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CONSTITUTIONAL LAW—II

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> The nation's armour of defence against the passions of men is the Constitution. Take that away, and the nation goes down into the field of its conflicts like a warrior without armour.[1]

I INTRODUCTION

A CONSTITUTION is not only a legal but also a political document. A Constitution would, therefore, have to be understood in the context of the historical conditions in which it evolved.

The Constitution of India provides in detail the norms of functioning for all the organs of the government, namely, the legislature, the executive and the judiciary and also the checks and balances in their functioning. The Constitution envisages that the rule of law shall be the fundamental principle to be followed in the governance of the country.

It reflects the hopes and aspirations of the people of India and what India ought to be in the midst of the family of nations.

The hallmark of a written Constitution is the acceptance of the constitutional limitations on the powers conferred on various organs of the state. The very object of such a Constitution is, while recognizing and conferring wide powers on various wings of the government, to seek to restrain those powers. The Constitution is a dynamic instrument and being the fundamental law of the country is subject to the interpretation by all the wings of the government. Since institutional perspective differs, so does their interpretation of the Constitution, leading to apparent conflicts. The question arises as to how to achieve the constitutional equilibrium while acknowledging the right of each organs of the government to interpret the Constitution. One perceptible view is, that in the ultimate analysis, the Constitution is, what the judges say it is. Though there are others who share a different perspective as regards the role of the courts, it could hardly be disputed, that the superior court's role in a written Constitution that seeks to distribute the powers between various organs and tier of government, is much more than mere interpretation of the provisions of the Constitution. In fact, the role of the superior courts in the interpretation of the silences in the Constitution and the consequential declarations of law is much more significant than the

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1 Henry Ward Beecher, *Proverbs from Plymouth Pulpit* (1887).

interpretation of the express provisions of the Constitution.

Whether a federal Constitution *per se* establishes the judicial supremacy in constitutional interpretation is a debate that has engaged the attention of many a stateman at all times. In his first inaugural address Abraham Lincoln evaluated the role of the U.S. Supreme Court thus:[2]

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the objects of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government…. [But] if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

Almost echoing the same sentiments, the then Prime Minister Jawaharlal Nehru, while moving the Constitution (First Amendment) Bill, 1951 in his speech delivered in the Parliament justifying amendment to article 31 and introduction of two new articles 31A and article 31B said:[3]

> What are we to do about it? What is the government to do? If a government has not even the power to legislate to bring about gradually that equality, the government fails to do what it has been commanded to do by this Constitution. *That is why I said that the amendments I have placed before the House are meant to give effect to this Constitution. I am not changing the Constitution by an iota; I am merely making it stronger. I am merely giving effect to the real intentions of the framers of the Constitution, and to the wording of the Constitution, unless it is interpreted in a very narrow and legalistic way.* Here is a definite intention in the Constitution. This question of land reform is under article 31(2) and this clause tries to take it away from the purview of the courts and somehow article 14 is brought in. That kind of thing is not surely the intention of the framers of the Constitution. Here again I may say that the Bihar High court held that view but the Allahabad and Nagpur High courts held a contrary view. That is true. There is confusion and doubt. Are we to wait for this confusion and doubt gradually to resolve itself, while powerful agrarian movements grow up? May I remind the House that

2 "Collected Works of Abraham Lincoln" 268, in Robert A Burt *The Constitution in Conflict* 1-2 (1992).

3 *Parliamentary Debates*, Part II, Vol.xiii (March 15, June 9, 1951) 9084 (emphasis in original).

> this question of land reform is most intimately connected with food production. We talk about food production and grow-more-food and if there is agrarian trouble and insecurity of land tenure nobody knows what is to happen. Neither the Zamindar nor the tenant can devote his energies to food production because there is instability. Therefore these loud arguments and these repeated appeals in courts are dangerous to the state, from the security point of view, from the food production point of view and from the individual point of view, whether it is that of the zamindar or the tenant or any intermediary.

Since the Constitution of India envisages a federal form of government distributing power between the centre and the states, at times, difficulties arise in delineating the respective spheres of their powers. The Constitution envisages a resolution of such issues administratively and failing success, by judicial intervention. It is rather intriguing that, in most cases, apparent conflicts regarding the scope of the respective powers of the centre and the states have arisen at the instance of citizens, private entities and entrepreneurs. Direct conflict between states or between the centre and the states is rather infrequent which highlights the true Indian constitutionalism. It is only in recent times that a new phenomenon is being witnessed in the functioning of the Indian federalism. Issues which could otherwise be resolved amicably viewed from national perspective are often politicised on regional or linguistic basis by people aiming for short term gains and thereby disturbing the equilibrium.

In the realm of finance and economy, the efforts made by the states are directed towards maximizing their revenue which, at times, conflict with the constitutional norms of distribution of revenue between the centre and states on the one hand, and the states *inter se*, on the other. Though, the superior courts have sought to resolve such a disputes applying their judicial parameters, it is a moot point whether such course of action have eventually subserved the larger interest of the economy of the nation.

By this survey, the entire conspectus of the functioning of all the organs of the government have come to be focused. It is for each of the organ of the government to introspect on the events that have gone by in the year under survey and to determine their course of action for future.

II CENTRE-STATE RELATIONS

Imposition of President's rule under article 356 of the Constitution

Part XVIII of the Constitution in articles 352 to 360 deal with the most significant aspect concerning not only the centre-state relations but administration of the country as a whole while passing through certain crisis. These provisions lay down the emergency provisions. Article 352 empowers the President, on being satisfied that a grave emergency exists whereby the security of India in any part of the country is threatened, whether by war or external aggression or armed rebellion, by proclamation to make a declaration

to that effect in respect of either the whole of India or any part of the territory as may be specified in the proclamation. The second emergency situation contemplated by the Constitution is when the President, on receipt of a report from the Governor of a state or otherwise, is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution. The President may by proclamation assume to himself all or any of the functions of the government of the state and all or any of the powers vested in or exercisable by the Governor; declare that the powers of the legislature are exercisable by or under the authority of Parliament (vide article 356). The third kind of emergency contemplated is financial emergency under article 360. It is only the declaration of the emergency to the effect that the government of a state cannot be carried on in accordance with the provisions of the Constitution as envisaged under article 356 that had been the subject matter of not only political battles fought both inside and outside the Parliament and in the states but also led to serious judicial pronouncements on repeated occasions. Evidently, the questions that have arisen in the context of invocation of powers under article 356 of the Constitution were essentially political questions though the remedy sought through courts inviting judicial verdict were apparently based on legal principles. Being essentially political questions there never existed any unanimity in either amongst the political commentators or the judges who had to consider the issues from the legal perspective. The fact that the emergency powers under article 356 have been invoked on about 100 occasions in the last five decades after adoption of our Constitution signifies the political importance attached to such powers.

Over the years there has been a sea change in the political arena with the emergence of large number of regional parties wresting power from political stronghold of those who almost held a monopoly in the governance of the country. While 60's and 70's witnessed governments at the states and at the centre being run by different political parties with different ideologies that gave rise to newer constitutional relationships between the centre and the state, from 80's onwards a completely new political scenario emerged with the polarization of various political parties both at the centre and at the states. Frequent changes in the combination of the groups that share governmental powers have added a newer dimension to the working of the Constitution at least in times of confusion and crisis when none of the political parties could muster a majority to form the government particularly in the states.

The major constitutional issue with regard to the invocation of the emergency powers came to focus when State of Rajasthan[4] approached the Supreme Court by filing a suit against the Union of India under article 131 of the Constitution and certain other states followed it by filing similar suits. On 18.1.1977, the *Lok Sabha* in which the Congress (R) had an overwhelming majority was dissolved. Fresh elections were held in March 1977 in which the ruling party lost its majority and went out of power. On 24.3.1977, the Janta

4 *State of Rajasthan* v. *Union of India*, (1997) 3 SCC 592.

Party formed a new government at the centre. Though the Congress (R) failed to secure majority to form government at the centre, it had remained in power in the states including Bihar, Haryana, Himachal Pradesh, Madhya Pradesh, Orissa, Punjab, Rajasthan and Uttar Pradesh and West Bengal. On 18.4.1977, the Home Minister addressed a letter to the Chief Ministers of these states earnestly commending for their consideration that they may advise the Governors of their respective states "to dissolve the state assembly" as contemplated under article 174(2) and seek a fresh mandate from the electorate. According to the Home Minister, this alone would be "consistent with constitutional precedents and democratic practices". The Union Law Minister also took the same stand in an interview in the "spotlight programme" of All India Radio held on 22.4.1977. On 25/26.4.1977, six out of nine states filed suits in the Supreme Court under article 131 of the Constitution seeking, *inter alia*, a declaration that the directives issued by the Home Minister to the Chief Ministers is unconstitutional and that the state governments are not legally and constitutionally obliged to comply with it. The states also contended that refusal by the Chief Ministers to give effect to the said directive cannot be made a basis for the issuance of a proclamation under article 356, dissolving the state assemblies for holding fresh elections. A preliminary objection was raised by the additional solicitor general appearing for the central government as regards maintainability of the suits under article 131 of the Constitution. The contention was that the dispute involved in the suits filed by the state governments fell outside the scope of article 131 since the dispute was not between the Government of India and any state as such but it was between the Government of India on the one hand and all nine state governments on the other.

It was contended that the question as to whether the state assemblies have to be dissolved or not was a matter of political expediency and though the government for the time being in power in a state may be interested in the continuance of the legislative assembly for the full term, the state has no legal right to ensure such continuance. The seven-judge bench, which heard the case, was sharply divided in their opinion as regards the maintainability of the suits under article 131 of the Constitution. While Chandrachud, Bhagwati, and Gupta, J J were of the view that the suits were maintainable, Goswami, Untwalia and Fazal Ali, JJ held that the suits were not maintainable. Beg CJ was of the view that "even if there be some grounds for making a distinction between a state's interest and rights and those of its government or its members, the court need not take too restrictive or stringent a view of the states' right to sue for any rights, actual or fancied, which the state government chooses to take up on behalf of the state concerned in a suit under article 131. Moreover as we have decided not to grant any relief after having heard detailed arguments and fully considered the merits of contentions advanced by both sides, I do not think that we need to determine, on this occasion, the precise scope of a suit under article 131".[5]

5 *Id*. at 635 para 97.

As regards the question as to whether there has been a break-down of the constitutional machinery in a state was a matter of subjective assessment and satisfaction of the President and whether exercise of the powers of the article 356 was amenable to judicial review, the majority took the view that the satisfaction of the President was his subjective satisfaction and cannot be tested by reference to any objective tests. Chandrachud J while subscribing to this view went on to hold that if the order passed by the President discloses reasons which bear a reasonable nexus with the exercise of the power, the satisfaction of the President must be treated as conclusive. If, however, the reasons given are wholly extraneous to the formation of the satisfaction, the proclamation would be open to the attack that it is vitiated by legal *mala fides*.[6] Goswami, Untwalia and Fazal Ali JJ were of the view that judicial scrutiny of the exercise of the power by the President under article 356 comes into operation when the decision is passed on extraneous or irrelevant considerations or is colourable or *mala fide*. The stamp of finality given to the exercise of power by the President by clause (5) of article 356 of the Constitution does not imply a free licence to the central government to give any advice to the President and get an order passed on reasons which are wholly irrelevant or extraneous or which have absolutely no nexus with the passing of the order. To this extent the judicial review remains.

The question regarding justiciability of the exercise of powers by the President under article 356 of the Constitution came to be considered by a bench of nine judges in *Bommai's* case.[7] A batch of appeals and transferred cases came up for consideration by the Supreme Court with regard to dissolution of legislative assemblies in the states of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Himachal Pradesh and Rajasthan. All these cases involved, *inter alia*, the question of exercise of powers by the President under article 356 of the Constitution issuing proclamation dissolving the respective state assemblies based on the reports of the respective Governors. Although six opinions were expressed by the bench, all of them held that a proclamation issued by the President on the advice of the council of ministers headed by the Prime Minister was amenable to judicial review. The judges, however, differed on the question as regards the scope and ambit of such judicial review i.e. the area of justiciability. In fact, the Attorney General for India as well as the counsel appearing for the Union of India had not disputed that proclamation issued by the President was amenable to judicial review, as recorded in the opinion expressed by Ahmadi J.[8] Having held that the proclamation issued by the President was amenable to judicial review, Ahmadi J observed that the opinion which the President would form on the basis of the Governor's report or otherwise could be based on his political judgment and hence it would be difficult to evolve judicially manageable norms for

6 *Id.* at 644 para 129.
7 *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1.
8 *Id.* at 80 para 32.

scrutinising such political decisions inasmuch as the decision is shown to be *mala fide*.

In the opinion of Ahmadi J "the temptation to delve into the President's satisfaction may be great but the courts would be well advised to resist the temptation for want of judicially manageable standards."[9] Verma J speaking for himself and Yogeshwar Dayal J held that "article 74(2) is no bar to production of the materials on which the ministerial advice is based, for ascertaining whether the case falls within the justiciable area". Sawant J speaking for himself and Kuldip Singh J with whom Pandyan J concurred held that the exercise of powers by the President under article 356 to issue proclamation is subject to judicial review at least to the extent of examining whether the conditions precedent to the issuance of the proclamation have been satisfied or not. This examination will necessarily involve the scrutiny of the material based on which the President reached the requisite satisfaction. In their opinion since article 356 requires the Presient "to be satisfied" that the situation in question has arisen, the material based on which the satisfaction could be reached, has to be such as would induce a "reasonable man" to come to the said conclusion. "It is not the personal whim, wish, view or opinion or the ipse dixit of the President *dehors* the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose." It was held that although "sufficiency" or otherwise of the material cannot be questioned, the legitimacy of inference drawn from such material is certainly open to judicial review.[10]

Ramaswamy J held that "the court when caught in a paralysis of dilemma should adopt self-restraint, it must use the judicial review with greatest caution. In clash of political forces in political statement the interpretation should only be in rare and auspicious occasions to nullify *ultra vires* orders in highly arbitrary or wholly irrelevant Proclamation which does not bear any nexus to the predominant purpose for which the Proclamation was issued, to declare it to be unconstitutional and no more".[11]

In the year under review, a constitution bench of the Supreme court again considered the question of justiciability and the extent of judicial review on proclamation issued by the President under article 356(1) of the Constitution ordering dissolution of the Bihar Legislative Assembly.[12] Sabharwal CJ in his judgment delivered for himself, B.N. Agrawal, and Ashok Bhan, JJ described it as " a unique case", since the earlier cases that came up before the court were those where the dissolution of assemblies were ordered on the ground that the parties in power had lost the confidence of the House. The present case is of its own kind where even before the first meeting of the legislative assembly, its dissolution has been ordered on the ground that attempts are being made to cobble a majority by illegal means and lay claim to form the

9 *Id.* at 82 para 35.
10 *Id.* at 103 para 74.
11 *Id.* at 204 para 241.
12 *Rameshwar Prasad & Ors* v. *Union of India*, (2006) 2 SCC I.

government in the state and if these attempts continue, it would amount to tampering with constitutional provisions.[13]

In the opinion of the court the case involved the question of far reaching consequences as to whether the President could order dissolution of assembly under article 356(1) of the Constitution in order to prevent the staking of claim by a political party to form the government on the ground that the majority has been obtained by illegal means.[14] The Election Commission had notified election to the Bihar Legislative Assembly on 17.12.2004; polling took place in three phases ending on 13.2.2005; results were declared on 4.3.2005; and notification was issued under section 73 of the Representation of People Act, 1951 notifying the names of the members elected for all the constituencies along with their party affiliation. The legislative assembly comprises of 243 members and to secure an absolute majority support of 122 members of legislative assembly is required.

The result of the poll disclosed that no single political party or coalition of parties was able to secure 122 seats. Based on the pre-poll analysis it was found that the two alliances, one led by RJD and the other by NDA both secured only 92 seats in the assembly. The Governor forwarded his report dated 6.3.2005 to the President reporting the results of the election and the interactions he had with the various political parties. In his report, the Governor explained that he had explored all possibilities but was satisfied that no political party or coalition of parties or groups were able to substantiate a claim of majority in the legislative assembly. The Governor was, therefore, unable to form a popular government in Bihar because of the situation created by the election results. He, therefore, recommended that "the present constituted assembly be kept in suspended animation". Since no political party was in a position to form government, on 7.3.2005 a notification was issued by the President under article 356 of the Constitution imposing President's rule over the state and the assembly was kept in suspended animation. The purpose of the proclamation imposing President's rule was to give time and space to the political process to explore the possibility of forming a majority government in the state.

On 27.4.2005, the Governor sent another report to the President stating, *inter alia,* that the news paper reports and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received, indicated a trend to win over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts etc., which was a disturbing feature. In view of the circumstances, the Governor held the view that "the present situation is fast approaching a scenario wherein if the trend is not arrested immediately, the consequent political instability will further give rise to horse trading being practised by various political parties/ groups trying to allure elected MLAs. Consequently it may not be possible

13 *Id.* at 61.
14 *Ibid.*, para 2.

to contain the situation without giving the people another opportunity to give their mandate through a fresh poll.[15] The Governor, thereafter, sent another report on 21.5.2005 detailing the developments that had taken place in the meantime. The Governor, however, expressed his view that "if the trend is not arrested immediately it may not be possible to contain the situation. Hence, in my view a situation has arisen in the state wherein it would be desirable in the interest of the state that the Assembly presently kept in suspended animation is dissolved, so that the people/electorate can be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course".[16]

The report of the Governor was received by the Union Government on 22.5.2005 and on the same day, the Union Cabinet met at about 11.00 P.M. and decided to accept the report of the Governor and sent a fax message to the President of India, who was then in Moscow, recommending the dissolution of the Legislative Assembly of Bihar. Accepting the recommendations, the President of India accorded his approval and, accordingly, a proclamation was issued on 23.5.2005 dissolving the Bihar Assembly. It is this proclamation dated 23.5.2005 which was the subject matter of challenge before the court. The challenge was, *inter alia*, on the grounds that the condition precedent for dissolving the assembly that is the satisfaction of the President that a situation has arisen in which the government of a state cannot be carried on in accordance with the provisions of the Constitution, had not been reached based on any cogent material. The power of dissolution cannot be used to prevent the staking of claim for the formation of a government by a political party with support of others. That while the assembly was kept under suspended animation, the political parties by process of realignment was able to provide a majority government in the state led by Nitish Kumar, who claimed, had the support of over 135 MLAs. It was contended that the Governor was under an obligation to make a meaningful and real effort for securing the possibility of a majority government in the state and that there was no material available or in existence to indicate that any political defection was being attempted through the use of money or muscle power and that in the absence of any such material the exercise of power under article 356 of the Constitution was a clear fraud on the Constitution.[17]

Sabharwal CJ speaking for the majority, rejected the first contention of the petitioners that powers under article 174(2)(b) of the Constitution for dissolution of the legislative assembly could be invoked only after the assembly was duly constituted i.e. after its first meeting. It was held that there is no restriction under article 174(2)(b) stipulating that the power to dissolve the legislative assembly can be exercised only after its first meeting and that the legislative assembly would be deemed to have been duly constituted on 4.3.2005 when the notification to that effect was issued under section 73 of the

15 *Id.* at 66-67.
16 *Id.* at 69 para 11.
17 *Id.* at 70.

