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# CONSTITUTIONAL LAW – I
## (FUNDAMENTAL RIGHTS)

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## I INTRODUCTION

THE INALIENABILITY and importance of fundamental rights received unprecedented support from the apex court of India during the period under survey. A nine judge bench wrestled with the ever perplexing questions as to whether fundamental rights are part of the basic structure and whether they can be amended and abridged by constitutional amendments without attracting the wrath of the basic structure theory. Another constitution bench had to deal with the issue of parliamentary privileges and the judicial immunity of speaker's powers of expulsion of parliamentarians for their acts of corruption. The content of many a fundamental right, especially that of equality rights and freedoms, acquired depth and width by judicial interpretations through numerous verdicts as never before. The different benches, both small and large, appeared to be competing with each other in providing an expansive, liberal and sympathetic construction of the constitutional provisions relating to fundamental rights.

## II GENERAL: FUNDAMENTAL-NESS OF FUNDAMENTAL RIGHTS

The fundamental-ness of fundamental rights was the main point for consideration in the nine judge verdict in *I.R. Coelho* v. *State of Tamil Nadu*.[1] It was dealing with the extent of immunity available to the acts and regulations placed in the 9th schedule of the Constitution after the basic structure theory laid down in *Kesavananda Bharati*.[2] According to the court the fundamental rights are reflective of the fundamental values of the Constitution and the fundamentalism of fundamental rights had to be examined having regard to the enlightened point of view as a result of development of fundamental rights over the years. The court found that it was

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1 (2007) 2 SCC 1.

2 See (1973) Supp SCR 1.

imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by court as distinct and separate rights.[3]

Some of the main points relating to the fundamental-ness of the fundamental rights declared or reiterated by this important judgment are as follows:

i) Protection of fundamental rights is a main feature of common law Constitutionalism.[4]
ii) The fundamental rights have enjoyed a special privilege and place in the Constitution.[5]
iii) The fundamental rights have been considered to be heart and soul of the Constitution.[6]
iv) Every fundamental right in part III stands either for a principle or a matter of detail.[7]
v) Articles 14, 19 and 21 represent foundational values.[8]
vi) The test of the infringement of a fundamental right is the actual effect of the law on the right guaranteed.[9]
vii) The development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protection.[10]
viii) A law which has been found by the court to be violative of part-III of the Constitution cannot be protected by placing the same in the 9th Schedule by use of article 31B devise or article 31B read with article 368.[11]
ix) Equality embodied in article 14 is part of the basic structure of the Constitution.[12]
x) Whether violation of equality amounts to destruction of the basic structure of the Constitution has to be found examining the violation in individual cases.[13]
xi) The rights and freedoms created by the fundamental right chapter can be taken away or destroyed by the amendment of the relevant article, but subject to limitation of the doctrine of basic structure.[14]

3 *Supra* note 1.
4 *Id.*, para 44.
5 *Id.*, para 105.
6 *Id.*, para 109.
7 *Id.*, para 103.
8 *Id.*, para 48.
9 *Id.*, para 56.
10 *Id.*, para 60.
11 *Id.*, para 75.
12 *Id.*, para 108.
13 *Id.*, para 95.
14 *Id.*, para 97.

xii) Parliament has power to amend the provisions of part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure of the Constitution.[15]

xiii) The fundamental right under article 32 and the jurisdiction conferred on the Supreme Court by this article is an important and integral part of the basic structure of the Constitution.[16]

xiv) While laws may be added to Ninth Schedule, once article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles.[17]

The court has also dealt with the issue of the apparent possible conflict between fundamental rights and directive principles of state policy. According to the *Coelho* bench, by enacting fundamental rights and directive principles which are negative and positive obligations of the state, the Constituent Assembly made it the responsibility of the government to adopt a middle path between individual liberty and public good. The judges are categoric that the balance between the fundamental rights and directive principles can be tilted in favour of the public good; however, the same cannot be overturned by completely overriding individual liberty.[18]

## III STATE AND ITS INSTRUMENTALITY

Article 12 of the Constitution was the subject matter of interpretation in a few cases before the Supreme Court. In *Deewan Singh* v. *Rajendra Pd. Ardevi*[19] the Supreme Court while considering the meaning of the instrumentality of state under article 12 of the Constitution, has laid down that the expression 'Agency' in context of statutory scheme would not mean that there would exist a relationship of principal and agent between it and the state. An agency of state would mean a body which exercises a public function. Ordinarily it would also mean an instrumentality of the state. It would itself be a state within the meaning of article 12 of the Constitution of India. But, according to the court, a statutory authority in the absence of the provision of a statute cannot be treated to be an agency of the state.

The applicability of part-III of the Constitution and especially article 16(4) to co-operative societies without 51% state paid-up share capital was considered in *Madhya Pradesh Rajya Sahakari Bank Maryadit* v. *State of Madhya Pradesh*[20] and it has been laid down that registrar of co-operative

15 *Id.*, para 105.
16 *Id.*, paras 37 to 41 – See also the guidelines on the previous cases in para 39.
17 *Id.*, para 114.
18 *Id.*, para 101.
19 (2007) 1 SCR 30.
20 (2007) 2 SCR 1049.

societies can lay down reservation in favour of SC, ST and OBC only in cooperative societies where state has more than 51% of paid-up share capital and not for others. According to the court, the order of registrar cannot be upheld to the extent it does not distinguish cooperative societies with and without 51% state paid-up share capital. [21]

Bharat Petroleum Corporation was held to be a 'state' within the meaning of article 12 in *Bharat Petroleum Corporation Ltd.* v. *Maddula Ratnavalli*.[22] Again in *P.C. Chacko* v. *Chairman, Life Insurance Corporation of India*[23] it was found that the Life Insurance Corporation is a state under article 12 of the Constitution of India and hence its action must be fair, just and equitable but the same would not mean that it shall be asked to make a charity of public money, although the contract of insurance is found to be vitiated by reason of an act of the insured. Similarly, in *Mohan Mahto* v. *Central Coal Field Ltd*.[24] it has been held that a public sector undertaking which is a 'state' within the meaning of article 12 of the Constitution is not only to act fairly but also reasonably and *bona fide*.

However, in *Mohammad Sadiq* v. *State of Uttar Pradesh*[25] the Supreme Court has held that Institute of Engineering and Rural Technology (IERT) is not an instrumentality of state under article 12 of the Constitution of India.[26]

In *Lt. Governor of Delhi* v. *V.K. Sodhi*[27] the Supreme Court held that the State Council of Education, Research and Training (SCERT), was not a 'state'. The employees of SCERT filed a writ petition claiming parity in pay scales and benefits of academic staff of NCERT (National Council of Educational Research and Training). The SCERT took the plea before the high court that the writ petition was not maintainable since it was not state under article 12 of the Constitution. Negating this plea the high court directed SCERT to implement Regulation 57 for providing parity of pay scales. The Supreme Court, however, held that since the government had neither deep and pervasive control nor financial control over matters of SCERT it was not a state or other authority and hence it was not amenable to writ jurisdiction.[28] The court found that SCERT was subservient to the

21 The court relied on *Indra Sawhney & Ors.* v. *Union of India & Ors*., (1992) Supp (3) SCC 217; *M. Nagaraj & Ors.* v. *Union of India & Ors.*, (2006) 8 SCC 212; *Supriyo Basu & Ors.* v. *W.B. Housing Board & Ors.*, (2005) 6 SCC 289.

22 (2007) 6 SCC 81. See also *Madhya Pradesh State Electricity Board* v. *Grasim Industries Ltd*., (2007) 13 SCALE 46.

23 (2007) 13 SCALE 329.

24 (2007) 8 SCC 549.

25 (2007) 8 SCC 171.

26 *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology and Ors.*, (2002) 5 SCC 111; *Board of Trustees, Ayurvedic and Unani Tibia College, Delhi* v. *State of Delhi (Now Delhi Administration)* and *Another*, AIR 1962 SC 458; and *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722, were relied on.

27 (2007) 8 SCR 1027.

28 Reliance was placed on *Chander Mohan Khanna* v. *N.C.E.R.T. & Ors*., (1991) 4 SCC 578.

provisions of the Societies Registration Act rather than to the state government and that the intention was to keep SCERT as an independent body and the role of the state government could not be compared with that of the central government in the case of Council of Scientific and Industrial Research.

In the instant case the court also held that there is no simple litmus test, to determine whether an entity was a state or other authority within the meaning of article 12. According to the court, various facets of the foundation and the working of the entity would be relevant in determining the question in the context of the duties entrusted to it or taken up by it for performance.

## IV LAWS INCONSISTENT WITH FUNDAMENTAL RIGHTS

Securing paramountcy of the fundamental rights is the main object of article 13 which declares all laws inconsistent with or in derogation of the fundamental rights as void. There was a time when even a constitutional amendment was considered as law within the definition of law in article 13. However, clause 4 inserted by the Constitution (Twenty-fourth Amendment) Act, 1971 seeks to ensure that a constitutional amendment did not fall within the definition of law in article 13 and its validity could not be challenged on the ground that it violated a fundamental right. While upholding the validity of the said amendment, the Supreme Court had in *Kesavananda Bharati* v. *State of Kerala*[29] laid down that there were some basic features of the Constitution constituting its basic structure which could not be amended under the amending power. Now a nine judge bench in *I.R. Coelho* v. *State of Tamil Nadu*[30] has stated that an amendment of the Constitution by Parliament is not an exercise of any constituent power but merely of its legislative or law-making power. Thus, despite clause (4) of article 13, a constitutional amendment under article 368 is treated as law, that too amenable under article 32, on the ground that it in effect violates such fundamental rights which are foundational and thus form part of the basic structure of the Constitution.

In *Institute of Chartered Financial Analysts of India* v. *Council of the Institute of Chartered Accountants of India*[31] it was laid down that if a notification issued under a statute is a law within the meaning of article 13(3)(a) of the Constitution, the same is liable to be struck down if it is contrary to any of the fundamental rights guaranteed under the Constitution.

29 *Supra* note 2.
30 *Supra* note 1.
31 2007 AIR SC 2091: (2007) 6 SCR 1127.

## V RIGHT TO EQUALITY

Right to equality has been considered as one of the basic features and hence part of the basic structure of the Constitution. This view was reiterated by a nine-judge bench in *I.R. Coelho*[32] wherein it was held that articles 14 together with articles 19 and 21 represented the foundational values which form the basis of rule of law.

**Article 14 a positive right**

It is an oft repeated principle that article 14 of the Constitution of India cannot be invoked for perpetuating illegality since it carries with it a positive concept. This was restated in *Vice Chancellor, M.D. University, Rohtak* v. *Jahan Singh.*[33]

In *Mukund Swarup Mishra* v. *Union of India*[34] the court has held that it is not open to the allottees of petrol pumps whose allotments have been found to be vitiated to plead equity under article 14 of the Constitution. According to the court, even the doctrine of promissory or equitable estoppel would not apply in such a case.

The fact that a similarly situated person has been illegally granted relief is not a ground to direct similar relief to another, since that would be enforcing a negative equality by perpetuation of an illegality which is impermissible in law.[35] The court found as invalid the exemption granted in respect of films made by film institutes and film entered by *Doordarshan* for entry in national film awards since there was no basis for a classification treating entries by *Doordarshan* as a special class requiring exemption. Therefore, it was directed that exemption in favour of film institutes and entries made by *Doordarshan* are illegal and other film makers cannot claim similar exemption.

