H of the Industrial Disputes Act, 1947 inasmuch as a person junior to him was still working. The labour court granted reinstatement with 50 per cent back wages on the ground of discrimination which was affirmed by the high court. On the failure of appellant to substantiate that no person junior to respondent had been retained in department, the Supreme Court upheld the order of reinstatement but without back wages.

Quota rule to be strictly implemented

The Supreme Court in *Uttaranchal Forest Rangers' Association (Direct*

24 *Ekta Shakti Foundation* v. *Government of NCT of Delhi*, AIR 2006 SC 2609.
25 2006 (10) SCALE 206.
26 2006 (10) SCALE 509.

Recruit) v. *State of Uttar Pradesh*,[27] held that the *rule of quota* being a statutory one, must be strictly implemented and it is impermissible for authorities concerned to deviate from the rule for reasons of administrative exigencies or expediency. It was observed that result of pushing down the promotees appointed in excess of quota might work out hardship, but it was unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend articles 14 and 16(1) of the Constitution.

Right to exemption already accrued cannot be withdrawn

In *MRF Ltd., Kottayam* v. *Assistant Commissioner (Assessment) Sales Tax*[28] the appellant had made huge investment in the State of Kerala under a promise held out to it that it would be granted exemption from payment of sales tax for a period of seven years. The exemption order was passed and eligibility certificate was issued to it.

The attempt of the state to take away the said benefit of exemption after about two years was held by the apex court as highly arbitrary, unjust and unreasonable.

Equality in contractual matters

In *Noble Resources Ltd.* v. *State of Orissa*[29] the Supreme Court has held that even in contractual matters a writ petition is maintainable if there is a violation of the equality clause. If an action on the part of the state is violative of equality, a writ would be maintainable even in contractual field.

The court has expressed the view that a distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on its part.

The apex court in *State of Uttar Pradesh* v. *Maqbool Ahmad*[30] has held that the grant of additional benefits of super time scale in case of stagnation due to non-availability of promotional avenue is permissible. Such policy decision is based on the equitable principle that if an employee does not get promotion, it is not because of his fault but because there were no sufficient vacancies available. It is to avoid stagnation that the government has decided that if an employee has to remain in one and the same cadre for 16 and 18 years, he would be granted selection grade and super time scale.

27 2006 (9) SCALE 577.
28 2006 (9) SCALE 420.
29 2006 (9) SCALE 181.
30 (2006) 7 SCC 521.

Classification permissible

In *Confederation of Ex-servicemen Association* v. *Union of India*[31] the constitution bench of the apex court reiterated the principle that article 14 prevents/prohibits a person or class of persons being singled out from others situated similarly. Article 14 prohibits discrimination or class legislation, however, it does not prohibit classification, if otherwise legal, valid and reasonable.

The court has reiterated that every classification to be legal, valid and permissible must fulfil the following twin-tests: (i) The classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and (ii) such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question.

In *Saraswat Co-op. Bank Ltd.* v. *State of Maharashtra*[32] it has been held that so long as the classification sought to be made is based on an intelligible differentia and has a nexus with the object sought to be achieved by the statute, the same would not offend the equality clause contained in article 14 of the Constitution.

Compassionate appointment

In *State of Jammu & Kashmir* v. *Sajad Ahmed Mir*[33] the court applied the test of article 14 in the matter of compassionate appointment. The court held that normally, an employment in government or other public sectors should be open to all eligible candidates on the basis of competitive merits. This general rule should not be departed from except where compelling circumstances demand, such as, death of sole bread earner and likelihood of the family suffering because of the set back. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say 'goodbye' to this normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of article 14 of the Constitution.

Open category if reserved candidate not available

K.H. Siraj v. *High Court of Kerala*[34] was a case of reservation in appointments to the posts of munsifs. Rule 15(a) and (b) of Kerala State and Subordinate Services Rules, 1958 specially mandates that if candidates belonging to a particular community OBC, SC/ST is not available to fill up any particular slot, then it should be passed over and filled up by a candidate available from the next reserved community and so on. If no member of a reserved community is ultimately available for filling up that slot, the same should be filled up by an open merit candidate. There were no eligible reserved candidates available for filling up few slots. Therefore, under rule 15, the

31 (2006) 8 SCC 399.
32 (2006) 8 SCC 520.
33 (2006) 5 SCC 766.
34 (2006) 6 SCC 395.

aforesaid slots were filled up by open merit candidates. It was not possible for the government to keep those vacancies unfilled particularly, when there was a total of 70 vacancies to be filled up and open merit candidates were available. Non-filling up of those vacancies by open merit candidates would have resulted in violation of rule 15. The apex court held that there was no departure from rules 14 to 17 in the preparation of the list.

Principle of sustainable development

In *Karnataka Industrial Areas Development Board* v. *C. Kenchappa*[35] the court directed that before acquisition of land for industrial development, the appellant must carry out necessary exercise regarding impact of development on ecology and environment. It must also incorporate as a mandatory condition of allotment that the allottee must obtain necessary clearance from the Karnataka State Pollution Control Board before the land is allotted for development in future.

Cut off date for pension

In *Raghavendra Acharya* v. *State of Karnataka*[36] it has been laid down that state can fix a cut-off date for pension unless and until the same is held to be arbitrary or discriminatory in nature.

Although a provision providing for deemed abandonment of service may be permissible in law, an action taken thereunder must be fair and reasonable so as to satisfy the requirements of article 14 of the Constitution. If the action taken by the authority is found to be illogical in nature and therefore violative of article 14, the same cannot be sustained as was held in *V.C. Banaras Hindu University* v. *Shrikant.*[37]

In *M.P. Gangadharan* v. *State of Kerala*[38] the Supreme Court has clarified that the question of reasonableness cannot be put into any straitjacket formula, and the constitutional requirement for judging question of reasonableness and fairness on the part of statutory authority must be considered having regard to the facts of each case.

After considering the doctrine of equal pay for equal work, it was held in *Uttar Pradesh State Sugar Corporation Ltd.* v. *Sant Raj Singh*[39] that possession of higher qualification is a valid basis for classification of two categories of employees.

The court has held in *Satya Narain Shukla* v. *Union of India*[40] that it is not the function of court to issue directions to streamline selection process and that courts can only examine if the selection procedure is unconstitutional, illegal or vitiated by arbitrariness and *mala fides*.

35 (2006) 6 SCC 371.
36 (2006) 9 SCC 630.
37 AIR 2006 SC 2304.
38 (2006) 6 SCC 162.
39 (2006) 9 SCC 82.
40 (2006) 9 SCC 69.

In *Sanjay Kumar* v. *Narinder Verma*[41] the court has set aside the direction of the high court holding that such direction for giving weightage to higher qualification for selection *de hors* the rules is improper.

Providing of security personnel to various organisations was not a scheduled employment under the minimum wages Act 1948 and hence the appellant, who provides security personnel, was not liable to pay minimum wages.[42] While ruling so the earlier decision in the case of *People's Union for Democratic Rights & Ors.* v. *Union of India & Ors.*[43] was distinguished.

In *State of Bihar* v. *Bihar Pensioners Samaj*[44] the challenge was to the Bihar State Government Employees Revision of Pension, Family Pension and Death-cum-Retirement Gratuity (Validation and Enforcement) Act, 2001 on the ground that it was enacted to frustrate, sidetrack and avoid an earlier decision of the high court. A division bench of the high court had struck down the 'Act' as invalid and unconstitutional. In earlier judgments, the high court had merely directed state government to consider the issue in the light of those judgments. After considering the effect of two judgments, state legislature passed the Act. Only ground on which the Act was said to be unconstitutional was fixation of cut off date for payment of revised benefits. While allowing the appeal the Supreme Court has found that fixing of a cut-off date for granting of benefits is well within the powers of the government as long as the reasons therefor are not arbitrary and are based on some rational consideration. The apex court has also held that refusal to make payment on the ground of financial burden, cannot be said to be arbitrary.

When one of the contracting parties is "state", it does not cease to enjoy the character of "state" and therefore would be subjected to all the obligations that "state" has under the Constitution. The apex court stated that when the state's act of omission or commission are tainted with extreme arbitrariness and with *mala fides*, it is certainly subject to interference by constitutional courts in the country.[45]

In *K.T. Veerappa* v. *State of Karnataka*[46] the appellants who were holding non-teaching post in the University of Mysore claimed revised pay-scale as given to employees of state government on the basis of Pay Commission Report, 1976. 23 employees of respondent-university, similarly placed as the appellant were accorded revised pay-scale as a result of writ petition filed by them. The Supreme Court held that the appellants were also entitled to the benefit of revised pay scale.