Representation of the People Act. However, Sabharwal CJ on a detailed analysis of the earlier decisions particularly *State of Rajasthan* v. *Union of India*[18] and *S R Bommai*[19] held that "the Governor cannot refuse formation of government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means. No such power has been vested with the Governor. Such a power would be against the democratic principles of majority rule. Governor is not an autocratic political ombudsman. If such a power is vested in the Governor and/or the President, the consequences can be horrendous. The ground of maladministration by a state government enjoying majority is not available for invoking power under article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in article 356(1)."[20] The Governor cannot assume to himself aforesaid judicial power and based on that assumption come to the conclusion that there would be violation of the Tenth Schedule and use it as a reason for recommending dissolution of assembly.[21] The Governor, a high constitutional functionary, is required to be kept out from the controversies like disqualification of members of a legislative assembly, for which a detailed procedure for obtaining the opinion of the Election Commission is prescribed under article 192(2) in the Constitution.[22] Since the proclamation was held to be based on the report of the Governor which did not furnish the materials relevant to the formation of the requisite satisfaction by the President, the proclamation dated 3.5.2005 was held to be unconstitutional.[23]

Though, the court held that immunity to the Governor conferred by article 361 provided a complete bar to the impleading and issue of notice to the President/Governor since they are not answerable to any court for the exercise and performance of their duties, the said bar, however, would not prevent the President/Governor from filing an affidavit on their own. The immunity granted by article 361(1) does not, however, take away the power of the court to examine the validity of the action including on the ground of *mala fides*. On the question as to whether the court having declared a proclamation as unconstitutional was duty bound to restore the *status quo ante* as prevailing before the dissolution of the assembly, it was held that "Having regard to these subsequent developments coupled with numbers belonging to different political parties, it was thought fit not to put the state in another spell of uncertainty. Having regard to the peculiar facts, despite unconstitutionality of the Proclamation, the relief was moulded by not directing *status quo ante* and consequently permitting the completion of the ongoing election process with the fond hope that the electorate may again not give a fractured verdict and may give a clear majority to one or other political party — the Indian electorate possessing utmost intelligence and having risen to the occasion on

18 *Supra* note 4.
19 *Supra* note 7.
20 *Supra* note 12 at 129 para 165.
21 *Id*. at 130 para 166.
22 *Ibid*. para 167.
23 *Ibid*. para 168.

various such situations in the past". Balakrishnan J (as he then was) though agreed with the majority on other questions, dissented on the question of validity of the proclamation dated 23.3.2005. In his opinion, "It is important to note that the writ petitioners have no case that JD(U) or any other alliance had acquired majority and that they had approached the Governor staking their claim for forming a government. No material is placed before us to show that the JD(U) or its alliance with BJP had ever met the Governor praying that they had got the right to form a government".[24] The petitioner's case was that they were about to form a government and in order to scuttle that plan, the Governor sent a report whereby the assembly was dissolved. Rejecting this contention as not supported by the facts, Balakrishnan J held:[25]

> The Governor in his report stated that 17 or 18 members of the LJP had joined the JD(U)-BJP alliance, but no materials have been placed before us to show that they had, in fact, joined the alliance to form a government. One letter has been produced by one of the petitioners and the same is not signed by all the MLAs and as regards some of them, some others had put their signatures. Therefore, it is incorrect to say that the Governor had taken steps to see that the Assembly was dissolved hastily to prevent the formation of a government under the leadership of the political party JD(U).

The fact that the proclamation for dissolution of the assembly was passed after about three months of the imposition of the President's rule, it was held by Balakrishnan J to be of great significance though "it cannot be said that it was a *mala fide* exercise of power".[26] It was further held that the Governor was justified in reporting to the President that some horse trading was going on and that some MLAs were being won over by allurements. Balakrishnan J held:[27]

> If by any foul means the government is formed, it cannot be said to be a democratically-elected government. If Governor has got a reasonable apprehension and reliable information such unethical means are being adopted by the political parties to get majority, they are certainly matters to be brought to the notice of the President and at least they are not irrelevant matters.

It was held that "applying the parameters of judicial review, the said proclamation issued on 23.5.2005 could not be set aside since the contentions urged by the petitioner were devoid of any merit".[28]

24 *Id.* at 147.
25 *Ibid.*
26 *Ibid.*
27 *Ibid.*
28 *Id.* at 148.

Pasayat J also delivered an elaborate, dissenting judgment. He observed that "There is no place for hypocrisy in democracy. The Governor's perception about his power may be erroneous, but it is certainly not extraneous or irrational".[29] Analysing the reports sent by the Governor to the President, Pasayat J held: [30]

> Had the Governor acted with the object of preventing anyone from staking a claim his action would have been vulnerable. The conduct of the Governor may be suspicious and may be so in the present case, but if his opinion about the adoption of tainted means is supportable by tested materials, certainly it cannot be extraneous or irrational. ……. In the instant case there is some material on which the Governor has acted. This ultimately is a case of subjective satisfaction based on objective materials. On the factual background one thing is very clear i.e. no claim was staked and on the contrary the materials on record show what was being projected. It is also clear from a bare perusal of the documents which the petitioners have themselves enclosed to the writ petitions that authenticity of the documents is suspect.

Emphasizing that the Governor occupies a very important and significant position in the democratic set up, Pasayat J observed that, it would be a sad reflection on the person chosen to be the executive head of the state if serious allegations are made with regard to his non-performance of constitutional obligation or functions in the correct way. It was, further, noticed that if the Governor concerned had earlier held a political office affiliated to a particular party- often allegations are made concerning his credibility by members belonging to other political parties. It appears to be a matter of convenience for different political parties to allege *mala fides*. To avoid such serious embarrassment to the constitutional functionaries, Pasayat J observed that it would be desirable to give effect to the recommendations made by Sarkaria Commission and also the National Commission to review the working of the Constitution. According to Pasayat J these recommendations however, are not given effect to for the reason that "this does not appear to be convenient for the parties because they want to take advantage of the situation at a particular time and cry foul when the situation does not seem favourable to them. This is a sad reflection on the morals of the political parties who do not lose the opportunity of politicizing the post of the Governor".[31] Pasayat J also emphasized that not only the Governor is the "the key actor in the Centre-state relations" but also "a bridge between the union and the state. The founding fathers deliberately avoided election to the office of the Governor, as is in vogue in the U.S.A. to insulate the office from the linguistic chauvinism".[32]

29 *Id.* at 176 para 260.
30 *Id.* at 177.
31 *Id.* at 228 para 270.

Regarding the scope of judicial review, Pasayat J held that "Proclamation under article 356 is open to judicial review, but to a very limited extent. Only when the power is exercised *mala fide* or is based on wholly extraneous or irrelevant grounds, can the power of judicial review be exercised. Principles of judicial review which are applicable when an administrative action is challenged cannot be applied stricto sensu". [33] In his opinion public interest litigation cannot be entertained where the stand taken was contrary to the stand taken by those who are affected by any action.[34]

Trade commerce and intercourse

Part XIII of the Constitution deals with trade, commerce and intercourse within the territory of India. Article 301 declares that "subject to the other provisions of this Part," trade, commerce and intercourse throughout the territory of India shall be free. The freedom thus granted under article 301 is subject only to the conditions specified under articles 302 to 307 appearing under part XIII and not to the other provisions of the Constitution. Article 302 authorises Parliament by law to impose such restrictions on the freedom of trade, commerce and intercourse as may be required in public interest. Article 303 provides that neither Parliament nor the legislature of a state has the power to make any law, giving or authorising any preference being given to one state over another or making any discrimination between one state and another in the matter of trade and commerce. The only exception is when Parliament declares by such law that "it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India". Article 304 permits the legislature of a state by law to impose on goods imported from other states any tax to which similar goods manufactured in that state are subjected to, so as not to discriminate between goods so imported and goods so manufactured. The state legislature may by law also impose such reasonable restrictions on the freedom of trade, commerce and intercourse or within that state as may be required in the public interest. The proviso to article 304, however, mandates that "no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the legislature of a state without the previous sanction of the President".

The scope of the freedom guaranteed under article 301 had been the subject matter of a series of litigations for decades. The significance of the provisions contained in part XIII of the Constitution could not be understood *de hors* the historical background. After the independence, when the drafting of the Constitution was in progress before the Constituent Assembly, one of the challenges that the country then faced was the process of merger and integration of the Indian states, which also became free from the British suzerainty, with the rest of the country. These Indian states also then known

32 *Id.* at 228 para 272.
33 *Id.* at 238 para 281.
34 *Id.* at 240.

as "*Indian India*"[35] had introduced several trade barriers impeding the free flow of trade, commerce and intercourse not only between the then provinces and the Indian states but also affected dealings *inter se* province and *inter se* Indian states. The framers of our Constitution were conscious of these ground realities and thus sought to secure the interest of the country by the provisions contained in part XIII. The three main considerations that weighed in the minds of the framers of our Constitution were (i) in the larger interest of India, there must be free flow of trade, commerce and intercourse both inter-state and intra-state; (ii) the regional interest must not be ignored altogether; and (iii) there must be a power of intervention by the union in the event of a crisis in any part of India.[36]

The first case of significance that came up for consideration before the Supreme court was *Atiabari Tea Company* v. *The State of Assam.*[37] In that case the tea companies which had been carrying on the trade of growing tea in Assam and trade in tea in Jalpaiguri in West Bengal had carried their tea to Calcutta for being sold in that market for home consumption or export outside India. The tea produced in Jalpaiguri had to pass through a few miles of territory in Assam while the tea produced in Assam had to be carried through Assam to reach Calcutta. The tea was carried not only by rail but substantial quantity thereof had to be carried by road or inland water ways. It was the tea that was carried by road or inland waterways that became liable to the levy of tax under the Assam Taxation (on Goods Carried by Roads or Inland Waterways) Act, 1954. The validity of this levy of tax was questioned before the high court. By majority, the Act was upheld. The tea companies preferred appeal before the Supreme court contending that the levy of tax violated the provisions of article 301 of the Constitution.

Three different opinions were delivered by the constitution bench of five judges which heard the matter. The Chief Justice was of the view[38] that taxation *simpliciter* did not come within the purview of article 301 and that a tax on the movement of goods or passengers did not necessarily constitute an impediment or restraint in the matter of trade and commerce. A distinction was drawn between taxation for the purpose of revenue which, according to the Chief Justice, did not fall within the purview of article 301 and taxation for the purpose of making discrimination or giving preference which alone could be treated as impediment to the free flow of trade and commerce. Shah J was of the view[39] that article 301 guaranteed the freedom in its widest amplitude—freedom from prohibition, control, burden or impediment in commercial intercourse. Gajendragadkar J speaking on behalf of the majority,[40] held that

35 *The Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan,* (1963) 1 SCR 491 at 511.
36 *Id*. at 512, the observations of Das J.
37 (1961) 1 SCR 809.
38 *Id.* at 831-32.
39 *Id.* at 874.
40 *Id*. at 860.

article 301 imposes a constitutional limitation on the power of Parliament and the state legislature to levy taxes. The restrictions, freedom from which is guaranteed by article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. It was held that taxes may and do amount to restrictions; but it is only such taxes which directly and immediately restrict trade that would fall within the purview of article 301. Since the tax levied under the Assam Act was on the movement of tea carried by road and inland waterways, the levy was declared unconstitutional as it directly impeded the free flow of trade.

No sooner than the delivery of the judgment in *Atiabari* case, another constitution bench heard a challenge to the validity of the Rajasthan Motor Vehicles Taxation Act, 1951 on the ground of violation of article 301 and having regard to the importance of the constitutional issues involved therein and the views expressed in *Atiabari* case, referred the matter to a larger bench. A seven judge bench held[41] by majority that the Rajasthan Act did not violate the provisions of article 301 of the Constitution since the taxes imposed thereunder were compensatory or regulatory taxes which did not hinder the freedom of trade, commerce and intercourse. The interpretation of the provisions contained in part XIII of the Constitution and particularly article 301 which was accepted by the majority in the *Atiabari* case was declared to be correct subject, however, to a clarification. The clarification was to the effect that regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by article 301 and such measures need not comply with the requirements of the proviso to article 304(b) of the Constitution.[42]

Although the court approved the view expressed by the majority in the *Atiabari* case that it would not be safe to rely upon American and Australian decisions in interpreting the provisions of our Constitution, yet the majority view was much influenced by the Australian decisions which were referred to *in extenso* by Das J speaking for the majority. Referring to the views expressed by Lord Porter[43] while construing section 92 of the Australian Constitution, Das J observed that two general propositions stood out: (i) that regulation of trade, commerce and intercourse among the states is compatible with its absolute freedom; and (ii) that section 92 of the Australian Constitution is violated only when a legislative or executive Act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or inconsequential impediment which may fairly be regarded as remote. In the light of the decisions on the interpretation of section 92 of the Australian Constitution, Das J observed that "as the language employed in article 301 runs unqualified, the court, bearing in mind the fact that provision has to be applied in the working of an orderly society, has

41 See, *supra* note 35.
42 *Id.* at 533.
43 *Commonwealth of Australia* v. *Bank of New South Wales*, (1950) AC 235.

necessarily to *add certain qualifications* subject to which alone, freedom may be exercised".[44] The majority therefore evolved a new constitutional parameter "compensatory taxes" and held that "such regulatory measures do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the trading facilities are not hit by the freedom declared by article 301".[45]

Following the decision in *Automobile Transport* case, a bench of three judges speaking through Mathew J held that "the very idea of a compensatory tax is service more or less commensurate with the tax levied".[46] In that case, the court considered the statistical data produced before it relating to receipt and expenditure for construction of roads and bridges for some years with a view to ascertain whether the tax levied was not patently more than what was required to provide the facility and hence the tax would be compensatory in nature. The levy in question was tax on motor vehicles which had direct nexus to the use of roads and bridges and hence the court was eminently justified in examining the relevant data pertaining to the expenses involved in the construction of roads and bridges which was found to be much more than the receipts.

Apart from the cases involving laws of motor vehicle taxes, the court in *Kamaljit* had to consider[47] the validity of the levy of toll tax levied under the U.P. Municipal Acts on vehicles and other conveyances entering municipal limits of a municipal board. Since the municipal board did not provide any facility whatsoever to the owners of the vehicles which entered the municipal areas, the toll tax levied was held to be violative of article 301.

In 1985, a three-judge bench while considering the challenge to the validity of M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam[48] rejected the contention that compensation is that which facilitates the trade only on the ground that the submission "does not appear to be sound". In that case, although it was demonstrated by the state and not disputed by the opposite parties, that the levy in question was compensatory in nature, nevertheless the court went on to observe that "the concept of compensatory nature of tax has been widened and if there is no *substantial* or even *some links* between the tax and the facilities extended to such dealers directly or indirectly the levy cannot be impugned as invalid.". This proposition emerged from the stand taken by the state in that case that "the revenue earned is being made over to the local bodies to compensate them for the loss caused, makes the impost compensatory in nature, as augmentation of their finance would enable them to provide municipal services more efficiently, which would help or ease free flow of trade and commerce, because of which the impost has to be regarded as compensatory in nature". For coming to the said conclusion, though the bench sought to draw support from another decision of the court

44 *Supra* note 35 at 521.
45 *Id.* at 528.
46 *G.K. Krishnan* v. *State of Tamil Nadu,* (1975) 1 SCC 375 at 386 para 29.
47 *Kamaljeet Singh* v. *Municipal Board, Pilkhwa,* (1986) 4 SCC 174.
48 *Bhagat Ram* v. *CST,* (1995) Supp 1 SCC 673.

in *Hansa Corporation*,[49] wherein, the court had expressly observed that "it is not necessary for us to examine whether the tax is compensatory in nature". Subsequently, the observations in *Bhagat Ram* were reiterated by a bench of two judges in *Bihar Chamber of Commerce* case,[50] and it was held that "some connection" between the tax and the trade facilities was sufficient to characterise the levy as a "compensatory tax".

In the context of a levy of entry tax under the Haryana Local Area Development Tax Act, 2000, a bench of two judges[51] considered the development of law on the subject and noticed that the subsequent decisions of the court after 1995 in *Bhagat Ram* case were at variance with the larger bench decisions of the court particularly in *Atiabari Tea* and *Rajasthan Automobile* cases. In the opinion of the bench "since the concept of compensatory tax has been judicially evolved as an exception to the provisions of article 301 and as the parameters of this judicial concept are blurred, particularly by reasons of the decisions in *Bhagat Ram* and *Bihar Chamber of Commerce* we are of the view that interpretation of the article 301 vis-à-vis compensatory tax should be authoritatively laid down with certitude by the Constitution Bench under article 145(3)".

During the year under review, a constitution bench of five judges heard the case *Jindal Stainless Steel* v. *State of Haryana*,[52] the facts of which are: The appellants are all industries or associations of industries manufacturing their products within the state of Haryana. The raw material for their respective products is purchased from outside the state. Most of the finished products are sent to other states on stock transfer or on consignment basis. The appellants challenged the constitutional validity of the Haryana Local Area Development Tax Act, 2005 which provided for levy of tax on the entry into a local area of the state of goods for use nor consumption therein *inter-alia* on ground that the levey being neither regulatory nor compensatory tax and further the law having not being enacted in compliance with the mandate of article 304, was violative of article 301 of the Constitution. The court declared that the test of "some connection" laid down in *Bhagatram* and followed in *Bihar Chamber of Commerce* is not good law and hence overruled the said two decisions.[53] It was held that the working test laid down in *Rajasthan Automobile* for testing whether a tax is compensatory or not, one has to enquire whether the trade as a class is having the use of certain facilities for the better conduct of the trade/business. This working test, it was held remained unaltered.[54] Kapadia J, speaking for the constitution bench, held that compensatory tax is an exception to article 301 as judicially evolved. Though the basis of that concept was not discussed in *Rajasthan Automobile*, it was

49 *State of Karnataka* v. *Hansa Corporation*, (1980) 4 SCC 697.
50 *State of Bihar* v. *Bihar Chamber of Commerce*, (1996) 9 SCC 136.
51 *Jindal Stripe Ltd. & Anr* v. *State of Haryana & Ors.*, (2003) 8 SCC 60.
52 (2006) 7 SCC 241.
53 *Id*. at 270 para 50.
54 *Id*. at para 49.

held that the basis of special assessments, betterment charges, fees, regulatory charges is "recompense/reimbursement" of the cost or expenses incurred or incurrable for providing services/facilities based on the principle of equivalence unlike taxes whose basis is the concept of "burden" based on the principle of ability to pay.[55]

Drawing a distinction between the exercise of taxation and regulatory power, the court held that "The primary purpose of a taxing statute is the collection of revenue. On the other hand, regulation extends to administrative acts which produces regulative effects on trade and commerce".[56] It is, however, conceded that difficulties arise when taxation is also used as a measure of regulation. Laying down the working test for deciding whether the law impugned was the result of exercise of regulatory power or whether it was a product of the exercise of taxation power, Kapadia J held "if the impugned law seeks to control the conditions under which an activity like trade is to take place then such law is regulatory".[57] Illustrating the nature of laws which would come under the respective categories, it was held "If the impugned taxing or non-taxing law chooses an activity, say, movement of trade and commerce as the criterion of its operation and if the effect of the operation of such a law is to impede the activity, then the law is a restriction under article 301".[58]

However, if the law enacted is to enforce discipline or conduct under which the trade has to perform or if the payment is for regulation of conditions or incidents of trade or manufacture then the levy is regulatory. The example of fee charged to provide security to a pipeline carrying gas was held to fall within the category of regulatory power whereas a tax levied for sale or purchase of gas would be manifestation of exercise of taxation power. Compensatory tax was held to be a tax based on the principle of "pay for the value" and hence such levy has been described as a sub class of a "fee". From the point of view of the government, "a compensatory tax is a charge for offering facilities. It adds to the value of trade and commerce which does not happen in the case of a tax as such". A compensatory tax, was held to be a compulsory contribution levied particularly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse. The levy may incidentally bring in net-revenue to the government but that circumstance is not an essential ingredient of compensatory tax. The court accepted that the compensatory nature and character of the levy of tax must appear on the face of the statute itself and held that "whenever a law is impugned as violative of article 301 of the Constitution, the court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis of which the compensatory tax is sought to be levied." At the

55 *Id.* at 267.
56 *Id.* at 266 para 38.
57 *Id.* at 38.
58 *Ibid.*

same time, the court ruled that "If the provisions are ambiguous or even if the Act does not indicate facially the quantifiable benefit, the burden will be on the state as a service/facility provider to show by placing the material before the court, that the payment of compensatory tax is a reimbursement/ recompense for the quantifiable/ measurable benefit provided or to be provided to its payer(s)".[59] Having clarified the constitutional position, the court directed that the validity of the respective state laws which are the subject matters of pending proceedings would be disposed of in the light of its judgment.

When the matters came up for hearing before a bench of two judges, the court reiterated the view taken by the constitution bench and held that "since the relevant data do not appear to have been placed before the High court, we permit the parties to place them in the writ petitions concerned within two months. The High courts concerned shall deal with the basic issue as to whether the impugned levy was compensatory in nature".[60] This direction came to be issued by the court in view of the fact that most of the high courts had followed the test laid down in *Bhagatram* and in *Bihar Chamber of Commerce* for determining whether the levies in question were in the nature of a compensatory levy. Since the high court did not apply the correct test as laid down in *Rajasthan Automobiles*, the directive calling for a fresh finding from the high court became inevitable.

Taxation

In *Bharat Sanchar Nigam Ltd.* v. *Union of India*[61] the question involved was with regard to the nature of transactions by virtue of which mobile phone connections are enjoyed. The further question was, whether the transaction was a sale or a service or both. The state legislature would be competent to levy sales tax on the transaction by law made under entry 54 list II, if it was a sale but not if a transaction was a service, in respect of which Parliament alone was competent to levy a tax under article 248 read with entry 97, list I of the VII Schedule of the Constitution. If the nature of the transaction had the characteristics of both a sale and a service then the further question for consideration of the court was whether both the legislature could levy tax on the respective aspects of the transaction.

Earlier, some of the states sought to levy sales tax on the rentals charged by the service providers to their cell phone subscribers. Three high courts of Allahabad,[62] Andhra Pradesh[63] and Punjab & Haryana[64] held that the transaction did not involve a sale of goods and hence the states were not competent to levy sales tax on the rentals so charged by the service providers.