In *Bihar Public Service Commission* v. *Kamini*[36] it was laid down that if some ineligible candidates were wrongly treated as eligible, respondent could not insist that she also must be treated as eligible though she was ineligible. According to the court such wrong action cannot give rise to equality clause enshrined by article 14 of the Constitution. It was held that misconstruction of a provision of law in one case did not give rise to a similar misconstruction in other cases on the basis of doctrine of equality. The court followed its earlier decision in *University of Mysore* v. *Govinda Rao*.[37]

The apex court has unequivocally found in *State of Kerala* v. *K. Prasad*[38] that the division bench of the high court was not justified in directing the

32 *Supra* note 1.
33 (2007) 5 SCC 77.
34 (2007) 2 SCC 536.
35 *Directorate of Film Festivals* v. *Gaurav Ashwin Jain*, (2007) 4 SCC 737.
36 (2007) 5 SCC 519.
37 (1964) 4 SCR 576.
38 (2007) 7 SCC 140.

state government to accord the same treatment which had been given to two other schools, which had been upgraded ignoring the statutory rules. The court relied on its earlier decisions to hold that article 14 embodies guarantee against arbitrariness but not assume uniformity in erroneous actions or decisions.[39]

The court also referred to some of the previous decisions to lay down that an order made in favour of a person in violation of the prescribed procedure cannot form a legal premise for any other person to claim parity with the said illegal or irregular order.[40]

An action/order contrary to law does not confer any right on any person for similar treatment. Equality clause provides for only positive equality but not negative. This principle was again declared in *Vishal Properties Pvt. Ltd.* v. *State of Uttar Pradesh*.[41] The court was of the view that removal of unauthorized constructions and rejection of prayer for change of land use could not have been faulted with on the ground that authorities acting in irregular manner in case of some others, since it did not confer any legal right on appellant to claim similar benefit.[42]

**Classification or class legislation**

Article 14 prohibits only class legislation and not classification based on intelligible differentia which distinguishes those that are grouped together from those left out provided that differentia has rational relation with objects sought to be achieved by the Act. In *P.K. Kapur* v. *Union of India*,[43] this proposition was followed and it was held that the government is always entitled to classify officers who stood retired *vis-à-vis* the officers whose tenure of service got reduced due to invalidment. The court relied on its earlier decision in *Union of India* v. *P.N. Menon and Others*,[44] wherein it was held that pay revision can invite a cut-off date.

The grant of pro-rata pensionary benefits and denial of service weightage to a specific class of retirees, are not arbitrary and discriminatory as found by the apex court in *Union of India* v. *A.S. Gangoli*.[45] The court rejected the plea that there is discrimination against Air Force officers retiring

39 *Chandigarh Administration* v. *Jagjit Singh*, (1995) 1 SCC 745, *Secretary Jaipur Development Authority, Jaipur* v. *Daulat Mal Jain*, (1997) 1 SCC 35; *Ekta Shakti Foundation* v. *Government of NCT of Delhi*, (2006) 10 SCC 337.

40 *Secretary, State of Karnataka & Ors*. v. *Umadevi,* (2006) 4 SCC 1; *Principal, Madhav Institute of Technology and Science* v. *Rajendra Singh Yadav*, (2000) 6 SCC 608.

41 (2007) 10 SCR 910.

42 Reliance was placed on *Sushanta Tagore & Ors.* v. *Union of India & Ors.,* (2005) 3 SCC 16; *Snehprabha* v. *State of U.P. & Ors.,* AIR 1996 SC 540; *Secretary, Jaipur Development Authority, Jaipur* v. *Daulat Mal Jain & Ors.*, (1997) 1 SCC 35; *State of Haryana & Ors.* v. *Ram Kumar Mann*, (1997) 3 SCC 321; *Faridabad C.T. Scan Centre* v. *D.G. Health Services & Ors.*, (1997) 7 SCC 752 etc.

43 (2007) 9 SCC 425. See also *Municipal Committee Patiala* v. *Model Town Residents Association*, (2007) 8 SCC 669.

44 (1994) 4 SCC 68.

45 (2007) 6 SCC 196. Also see *State of Tamil Nadu* v. *Seshachalam*, (2007) 10 SCR 53.

prematurely on personal reasons from those officers retiring prematurely for joining in PSU. It was found that classification was based on an intelligible differentia, which had a rational nexus with the object sought to be achieved.

**Classification based on cut-off date permissible**

In *New Delhi Municipal Council* v. *Pan Singh*[46] it was held that non-grant of the benefit of an award of industrial tribunal to similar employees was not discrimination nor against article 14 when they form a different class having been appointed after the cut-off date. According to the court, a cut-off date having been fixed by the tribunal, those who were thus not similarly situated, could not be treated alike with the others.

In *Achhaibar Maurya* v. *State of Uttar Pradesh*[47] it was held that a statute cannot be declared unconstitutional for conferring benefit to a section of the people. The court found that legislature is entitled to fix a cut off date and a cut off date fixed by statute may not be struck down unless held arbitrary.

**Not to discriminate among similarly situated**

In *State of Karnataka* v. *Karnataka State Patels Sangha*[48] it was held that by virtue of article 14 when two classes of persons are similarly situated then one cannot be discriminated against. In the context of Karnataka Village Officer's Abolition Act, 1961, *Patels vis-a-vis Shanbhogues* both categories were enjoying similar benefits prior to abolition of posts and both were similarly placed and discharging identical duties. According to the Supreme Court in such circumstances differential grant of compassionate allowance was unjustified.

**No wooden equality permissible**

In *Government of Andhra Pradesh* v. *G. Jaya Prasad Rao*[49] it was held that equality clauses under articles 14 and 16 require that dissimilarly placed persons cannot be treated similarly and that wooden equality is not possible. The court examined the validity of the scheme for accelerated promotion of police officers for the outstanding work in the field of anti extremist operation. It found that those who take risk in their life and prefer to face hazardous duties, form a class and they stand differentiated from other class of persons who are not prepared to take risk in their life and want to continue with the normal police duties and seek their promotion in due course of time. According to the court, such classification cannot be looked down as arbitrary or violative of articles 14 and 16 of the Constitution.

46 (2007) 9 SCC 278.
47 (2007) 14 SCALE 425.
48 (2007) 4 SCC 207.
49 (2007) 4 SCR 256.

**Unequals not to be treated equally**

In *Management of Coimbatore District Central Co-operative Bank* v. *Secretary, Coimbatore District Central Co-operative*,[50] it was held that equals must be treated equally and unequal treatment to equals would be violative of article 14 and equal treatment to unequals would also be violative of the 'equal protection clause' enshrined therein. The court found that 134 employees gave up strike call and resumed work but 53 employees continued strike. Disciplinary action against the latter was found to be not discriminative or arbitrary.[51] However, the Supreme Court attempted to temper justice with mercy by observing that "Hence, while declaring the law on the point, we temper justice with mercy. In the exercise of plenary power under article 142 of the Constitution, we think that it would not be proper to deprive 53 workmen who have received limited benefits under the order passed by the Division Bench of the High Court."

In *Union of India* v. *S.R. Dhingra*[52] it was held that when two sets of employees of same rank retire at different points of time, one set cannot claim the benefit extended to the other set on the ground that they are similarly situated. The court found that though they retired with the same rank, they were not of the same class or homogeneous group and hence article 14 had no application.

**Arbitrary taxation**

In *Gupta Modern Breweries* v. *State of Jammu and Kashmir*[53] it was found that the provision for levy of supervisory charge was tax and not a fee and the imposition of tax or fee on the citizens for the services that the state rendered to itself and not to the tax payers was clearly impermissible, arbitrary and unjustifiable. The court found that there is no *quid pro quo* between the fee charged and the services rendered.[54]

**Different taxes on the basis of language**

In *Aashirwad Films* v. *Union of India*[55] it was held that a taxing statute, is not beyond the pale of challenge under article 14 of the Constitution and the extent of reasonability of any taxation statute lies in its efficiency to

50 2007(4) SCC 669.

51 The court relied on *Council of Civil Service Union (CCSU)* v. *Minister for Civil Service;* (1984) 3 All ER 935; *Indian Chamber of Commerce* v. *Workmen*, (1972) 1 SCC 40; *Bengal Bhatdee Coal Co.* v. *Ram Prabesh Singh & Ors*, (1964) 1 SCR 709; *M.P. Electricity Board* v. *Jagdish Chandra Sharma*, (2005) 3 SCC 401; *M.P. Gangadharan & Anr.* v. *State of Kerala & Ors*., (2006) 6 SCC 162; *Union of India* v. *Parma Nanda*, (1989) 2 SCC 177; *Obettee (P) Ltd.* v. *Mohd. Shafiq Khan*, (2005) 8 SCC 47.

52 (2007) 14 SCALE 451.

53 (2007) 6 SCC 317.

54 The court relied on its previous decisions on similar issue, namely, *Khoday Distilleries Ltd.* v. *State of Karnataka*, (1995) 1 SCC 574; *Devi Das Gopal Krishnan* v. *State of Punjab,* (1967) 3 SCR 557; *Indian Mica Micanite Industries* v. *The state of Bihar*, 1971(2) SCC 236.

55 (2007) 6 SCC 624.

achieve the object sought to be achieved by the statute and the classification must bear a nexus with the object sought to be achieved.

The court found that different rate of entertainment tax was discriminatory and it was difficult to laud the objective of the taxation statute in the instant matter which differentiates on the basis of language alone which is definitely derisive of social attributes of the polity and article 14 in its basic form i.e. equality before law.

**Fairness even in subjective satisfaction**

In *Bharat Petroleum Corporation Ltd.* v. *Maddula Ratnavalli*[56] it was held that even subjective satisfaction on the part of 'state' was liable to judicial review and 'state' acting whether as a 'landlord' or a 'tenant' was required to act *bona fide* and not arbitrarily, when the same was likely to affect prejudicially the right of others.

**Equality even in distribution of largesse**

In *Shree Surat Valsad Jilla K.M.G. Parishad* v. *Union of India*[57] it was a case of grant of dealership in petroleum products which was reserved for scheduled caste candidate and the court held that in the distribution of largesse also the state should follow the principle of equality.

**No blind approach permissible**

In *State of Uttar Pradesh* v.*Deepak Fertilizers & Petrochemicals Corporation Ltd*.[58] it was held that classification for the purpose of levy or for exempting tax, cannot be a product of blind approach by administrative authorities on which the responsibility of delegated legislation is vested by the Constitution.[59]

Relying on *Ayurveda Pharmacy* the court found that two items of the same category could not be discriminated and where such a distinction was made between items falling in the same category it should be done on a reasonable basis, in order to save such a classification being in contravention of article 14 of the Constitution.

