5

CONSTITUTIONAL LAW – II
(NON-FUNDAMENTAL RIGHTS)

*Krishan Mahajan**

I INTRODUCTION

THE YEAR 2007 saw two constitution benches of the Supreme Court saving representative democracy from its own representatives in the cash-for-query MPs case and the Uttar Pradesh MLAs defection case. Another nine judge constitution bench had to lay down stricter constitutional tests for the valid exercise by Parliament of its power to amend the Constitution. However, it seems that much of the Supreme Court's time in 2007 was spent on sending out the message of constitutional and legal discipline to the Union of India and the various high courts, the judgments of which came up for examination before it under article 136 of the Constitution.The Supreme Court not only had to tell the Union of India its constitutional duty concerning national security but also these high courts the elementary principles like the binding nature of a coordinate bench decision of the same court, alternative remedy, the need to give reasons and what can or cannot be done under article 226 of the Constitution in terms of the repetitive declaration of law by it on an issue.

II MPs PRIVILEGES: ARTICLES 105(3) AND 194(3)

In the cash for query case, *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha*,[1] based on a sting operation showing MPs demanding money for asking questions in a case and in another sting operation showing an MP asking money to let NGOs work under the MP Local Area Development Scheme and to recommend works under this scheme, a five judge constitution bench of the Supreme Court held that it has the constitutional jurisdiction to decide the content and scope of the powers, privileges and immunities of the legislatures and its members; that the powers and privileges of legislatures in India include the power of expulsion of its members; and that the Supreme Court has the jurisdiction to interfere by judicial review with the exercise of the power of expulsion by the legislatures.

* Advocate, Supreme Court; Sterne Fellow & LL.M, Columbia Law School, U.S.A.

1 (2007) 3 SCC 184.

The court pointed out that the power of Parliament to expel for contempt is part of the broad power of contempt of the British House of Commons and the *U.P. Assemby* case[2] only decided one aspect of this power, namely, to issue unspeaking warrants, to hold that such a power was not available under the Constitution of India.The question whether legislatures have the power of expulsion of its members is a matter of interpretation of articles 105(3) and 194(3) and so the final arbiter on this issue is the Supreme Court and not the legislatures. Further, neither Parliament nor state legislatures can claim the power to provide for or regulate their own constitution in the manner claimed by the British House of Commons due to the elaborate provison made in the Constitution's articles 3, 4,79,81 to 85,99,101 to 104,168 to 174,191,330,331 and others. Hence, Parliament and the state legislatures are completely subservient to and controlled by the written provisions of the Constitution of India in regard to the composition and the regulation of the membership thereof. The court reiterated the *U.P. Assembly* case which held that it cannot be accepted in its entirety that all the powers enjoyed by the House of Commons at the commencement of the Constitution of India vest in an Indian legislature, as the legal fiction created by article 105(3) cannot introduce historical facts peculiar to the English Constitution into the Constitution of India.

III DEFECTIONS : SCHEDULE X, ARTICLES 102 AND 191

In *Rajendra Singh Rana* v. *Swami Prasad Maurya*,[3] a five judge constitution bench of the Supreme Court held that an order of the speaker of an assembly under schedule X of the Constitution is open to challenge in the high court under articles 226 and 227 of the Constitution if a speaker without exercising the jurisdiction of deciding the issue of defection under the schedule on a disqualification application pending before him, decides a subsequent application by several MLAs including those whom the pending application alleges have defected, of a split in the party. The claim in an application before the speaker of a split under para 3 of the schedule (as the para existed before its deletion) or of a merger under para 4 of the schedule, is really an answer to a prayer for disqualification of a member/s from the legislature on the ground of defection. Hence the speaker's jurisdiction to decide the issue of a split or a merger arises only after he is seized of the issue of disqualification and so the speaker cannot decide an application of split or merger independently of the application for disqualification by simply postponing a decision on the disqualification application pending before him. Such jurisdictional illegality is violative of the entire constitutional scheme of adjudication contemplated under schedule X read in the context of articles 102 and 191 of the Constitution.It also goes against the rules and the procedure which a speaker is expected to follow. Thus, such a decision of the speaker is liable to be set aside in exercise of the power

2 AIR 1965 SC 745.

of judicial review. Further, there is no snowballing theory of defections recognized by the schedule, the purpose of which was to discourage defections which has assumed menacing proportions undermining the very basis of democracy. This purpose would be defeated if the schedule is interpreted to mean that the date of disqualification of an alleged defector against whom an application has been moved before the speaker, would be the date if and when the speaker chooses to decide the application. The application for disqualification must be decided with reference to the date of quitting of the original party by the alleged defector. The irresistible inference arises of voluntarily quitting the party on whose ticket the alleged defectors had been elected, and no further enquiry or evidence is necessary of the defection, when MLAs of the ruling party meet the Governor alongwith the general secretary of the opposition party to request by letters that the leader of the opposition party be called to form the government in the teeth of the cabinet decision of the ruling party recommending to the Governor the dissolution of the legislature. An MLA or MLAs putting up the defence of a split under the Xth Schedule in answer to an application for his or their disqualification from the house on the ground of defection or voluntarily giving up the membership of the original political party must support the claim of a split in the original party with some *prima facie* evidence of the same in addition to the evidence that one third of the MLAs of the original party in the legislature have separated from it. Para 3 of the Xth Schedule requires both conditions to be fulfilled.As a protector of the Constitution and of its basic feature, namely, democracy, the Supreme Court rejected the normal route of remitting the case to the speaker for deciding the issues of defection and split when the term of the assembly is nearing an end and the question is one of the legality of the continuance as MLAs and ministers of those who had defected from the membership of the ruling party. Accordingly, the Supreme Court decided the case and held that there was defection on the part of the 13 MLAs of Bahujan Samaj Party (BSP) who had gone to the Governor and given him letters to call the opposition leader to form the Government in Uttar Pradesh, in the presence of the general secretary of the opposition party, in the teeth of the BSPs recommendation to the Governor for dissolution of the assembly and nothing had been shown that there had been a split by a faction in the BSP itself.Hence the 13 MLAs stood disqualified with effect from 28.8.2003, the date when they met the Governor, in terms of article 191(2) read with para 2 of the Xth Schedule of the Constitution.