59 *Id.* at 268 para 46.
60 *Jindal Stainless Ltd.* v. *State of Haryana*, (2006) 7 SCC 271at 275 decided on July 14, 2006.
61 (2006) 3 SCC 1.
62 *Union of India* v. *State of U.P.*, (1999) 114 STC 288 (All).
63 *Union of India* v. *Secretary, Revenue Department*, (1999) 113 STC 203 (AP).
64 *Union of India* v. *State of Haryana*, (2001) 123 STC 539 (P&H).

On appeal by the states, a two-judge bench of the Supreme Court[65] overruled the said three decisions of the high courts. The court held that a telephone connection and other accessories which gave access to the telephone exchange with or without instrument were "goods" and that transferring the right to use the telephone instrument/apparatus and the whole system fell within the extended meaning of "sale" under section 2(h) of the U.P. Trade Tax Act.

In the meantime, a division bench of the Kerala High Court held[66] that the transaction of sale of a SIM card included its activation charges which formed part of the consideration and hence could be subjected to the levy of sales tax under the Kerala General Sales Tax Act. At the same time, the high court further held that selling of the SIM card and the process of activation were both services rendered by the mobile cellular phone companies to their subscribers and fell within the definition of "taxable services" as defined in section 65(72)(*b*) of the Finance Act, 1994, by which Parliament sought to levy service tax on that transaction. The correctness of this judgment was challenged before the Supreme Court. In the meantime, other states also sought to levy similar taxes relating to mobile phone connections as 'deemed sales', which came to be challenged before the Supreme Court by the service providers by filing writ petitions under article 32 of the Constitution. The service providers contended, *inter-alia,* that they were licencees under section 4 of the Telegraph Act, 1885 and provided "telecommunications services" as contemplated under section 2(k) of the Telecom Regulatory Authority of India Act, 1997.[67] The tariff realized from the subscribers are subjected to levy of service tax under the parliamentary legislation—the Finance Act, 1994 as amended from time to time.

Referring to the provisions contained in clause (d) of article 366 (29-A) relied upon by the states, the service providers contended that there was 'no transfer of any legal right by the service providers' nor any delivery of any goods which may be covered under the Telegraph Act, 1885 as the same is barred and prohibited in terms of the licences provided to the service providers under section 4 of the Act.[68] It was contended that without the delivery of goods, there could not be a transaction of any *right to use* those goods as contemplated by the said provision. The obligation of the service providers was merely to transmit voice and that the subscriber was not interested in stipulating as to how the voice/data is to be conveyed to the other end. It was for the service providers to choose the medium as they liked and that the SIM card could not be called as "goods", as its only function is to enable the function of the mobile phone. They contended that the earlier decision of the Supreme Court in the *State of U.P.* v. *Union of India*[69] was erroneous not only

65 *State of U.P.* v. *Union of India,* (2003) 3 SCC 239.
66 *Escotel Mobile Communications Ltd.* v. *Union of India,* (2002)126 STC 475 (Ker).
67 *Supra* note 61.
68 *Id.* at 22.
69 (2003) 3 SCC 239.

because it held that telephone connection and all other accessories which gave access to the telephone exchange with or without any instruments are goods but also because there was in fact no transfer of any of these equipments to the subscribers.[70] It was further contended that the activity of providing the connection involved the use of instruments embedded in the earth or attached to what is embedded in the earth and therefore was immovable property which fell outside the scope of sales tax.[71] It was contended that the service providers merely provided the means of communication and what was transferred was the sounds of the message or signals which were generated by the subscribers themselves and the SIM card was merely an identification device for granting access and was only the means to access services.[72] The Union of India, supported the stand taken by the service providers that the transaction in question was only a service.[73]

The states, on the other hand, contended that in granting permission to the service providers by issuing licences in their favour, there was a transfer of right to use the telegraph, which right was further given to the subscribers in a transaction which would be covered by article 366(29-A)(d).[74] It was stated that delivery of goods was not necessary for the purpose of transferring the right to use and it has been so held by the constitution bench of the Supreme Court in *20th Century Finance Corporation Ltd.* v. *State of Maharashtra*.[75] In any event, different aspects of a given transaction can fall within the legislative competence of two legislatures and both would have the power to tax that aspect.[76] The states contended further that the judgment in the *U.P.* case should be affirmed. Further, as the nature of transaction involved complicated questions of fact, the proceedings under article 32 of the Constitution was not the appropriate remedy. It was contended that a subscriber makes use of the telephone system as a matter of right and is capable of ascerting that right even against the government.[77] The subscriber's right to use his telephone line is to the exclusion of every other person and to that extent the right of the government/ service providers stands denuded. The right is based on contract and is in addition to the right to the service provided by the service providers.[78]

With regard to the SIM card, it was contended that the SIM cards are the key for access to the telephone system or the network and symbolizes the right to participation by a subscriber in the telephone system. There are two distinct transactions, one as the transferee of the legal right to use the telephone and the other of a contract of service. Since the two aspects are different, each

70 *Supra* note 61 at 22.
71 *Id*. at 23 para 25.
72 *Ibid*. para 26.
73 *Id*. at 24 para 28.
74 *Ibid*. para 29.
75 (2000) 6 SCC 12.
76 *Supra* note 61 para 29.
77 *Id*., para 30.
78 *Ibid*.

attracted a different tax.[79] The expression "goods" had a very wide and comprehensive meaning and assuming "delivery" was necessary, the transaction would include the entire telephone system as well as telephone appliances, instruments, materials, towers, exchanges, etc. The means of communication i.e. electrical or electromagnetic waves are forms of energy, all of which form part of the "goods". That the *situs* of the taxable event under the Sales Tax Act would be where the transfer of right takes place between the service providers and the subscribers, which is also a question of fact and may vary from case to case not warranting the decision by the court bypassing determination by the statutory authorities.[80] The states submitted that the mere fact that service tax was being levied under the parliamentary legislation could not be used to deny the state's power to levy sales tax on the transaction or sale. It was contended that the test of dominant object of a composite works contract was no longer relevant after the Forty-sixth Amendment of the Constitution and that the service providers transfer the right to use radio frequency channel to their subscribers for a specific duration and thus have effected a deemed sale of goods under article 366(29-A)(*d*).[81]

The court formulated following questions for its consideration:[82]

(a) What are "goods" in telecommunication for the purposes of article 366(29-A)(*d*)?
(b) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber?
(c) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the states to tax the sale element?
(d) If the providing of a telephone connection involves sale, is such sale an inter-state one?
(e) Whether the "aspect theory" be applicable to the transaction enabling the states to levy tax on the same transaction in respect of which the Union Government levies service tax?

Tracing the legal history that led to the Forty-sixth Amendment to the Constitution and insertion of clause (29-A) in article 366, Ruma Pal J, speaking for the court, held that the contract for services does not involve a "sale" for the purposes of entry 54, list II. It was held that after the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29-A) of article 366 are separable and may be subjected

79 *Ibid*.
80 *Ibid*.
81 *Id*. at 26.
82 *Ibid*., para 32.
83 (2005) 13 SCC 37.
84 (2001) 4 SCC 593.

to sales tax by the states under entry 54 of list II and there is no question of the dominant nature test applying. Therefore, when in 2005 *C.K. Jidheesh* v. *Union of India*[83] held that the aforesaid observations in *Associated Cement*[84] were merely *obiter* and that *Rainbow Colour Lab*[85] was still good law, it was not correct. It is necessary to note that *Associated Cement*[86] did not say that in all cases of composite transactions the Forty-sixth Amendment would apply.

In a transaction of sale, what are the "goods" i.e. the subject matter of sale or purchase primarily was a matter of contract and intention. The seller and purchaser would have to be *ad idem* as to the subject matter of sale. According to the states, who were respondents in the proceedings, in telecommunications, the electromagnetic waves constituted the goods in the contract between the cellular services and the subscribers. Referring to certain text books with regard to the movement of electromagnetic waves and transmission of data signals, the court held that " electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are merely the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers."[87] In the opinion of the court, a subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. "At the most, the concept of the sale in a subscriber's mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection".[88]

Distinguishing the decision of the constitution bench in *20th Century Finance Corporation*,[89] the court held that the essence of the right under article 366(29-A)(*d*) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise. Accepting that clause (29-A) was inserted in article 366 to give an extended

85 *Rainbow Colour Lab* v. *State of M.P.*, (2000) 2 SCC 385.
86 (2001) 4 SCC 593.
87 *Supra* note 61 para 63.
88 *Ibid.*, para 64.
89 *20th Century Finance Corporation Ltd.* vs. *State of Maharashtra*, (2000) 6 SCC 12.

meaning to the word "sale", the court held that "it is sufficient for the purposes of this judgment to find, as we do, that a telephone service is nothing but a service. There is no sales element apart from the obvious one relating to the handset, if any. That and any other accessory supplied by the service provider in our opinion remain to be taxed under the state sales tax laws".[90] Referring to the decision of the Kerala High Court in *Escotel's* case, the court held that it could not opine finally as to whether a SIM card merely represented a means of the access and identified the subscribers or whether constituted "goods" since it was a question of fact. The court further held that in determining the said issue, the assessing authority must keep in mind that "if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the sales tax authorities to levy sales tax thereon".[91]

Emphasizing that though the states could not be denied of their legislative competence to levy tax on sales, it was subjected to the necessary concomitants of a sale to be present in the transaction and "the sale is distinctly discernible". It was held that the power of the state, however, does not permit it " to entrench upon the Union List and tax services by including the cost of such service in the value of the goods."

It was held that even in those composite contracts, which are, by legal fiction deemed to be divisible under article 366 (29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. The court, therefore, answered the questions thus:[92]

(A) Goods do not include electromagnetic waves or radio frequencies for the purpose of article 366(29-A)(*d*). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the assessing authorities.

(B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

(C) The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the state to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

(D) The issue is left unanswered.

(E) The 'aspect theory' would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of service.

90 *Supra* note 61, para 84.
91 *Id.*, para 87.
92 *Id.*, para 92.

A.R. Lakshmanan J, in a concurring opinion, held that " It is not possible to interpret the contract between the service provider and the subscriber that the consensus was to mutilate the integrity of contract as a transfer of right to use goods and rendering service. Such a mutilation is not possible except in the case of deemed sale falling under sub-clause (*b*). Nor can the service element be disregarded and the entirety of the transaction be treated as a sale of goods (even when it is assumed that there are any goods at all involved) except when it falls under sub-clause (*f*). This will also result in an anomaly of the entire payment by the subscriber to the service provider being for alleged transfer of a right to use goods and no payment at all for service."[93]

III DISPUTE BETWEEN STATES

In *Mullaperiyar Environmental Protection Forum*,[94] a sensible group of residents of the State of Kerala initiated writ proceedings in the High Court of Kerala against Union of India, State of Tamil Nadu and State of Kerala concerning storage of water in Mullaperiyar dam beyond the present level of 136 ft. A similar writ petition was filed by the farmers of Tamil Nadu seeking directions upon the states to raise the water level in the reservoir to 142 ft. and later to its full level of 152 ft before the High Court of Madras. In reality, both the petitions concerned the dispute between Kerala on one hand and Tamil Nadu on the other. The Supreme Court had withdrawn these writ petitions to itself and resolved the conflict between the two states and in the process, the court charted a new dimension of the legislative powers of the respective states and the Union Parliament.

By an agreement dated 29.10.1886 entered into between the Maharaja of Travancore and the Secretary of State for India in Council whereunder about 8000 acres of land in Travancore was leased for execution and preservation of irrigation works called "The Periyar Project".[95] In pursuance of the agreement, during 1887-95 what is known as "Mullaperiyar Dam" consisting of main dam, baby dam and other ancillary works were constructed. In 1970, another agreement was executed between the states of Tamil Nadu and Kerala modifying the earlier agreement dated 29.10.1886 whereunder the State of Tamil Nadu was allowed to generate electricity from the project and in turn it surrendered fishing rights in the leasehold land in favour of the State of Kerala and also agreed to pay annually, a sum specified in the agreement, to the State of Kerala. In the past, the reservoir used to be filled up to its full level of 152 ft. as per the said agreements. According to the writ petitioners, which were originally filed in the High Court of Kerala, there was a leakage in the gallery of the dam which affected its security, and hence, water level of the water stored in the dam was restricted to 136 ft. The Central Water Commission

93 *Id.*, para 116.
94 *Mullaperiyar Environmental Forum* vs. *Union of India & Ors.*, (2006) 3 SCC 643.
95 *Id.* at 645.

(CWC) inspected the dam and held meetings with the two states to consider the ways and means for strengthening the dam and at the meetings, decisions were taken, some of which were emergency measures, while others were in the nature of mid-term or long-term measures.[96]

In view of the apprehensions expressed due to the said leakage, in 1997, the water level in the reservoir was allowed to go up to 136 ft. instead of 152 ft. However, after a thorough study of the dam, CWC felt that certain steps are required to be taken immediately and that both the states ought to co-operate on this. CWC was of the opinion that by taking those steps, the water level could be allowed to go up to 142 ft and after fulfilling certain other conditions, the water level could be increased to 152 ft.[97] The State of Kerala, however, expressed its reservations in respect of the report submitted by CWC.[98] The State of Tamil Nadu, on the other hand, took the stand that CWC was the highest technical authority with the requisite expertise on the subject and in view of their report, the apprehensions expressed by Kerala were totally ill-founded. Moreover, as per the report submitted by the expert committee constituted by the Supreme Court in 2001, water level deserved to be raised up to 142 ft., as an interim measure on taking certain steps and after strengthening of the baby dam and the earthen bund, the water level could be allowed to be stored at FRL i.e. 152 ft. The governments of the two states supported their respective writ petitioners.[99]

The court identified five issues that required its adjudication.[100] The first was regarding validity of section 108 of the States Re-organisation Act which, *inter-alia*, provided that any agreement or arrangement entered into between the central government and one or more states or between two or more states relating to the administration, maintenance and operation of any project executed before this appointed day (i.e. 1.11.1956), or the distribution of benefits, such as, the right to receive or utilize water or electric power, to be derived as a result of the execution of such project which was subsisting immediately before the appointed day, shall continue to be in force. Kerala's contention was that section 108 of the Act was beyond the legislative competence of Parliament as the subject matter did not fall under any of the entries mentioned in list I and in fact the subject matter of water was covered by entry 17 of list II of the seventh schedule to the Constitution. Rejecting the argument, the court speaking through Sabharwal CJ held that the States Reorganisation Act, was referable to the provisions contained in articles 3 and 4 of the Constitution and not to any of the entries in the respective lists in the seventh schedule to the Constitution. The law making power of Parliament under articles 3 and 4 was held to be paramount and not subjected to nor fettered by article 246 read with lists II and III of the seventh schedule. The

96 *Id.* at 646.
97 *Id.* at 647.
98 *Ibid.*
99 *Id.* at 648.
100 *Id.* at 652.

power conferred by articles 3 and 4 on Parliament of creating new states by reorganization was a supreme and exclusive power of Parliament. Hence "the Constitutional validity of law made under articles 3 and 4 cannot be questioned on the ground of lack of legislative competence with reference to the Lists of the Seventh Schedule. The new state owes its very existence to the law made by Parliament … the power of the state to enact laws in List II of the Seventh Schedule are subject to Parliamentary legislation under articles 3 and 4. The state cannot claim to have legislative powers over such waters which are the subject of an inter-state agreement which is continued by a parliamentary enactment, namely, the States Reorganization Act, enacted under articles 3 and 4 of the Constitution".[101]

The court also held that the contractual rights and obligations which are statutorily recognized, cannot be affected unilaterally by any of the party states either by legislation or executive action.[102] The court also repelled the contention that the question as regards the permissible storage of water in the reservoir constituted a "water dispute" within the meaning of section 2(c) of the Inter-state Water Disputes Act, 1956 and hence the bar of jurisdiction of the court contemplated in section 11 of the Act read with article 262 of the Constitution did not operate.[103] Referring to an earlier constitution bench judgment in *Madhav Rao Scindia*,[104] the court held that the bar of jurisdiction contemplated under article 363 operated only against certain class of agreements and was intended to prevent the Indian rulers from resiling from such agreements since such act could affect the integrity of India. The agreements between the erstwhile State of Travancore and the Secretary of State and between the States of Kerala and Tamil Nadu do not fall in that category. The court also rejected the further contention of Kerala that the parties be directed to resort to alternative remedy of arbitration as contemplated in the agreement dated 29.10.1886. The court held that the dispute that has arisen between the parties did not relate to their rights, duties and obligations or interpretation of any part of the agreement but the question was only limited to the aspect of increase of the water level in the reservoir which clearly depended upon the safety of the dam and which according to the experts, remained unaffected for a rise in the water level upto 142 ft.[105] Referring to various reports of expert bodies, the court also rejected the apprehension regarding the adverse impact on environment and ecology if the water level was allowed to go up to 142 ft.[106] The court, therefore, permitted the State of Tamil Nadu to carryout further strengthening measures as suggested by the CWC and hoped that the State of Kerala would co-operate in the matter. The court, however, restrained the State of Kerala and its officers

101 *Id.* at 653.
102 *Ibid*.
103 *Ibid*.
104 *Madhav Rao* v. *Union of India*, (1971) 3 SCR 9.
105 *Id.* at 654-55.
106 *Id.* at 656.

from causing any obstruction. The court directed that after the strengthening work is complete to the satisfaction of CWC, independent experts would examine the safety angle before the water level is permitted to be raised to 152 ft.[107]

IV JUDICIAL REVIEW

In *Government of Andhra Pradesh* v. *Mohd Nasrullah Khan*,[108] reiterating the law laid down in earlier cases,[109] the court held that an order of dismissal from service, passed by the disciplinary authority and confirmed by the appellate authority as well as by the state appellate tribunal (SAT), could not have been interfered by the high court in exercise of its power of review under article 226. It was held that if there has been a disciplinary enquiry consistent with the rules and in accordance with the principles of natural justice, the punishment that would meet the ends of justice was a matter exclusively within the jurisdiction of the competent authority and it was not for the high court to substitute its own discretion for that of the authority in exercise of its power of judicial review.

Sema J, speaking for the court, held: [110]

> By now it is a well-established principle of law that the High Court exercising power of judicial review under Article 226 of the Constitution does not act as an appellate authority. Its jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. Judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority.

In *Union of India* v. *Flight Cadet Ashish Rai*,[111] the directions given by a division bench of the Allahabad High Court to the appellants to allow the respondent, a flight cadet, who was undergoing training to become a pilot in the Air Force, to complete the training from the stage he had left and to act in terms of orders of head quarters, Indian Air Force, as regards retesting were under challenge. The high court quashed the orders dated 16.6.2000 and 27.6.2000 by which further training of the respondent was terminated due to his failure in academics and for maintaining low standard of discipline. The directions given by the court were questioned before the Supreme Court on the ground that the high court clearly exceeded its power of judicial review.

107 *Id.* at 657.
108 (2006) 2 SCC 373.
109 *UOI* v. *Parmananda*, (1989) 2 SCC 177; and *B.C. Chaturvedi* v. *UOI*, (1995) 6 SCC 749.
110 *Supra* note 108 at 379 para 11.
111 (2006) 2 SCC 364.

Accepting the contention of the Union of India, the court speaking through Pasayat J held:[112]

> There should be judicial restraint while making judicial review in administrative matters. Where irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, there is no scope for interference. The duty of the court is (a) to confine itself to the question of legality; (b) to decide whether the decision-making authority exceeded its powers; (c) committed an error of law; (d) committed breach of the rules of natural justice; and (e) reached a decision which no reasonable tribunal would have reached; or (f) abused its powers. Administrative action is subject to control by judicial review in the following manner:
>
> (i) Illegality: this means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
> (ii) Irrationality, namely, Wednesbury unreasonableness.
> (iii) Procedural impropriety.