**Facts to be pleaded**

In *Southern Petrochemical Industries Co. Ltd.* v. *Electricity Inspector and E.T.I.O.*[60] it was held that to attract article 14, necessary facts were required to be pleaded and in the absence, a provision of law could not be

56 (2007) 6 SCC 81.
57 (2007) 5 SCC 360.
58 (2007) 6 SCR 525.
59 The court distinguished the decisions in *Ayurveda Pharmacy & Anr.* v. *State of Tamilnadu,* (1989) 2 SCC 285; *Kerala Hotel and Restaurant Association & Ors.* v. *State of Kerala & Ors.,* AIR 1990 SC 913. Reliance was placed on *Associated Cement Company* v. *Government of Andhra Pradesh and Anr.,* (2006) 1 SCC 597; *State of Assam & Ors.* v. *Naresh Chandra Ghosh (D) by LRs*., (2001) 1 SCC 265.
60 (2007) 5 SCC 447.

said to be violative of equality clause under article 14.[61]

**Arbitrariness in acquisition of property**

Land acquisition matters are not beyond the teeth of the equality rights. The Supreme Court has given its view that courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right to hold property, on the other in *Chairman, Indore Vikas Pradhikaran* v.*Pure Industrial Cock and Chem. Ltd.*[62] The court found that it is improper for the town development authority to declare its intention to formulate town development scheme even without a development plan as it would be an improper, unlawful deprivation of the citizen's right to property and an arbitrary exercise of power.[63]

However, in *Ram Krishan Mahajan* v. *Union Territory of Chandigarh*[64] the court held that the plea that some land earlier notified for acquisition had been released by government under section 48, by itself did not justify the conclusion that there was discrimination in the matter of acquisition of land.

**Land valuation survey by casual employees**

In *Bidhannagar (Salt Lake) Welfare Association* v. *Central Valuation Board*[65] it was held that survey of land valuation made by casual employees and was in violation of natural justice. The court found that the general valuation had been prepared without giving an opportunity of hearing and/or in a most unscientific manner resulting in exorbitant increase in valuation which itself was indicative of arbitrariness, and hence, violative of article 14 of the Constitution.[66]

**Public property by auction**

In *Aggarwal and Modi Enterprises Pvt. Ltd.* v. *New Delhi Municipal Council*[67] it was held that disposal of public property partakes the character of trust and there is distinct demarcated approach for disposal of public property in contradiction to the disposal of private property i.e. it should be for public purpose and in public interest. Invitation for participation in public

61 See, *State of A.P.* v. *National Thermal Power Corpn. Ltd. and Others,* (2002) 5 SCC 203; *Raja Jagannath Baksh Singh* v. *State of Uttar Pradesh,* AIR 1962 SC 1563; *M.P. Vidyut Karamchari Sangh* v. *M.P. Electricity Board,* (2004) 9 SCC 755, etc.

62 (2007) 8 SCC 705.

63 The court followed earlier decisions in *Hindustan Petroleum Corporation Ltd.* v. *Darius Shapur Chenai & Ors.,* (2005) 7 SCC 627; *State of Rajasthan & Ors.* v. *Basant Nahata*, JT 2005 (8) SC 171; *State of Uttar Pradesh* v. *Manohar,* (2005) 2 SCC 126; *Jilubhai Nanbhai Khachar & Ors.* v. *state of Gujarat and Anr.,* (1995) Supp 1 SCC 596; *Rakesh Vij* v. *Dr. Raminder Pal Singh Sethi,* AIR 2005 SC 3593.

64 (2007) 6 SCC 634.

65 (2007) 6 SCC 668.

66 The court relied of the case of *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

67 (2007) 8 SCC 75.

auction ensures transparency and it would be free from bias or discrimination and beyond reproach.[68]

**Vagueness in tender terms**

In *Reliance Energy Limited* v. *Maharashtra state Road Development Corporation Ltd*.[69] it was held that when tenders are invited, terms and conditions must indicate with legal certainty, norms and benchmarks. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment.

**Change in policy**

In *Dhmapur Sugar (Kashipur) Ltd.* v. *State of Uttaranchal*[70] it was held that the government has power to frame and reframe, change and rechange, adjust and readjust policy. The said action cannot be declared illegal, arbitrary or *ultra vires* the provisions of the Constitution only on the ground that earlier policy had been given up, changed or not adhered to.

**Armed forces**

In *Sheel Kumar Roy* v. *Secretary M/O Defence*[71] it was held that fairness and reasonableness in the action of the state whether in a criminal proceeding or otherwise is the hallmark of article 14 of the Constitution and hence a person merely by joining the armed forces does not cease to be a citizen or be deprived of his human or constitutional right.[72]

**Fairness not charity**

In *P.C. Chacko* v. *Chairman, Life Insurance Corporation of India*[73] it was held that Life Insurance Corporation as a state its action must be fair, just and equitable but the same would not mean that it shall be asked to make a charity of public money, although the contract of insurance was found to be vitiated by reason of an act of the insured.

**Applicability of expired criminal provision**

In *Vijaykumar Baldev Mishra* v. *State of Maharashtra*[74] the court considered the constitutional validity of section 1(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1987. By virtue of the said provision prosecution under TADA was to be continued although the life of the Act had expired provided the act in question was committed when the Act was in

68 *State of UP* v. *Shiv Charan Sharma*, AIR 1981 SC 1722; *Ram and Shyam Company* v. *State of Haryana*, (1985) 3 SCC 267; *Sterling Computers Ltd.* v. *M & N Publications Ltd.*, (1993) 1 SCC 445, etc. were referred.

69 (2007) 8 SCC 1.

70 (2007) 8 SCC 418.

71 (2007) 7 SCR 475.

72 The court referred to *Nirmal Lakra* v. *Union of India & Ors*, (2003) 1 SLJ 151.

73 (2008) 1 SCC 321.

74 (2007) 7 SCR 601.

force. According to the court, it did not stand to reason that a certain act would be treated as a crime if committed within one time period, but it would not be a crime if committed thereafter. The court opined that the said provision was violative of article 14 of the Constitution and liable to be struck down as unconstitutional, but since the said point was not raised in the present appeal the court stated that it was not a final opinion.

**Expanded scope of article 14**

In *Divisional Manager, Aravali Golf Club* v. *Chander Hass*[75] it was held that the expanded scope of article 14 should be resorted to only in exceptional circumstances when the situation forcefully demands it in the interest of the nation or the poorer and weaker sections of society but always keeping in mind that ordinarily the task of legislation or administrative decisions is for the legislature and the executive and not the judiciary.

**Prohibition of discrimination on certain grounds**

Whether prohibition of women in bar was an impermissible discrimination on the ground of sex was one of the issues in *Anuj Garg* v. *Hotel Association of India*.[76] As a matter of principle the court has held that when the validity of a legislation is tested on the anvil of equality clauses contained in articles 14 and 15, the burden therefore would be on the state. It is doubtful whether this principle will have binding force in view of the law on the presumption of constitutionality even in such matters as held by several constitution benches of the apex court.

It may appear that the court is bringing through the backdoor the tests of different grades of scrutiny as applied by the courts in the Unite States to the Indian situations even though the Supreme Court has consistently found that these tests are not applicable in the context of Indian Constitution. According to the present bench, protective discrimination statute would entail a two pronged scrutiny: (a) the legislative interference (induced by sex discriminatory legislation in the instant case) should be justified in principle, (b) the same should be proportionate in measure.

Dealing with the issue of prohibition of employment of women in places where liquor is served, the court was of the view that instead of prohibiting of employment of women in bar, state should strive for elimination of sexual discrimination. The court found that the impugned legislation suffers from stereotype morality and outmoded content. The court relied on a number of earlier decisions.[77]

75 (2008) 1 SCC 683: (2007) 14 SCALE 1.

76 (2007) 13 SCALE 762.

77 *Githa Hariharan* v. *Reserve Bank of India*, (1999) 2 SCC 228; *Air India* v. *Nergesh Meerza,* (1981) 4 SCC 335; *Municipal Corporation of Delhi* v. *Female Workers (Muster Roll) & Anr.*, (2000) 3 SCC 224; *Madhu Kishwar & Ors.* v. *State of Bihar & Ors.*, (1996) 5 SCC 125; *Vishaka & Ors.* v. *State of Rajasthan & Ors.*, (1997) 6 SCC 241, etc.

Women would be as vulnerable without state protection as by the loss of freedom because of the impugned Act. The court has found that the present law ends up victimizing its subject in the name of protection. It was of the view that instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach.

In *People's Union for Civil Liberties* v.*Union of India*[78] the court was dealing with the issue of modification of national maternity benefit scheme and introduction of new scheme, namely, Janani Suraksha Yojana, and the court gave different directions for the proper implementation of the schemes.

The challenge to the fact that the percentage of reservation for women was increased from 30% to 33-1/3% and given retrospective effect was the issue in *Marripati Nagaraja* v.*Government of Andhra Pradesh*.[79] The court found that no existing or vested right of any person was taken away and hence the high court erred in restricting reservation for women to 30% instead of 33-1/3%.[80]

Reservation for women in judicial service without consultation with the high court was held to be illegal.[81] While setting aside the order of reservation, relief was granted by the Supreme Court to those already appointed in order to do complete justice between parties.

In *Rajesh Kumar Daria* v. *Rajasthan Public Service Commission*[82] the court found that the special provision for women made under article 15(3), in respect of employment, is a special reservation when contrasted with the social reservation under section 16(4). According to the court, these are vertical and horizontal reservations and hence distinct from each other. The court laid down that the principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. It directed that where a special reservation for women is provided within the social reservation for scheduled castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to scheduled castes. According to the court, to this extent, horizontal (special) reservation differs from vertical (social) reservation.

78 2007(13) SCALE 324.
79 (2007) 11 SCR 506.
80 The court relied on the decision in *N.T. Devin Katti* v. *Karnataka Public Service Commission*, (1990) 3 SCC 157.
81 *Manjula Sircar* v. *Harendra Bahadur Singh*, (2007) 7 SCC 488.
82 (2007) 8 SCC 785.

In *Ashoka Kumar Thakur* v. *Union of India*[83] a bench of two judges stayed the implementation of the Central Educational Institutions (Reservation in Admission) Act, 2006 with regard to reservation of 27% for "other backward classes" holding that differentiation or classification for special preference must not be unduly unfair for the persons left out of the favoured groups. The court held that baseless figure of 27% cannot be pressed into service for introducing a statute which has wide ramifications. According to the court, no methodology has been laid down for determining socially and educationally backward classes because caste alone should not be made the basis for identification and non-exclusion of "creamy layer". However, operation of the statute so far as scheduled castes and scheduled tribes are concerned was not stayed. The Act was promulgated in furtherance of newly added article 15 (5) of the Constitution.

**Public appointments to be in tune with scheme of equality**

In recent years the apex court has widened the scope of the equality rights under articles 14 and 16 to a peculiar dimension which has resulted in a kind of double jeopardy to the victims of ad-hoc-ism in government appointments. Now it seems that the court is overseeing a duel between the rights of these aggrieved persons before the courts and the so called equality rights of those imaginary persons who are not before the court and who are imagined to be the would-be candidates for appointment. Thus, a special kind of equality jurisprudence on behalf of the unseen is being developed by some benches of the apex court. This new jurisprudence together with the so called principle that equality cannot be invoked to perpetuate illegality is allowing the government, the biggest employer, to go scot-free granting the same posts for similar future misadventures, while leaving the victims in the lurch.

In *State of Manipur* v. *Y. Token Singh*[84] it was held that an appointment can be offered by the state only after having regard to constitutional scheme adumbrated in articles 14 and 16. According to the court, the state must comply with its constitutional duty, subject to just and proper exceptions, to give an opportunity of being considered for appointment to all persons eligible therefor.