IV AMENDMENT: ARTICLE 368

In *I.R. Coelho* v. *State of Tamil Nadu*,[4] a nine judge bench of the Supreme Court held that Parliament cannot increase the amending power by

3 (2007) 4 SCC 270.
4 (2007) 2 SCC 1.

amendment of article 368 to confer on itself unlimited power of amendment and destroy and damage the fundamentals of the Constitution, nor can it use article 31-B to achieve the same purpose. Firmly asserting judicial review the bench held that all amendments to the Constitution made on or after 24.4.1973 by which the IXth Schedule has been amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution. Further, after a law is placed in the IXth Schedule its validity has to be tested on the touchstone of the basic structure doctrine.The object behind article 31B is to remove difficulties and not to obliterate judicial review. Laws included in the IXth Schedule do not become part of the Constitution. They derive their vailidty on account of the exercise undertaken by Parliament to include them in the IXth Schedule. That exercise has to be tested every time it is undertaken.

V NATIONAL SECURITY AND SC'S MANDAMUS: ARTICLE 141

The message of constitutional and legal discipline had to be sent by the Supreme Court to the Union of India in *Sarbananda Sonowal (II)* v. *Union of India*.[5] Deprecating the attempt by the Union Government to evade its directions in *Sonowal (I)*,[6] in exercise of its powers under section 3 of the Foreigners Act, 1946, the apex court pointed out that instead of implementing its directions, the Union Government had chosen by subordinate legislation, the Foreigners (Tribunals) Amendment Order, 2006, to nullify the *mandamus* issued by it so as to make the 1964 order under the Act inapplicable to the State of Assam.This had been done despite the apex court stating in *Sonowal I* how the interests of national security and the preservation of demographic balance in a part of India were crucial to security and integrity of India. Holding that the directions of the Supreme Court could not be nullified by way of subordinate legislation, the court saw it as "not a commendable attempt to evade the directions''. It added, "when the security of the nation is the issue … it has to be said that the bona fides of the action leave something to be desired.''

VI LEGAL DISCIPLINE IN HIGH COURTS: ARTICLE 226

Disobeying SC's directions/judgments

In *CBI* v. *Ashok Kumar Aggarwal*,[7] the Supreme Court felt sorry that inspite of its specific direction to the Delhi High Court to consider the maintainability of the pending writ petition under article 226, the high court instead had heard the matter on merits and directed the Deptt of Revenue to allow inspection of confidential files pertaining to sanction for prosecution

5 2007 (1) SCC 174.
6 (2005) 5 SCC 665.
7 (2007) 10 SCC 736.

of the respondent.Accordingly the Supreme Court set aside the order of the high court and requested it to take up both the issues of maintainability and the validity of sanction for prosecution simultaneously and decide the same on merits.

The Supreme Court had to point out to the Bombay High Court in *State of Maharashtra & Ors* v. *Ravi Prakash Babulalsing Parmar & Anr*,[8] that it had acted contrary to the Supreme Court's 1994 judgment in *Madhuri Patil* v. *Addl Commissioner, Tribal Development*,[9] by holding in the scheduled tribe certificate verification case of a Thakur, that once a person's surname tallies with the name of the caste or tribe mentioned in the Scheduled Castes and Scheduled Tribes Orders (Amendment Act), 1976, issued under articles 341 and 342 of the Constitution, no enquiry could be launched into the correctness of the scheduled caste or scheduled tribe certificate granted to a person.

Presiding and puisine judge

In *Rajendra Singh Rana* v. *Swami Prasad Maurya*[10] the Supreme Court five judge constitution bench was constrained to point out its unhappiness to the Allahabad High Court at the tardy manner in which it had dealt with the case of defections from the Bahujan Samaj Party of the then Chief Minister Mayawati to the opposition Samajwadi Party of Mulayam Singh Yadav. The constitution bench felt that promptitude apart, the high court should have ensured the avoidance of the unfortunate events, recorded by the senior judge of the two judge bench in which the *puisine* judge took out typed and signed orders and directed the bench secretary to put these on record as his judgment when the orders had not been dictated in open court, the same were not circulated to the senior judge, no consultation had taken place with the senior judge and at no point of time the senior judge had indicated that the judgment in the writ petition may be prepared by the *puisine* judge.