In *Union of India* v. *Kali Dass Batish*,[113] the court was called upon to pronounce on the scope of judicial review by the high court in respect of an order of appointment of a member of the Central Administrative Tribunal (CAT) made by the central government in consultation with the Chief Justice of India. Seven vacancies of judicial members and three vacancies of administrative members of the CAT had arisen. After inviting nominations for filling up of the said vacancies from different authorities, the selection committee under the chairmanship of G B Pattanaik J (as he then was) considered the names of 121 persons and recommended seven persons for appointment as judicial members and three persons for appointment as administrative members. The names of respondents 1 and 2 were recommended by the said committee and ranked at sl. nos. 1 and 6, respectively. As per the established procedure, since, respondents 1 and 2 were members of the bar, who were recommended for appointment to the said posts, their antecedents were required to be verified through the Intelligence Bureau (IB). IB submitted its report to the central government, which was adverse to respondents 1 and 2. The recommendations of the committee along with the IB report were forwarded to the Chief Justice of India while seeking concurrence thereon. Since, respondents 1 and 2 were not appointed as members of the CAT, they challenged the selection and appointment of other candidates by filing writ petitions. Respondent no. 2 filed a writ petition before the Jharkhand High

112 *Id.* at 367.
113 (2006) 1 SCC 779.

court, which was dismissed, *inter-alia,* on grounds that mere inclusion of the name of a candidate in the select list conferred no right in him to be appointed to the post and that in view of the nature of the appointment, the government was justified in verifying the antecedents of the candidates and in not appointing those who are adversely commented upon in the report of the IB. It was further held that since the government had secured the concurrence of the Chief Justice of India to its report, there was no scope for any judicial review of its decision. Respondent no. 1 filed a writ petition before the High Court of Himachal Pradesh, which was allowed. The high court directed the appointing authority to consider his candidature afresh, as a special case, for appointment as a judicial member of CAT based on his selection by the selection committee. Both the judgments came to be challenged before the Supreme court of India by appeal. Speaking for the court, Srikrishna J reiterating the earlier decisions[114] held that :[115]

> Even if such candidate was found physically fit, had passed the written test and interview and was provisionally selected, if on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a constable, the view taken by the appointing authority could not be said to be unwarranted, nor could it be interdicted in judicial review.

In *K K Parmar*[116] the issue was of promotion of the high court employees from the post of assistants to the post of section officers. The high court instead of following the High Court of Gujarat (Recruitment and Conditions of Service of Staff) Rules, 1992 and particularly rule 47 thereof which relates to promotion, applied the executive instructions issued by the state government on or about 20.3.1982 and concluded the selection process. By a writ petition filed before the high court, the said selection process was challenged contending, *inter alia*, that since there were only 25 vacancies for promotion to the post of section officers in terms of the said executive instructions of the state government, the zone of consideration ought to have been confined to 75 candidates instead of 91 candidates who were allowed to appear for *viva voce* test, and that, there was violation of rule 47(2) by not determining the *inter se* merits of the candidates taking into account their past performance, performance in the written test and the *viva voce* test. A single judge of the high court accepted the challenge and allowed the writ petition. On appeal, the division bench of the high court reversed the said judgment holding, *inter alia*, that the executive instructions issued by the state government on 20.3.1982 had no application to the promotion in question. On

114 *Delhi Administration* v. *Sushil Kumar,* (1996) 11 SCC 605.
115 *Supra* note 113 at 787.
116 *K K Parmar & Ors.* v. *High Court of Gujarat through Registrar & Ors.*, (2006) 5 SCC 789.

the question as to the procedure required to be adopted by the selection committee for assessing the *inter se* merits of the candidates, the division bench held that it was not open to the courts in a proceeding under article 226 of the Constitution to lay down any particular procedure to be followed by such selection committee which necessarily had to be left to the committee itself.

On further appeal to the Supreme Court, it was held that while a rule framed by the state in exercise of its power under the proviso of article 309 of the Constitution may be applicable to the employees of the High Court but not to executive instructions issued by the state and particularly when the instructions were contrary to or inconsistent with the rules framed by the Chief Justice of the high court under its powers vide article 229 of the Constitution.[117] Regarding the assessment of the merit of the candidates, the court held that since the primary posts were selection posts, the selection of the candidate was required to be made strictly on the basis of their *inter se* merits on the basis of their past performance as well as on their performance at the written test and oral test undertaken by the selection committee. It was for the selection committee to have allocated certain marks to the respective criteria required to be considered for *inter se* merits of the candidate. It was held that :[118]

> Merit of a candidate is not his academic qualification. It is sum total of various qualities. It reflects the attributes of an employee. It may be his academic qualification. He might have achieved certain distinction in the university. It may involve the character, integrity, and devotion to duty of the employee. The manner in which he discharges his final duties would also be a relevant factor.

With regard to the scope of judicial review, S B Sinha J, speaking for the court, held :[119]

> The superior court exercising its power of judicial review is not concerned as to whether a wrong provision of law has been taken recourse to, but is only concerned with the question as to whether the authority passing the order had the requisite jurisdiction under the law to do so or not. In the event, it is found that the impugned order is not ultra vires or illegal or without jurisdiction, the same would not be interfered with only because it at one point of time proceeded on a wrong premise. A jurisdictional question, in our opinion, can always be permitted to be raised.

117 *Id.*, para 17.
118 *Id.*, para 27.
119 *Id.* at 800 para 21.

V PUBLIC INTEREST LITIGATION

In a writ petition, filed under article 32 of the Constitution as Public Interest Litigation (PIL), by two members of Parliament,[120] the Supreme Court was called upon to consider several substantial and constitutional questions *inter alia*, as to the power and propriety of the Supreme Court entertaining a challenge in a collateral proceedings to the appointment of a special judge, which is exclusively within the domain of the high court under article 235 of the Constitution. The court was also called upon to consider the standing of the writ petitioners to maintain such PIL concerning a criminal case pending before the special judge in respect of which proceedings, the petitioners were total strangers and not even *de facto* complainants. The complainant's petition, which was heard by a bench of three judges was dismissed by majority. K.G. Balakrishnan J (as he then was) and A.R. Lakshmanan J, though delivered separate opinions, agreed that the writ petitioners lack standing and that the petitions were also without merits and hence liable to be dismissed. Balakrishnan J observing that the petitioners had approached the Supreme Court by filing a PIL under article 32 of the Constitution at the time when the recording of the prosecution evidence was almost over and trial of the case reached the final stage, held:[121]

> If at all the petitioners had any grievance regarding the removal of the Public Prosecutor, they should have submitted their grievance before the Special Judge or before the High court …. The petitioners had no direct connection with the case. They were absolutely strangers as regards the criminal cases against Respondents 4 and 5 which were pending before the Special Judge. This unnecessary interference in the criminal case may cause, sometimes, damage to the prosecution case and at times may cause serious prejudice to the accused also. In any view of the matter, this sort of interference in the criminal prosecution would only deny a fair trial to the accused.

Lakshmanan J concurring with the said view held that: [122]

> 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. We also say 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 our opinion, the liberty of an accused cannot be taken away except in accordance with the established procedure of law

120 *Rajiv Ranjan Sindh 'Lalan'(viii)* v. *Union of India* (2006) 6 SCC 613.
121 *Id.* at 634 para 25.
122 *Id.* at 645 para 58.

> under the Constitution, criminal procedure and other cognate statutes. We are also of the opinion that PIL is totally foreign to pending criminal proceedings.

S.H. Kapadia J in his *dissenting opinion* ruled that: [123]

> The present petitions are filed on the alleged acts of misfeasance. The test which one has to apply to decide the maintainability of the PIL concerns sufficiency of the petitioner's interest. Under this test it is necessary to consider the subject-matter to which PIL relates. It is wrong in law for the court to judge the applicant's interest without looking at the subject-matter of his complaint. If the petitioner shows failure of public duty, the court would be in error in dismissing his PIL.

On the question of legality of the appointment of the special judge, Balakrishnan J observed that though in the writ petitions no allegations were made to that effect, at the time of argument, the senior counsel appearing for the petitioners sought to contend that the special judge Munni Lal Paswan had poor record and that he was not senior enough to be appointed as a special judge. After perusing the confidential register of Shri Paswan, Balakrishnan J held that it had been repeatedly recorded in the register that:[124]

> This officer has maintained honesty and integrity during the period under report. About his conduct and integrity nothing adverse is reported against him. Of course, in some of the years, this officer has been graded as "Category B" with regard to his judicial performance. These are all matters considered by the Standing Committee which consists of senior Judges of the High Court. The appointment of this officer is not challenged by the petitioners and no pleadings also made in the main writ petition. By filing a criminal miscellaneous application, the petitioners have made a series of allegations which are not borne out by any records. If at all, the petitioners had any grievance regarding the appointment of any particular officer, the proper remedy was to approach the High Court and to bring this fact to the notice of the Chief Justice .....the appointment as such cannot be challenged in a collateral proceedings and this court cannot go into the question of appointment of a Special Judge which is exclusively within the domain of the High Court under article 235 of the Constitution.

123 *Id.*, para 77.
124 *Id.* at 631-32, para 17.

Concurring with the view, Lakshmanan J held that :[125]

> The Standing Committee had taken a decision to appoint Munni Lal Paswan and other officers after scrutinizing the records, ACRs, etc. in accordance with articles 233 and 235 of the Constitution of India which is the prerogative right of the Standing Committee and the High Court, and when a decision is taken it is not for this court to scrutinize the correctness of the decision, that too at the instance of third parties".

In his dissenting notes, Kapadia J after an in depth analysis of the entire service record of Shri Paswan, emphasizing the importance of posting of a special judge to adjudicate upon complicated matter involving economic scams, held that:[126]

> It is important to bear in mind that in the matter of economic scams, be it security transactions or Fodder Scams or Taj Corridor it is the economic interest of the country which is at stake. These cases are highly complicated in which complicated questions are involved and, therefore, posting (of the Judge) plays a vital role.... In the circumstances, a request is being made to the Chief Justice of the Patna High Court to convene an urgent meeting of Administrative Judges and complete the exercise of giving appropriate gradation/ categorization after looking at the judgments and orders delivered by the Judge concerned, Mr. Paswan.

The other important question, on which the court was called upon to consider was whether there was failure of statutory duty or public duties on the part of the tax authorities in not preferring an appeal to the high court from the orders passed by the Income Tax Appellate Tribunal (ITAT) which set aside the orders passed by the assistant commissioner, income tax holding that despite large investments having been made by the respondents 4 and 5 who were former Chief Ministers of the State of Bihar, no income tax return was filed and that only recently one of them had filed a petition under section 273-A of the IT Act, 1961 before CIT, Patna disclosing an income of Rs.70,000/- for the assessment year in question in order to explain the capital required for the investment that she made. By allowing the appeal of the assessee, the tribunal held that the case involved highly intricate issues; that, these issues were extremely difficult to understand; that, but for the assistance of advocates on both sides it was difficult to adjudicate such disputes. The tribunal, however, adversely commented upon the officers of the income tax department that rampant additions were made to destroy the case of the assessees and to destroy their political career.

125 *Id.* at 644, para 52.
126 *Id.* at 660 para 98-99.

Balakrishnan J and Lakshmanan J constituting the majority, however, held that the writ petitioners had not made out a case for issuing a writ of *mandamus* to the Union of India for preferring an appeal against the order passed by the ITAT. It was held that the Union Government and the income tax authorities after following the due procedure, have decided not to file an appeal against the ITAT and hence the court did not find any reason to give any direction to file such appeal. Kapadia J, however, held that since the tribunal itself held that the case involved complex legal issues, "one fails to understand why the department has not moved in appeal under section 260-A of the IT Act. In the circumstances of this case, the Union of India should apply its mind afresh and take its decision."[127] Kapadia J concluded his opinion with the remark " in the end it may be stated that true value of a decision lies in its propriety and not in the decision being right or wrong."[128]

In *State of Karnataka* v. *All India Manufacturers Organisation*,[129] the important question for consideration before the court was whether the writ petitions filed as PILs before the High Court of Karnataka challenging the implementation of the "Bangalore-Mysore Infrastructure Corridor Project" were barred by the principles of *res judicata* in view of earlier decision of the high court upholding execution of the project dismissing a writ petition no. 29221 of 1997 in November 1999 preferred by a retired chief engineer.[130] In the said decision a division bench of the high court had accepted the plea of the state government that it had agreed to provide the "minimum extent of land" for the project, which was 20,193 acres of land and that no excess land was being acquired. The main grievance of the writ petitioner in *Somashekar's* case was that land was being acquired far in excess of what was required for the project. Rejecting the contention raised by the petitioner, the high court had declared that the Framework Agreement [FWA] executed between Nandi Infrastructure Corridor Enterprises Ltd. and the state government was valid and was not opposed to public policy; that it was not un-constitutional or illegal; that it was not vitiated by *mala fides*; that no right of individual or individuals had been illegally affected by the execution of the agreement and that the court could not exercise its power of judicial review to interfere with FWA which was in reality a policy choice of the government. A special leave petition was preferred against the said judgment before the Supreme Court, which was dismissed *in limine* on 26.3.1999 and hence judgment of the division bench of the high court reached finality.

Between November 1997 when the earlier writ petition was filed and September 1998 when the high court dismissed the said petition, the work of implementation of the project was going on and a number of notifications had been issued for acquisition of the land required for the purposes of the FWA. The state government had supported the stand taken by Nandi before the

127 *Id.* at 656 para 85.
128 *Id.* at 661 para 102.
129 (2006) 4 SCC 683.
130 *H T SomaShekar Reddy* v. *Govt of Karnataka*, (1999) 1 KLD 500.

single judge who had partially allowed the land owners' petitions. However, seven years later in 2004, a batch of three petitions came to be filed claiming to be in public interest at the instance of two members of the legislative assembly and a social worker. In these petitions, it was prayed that CBI enquiry be instituted in the matter and that the state government be restrained for continuing the project or acquiring any further land for the project. All India Manufacturer's Organisation as well as two ex-mayors of Mysore moved the high court for a direction to the state government to implement the project according to FWA. A division bench of the high court allowed two of the writ petitions and directed the State of Karnataka and all its instrumentalities including the KIAD Board, to execute the project as conceived originally and to implement the FWA in "letter and spirit". The high court also directed prosecution of the Chief Secretary to the Govt. of Karnataka and the Under Secretary in the Department of Industries and Commerce under section 340 read with section 195 of Cr. P.C. for certain offences which came to its notice as a result of the affidavits filed by them. Holding that the subsequent petitions, though filed as PIL, are barred by the principles of *res judicata* which are based on larger public interest and are founded on broadly two grounds; one being the maxim *nemo debet bis vexari pro una et eadem causa* (no one ought to be twice vexed for one and the same cause[131]) and second, public policy that there ought to be an end to the same litigation.[132] Srikrishna J speaking for the court held:[133]

> In a public interest litigation, the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is *bona fide*, a judgment in a previous public interest litigation would be a judgment in *rem*. It binds the public at large and bars any member of the public from coming forward before the court and raising any connected issue or an issue, which had been raised (*sic* or) should have been raised on an earlier occasion by way of a public interest litigation.

In *Bombay Dyeing & Mfg. Co. Ltd. and Bombay Environmental Action Group and Others*,[134] the court struck a balance between protection of several interests on the one hand and greater public interest on the other when in a PIL the validity of the Development Control Regulation 58 [DCR 58] framed by the State of Maharashtra in terms of the Maharashtra Regional and Town Planning Act, 1966 [for short MRTP Act) came to be challenged by an environmental action group in a PIL. The environmental action group filed the PIL allegedly to protect the interests of the residents of Mumbai and to

131 P. Ramanatha Aiyer: *Advanced Law Lexicon*, 3170 (Vol.3, 3rd Edn., 2005).
132 Mulla: *Code of Civil Procedure*, 94 (Vol.1, 15th Edn., 1995).
133 (2006) 4 SCC 699 para 35.
134 (2006) 3 SCC 434.

improve the quality of life in the town of Mumbai which was said to have drastically deteriorated in the past 15 years as also for preventing further serious damage to town planning and the ecology to avoid an irretrievable breakdown of the city. The main thrust of the writ petitioners was to ensure "open spaces" for the city and to provide for the crying need of space for public housing. In the said PIL, which was initiated before the High Court of Bombay a large number of mill-owners and others who had allegedly invested huge sums on the lands of the mill-owners or otherwise interested in the implementation of DCR 58 of 2001 were allowed to intervene. The court formulated the following question for its consideration: Whether any synthesis between environmental aspects and building regulations vis-à-vis the scheme floated by the Board of Industrial and Financial Reconstruction [for short "BIFR"] in terms of the provisions of the Sick Industrial Companies [Special Provisions) Act, 1985 [for short "SICA" herein] is possible?

The high court allowed the writ petition holding, *inter alia*, that DCR 58 should be construed, having regard to the importance of open space and public space; and that if they are not so construed they would be rendered *ultra vires* articles 14, 21 and 48-A of the Constitution. The high court further held that an ecological imbalance would be created by proliferation of high-rise structures in Girangaon area, which was essentially planned for commercial and industrial activities and that DCR 58 facilities, the implementation of measures for revival, rehabilitation and modernization of closed, sick and potentially viable sick mills and must, thus, be construed as such.

Reversing the judgment of the high court and dismissing the writ petitions filed by the environmental action group, the Supreme Court held that in a PIL concerning environmental issues, the court has to take into consideration a large number of factors, some of which may be found competing with each other. In such cases, therefore, it may not be proper to give due importance to one at the cost of the other which may ultimately be found to be vital and give effect to the intent and purport of the legislation. The court held that the PILs have limitations and in that context reiterated the law laid down in a series of decisions. Speaking for the court, Sinha J held that in a PIL:[135]

> The court should find out as to how greater public interest should be subserved and for the said purpose a balance should be struck and harmony should be maintained between several interests such as (a) considerations of ecology; (b) interest of workers; (c) interest of public sector institutions, other financial institutions, priority claimed due to workers; (d) advancement of public interest in general and not only a particular aspect of pubic interest; (e) interest and rights of owners; (f) the interest of a sick and closed industry; and (g) the schemes framed by BIFR for revival of the company.

135 *Id*. at 480 para 63.

In *Jaipur Aloo Aaratiya Sangh and Others* v. *State of Rajasthan and Others*,[136] the court was called upon to consider whether the high court in exercise of its jurisdiction under article 226 of the Constitution in a PIL could pass orders dispensing with the requirements of a statute which mandates the concerned authorities to act in accordance with the norms laid down therein. The High Court of Rajasthan had initiated a *suo motu* proceedings in exercise of its jurisdiction under article 226 of the Constitution in view of the maladies in certain areas in the city of Jaipur. The high court passed several orders from time to time in the said proceedings in view of the huge traffic congestion in the city of Jaipur. The high court issued a complete ban with regard to the entry of trucks in the city between 6 a.m. to 10.30 p.m. The said ban severely affected carriage of vegetables and fruits to the city. In the meantime, the monitoring committee, constituted by the high court, presumably to oversee implementation of its orders in its report submitted to the high court on 2.1.2004 had recommended that the high court may pass appropriate orders, *inter alia*, for shifting of Phal Subzi Mandi from Lal Kothi to Village Sukhiyan-Mohana (near Sanganer) at the earliest and, if possible within two months. The appellant being a traders association filed an application for intervention in the said proceedings before the high court. The State of Rajasthan, the monitoring committee as well as the appellant association agreed in principle that the trucks can be allowed to exit from Lal Kothi Sabzi Mandi to Gopalpura bypass between 11.00 a.m. to 12.30 p.m subject to the condition that they would not ply on any route other than the specified ones and the trucks would carry the exit passes issued by the competent authorities of the Mandi Samiti. On 27.8.2004, the high court passed the following order:[137]

> We have been told that the state government has invested a lot of money for establishing a mandi at Mohana. It appears that there are certain difficulties which need to be ironed out. The state government shall take effective steps for ironing out the difficulties and making it feasible for the mandi to be shifted to Mohana within a period of eight months.

The appellant challenged the said order before the Supreme Court on various grounds including the ground that the notification proposed to be issued by the state government pursuant to the directions given by the high court do not satisfy the statutory requirements since the notification is proposed to be issued merely because of aforementioned directions of the high court and not as a result of due application of mind on the part of the authorities of the state in the light of the statutory requirements. Accepting the plea Sinha J, speaking for the court, held:[138]

136 (2006) 8 SCC 450.
137 *Id.* at 453.
138 *Id.* at 455 para 16.

> Although the High Court in exercise of its jurisdiction under article 226 of the Constitution of India was entitled to pass appropriate orders in the said proceedings in public interest but where the requirements of law are to be complied with, the court ordinarily should not dispense therewith. The Act is a regulatory one. While regulating the trade in agricultural produces, the state can issue notification as a result whereof the trade by the dealers in vegetables or fruits may have to be carried within the premises notified therefor. The Act contemplates steps to be taken at various stages. When such a step is taken, indisputably the validity of the action of the state will have to be judged keeping in view the nature of restraint and other relevant factors including the public interest involved.

The court also held that having regard to the fact that the state was required to take certain actions under the Act, it should be allowed to carry out its statutory functions including issuing of appropriate notifications as may be necessary for enforcement of the state's policy/scheme in accordance with the law. Finally, while preserving the right of those who may be affected by the notification to be issued by the state government to challenge the legality thereof, the court held:[139]

> While giving opportunity to the state to take requisite steps for implementation of the provisions of the said Act, in the event, the legality or validity of the said notifications is challenged before the High Court, the same may be disposed of by the High Court as quickly as possible. This order shall, however, not mean that the High Court in the existing public interest litigations would not be entitled to pass appropriate order(s) in regard to vehicular traffic and/or other questions pending before it.