It was reiterated in *State of Orissa* v. *Prasana Kumar Sahoo*[85] that state is bound by the constitutional scheme to treat all persons equally in the matter of grant of public employment as envisaged under articles 14 and 16 of the Constitution. Equality under article 14, is a positive concept. There cannot be any equality in illegality. The court held that if by reason of some misconception or otherwise, the tribunal had granted some relief in favour of some census employees, the same by itself would not confer any legal right upon a person for being absorbed in state services without compliance

83 (2007) 4 SCC 361.
84 (2007) 5 SCC 65.
85 2007(5) SCR 697.

of the mandatory provisions of the recruitment rules and the constitutional scheme adumberated under article 16 of the Constitution.

In *Post Master General, Kolkata* v. *Tutu Das (Dutta)*[86] it was held that in public employment no appointment should be made contrary to the statutory provisions governing recruitment or the rules framed in that behalf under a statute or the proviso appended to article 309 of the Constitution. The court further said that equality is a positive concept and therefore, it cannot be invoked where any illegality has been committed or where no legal right is established.

It was held in *Mahadeo Bhau Khilare (Mane)* v. *State of Maharashtra*[87] that regularisation in service, in cases where the appointments were void *ab initio*, having been made in utter disregard of the existing recruitment rules and/or constitutional scheme adumbrated under articles 14 and 16 of the Constitution would be wholly illegal.

In *Kendriya Vidyalaya Sangathan* v.*L.V.Subramanyeswara*[88] it was held that regularisation of teachers appointed on leave vacancies was improper. Selections were held only at the local level and not on all India level. Keeping in view the nature of the job and in particular that the posts are transferable throughout the country, an opportunity within the meaning of articles 14 and 16 of the Constitution of India would mean an opportunity to all who are eligible therefor.

In *Uttar Pradesh Power Corporation Ltd.* v. *Bijli Mazdoor Sangh*[89] it was held that an industrial adjudicator can vary the terms of contract of employment but it cannot do something which is violative of article 14.

The claim of regularization of an appointment on temporary post is impermissible on a plea that persons similarly situated are still continuing in service. The court found that the said plea is unsustainable as the equity is a positive concept and it cannot be invoked where any illegality has been committed or where no legal right is established.[90]

In *Ashok Kumar Sonkar* v. *Union of India*,[91] the apex court held that appointment of a teacher must conform to the constitutional scheme as adumbrated under articles 14 and 16 of the Constitution and the terms of the Act or the statute or ordinances governing the field. The court found that indisputably the appellant did not hold requisite qualification on cut-off date and his appointment, therefore, illegal and rightly set aside by the visitor. According to the court, equity jurisdiction cannot be invoked in such a case.

86 (2007) 5 SCC 317.
87 (2007) 5 SCC 524. See also, *Veer Kunwar Singh University Ad Hoc Teachers Association* v. *Bihar State University (C.C.) Service Commission*, (2007) 7 SCR 396.
88 (2007) 5 SCC 326.
89 (2007) 5 SCC 755.
90 *Nagar Mahapalika, Kanpur* v. *Vibha Shukla*, (2007) 7 SCR 488.
91 (2007) 4 SCC 54.

The court in *Madhya Pradesh State Coop. Bank Ltd., Bhopal* v. *Nanuram Yadav*[92] after culling out the principles to be followed in the matter of public appointments, found that the termination of service of duly selected appointee on the basis of report of *Lokayukt* without following service rules was improper. According to the court there was material to show that procedures have been complied with before selecting respondents in vacant posts and hence their services could not be terminated without following the service rules applicable to them. The court found that in the absence of opportunity to the employees, the termination order based on report of *Lokayukt* could not be sustained.

In *National Institute of Technology* v. *Niraj Kumar Singh*[93] it was held that in the matter of appointment, state is under a constitutional obligation to give effect to the constitutional scheme of equality as enshrined under articles 14 and 16 of the Constitution. The court held that appointment on compassionate ground would be illegal in the absence of any scheme providing therefor and such scheme must be commensurate with the constitutional scheme of equality.

It was held in *I.G. (Karmik)* v. *Prahalad Mani Tripathi*[94] that all appointments including compassionate appointments must conform to the said constitutional scheme. According to the court, compassionate employment is an exception in favour of children or relatives of an employee who dies or becomes incapacitated while rendering services. When such an exception has been carved out by this court, the same must be strictly complied with.

However, in *Mohan Mahto* v. *Central Coal Field Ltd*.[95] the court held that the plea of delay in filing application for compassionate appointment was not sustainable when the relevant settlement did not provide for any time limit for filing application.

In *Aryavrat Gramin Bank* v. *Vijay Shankar Shukla*[96] it was held that courts, ordinarily in exercise of judicial review would not interfere with the right to make appointment by an employer unless its action or inaction is found to be wholly arbitrary so as to offend article 14.

The employer has power to prescribe cut off mark. In *Union of India* v. *S. Vinodh Kumar*[97] the court held that if cut-off mark was fixed on rational basis no exception thereto could be taken and the court while exercising power of judicial review, ordinarily, should not intermeddle with such fixation.

92 (2007) 8 SCC 264.
93 (2007) 2 SCC 481.
94 (2007) 6 SCC 162.
95 (2007) 8 SCC 549.
96 (2007) 10 SCR 593.
97 (2007) 8 SCC 100.

In *R. Radhakrishnan* v. *Director General of Police*[98] it was held that denial of appointment on the ground of false statement made by appellant in his verification roll regarding pendency of criminal case against him was correct and justified.

**Service rule discriminating between direct recruits and promotees**

In *Andhra Pradesh Cooperative Oil Seeds Growers Federation Ltd.* v. *D. Achyuta Rao*[99] it was held that if the service rule otherwise appears to be fair, just and reasonable and does not suffer from the vice of articles 14 and 16 of the Constitution or any constitutional guarantee, the mere fact that some little hardship or injustice is caused to someone, is no ground to strike down the rule altogether. However, the court in the present case found that counting the period of officiation and probation in the case of direct recruits and not counting such officiation in the case of promotees was arbitrary and unreasonable and was, therefore, violative of articles 14 and 16 of the Constitution because it left the valuable right of seniority to depend upon the mere accident of confirmation. The court has held that seniority must be determined by rules validly framed or norms enunciated and/or followed which are consistent with the principles enshrined in articles 14 and 16 of the Constitution.

**Right to be considered for Promotion**

In *Shailendra Dania* v. *S.P. Dubey*[100] the court has found that if a candidate is deprived of his right to be considered for promotion on misinterpretation and misconstruction of a statutory provision, it would attract the wrath of article 16. On that ground the earlier decision would not attract the principle of *res judicata*. The court considered the requirement of lesser period of experience in case of higher educational qualification and held that the service experience required for promotion from the post of junior engineer to the post of assistant engineer by a degree-holder in the limited quota of degree-holder junior engineers cannot be equated with the service rendered as a diploma-holder nor can it be substituted for service rendered as a degree-holder.

**Different scales on qualification**

In *Sohan Singh Sodhi* v. *Punjab State Electricity Board, Patiala*[101] it was held that laying down different scales of pay for the employees on the basis of educational qualification *per se* is not discrimination. Parity in the pay cannot be claimed when the educational qualification is different.[102]

98 (2007) 11 SCR 456.
99 (2007) 4 SCR 1.
100 (2007) 5 SCC 535.
101 (2007) 5 SCC 528.
102 The court relied on *P. Murugesan & Ors.* v. *State of Tamil Nadu & Ors*, (1993) 2 SCC 340.

**Different scale for trained and untrained**

It was held that there was a distinction between trained and untrained lecturers and such classification in *State of Bihar* v. *Bihar State +2 Lecturers Associations*[103] was reasonable and rational and there was nothing wrong in prescribing different pay scales for trained lecturers and untrained lecturers.[104]

**Parity in pay**

In *Canteen Mazdoor Sabha* v. *Metallurgical Engg. Consultants (I) Ltd.*[105] it was held that simply because canteen workers were discharging the same duties as those discharged by employees of VIP Guest House, it did not make them eligible for parity in pay. Since there was no relationship of master and servant between the employees of the canteen and Mecon, there was no question of giving them the salary at par with that of the employees of Mecon.[106]

In *S.C. Chandra* v. *State of Jharkhand*[107] it was held that for application of the principle of equal pay for equal work, there should be total identity between both groups i.e. the teachers of the school on the one hand and the clerks in Bharat Coking Coal Ltd (BCCL), and as such the teachers cannot be equated with the clerks of the state government or of the BCCL. The court found that the school in question was not managed by BCCL but it only was extending financial assistance and by that it cannot be saddled with the liability to pay these teachers of the school what was being paid to the clerks working with BCCL or in the Government of Jharkhand.[108].

The court has further laid down referring to a few earlier decisions that fixing pay scales by courts by applying the principle of equal pay for equal work upsets the high constitutional principle of separation of powers between the three organs of the state and hence courts have to avoid applying the principle of equal pay for equal work unless there exits complete and wholesale identity between the two groups.[109]

103 (2007) 6 SCR 631.

104 The court follwed *State of West Bengal* v. *Anwar Ali Sarkar*, (1952) SCR 284; *State of Jammu & Kashmir* v. *Triloki Nath Khosla & Ors.*, (1974) 1 SCC 19; *Shyam Babu Verma & Ors.* v. *Union of India & Ors.*, (1994) 2 SCC 521; *U.P. State Sugar Corporation & Anr.* v. *Sant Raj Singh*, (2006) 9 SCC 82; *Andhra Kesari Educational Society* v. *Director of School Education & Ors.*, (1989) 1 SCC 392.

105 (2007) 7 SCC 710.

106 *M.M.R. Khan & Ors.* v. *Union of India & Ors.*, (1990) Supp. SCC 191; *Management of Reserve Bank of India* v. *Workmen*, (1996) 3 SCC 267; *State Bank of India & Ors.* v. *State Bank of India Canteen Employees' Union (Bengal Circle) & Ors.*, (2000) 5 SCC 531; *State of Haryana & Ors.* v. *Charanjit Singh & Ors.*, (2006) 9 SCC 321 were relied on.

107 (2007) 8 SCC 279.

108 *State of Haryana & Ors.* v. *Charanjit Singh & Ors.*, (2006) 9 SCC 321.

109 *Dhirendra Chamoli and another* v. *State of U.P.*, (1986) 1 SCC 637; *Surinder Singh* v. *Engineer-in-Chief, C.P.W.D.*, (1986) 1 SCC 639; *Randhir Singh* v. *Union of India*, (1982) 1 SCC 618; *State of Haryana* v. *Tilak Raj*, (2003) 6 SCC 123.

In *Union of India* v. *Arun Jyoti Kundu*[110] the benefit of revision was given to typists with effect from 31.1.2000 while in respect of other employees it was given with effect from 1.1.1996 on recommendation of the Fifth Pay Commission. It was held by the apex court that when a concession was being extended as distinct from implementing a specific recommendation of the pay commission with reference to a particular point of time, it is open to the government to provide that the benefit it proposes to give, would be available only from a notified date. Further, the very right to their benefit arose because of decision of the government to extend to them a particular benefit not specified in Fifth Pay Commission. Therefore, it is not possible to postulate that decision of the government must be given retrospective effect. Thus, there would arise no discrimination because the very implementation of Fifth Pay Commission Report would not entitle respondents to any benefit.