Respecting decisions of coordinate benches

In *Maharashtra University of Health Sciences* v. *Paryani Mukesh Jawaharlal*,[11] the Supreme Court had to tell the Bombay High Court that under article 226 it could not ignore a binding precedent of a coordinate bench concerning the amended Medical Council of India rules and the university ordinance for graduate medical education and instead follow what the Kerala High Court had decided on this issue. If the high court wanted to take a different view, judicial propriety required that the matter be referred to a larger bench

The Supreme Court in *Sankar Deb Acharya* v. *Biswanath Chakraborty*,[12] held that a high court bench acting under article 226 cannot

8 (2007) 1 SCC 80.
9 (1994) 6 SCC 241.
10 (2007) 4 SCC 270.
11 (2007) 10 SCC 201.
12 (2007) 1 SCC 309.

restore a promotion order set aside already by a coordinate bench of that court. The apex court had to intervene and declare as unsustainable the order of the high court since it not only restored the promotion order set aside earlier by a coordinate bench of that court, but had also set aside an order passed by the government pursuant to a writ of *mandamus* issued earlier by another coordinate bench of that court.

In *U.P.Gram Panchayat Adhikari Sangh* v. *Daya Ram Saroj*,[13] the Supreme Court pointed out that judicial discipline and *decorum de minimis* required a division bench seized of an article 226 petition to treat as binding the decision of a coordinate bench. The division bench had a right to take a different view or to doubt the correctness of the decision of the coordinate bench and thereby refer the matter to a larger bench. But it could not, after duly noticing the decision of the coordinate bench, give a decision on the same set of facts contrary to the decision noticed by it as judicial discipline is self discipline.

Interim relief, alternative remedy and no reasons

In *State of U.P.* v. *Desh Raj*[14] it has been held by the apex court that article 226 jurisdiction cannot be used by a high court to grant by an interim order a relief which can be granted only at the final hearing, especially where the appointment is *ex facie* illegal being in violation of the constitutional scheme of equality. The high court while ordering by an interim order the consideration of the claim of the petitioner under the U.P.Regularisation Rules, 2001 directed that pending a decision the appellant would be paid the minimum of the pay scale of a regular mate in the department. Further, his claim for regularization could not be turned down merely because there was no post, in which case, supernumerary posts should be created for compliance with the rules and these posts should continue till a regular post fell vacant.

The Allahabad High Court had to be told by the Supreme Court in *Municipal Corporation Allahabad* v. *Harsh Tandon & Anr*,[15] that under article 226 a high court cannot direct a small causes court to hear a stay application in a case without first deciding the issue of the maintainability of the appeal before it.

In *Dhampur Sugar Mills Ltd* v. *State of U.P.*[16] the Supreme Court pointed out that an appeal within the government against its own policy decision is neither an alternative remedy, nor an equally efficacious remedy to oust a petitioner from the writ remedy under article 226, since such an appeal is from "Caesar to Caesar's wife", an "empty formality" or a "futile attempt." The Supreme Court refrained from expressing any opinion as to whether a state order to reserve molasses from a sugar factory for country

13 (2007) 2 SCC 138.
14 (2007) 1 SCC 257.
15 (2007) 6 SCC 419.
16 (2007) 8 SCC 338.

liquor was violative of the directive principle under article 47 of the Constitution, which requires the state to endeavour to bring about prohibition of the consumption of intoxicating drinks injurious to health.

In *Secretary U.P. High School & Intermediate Education Allahabad & Anr.* v. *H.K. Lal*,[17] the Supreme Court had to point out that article 226 of the Constitution cannot be used by a high court to entertain a writ petition to enforce a civil court decree against which an appeal is already pending. The already existing alternative remedy of a pending appeal ruled out a writ petition. The issue involved was whether the respondent had a legal right to alter his date of birth recorded in the certificate granted by the board.

The Supreme Court held in *M.P. State Agro Industries Development Corporation Ltd* v. *Jahan Khan*,[18] that the rule of exclusion of writ jurisdiction under article 226 of the Constitution is a rule of discretion and not of compulsion. In an appropriate case, inspite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, where the writ petition seeks enforcement of any fundamental rights; where there is a failure of natural justice and where the orders or proceedings are wholly without jurisdiction or the *vires* of an Act is challenged. In these circumstances an alternative remedy does not act as a bar.

In *Union of India and Others* v. *Jai Prakash Singh & Anr*,[19] the Supreme Court had to remind the Allahabad High Court that a high court must give reasons, howsoever brief, in its order indicating an application of mind, all the more when the order is amenable to further avenue of challenge.

In *State of Manipur* v. *Chabungham Thoibisana Devi*,[20] the Supreme Court had to tell both the single judge and the division bench that in a writ petition under article 226 concerning the appointment of assistant government advocate cum assistant public prosecutor, orders cannot be passed without any reasons.

P.K. Balasubramanyan J dissenting with the other judge on the bench Tarun Chatterjee J and referring the matter to a larger bench, held in *Haryana State Industrial Development Corporation* v. *Cork Mfg. Co.*[21] that article 136 jurisdiction of the Supreme Court is a corrective and not a restricted one. The dissenting judge further exhorted the trial courts, the first appellate courts and the second appellate courts of Haryana to show better application of mind while deciding a *lis* keeping in mind that what they are performing is a divine function that is onerous and at the same time challenging. The dissenting judge concluded that he was making these observations regarding the Punjab and Haryana High Court on a matter

17 (2007) 2 SCC 216.
18 (2007) 10 SCC 93.
19 (2007) 10 SCC 712.
20 (2007) 5 SCC 655.
21 (2007) 8 SCC 120.

emanating in Haryana courts since he had been noticing for the last three years with regret the lack of application of mind in many a case that had come before the Supreme Court.