In *Kerala Samsthana Chethu Thozhilali Union* v. *State of Kerala*[47] the court examined the permissibility of taking recourse to doctrine of "take it or leave it" by the state. The court has held that the state while parting with its

41 (2006) 6 SCC 467.
42 *Lingegowd Detective and Security Chamber (P) Ltd.* v. *Mysore Kirloskar Limited,* (2006) 5 SCC 180.
43 AIR 1982 SC 1473.
44 (2006) 5 SCC 65.
45 *State of Karnataka* v. *All India Manufacturers Organisation,* 2006 (4) SCC 683.
46 (2006) 9 SCC 406.

exclusive privilege cannot take recourse to the said doctrine having regard to the equity clause enshrined under article 14 of the Constitution. While reiterating that the state must in its dealing act fairly and reasonably, the court referred to its decision in *Hindustan Times and Ors.* v. *State of U.P. & Anr*.[48]

Filling up of vacancies over and above the number of vacancies advertised would be violative of fundamental rights granted under articles 14 and 16 of the Constitution.[49] The court referred to the decision in *Kamlesh Kumar Sharma* v. *Yogesh Kumar Gupta & Ors.*[50]

In *Bharat Sanchar Nigam Ltd.* v. *Union of India*[51] a writ petition was filed challenging levy of sales tax on mobile service. The court rejected the plea that there were different factual scenario as a result of which the possible outcome of particular assessment could not be predicted and hence it was not appropriate to intervene under article 32. The court found that writ petition raised a question relating to the competence of the state to levy sales tax on telecommunications service which was not an issue to have been raised and decided by assessing authorities. According to the court, if state legislature is incompetent to levy the tax, it would not only be an arbitrary exercise of power by state authorities, it would also constitute an unreasonable restriction upon the right of service provider to carry on trade under article 19(1)(g) of Constitution.

The constitutional validity of Foreign Exchange Regulation Act, 1973 was challenged in *Standard Chartered Bank* v. *Directorate of Enforcement*[52] on the allegation of violation of articles 14 and 21 of the Constitution. It was admitted that the Act has been included in Ninth Schedule to the Constitution. Therefore, the court held that in terms of article 31-B, none of the provisions of FERA can be deemed to be void or ever to have become void on ground that the FERA or any provisions thereof, are inconsistent with any right conferred by part III of the Constitution which includes articles 14 and 21.

In *CEAT Ltd.* v. *Anand Abasaheb Hawaldar*[53] the court has held that the differential treatment by an employer, will become an unfair labour practice, only when it is a prejudice which is not founded on reasons, and actuated by self-interest whether pecuniary or personal. The court also referred to the earlier decision in *G.N. Nayak* v. *Goa University and Ors*.[54]

The court in *State of Karnataka* v. *C. Lalitha*[55] considered the right of a person for similar treatment in the service matters and held that service jurisprudence evolved by the Supreme Court postulated that all persons similarly situated should be treated similarly. It was reiterated that only

47 (2006) 4 SCC 327.
48 (2003) 1 SCC 591.
49 *State of Uttar Pradesh* v. *Rajkumar Sharma,* (2006) 3 SCC 330.
50 AIR 1998 SC 1021.
51 (2006) 3 SCC 1.
52 (2006) 4 SCC 278.
53 (2006) 3 SCC 56.
54 (2002) 2 SCC 712.
55 (2006) 2 SCC 747.

because one person has approached the court, the other persons similarly situated should not be treated differently.

In the case of *K.K. Bhalla* v. *State of Madhya Pradesh*[56] claim was made for the allotment of land on the ground of allotment to others by the state contrary to statute. The court held that when allotment itself was illegal being contrary to the provisions of concerned Act and rules, article 14 which carries with it a positive concept would have no application. The previous decisions in *Jalandhar Improvement Trust* v. *Sampuran Singh*,[57] and *State of Bihar* v. *Kameshwar Prasad Singh*,[58] were referred to.

It was found in *Associated Cement Companies Ltd.* v. *Government of Andhra Pradesh*[59] that classification based on the mode of sale and provision for higher rate of sale tax on the same commodity solely based on that classification was not violative of the equality right under article 14.

Regularisation of services

During the period under survey, the law relating equality rights in the matters of regularisation of temporary employees and daily rated has been the subject of a number of judgments including a constitution bench decision. These rulings will have far reaching consequences. This new development can be considered a watershed in the history of service law jurisprudence.

In *Secretary, State of Karnataka* v. *Umadevi*[60] a constitution bench considered the right of *ad hoc*, temporary or daily rated employees for regularization of their services. It has in fact unsettled the long accepted principles regarding this issue, thus over ruling a few previous judgments. This present decision has categorically stated that there is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service.

The court has also laid down that temporary, contractual or casual worker cannot invoke the doctrine of equality for being confirmed in the post. According to the court this doctrine can be invoked if the decision of the administrative authority affects the person by depriving him of some benefit or advantage which either (i) he had in part been permitted by decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do; or (ii) he has received an assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn

The court has held that the constitutional scheme envisages employment by the government and its instrumentalities on the basis of a procedure established in that behalf. According to the court, any public employment has to be in terms of the constitutional scheme. It appears that the court is over-pre-occupied by the contemplated rights of so many unseen citizens to be

56 (2006) 3 SCC 581.
57 (1999) 3 SCC 494.
58 (2000) 9 SCC 94.
59 (2006) 1 SCC 597.
60 (2006) 4 SCC 1.

competing for selection and appointment to the said posts being held by or to be absorbed by the temporary or casual workers. The court seems to be rooting for the fundamental rights of the unseen possible candidates under articles 14 and 16 of the Constitution of India who might have had a desire to apply for these posts. Compared to their rights, these casual or temporary employees are already condemned with a vengeance for having served the country and public, though they are accused of having come through the back-door. But in another breath the court states that the sovereign government, considering the economic situation, is not precluded from making temporary appointments or engaging workers on daily wages but a regular process of recruitment has to be resorted to when regular vacancies in posts are to be filled up at a particular point of time. The court is categorical that the argument that the right to life protected by article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. However, after the very strict and harsh posturing when the judgment reaches paragraph 53, the sympathetic and compassionate heart of the court slightly opens up (not through the back-door, but the side-door perhaps) and provide for regularization of irregular appointees who have continued to work for ten years or more but without the intervention of the courts or tribunals. What do we call it? Legitimate expectation or unexpected legitimation?

In *State of Uttar Pradesh* v. *Neeraj Awasthi*,[61] it was declared that no equality can be claimed in illegality. According to the court, in the matters of appointment and regularization, if illegality had been committed, it cannot be said to be a normal mode which must receive the seal of court.

This principle was reiterated in *Project Uchcha Vidya Sikshak Sangh, State of Bihar* v. *Project Uchcha Vidya, Sikshak Sangh*.[62] It was observed that the concept of regularization pre-supposes irregular appointment at the first instance so as to enable the employer to regularize the same. It was also held that regularization of service must precede a legislative act or in the absence of legislation, rules framed in terms of proviso appended to article 309 of the Constitution.

This proposition of law was again relied on while reversing the direction of a high court to regularise the services of *ad hoc* or daily wage employees based on a scheme of regularisation in KGSD canteen employees case.[63]

In the case of *Municipal Council, Samrala* v. *Raj Kumar*[64] it was held that even an order of labour court reinstating an employee should consider the equality rights of other would be employees if the earlier appointment was not made according to statutory rules. The court found that the order of reinstatement was improper when appointment was not made in compliance of statute, statutory rules or in conformity with articles 14 and 16 of the

61 (2006) 1 SCC 667.
62 (2006) 2 SCC 545.
63 *State of Karnataka* v. *KGSD Canteen Employees Welfare Association*, (2006) 1 SCC 567.
64 (2006) 3 SCC 81.

Constitution. It was held that the instant case was covered by the second part of section 2(oo)(bb) of the Act

Since the respondent was categorically informed that as per the terms of the contract, the same was a short-lived one and would be liable to termination as and when the appellant thought it fit or proper or necessary to do so.

In *Inderpreet Singh Kahlon* v. *State of Punjab*[65] it was reiterated, relying on *Umadevi*[66] that appointment made in violation of articles 14 and 16 are void and selection process a nullity. However, in *Workmen of Bhurkunda Colliery of Central Coalfields Ltd.* v. *Management of Bhurkunda Colliery of Central Coalfields*[67] the court found that it is the mandate of equality that temporary or *ad hoc* employees who have continued in employment for a long time ought to be regularized. In view of the *Umadevi* judgment by the constitution bench this decision stands overruled.

It was clarified in *Surendra Prasad Tiwari* v. *Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad*[68] that daily wagers, *ad hoc* employees, probationers, temporary or contractual employees do not have any right of regularization. It was reiterated that it is improper for courts to give direction for regularization of services of persons working either as daily-wagers, *ad hoc* employees, probationers, temporary or contractual employees, who were appointed by not following the procedure laid down in articles 14, 16 and 309 of the Constitution.

In *Principal, Mehar Chand Polytechnic* v. *Anu Lumba*[69] and *R.S. Garg* v. *State of Uttar Pradesh*[70] it was reiterated that a temporary appointee does not have any right of regularization and that provisions of articles 14 and 16 cannot be given a complete go-by.