**Transfer**

An order of transfer should be in terms of existing rules and an order of transfer cannot prejudicially affect the status of an employee. According to the court, if orders of transfer substantially affect the status of an employee, the same would be violative of the conditions of service and, thus, illegal. Transfers must be made to an equivalent post. Respondents, who were appointed as assistant deputy education inspector (ADEI), were transferred to the post of asstt. project officer/asstt. teacher and those who had been working in those positions were transferred to the posts of ADEI. Indisputably, by reason of such orders of transfer, the respondents suffered civil consequences as the quantum of their pay was reduced. Hence the court found that impugned orders of transfer in any event could not have been passed without complying with the principles of natural justice. [111]

**DPC**

In *Union of India.* v. *A.K. Narula*[112] it was held that where the DPC proceeded in a fair, impartial and reasonable manner, by applying the same yardstick and norms to all candidates in the process of assessment the court will not interfere.

**Promotion by seniority**

In *Valsala Kumari Devi M* v. *Director, Higher Secondary Education*,[113] it has been held that the expression "subject to seniority and suitability" does not mean the comparative assessment of suitability and it only means the suitability for the particular post and the suitability is related to the prescribed qualification and requisite experience. Once the

110 (2007) 7 SCC 472.
111 *Tejshree Ghag* v. *Prakash Parashuram Patil*, (2007) 6 SCC 220.
112 (2007) 7 SCR 262.
113 (2007) 8 SCC 533.

requirement of the prescribed qualification is satisfied, the selection must be made on the basis of the seniority and suitability and there is no scope for making comparison of qualifications or comparative assessment of suitability. The expression 'suitability' means that a person to be appointed shall be legally eligible and 'eligible' should be taken to mean 'fit to be chosen'.

**No right to appointment**

In *State of Madhya Pradesh* v. *Sanjay Kumar Pathak*[114] it was held that as selection process itself was not completed the respondent even if included in select list cannot be said to have acquired any legal right to claim appointment. The court has found that the state, subject to acting *bona fide* as also complying with the principles laid down in articles 14 and 16 of the Constitution of India, is entitled to take a decision not to employ any selected candidates even from amongst the select list.

**Transfer without consent**

In *BCPP Mazdoor Sangh* v. *N.T.P.C.*[115] it was held that writ petition filed against transfer of workmen from a public sector undertaking to private organization without their consent. It was also held that the change of service condition without consent of employees was not sustainable.[116]

**Parity in pay**

In *Union of India* v. *Hiranmoy Sen*[117] the respondents, who were senior officers in the Office of Accountant General, Assam and Meghalaya had made a claim for parity in pay scales with assistants in central secretariat. Rejecting their claim it was held that in the absence of complete identity court cannot order grant of parity in pay scales.

It was held in *State of Punjab* v. *Surinder Singh*[118] that mere discharge of same functions was not sufficient. Complete and total identity must be there between the two similarly situated persons for grant of equal pay. The court has relied on the decision in *S.C. Chandra* v. *State of Jharkhand*.[119]

In *Union of India* v. *Mahajabeen Akhtar*[120] it was held that large number of factors, namely, educational qualifications, nature of duty, nature of responsibility, nature of method of recruitment etc. would be relevant for determining equivalence in the matter of fixation of scale of pay.[121]

114 (2007) 10 SCR 951.
115 (2007) 10 SCR 1084.
116 *Ibid*.
117 (2007) 11 SCR 83.
118 (2007) 11 SCR 707.
119 (2007) 9 SCR 130.
120 (2007) 11 SCR 807.
121 *Ibid*.

**Method of short listing not given in advertisement not permissible**

In *B. Ramakichenin* v. *Union of India*[122] it was held that it was not permissible to resort to a different method of short listing of candidates for appointment, other than the method as prescribed in the advertisement, even if another method is fair and objective.

In the present case, a particular manner of short-listing was prescribed in the advertisement. Hence, it was not open to the UPSC to resort to any other method of short-listing even if such other method could be said to be fair and objective.

**Reduction in cadre strength**

In *Jitendra Kumar* v. *State of Haryana*[123] it was held that duty of public service commission was to see that the entire selection process was carried out strictly in accordance with law fairly, impartially and independently. The court found that showing of any favour to any candidate on an irrelevant or extraneous consideration would be contrary to the constitutional norms of equality envisaged under articles 14 and 16 of the Constitution.

As no arbitrariness was found in the actions of state, neither *Wednesbury* principles of reasonableness nor doctrine of legitimate expectation could be invoked and hence the reduction of cadre strength by the state was found to be valid.

In *Hindustan Paper Corporation Ltd.* v. *Kagajkal Thikadar Sramik Union*[124] it was held that it was not proper for courts to interfere and decide the matter as if there existed no competent authority especially when the matter was before the labour authority. Proper course for the division bench was to direct the authority concerned to decide the issue expeditiously.[125]

In *Lal Mohammad* v. *Indian Railway Construction Co. Ltd*.[126] it was held that there was no violation of article 14 or 16 when employees of a project were terminated at the end of the project giving them the benefits as available under the Industrial Disputes Act, 1947.

In *Mahesh Gupta* v.*Yashwant Kumar Ahirwar*[127] it was held that state in terms of article 16 may make two types of reservations vertical and horizontal. Article 16(4) provides for vertical reservation; whereas clause (1) of article 16 provides for horizontal reservation. Whereas a reasonable reservation within the meaning of article 16 should not ordinarily exceed 50%, reservation for women or handicapped persons would not come within the purview thereof.[128]

122 (2007) 13 SCALE 175.
123 (2007) 14 SCALE 125.
124 (2007) 14 SCALE 457.
125 The court relied on *BHEL Workers Association, Hardwar and Others* v.. *Union of India and Others*, (1985) 1 SCC 630.
126 (2007) 2 SCC 513.
127 (2007) 8 SCC 621.
128 The court relied on the decision in *Indra Sawhney* v. *Union of India*, (1992) Supp (3) SCC 212.

In *Additional General Manager/Human Resources Bharat Heavy Electricals Ltd.* v.*Suresh Ramkrishna Burde*[129] it is held that where a person secures an appointment on the basis of a false caste certificate, he cannot be allowed to retain the benefit of the wrong committed by him and his services are liable to be terminated.

**Right to be considered for promotion**

In *S.B. Bhattacharjee* v. *S.D. Majumdar*[130] the court has reiterated the principle that although a person has no fundamental right of promotion in terms of article 16 of the Constitution, he has a fundamental right to be considered therefor.

In *Hindustan Aeronautics Ltd.* v. *Dan Bahadur Singh*[131] it was held that the position of a government servant was different from a workman in an industrial establishment in the matter of compliance with the principles of natural justice. A permanent government servant has a right to hold the post and he cannot be dismissed or removed or reduced in rank unless the requirements of article 311 of the Constitution or the rules governing his service are complied with.

In *Madhya Pradesh Rajya Sahakari Bank Maryadit* v. *State of Madhya Pradesh*[132] it was held that registrar can lay down reservation in favour of SC, ST and OBC only in cooperative societies where state has more than 51% of paid-up share capital and not for others.

Article 16(1) guarantees to all citizens equality of opportunity in matters relating to employment to any office under the state. By virtue of article 16(2) all citizens are protected against discrimination in respect of any employment on ground only of religion, race, caste, sex and descent.[133]

## VI RIGHT TO FREEDOM: ARTICLE 19

The six freedoms guaranteed under article 19 are necessary not only to protect certain basic rights of the citizens but also to promote certain democratic values. Hence the rights under article 19 have foundational value. The foundational value of article 19 was reiterated by the nine judge bench in *I.R. Coelho* v. *State of Tamil Nadu*[134] holding that article 19 together with articles 14 and 21 represent the foundational values which form the basis of rule of law.

129 (2007) 5 SCC 336.
130 (2007) 6 SCR 743. See also *Coal India Ltd.* v. *Saroj Kumar Mishra*, (2007) 9 SCC 625.
131 2007(6) SCC 207.
132 (2007) 2 SCR 1049.
133 S*tate Bank of India* v. *Somvir Singh*, (2007) 4 SCC 778.
134 *Supra* note 1.

**Freedom of speech and expression**

In *Manzar Sayeed Khan* v. *State of Maharashtra*[135] the court found that investigation and criminal proceedings against an author under sections 153, 153-A, 505(2) and 34 of the Indian Penal Code, 1860 was improper. The court did not find any probability of the offence by author and publishers of the book entitled "Shivaji—Hindu King in Islamic India". The court noticed that the book dedicated to his mother Marie Whitwell Laine, was purely a scholarly pursuit and the author had no intention or motive to involve himself in trouble. The court also found that James W. Laine, the author of the book, has exercised his reason and analytical skills before choosing any literature which he intended to include in his book.

In *Directorate of Film Festivals* v. *Gaurav Ashwin Jain*[136] it was held that the right of a film maker to make and exhibit his film, is a part of his fundamental right of freedom of speech and expression under article 19(1)(a) of the Constitution. However, it was found that the requirement under sections 4 and 5A of the Cinematograph Act, 1952 relating to certification by the board, where the film is intended for public exhibition, by applying the guidance principles set out in section 5B, is a reasonable restriction on the exercise of the said right of speech and expression contemplated under article 19(2), and therefore, constitutional.

In *Baragur Ramachandrappa* v. *State of Karnataka*[137] it was laid down that right of freedom of speech and expression under article 19(1)(a) must be available to all and no person has a right to impinge on the feelings of others on the premise that his right to freedom of speech remains unrestricted and unfettered. The court found that the government has the power to nullify a publication which endangers public order, although the freedom of expression in this situation is undoubtedly restricted even though such freedom "is an indicator of the permanent address of human progress". It is observed that forfeiture of a newspaper or book or a document is a serious encroachment on the right of a citizen, but if forfeiture is called for in the public interest it must without a doubt have pre-eminence over any individual interest. The case related to P.V. Narayanna's novel of 1995 entitled "Dharmakaarana" portraying the story of Basaveshwara, Akkanagamma and Channabasaveshwara narrated in first person, the narrator being Basaveshwara himself which was selected by the Karnataka Sahitya Academy for its annual award as the best novel for the year 1995. However, there were objections from public and some eminent figures in the field of literature and otherwise that some of the statements made therein were objectionable, inflammatory, hurtful and insulting to the sentiments and feelings of the Veerashaivas and the followers of Basaveshwara. The court approved the notification of the government banning the book.

135 (2007) 5 SCC 1.
136 (2007) 4 SCC 737.
137 (2007) 5 SCC 11.

In *Chairman, Indore Vikas Pradhikaran* v. *Pure Industrial Cock and Chem. Ltd*[138] it was held that courts must make an endeavour to strike a balance between public interest on the one hand and protection of a constitutional right to hold property, on the other.

In *All India Anna Dravida Mannetra Khazagam* v. *Chief Secretary, Government of Tamil Nadu*[139] it was held that under article 19(1)(a), nobody had a right to call for "Bandh". A 'Bandh' call was given in state of Tamil Nadu by respondents 3 to 7 political parties for holding a Bandh on 1.10.2007. High Court recorded a prima facie finding that call was given for Bandh and not for strike/hartal. According to the Supreme Court, ordinarily Courts are refrained from passing interim order that has effect of granting main relief but where a party approaches without any laches, court can pass such orders. The court referred to the case in *Communist Party of India (M)* v. *Bharat Kumar.*[140]

**Freedom of profession, occupation, trade or business**

In *Sudhir Madan* v. *Municipal Corporation of Delhi*,[141] the court has dealt with the National Policy on Urban Street Vendors, 2004 with regard to the grant of Tehbazari/Squatting/Vending Rights and considered the rights of the vendors to do their business. The court issued directions regarding no-hawking zones, weekly bazaars etc. to MCD and NDMC to reframe the scheme in the light of its observation.