Judicial restraint

In *State of Maharashtra and Ors* v. *Ravi Prakash Babulalsing Parmar & Anr*,[22] the Supreme Court was constrained to advise that high court judges while functioning under article 226 should exercise restraint before making observations of far reaching effect to suggest that all bodies like the caste scrutiny committee and the commissioner be brought within the purview of article 235 of the Constitution or that only judicial officers should be appointed for such a task.In the absence of the state being called upon to make its comments on such a suggestion and the further absence of an empirical study on the functioning of the quasi judicial caste scrutiny committees, the comments of the high court judges were unwarranted.The respondent litigants who had written letters to the judges hearing the matter in the Supreme Court, requesting that the matter may not be remitted to the high court, were not proceeded against under the Contempt of Courts Act, 1971 but directed to pay Rs 25,000 in each of the four appeals as costs of the state government which had come in appeal.

Contractual matters

In *Rajasthan Housing Board* v. *G.S. Investments*,[23] the Supreme Court while reiterating its earlier decisions on the scope of judicial review in contractual matters, held that it was not a function of a high court under article 226 to virtually confirm the bid of the highest bidder by directing the state instrumentality to issue a demand notice to such a bidder for payment of the balance amount when the instrumentality had a right under the rules to decide upon the final acceptance of the bid and had not accepted the bid on grounds of fairness and generation of public revenue.

Service cases

The Supreme Court in *UPSRTC* v. *Ram Kishan Arora*,[24] reemphasised its own earlier judgments that under article 226 a high court cannot substitute its own decision as to the quantum of punishment for that of the disciplinary authority and even if such a course of action is called for then it must remit the matter to the employer for reconsideration of the quantum of punishment. In this case the high court without coming to any conclusion that the quantum of punishment was disproportionate to the gravity of the misconduct of the conductor of the bus reduced the punishment of removal from service to reinstatement without any back wages and stoppage of two increments with cumulative effect.

22 (2007) 1 SCC 80.
23 (2007) 1 SCC 477.
24 (2007) 4 SCC 627.

In *State of Haryana* v. *M.P. Mohla*[25] the Supreme Court had to tell the Punjab and Haryana High Court in the case concerning the pay scale of a Deputy Director of Veterinary Services, Haryana, that a writ for review does not lie in a high court for seeking clarification of a judgment and that the effect of a judgment is different from the judgment itself

The Supreme Court held in *Hindustan Aeronautics Ltd* v. *Dan Bahadur Singh & Ors*[26] that *malis* of a government company cannot approach a high court under article 226 for regularization of their services since they are not government servants covered by article 311 of the Constitution.

In *Bank of India* v. *T. Jogaram*,[27] the Supreme Court noticed with dismay that the division bench of the Andhra Pradesh High Court had chosen to "somersault'' after noting the correct legal position that under article 226 it would not interfere as a matter of course with findings recorded at the departmental inquiry by the disciplinary authority or the enquiry officer and that a high court cannot sit in appeal over those findings to assume the role of an appellate authority. The division bench order was set aside and the order of the single judge was restored.

The Supreme Court in *Ramesh Chandra Sharma* v. *Punjab National Bank*,[28] had to remind the Allahabad High Court that in an article 226 writ petition by a delinquent employee it should not interfere with the quantum of punishment imposed by the disciplinary authority when the punishment was not impermissible in law or wholly disproportionate to the misconduct found to have been committed by the delinquent.

In *Mohd. Masood Ahmad* v. *State of U.P.*[29] the Supreme Court had to remind the Allahabad High Court that exercise of article 226 jurisdiction does not permit interference with the exigency of service called transfer, unless the transfer order is found to be *mala fide* or that the transfer was prohibited under the service rules or that the authority issuing the order was not competent to do so.

A high court cannot entertain a petition under article 226 at the instance of unsuccessful candidates to challenge the appointment of selected candidates. Moreover, the fact that the authority concerned could not produce the record of the written examination and the oral interview on the ground that the same had been lost did not mean that the records were not produced due to a *mala fide* intention.[30]

The Supreme Court in *Tirumala Tirupati Devasthanams* v. *K. Jotheeeswara Pillai*,[31] had to tell the Andhra Pradesh High Court that a

25 (2007) 1 SCC 457.
26 (2007) 6 SCC 207.
27 (2007) 7 SCC 236.
28 (2007) 9 SCC 15.
29 (2007) 8 SCC 150.
30 *Trivedi Himanshu Ghanshyambhai* v. *Ahmedabad Municipal Corporation*, (2007) 8 SCC 644.
31 (2007) 9 SCC 461.

mandamus under article 226 cannot be issued directing the authorities to consider the case of a candidate for grant of exemption from the eligibility criterion for a post when there is no statutory duty on the authorities to grant such exemption and no legal right in the employee to such an exemption.