Non-regularization of services of workmen employed since 1979 was considered in *Minerals Exploration Corporation Employees' Union* v. *Mineral Exploration Corporation Limited.*[71] The Supreme Court found that ample material was placed on record to show that temporary employees were doing the work of permanent nature and the respondent itself effected their transfers from one project to another and granted them the benefit of T.A., D.A. etc. The court referred to *Umadevi*[72] and clarified that it shall be proper to regularize the services of the workmen who have worked for several years. However, it was directed that the workmen in order to succeed will have to substantiate their claim as per the established principles of law before the labour tribunal.

State of Gujarat v. *Karshanbhai K. Rabari*,[73] a case involving the claim of daily workers for parity in treatment with permanent employees, the apex

65 2006 AIR SC 2571.
66 *Supra* note 60.
67 (2006) 3 SCC 297.
68 (2006) 7 SCC 684.
69 (2006) 7 SCC 161.
70 (2006) 6 SCC 430.
71 (2006) 6 SCC 310.
72 *Supra* note 60.
73 (2006) 6 SCC 21.

court remitted the matter to the high court for fresh consideration, keeping in view the decision in *Umadevi*[74] and *Union of India* v. *Manudev Arya*.[75]

In *Manager (Now Regional Director) R.B.I.* v. *Gopinath Sharma*[76] the Supreme Court held that high court had committed a patent error in allowing the writ petition filed by the respondent herein who is a daily wage worker as peon-cum-farash and ordered reinstatement when it was not established that he was working on regular basis.

It was reiterated in *Municipal Council, Sujanpur* v. *Surinder Kumar*[77] that any recruitment made in violation of recruitment rules and also in violation of scheme under articles 14 and 16, would be void in law. In *State of Uttar Pradesh* v. *Desh Raj*[78] it was held that appointments, if made in violation of the constitutional scheme of equality as enshrined under articles 14 and 16 of the Constitution of India, would be rendered illegal and, thus, void *ab initio*.

In *Regional Manager, SBI* v. *Mahatma Mishra*[79] it was held that retrenchment is not illegal when appointment of respondent was on temporary basis for 88 days. In *State of Madhya Pradesh* v. *Lalit Kumar Verma*[80] it was held that daily wagers do not have any right of regularization.

The apex court made a distinction between irregular appointment and illegal appointment in *Municipal Corporation, Jabalpur* v. *Om Prakash Dube*[81] and held that if appointment was made in total disregard of constitutional scheme as also the recruitment rules framed by employer, which is "state" under article 12 of the Constitution, the recruitment would be illegal. Whereas in cases where although substantial compliance of constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of rules might not have been strictly adhered to.

Punjab Water Supply and Sewerage Board v. *Ranjodh Singh*[82] was a case of regularisation of services of employees of the appellant-board. The Supreme Court ruled that the impugned judgment could not be sustained, since the high court directed regularisation only on the basis of a purported policy of the state government which was not applicable to the board in question.

In *State of Karnataka* v. *Ameerbi*[83] it was held that *anganwadi* workers appointed under the Integrated Child Development Service Programme, were not holders of civil post and hence the administrative tribunal did not have jurisdiction to entertain the application of such workers.

74 *Supra* note 60.
75 (2004) 5 SCC 232.
76 (2006) 6 SCC 221.
77 (2006) 5 SCC 173.
78 (2006) 13 SCALE 382.
79 (2006) 11 SCALE 258.
80 (2006) 12 SCALE 642.
81 (2006) 13 SCALE 266.
82 (2006) 13 SCALE 426,
83 (2006) 13 SCALE 319.

It was clarified that a "state" within the meaning of article 12 is bound to comply with the constitutional requirements as adumbrated in articles 14 and 16 thereof and hence any appointment in violation of such rules would render them as nullities.[84]

Classification of employees of government and corporations

In *Arun Kumar* v. *Union of India*[85] it was held that the classification of employees on the basis of the employer being central government, state government and government corporations was not discriminatory. Valuation of perquisites under sections 17(2), 192 and 295 Income Tax Act, 1961 and rule 3 of the Income Tax Rules, 1962 (as amended by rules, 2001) was challenged on the plea that said provision was arbitrary and *ultra vires* the act as it differentiated employees of government and employees of companies, corporations and other undertakings. The Supreme Court held that the distinction sought to be made by the rule making authority was a reasonable classification based on intelligible differentia having rational nexus to the object sought to be achieved.[86]

IV DISCRIMINATION ON PROHIBITED GROUNDS

The Supreme Court had few occasions to reiterate a recently developed principle regarding eligibility for reservation based on caste. This relates to the acquisition of caste status by voluntary act like marriage. The court has taken the view that none of the constitutional reservations would be available to such persons.

In *Meera Kanwaria* v. *Sunita*[87] one of the questions involved was whether the purpose of reservation under articles 15(4) and 16(4) on the one hand and articles 330 and 332 on the other, is different. The Supreme Court has held that it is not different and that reservation of seat for a scheduled caste or tribe under articles 330 and 332 is also constitutional reservation intending to benefit the really under privileged and not those who came to the class by way of marriage. The court relied on the previous decision in *Sobha Hymavathi Devi* v. *Setti Gangadhara Swamy*.[88]

Similarly, in *Anjan Kumar* v. *Union of India*[89] the court has held that a person not belonging to SC or ST claiming himself to be a member of such caste by procuring a bogus caste certificate, to get a reserved post, plays fraud on the Constitution as it results in the reserved post going into the hands of a non-deserving candidate. In such case, it would be violative of the mandate of articles 14 and 21 of the Constitution.

84 *National Fertilizers Ltd.* v. *Somvir Singh*, (2006) 5 SCC 493.
85 2006 (9) SCALE 320.
86 *Ibid*.
87 (2006) 1 SCC 344.
88 (2005) 2 SCC 244.
89 (2006) 3 SCC 257.

In *Ewanlangki-E-Rymbai* v. *Jaintia Hills District Council*[90] it was held that exclusion of Christians from contesting election as per sections 3, 2(a), (b) and (g) of the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959 was not unconstitutional. In this case challenge was to the validity of the provisions requiring appointment of chiefs or headmen to be in accordance with existing customs prevailing in *elaka* concerned thereby excluding Christians from contesting election for said post. The court found that the ground for exclusion of Christians was not solely on the ground of religion but on account of the admitted fact that a Christian cannot perform the religious functions attached to office of *Dolloi*.

The question in *Akhil Bharat Goseva Sangh* v. *State of Andhra Pradesh*[91] was whether section 5 of the Mysore Prevention of Cow Slaughter and Cattle Preservation Act, 1964 is unconstitutional insofar as it does not impose a total prohibition on slaughter of bovine cattle and whether a writ of *mandamus* must be issued to state government to impose a total ban on slaughter of bovine cattle in the State of Karnataka. In this case section 5 of the 1964 Act did not provide for a total prohibition on slaughter of bovine cattle. Hence the court held that declaring section 5 of the Act as unconstitutional and directing the state government to impose a total ban on slaughter of bovine cattle, as requested by the appellants, would lead to judicial legislation and would encroach upon the powers of the legislature.

In *R.D. Upadhyay* v. *State of Andhra Pradesh*[92] the question of discrimination based on sex was in issue in the context of women undertrial prisoners and women convicts. It was held that female prisoners were to be allowed to keep their children with them in jail till they attain age of six years. The court directed that upon reaching age of six years, the child should be handed over to a suitable surrogate as per the wishes of the female prisoner or sent to a suitable institution run by the social welfare department. It was also ordered that in case a prisoner dies leaving behind a child the concerned district magistrate has to arrange for the proper care of the child. Specific directions were also issued with regard to pregnant women prisoners to the effect that before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre-natal and post-natal care for both, the mother and the child.

The effect of a conflict between percentage of reservation and roster-point reservation was examined in *R.S. Garg* v. *State of Uttar Pradesh*.[93] It was clarified that in the event of such a conflict, percentage of reservation shall prevail. This was done in the context of U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994.

90 (2006) 4 SCC 748.
91 (2006) 4 SCC 162.
92 AIR 2006 SC 1946.
93 (2006) 6 SCC 430.

In *Atyant Pichhara Barg Chhatra Sangh* v. *Jharkhand State Vaishya Federation*[94] it was held that it is impermissible to amalgamate the two classes i.e. extremely backward class and backward class and to reduce their reservation from 12 per cent and 9 per cent respectively, to 14 per cent for the purpose of admission in professional educational institutions.

V RIGHT TO FREEDOM

The ban on online and internet lotteries was the issue in *Tashi Delek Gaming Solutions Ltd.* v. *State of Karnataka.*[95] Notification was issued prohibiting online and internet lotteries in the State of Karnataka with immediate effect. On line lotteries were commenced in the state by the States of Sikkim and Meghalaya through their agents. Writ petition was filed by these states together with their agents challenging the validity of the notification. Preliminary objection was raised that as the dispute was between the two state governments, the writ petitions were not maintainable in view of constitutional bar under article 131. The Supreme Court held that if the State of Sikkim or State of Meghalaya intended to sue the State of Karnataka independently, in terms of article 131, the only forum was the Supreme Court. But when such a suit was brought jointly by the state with their agents who had also independent cause of action and legal right to maintain writ application, a suit in terms of article 131 would not be maintainable. A person must be held to have access to justice if his right in any manner whether to carry on business or threat to his liberty is infringed. Access to justice is a human right. An agent coupled with interest has a right to sue. He may in certain situations be sued with regard to his own liabilities independent of his principal. The Supreme Court held that the appellants' writ petitions were maintainable since they were challenging the violation of their fundamental rights under article 19(1)(g) of the Constitution with other rights.