In *Gupta Modern Breweries* v. *state of Jammu and Kashmir*[142] it was held that trade in liquor is *res extra commercium* and, therefore, not entitled to the protection of article 19(1)(g); but any licensing, regulation or imposition in respect of the liquor trade cannot be arbitrary and discriminatory. However, it was held that levy of supervisory charge was improper and *ultra vires*, since there was no co-relationship between the expenses incurred by the government and the fee sought to be raised and there was no *quid pro quo* between the fee charged and the services rendered and hence no statutory backing.

In *Udai Singh Dagar* v. *Union of India,*[143] the court has found that the notification issued by State of Maharashtra specifying minor veterinary services to be rendered by veterinary science certificate or diploma holder as proper since the relevant provisions constitute a reasonable restriction within the meaning of the first part of article 19(6) of the Constitution and the fundamental rights under article 19(1)(g) thereof.

In *Institute of Chartered Financial Analysts of India* v. *Council of the Institute of Chartered Accountants of India*[144] it was held that excessive

138 (2007) 8 SCC 705.
139 (2007) 11 SCALE 607.
140 (1998) 1 SCC 201.
141 (2007) 8 SCALE 334.
142 (2007) 6 SCC 317.
143 2007(6) SCR 707.
144 2007(6) SCR 1127.

restriction on freedom of trade and business which is not required in the public interest is not reasonable and hence not saved by article 19(1)(6). According to the court the notification imposing restrictions for obtaining a particular qualification was violative of article 19(1)(g) of Constitution. A statutory authority cannot transgress its authority by stating that acquisition of qualification by its members itself would amount to misconduct.[145] The court distinguished its decisions in *The Council of the Institute of Chartered Accountants of India & Another* v. *B. Mukherjee*,[146] *H.A.K. Rao* v. *Council of Institute of Chartered Accountants of India, New Delhi*[147] and relied on the cases in *Probodh Kumar Bhowmick* v. *University of Calcutta and Ors*.,[148] *B.P. Sharma* v. *Union of India and Others*.[149]

In *Reliance Energy Limited* v. *Maharashtra State Road Development Corporation Ltd*.[150] it was held that doctrine of "Level playing field" is an important doctrine embodied in article 19(1)(g) which provides a space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. According to the court, decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in article 19(1)(g) especially in the context of participation in a tender bid. This proposition which is a path breaking one would have far reaching impact.

## VII PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES

In *Pradeep Singh* v. *Union of India*[151] it was held that dismissal from service after summary court martial and withdrawal of petitioner's rank of *naik* did not amount to double jeopardy and the rank being a concession was rightly withdrawn.

In *State of Haryana* v. *Mahender Singh*[152] it was held that no convict has a fundamental right of remission or shortening of sentence and a right to be considered for remission is a legal right which emanates from the Prisons Act and Rules framed thereunder.[153]

## VIII RIGHT TO LIFE AND PERSONAL LIBERTY

Expanding the scope of the fundamental right to life, the court has laid down in *State of Maharashtra* v. *Public Concern for Governance Trust*[154]

145 *Ibid*.
146 (1958) SCR 371.
147 AIR 1967 SC 1257.
148 1994 (2) C.L.J. 456.
149 (2003) 7 SCC 309.
150 (2007) 8 SCC 1.
151 (2007) 5 SCR 358.
152 (2007) 12 SCALE 669.
153 The court relied on *Maru Ram* v. *Union of India*, (1981) 1 SCC 107.
154 (2007) 3 SCC 587.

that right to preserve and protect personal reputation is protected under article 21 of the Constitution. The court has found that authority making adverse comment must provide a chance to affected party to have his say in the matter. According to the court, the right of an individual to have the safeguard of principle of natural justice before being adversely commented upon is statutorily recognized and violation of the same will have to bear the scrutiny of judicial review.

The power of expulsion under article 105(3) of the Constitution is not violative of article 21. According to the court, it is not possible to say that because a 'procedure established by law' is required, it will prevent the power of expulsion altogether and that every act of expulsion will be contrary to the procedure established by law. However, in case where a member's personal liberty is threatened by imprisonment of committal in exercise of parliamentary privilege, article 21 would be attracted.[155]

In *I.R. Coelho* v. *State of Tamil Nadu*[156] it was held that article 21 together with articles 14 and 19 represent the foundational values which form the basis of rule of law.

Right to have hygienic, healthy and safe environment is part of the right under article 21 and therefore, decision of the government to relocate milkmen to a new site cannot be questioned particularly when the state government has taken the decision based on expert's advice in the larger public interest. According to the Supreme Court, the high court had rightly opined that it is the dire need of the city of Jodhpur to relocate the milk dairies which were creating nuisance for the citizens of the city of Jodhpur.[157]

An appeal is indisputably a statutory right and a convicted offender is entitled to avail right of appeal provided under section 374; but a right of appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of article 21 is also a fundamental right. According to the court the right of appeal, thus, can neither be interfered with or impaired, nor can it be subjected to any condition. Even in a case where violation of fundamental right guaranteed under article 21 is alleged, amount of compensation cannot be arbitrary or unreasonable even under public law.[158]

In *Kranti* v. *Union of India*[159] it was held that problems faced by Andaman Nicobar Islanders in the wake of Tsunami including scarcity of potable drinking water, lack of housing and medical facilities violate their right to life. The court issued certain interim directions to mitigate the sufferings of victims, including directions for providing clean drinking

155 *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184.
156 *Supra* note 1.
157 *Milkmen Colony Vikas Samiti* v. *State of Rajasthan*, (2007) 2 SCC 413.
158 *Dilip S. Dahanukar* v. *Kotak Mahindra Co. Ltd.*, (2007) 6 SCC 528.
159 (2007) 6 SCC 744.

water, dry rations, replacement of fishing nets and fishing boats, setting up of cold storages, shelters, health services, legal aid, and compensation for lost land.

In *Sheel Kumar Roy* v. *Secretary M/o Defence*[160] it was held that a person merely by joining armed forces does not cease to be a citizen or be deprived of his human or constitutional right especially the right under article 21.

In *Sahara House* v. *Union of India*[161] the court ruled that it is for the Government of India to accept any financial assistance of the voluntary organizations for the treatment of HIV/AIDS patients and the court cannot direct the acceptance of any such assistance from multinational voluntary organisations which are willing to give financial assistance to the Government of India.

The bail order once it is passed should be complied with most expeditiously and the detenu released otherwise there will be violation of article 21 of the Constitution.[162]

In *State of Haryana* v. *Mahender Singh*[163] it was held that no convict has a fundamental right of remission or shortening of sentence. A right to be considered for remission is a legal right emanating from the Prisons Act and rules framed thereunder.

In *State of Madhya Pradesh* v. *Babu Lal*[164] it was held that sexual violence apart from being a dehumanising act is also an unlawful intrusion of the right to privacy and sanctity of a female and it is a serious blow to her supreme honour and offends her self-esteem and dignity.

Termination of service on the ground of misconduct of judicial officer who was found guilty of commission of large number of misconducts, cannot be questioned on ground of violation of article 21.[165]

In *Directorate of Revenue* v. *Mohammed Nisar Holia*[166] it was held that statutory power to make search and seizure by itself does not offend the right of privacy. However, where a statute confers such power to make search and seizure at all times, the same may be held *ultra vires* unless restrictions imposed are reasonable. According to the court, a person, if he does not break a law would be entitled to enjoy his life and liberty which would include the right not to be disturbed and a right to be let alone is recognized to be a right which would fall under article 21. The court referred to *Sharda* v. *Dharampal*;[167] *District Registrar and Collector, Hyderabad & Anr.* v. *Canara Bank & Ors*.[168]

160 (2007) 7 SCR 475.
161 (2007) 9 SCALE 619.
162 *Shah Nawaz Khan* v. *State of Maharashtra*, (2007) 13 SCALE 460.
163 (2007) 12 SCALE 669.
164 (2008) 1 SCC 234.
165 *Naresh Govind Vaze* v. *Govt. of Maharashtra*, (2008) 1 SCC 514.
166 (2007) 13 SCALE 744.
167 (2003) 4 SCC 493.
168 (2005) 1 SCC 496.

## IX. RIGHT TO EDUCATION

In *City and Industrial Development Corporation of Maharashtra* v. *Ekta Mahila Mandal*[169] it was held that merely because article 21-A of the Constitution has treated primary education as a fundamental right, that does not confer any right on an encroacher to seek regularization of encroachment on the ground that ultimately some children of the particular age group would be taught in the school. Respondent no. 1, a charitable trust, sought for a direction to regularize a plot of land claiming to be under its possession for construction of school building. Record showed that plot in question was reserved for green belt area and there was no policy for regularization and change in reserved area. The court found that regularisation of green belt area was not permissible even for use of school for minor children.

In *Election Commission of India* v. *St. Mary's School*[170] it was held that education is one of the most important functions of the state and holding of election is also of paramount importance but for the said purpose, education of children cannot be neglected. A balance, hence, has to be maintained between the two. The court directed that the services of teachers should not be requisitioned on days on which schools are open. The court relied on *Election Commission of India* v. *State Bank of India Staff Association, Local Head Office Unit, Patna and Others*;[171] *Mohini Jain* v. *State of Karnataka*;[172] *Unni Krishnan, J.P. & Others* v. *State of Andhra Pradesh & Others*;[173] and *Brown* v. *Board of Education*.[174]

The court also referred to the Human Rights Conventions which have imposed a duty on the contracting states to set up institutions of higher education which would lead to the conclusion that the citizens thereof should be afforded an effective right of access to them. According to the court, in a democratic society, a right to education is indispensable in the interpretation of right to development as a human right. The court also took notice that the right to development is also considered to be a basic human right.

## X PREVENTIVE DETENTION

In *Union of India* v. *Harish Kumar*[175] the court reiterated the principle that right to make a representation against the order of detention is the most cherished and valuable right conferred upon a detenue under article 22(5) of the Constitution and if there has been any infraction of such right the detenu

169 (2007) 7 SCC 701.
170 (2007) 13 SCALE 777.
171 (1995) Supp 2 SCC 13.
172 (1992) 3 SCC 666.
173 (1993) 1 SCC 645.
174 347 US 483 (1954).
175 (2008) 1 SCC 195.

is entitled to be released. The person detained has the right to make a representation not only to the officer who made the order of detention but also to the state government and the central government who are competent to revoke the order of detention.

Mere factum of filing of application for bail is not sufficient for detaining authority to arrive at a subjective satisfaction while passing the detention order. Some material must be there on record to justify possibility of release on bail. Co-accused in the instant case was not released on bail. Detaining authority in view of the matter ought to have applied its mind in arriving at a subjective satisfaction. The court therefore, found that the order of detention was unsustainable on that ground alone.[176]

## XI RIGHT TO FREEDOM OF RELIGION

In *Moran M. Baselios Marthoma Mathews II* v. *State of Kerala*[177] the court found that disputed questions in regard to title of the properties or the right of one group against the other in respect of the management of such a large number of churches could not have been the subject matter for determination by a writ court under article 226 of the Constitution in the garb of grant of police protection to one or the other appellants.