In *T N Godavarman Thirumulpad* v. *Union of India and Others*[140] in a PIL initiated by one Deepak Agarwal claiming to be a public-spirited person and journalist by profession and concerned about the adverse effect on environment of the concerned area in Chattisgarh allegedly as a result of grant of lease of forest land for non-forest activities in violation of law. The court was called upon to consider whether the land measuring about 15 acres leased by the State of Chattisgarh in favour of M/s Maruti Clean Coal and Power Limited [for short "Maruti"] for setting up of a coal washery was part of "forest land" as alleged by the petitioner. The court on an indepth analysis of the materials on record found that there was no merit in the allegations made by the petitioner in the said PIL. The court not only dismissed the petition with

139 *Id.* at 456 para 25.
140 (2006) 5 SCC 28.

cost but ruled that the said petitioner had abused the process of law and deserved to be sternly dealt with since enormous judicial time had to be wasted in the said proceedings which could have been used in deciding other cases. Initiation of the said proceedings also resulted in Central Empowered Committee and others incurring huge expenses and wasting their time as well. The court, therefore, imposed a cost of Rs. one lakh on the said writ petitioner which amount was directed to be paid to CEC, to be utilized for preservation of forests in the State of Chattisgarh. Striking a balance between the duty of the court to examine a serious allegation of degradation of environment on its merit and at the same time the obligations of the court to ensure that its valuable time is not wasted by initiation of proceedings at the behest of persons whose *bona fides* and credentials are in doubt, Sabharwal CJ, speaking for the court, made the following pertinent observations: [141]

> For the last few years, inflow of public interest litigation has increased manifold. Considerable judicial time is spent in dealing with such cases. A person acting *bona fide* alone can approach the court in public interest. Such a remedy is not open to an unscrupulous person who acts, in fact, for someone else. The liberal rule of *locus standi* exercised in favour of *bona fide* public interest litigants has immensely helped the cause of justice. Such litigants have been instrumental in drawing attention of this court and High Courts in matters of utmost importance and in securing orders and directions for many underprivileged such as, pavements-dwellers, bonded labour, prisoners' conditions, children, sexual harassment of girls and women, cases of communal riots, innocent killings, torture, long custody in prison without trial or in the matters of environment, illegal stone quarries, illegal mining, pollution of air and water, clean fuel, hazardous and polluting industries or preservation of forest as in *Godavarman (1) case*.[142] While this court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and note of severe warning that courts should not allow their process to be abused by a mere busybody or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration.

The duty of the court in such proceedings as laid down in its earlier decisions[143] was reiterated, and it was held that:[144]

141 *Id*. at 38 para 26.
142 (1997) 2 SCC 267.
143 *Dattaraj Nathuji Thaware* v. *State of Maharashtra*, (2005) 1 SCC 590.
144 *Supra* note 140 at 39.

> Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public inquiry and not be publicity-oriented or founded on personal vendetta. As indicted above, court must be careful to see that a body of persons or member of the public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well as enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

VI LAW DECLARED BY SUPREME COURT

Article 141 of the Constitution provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. This provision recognises the rule of precedent. What then is the connotation of the expression 'declared'? It is certain that the Supreme Court is not competent to 'enact' a law which power exclusively vests in the appropriate legislature under articles 245 and 246 of the Constitution. There could, therefore, be no doubt, that the law 'declared' by the Supreme Court is not equal to law "made by it". The decisions of the court could not be read as statutory enactments. That brings in the jurisprudential question, whether the function of the court and judges are only to interpret the law and make declaration to that effect and not to make laws. Sabyasachi Mukherji CJI in a powerful dissent in *Delhi Transport Corporation* v. *DTC Mazdoor Congress*[145] pleaded that the courts must do away with "the childish fiction" that law is not made by the judiciary.[146] Austin has described the Blackstone's principle of finding the law as the childish fiction. In his opinion the court is enjoined to declare the law and that the expression "declared" is wider than "found" or "made". In agreement with the views expressed by the majority of the Constitution bench speaking through K. Subbarao CJ in *Golaknath's*

145 (1991) Supp. 1 SCC 600 at 683.
146 Austin, *Jurisprudence* 65 (4th Edition).

case[147] he felt that to deny the court the power to make law "on the basis of some outmoded theory that the court only finds law but does not make it, is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country".

The expression "all courts" in article 141 includes the Supreme Court as well and hence an earlier decision of the court is binding on a coordinate bench. The object of incorporating the theory of precedent or the doctrine of *stare decisis* is to avoid uncertainty in the declaration of law by the court and to sub-serve the ends of justice. The exceptions to the rule are the principles of *per incuriam*[148] and *sub silentio.*[149] In a decision what is binding is only that which forms part of the *ratio decidendi,* that is the principle upon which the decision is based on any question that arose for consideration of the court.[150]

Article 142 of the Constitution declares that the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. This plenary power of the court could not be curtailed by any statutory provision.[151] However, questions have arisen as regards the scope of this power. Could the court ignore the law whether statutory or the law declared by it in an earlier decision, to do complete justice between the parties? In other words, the question is, whether the court could supplant the existing law or whether its power is limited only to supplement the law.

Taking the view that role of the court being confined only as the interpreter of the law, a bench of two judges in *Rishab Agro Industries Limited* v. *PNB Capital Services Ltd.*[152] speaking through Sethi J, while accepting the confirmation that the interpretation of the provisions of sections 15 and 16 of the Sick Industrial (Special Provisions) Act, 1985 in an earlier decision of the court would defeat the provisions of the Company's Act, held that:[153]

> Such grievances may be justified and the submission having substance but in view of the language of sections 15 and 16 of the Act particularly the Explanation to section 16 inserted by Act 12 of 1994, this court has no option but to adhere to its earlier decision in *Real Value Appliances*.[154] While interpreting, this court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.

147 *I.C. Golak Nath* v. *State of Punjab,* (1967) 2 SCR 762 at 813-14.
148 *State of U.P* v. *Synthetics and Chemicals Ltd.,* (1991) 4 SCC 139.
149 *Amrit Das* v. *State of Bihar,* (200) 5 SCC 488 pr.20.
150 *Commissioner of Income Tax* v. *Sun Engineering Works Pvt. Ltd.,* (1992) 4 SCC 363 para 39.
151 *Anis Mohammad* v. *Union of India,* (1994) Supp 1 SCC 145.
152 (2000)5 SCC 515.
153 *Id.* at 521-22.
154 (1998) 5 SCC 554.

Emphasizing the need of consistency in the decisions rendered by the court as it declares law which is binding on all courts, a constitution bench speaking through Balasubramanyan J[155] held:[156]

> This court, at the threshold, stated that it should individualize justice to suit a given situation. With respect, it is not possible to accept the statement, unqualified as it appears to be. This court is not only the constitutional court, it is also the highest court in the country, the final court of appeal. By virtue of article 141 of the Constitution, what this court lays down is the law of the land. Its decisions are binding on all the courts. Its main role is to interpret the constitutional and other statutory provisions bearing in mind the fundamental philosophy of the Constitution. We have given unto ourselves a system of governance by rule of law. The role of the Supreme Court is to render justice according to law. As one jurist put it, the Supreme Court is expected to decide questions of law for the country and not to decide individual cases without reference to such principles of law. Consistency is a virtue. Passing orders not consistent with its own decisions on law, is bound to send out confusing signals and usher in judicial chaos. Its role, therefore, is really to interpret the law and decide cases coming before it, according to law. Orders which are inconsistent with the legal conclusions arrived at by the court in the self same judgment not only create confusion but also tend to usher in arbitrariness highlighting the statement, that equity tends to vary with the Chancellor's foot.

Exercise of powers by the court under article 142 to render complete justice to a cause, have often given rise to the question of their binding efficacy as precedent in view of the mandate of article 141. This has not only caused considerable anxiety for high courts and other subordinate courts who, under the constitutional mandate are bound by the law declared in such decisions, but have also been of considerable anxiety to the Supreme Court itself. Not only the court bas been called upon to resolve constitutional and other legal issues raised before it as regards the binding character of such decisions, it is also called upon to face newer challenges when the high courts repeatedly follow the directions given by the court under article 142 treating them to be the "law declared" by the court and binding on them. *In Indian Bank* v. *ABS Marine Products (P) Ltd.*,[157] the court speaking through Raveendran J has held that:

> Many a time, after declaring the law, this court in the operative part of the judgment, gives some directions which may either relax the

155 Secy., *State of Karnataka* v. *Umadevi*, (2006) 4 SCC 1 at 26.
156 *Id.* at 26.
157 (2006) 5 SCC 72 at 87.

> application of law or exempt the case on hand from the rigour of the law in view of the peculiar facts or in view of the uncertainty of law till then, to do complete justice. While doing so, normally it is not stated that such direction/order is in exercise of power under article 142. It is not uncommon to find that courts have followed not the law declared, but the exemption/relaxation made while moulding the relief in exercise of power under article 142. When the High Courts repeatedly follow a direction issued under article 142, by treating it as the law declared by this court, incongruously the exemption/ relaxation granted under article 142 becomes the law, though at variance with the law declared by this court. The courts should therefore be careful to ascertain and follow the *ratio decidendi*, and not the relief given on the special facts, exercising power under article 142. One solution to avoid such a situation is for this court to clarify that a particular direction or portion of the order is in exercise of power under article 142.

In *Employees' State Insurance Corpn. & others* v. *Jardine Henderson Staff Association & Ors.* [158] the court reiterated the well settled principle that with a view to avoid undue hardship to the parties who may be affected by the declaration of law in a cause, at variance with the law as understood and applied before such declaration, the court, in order to do complete justice, moved the relief by resorting to the well known principle of prospective applicability of the law so declared by it. In fact, reiterating its earlier decisions,[159] the court emphasized that the principle of prospective over-ruling or applicability of its decision is invoked as a matter of its discretion in view of the given circumstances of a case and not as a matter of course or law.

In *Hargobind Yadav* v. *Rewa Sidhi Gramin Bank & Ors.*,[160] the court taking into consideration the fact that the appellant had been denied promotion for more than 16 years by the Bank by repeatedly following the procedure which was not in consonance with the seniority-cum-merit, considered it to be an appropriate case for exercise of its power under article 142 of the Constitution and declined to drive the appellant back again to face the procedure of selection for promotion. Speaking for the court, Raveendran J held:[161]

> With a view to do complete justice, in exercise of our power under article 142 we hereby direct the first respondent bank to promote the appellant as a Field Supervisor, from the date the third defendant was

158 (2006) 5 SCC 581.
159 *SBP Co.* v *Patel Engg. Ltd.*, (2005) 8 SCC 618.
160 (2006) 6 SCC 145.
161 *Id.* at 159 para 27.

> promoted as Field Supervisor and place him above the third Respondent. However, he will be entitled to monetary benefits flowing from such promotion only prospectively, though the pay is to be refixed with reference to the retrospective date of promotion.

In *Bhadra Shahakari S.K. Niyamita* v. *Chitradurga Mazdoor Sangh & Ors.*,[162] the Supreme Court held that the writ petition filed by the respondent union against the appellant which was a cooperative sugar factory registered under the Cooperative Societies Act, was not maintainable since the society did not fall within the definition of "state" under article 12 of the Constitution. However, considering the critical financial situation of the sugar factory, the court gave a direction for payment of only 10% of the backwages to the workmen which came to Rs.9.52 lacs instead of 40% of the backwages awarded by the high court. Though, the court did not mention that it was exercising its power under article 142 of the Constitution, it held that "in the interest of the workers", the said direction have been issued.

In *Ram Pravesh Singh and others* v. *State of Bihar*[163] the court held that an order made under article 142 of the Constitution would not have been in binding efficacy under article 141. The court distinguishing an order made in earlier proceedings as not being a precedent, speaking through Reveendran J held that:[164]

> The tenor of the said order, which is not preceded by any reasons or consideration of any principle, demonstrates that it was an order made under article 142 of the Constitution on the peculiar facts of that case. Law declared by this court is binding under article 141. Any direction given on special facts, in exercise of jurisdiction under article 142, is not a binding precedent.

VII POWER OF REVIEW

Supreme Court's power to review any judgment or order under article 137 of the Constitution is subject to the provisions of any law made by Parliament or any rules made under article 145 by the court itself with the approval of the President.

In *Jain Studios Ltd.* v. *Shin Satellite Public Co. Ltd.*,[165] it was held that an order passed by the Chief Justice of India or his nominee under sub-section (6) of section 11 of the Arbitration and Conciliation Act, 1966 is indeed an 'order' within the meaning of article 137 of the Constitution and would be

162 (2006) 8 SCC 552.
163 (2006) 8 SCC 381.
164 *Id.* at 395 para 23.
165 (2006) 5 SCC 501.

amenable to review by the court in exercise of its powers under article 137 of the Constitution particularly when the Constitution bench of the court by a majority of 6:1 in *Patel Engineering Ltd*. [166] held that the powers and function of the Chief Justice of High Court or his nominee or by the Chief Justice of India or his nominee under the said provisions of the act were 'judicial' and not administrative. However, rejecting the application for review on its merit, Thakkar J ruled that:[167]

> Virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

In *Haridas Das* v. *Usha Rani Banik (Smt) and others*[168] it was held that power of review under section 114 CPC would have be read in conjunction with the parameters prescribed under order 47 rule 5 of the Code which permits review of judgment or an order only on the following conditions:-

(a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant;
(b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and
(c) on account of some mistake or error apparent on the face of the record or any other sufficient reason.

Reiterating that the powers of review was limited, the exercise of which was strictly conditioned by the provisions of the Code, Arijit Pasayat J held that:[169]

> An error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long-drawn process of reasoning.

166 (2005) 8 SCC 618.
167 *Supra* note 165 at 504-05 para 11.
168 (2006) 4 SCC 78.
169 *Id.* at 84.

VIII CONTEMPT OF COURT

Article 129 of the Constitution declares that the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Article 215 makes an identical declaration with regard to the high courts and it provide that every high court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Article 142 deals with enforcement of decrees and orders of the Supreme Court. Sub-article (2), however, provides that "Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or *punishment of any contempt of itself*." Is there an apparent incongruity between article 129 which declares the Supreme Court to be a court of record with all powers of such a court including the power to punish for contempt of itself and article 142(2) which recognises the power of the Supreme Court to make any order for the purpose of punishment of any contempt of itself being "subject to the provisions of any law made in this behalf by Parliament"? Article 246 read with entry 77 of list I of the Seventh Schedule to the Constitution undoubtedly empowers Parliament to make law on the subject — "Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such court), and the fees taken therein; persons entitled to practise before the Supreme Court". Although there is no provision similar to article 142(2) in respect of the powers of the high courts, article 246 read with entry 14 of list III would undoubtedly confer power to make law both on Parliament and the state legislature on the subject — "contempt of court, but not including contempt of the Supreme Court".

The Constitution does not define the expression "court of record". However, it is now well recognised that the said expression was adopted in the Constitution following the English practice where, the superior courts, being courts of record, were recognised to have the power of summarily punishing contempt of such courts. In India, we have followed the English practice. The superior courts that is, the Supreme Court and the high courts as the courts of record have the power of punishing for contempt of itself as well as of subordinate courts.[170] The most important question that inevitably arises is, whether articles 129 and 215 limit the legislative powers with regard to subject matters covered under entry 77 of list I and entry 14 of list III of the Seventh Schedule? There is no doubt that the power to punish for contempt vested in the Supreme Court and in the high courts could not be taken away by any legislation. However, since the Supreme Court has characterised its

170 *Delhi Judicial Service Association* v. *State of Gujarat and Others*, (1991) 4 SCC 406.

jurisdiction under article 129 as *sui generic,*[171] question may still arise as to whether the legislative powers would not comprehend the power to determine what amounts to "contempt" and also to lay down the procedure regulating such proceedings. The Sanyal Committee on an in depth analysis[172] of the entire law of contempt was of the view that the provisions of the Constitution do envisage that Parliament is competent to legislate on the law relating to contempt of courts and that mere use of the expression '*court of record'* in articles 129 and 215 cannot have the effect of detracting from that conclusion. In the opinion of the committee, the concept of "*court of record*" was derived from English law which itself recognised that all the powers of the court of record including the power to punish for contempt and the right to determine what amounts to contempt would all be subject to legislative provisions to the contrary including the Administration of Justice Act, 1960, then prevailing in England.

The committee also noted that the English concept of "*court of record*" does not preclude the possibility of the decision in contempt matter of the court being considered and reversed, if the appellate court thinks so fit in appeal. The logic behind its opinion was that if the superior courts in India were to be the final arbiter of what amounts to contempt of themselves, and if the legislature was precluded from determining what amounts to contempt of court, it would mean that "there might be as many systems of law of contempt in the country as there are High Courts plus one, for the Supreme Court is also a court of record. It might also mean that the provisions of article 141 of the Constitution which provided that the law laid down by the Supreme Court shall be binding on all the courts within the territory of India would be subject to an exception in relation to the law of contempt"[173]. However, following an observation made by the Supreme Court in *Sukhdev Singh's*[174] case a single judge of the Calcutta High Court[175] declared section 20 of the Contempt of Court Act, 1961 which prescribes a period of limitation for institution of any proceedings for contempt as *ultra vires* article 215 of the Constitution, disagreeing with the view taken by the High Court of Andhra

171 *In Re: Vinay Chandra Mishra,* (1995) 2 SCC 584.

172 Constituted by the Government of India, Ministry of Law by its Order No. F.49/ 61-Adm. I dated 29.7 1961 under the chairmanship of H.N.Sanyal, then Additional Solicitor General of India. The committee submitted its report on 26.2.1963 and based upon its recommendations Parliament enacted the Contempt of Courts Act, 1971.

173 *Report of the Sanyal Committee* 16-17.

174 *Sukhdev Singh* v. *Hon'ble Chief Justice and Judges of the Pepsu High Court,* (1954) SCR 454, wherein the Supreme Court held "in any case, so far as contempt of a High Court itself is concerned, as distinct from one of a subordinate court, the Constitution vests these rights in every high court, so no Act of a Legislature could take away that jurisdiction and confer it afresh by virtue of its own authority".

175 *Tata Iron and Steel Company Ltd.* v. *Ram Niwas Poddar,* AIR 1989 Cal 373, although an appeal is still pending before the division bench of the high court, another division bench of the high court has overruled the said decision in *Arthur Branwell and Company Ltd.* v. *Indian Fibres Ltd,* (1993) 3 CLJ 182.

Pradesh in *Koteswara Rao's*[176] case. A full bench of the Kerala High Court,[177] has held that the provisions of section 20 would have no application to the contempt proceedings initiated by the high court on its own motion under article 215 of the Constitution which confers unfettered power on the high courts and hence the period of limitation could not be applied to such proceedings. The Gujarat High Court,[178] has, however, held that it would have no jurisdiction to initiate contempt proceedings after the expiry of the period of one year prescribed under section 20 of the Act, unless, the contempt is of a continuing nature.

Article 19(2) of the Constitution also recognises that the state may, by law, impose reasonable restrictions on the exercise of the right to freedom of speech and expression, *inter alia*, "in relation to contempt of court". Surely, the expression "prevent the state from making any law" has obvious reference to the legislative enactment by the state which could only be with respect to the subject matters covered by either entry 77 of list I or entry 14 of list III of the Seventh Schedule to the Constitution. However, the debate continues as to whether the powers of punishment for contempt vested in the court are consistent with the rule of law and democracy which envisage a transparent functioning of all institutions. The nebulous nature of the law of contempt is considered in certain quarters as un democratic as it seeks to penalise a fair criticism of the functioning of the judicial organ of the state. The conferment of such powers in the hands of the courts is justified as essential to the functioning of a peaceful and orderly civilized society. The Supreme court fully endorsing this philosophy speaking through Sawant J held that:[179]

> If the judiciary has to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. It is for this purpose that the courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside the courts, which tend to undermine their authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties without fear or favour. When the court exercises this power, it does not do so to vindicate the dignity and honour of the individual judge who is personally attacked or scandalised, but to uphold the majesty of law and of the administration of justice. The foundation of this judiciary is the trust and the confidence of the people in its ability to deliver fearless and

176 *Advocate General, Andhra Pradesh* v. *Koteswara Rao,* (1984) Cr LJ 1171.
177 *A. Mayilswami* v. *State of Kerala,* (1995) Cri LJ 3830.
178 *State of Gujarat* v. *Karanbhai L. Parmar,* (1987) Cri LJ 1842.
179 *In re: Vinay Chandra, supra* note 171 at 617.

> impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded.