Falling in line with this trend of the Supreme Court having to repeat the same legal position again and again, in *Gurdev Kaur* v. *Kaki*,[32] the Supreme Court found that the Punjab and Haryana High Court had interfered under section 100 CPC with concurrent findings of fact on a will. Pointing out the indiscriminate and frequent interference under section 100 CPC in cases totally devoid of any question of law, despite declaration of the law on this in numerous judgments, the Supreme Court collected and put down all its judgments on section 100 CPC "with the hope that in future the High Courts would decide" as per these judgments and "this court may not be compelled to interfere with the judgments delivered under Section 100 CPC."

VII ARTICLE 226: WHAT CANNOT BE DONE

The Supreme Court had to list out in 2007 a number of cannots for the high courts under article 226 jurisdiction of the high courts.

In *Ram Singh Vijay Pal Singh* v. *State of UP*,[33] the Supreme Court held that writ of *mandamus* under article 226 of the Constitution were meant only to enforce the public duties prescribed by a statute and not for deciding policy issues as to whether allottees should be given shops, godowns or sheds on a lease basis or a hire purchase basis.

In *S. Sethuraman* v. *R.Venkataraman*,[34] the Supreme Court held that he Madras High Court could not debar a petitioner on the ground of estoppel from impugning the order of an appellate authority based on irrelevant considerations, because the petitioner had consented earlier to the matter being remanded to the appellate educational authority.

In the garb of grant of police protection to one or the other petitioner a high court under article 226 cannot enter into disputed questions in regard to title of the properties or the right of one group against the other in respect of the management of a large number of churches.[35]

Under article 226(2) a high court could not, on the ground that the major part of the offences had occurred in the state of its jurisdiction, order the transfer of an investigation from another state whose chief metropolitan magistrate (in a complaint that on the face of it was not *mala fide*), had issued orders under section 156(3), Cr PC followed by non bailable warrants against the accused who had moved under article 226 for transfer of the investigation.[36] Where, the legal error of the transfer of investigation,

32 (2007) 1 SCC 546.
33 (2007) 6 SCC 44.
34 (2007) 6 SCC 382.
35 *Moran M. Baselios Marthoma Mathews H.* v. *State of Kerala*, (2007) 6 SCC 517.
36 *Asit Bhatacharjee* v. *Hanuman Prasad*, (2007) 5 SCC 786.

pursuant to the orders of the high court under article 226, has already been executed the Supreme Court would pass orders under article 142 of the Constitution of India permitting the police of the state to which the case has been transferred to complete the investigation but place its final report before the chief judicial magistrate of the other state and leaving it to the chief judicial magistrate to decide the question of his jurisdiction at an appropriate stage.

Article 226 writs cannot be used to perpetuate an illegality and hence schools cannot seek a writ direction for upgradation because other schools have been upgraded in violation of the Kerala Education Rules, 1959.[37]

It was essentially a question of fact as to whether the grant of licence to manufacture *rab* had adversely affected the sugar factory in whose reserved area the *rab* manufacturing unit was located and hence this could not be decided in proceedings under article 226 of the Constitution. Moreover, where under the U.P. Khandsari Sugar Manufacturers Licensing Order, 1967, the decision of the state government on an appeal against the licensing authority's order on the grant of a licence to the *rab* manufacturing unit was stated to be "final", the high court under article 226 or the Supreme Court under article 136 would not substitute their decision for the decision of the authority concerned.[39]

A party whose hands are soiled by not stating the facts candidly, by suppressing or distorting the facts, cannot hold the writ of the court. Such a party cannot be entertained under article 226 or 136 of the Constitution of India.[40]

Under article 226 of the Constitution it is not open to a high court to, particularly in the matter of taxation, to direct the state legislature not to amend the law retrospectively.[41]

VIII WINDOWS FOR HIGH COURTS IN ARTICLE 226

The Supreme Court in *Reliance Energy Ltd* v. *Maharashtra State Board Development Corpn Ltd*,[42] concerning disqualification of a bidder in a global tender seemed to send the message that in an article 226 writ petition the high courts should enter extensively into the details of financial statements, the concepts used in the pre qualification bid process and the income tax treatment of the concepts to assess the validity of state action in government contracts on the touchstone of fundamental rights.

In *P.V George* v. *State of Kerala*,[43] the Supreme Court opened a small but undefined window in service matters under article 226 by stating that

37 *State of Kerala* v. *K. Prasad,* (2007)7 SCC 140.
38 *Dhampur Sugar (Kashipur) Ltd.* v. *State of Uttaranchal*, (2007) 8 SCC 418.
39. *Ibid*.
40 *Prestige Lights Ltd.* v. *State Bank of India*, (2007) 8 SCC 449.
41 *Municipal Committee Patiala* v. *Model Town Residents Association*, (2007) 8 SCC 672.
42 (2007) 8 SCC 1.
43 (2007) 3 SCC 557.

though the power of prospective overruling is vested only in the Supreme Court and that too in constitutional matters, yet the high courts without applying the doctrine of prospective overruling may indisputably grant a limited relief in exercise of their equity jurisdiction concerning past appointments and promotions when the service law concerning a group of employees was in a flux. In this case, however, after the full bench decision, subsequent to conflicting decisions by two benches, and dismissal of the SLP against the full bench decision, the subsequent division bench "could not have said as to whether the law declared by the Full Bench would have a retrospective effect or not." The law declared by a court will have a retrospective effect if not otherwise stated to be so specifically.