Merely because the appellant had a residential house in the portion of property, which was the subject matter of the trust, the same is not outside the purview of the A.P. Charitable and Hindu Religious Institutions and Endowments Act, 1966.[178] In this case idol was installed in the residential premises and construction for residential purposes happened long after dedication. Temple was not established as a private place of worship by the plaintiffs or their family members but it had been established with the help extended by the disciples and members of the public. The court held that it was not a case where the dedication of the property occurred subsequent to the construction of the residential houses. It was also not a case where the idol was installed inside the residential premises.

## XII IMMUNITY AGAINST FUNDAMENTAL RIGHTS

The effect and extent of immunity available to the Acts and regulations included in the IXth schedule by constitutional amendments as per article 31(B) from the challenge based on fundamental rights was considered in detail in the 9-judge bench verdict in *I.R. Coelho* v. *State of Tamil Nadu*.[179] It was held that laws included in the IXth schedule have no absolute immunity.

176 *Sayed Abul Ala* v.*Union of India*, (2007) 10 SCR 631.
177 (2007) 6 SCC 517.
178 *Gedela Satchidananda Murthy* v. *Deputy Commissioner, Endowments Department*, (2007) 5 SCC 677.
179 *Supra* note 1.

While laws may be added to the IXth schedule, once article 32 is triggered, these legislations must answer to the complete test of fundamental rights and every addition therein also triggers article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in part III.

The instant case may be referred to as the second fundamental rights case after the first one in the *Kesavananda Bharati*. The judgment is laudable on different counts including the categorical declaration of the fundamentalness of the fundamental rights. It also clarifies the method to test the validity of an amendment to the Constitution on the touchstone of the basic structure theory. The judgment has also attempted to clarify the question whether the fundamental rights are included in the basic structure of the Constitution and whether an amendment abridging or curtailing fundamental right can affect the basic structure of the Constitution.

While the court has apparently solved long standing disputes and problems relating to basic structure theory and the fundamental rights, the judgment may create further complicated problems in the area of constitutional adjudication not only relating to fundamental rights but also the issue of amendment of the Constitution itself.

The *Coelho* decision appears to overreach the *Kesavananda Bharati* decision and takes one back to the *Golaknath* era. The *Golaknath* principles which were overruled by the majority in *Kesavananda Bharati* have been brought back indirectly by the *Coelho* decision. The distinction between a law under article 13 and an amendment to the Constitution under article 368 appears to have been demolished by the present *Coelho* decision. The question whether Parliament is exercising its constituent power while amending the Constitution or it is a mere legislative power is brought to a disputed position again.

The court appears to have missed the real question before it as per the reference order. The question referred to the 9-judge bench as per the order of reference[180] was different from the question framed and answered by the present 9-judge bench. The *Coelho* bench has framed the question as follows:

> The fundamental question is whether on and after 24th April, 1973 when basic structure doctrine was propounded, it is permissible for the Parliament under article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court.

The reference order framing the question and referring it to a larger bench has major differences with the above question.

180 *I.R. Coelho* v. *State of T.N.*, (1999) 7 SCC 580.

The judgment also has a few inherent contradictions. On the one hand it presumes the validity of article 31(B) of the Constitution and on the other it states that the question of the validity is not before it and at another place it gives the impression that article 31(B) may be invalid once it is challenged. Similarly, on the one hand the court rules that legislations which violate the fundamental rights can be protected by including them in the IXth schedule, on the other hand it holds that the moment article 32 is triggered with regard to post-1973 legislations included in the IXth schedule the fundamental rights test has to be applied and all legislations would be subjected to judicial review on the principles of rights test and essence of rights test. The court also states that the amendment of the Constitution is only an exercise of its legislative power by Parliament and not a constituent power and on the other hand it concedes that by constitutional amendment even the fundamental rights can be abridged. Moreover, it is presumed by the judgment that those parts of the Constitution which is the result of an amending exercise of Parliament is not in any manner less than the parts of the original Constitution.

The court's exercise in creating a hierarchy of fundamental rights for the purpose of testing the basic structure appears to be problematic. The court extols the golden triangle of three fundamental rights of articles 14, 19 and 21 and declares them as part of the basic structure of the Constitution. It appears that the court wants to put on the backburner the fundamental rights like the removal of untouchability, abolishing of bonded labour, the right to freedom of religion, the minority rights, etc., as secondary rights or unimportant rights in the hierarchy of fundamental rights.

It is surprising that an issue of such great importance and also of extreme complex nature did not have any concurring or differing judgment from any other judges constituting the 9-judge bench. Considering the judicial history of interpretation of these provisions it is exceptional and shocking. The posterity would be at a loss in not having the possible points of view of the eminent judges on such an important topic which used to have razor-edge majority as happened in *Golaknath* and *Kesavananda Bharati*.

The court has, of course, conceded that Parliament has power to amend the provisions of part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine and whether the impact of such amendment results in violation of basic structure has to be examined with reference to each individual case. The court has also held that mere possibility of abuse is not a relevant test to determine the validity of the provision.[181]

## XIII RIGHT TO CONSTITUTIONAL REMEDIES

This special right under article 32 which has been long considered as the sentinel on the *qui vive*, has received further fortification and reiteration

181 *Supra* note 1.

through a number of judgments. *Parliamentarians' Expulsion* case and *Coelho* case can be considered as the greatest landmarks in the history of recent years.

Judicial review of expulsion of Members of Parliament from Parliament by the Speaker was the main issue in *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha*.[182] It was held that article 122 prohibits interference with internal parliamentary proceedings on the ground of mere procedural irregularity, however, proceedings which may be tainted on account of substantive illegality or unconstitutionality, as opposed to those suffering from mere irregularity thus cannot be held protected from judicial scrutiny under article 32. There is no absolute immunity available to parliamentary proceeding under article 105(3). The court held that the Supreme Court has jurisdiction to examine the procedure adopted to find if it is vitiated by any illegality or unconstitutionality.

Despite interpreting article 32 in such an expansive manner, the judgment by the majority failed to reach a logical conclusion by striking down the illegal expulsion which would have supported the principles of rule of law and democracy. This is a judgment which will have far reaching consequences not only for the constitutional interpretation but for the democratic process in India. It was directly concerned with the judiciary entering into the holy of holies of Parliament and the parliamentary procedures and privileges. In addition, it involved the sanctity and inviolability of the fundamentalness of the fundamental rights, especially the inviolable liberties of the citizens. But for the sensitivity and the seriousness of the allegations involved, the judgment would have attracted serious in-depth debate. The general attitude appears to be that since the parliamentarians involved were accused of serious acts of corruption, they were not entitled to the constitutional rights as ordinarily available. The only salutary feature of the judgment is that apart from the majority judgment delivered by the then Chief Justice, the country has had the benefit of two more judgments one by Thakkar J, concurring with the Chief Justice and another by Raveendran J, differing from the majority judgment. The judgment by Raveendran J, deserves close analysis and study not only because of his correct view refusing to circumvent and overlook the constitutional provisions for the defense of the involved parliamentarians merely on the basis of the serious allegations of corruption against them but also because of the nuances and issues succinctly dealt with in the said judgment. The opinion of Raveendran J, appears to be the correct one unless one is swept away by the current attitudes of aversion and sense of disgust against corruption and criminalization in the democratic process and among the legislators. The need of punishing such culprits even under a non-existing law may appear to be appealing to any one. Similarly, people are in such a blind

182 2007(3) SCC 184.

hurry not to wait for making appropriate legal provisions to deal with such issues of corruption. It appears that since their action of expelling the said parliamentarians was upheld by the Supreme Court, the speaker and other members of Parliament did not want to criticize the alleged usurpation of their powers through judicial review by resorting to a wide interpretation of article 32.

In *I.R. Coelho*[183] it was held that the jurisdiction conferred on the Supreme Court by article 32 is an important and integral part of the basic structure of the Constitution. No act of Parliament can abrogate or take it away except by way of impermissible erosion of fundamental principles of the constitutional scheme. While laws may be added to the Ninth Schedule, once article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every addition to the Ninth Schedule triggers article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in part III.

A judgment of the apex court is not to be challenged in a petition under article 32; however, the same can be reviewed under article 137 or in exceptional circumstances reconsidered in exercise of inherent power, on a curative petition. The court relied on the decision in *Rupa Ashok Hurra* v. *Ashok Hurra*.[184] The court further held that a final judgment of a high court can be challenged only by an appeal under articles 132 to 134 or by obtaining 'special leave' under article 136 and not by a petition under article 32. [185]

The court has taken a view in *Vikram Dhillon* v. *State of Haryana*[186] that in a writ proceeding under article 32 it is not permissible to cancel the grant of admission to a person lower in rank, due to non-appearance of person higher in rank. For the admission in government dental college, the petitioner in wait list, was ranked higher than respondent-6. Three seats fell vacant due to non-payment of fees by selected candidates. Respondent-6 was admitted, as he was present in college on that date and petitioner could not get admission for not being present on that date. A representation was made by petitioner for the first time after about 18 days stating that he came to know later regarding wrong admission of respondent-6. The court held that in such circumstances, grant of admission to respondent-6 on 30.9. 2004 could not be cancelled at that stage.

A criminal writ under article 32 on the ground of wrongful confinement would not be maintainable when petitioner is not in any kind of detention at the present moment.[187]

In *P.V. George* v. *State of Kerala*[188] it was laid down that the apex court in exercise of its jurisdiction under article 32 or article 142 of the Constitution may declare a law to have a prospective effect.

183 *Supra* note 1.
184 2002 (4) SCC 388.
185 *Sanjay Singh* v. *U.P. Public Service Commission, Allahabad*, (2007) 3 SCC 720.
186 2007 (9) SCC 408.
187 *Vinay Shukla* v. *Union of India*, 2007(2) SCC 464.
188 2007 (3) SCC 557.

The decision of the Speaker in respect of disqualification of a person for being a member of either House of Parliament or legislative assembly and council is not immune from judicial review on grounds like gross violation of natural justice, perversity, bias and such like defects.[189]

Judicial review by the Supreme Court under article 32 is maintainable in a matter questioning the correct criteria for achieving the constitutional goal in identifying the creamy layer of OBC. According to the court, such a matter not only involves interpretation of constitutional provisions but being the subject matter of decisions by this court, it will be improper for it to refuse to undertake judicial exercise in such matters and the level of scrutiny would be more intrinsic than the doctrine of *Wednesbury* unreasonableness.[190]

In *Vishwanath Chaturvedi* v. *Union of India*[191] it was held that it would be wrong in law for the court to judge the petitioner's interest without looking into the subject matter of his complaint and if the petitioner showed failure of public duty, the court would be in error in dismissing the PIL. Therefore, the court directed the CBI to conduct a preliminary enquiry into the assets of all the respondents and after scrutinizing, if a case is made out, to take further action in the matter.

The court in *Vijay Singh Gond* v. *Union of India*[192] refused to grant interim relief in a petition under article 32 when it was likely to create more problems, complications and confusion in a case of transfer of persons belonging to certain scheduled castes as members of scheduled tribes under an Act enacted by a competent legislature. Interim relief of staying the effect and operation of the Act and to permit petitioners to contest the forthcoming assembly election on seats reserved for scheduled castes was prayed. Moreover, the Act came into force in January 2003 whereas the petition under article 32 the of Constitution was filed only in July, 2006.