In *T N Godavarman Thirumulpad* v. *Ashok Khot and another*,[180] serious allegations were made against Principal Secretary, Department of Forest, Government of Maharashtra and the Minister Incharge of the Department of Forest of deliberately and wilfully flouting the orders of the Supreme Court. A bench of the Supreme Court by its order dated 4.3.1997 had directed closure of all unlicensed sawmills, veneer and plywood industries and retained them from operating without the prior permission of Central Empowered Committee (CEC). The State of Maharashtra by IA No. 414 sought permission to permit the reopening of sawmills/veneer and plywood industries which, *inter alia*, are dependent on imported timber. The court had declined to grant such permission by its order dated 14.7.2003. On enquiries made by the CEC, the state government stated that the orders of this court would be complied with and six mills in question were actually closed. It was alleged that subsequently, by orders dated 7.4.2004 and 29.5.2004, the State of Maharashtra granted permission to the said six units to operate in the state. Such permissions were granted on the basis of decisions taken by the two alleged contemnors –the principal secretary and the minister-in-charge, deliberately and consciously, though fully aware of the orders passed by the court, with the sole motive of favouring those units and to evade enforcement of the orders passed by the court. By its order dated 3.2.2006, the court had called upon the alleged contemnors to submit their response to the charges framed against them. The contemnors in their response took the plea of having acted *bona fide*. The court, however, noticed that the deputy secretary to the government had made a detailed note on the file on the directions of the principal secretary. The note records various proceedings before the court including the application for permission sought by the state government being denied by the court by rejecting its IA. The court, therefore, disregarded the plea taken by the contemnors that they had acted *bona fide* or that they had any doubt about the scope of the directions of the court. The court came to the conclusion that the contemnors had deliberately disobeyed the orders of the court. The court noted that in accordance with the procedures laid down by the court, the applications of those eligible for grant of licenses were required to be sent to CEC, which was then required to submit its report to the court. The court would have then decided on the question of entitlement for grant of licenses. This procedure mandated by the court had not been followed and instead, the contemnors permitted resumption of operations by the unit-holders. Rejecting the apology tendered by the contemnors, Pasayat J, speaking for the court, held:[181]

180 (2006) 5 SCC 1.
181 *Id.* at 17 para 31.

> Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace, the apology is shorn of penitence and hence it is liable to be rejected. If the apology is offered at the time when the contemnors find that the court is going to impose punishment it ceases to be an apology and becomes an act of a cringing coward. Apology is not a weapon of defence to purge the guilty of their offence, nor it is intended to operate as universal panacea, but it is intended to be evidence of real contriteness.

The court, therefore, concluded that the contemnors deserved severe punishment which will set an example for those "who have a propensity for disregarding the court's orders because of their money power, social status or posts held." The court, therefore, directed a custodial sentence of one month's simple imprisonment in each case holding that the punishment would meet the ends of justice.[182]

In *Hamza Haji* v. *State of Kerala and another*,[183] the court speaking through Balasubramanyan J ruled:[184]

> There cannot be any doubt that the court in exercise of its jurisdiction under article 215 of the Constitution has the power to undo a decision that has been obtained by playing fraud on the court.

The court held that the high court is competent to nullify a decision procured by a party by playing fraud upon the court and that the Supreme Court would decline to exercise its jurisdiction under article 136 of the Constitution in such cases.

In *Zahira Habibullah Sheikh and another* v. *State of Gujarat and others*[185] known as the *Best Bakery* case, in the appeals preferred by the victims of the carnage that took place in Gujarat following the Godhra incidence, the basic question before the court was whether in the State of Gujarat the atmosphere was conducive to a fair trial of the case. Zahira, who was projected as the star witness made a grievance that she was intimidated, threatened and coerced to depart from the truth and to make statement in the court which did not reflect the reality. The trial court on the basis of the evidence tendered by the witnesses in the court directed acquittal of the accused persons. Before the Gujarat High Court, an application under section 391 of the Code of Criminal Procedure, 1973 highlighting the necessity for accepting additional evidence was filed. The foundation of the application was the statement made by Zahira. The high court did not accept the prayer and hence the appeals came to be filed before the Supreme Court. By judgment and

182 *Id.* at 18.
183 (2006) 7 SCC 416.
184 *Id.* at 429 para 26.
185 (2006) 3 SCC 374.

order dated 12.4.2004 the Supreme Court on the basis of the materials placed before it, came to the conclusion that there has been glaringly demonstrating subversion of justice-delivery system with no congenial and conducive atmosphere still prevailing" and hence the court directed retrial of the case by a court under the jurisdiction of the Bombay High Court. A review petition filed by the state was disposed of by the court. While the trial was on before a court in Maharashtra, Zahira gave a press statement in the presence of some government officials that what she had stated before the trial court in Gujarat earlier was correct. A petition was filed before the Supreme Court alleging that Zahira's statement was nothing but contempt of the Supreme Court. At a press conference held on 3.11.2004 few days before the scheduled appearance of the witnesses in the trial, she had changed her version, disowned the statements made before the Supreme Court and the other bodies like the National Human Rights Commission. In this background, the court in its order dated 10.1.2005 held that a detailed examination of the matter was necessary to ascertain which of the version of Zahira was truthful particularly when the various documents placed before the court demonstrated that she had departed from her earlier statements. The court, therefore, directed the Registrar General to conduct an enquiry and submit a report on the questions (a) if Zahira was in any manner pressurised to depose/make statements by any person or persons; (b) if the answer is in the affirmative, who the person/petitioners is/are? The Registrar General submitted his report to the court to the effect that Zahira had changed her stand at different stages and had departed from statements made before the Supreme Court on the question whether she was threatened, coerced, lured, induced and/or in any manner pressurized to make statements in a particular way by any person or persons. The report stated further that Zahira was not been able to explain the assets in her possession in spite of several opportunities having been granted to her.

Referring to the transcript of conversations purported to have been made between a representative of 'Tehelka' and a few other persons, the enquiry officer held that money was paid to Zahira to change her stand. Referring to the explanations offered by Zahira and her family members, the inquiry officer found that she could not explain the amounts received by her and the deposits made in their bank accounts. The amount involved was nearly rupees five lakhs. The explanation offered by Zahira and her family members was found unacceptable. Accepting the report of the Registrar General, the court held that Zahira was guilty of having committed contempt of the court. Referring to entry 77 list I of the Seventh Schedule to the Constitution, the court held that Parliament was competent to enact a law relating to the power of the Supreme Court with regard to contempt of itself and that such law may prescribe the nature of punishment which may be imposed on a contemnor by virtue of provisions contained in article 129 read with article 142 (2) of the Constitution. Pasayat J speaking for the court, however, held that: [186]

186 *Id.* at 390.

> Since, no such law has been enacted by Parliament, the nature of punishment prescribed under the Contempt of Courts Act, 1971 may act as a guide for the Supreme Court but the extent of punishment as prescribed under that Act can apply only to the High Courts, because the 1971 Act ipso facto does not deal with the contempt jurisdiction of the Supreme court, except that section 15 of the Act prescribes procedural mode for taking cognizance of criminal contempt by the Supreme Court also. Section 15, however, is not a substantive provision conferring contempt jurisdiction. Relating to its earlier decision in *Sukhdev Singh Sodhi* v. *Chief Justice and Judges of the Pepsu High Court*[187] as regards the extent of "maximum punishment" which can be imposed upon a contemnor must, therefore, be construed as dealing with the powers of the High Courts only and not of this Court in that behalf. In *Supreme Court Bar Association* v. *Union of India*[188] this court expressed no final opinion on that question since that issue, strictly speaking, did not arise for decision in that case. The question regarding the restricton or limitation on the extent of punishment, which this court may award while exercising its contempt jurisdiction, it was observed, may be decided in a proper case when so raised. We may note that a three-Judge Bench in *T N Godavarman Thirumulpad* v. *Union of India*[189] imposed costs of Rs.50,000/-.

Emphasizing that in the complex pattern of life which is never static requires a fresher outlook and a timely and vigorous moulding of old precepts to some new conditions, ideas and ideals, Pasayat J held that by not acting in the expected manner a judge exposes himself to unnecessary criticism. At the same time the judge is not to be innovative at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness, as observed by Cardozo in *The Nature of Judicial Process.*

It was held that the state has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in the court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every state has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. Pasayat J further held that there should not be any undue anxiety to only protect the interest

187 (1954) SCR 454.
188 (1998) 4 SCC 409.
189 *TN Godavarman* v. *Union of India,* (2003) 10 SCALE 1126.

of the accused. That would be unfair to the needs of society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interest of the individual accused. In this courts have a vital role to play.[190]

Having held that Zahira was guilty of having committed contempt, the court sentenced Zahira to undergo simple imprisonment for one year and to pay cost of Rs.50,000/- and in case of default of payment within two months, she shall suffer further imprisonment of one year.

IX COMPOSITION OF RAJYA SABHA: MEANING OF "REPRESENTATIVE OF EACH STATE"

Kuldip Nayar,[191] a noted journalist filed a writ petition under article 32 of the Constitution challenging the constitutional validity of the Representation of the People (Amendment) Act 40 of 2003 which came into force w.e.f. 28.08.2003, *inter alia*, on the ground that the said amendment destroys federalism and bicameralism of the Parliament which is a basic feature of the Constitution. A constitution bench of five judges rejecting the contention as devoid of merits dismissed the writ petition. Article 80 of the Constitution provides that the Council of States shall consist of 12 members to be nominated by the President and not more than 238 representatives of the states and the union territories. Clause (4) of article 80 provides that the representatives of each state in the Council of States shall be elected by the elected members of the legislative assembly of the state in accordance with the system of proportional representation by means of the single transferable vote. Clause (5) of article 80 provides that the representatives of the union territories in the Council of States shall be chosen in such manner as Parliament may by law prescribe. Article 84 lays down the qualification for membership of Parliament. Clause (c) of article 84 provides that a person shall not be qualified to be chosen to fill a seat in Parliament unless he possesses such other qualifications as may be prescribed in that behalf by and under any law made by Parliament. Parliament has since enacted two enactments – Representation of People Act, 1950 (R P Act, 1950) and the Representation of People Act, 1951 (R P Act 1951). Section 3 of the R P Act, 1951 was first amended by Adaptation of Laws (No.2) Order, 1956 as a consequence of the reorganisation of the territories of the states under the Reorganisation of States Act, 1956. The amended provision of section 3 lays down the qualification for membership of the Council of States. It provides that a person shall not be qualified to be chosen as a representative of any state (other than the State of Jammu and Kashmir) or union territory in the Council of States unless he is an elector for

190 *Supra* note 185 at 398 para 42.
191 *Kuldip Nayar* v. *Union of India*, (2006) 7 SCC 1.

a parliamentary constituency in that state or territory. This provision was again amended by Act 40 of 2003 which has been the subject matter of challenge in this case. The amendment was brought in w.e.f. 28.8.2003 by substituting the words " in that state or territory" by the words "in India". The amended provision reads thus: "A person shall not be qualified to be chosen a representative of any state or union Territory in the Council of States unless he is an elector for a parliamentary constituency in India".

The word "elector" is defined in section 2 (e) of the R P Act, 1951 in relation to a constituency to mean " a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950)". Section 19 of the R P Act, 1950 lays down the conditions of registration of the electors in the electoral roll and provides, *inter alia*, that every person who is 'ordinarily resident in a constituency' shall be entitled to be registered in the electoral roll for that constituency. The expression 'ordinarily resident' appearing in section 19 (b) has been explained in section 20 of the R P Act, 1950. Section 20 (1) and (1A) provides that a person shall not be deemed to be ordinarily resident in a constituency on the ground only that he owns, or is in possession of, a dwelling house therein and that a person absenting himself temporarily from his place of ordinary residence shall not by reason thereof cease to be ordinarily resident therein. Sub-section (4) provides that a person holding any office in India declared by the President in consultation with the Election Commission to be an office to which the provisions of this sub-section apply, shall be deemed to be ordinarily resident on any date in the constituency in which, but for the holding of any such office, he would have been ordinarily resident on that date. Sub-section (5) provides that the statement of any such person as is referred to in sub-section (3) or sub-section (4) made in the prescribed form and verified in the prescribed manner, that but for his having the service qualification or but for his holding any such office as is referred to in sub-section (4) he would have been ordinarily resident in a specified place on any date, shall, in the absence of evidence to the contrary, be accepted as correct. Sub-section (7) provides that "if in any case a question arises as to where a person is ordinarily resident at any relevant time, the question shall be determined with reference to all the facts of the case and to such rules as may be made in this behalf by the central government in consultation with the Election Commission. Thus, the expression "ordinarily resident" as defined does not positively state as to when a person could not be said to be ordinarily resident of a place. The definition only enumerates circumstances which, by themselves, would neither make a person ordinarily resident in a constituency nor would, certain other circumstances like temporary absence etc from his place of ordinarily resident, made such a person ceasing to be ordinarily resident thereof. By and large, the concept has been understood in the context of "domicile".

Quoting from the debates in the constituent assembly, the court held that there cannot be any doubt that the concept of federalism in various provisions and the federal principles in the Constitution are its basic features.[192] The court rejected the argument of the petitioners that "birth" and "residence" are the two constitutionally recognised links with a state or a union territory which alone provide an identifiable nexus with the state or union territory concerned and that unless a person belongs to a state or a union territory, in the scheme of the Constitution, he would not have the capacity to represent the concerned state or the union territory in the Council of States. The court held that India is not a true federation formed by agreement between various states and that territorially "it is open to the Central government under article 3 of the Constitution, not only to change the boundaries, but even to extinguish a state …. when it comes to exercising powers, they are weighed heavily in favour of the Centre, so much so that various descriptions have been used to describe India such as a pseudo-federation or quasi-federation in an amphibian form etc". [193]

The Constitution provides for a bicameral legislature at the centre. The House of the People is elected directly by the people. The Council of States is elected by the members of the legislative assemblies of the states. It is the electorate in every state who are in the best position to decide who will represent the interests of the state, whether as members of the lower house or the upper house.[194] It is no part of the federal principle that the representatives of the states must belong to that state. There is no such principle discernible as an essential attribute of federalism, even in the various examples of upper chamber in other countries.[195] Emphasizing the reason for adoption of 'Bicameralism' in parliamentary forms of government in Indian Constitution, the court held that the unequal yet weighed proportional representation method adopted for *Rajya Sabha* elections was a consequence of the analysis of representation in other federal bicameral legislatures…..the formation and re-organisation of states in India since independence has largely been on linguistic lines and other factors of cultural homogeneity among groups, where the sizes of these communities vary tremendously in comparison to each other. Hence, allocating seats to the states in the *Rajya Sabha*, either on equal terms or absolutely in accordance with population distribution would have been extreme solutions. Hence, the formula applied for the purposes of allocation of seats in the Fourth Schedule seems to be a justifiable solution.[196]

Turning down the contention that the validity of the legislation i.e. R.P. Act, 1950 as amended by Act 40 of 2003 could be challenged on the

192 *Id.*, para 50-68.
193 *Id.* at 56 para 71.
194 *Ibid.*
195 *Id.*, para 72.
196 *Id.* at 61-62 para 87.

ground of violation of the basic structure of the Constitution, Sabharwal C J held:[197]

> The basic structure theory imposes limitation on the power of the Parliament to amend the Constitution. An amendment to the Constitution under article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners.

It is respectfully submitted that though the basic structure doctrine was evolved in the context of the constitutional limitation on the power of Parliament to amend Constitution, yet logically should it not follow that if a constitutional amendment would not be permissible due to infraction of the basic structure of the Constitution, an ordinary legislation enacted under the Constitution having the same effect, *a fortiori* could not be considered as constitutional? What Parliament could not do in exercise of its constituent power, could it be suggested that the same objective could be achieved by enacting a law in exercise of its ordinary legislative power? Rejecting the contention that on the principle of *contemporanea expositio*, the provisional Parliament, which consisted of the members of the Constituent Assembly, in exercise of its law making power under article 379 of the Constitution having enacted the R P Act, 1951 laying down the residence qualification for those seeking membership of the *Rajya Sabha* representing a particular state, the said requirement should be construed as having become part of the constitutional law or part of the basic feature of the Constitution, the court held:[198]

> But then, the fallacy of the above approach to the subject lies in the fact that legislation by the Provisional Parliament did not produce a constitutional rule. It does not have the sanctity or normative value of Constitutional Law. When the Act of 1951 was debated, no one argued that the residence qualification had already been decided upon by the Constituent Assembly and, therefore, no debate should take place. The difference between the original and derived power is the basis of the doctrine of basic structure.

197 *Id.* at 67 para 107. On 11.1.2007, a nine judge bench speaking through Sabharwal CJ in *I.R. Coelho* v. *State T.N.*, (2007) 2 SCC 1 at 111 held that "even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure".

198 *Id.* at 72 para 124.

The petitioners had contended that the expression "representatives of state" appearing in article 80 of the Constitution in the context of democracy envisaged two aspects: (a) capacity to represent; and (b) authority to represent;[199] It was contended that the words "representatives of states" in article 80 (1) (b) and (2) and the words "representatives of each state in the Council of States" appearing in article 80(4) need to be interpreted consistent with the concept of democracy which is a basic structure of the Constitution,[200] and that only a member belonging to a class could represent the class in a system of self governance. It has asserted that a person belongs to a state either by birth, or by domicile or by ordinary residence and only such a person can represent the state in the Council of States.[201] Rejecting these contentions, the court held:[202]

> We are not impressed with the submission that it is inherent in the expression "representative", that the person, in order to be a representative, must first necessarily be an elector in the state. If this concept were to be stretched further, it might also require birth in the particular state, or owning or having rented property or belonging to the majority caste, etc. of that state. Needless to mention, no such qualification can be added to say that only an elector of that state can represent that state. The "representative" of the state is the person chosen by the electors who can be any person who, in the opinion of the electors, is fit to represent them. There is absolutely no basis for the contention that a person who is an elector in the state concerned is more "representative" in character than one who is not.

The petitioners also challenged the amendments made to sections 59, 94 and 128 of the R.P. Act, 1951 introducing the concept of open ballot in place of secret ballot. According to the petitioners, election of members of *Rajya Sabha* is an essential part of democracy that is based on free and fair elections. The voters should have freedom of expressing their view through their votes. The impugned amendment violates the right of secrecy by resorting to open ballot system that is nothing but a political move by clique in political parties for their own achievement.[203] The amendments, it was contended, were violative of the fundamental right under article 19(1)(a) of the Constitution as well as the provisions in the R. P. Act, 1951, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Countering these submissions, it was contended on behalf of the union government that unlike the provisions contained in articles 55(3) and article

199 *Id.* at 84 para 183.
200 *Id.*, para 184.
201 *Id.*, para 186.
202 *Id.* at 88 para 202.
203 *Id.* at 109 para 314

66(1) for elections to the offices of the President of India and the Vice-President of India, respectively, there is no constitutional requirement that election to the Council of States be conducted "by secret ballot".[204] The Ethics Committee of Parliament in the wake of emerging trend of cross voting in the *Rajya Sabha* and legislative council elections, in its report dated 1.12.1998 had recommended that such elections being held by "open ballot". Reference was made to the influence of money power and muscle power in *Rajya Sabha* elections and also to the provisions contained in the Tenth Schedule to the Constitution. It was submitted that "the secret ballot system had in fact become counter-productive and opposed to the effective implementation of the principles of democratic representation of states in the Rajya Sabha".[205] Rejecting the contentions of the petitioners, Sabharwal CJ speaking for the court held that:[206]

> It is not without significance that, barring the exception in case of Independents, which are few and far between, experience has shown that it is the political parties that mostly set up the Members of legislatures at the Centre or in the states. We may also refer to the nomination papers prescribed under the Conduct of Election Rules, 1961 for election to the Council of States, being Form 2-C, or for election to the state Legislative Assembly, being Form 2B, each of which require a declaration to be made by the candidate as to particulars of the political party that has set him up in the election. This declaration binds the elected legislators in the matter of allegiance to the political party in all matters including, and we find the Attorney General is not wrong in so submitting, the support of the party to a particular candidate in election to the Council of States. Yet, in view of the law laid down in *Kihoto Hollohan* v. *Zachillhu*[207], it is not correct to contend that the open ballot system tends to expose the members of the Legislative Assembly to disqualification under the Tenth Schedule since that part of the Constitution is meant for different purposes.