In *State of Bihar* v. *Project Uchcha Vidya, Sikshak Sangh*[96] the court held that taking over of management and control of schools and vesting the same in state government could not have been done by a notification issued by the district education officer. Such action must have been by a law enacted by legislature since it takes away a fundamental right under article 19(1)(g). In view of the eleven-judge bench decision in *T.M.A. Pai Foundation & Others* v. *State of Karnataka*[97] establishment and management of an educational institution has been held to be a part of fundamental right, being a right of occupation as envisaged under article 19(1)(g) of the Constitution. A citizen cannot be deprived of the said right except in accordance with law. The requirement of law for the purpose of clause (6) of article 19 of the Constitution can by no stretch of imagination be achieved by issuing a circular or a policy

94 (2006) 6 SCC 718.
95 (2006) 1 SCC 442.
96 (2006) 2 SCC 545.
97 (2002) 8 SCC 481.

decision in terms of article 162 of the Constitution or otherwise. The court reiterated that such a law must be one enacted by legislature.

Industrial jurisprudence seeks to evolve a rational synthesis between the conflicting interests and rights of employers and employees. In *Workmen of Bhurkunda Colliery of Central Coalfields Ltd.* v. *Management of Bhurkunda Colliery of Central Coalfields*[98] the court took note of the fact that industrial jurisprudence has developed taking in view the interest of employees which have received constitutional guarantees under the directive principles, the interest of employers which have received a guarantee under article 19 of Constitution and the interest of community at large

In *Union Public Service Commission* v. *Girish Jayanti Lal Baghela*[99] the Supreme Court has held that a private employer enjoys almost complete freedom under article 19(1)(g) and (6) to select and appoint anyone he likes. No statutory provision can mandate advertisement of post or selection being made strictly on merit even where some kind of competitive examination is held. A private employer has absolute liberty to appoint a less meritorious person. It was held in this case that an employee working in a private establishment normally does not enjoy any statutory protection regarding his tenure of service except those covered by definition of "workman" and governed by Industrial Disputes Act or any such allied enactment.

In *Bharat Sanchar Nigam Ltd.* v. *Union of India*[100] it was held that a writ petition challenging levy of sales tax on mobile service was maintainable. The court did not accept the plea that there were different factual scenario as a result of which the possible outcome of particular assessment could not be predicted and it was not appropriate to intervene under article 32. The court found that the writ petition raised a question relating to the competence of the state to levy sales tax on telecommunications service which is not an issue to have been raised and decided by assessing authorities. If state legislature is incompetent to levy the tax, it would not only be an arbitrary exercise of power by state authorities, it would also constitute an unreasonable restriction upon the right of service provider to carry on trade under article 19(1)(g) of the Constitution.[101]

The Supreme Court has held that the right of a citizen to enter into any contract of employment under article 19(1)(g), unless it is expressly prohibited by law or is opposed to public policy, cannot be restricted. So long as the contract of employment in a particular trade is not prohibited either in terms of statutory or constitutional scheme, the state intervention would be unwarranted unless there exists a statutory interdict. This was held in *Kerala Samsthana Chethu Thozhilali Union* v. *State of Kerala.*[102]

98 (2006) 3 SCC 297.
99 (2006) 2 SCC 482.
100 (2006) 3 SCC 1.
101 The court referred to the earlier decision in *Bengal Immunity Company* v. *State of Bihar,* 1955(2) SCR 603.
102 (2006) 4 SCC 327.

In *Akhil Bharat Goseva Sangh* v. *State of Andhra Pradesh*[103] the Supreme Court rejected the prayer for complete ban on slaughter of cattle/ buffalo but permission for establishment of slaughter house was granted. The plea of cattle/buffalo depletion in the concerned region, was found unsustainable. The court found no reason to hold that the functioning of Al-Kabeer abattoir would result in depletion of buffalo population in the concerned region; instead it found that huge amount was invested by the concerned company exercising its right under article 19 (I)(g). The court also found that the company had installed elaborate anti-pollution equipments and was operating the same with the consent of APPCB (Andhra Pradesh Pollution Control Board).

In *State of Maharashtra* v. *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya*[104] the question involved was of permission to start a B.Ed. college. As regards the right to start a college, the apex court held that as per article 19(1)(g) all citizens have the right to practice any profession or to carry on any occupation, trade or business unless they are restrained by imposing reasonable restriction under article 19(6).

It was held in *Lata Singh* v. *State of Uttar Pradesh*[105] that citizens have a right under article 19 (I) (a) to have inter-caste marriages. It was also held that inter-caste marriages are in the national interest resulting in the destruction of the caste system. According to the court, the nation is passing through a crucial transitional period in our history, and Supreme Court could not remain silent in matters of great public concern, such as the case in hand.

The right to have secret ballot in election to Council of States, was the issue in *Kuldip Nayar* v. *Union of India.*[106] The new amendment provided for 'open ballot' in place of 'secret ballot'. Constitutional validity of amendment was challenged as violative of the secrecy of ballot, a vital principle for ensuring free and fair elections. The court held that if secrecy becomes a source for corruption then transparency have the capacity to remove it. Hope was expressed by the Supreme Court that open ballot will eliminate evil of corruption.

The court also accepted the justification of the impugned amendment on the reasoning that open voting eradicates the evil of cross-voting by electors who have been elected to the assembly of the particular state on the basis of party nomination.

In *Director General, Directorate General of Doordarshan* v. *Anand Patwardhan*[107] the issue was about article 19(1)(a) which guarantees right to freedom of expression. It was held that by virtue of article 19, everyone shall have the right to freedom of expression which has to include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers,

103 (2006) 4 SCC 162.
104 (2006) 9 SCC 1.
105 (2006) 5 SCC 475.
106 (2006) 7 SCC 1.
107 (2006) 8 SCC 433.

either orally, in writing or in print, in form of art or through any other media of his choice. The court found that the documentary film "Father, Son and Holy War" was an award winning documentary film at international level and it could not be denied exhibition on *Doordarshan* simply on account of its `A' or "UA" certification. The Supreme Court also found that the refusal by *Doordarshan* for telecasting of the documentary film, was *mala fide* and arbitrary.

The true scope of articles 19(1)(f), 31(1) (as repealed by 44th amendment 1978) and article 300 were considered by the Supreme Court in *State of West Bengal* v. *Haresh C. Banerjee*.[108] After amendment of 1978, the right to property is no longer a fundamental right and it is now a constitutional right as provided in article 300-A of the Constitution. The validity of rule 10 (I) of the West Bengal Services (Death-cum-Retirement Benefits) Rules, 1971 providing for withholding of pension, was challenged on the plea that said provision is *ipso facto ultra vires* being violative of article 19(1)(f) as it stood in 1971 when rules were framed. The court repelled the challenge.

In *Mid-Day Multimedia Ltd.* v. *Mushtaq Moosa Tarani*[109] permission was sought for release of the film "Black Friday". The high court had refused permission to release, screen and exhibit the film until the pronouncement of judgment in the *Bombay Bomb Blasts* case. The apex court disposed of the appeal with the direction not to release the film till such time as the trial court pronounced its judgment on guilt or otherwise of the concerned accused.

In *Ajay Goswami* v. *Union of India*[110] the Supreme Court has found that the writ petition was not maintainable on the allegation that minors were exposed to sexually exploitative material through newspapers. In view of the availability of sufficient safeguards in terms of various legislations, norms and rules and regulations protecting the society in general and children, in particular, from obscene and prurient contents, the court did not want to interfere. According to the court it would be inappropriate to deprive the adult population of the entertainment which is well within the acceptable levels of decency on the ground that it may not be appropriate for children.[111]

According to the apex court where art and obscenity are mixed, what must be seen is whether the artistic, literary or social merit of the work in question outweighs its "obscene" content.[112]

VI PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES

Suit for damages is not maintainable in a case where penalty was imposed in departmental proceedings on account of same cause of action. The court found in *Punjab State Civil Supplies Corporation Ltd.* v. *Sikandar Singh*[113]

108 (2006) 7 SCC 651.
109 2006(10) SCALE 141.
110 2006 (14) SCALE 317.
111 *Ibid.*
112 *Ibid.*
113 (2006) 3 SCC 736.

that after imposition of penalty on misconduct, tortious claim of damages is not maintainable on same cause of action in view of the principle under article 20(2) and section 73 of the Contract Act, 1872.