In *Greater Bombay Co-op. Bank Ltd* v. *United Yarn Tex. Pvt. Ltd.*[193] it was held that validity of an Act can be challenged on ground of lack of legislative competence and violation of any of fundamental rights guaranteed in part III or any other constitutional provision. The court relied on *State of A.P. & Ors*. v. *McDowell & Co. & Ors*.[194] The court found that it is imperative upon courts while examining the scope of legislative action to be conscious to start with presumption regarding constitutional validity of legislation.

The court in *Rubabbuddin Sheikh* v. *State of Gujarat*[195] desisted from issuing a formal writ and the State of Gujarat was directed to submit the final

189 *Rajendra Singh Rana* v. *Swami Prasad Maurya*, 2007(4) SCC 270.
190 *Nair Service Society* v. *State of Kerala*, 2007(4) SCC 1.
191 2007(4) SCC 380.
192 2007(3) SCC 519.
193 (2007) 6 SCC 236.
194 (1996) 3 SCC 709.
195 2007(4) SCC 318.

status report. In this case the petitioner wrote a letter to the Chief Justice of India complaining about the killing of his brother, Sohrabuddin, in a fake encounter and disappearance of his sister-in-law Kausarbi at the hands of the Anti Terrorist Squad (ATS) Police (Gujarat) and Rajasthan Special Task Force (STF). Taking notice of the letter, the court forwarded it to DGP, Gujarat to take action. Enquiry was conducted by CID. Writ petitioner was apprehensive of the safety of his brother, Nayabuddin who was one of the witnesses, and had prayed for a direction to the Gujarat police to produce Kausarbi and for a fair and impartial investigation. Having regard to the facts, some more time was granted to the State of Gujarat before any further action was taken in the matter. As per the recording in action taken report 3, the body of Kausarbi was disposed off by burning it in village Illol, Sabarkantha District.

The court in *University of Kerala* v. *Council, Principals', Colleges, Kerala*[196] dealt with the remedial measures to tackle the problem of 'ragging' in educational institutions. It directed that the committee constituted pursuant to the order of the court shall continue to monitor the functioning of the anti-ragging committees and the squads to be formed and they shall also monitor the implementation of the recommendations.

The court does not have the power to fix salaries and allowances of members of district consumer forums and state commissions. Salaries and other allowances can be prescribed by state government but not by the Supreme Court. When Parliament nominates a particular authority to fix salaries, the court cannot override the clear language, though it can make recommendations.[197]

*In Re: Destruction of Public & Private Properties*[198] where *suo motu* cognizance was taken by the Supreme Court on the basis of reports of media regarding destruction of public and private property and failure of police authorities to take action in the case of Gujjar agitation, the court issued direction to the director general of police of concerned states and the Commissioner of Police, Delhi to file affidavit as to what actions have been taken and are proposed to be taken against offenders.

The court found in *Ashok Pandey* v. *K. Mayawati*[199] that a writ petition seeking a declaration of disqualification to be appointed as chief minister or minister on the plea that since respondents were members of *Rajya Sabha*, the requirement of their being elected to the state legislative assembly within six months would not apply to them was not maintainable since there was no provision in the Constitution under which a person who is elected to a state legislature is prohibited from being appointed as a minister. The court found

196 (2007) 7 SCALE 390.
197 S*tate of Uttar Pradesh* v. *Jeet S. Bisht*, (2007) 6 SCC 586.
198 (2007) 2 SCC (Cr) 351.
199 (2007) 7 SCR 1006.

that in view of the decision in *Dr. Janak Rai Jain* v. *M.D. Deve Gowda*,[200] the petition was sans merit and deserved to be dismissed.

In *People's Union for Civil Liberties* v. *Union of India*[201] the court issued directions to clear the backlog in establishing integrated child development services and *anganwadi* centers. The court made it clear that if there was any non observance of the time period fixed it would be seriously viewed.

It was held in *National Council For Civil Liberties* v. *Union of India*[202] that public interest litigation may be entertained when an issue of great public importance is involved, but not to settle private scores. According to the court, in an application under article 32 of the Constitution there must be an element of infraction of one or the other fundamental rights contained in part III of the Constitution. It was found that though the petition was allegedly filed as a public interest litigation, the facts sought to be projected clearly indicated the grudge harboured by the president of the petitioner-association against Medha Patkar.

In *Aleque Padamsee* v. *Union of India*[203] it was held that if any person is aggrieved by the inaction of the police officials in registering the FIR, the modalities contained in section 190 read with section 200 of the Code are to be adopted and observed.

In *Oil & Natural Gas Corporation Ltd.* v. *City and Industrial Development Corporation, Maharashtra*[204] the court directed that in cases of differences between public sector undertakings, state governments and government departments instead of resorting to writ jurisdiction, it is desirable to have a committee to sort out differences between them.

It was held in *Prestige Lights Ltd.* v. *State Bank of India*[205] that if there is suppression of material facts on the part of the applicant or twisted facts have been placed before the court, the writ court may refuse to entertain the petition and dismiss it without entering into merits of the matter. Very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible. The court found that the appellant suppressed material facts and approached the court with unclean hands hence not entitled to equitable relief.

In *Bal Ram Bali* v. *Union of India*[206] it was held that writ for a direction to completely ban slaughter of cows, horses, buffaloes and chameleon was not within the domain of the court as it was a matter of policy decision. Besides, a complete ban on slaughter could be imposed only by legislation

200 (1997) 10 SCC 462.
201 (2007) 8 SCR 159.
202 (2007) 6 SCC 506.
203 (2007) 6 SCC 171.
204 (2007) 7 SCC 39.
205 (2007) 8 SCC 449.
206 (2007) 6 SCC 805.

enacted by the appropriate legislature. Courts cannot issue any direction to Parliament or to the state legislature to enact a particular kind of law.

It was held in *Fruit Commission Agents Association* v. *Government of Andhra Pradesh*[207] that judicial review is not permissible in the case of fixation of revised rent for shop-cum-godowns allotted to fruit commission agents on lease by the agricultural market committee. Further, it being an executive function the court is not to interfere except on *Wednesbury* principles.

It was held in *Dhamapur Sugar (Kashipur) Ltd.* v. *State of Uttaranchal*[208] that while exercising the extraordinary power of judicial review, the high court or the apex court cannot substitute its decision for the decision taken by the authority which is final under the relevant law. Ordinarily, the high court as well as the Supreme Court would refrain from passing an interim order which would have the effect of granting the main relief ; however, in cases where a party approaches the court without loss of time, and it is not possible to give notice to all the necessary parties and hear them because of paucity of time and in case interim order was not passed, the main case would become infructuous, the court might grant appropriate interim order in such circumstances.

When there exists an arbitration agreement the writ court ordinarily would not exercise its discretionary jurisdiction to enter into the dispute.[209]

In *People's Union for Civil Liberties* v. *Union of India*[210] the court entertained the challenge to the legality of discontinuation of the National Maternity Benefit Scheme and modification of and introduction of a new scheme, namely, Janani Suraksha Yojana in its place and gave directions for its implementation.

Where public interest litigation is nothing but a camouflage to foster personal disputes, such petition is liable to be thrown out. PIL cannot be invoked by a person or body of persons to further their personal causes or satisfy personal grudge and enmity. [211]

A person acting *bona fide* and having sufficient interest in the proceeding of public interest litigation will alone have a *locus standi* and can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. Reliance was placed on *Janta Dal* v. *H.S. Chowdhary*.[212]

A person who approaches court for relief in public interest must not only come with clean hands but also with clean heart, mind and objective. In cases where the court comes to a conclusion that the writ petition was not in public

207 (2007) 8 SCC 511.
208 (2007) 8 SCC 418.
209 *Empire Jute Co. Ltd.* v. *Jute Corporation of India Ltd*., (2007) 11 SCR 388.
210 AIR 2008 SC 495.
211 *Holicow Pictures Pvt. Ltd.* v. *Prem Chandra Mishra*, (2007) 14 SCALE 10.
212 (1992) 4 SCC 305.

interest but yet there exists scope for dealing with the matter in greater interest of public, it must keep out the writ petitioner and appoint an *amicus curiae*. However, this should be done in exceptional cases and not as a routine matter.

In *Divisional Manager, Aravali Golf Club* v. *Chander Hass*[213] the court has observed that courts should not embarrass administrative authorities and must realize that they have the expertise in the field of administration which courts do not possess. Judicial activism is to be resorted to only in exceptional circumstances, when situation demands it in national interest or poor/weaker sections interests. Judiciary should confine itself to proper sphere, realizing that in a democracy many controversies are best resolved in non-judicial setting.

It was held in *Sarabjit Rick Singh* v. *Union of India*[214] that superior courts while entertaining a writ petition exercises a limited jurisdiction of judicial review, *inter alia*, when constitutional/statutory protection is denied to a person; but when it is required to issue a writ of *certiorari*, the order under challenge should not undergo scrutiny of an appellate court.

**Writ petitition maintainable to implement an order**

In *Commissioner, Karnataka Housing Board* v. *C. Muddaiah*[215] the court has laid down that a writ petition is mainatainable to get a previous order implemented. If an order passed by a court of law is not complied with or is ignored, there will be an end of rule of law. A fresh substantive petition, hence, could be filed by him.

The court has held in *Arunima Baruah* v. *Union of India*[216] that access to justice is a human right. A person who has a grievance against a state, a forum must be provided for redressal thereof. The court's jurisdiction to determine the *lis* between the parties, therefore, may be viewed from the human rights concept of access to justice. Same, however, would not mean that the court will have no jurisdiction to deny equitable relief when the complainant does not approach the court with a pair of clean hands.

**Alternative remedy is only a rule of discretion**

In *BCPP Mazdoor Sangh* v. *NTPC*[217] it was held that the availability of alternative remedy for the mainatainability of writ petition is merely a rule of discretion and not the rule of law. In the present case a writ petition was filed against transfer of workmen from public sector undertaking to private organization without their consent. The court found that the petition was maintainable.

213 (2008) 1 SCC 683.
214 (2007) 14 SCALE 263.
215 (2007) 7 SCC 689.
216 (2007) 6 SCC 120.
217 (2007) 10 SCR 1084.

## XV CONCLUSION

The year under survey may be remembered for a number of important decisions concerning the fundamental rights; but no other decision may match the uniqueness and contentiousness of the *IR Coelho* judgment delivered by the nine judge bench. The judgment has provided clarity to the test of constitutionality of constitutional amendment on the touchstone of the basic structure doctrine. Thus, the brooding omnipresence of basic structure has been translated to specific tests for judicial review. Now onwards the judicial platoons can march step by step from 'rights test' to 'essence of rights test' ultimately discerning the destruction of the basic structure of the Constitution with an adjudicative magic wand called the 'impact test'. In the Indian scenario the Constitution is stated to be supreme; however, in the tug of war between parliamentary supremacy and judicial supremacy, constitutionalism may become a casualty lost in the corridors of litigation, mostly adversarial and selectively public interest litigation.

Apart from detailing a technique to test the constitutional amendments on the theory of basic structure, the *Coelho* verdict has placed part III of the Constitution on a very high pedestal. The fundamental rights in part III have been described as transcendental, inalienable and primordial. It is categorically stated, "Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives protection." A right becomes a fundamental right because it has a foundational value, in the words of the judgment. One may wonder whether the Indian Supreme Court has lapped up wholeheartedly the views of the proponents of natural law doctrine. However, by providing the part III of the Constitution a key role to play in the application of the doctrine of basic structure, the fundamental rights have acquired unprecedented importance and relevance even beyond the celebrated fundamental rights case known as *Kesavananda Bharati*.