The Supreme Court held in *Arunima Baruah* v. *Union of India & Ors*[44] that the human right of access to justice and the basic feature of judicial review permitted a petitioner to file a second writ petition with full facts under article 226 against the termination of services by an instrumentality of the state even after the high court has dismissed the earlier writ petition on the ground of suppressing the fact that the petitioner's suit against the termination was pending when the writ petition was filed after the civil court refused to grant any *ex parte ad interim* injunction order in the suit. The second writ petition was maintainable since the suppression of the pending suit in the earlier writ petition was no longer a material fact, as the suit had already been withdrawn after the filing of an application for the withdrawal of the pending suit before the preliminary hearing of the writ petition on which notice was issued. In such a case the earlier judgment of the single judge of the high court confirmed by the division bench, dismissing the writ petition on the ground of suppression of a material fact, would not operate as *res judicata*, though it was obligatory on the part of the petitioner to have disclosed the pending suit and the refusal of an interim injunction in the earlier writ petition.

Acceptance of the decision of a high court in a writ petition under article 226 of the Constitution by not challenging that decision does not bind the state as constructive *res judicata* so as to prevent it from challenging a high court decision in another writ petition.[45]

Judicial review lies even if there is an error apparent on the face of the record. If the statutory authority uses its power in a manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact for sufficient reasons may attract the principles of judicial review.[46]

44 (2007) 6 SCC 120.
45 *UOI* v. *A.S. Gangoli*, (2007) 6 SCC 197.
46 *Mathura Prasad* v. *Union of India*, (2007) 1 SCC 437.

IX GOVERNMENTS SHOULD NOT BURDEN ARTICLE 226

In *Oil & Natural Gas Corporation Ltd* v. *City Industrial Development Corporation, Maharashtra Ltd*.[47] the Supreme Court reiterated that in disputes between departments of state government or between entities of a state and the centre, a committee should be set up to sort out the differences instead of the disputants coming to the court by way of writ petitions under article 226 of the Constitution. Accordingly, it directed in this case of execution of a lease between ONGC and CIDCO, the setting up of a committee consisting of the union cabinet secretary, chief secretary of the state, secretaries of the departments concerned of the union and the state and the chief executives of the undertakings concerned. The committee was directed to give a decision within four months of the date of receipt of the judgment, as the matter had been pending since 1990.

X HIGH COURT ADMINISTRATION: ART.229(2).

In *High Court Employees Welfare Association* v. *State of West Bengal*,[48] the Supreme Court held that the requirement under article 229(2) of a prior approval of the Governor of the rules framed by the Chief Justice of a high court concerning the salaries, allowances, leave or pensions of the employees of that high court, is not a mere formality. Accordingly the West Bengal High Court employees could not insist on a rule in the Revision of Pay and Allowance Rules, 1998, on the basis of the Special Pay Commission's recommendation that existing employees be placed at two higher stages in the revised scale by way of fitment, since the agreed minutes between the Chief Justice, the Law and Finance Ministers showed that it had been decided to apply the state pay rules for the fitment of the existing employees.The Special Pay Commission had been constituted by the Chief Justice of the Calcutta High Court on the orders of the Supreme Court. The high court incorporated the recommendation of the Special Pay Commission in the Calcutta High Court (Appellate Side & Original Side) Services (Revision of Pay & Allowances) Rules, 1998, concerning the fitment of the existing employees and the state government had objected to this. The Supreme Court then had adjourned the case to enable the Chief Justice and the Ministers of Finance and Law to meet and work out a satisfactory solution based on the recommendations of the Special Pay Commission. The minutes of this meeting found different interpretations between the Registrar of the High Court and the state government.

In *Mahendra & Ors* v. *State of Uttaranchal Pradesh & Anr*,[49] the Supreme Court observed that several petitions of a similar nature are being filed without disclosing that earlier a petition had been filed. Hence the

47 (2007) 7 SCC 39.
48 (2007) 3 SCC 637.

Supreme Court held that it would be appropriate for high courts to make provision in the relevant rules that in every petition it shall be clearly stated as to whether any earlier petition had been filed and/or is pending in respect of the same cause of action and that the result of the earlier petition must be stated.

XI HIGH COURTS v. TRIBUNALS

In *Union of India* v. *R. Gandhi*[50] the Supreme Court referred to a constitution bench the issue of a "wholesale transfer of powers'', except those of articles 226/227, of the high courts to a tribunal. This issue arose on the constitutional validity of the Companies (Second Amendment) Act, 2002 constituting the National Company Law Tribunal and the National Company Appellate Tribunal which took away almost all jurisdictions exercised by high courts, except those of articles 226/227, in relation to company matters. The court felt that though various decisions of the Supreme Court had held that Parliament and state legislatures possess the legislative competence to effect changes in the original jurisdiction of the Supreme Court and high courts, yet so far it had never been considered as to the extent to which the powers of the high court could be transferred to a tribunal. This issue would have a direct impact on separation of powers and the independence of the judiciary.

XII SC AND SEPARATION OF POWERS

While the Supreme Court was pronouncing, as aforementioned, upon the scope and extent of article 226 jurisdiciton in the exercise of its corrective jurisdiction under article 136 of the Constitution, it was faced with a serious internal debate over its own jurisdiction and that of courts in general *vis a vis* the concept of separation of powers.