In *State of Karnataka* v. *Parmjit Singh*[114] the constitutional validity of section 27 (prior to its amendment in 2003) of the Consumer Protection Act, 1986 was the issue. Plea was raised that forum created under the Act was clothed with blanket power to pass orders including order of civil imprisonment, as section 27 does not prescribe any procedure for trial . Proviso to section 27 was held by the high court to be unconstitutional and liable to be struck down. Later on the said proviso has been omitted by the Amendment Act, 2002 and sub-section (2) has been introduced providing to forums, the power of a judicial magistrate of first class for trial of offences under the Act. The court found that since the amendment was made effective w.e.f. 15.3.2003 the controversy has become academic. [115]

The issue in *State* v. *A. Parthiban*[116] was the interpretation of section 71 of the Indian Penal Code, 1860 in the context of article 20(2) of the Constitution of India. The court held that if the offence was a single transaction but fell under two different sections, the offender could be made liable for double penalty.

In *Aloke Nath Dutta* v. *State of West Bengal*[117] the right to silence under articles 20(3) was in issue in the context of confession before magistrate and the magistrate putting questions to the accused brought before him from police custody. According to the court the manner of putting questions should be more intrusive than what is required in law.[118]

VII RIGHT TO LIFE AND PERSONAL LIBERTY

Right to rehabilitation of encroachers

Milk Producers Association, Orissa v. *State of Orissa,*[119] was a case of encroachment upon government land by appellants carrying on business in milk, who when evicted had claimed alternative accommodation in terms of the rehabilitation scheme. Policy decision for rehabilitation by the chief minister was not given effect to as later on it was detected that all concerned villages were within the master plan since 1982. By virtue of amendment in the Act it was not permissible to keep cattle within the town of Bhubaneshwar. The court found that there was neither a policy decision which could give rise to a legal right to the appellants for rehabilitation, nor was there any notification issued

114 (2006) 4 SCC 49.
115 *Ibid.*
116 AIR 2007 SC 51.
117 2006 (13) SCALE 467.
118 Reliance was placed on *Babubhai Udesinh Parmar* v. *State of Gujarat*, 2006 (12) SCALE 385.
119 (2006) 3 SCC 229.

in terms of article 162 of the Constitution to give a legal right to appellants to be rehabilitated.

Compensation for custodial torture

In *Sube Singh* v. *State of Haryana*[120] the court considered the issue of ordering compensation for illegal detention, custodial torture and harassment. It found that there was no clear or incontrovertible evidence about custodial torture nor any medical report of any injury or disability. Grievance of petitioner was against different officers in different police stations at different points of time, but several of the allegations were proved to be exaggerated and false. Hence the court held that it was not a fit case for award of compensation and that all reliefs which should be granted in such a case have already been granted by ordering an inquiry by CBI and ensuring that police officers named are prosecuted.

Ship with hazardous waste from foreign country

The question involved in *Research Foundation for Science* v. *Union of India*[121] was restraint on entry of waste material into India. A ship from a foreign country containing hazardous substance was to enter the exclusive economic zone. The court directed that the concerned warship shall not be permitted to enter there. However, the court permitted the importers of ship to file the bill of entry with customs authorities to be examined to find out whether hazardous substances are present and whether it would be desirable to permit the ship to enter into the exclusive economic zone. In an exceptional manner, the court consisting of Arijit Pasayat and S.H. Kapadia, JJ directed that if any person is found to be holding public demonstration and writing any articles on the issue which is the subject matter of dispute, he shall be *prima facie* held to have committed contempt of this court and appropriate action would be taken against him.

Inter-generational equity and environment

In *Intellectuals Forum, Tirupathi* v. *State of Andhra Pradesh*[122] the court considered the principle of "Inter-Generational Equity", and found that the said principle wholly applies for adjudicating matters concerning environment and ecology. It was held that this principle must be applied in full force for protecting the natural resources of this country.

The court quoted with approval from its earlier decision in *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu & Ors.*[123] as follows:-

"The principle of inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations.

120 (2006) 3 SCC 178.
121 2006 (3) SCALE 311(2).
122 (2006) 3 SCC 549.
123 (1999) 2 SCC 718.

Principle 1 - Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations —

Principle 2 - The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate."

Prosecution of an officer in connection with a company

Constitutional validity of section 68 of the Foreign Exchange Regulation Act, 1973 was under challenge in *Standard Chartered Bank* v. *Directorate of Enforcement.*[124] Section 68(1) was attacked as violative of articles 14 and 21 of the Constitution since it seeks to prosecute the officer concerned who has done something leading to the company to contravene the provisions of the Act alongwith the company. The court found that the legislative intent of enactment and inclusion of it in ninth schedule to the Constitution is to punish any one directly responsible for or conniving, at the offence for any contravention of provision of Act and hence section 68(1) cannot be challenged as violative of articles 14 and 21 of the Constitution.

Increase of water level of Mullaperiyar dam

The State of Kerala claimed in *Mullaperiyar Environmental Protection Forum* v. *Union of India*[125] that water level must not be allowed to be raised beyond 136 ft. as it is dangerous to all. The court permitted the State of Tamil Nadu to carry out further strengthening measures as suggested by CWC and the State of Kerala was directed not to obstruct it.

Rape a crime against right to life

In *Dinesh* v. *State of Rajasthan*[126] the Supreme Court has stated that rape as a crime under section 376 of the Indian Penal Code, 1860 is against the basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life under article 21 of the Constitution. According to the court, it not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her, chastity. The court unequivocally declared that rape is not only a crime against the person of a woman, it is a crime against the entire society.

Pavement hawkers

In *Sudhir Madan* v. *Municipal Corporation of Delhi*[127] direction was given by the court to remove unauthorised encroachers of pavements and

124 (2006) 4 SCC 278.
125 (2006) 3 SCC 643.
126 (2006) 3 SCC 771.
127 2006 (7) SCALE 326.

roads and to frame a scheme by keeping the National Policy on Urban Street Vendors 2004 in mind. The court directed that the authority which frames a scheme, has to keep this paramount consideration in mind that consistent with the rights of citizens, if it is possible to provide any space to hawkers, squatters etc., that may be done consistent with the policy to be framed by the concerned authority.

Environmental law and sustainable development

In *Bombay Dyeing and Mfg. Co. Ltd.* v. *Bombay Environmental Action Group*[128] the court has dealt with the concept of sustainable development in the context of town planning and environment protection. According to the court, the harmonization of needs to promote development and to protect environment has led to concept of sustainable development. The court found that sustainable development is a process in which development can be sustained over generations. Sustainable development as defined by *Brundtland Report* is a development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs.

Fair trial

The meaning of fair trial was examined in *Zahira Habibullah Sheikh* v. *State of Gujarat.*[129] According to the court fair trial as a fundamental right obviously would mean a trial before an impartial judge, a fair prosecutor and wherein bias or prejudice for or against the accused, witnesses or the cause which is being tried is eliminated. The court specifically clarified that if the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial.

Disclosure of reasons for deportation

In *Hasan Ali Raihany* v. *Union of India*[130] the court stressed on the obligation on the part of the authority to disclose the reason for deportation. Writ petition was filed seeking direction for quashing the order of deportation and allow the petitioner to enter the Indian territory. Petitioner had entered this country legally upon the single entry permit issued to him by the Indian Embassy at Tehran. The fact that he had been deported from this country was mentioned in application for grant of entry visa and nothing was concealed. The court found that there was no compelling circumstances for the state not to observe the proper procedure of informing reasons to the petitioner and giving him an opportunity to submit his representation against. The court also directed that the reasons disclosed must be sufficient to enable the petitioner to make an effective representation, if he wishes to do so.

128 (2006) 3 SCC 434.
129 (2006) 3 SCC 374.
130 (2006) 3 SCC 705.

Claim for police protection

In *P.R. Murlidharan* v. *Swami Dharmananda Theertha Padar*[131] the court has held that a writ petition claiming police protection has only a limited scope, as, when the court is approached for protection of rights declared by a decree or order passed by civil court. It cannot be extended to cases where rights have not been determined either finally by civil court or at least at an interlocutory stage in an unambiguous manner and then too in furtherance of decree or order.

Right to wages of seamen

Enforceability of maritime lien in respect of seamen's wages under the Merchant Shipping Act, 1958 was considered in *O. Konavalov* v. *Commander, Coast Guard Region.*[132] The court held that confiscation by government of the vessel cannot extinguish the pre-existing rights of seamen. It was further held that right to wages of seamen as wages of any employee is integral to article 21 of the Constitution. In this case it was also held that the principle enshrined under article 21, will be applicable to a foreigner also.

Right to life not to include right to employment

In *Secretary, State of Karnataka* v. *Umadevi*[133] a constitution bench has held that right to life under article 21 would not include the right to employment. The argument that right to life protected by article 21 of the Constitution would include the right to employment cannot be accepted at this juncture.

Protection of natural environment

The importance of the protection and improvement of environment was considered as right to life in *Karnataka Industrial Areas Development Board* v. *C. Kenchappa.*[134] According to the court by virtue of the constitutional provisions framers of the Constitution expressed concern for the protection and improvement of forests, lakes, rivers and wild life for preserving the environment.