Whether the directions issued by the High Court of Bombay to exhibit the entire documentary film titled Father, Son and Holy War produced by the respondent within a time frame was in excess of the power of judicial review was the question before the court in *Director General, Directorate General of Doordarshan* v. *Anand Patwardhan & Anr.*[208] The respondent, a film maker, had produced the aforementioned documentary film, which was the third part of a trilogy of documentary films against communal violence made

204 *Id.* at 110 para 316.
205 *Id.*, para 317.
206 *Id.* at 129 para 385.
207 (1992) Supp (2) 651.
208 (2006) 8 SCC 433.

from mid 1980's to mid 1990's. The earlier two documentary films titled "*In memory of Friends" (1990)* (on building communal peace in strife-torn Punjab) and "*Ram ke Naam/In the name of God"(1992)* (on the Ayodhya crisis), though won national awards were refused to be screened by the *Doordarshan* on the ground that they would create law and order problems. The last of the three films was produced in 1995 which focused on the question of gender bias – religious violence. The documentary film was in two parts, Part I was given 'U' certificate and Part II was given 'A' certificate by the Censor Board. *Doordarshan* issued a circular on 14.8.1996 to the effect that it shall not telecast any 'A' certified adult or 'U/A' certified feature film on it. The respondent handed over a copy of the U-matic certificate for the documentary film to be aired by *Doordarshan*. It still refused to telecast the documentary. The respondent filed a writ petition before the High Court of Bombay challenging the said refusal. The high court directed *Doordarshan* to take a decision on the application of the respondent within a period of six weeks. A selection committee was constituted on 10.8.1998 to preview the documentary film. The selection committee observed that the documentary "depicts the rise of Hindu fundamentalism and male chauvinism without giving any solution how it could be checked. The violence and hatred which is depicted in the whole documentary will have an adverse effect on the minds of the viewers..."[209] When this decision of the selection committee was communicated to the respondent, he challenged the same again before the High Court of Bombay. The high court directed *Doordarshan* to telecast the documentary film within a period of six weeks in the evening slot. It was this decision which came to be challenged before the Supreme Court. The issue before the Supreme Court concerned balancing the need to protect the society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and ideas. The court apprised itself with sections 292 and 293 of the Penal Code and ruled that there is a danger of a publication meant for public good or for *bona fide* purpose of science, literature art or any other branch of learning being declared as obscene literature as there is no specific provision in the Act for exempting them from operations of those sections and also by reasons of omission of definition of obscenity in the statute leaving a large grey area in the laws restricting publication of materials which may be called obscene.[210] The court held that the high court was well within its power and judicial review to have directed *Doordarshan* to telecast the film in the light of the recommendations of the expert committee and also having itself viewed the film. Speaking for the court Lakshmanan J held that:[211]

> The High Court of Bombay has not substituted its discretion for that of the authorities. On the contrary, the High Court has ruled that

209 *Id.* at 440.
210 *Id.* at 444-45.
211 *Id.* at 449.

when the decision-making process has itself resulted in the recommendations to telecast, it is not open to Doordarshan to find other means just to circumvent this recommendation. The High Court has only corrected the failure of Doordarshan to follow through with their own decision-making process on the pretext of a circular which being non-statutory cannot be used to limit the right of expression. Besides, the circular, in terms, applied only to feature films and not to documentaries. Before ruling thus, the High Court viewed the film for itself which is a process followed innumerable times before, even by this court in cases concerning the official media to satisfy itself that the recommendations of the Expert Committee were not patently absurd. Thus, it is not a case where the High Court has substituted its judgment for that of the decision-making authority but one where the decision made by due process has been upheld by the High Court. In our view, Doordarshan being a national channel controls airwaves, which are public property. The right of the people to be informed calls for channelising and streamlining Doordarshan's control over the national telecast media vehicle.

X DISQUALIFICATION FOR MEMBERSHIP TO PARLIAMENT/ STATE ASSEMBLY

Articles 102 and 191 of the Constitution lay down the circumstances as to when a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the legislative assembly or legislative council of a state. One of the disqualifications prescribed is, if the person concerned holds "any office of profit" under the Government of India or the government of any state, other than an office declared by Parliament or the legislature of the state, as the case may be, by law not to disqualify its holder. Parliament has enacted the Parliament (Prevention of Disqualification) Act, 1959 declaring that certain offices of profit mentioned in section 3 read with the schedule to the Act under the government of India or the Government of any state shall not disqualify the holders thereof for being chosen as, or for being Members of Parliament. Likewise the state legislatures have also passed respective legislations declaring that the holders of certain offices shall not be disqualified for being chosen as, or for being members of the legislative assembly or the legislative council. Although the law is well settled since 1954[212] as to what constitutes an office of profit to attract the disqualification, a large number of cases have come up before courts time and again involving the same question primarily due to the factual backgrounds involved in such cases.

In *Jaya Bacchan* v. *Union of India*[213] the petitioner challenged the order dated 16.03.2006 passed by the President of India under article 103(1) of the

212 *Ravanna Subanna* v. *G.S. Kaggeerappa,* AIR 1954 SC 653.
213 (2006) 5 SCC 266.

Constitution after obtaining the opinion of the Election Commission holding that the petitioner was disqualified for being a member of the *Rajya Sabha* on and from 14.07.2004 on her appointment by the Government of Uttar Pradesh as chairperson of the U.P. Film Development Council. The Government of Uttar Pradesh had appointed the petitioner to the said post by virtue of which she not only got the benefits of the rank of cabinet minister but also became entitled to several benefits such as honorarium of Rs. 5000/- per month; daily allowances and a monthly entertainment expenditure of Rs. 10,000/- per month; staff car with driver, telephones private secretary and personal assistant and two class IV employees, body guard and night escort, free accommodation and free medical treatment facilities and free accommodation in government circuit houses/ guest houses and hospitality while on tour. The Election Commission expressed its opinion that the office of the chairperson of the council was an "office of profit" within the meaning of article 102 (1)(a) of the Constitution and since section 3 of the 1959 Act did not exempt the said office from disqualification, the petitioner became disqualified to be a member of the *Rajya Sabha*.

The petitioner contended that conferment of the rank of cabinet minister was only "decorative" and that she neither received any remuneration nor any monetary benefit from the state government nor did she seek any residential accommodation nor use the telephone etc. Her case was that she accepted the chairmanship of the council honorarily and did not use any of the facilities mentioned in the office memorandum pertaining to her appointment and hence she could not be said to hold any office of profit under the state government. Her disqualification therefore was invalid.[214] The expression, "office of profit" has neither been defined in the Constitution nor in the Representation of Peoples Act, 1951. The expression, however, has been a subject matter of interpretation in several cases and the legal position stood settled for over half a century. Referring to the earlier decisions the court held that an "office of profit" is an office which is capable of yielding a profit or pecuniary gain. Holding of an office under the state or the central government to which some pay, salary, emolument, remuneration or non compensatory allowance is attached is "holding an office of profit". The test for determining the question is, whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained any monetary gain. It was held that if the office carries with it or entitles the holder to any pecuniary gain other than reimbursement of out of pocket/ actual expenses, then the office will be an "office of profit" for the purpose of article 102(1)(a). The court, therefore, upheld the order passed by the President.

In *Shrikant* v. *Vasant Rao*[215] the question that arose for consideration was whether the appellant who had entered into a contract with the state government but stood transferred to a corporation established under the Maharashtra Godawari Marathwada Irrigation Development Corporation Act

214 *Id.* at 269.
215 (2006) 2 SCC 682.

1998 (for short MGMIDC) and two other contracts with Maharashtra Jeevan Pradhikaran, (for short MJP), an authority constituted under the Maharashtra Jeevan Authority Act, 1976, (for short MJA) stood disqualified by reason of section 9(A) of the Representation of the People Act. Section 9(A) provides that a person shall be disqualified if there subsists a contract entered into by him in the course of his trade or business with the appropriate government for the supply of goods to, or for the execution of any works undertaken by, that government. Section 7 of the Act defines "appropriate government" in relation to any disqualification for being chosen as or for being a member of the legislative assembly or council of a state, the state government. The expression "state government" is neither defined in the Constitution nor in the Representation of the People Act, 1951. Section 2(j) of the Representation of the People Act, 1950 defines the expression "state government", in relation to a union territory, means the administrator thereof. Section 2(60) of the General Clauses Act, 1897, provided that the term "state government", as respects anything done, or to be done shall mean in a state, the Governor. The appellant was declared elected to the Maharashtra Legislative Council from the Aurangabad Division Graduates' Constituency. The respondent who was one of the rival candidates filed an election petition in the High Court of Bombay challenging the election of the appellant, *inter alia*, on the ground that he was disqualified by reason of the subsisting contracts with the government in terms of the provisions contained in section 9 (A) of the Representation of the People Act, 1951. The high court allowed the election petition and declared the election of the appellant as void since the Corporation set up under MGMIDC and MJP were statutory corporations wholly controlled by the state government and hence fell within the expression "state" under article 12 of the constitution. Since the said Corporations were wholly controlled by the state government they are the same as the "state government". The two corporations therefore could be termed as appropriate government within the meaning of section 9(A) of the Act. The following three questions arose for consideration of the court:[216]

(i) Whether a statutory body or authority which answers the definition of "state" under article 12, for the purposes of Parts III and IV of the Constitution, is an "appropriate government" for the purposes of section 9(A) of the Act, and
Whether GMIDC and MPJ can be termed as "appropriate government" (that is "state government" having regard to definition under section 7 of the Act) for the purposes of section 9(A) of the Act.

(ii) Whether the contract dated 19.05.1996 entered into by the appellant with the state government continued to be a contract with the state government, after its transfer to GMIDC with effect from 1.10.1998.

216 *Id.* at 687-88.

(iii) Whether the appellant incurred any disqualification under section 9(A) of the Act on account of its contract dated 19.05,19996, 31.12.1998 and 12.04.1999?

While answering the first question, the court held, that there is a clear distinction between "instrumentalities of the state" and the "state government" though both may answer the definition of "state" under article 12 for the limited purpose of part III of the Constitution. Raveendran J speaking for the court held, that 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 and that the term "state government" in its ordinary sense does not encompass in its fold either a local or statutory authority. It follows, therefore, that though GMIDC and MPJ fall within the scope of 'state' for the purposes of part III of the Constitution, they are not 'state government' for the purposes of section 9(A) (read with section 7) of the Act". [217]

Answering the second question it was held that section 9 of the Act would be attracted if the contractor has some obligation to perform towards the state government on the relevant date. The court found that from the appointed day i.e., 1.10.1998 the Tawarja Project with all rights, liabilities and obligations of the state government stood vested in and transferred to the corporation (GMIDC) and hence as a consequence all rights, liabilities and obligations under the contract in question stood statutorily vested in and transferred to GMIDC. The contract thus ceased to be a contract with the state government from 1.10.1998.[218] Since on the date of filing of nomination by the appellant and scrutiny of the nomination the contract in question was no longer a contract with the appropriate government but only with the corporation (GMIDC) the provisions of section 9(A) were not attracted.

Answering the last question it was held that since the contracts in question on the relevant date were only with the respective corporations and not with "appropriate government", the appellant did not incur any disqualification under section 9(A) of the Act.

XI POWER OF PRESIDENT /GOVERNOR TO GRANT PARDON, REMIT OR COMMUTE SENTENCES

Article 72 of the Constitution confers power on the President to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence where the punishment or sentence is by a court martial; for an offence against any law relating to a matter to which the executive power of the Union extends; and in all cases where the sentence is a sentence of death. Likewise, article 161 confers power on the Governor to grant such pardon, remission of punishment

217 *Id.* at 694-95.
218 *Id.* at 698-99.

or sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the state extends.

Although the power so vested in the President and the Governor are in absolute terms and without any limitation, yet questions have arisen as to the scope and nature of such powers. A constitution bench in *Maru Ram* v. *Union of India*[219] on a detailed analysis of the provisions of the Constitution and sections 330A and 433A of the Code of Criminal Procedure, 1973, held that the power of pardon, commutation and release is a very wide power vested in the President and the Governor, respectively. Such powers like all other public power including constitutional power shall never be exercisable arbitrarily or *mala fide* and, ordinarily, guidelines for fair and equal execution are guarantors of the valid exercise of power. Speaking for the court Krishna Iyer J held that the wide power to grant pardon, commutation and release cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course.[220] It was clarified that the power of pardon under article 72 and 161 of the Constitution are to be exercised by the President and the Governor with the aid and advice of the appropriate government. The President and the Governor do not, on their own, exercise the powers to grant pardon; they are bound by the advice of the government. Rejecting the contention that the court should lay down guidelines for exercise of such powers, it was held that considerations for exercise of power under section 72 and 161 of the Constitution "may be myriad and their occasions protean, and are left to the appropriate government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or *mala fide*. Only in these rare cases, it was held that the court would examine the exercise of such powers.

This decision though was followed by a constitution bench in *Kehar Singh*,[221] it was held that "the power of clemency was capable of exercise on a variety of grounds, for reasons of state as well as the desire to safeguard against judicial error."[222] Pathak J, speaking for the court, held that "it is apparent that the power under Art. 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this court".[223] It was further held that when the decision of Parliament regarding grant or refusal of the pardon before the court, the court would not be concerned with the merits of the decision nor can the court ask for the reasons of the President's order. The manner of consideration of the petition for grant of pardon lies within the discretion of the President and it is for him to decide how best he can acquaint himself with all the information

219 (1981) 1 SCC 107.
220 *Id.* at 147 para 62.
221 *Kehar Singh* v. *Union of India,* (1989) 1 SCC 204.
222 *Id.* at 211.
223 *Id.* at 214.

that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him or he may send for further material relevant to the issues which he considers pertinent. It was held that the matter lies entirely within his discretion. Declining to draw up a set of guidelines for regulating the exercise of the power, the court held that "It seems to us that there is sufficient indication in terms of Art. 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case."[224]

A division bench of two judges in *Satpal*[225] following a three judge bench decision in *Swaran Singh's* case[226] quashed the order passed by the Governor granting pardon remitting the unexpired portion of the sentence based on one Shri Siriyans Kumar Jain, who was convicted by the Supreme Court for an offence under section 302 read with sections 149 and 120 B IPC and sentenced to undergo life imprisonment. On an examination of the case, the court reached the conclusion that the Governor had not applied his mind to the materials on record and had mechanically passed the orders just to allow the prisoner to overcome the conviction and sentence passed by this court. One of the striking features of the order dated 25.1.1999 passed by the Governor was that while remitting the unexpired portion of the sentence the order passed by the Governor clearly indicated that the Governor of Haryana is pleased to grant pardon remitting the unexpired portion of the sentence passed on prisoner, who was then confined in the Central Jail, Hissar. Whereas the prisoner was not in fact in the Central Jail, Hissar on that date and on the other hand after obtaining the order of pardon and remission of sentence, he surrendered before the court of Sessions Judge, Hissar on 2.2.1999 and also was released on the very same day in view of the order of Governor dated 25.1.1999. The court held that the accused was convicted of heinous offence of murder and was sentenced to imprisonment for life. The Governor, before grant of remission of sentence ought to have been made aware of the period of sentence actually undergone by the said convict as well as his conduct and behaviour while he had been undergoing the sentence which would be all germane considerations for exercise of the power of pardon.

In the year under survey, a two-judge bench of the Supreme Court[227] had to consider the validity of an order passed by the Governor of Andhra Pardesh remitting the unexpired period of about seven years imprisonment awarded to respondent no. 2 for being convicted of an offence of murder. The order of the Governor was challenged by the son of the victim in a petition under article

224 *Id.* at 218.
225 *Satpal* v. *State of Haryana*, (2005) 5 SCC 170.
226 *Swaran Singh* v. *State of UP*, (1998) 4 SCC 75.
227 *Epuru Sudhakar* v. *Govt of Andhra Pradesh*, (2006) 8 SCC 161.

32 of the Constitution, *inter alia*, on the ground that the order was passed without application of mind and that the recommendations made by the government for grant of remission were passed on irrelevant materials. Though concurring, the two judges delivered separate opinions allowing the writ petition and quashing the order passed by the Governor. Pasayat J in his opinion tracing the long history of source of power to grant pardon or remission held that the order of the President or the Governor under articles 72 and 161, respectively, could not be subjected to judicial review on merits except within the strict limitations delineated in *Maru Ram's* case.[228] The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court". The exercise of the power of pardon was thus not immune from judicial review though on limited grounds. It was held that considerations of religion, caste, colour or political loyalty are totally irrelevant facts for grant of such relief.

Pasayat J further held that scope of judicial review of the order of the President or the Governor under articles 72 and 161, respectively, are confined to the following grounds:- (a) that the order has been passed without application of mind; (b) that the order is *mala fide*; (c) that the order has been passed on extraneous or wholly irrelevant considerations ; (d) that relevant materials have been kept out of consideration; (e) that the order suffers from arbitrariness. Reiterating that as held in *Satpal*, the power of granting pardon under article 161 is very wide and does not contain any limitation as to the time at which and the occasion on which and the circumstances under which the said powers could be exercised, at the same time, it was held that the exercise of constitutional power by the Governor would be amenable to judicial review only on certain limited grounds. The judge also observed that "the principles of judicial review on the pardon power has been restated in *Bikas Chatterjee* v. *Union of India*.[229] In *Bikas*, the brother of the convict Dhananjoy had filed an article 32 petition in the Supreme Court challenging the order of the President rejecting the prayer for grant of pardon to Dhananjoy Chatterjee who was convicted of rape and murder and was awarded death sentence.[230]

228 *Supra* note 219.

229 (2004) 7 SCC 634.

230 *Dhananjoy Chatterjee* v. *State of West Bengal*, (1994) 2 SCC 220. Dhananjoy Chatterjee was convicted of the offence of rape and murder under ss. 376 and 302 IPC of a young girl who resided in a flat in a multistory building in which Dhananjoy Chatterjee was posted as security guard. The conviction was based entirely on circumstantial evidence and there was no eye witness to the occurrence. One crucial circumstance of the case was recovery of a chain which had a lock of hair tucked to it. Neither the chain nor hair was sent by the IO for forensic examination and report thereby. This chain was identified by one Gauranga Chandra PW 11 who was working as a domestic help in an adjoining flat. Gaurango had identified the chain and has deposed as PW1 that he had given the chain to Dhananjoy about a month prior to the date of the incident.

Rejecting the petition, the constitution bench had held "admittedly the petition for pardon filed before the President of India remained pending receiving his consideration for about six weeks. We have no reason to assume that the President of India has not applied his mind to all the relevant facts and aspects of the case. Nor are we inclined to hold that there is any material which the President considered relevant and was inclined to look into but was not before him or was not called for by him when he took the decision to reject the petition for grant of pardon. …. We do not find that any case has been made out for making a departure for the presumption and assumption which attaches with the order of the President of India passed under article 72 of the Constitution".

Although the earlier two constitution bench decisions specifically declined to call for the reasons in support of the order granting pardon or remission, the *amicus curiae* appearing in the case, however, contended[231] that reasons are to be indicated in the orders passed by the President or the Governor, as the case may be, and that in the absence of such reasons the exercise of judicial review would be affected. Pasayat J though noticed that it was expressly held in *Kehar Singh* that there was no question of the court asking for the reasons for the President's order, held the that "absence of any obligation to convey the reasons does not mean that there should not be legitimate or relevant reasons for passing the order."[232] Analyzing the factual background that led to the passing of the order of remission by the Governor it was held that though the Governor had obtained the advice of the three district level officials, the information furnished by them were irrelevant and based on extraneous materials. Scrutinizing the various reports which formed the basis of the order of pardon made by the Governor,

> The prosecution did not lead any evidence as to how PW 11 came to identify the chain on the basis of which the police could gather the information that the PW 11 could be in a position to identify the chain. No explanation was given by police as to why PW 1 was not suspected to be possible offender since the chain and the lock of hair were material objects exhibited at the trial, the courts right up to the Supreme Court had the opportunity to get the lock of hair examined forensically under DNA test would have established the link between the accused and the chain. Even the Supreme Court did not consider these circumstances and summarily dismissed the contention of defense, his observation "there was no cross examination of this witness to challenge this part of his testimony". If the law laid down in *Kehar Singh II* were to be applied in *Dhananjoy* case as the precedent was it not required to consider this crucial circumstance which broke the chain of circumstances pointing the guilt of Dhananjoy in view of a serious doubt as regards the possibility of the presence of PW1 at the time and scene of occurrence. This raises a vital question as to whether a sentence of death could at all be imposed in the case of conviction based purely on circumstantial evidence particularly when a human error in the decision making process could not possibly be ruled out and as the sentence executed could not be reversed.

231 *Supra* note 227 at 182, para 38.

232 *Id.* at 182, para 38.

Pasayat J held that "with such pliable bureaucracy, there is need for deeper scrutiny when power of pardon/remission is exercised."[233]

Kapadia J, though concurring, delivered a separate opinion clarifying that grant of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. Observing that the exercise of power of pardon is not immune from judicial review he held that "the impugned decision must indicate exercise of power by application of manageable standards and in such cases the courts will not interfere in its supervisory jurisdiction".[234] Explaining the concept of manageable standards, Kapadia J, further held "we mean standards expected in functioning democracy".[235]

Since the exercise of power by the Governor was not backed by any data or manageable standards, Kapadia J, held that "the decision amounts to derogation of an important Constitutional principle of Rule of Law"[236] and hence agreed with Pasayat J that the order passed by the Governor could not be sustained.