In *Indian Drugs & Pharmaceuticals Ltd* v. *Workmen*[51] the Supreme Court held that the Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize *qua* any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory powers. Hence, orders for creation of posts, appointment on these posts, regularization, fixing pay scales, continuation in service, promotions etc are all executive or legislative functions and it is highly improper for judges to step into this sphere, except in a rare and exceptional case. In any event such orders which have been passed earlier as directions do not constitute a precedent under article 141 of the Constituiton since

49 (2007) 10 SCC 158.
50 (2007) 4 SCC 341.
51 (2007) 1 SCC 408.

only where the Supreme Court lays down a principle of law that a precedent is constituted. The judicial restraint philosophy spelt out by the Madras High Court in *Rama Muthuramalingam* v. *Dy. Supdt of Police*,[52] was fully agreed with.

In *State of U.P.* v. *Jeet S. Bisht*[53] a two judge bench of the apex court S.B. Sinha and M. Katju JJ differed on the power of a high court under article 226 of the Constitution to direct or suggest the salaries and allowances of the state consumer commissions under the Consumer Protection Act, 1986, and referred the issue to a larger bench with both the judges differing on the concept of separation of powers. However, both the judges agreed to request the central and state governments to consider fixing adequate salaries and allowances for members of the consumer bodies at all the three levels, so that they can function effectively and with a free mind and to fill up vacancies expeditiously so that they can function effectively.

XIII BASIC FEATURE

In *U.P. Gram Panchayat Adhikari Sangh* v. *Daya Ram Saroj & Ors*[54] the Supreme Court held that *panchayati raj* provisions in article 40 and article 243G of the Constitution do not form part of the basic structure of the Constitution. Concerning article 243 G the court stated that it came in by way of the 73rd Amendment of the Constitution and is only an enabling provision. However, there was no reasoning given concerning the ruling *vis a vis* article 40.

XIV DIRECTIVE PRINCIPLES

It may not be correct to say that any action which is not in consonance with the provisions of Part IV of the Constitution would be *ultra vires* but there cannot be any doubt whatsoever that the principles contained therein would form a relevant consideration for determining a question in regard to price fixation of an essential commodity.[55] Directive principles of state policy provide for a guidance to interpretation of fundamental rights of a citizen as also the statutory rights. The court held this while holding that companies which are an instrumentality of the state cannot use the monopoly in the supply of an essential commodity like coal to make profit for themselves alone without paying heed to article 39(b) of the Constitution, the aim of the laws nationalizing coal and the relevant statutory provisions governing the commodity.

52 AIR 2005 Mad 1.
53 (2007) 6 SCC 586.
54 (2007) 2 SCC 138.
55 *Ashoka Smokeless Coal India (P) Ltd* v. *Union of India*, (2007) 2 SCC 640.

XV ARTICLE 136: SKY IS THE LIMIT

In *A.V. Papyyasastry* v. *Govt of A.P.*[56] the Supreme Court held that the limit of its extraordinary jurisdiction under article 136 of the Constitution, when it chases injustice, is the sky. Such power, therefore, may be exercised by the Supreme Court whenever and wherever justice demands intervention by the highest court. Article 136, however, does not confer a right of appeal on any party. It confers discretion on the Supreme Court to grant leave to appeal in appropriate cases. In other words, the Constitution has not made the Supreme Court a regular court of appeal or a court of error. It only intervenes where justice, equity and good conscience require such intervention.The jurisdiction is equitable in nature. Hence when a judgment, decree or order has been obtained by fraud, as found out by the high court after the SLP had been dismissed from the Supreme Court, it can be challenged and set aside in any court at any time. Article 141 of the Constitution or the doctrine of merger does not come in the way since fraud vitiates all acts, whether *in rem* or *in personam*. The principle of finality of litigation cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

XVI PROPERTY RIGHT : ARTICLE 300A

In *Bharat Petroleum Corporation Ltd* v. *Maddula Ratnavalli*,[57] the Supreme Court held that any expropriatory legislation must be construed strictly as the right of property although not a fundamental right is nonetheless a constitutional right.

The right to property is not only a constitutional right but also a human right. Hence property while ceasing to be a fundamental right would however be given express recognition as a legal right, provisions being made under article 300A of the Constitution that no person shall be deprived of his property save in accordance with law.Hence statutes of town planning should be considered in such a manner, having regard to the drastic consequences thereunder, that greater hardship is not caused to the citizens than actually contemplated thereby.[58] Thus, although ordinarily when a public authority is asked to perform statutory duties within the time stipulated, it is directory in nature, but when it involves valuable rights of the citizens and provides for the consequences therefor it would be construed to be mandatory in character. Hence to accept that it is open to a town development authority to declare an intention to formulate a town development scheme even without a development plan and *ipso facto* bring into play a freeze on usage of the land would lead to complete misuse of powers and arbitrary exercise thereof

56 (2007) 4 SCC 221.
57 (2007) 6 SCC 81.
58 *Chairman, Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705.

depriving the citizen of his right to use the land subject to the permitted land use and laws relating to the manner of usage thereof. This would be an unlawful deprivation of the citizen's right to property which right includes within it the right to use the property in accordance with the law as it stands at such time.