Right to food

In *People's Union for Civil Liberties* v. *Union of India*[135] the issue was about the continuation of food grain allocation by central government to beneficiaries under TPDS. The court recorded that as per statement of parties a settlement has been arrived at between the petitioner and the Ministry of Rural Development and the Ministry of Consumer Affairs, Food and Public Distribution, Government of India in certain terms and, therefore, application was disposed of in terms of the settlement.

131 (2006) 4 SCC 501.
132 (2006) 4 SCC 620.
133 *Supra* note 60. See also, *IDPL* v. *Workman, IDPL,* 2006 (12) SCALE 1.
134 (2006) 6 SCC 371.
135 2006 (3) SCALE 303.

Natural tanks and artificial tanks

In *Susetha* v. *State of Tamil Nadu*[136] the Supreme Court found that natural water storage resources are not only required to be protected but also steps are required to be taken for restoring the same if it has fallen in disuse, but the same principle cannot be applied in relation to artificial tank.

Right to medical aid

A constitution bench of the open court considered the right to medical aid as a fundamental right under article 21 of the Constitution in *Confederation of Ex-servicemen Association* v. *Union of India.*[137] The court held that a scheme, providing for medical facilities to ex-defence personnel by charging 'one time contribution' on the basis of pension amount was not a volation of their fundamental rights. The court observed that though the right to medical aid is a fundamental right of all citizens including ex-servicemen guaranteed by article 21 of the Constitution, framing of a scheme for ex-servicemen and asking them to pay 'one time contribution' neither violated part III nor was it inconsistent with part IV of the Constitution.[138]

Traffic congestion

Traffic congestion in Jaipur city and the fundamental right under article 21 was the issue in *Jaipur Aloo Aaratiya Sangh* v. *State of Rajasthan.*[139] Shifting of wholesale fruit and vegetable markets was done on account of this congestion. There was an initiation of *suo motu* proceedings by the high court in the form of PIL. Complete ban was issued as to entry of trucks in Jaipur city from 6 a.m. to 10.30 p.m. A monitoring committee also was appointed. The Supreme Court directed the state to issue appropriate notification necessary for enforcement of policy. It was clarified that this order shall, however, not mean that the high court in the existing public interest litigation would not be entitled to pass appropriate order (s) in regard to vehicular traffic and/ or other questions pending before it.

Right to speedy trial

In *Moti Lal Saraf* v. *State of Jammu & Kashmir*[140] the commencement and continuance of right to speedy trial enshrined under article 21 of the Constitution was considered. According to the court right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration. It continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of commission of offence till it consummates into a finality, can be averted.

136 (2006) SCC 543.
137 (2006) 8 SCC 399.
138 *Ibid.*
139 (2006) 8 SCC 450.
140 AIR 2007 SC 56.

Similarly, in *Lallan Chaudhary* v. *State of Bihar*[141] the court considered another aspect of right to speedy trial. When there was non-registration of case and framing of charge not for the offence disclosed in complaint, the high court issued directions to the concerned magistrate to proceed in the matter in accordance with the procedure as contained in section 209 Cr PC. The Supreme Court found that such a direction would not impede speedy trial and same would not be violative of article 21 of the Constitution. According to it, no doubt, quick justice is a *sine-qua-non* of article 21 but, when grave miscarriage of justice, as pointed out in the present case, is committed by the police officer, the ground of delay of disposal of cases or otherwise would not scuttle the miscarriage of justice.

Fundamental rights of prisoners

When a special leave petition is sent by a person in custody, delay in putting up record sent by him before the court is improper. In *Nathu* v. *State of Rajasthan*[142] SLP was filed on 10.6.2004 which was sent by the appellant in custody. He had also sent a copy of judgment of the high court but the record was put up only on 4.9.2006. It was directed that when a prisoner sends a petition or appeal from jail, the same requires immediate attention of this court. Rule framed by the Supreme Court must be read in consonance with the fundamental rights of prisoners. Direction was issued by the court that when SLP is forwarded through officer of jail, same should urgently be placed before the court and first listing of case should not be delayed.

Right to individual liberty

It was held in *Rakesh Ranjan Yadav* v. *CBI*[143] that though it is true that article 21 enshrines fundamental right to individual liberty, a balance has to be struck between right to individual liberty and interest of society. In *Sarbananda Sonowal* v. *Union of India*[144] the court considered the fairness and reasonableness of the procedure under article 21 in the context of the Foreigners Act, 1946. It was held that the burden of proving citizenship on alleged illegal immigrant by itself would not mean that the procedure is *ultra vires*, the provisions of article 21 of the Constitution as the procedures laid down therein are fair and reasonable.

VIII RIGHT TO EDUCATION

In *State of Bihar* v. *Project Uchcha Vidya, Sikshak Sangh*[145] the court considered the fundamental right to education under article 21-A of the Constitution while dealing with the scheme for establishing project schools in

141 AIR 2006 SC 3376.
142 AIR 2007 SC 1.
143 AIR 2007 SC 451.
144 2006 (13) SCALE 33.
145 (2006) 2 SCC 545.

Bihar and its implementation. It found that by virtue of article 21-A children of age group 6 to 14 have a fundamental right of education. Thus, a citizen of India above 14 years may not have any fundamental right in relation thereto. But the court found that education as a part of human development, indisputably is a human right.[146]

The court has found in *State of Maharashtra* v. *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya*[147] that article 21-A would cover primary as well as secondary education and thus petitioners could claim benefit of part III of the Constitution while seeking permission to start a B.Ed college.

The right to education under article 21 –A was also considered in *R.D. Upadhyay* v. *State of Andhra Pradesh*[148] while dealing with the entitlement of women under-trial prisoners and women convicts to have their child in prison and to keep their children with them in prison. It directed that female prisoners should be allowed to keep their children with them in jail till they attain age of six years and upon reaching age of six years, the child is to be handed over to a suitable surrogate as per wishes of female prisoner or to be sent to a suitable institution run by the social welfare department.

IX PROTECTION AGAINST ARREST AND DETENTION

In *Sunila Jain* v. *Union of India*[149] the court has considered the issue of preventive detention and found that constitutional mandate under article 22(5) can be said to be violated if (1) the impairment has been caused to the subjective satisfaction to be arrived at by the detaining authority; (2) relevant facts had not been considered or the relevant or vital documents have not been placed before the detaining authority.

When there is unsatisfactory and unexplained delay between detention order and date of securing arrest, such a delay would throw a considerable doubt on the genuineness of subjective satisfaction of detaining authority.[150]

The court also reiterated the limited grounds on which it may interfere with detention order at pre-execution stage: where courts are *prima facie* satisfied that (i) impugned order was not passed under the Act under which it is purported to have been passed; (ii) it is sought to be executed against a wrong person; (iii) it is passed for wrong purpose; (iv) it is passed on vague, extraneous and irrelevant grounds; and (v) the authority which passed the order had no authority to do so.[151] This was a case which related to section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and sections 9(4), 10 and 11 of the Foreign Trade (Development and Regulation) Act, 1992.

146 *Ibid.*
147 (2006) 9 SCC 1.
148 AIR 2006 SC 1946.
149 (2006) 3 SCC 321.
150 *Rajinder Arora* v. *Union of India,* (2006) 4 SCC 796.
151 *Ibid.*

In *D. Anuradha* v. *Joint Secretary*,[152] it was another case relating to preventive detention in the context of section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The court found that a delay of 119 days in disposal of representation did not vitiate the detention order since there was sufficient explanation for the delay. It was found that delay was on account of obtaining translated copy of representation and it was satisfactorily explained and delay occurred only in the case of one representation out of five representations.

Whether passing of preventive detention order was valid despite the fact that detenue was already in jail was the question in *Senthamilselvi* v. *State of Tamil Nadu.*[153] On behalf of the detenu the plea was raised that since he had not filed any bail application, the detaining authority could not have inferred that there was possibility of his being released on bail. The court found that on the basis of materials, the detaining authority came to the conclusion that there was likelihood of detenu being released on bail which was a subjective satisfaction and normally not to be interfered with.

In *A. Geetha* v. *State of Tamil Nadu*[154] preventive detention order was passed when detenue was already in jail, on the ground that there was likelihood of detenu being released on bail. Conclusion of detaining authority about imminent possibility of release on bail depends on circumstances of each case and no hard and fast rule can be applied. Supreme Court found that the high court was justified in rejecting the stand of detenu/appellant in the context of T.N. Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Slum Grabbers and Video Pirates Act, 1982. The court distinguished the earlier decision in *Rajesh Gulati* v. *Govt. of NCT of Delhi and Another*,[155] and referred to the decisions in *Ibrahim Nazeer* v. *State of Tamil Nadu and Anr.*,[156] and *Senthamilselvi* v. *State of T.N.* and another.[157] It held that the only requirement in such cases is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail.

Whether the order of preventive detention was vitiated due to non-supply of documents in a language understood by detenue in the context of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was the question at issue in *Sheetal Manoj Gore* v. *State of Maharashtra.*[158] It was the plea of the petitioner that detenu does not understand English and is conversant only with Marathi and Hindi languages. The court found that detention order was not vitiated on this count. It also found that detenu signs, understands English and corresponded with authorities in English.