XII PUBLIC EMPLOYMENT

Part XIV of our Constitution deals with the services under the Union and the states. Article 309, which appears under chapter I of that part, provides that subject to the provisions of the Constitution, acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with affairs of the Union or of any state. Article 315 appearing under chapter II provides that there shall be a Public Service Commission for the Union and a Public Service Commission for each state. Article 320 enumerates the duties and functions of the Public Service Commissions and provides that the Public Service Commissions have the duties to conduct examinations for appointment to the services of the Union and the states, respectively. It further provides that the respective commissions shall be consulted, *inter alia*, on all matters relating to methods of recruitment to civil services and for civil posts. The respective legislatures have made laws and in the absence thereof rules have been framed by the President or the Governor, as the case may be, in terms of the proviso to article 309 of the Constitution. Inspite of the existence of such statutory regulatory measures, the executive government whether at the centre or at the states have continued to appoint and employ a large number of persons in connection with the affairs of the Union and the states on temporary basis, on contracts, or on casual, daily wage or *ad hoc* basis claiming that exigencies of circumstances demanded the public authorities to resort to such

233 *Id.* at 189 para 57.
234 *Id.* at 191, para 68.
235 *Ibid*.
236 *Id.* at 192 para 69.

recruitments since the regular recruitments, as envisaged under the law by following elaborate procedure, would have led to considerable delay which, the exigencies of the circumstances did not permit. If the executive had been true to their professed stance, they would not only have upheld the rule of law but also would have substantially met the constitutional mandate of equal opportunities in public employment guaranteed under article 16. Unfortunately, the executive governments having taken such *ad hoc* or temporary measures, did not choose to initiate the regular process of recruitment in most cases and continued such *ad hoc* or temporary employments. The respective governments have also continued to recruit employees on such *ad hoc* /temporary basis over the years and, at times, offering lower wages to such employees as compared to the wages paid to the regular employees discharging the same duties and responsibilities. These executive actions had given rise to a series of proceedings before the high courts and also the Supreme Court for nearly last three decades. Initially, the cases that came up before the court concerned claims, founded on the principle of "equal pay for equal work".[237] Although, no fundamental right guaranteed "equal pay for equal work" yet petitions filed under article 32 of the Constitution had been entertained and allowed by the Supreme Court in the light of Directive Principles of State Policy contained in article 39(d) which mandates the state to direct its policy towards securing "equal pay for equal work for both men and women". It is the continuation of such *ad hoc* and temporary employment by the different authorities for years, sometimes for more than decades that give rise to claims by such employees for regularization of their employment. Regularization, in such cases, meant conferment of permanent status to such employees.

Since such recruitments on temporary, *ad hoc* or casual basis were outside the purview of the law and the treatment meted out to such employees by the state governments have not been uniform, the judicial pronouncements in such cases were also not uniform. As the claims of the employees were founded on equity, they received differential treatments at the hands of different benches constituted at different times exploding the myth that judges do not make law but only interpret them. The decisions of the Supreme Court being far from uniform in these respects, led to conflicting decisions rendered by high courts. Finally, a three-judge bench of the Supreme Court referred the question to be resolved by a constitution bench.[238] A constitution bench of five judges in *Secretay, State of Karnataka* v. *Umadevi (3)*[239] finally resolved the conflicts. The court held that there may be occasions when the sovereign state or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the

237 *Randhir Singh* v. *Union of India,* (1982) 1 SCC 618.
238 *Secretary, State of Karnataka* v. *Umadevi (2),* (2006) 4 SCC 44 .
239 (2006) 4 SCC 1.

required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the state governments cannot but be recognized and "there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation".[240] The court, however, hastened to add that such engagements could not be "used" to defeat the very scheme of the public employment. The court also deprecated the practice of high courts under article 226 of the Constitution and of the Supreme Court under article 32 of the Constitution directing absorption in permanent employment of those who have been engaged without following due process of selection as envisaged by the constitutional scheme. In support of its conclusion, the court referred to an earlier decision of a constitution bench in *State of Punjab* v. *Jagdeep Singh*,[241] which, however, declared that though an authority under the government acting beyond its competence had purported to give that person a status which it was not entitled to give, he would not in law be deemed to have been validly appointed to the post or given the particular status, such acts in law could not be deemed either to have validly conferred the particular status or a valid appointment to the post.

Emphasizing the imperative need of the Supreme Court to formally lay down the law on the question involved and to ensure certainty in dealings relating to public employment, the court acknowledged that "the very divergence in approach in this court, the so-called equitable approach made in some, as against those decisions which have insisted on the rules being followed also justifies a firm decision by this court one way or another. It is necessary to put an end to uncertainty and clarify the legal position.[242] Emphasizing that it was necessary to bear in mind the distinction between regularization and permanence in service jurisprudence., the court held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments". These are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments.[243] It was held that only "something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized". Emphasizing the constitutional scheme of public employment it was held further that the executive and for that matter the court could regularize the appointment only in appropriate cases, where the appointment are made following the due procedure even though "a non fundamental

240 *Id.* at 22 para 12.
241 (1964) 4 SCR 964.
242 *Supra* note 239 at 24.
243 *Id.* at 24 para 16.

element" of that process or procedure has not been followed. The court however, did not clarify, under what circumstances one could reach the conclusion that "only something that is irregular for want of compliance with one of the elements in the process of selection which does go to the roots of the process"[244] and what would constitute "a non fundamental element"[245] of the process or procedure required to be followed in a regular appointment presumably because such inferences are to be drawn by the courts depending upon the factual contexts of the case. Further, the judgment does not indicate whether court was apprised of the fact that there are separate set of statutory rules framed by the central government authorizing public employment on temporary, *ad hoc* or tenure basis like central civil services temporary appointment rules. The state governments have also framed similar rules and some of them contemplate absorption of the employees in regular services. But the question is whether these parameters lay down a discernible objective standards for the courts to be followed hereinafter. If, however, criteria with regard to a non fundamental element in the process of recruitment on regular basis is capable of varying interpretation, it is submitted, the very objective of the law laid down by the court in its authoritative pronouncement could be jeopardized and defeated.

The decision of the constitution bench is also significant from the point of the time of its pronouncement when the court faces the criticism of overreaching its limits. On a deep introspection of its own performance, the court concludes that as a result of the court invoking its sympathy and concern; handful of employees who have approached it, has resulted in "a class of employment which could only be called 'litigious employment' like a phoenix seriously impairing the constitutional scheme.". Criticizing its own earlier judgments, the court speaking through Balasubramanyan J observed that "this court has also on occasions issued directions which could not be said to be consistent with the constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable consideration or individualization of justice. The question arises, equity to whom? Equity for handful of people who have approached the court with a claim, or equity for the teeming millions of this country seeking employment and seek a fair opportunity for competing for employment?"[246] Rejecting the contentions of the *ad hoc* and temporary employees seeking regularization that their fundamental rights under articles 14, 16 and 21 of the Constitution would be violative in case their services are not regularized, the court held that the acceptance of such arguments would negate the rights of others who are waiting for public employment and who have the right to seek equal opportunity for competing for public employment.[247] Declaring that the courts

244 *Id.* at 24 para 17.
245 *Id.* at 18 para 5.
246 *Id.* at 18 para 5.
247 *Id.* at 41.

would not be competent to issue a writ of *mandamus* to compel the authorities to regularize the employment of temporarily absorbed persons in public employment, the court, however, hastened to clarify by directing that :[248]

> Union of India, the state government and their instrumentalities should take steps to regularize, as a one time measure, the services of such irregularly appointed employees who have worked for 10 years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement in regularizing or making permanent, those not duly appointed as per the constitutional scheme.

Soon, after the decision of the constitution bench, a bench of two judges had the occasion to apply the law laid down in *Umadevi's* case. In *Mineral Exploration Corporation Employees Union* v. *Mineral Exploration Corpn. Ltd. and Another*[249] the employees union complained that even though the corporation had employed the concerned workmen for a period ranging between 8 years to 20 years but it had neither regularized their services nor paid them regular wages as per the revision of the pay scales. It was alleged that the corporation turned down the demands of the workmen and resorted to the retrenchment of workmen that led to serious industrial unrest. An industrial dispute was referred to the industrial-cum-labour court, Jabalpur. The tribunal by its award held that all workmen concerned were entitled to be regularized and hence it directed the corporation to regularize them within a period of three months and also to pay them regularization scales, increments, dearness allowance etc. The tribunal, however, did not award regular pay scales from the date when the order of reference was made. The corporation challenged the award by filing a writ petition before the high court. The union also preferred a writ petition challenging the award to a limited extent that the relief of regular pay scales and regularization were refused by the tribunal w.e.f. the date of reference. Both the writ petitions were disposed of by the high court by allowing the writ petition filed by the corporation and setting aside the award and by dismissing the writ petition filed by the union. The union challenged the judgment of the high court by an appeal to the Supreme Court. The union relied upon the directions given by the constitution bench

248 *Id.* at 42.
249 (2006) 6 SCC 310.

in *Umadevi* to regularize certain recruitments as a one time measure while the corporation relied on other parts of the same judgment wherein the court had declared that the high court under article 226 of the Constitution and the Supreme Court under article 32 could not direct absorption in permanent employment of those who have been engaged without following the due process of selection. On the basis of the materials placed before it, the court came to conclusion that the nature of work undertaken by the management was permanent in nature and it had been continuously undertaking projects after projects, so that when one project is completed, then the work starts in another project. The court was also satisfied that the temporary employees were required to do work which was required to be done by the skilled employees. From the internal report of the corporation, the tribunal as well as the court came to the conclusion that the corporation had sufficient work and that the financial condition of the corporation was also satisfactory. The court also noticed that:[250]

> Usual practice of the Corporation has been to keep contingent workmen for long duration of time and offering regular appointment periodically which abruptly had stopped due to unfair attitude of the management. Reduction in work leading to poor physical and financial performance has been a result of incompetent and poor management which cannot be allowed to play with the future of thousands of employees and their families.

Drawing inspiration from the directions given by the constitution bench in *Umadevi* with regard to grant of one time regularization within a time frame, the court held that it would be appropriate to regularize the services of workmen who had worked for several years subject however to their substantiating the claims as per the established practice of law. The court remanded the matter to the tribunal for a decision within a time frame with regard to the genuineness and analysis of each of the claims for regularization.

XIII CONCLUSION

Under the traditional theory of separation of powers, the legislature, the executive and the judiciary enjoy separate and distinct domain. Policy making and implementation are conventionally regarded as the exclusive domain of the legislature and the executive, respectively, with the judiciary performing a supervisory function. The Indian Constitution does envisage distinct roles for the three organs of the state. It absorbs the philosophy of the theory of separation of powers, but to an extent. Specific provisions of the Constitution vest in each of these organs powers and functions to be exercised in the

250 *Id.* at 324 para 36.

manner laid down in it. But this division of powers does not carve out mutually exclusive domains as contemplated in the Montesquieun doctrine. What the Constitution contemplates is a separation of *functions* rather than a separation of *powers.* It is well within the scheme of this framework for the legislature and the executive to perform a *judging* function as it is for the executive and judiciary to assume policy making and implementation functions. The ordinance making power of the President is a power to make law and therefore a legislative function, vested in the executive head. When the superior courts, the Supreme Court and the high courts, lay down rules governing the procedure to be followed in courts they perform a legislative function. In matters relating to election and disqualification of members of Parliament for defection under the tenth schedule to the Constitution, significant judicial powers are retained by Parliament.[251] Likewise, in impeachment motions it is the legislature which passes a judicial verdict on proved misconduct by a judge. The field of administrative law is replete with instances where the executive performs judicial functions. Powers exercised by taxation and revenue authorities, licensing authorities, specialized tribunals such as the administrative tribunals, sales tax appellate tribunal, central excise and gold control appellate tribunal, debt recovery tribunal, are judicial powers. The Constitution being a political document, besides a legal document, is subject to interpretation by all the three wings in the course of their functions. But it is the court which is the ultimate interpreter of the Constitution.

The fine balance envisaged in the Constitution is drawn on a system of checks and balances, overlaps and divisions of powers and functions. But overlaps do not mean that one organ can usurp the powers of another.[252] The Supreme Court has itself recognized the differentiation of functions between the executive, legislature and judiciary and reasoned that although the Constitution did not incorporate a rigid separation of powers, no organ could constitutionally assume the powers that essentially belonged to another organ.[253]

The emergence of judicial activism has been attributed to the post-emergency crisis of conscience and public image faced by the judiciary consequent upon its surrender to the might of the political authority in the *Fundamental Rights*[254] case rendered during emergency. The court by a majority of 4:1 held that in view of the suspension of the right under article 21 of the Constitution during emergency, executive actions contrary to the said provisions could not be examined by any court. This decision undoubtedly caused a serious dent to the public image of the court and the judicial independence which had, hithertofor been well accepted. It is perceived by

251 Inserted by the Constitution (Fifty-second Amendment) Act, 1985.
252 *Kihoto Hollohan* v. *Zachillu and Others,* 1992 Supp (2) SCC 651.
253 *In re Delhi Laws,* (1951) SCR 747; *Ram Jawaya* v. *Union of India,* (1955) 2 SCR 225.
254 *ADM Jabalpur* v. *Shiv Kant Shukla,* AIR 1976 SC 1207.

many that the post-emergency judicial activism of the court is a result of its realization that its decision in the *Fundamental Rights* case had cost it the public esteem that it had enjoyed. Whether such perception is true or otherwise, post-1977 mark the beginning of an era that totally transformed the judicial process in this country.

Through public interest litigation and by reason of liberalization of the rule of standing, the court not only facilitated access to the judicial process to the poor and disadvantaged but also permitted its intervention on complex and varied subjects and aspects of life on the allegation of executive and, some cases, legislative inaction. Transcending the limits of what is traditionally known as judicial function, the court not only liberally interpreted the fundamental rights guaranteed under the Constitution to create new rights such as right to work, right to education, right to shelter and the like but undertook virtual legislations by framing schemes for admissions to technical and professional institutions, providing mechanism for determination of fee structure that are to be observed by all such institutions of higher learning, schemes for release and rehabilitation of bonded labour, child labour, laying down norms for functioning of central investigating agencies, like CBI and CVC, laying down norms and schemes for administration of forest areas and constitution of court empowered committees for implementation of such norms, laying down norms of conduct in work places to protect women from sexual harassment in such places, norms for disclosure of antecedents of candidates seeking to contest elections, laying down tests and criteria that limit the powers of the President under article 356, powers of Governor under article 161 and those of the President under article 72 of the Constitution and many more.

The case concerning dissolution of Bihar Legislative Assembly is "a unique case" not only for the reasons suggested by Sabharwal CJ but also for the reason that while conceding that the Governor's report contemplated under article 356(1) of the Constitution is based on the subjective assessment of the situation in the state, the insistence that such satisfaction cannot be "dehors the legitimate inference from the relevant material and that the legitimacy of the inference drawn was open to judicial review"[255] has thrown open many multi-dimensional constitutional issues. The question is, what parameters would satisfy the "legitimacy of the inference" and whether such parameters would provide judicially manageable standards to enable the court to exercise its power of judicial review. The further conclusion that "the Governor is not an autocratic political ombudsman" denies the fact that the Constitution is also a political instrument and that ability of the elected members to an assembly to form a government at the state would essentially involve an assessment from the political perspective of the possible attitude of the elected members who belong to different political parties having different political agenda. Moreover, the finding of fact recorded in the

255 *Supra* note 12 at 108 para 126.

minority decision of Balakrishnan J (as he then was) to the effect that no material had been placed before the court to show that LJP had joined the JD(U)-BJP alliance and that the letter of support produced by one of the petitioners was not even signed by all the MLAs, which fact had not been contradicted in the majority judgment, gives rise to a fundamental question as to whether adjudication on issues like the nature of the satisfaction of the Governor and the President and the extent of courts power of judicial review thereof were at all warranted.

The decision in *Kuldip Nayar*[256] holds that neither federalism nor bicameralism of Parliament are affected by the amendments made to the RP Act, 1951 by doing away with the earlier requirement of only an elector in the state concerned can represent the state as a member in the Council of States. The fact that the provisional Parliament consisting of the members of the Constituent Assembly enacted the R.P. Act 1950 laying down the residence qualification for those seeking membership of the *Rajya Sabha* representing a particular state has been held as not to have the sanctity or normative value of constitutional law only on the ground that when the Act was debated in Parliament no one argued that the residence qualification had already been decided upon by the Constituent Assembly. The debates in the Constituent Assembly on many aspects of the Constitution, however, depict that the members of the said august assembly insisted that many vital aspects could well be expected to be provided for by Parliament by law instead of the Constitution itself laying down such law.[257] In all such cases Parliament was expected to enact only such laws as was desired by the Constituent Assembly. Vital legislations by the provisional Parliament, therefore, undoubtedly had the sanctity and the normative value equal to constitutional law as such laws not only filled the void but also spelt out the silences of the Constitution.

The decision in *Bharat Sanchar Nigam Ltd*[258] rendered by a bench of three judges apparently ignores the mandate of article 145(3) of the Constitution as it interpreted the provisions contained in article 366(29-A)(d) of the Constitution and in the context of use of electro magnetic waves in the cellular phone services and distinguished a constitutional bench judgment[259] on the question whether 'delivery' was an essential condition of sale of goods to attract the liability of sales tax levied by the states. The decision involved complicated technical issues as to whether electro magnetic waves or radio

256 *Supra* note 191.

257 CAD 339 vol.ix 10.8.1949 on draft article 268(corresponding to article 292 of the Constitution) wherein B R Ambedkar observed 'this article specifically says that the borrowing power of the executive shall be subject to such limitations as Parliament by law may prescribe. If Parliament does not make a law it is certainly the fault of Parliament and I should have thought it very difficult to imagine any future Parliament will not pay sufficient or serious attention to this matter and enact a law'.

258 *Supra* note 61.

259 *20th Century Finance Corporation Ltd.* v. *State of Maharashtra*, (2000) 6 SCC 12.

frequencies are 'goods' for the purposes of article 366 (29A)(d) in respect of which no evidence was laid before the court more so when the proceedings did not emanate from any adjudication on merits of such technical issues by the concerned jurisdictional authorities.

The declaration by the court in *Zahira*[260] that the Contempt of Courts Act, 1971 is not a law relating to the power of the Supreme Court with regard to punishment for any contempt of itself and that section 14 of the Act merely prescribes the procedural mode for taking cognizance of criminal contempt by the Supreme Court and that the said provision is not a substantive law conferring contempt jurisdiction raises serious question whether the provisions contained in the Contempt of Courts Act, 1971 other than section 15 which provided for cognizance of criminal contempt are at all applicable to the exercise of the power to punish for contempt of the Supreme Court. Would it, therefore, imply that the provisions contained in section 14 of the Act which lays down the procedure where contempt is in the face of the Supreme Court would also be inapplicable? Does it also imply that as to what constitutes civil contempt and criminal contempt, respectively, as defined in section 2(b) and 2(c) of the Act would equally be inapplicable to the Supreme Court and would that not further imply that it would be open to the court to evolve in each individual case as to what would constitute a contempt of the Supreme Court. The further inference that would follow is that while the high courts would be bound by the provisions contained in section 20 of the Act prescribing the period of limitation for actions for contempt, the said provisions would not bind the Supreme Court and the same consequence would follow as regards the provisions contained in section 12 of the Act which prescribes the punishment that may be imposed by the courts for those who were found guilty for contempt of court. What would then be the scope of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975 framed by the court in exercise of its powers under section 23 of the Contempt of Courts Act, 1972 read with article 145 of the Constitution? Does this decision also lend support to the apprehension expressed by the Sanyal Committee that "there might be as many systems of law of contempt in the country as there are high courts plus one, for the Supreme Court"?

In *Umadevi*,[261] the court undoubtedly made an authoritative pronouncement as regards the scope of appointment to public offices and more particularly regularization of temporary and *ad hoc* appointments ironing out the inconsistent views expressed in the earlier decisions. In the process, however, the court has laid down that regularization can be ordered only in cases where "want of compliance with one of the elements in the process of selection which does not go to the root of the process and in cases where there has been a non-compliance with a non fundamental element." One would only expect that the tests so laid down may not eventually get diluted on their

260 *Supra* note 185.
261 *Supra* note 239.

application in cases arising under varied factual contexts. In fact, the decision that followed immediately in *Mineral Exploration Corporation Employees Union*[262] itself demonstrates that possibility.

The Supreme Court is one of the few public institutions which inspires confidence amongst ordinary citizens. It is imperative that it continues to enjoy such credibility and support. At the same time, judges must remain conscious of our constitutional scheme and the fine balance of power envisaged therein. The health of a democracy hinges upon harmonious and coordinated interaction between the three wings of the government.

262 *Supra* note 249.