152 (2006) 5 SCC 142.
153 (2006) 5 SCC 676.
154 (2006) 7 SCC 603.
155 2002 (7) SCC 129.
156 JT 2006 (6) SC 228.
157 *Supra* note 153.
158 (2006) 7 SCC 560.

In *Adishwar Jain* v. *Union of India*[159] the Supreme Court reiterated the principle that in a case of preventive detention all relevant documents are necessarily to be supplied to detenu, but all documents which are not material are not necessary to be supplied. According to the court all relevant documents must be supplied so as to enable the detenu to make an effective representation which is his fundamental right under article 22(5) of the Constitution.

Anand Hanumathsa Katare v. *Additional District Magistrate*[160] was a case under the Karnataka Prevention of Dangerous Activities of Boot-Leggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985. Detention order was approved by the state government. Hence the question was whether after approval by the state government, the detaining authority became *functus officio* and representation given to authority ought to have been transmitted to be considered by the state government. The Supreme Court held that the authority had not become *functus officio.*

The Supreme Court has held in *Usha Agarwal* v. *Union of India*[161] that in a case of preventive detention the delay in disposal of second representation is not fatal, when the second representation in question is only a reiteration of earlier representation. It was also held that detenue can make representation not only to detaining authority but to any authority which can revoke detention order.

X RIGHT AGAINST EXPLOITATION

In *Secretary, State of Karnataka* v. *Umadevi*[162] the constitution bench has considered the meaning of forced labour under article 23 and has held that employment on daily wages does not amount to forced labour.

Whether there was a liability to pay minimum wages in an employment of providing of security personnel to various organisations which is not a scheduled employment was the question in *Lingegowd Detective and Security Chamber (P) Ltd.* v. *Mysore Kirloskar Limited.*[163] According to the apex court since the Minimum Wages Act cannot be extended to those not intended to be covered, the appellant, who provides security personnel was not liable to pay minimum wages. The court distinguished the earlier decision in *People's Union for Democratic Rights & Ors.* v. *Union of India & Ors.*[164]

159 2006 (10) SCALE 553.
160 2006 (10) SCALE 385.
161 2006 (11) SCALE 173.
162 *Supra* note 60.
163 (2006) 5 SCC 180.
164 AIR 1982 SC 1473.

XII RIGHT TO FREEDOM OF RELIGION

In *Ewanlangki-E-Rymbai* v. *Jaintia Hills District Council*[165] it was held in the context of the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, that 1959 exclusion of Christians from contesting election to the posts of chiefs or headmen was not unconstitutional.

It was reiterated in *I. Nelson* v. *Kallayam Pastorate*[166] that rights under articles 25 and 26, are not absolute and unfettered. Right to manage does not carry with it a right to mismanage and therefore in cases of mismanagement, courts can oversee its function.

XI CULTURAL AND EDUCATIONAL RIGHTS

In *Committee of Management Kanya Junior High School Bal Vidya Mandir, Etah, U.P.* v. *Sachiv, U.P. Basic Shiksha Prishad*[167] the Supreme Court held that merely because an educational institution is managed by a person belonging to a particular religion it would not *ipso facto* make the institution an institution run and administered by minority.

It was also held that the rights of minorities under articles 29 and 30 of the Constitution are no higher rights but mere additional protection conferred on minorities and that minority communities have no higher rights than majority communities. The court referred to its earlier decision in *P.A. Inamdar & Others* v. *State of Maharashtra & Others*.[168] This proposition appears to be contrary to ratio of the decisions of larger benches like *T.M.A Pai Foundation* v. *State of Karnataka*[169] and *Ahmedabad St. Xaviers College* v. *State of Gujarat*.[170] It also appears to be contrary to the ruling of 13 judges decision in *Kesavananda Bharati* v. *State of Kerala*[171] wherein it was held that minority rights form part of the basic structure of the Constitution. Can such a right which form part of the basic structure of the Constitution be held as nothing more than or higher than the rights of the majority? The very existence of article 30 of the Constitution appears to be in jeopardy. Are the articles 29 and 30 mere toppings on the constitutional cake as a decorative piece or as a precautionary re-statement of the rights already available to the majority?

In *Secretary, Malankara Syrian Catholic College* v. *T. Jose*[172] the Supreme Court examined the right of the minority educational institutions to have a person of its choice as principal in the context of the Kerala University

165 *Supra* note 90.
166 2006 (9) SCALE 245.
167 AIR 2006 SC 2974.
168 (2005) 6 SCC 537.
169 (2002) 8 SCC 481.
170 (1975) 1 SCR 173.
171 See, *supra* note 15.
172 2006 (13) SCALE 1.

Act, 1974. The freedom to choose the person to be appointed as principal has always been recognized as a vital facet of the right to administer the educational institution. This has not been, in any way, diluted or altered by *TMA Pai*. Having regard to the key role played by the principal in the management and administration of the educational institution, there can be no doubt that the right to choose the principal is an important part of the right of administration and even if the institution is aided, there can be no interference with the said right. The fact that the post of the principal/ headmaster is also covered by state aid, will make no difference.

The Supreme Court while setting aside a judgment of the Kerala High Court demonstrated that the interpretation of minority rights by the 11 judge bench decision in *TMA Pai Foundation* has not changed the prerogative right of the minority management to appoint a principal of their choice even in an aided educational institution.

In spite of all the previous declarations by the Supreme Court, the controversy arose since there were some observations in the *T.M.A. Pai* decision by the eleven judge bench regarding the lesser autonomy of minority institutions which receives governmental aid. Now the court has clarified that those observations in that case cannot mean to take away the right to select and appoint the principal of their choice even in aided institutions. While ruling so the Supreme Court also examined what are the additional control the government or university can exercise in view of the grant of aid to minority institutions.

XII RIGHT TO CONSTITUTIONAL REMEDIES

Pragmatic remedy

A constitution bench of five judges in *Rameshwar Prasad* v. *Union of India*[173] dealt with the writ petitions under article 32 challenging the constitutional validity of the proclamation dated 23.5.2005 dissolving the legislative assembly of Bihar. The court allowed the challenge to constitutional validity by holding that the proclamation was unconstitutional but it declined to pass an order of *status quo ante* taking a pragmatic view. As a result of the impugned proclamation, the Election Commission had not only made preparation for four phase election but also issued notification in regard to the first two phases before conclusion of arguments. Having regard to these subsequent developments it was thought fit not to put the state in another spell of uncertainty.

Refusal of compensation

In *Sube Singh* v. *State of Haryana*[174] the court considered the propriety of awarding compensation as a public law remedy for violation of the fundamental rights enshrined in article 21 of the Constitution, in addition to

173 (2006) 2 SCC 1.
174 (2006) 3 SCC 178.

the private law remedy under the law of torts. This remedy was evolved by the Supreme Court under its jurisdiction under article 32 of the Constitution in the last two and a half decades. The court in the instant case laid down the requirements for granting compensation for illegal detention, custodial torture and harassment. It found that there was no clear or incontrovertible evidence about custodial torture nor any medical report of any injury or disability. Though the petitioner had raised grievances against different officers in different police stations at different points of time, several of these allegations were proved to be exaggerated and false. Hence it was found not to be a fit case for award of compensation. According to the Supreme Court all reliefs which should be granted in such a case have already been granted by ordering an inquiry by CBI and ensuring that police officers named are prosecuted.

In *Amar Singh* v. *Union of India*[175] the Supreme Court was exercising its jurisdiction under article 32 of the Constitution in a case of tapping of telephones. Directions were given to electronic and print media not to publish/ display unauthorisedly and illegally recorded telephone tapped version. Interception of telephone calls at the request of police was outside the order of designated authority. In view of the facts and circumstances of the case, direction was issued to electronic and print media not to publish/display unauthorisedly and illegally recorded telephone tapped version of any person till further orders.

A writ petition was filed in *Bharat Sanchar Nigam Ltd.* v. *Union of India*[176] challenging levy of sales tax on mobile service. It was opposed alleging that it was not maintainable stating that there were different factual scenario as a result of which the possible outcome of particular assessment could not be predicted and it was not appropriate to intervene under article 32. Writ petition raised question relating to competence of state to levy sales tax on telecommunications service which is not an issue to have been raised and decided by assessing authorities. If state legislatures are incompetent to levy the tax, it would not only be an arbitrary exercise of power by state authorities, but it would also constitute an unreasonable restriction upon the right of service provider to carry on trade under article 19(1)(g) of the Constitution. Hence, the Supreme Court found that writ petition was maintainable.

Sudhir Madan v. *Municipal Corporation of Delhi*[177] was a case for removal of unauthorised occupation of pavements and roads by hawkers. Direction was given to frame a scheme by keeping the National Policy on Urban Street Vendors 2004 in mind. Direction was also given to remove unauthorised encroachers.

The court considered in *Bombay Dyeing and Mfg. Co. Ltd.* v. *Bombay Environmental Action Group*[178] the effect of delay and laches in filing public

175 2006 (2) SCALE 698.
176 (2006) 3 SCC 1.
177 2006 (7) SCALE 326.
178 (2006) 3 SCC 434.

interest litigation. Where by reason of delay and laches, the parties altered their position and/or third party interest have been created, public interest litigation may be summarily dismissed. Delay although may not be the sole ground for dismissing a public interest litigation in some cases and thus each case must be considered having regard to facts and circumstances obtaining therein, the underlying equitable principle cannot be ignored. The court referred to its decision in *Chairman & M.D. BPL Ltd.* v. *S.P. Gururaja.*[179]

In *Dipak K. Ghosh* v. *State of West Bengal*[180] the main issue was the jurisdiction of the Supreme Court to pass an order cancelling allotment of a plot. The apex court cancelled the plot which was wrongfully obtained by a former judge of the high court from chief minister's discretionary quota. Plea was raised that said order passed by the Supreme Court was void, a nullity and *non est* as it had no jurisdiction to pass such an order. The court held that since both the review petition and also the curative petition had been dismissed, it was too late in the day to raise such a contention, which would amount to re-opening of the entire controversy.

It was held in *Akhil Bharat Goseva Sangh* v. *State of Andhra Pradesh*[181] that the finding of expert bodies in technical and scientific matter cannot ordinarily be interfered by the court either under article 226 or by the Supreme Court under article 32 or 136 of the Constitution.

In *T.N. Godavarman Thirumulpad* v. *Union of India*[182] the apex court dismissed the PIL with cost of Rs. 1 lakh. Land measuring about 15 hectares was leased to M/s Maruti Clean Coal and Power Limited for setting up a of coal washery. PIL alleging non-forest activities was referred to the Central Empowered Committee. CEC concluded that the land allotted to Maruti was not a forest land and the PIL had been set up by others. The court found that PIL was entirely misconceived and *mala fide* and the applicant was nothing but a name lender.

The court in *Narender Malav* v. *State of Gujarat*[183] accepted a letter sent by 'N' as a writ petition under article 32 of the Constitution. Grievance was as to the working conditions of salt workers in Kutch District of Gujarat. Several directions were issued to State of Gujarat and other functionaries and status report was filed. It was submitted that the State of Gujarat was taking up the issue of socio-economic development of salt workers in a holistic and sustainable manner. Deputy Secretary (Labour), filed an affidavit furnishing details of measures taken for welfare of children of salt workers and for providing them with adequate number of schools. Since the material revealed that sincere efforts were being made by the state, the court felt that it was not necessary to keep the writ pending.

179 (2003) 8 SCC 567.
180 (2006) 3 SCC 765.
181 (2006) 4 SCC 162.
182 (2006) 5 SCC 28.
183 2006 (6) SCALE 218.

A writ petition under article 32 was filed in *Hari Singh* v. *State of Uttar Pradesh*[184] before the apex court seeking a direction to conduct an enquiry by CBI into the murder of petitioner's son. Plea was that though FIR had been lodged with the police to the effect of commission of murder and not suicide, no positive action was taken by police because of pressure from some influential people. The Supreme Court held that when the petitioner can file a complaint under section 190 read with section 200 before the magistrate having jurisdiction for, a petition under article 32 cannot be entertained.

In *National Human Rights Commission* v. *State of Gujarat*[185] an application was filed for further investigation of the case and for conducting trial outside Gujarat. The court found that the main question involved was whether cases were properly investigated by police or not. Voluminous material on record was required to be scrutinized for the purpose of deciding the main question. Assistance of an experienced judicial officer was required for scrutiny of material. The high court was requested to provide assistance of senior additional district and sessions judge to go through the papers.

A PIL based on newspaper report is not maintainable. Newspaper report does not constitute evidence. The court in *Kushum Lata* v. *Union of India*[186] held that a petition based on unconfirmed news reports without verifying their authenticity should not normally be entertained as such petition does not provide any basis for verifying the correctness of statements made and information given therein.

In *Rajiv Ranjan Singh 'Lalan'* v. *Union of India*[187] the apex court examined the purpose and maintainability of PIL. According to the court (in the opinion of the majority) public interest litigation is meant for the benefit of the lost and lonely and it is meant for the benefit of those whose social backwardness is the reason for no access to the court. The court found that PILs are not meant to advance the political gain and also settle their scores under the guise of a public interest litigation and to fight a legal battle. In court's view, the liberty of an accused cannot be taken away except in accordance with the established procedure of law under the Constitution, criminal procedure and other cognate statutes. In its opinion, PIL is totally foreign to pending criminal proceedings.

Article 32 read with article 142 empowers the Supreme Court to issue such direction as may be necessary for doing complete justice in any cause or matter. The court in *Prakash Singh* v. *Union of India*[188] reiterated that all authorities are mandated by article 144 to act in aid of orders passed by the Supreme Court.

In *Union of India* v. *Reshma Yadav*[189] the question to be decided by the apex court was the power of the Supreme Court to give directions for the

184 (2006) 5 SCC 733.
185 2006 (9) SCALE 3.
186 (2006) 6 SCC 180.
187 (2006) 6 SCC 613.
188 (2006) 8 SCC 1.
189 2006 (10) SCALE 158.

payment of damages/arrears of rent under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 for unauthorised occupation of shops/ stalls by the respondent contumaciously flouting order of the Supreme Court. The court found that the plea of the respondent that Supreme Court is not a proper forum to grant such prayer and such power can be exercised by the estate officer in terms of section 7 is unsustainable as the entire cause of action arose not in proceedings initiated under the Act, but due to the wilful violation of this court's order.

A petition under article 32 or 226 or 136 seeking relief will not be maintainable at the instance of law violators. The court in *Kumaran Silk Trade (P) Ltd.* v. *Devendra*[190] found that the petitioner having got a sanctioned plan for construction of basement, parking, ground floor and three floors, not only flouted the permission and plan, but had gone ahead constructing additional floors without any regard to building bye-laws showing scant respect to orders of court. It was held that the petitioner was neither entitled to any order by way of discretion from the Supreme Court in view of abovesaid conduct nor entitled to any order as of right.

A writ petition was filed against the validity of sale of Hotel Agra Ashok to a private party in *All India ITDC Workers Union* v. *ITDC.*[191] Petitioners were employees of the hotel. The alleged sale took place pursuant to the disinvestment policy of the Government of India. The Supreme Court held that such a policy decision should be least interfered in judicial review. The court distinguished its earlier decision in *Jawaharlal Nehru University* v. *Dr. K.S. Jawatkar and Others*[192] and relied on the judgment in *Balco Employees' Union (Regd.)* v. *Union of India and Others.*[193]

The manner of conducting investigation and the functioning of the investigating agency was under challenge in *Shashikant* v. *Central Bureau of Investigation.*[194] It was held that ordinarily, it is not within the province of the court to direct the investigating agency to carry out investigation in a particular manner. According to the court a writ court ordinarily would not interfere with the functioning of an investigating agency.

XIII CONCLUSION

The interpretation of fundamental rights has reached unmatched heights during the year under survey. The foundational character of the fundamental rights was categorically declared. Fundamental rights are available by reason of the basic fact that we are members of human race. A right becomes a fundamental right because it has foundational value. Fundamental right is a limitation on the power of state. It is not to be regarded as a gift from the state

190 (2006) 8 SCC 555.
191 AIR 2007 SC 301.
192 1989 Supp (1) SCC 679.
193 (2002) 2 SCC 333.
194 AIR 2007 SC 351.

to its citizens but possessed by individuals independently by reason of the basic fact that they are members of human race.

Further, the content of fundamental rights especially that of equality received purposive and expansive interpretation reiterating that the reservations and special provisions in favour of backward classes are the mandate of the concept of equality itself. It is equality in fact or substantive equality, as it is called. Again by upholding the four constitutional amendments which were brought in with the avowed purpose of destroying the basis of previous judgments of the Supreme Court in the matter of reservations, it was made unequivocally clear that the democratic dialogue between the judicial wing and other wings of the state has come of age in India.

Other fundamental rights including that of life and personal liberty received liberal interpretation. The rights of women prisoners and their children, the stress on sustainable development and inter-generational equity are all examples of this jurisprudential development.

In the area of service jurisprudence and labour laws, certain cob-webs were cleared with magical dexterity as in the case of *Umadevi* and pursuant decisions. But these decisions may not in any manner reduce the suffering and groaning of the hapless labourers and casual/temporary/contractual workers.

The grass-roots democracy in India also got a shot in the arm when a constitution bench of the Supreme Court ruled that the constitutional scheme and the democratic and fundamental rights of the citizens mandate that the elections to the municipalities and panchayats are to be mandatorily conducted after the expiry of the period and cannot be extended at any cost even by the election commission or at the instance of the government.

Thus, overall, the liberal, expansive and harmonious interpretation of the fundamental rights continued its royal march, thanks to the Supreme Court of India, the *sentinel qui vive.*