XVII SC/ST AND ELECTION COMMISSION: ARTICLES 332(3) AND 341

In *Anand Singh Kunwar* v. *Election Commission of India,*[59] the Supreme Court pointed out that article 332(3) of the Constitution mandates that the reservation of seats for scheduled castes and scheduled tribes must be made in proportion to the population of the scheduled caste/ scheduled tribe of the state concerned. This should be the paramount consideration for the Election Commission and not any other consideration. The mandate of the Constitution is supreme and the Election Commission has no scope to go beyond the Constitution. Any notification issued by the Election Commission shall confine itself to this mandate and will not be swayed by any other consideration

Since the power under article 341 authorised the President to specify not only the castes, races or tribes but also parts of or groups within castes, races or tribes which shall be deemed to be scheduled castes, this power could be exercised only for part of a state. Further, it is not for the court to render its opinion as to whether the President was correct in confining inclusion of the caste *mochi* within a particular area of Gujarat. The Supreme Court, accordingly, confirmed the decision of the high court upholding the validity of the Consitution (Scheduled Castes) Orders (Second Amendment) Act, 2002.[60]

XVIII ELECTRICTY CONSUMPTION TAX: ARTICLE 254 ENTRY 53 LIST II AND ENTRY 38 LIST III

In *Southern Petrochemical Industries Ltd* v. *Electricity Inspector & ETIO*,[61] the Supreme Court declared that article 254 of the Constitution comes into play only when there is a direct conflict between the law made by the state legislature and the law made by Parliament. Entry 53 of List II of Seventh Schedule to the Constitution deals with taxes on consumption or sale of electricity whereas entry 38 in List III of the Seventh Schedule provides for a non taxation entry with general principles of electricity excluding taxation. The state law, Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 enacted under entry 53 of List II was in no way

59. (2007) 7 SCC 234.
60 *Shree Surat Valsad Jilla K.M.G. Parishad* v. *Union of India*, (2007) 5 SCC 360.
61 (2007) 5 SCC 447.

repugnant to the Electricity Regulatory Commissions Act, 1998 enacted by Parliament under entry 38 List III. The 1998 Act only empowers the commission to fix the electricity tariff or the charges for the consumption of electricity. The power to fix tariff does not include the power to impose tax. The legislation made by the state is independent of the actual tariff or the charges for consumption of electricity and hence the state's law imposing tax on sale or consumption of electricity operates differently from the power to impose tariff. The concept of tariff and tax is different. Whereas tariff would include a list of charges, a tax must be on actual basis. The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power since a clear distinction is provided in the scheme of List I, List II and List III of the Seventh Schedule between the general subjects of legislation and heads of taxation.Taxation is treated as a distinct matter for purposes of legislative competence *vis a vis* the general entries. Clauses (1)and (2) of article 248 of the Constitution also manifest this nature of the entries in the lists. However, the court stated that with regard to the validity of a taxation statute this distinction by itself would not be a determinative factor as in a case where Parliament may legislate an enactment under several entries, one of them being a tax entry. Further, just because a provision of the Constitution has been mentioned in an Act, the same would not necessarily mean that the provision is required to be taken into consideration for the purpose of judging the constitutionality of the Act. Hence the mentioning of article 288 in the impugned Tamil Nadu Act "must have been done by way of abundant caution.'' Lastly, when the Supreme Court had held electricity to be goods for the purpose of application of sales tax laws and other tax laws, the same would have nothing to do with the construction of entry 53 of List II of the Seventh Schedule of the Constitution.

The Supreme Court declared this while holding that a state can express its policy both by notifications under an Act as well as executive instructions; that both promissory estoppel and the doctrine of legitimate expectation would apply to the notifications and the executive instructions which take away accrued rights of exemption from tax for a fixed period; that a tax exemption given by a valid notification on conditions which stand fulfilled by the assessee gives rise to an accrued right in the assessee and the same can be taken away only by a statute as an exemption from a tax is not a mere concession defeasible by the government. However, promissory estoppel and legitimate expectation are not available against a statute or the Constitution.

XIX SERVICES: ARTICLE 162

In *Punjab State Warehousing Corporation* v. *Manmohan Singh*,[62] the Supreme Court held that when the terms and conditions of the services of an

62 (2007) 9 SCC 337.

employee are governed by the rules made under a statute or the proviso appended to article 309 of the Constitution laying down the mode and manner in which the recruitment would be given effect to, even no order under article 162 can be made by way of alterations or amendments of the said rules. *A fortiori* if the recruitment rules could not be amended even by issuing a notification under article 162 the same cannot be done by a circular letter. The state has no say in the alteration of the terms and conditions of employees of a statutory corporation. A policy made by the state would ordinarily apply only in respect of employees working under it. The policy decision of a state cannot be extended to a statutory corporation unless it is permitted to do so by the statute of the corporation.[63]

A scheme framed by the state government in exercise of its executive power under article 162 cannot violate the statutory rules of a statutory corporation of the state. The scheme could not also violate rules framed under the proviso to article 309.[64]

Under article 136 a petitioner is disentitled from questioning a high court decision once he has submitted to it by filing a departmental representation for reconsideration of his transfer, for which leave was granted by the high court.[65]

A teacher of the *Kendriya Vidayalaya* does not hold a civil post and hence cannot seek protection of article 311 when his services are terminated.[66]

XX CRIMINAL LAW: ARTICLES 72, 161

In *C.A. Pious* v. *State of Kerala*,[67] the Supreme Court held that the power under articles 72 and 161 of the Constitution can be exercised by the central and state governments, not by the President or Governor on their own. The advice of the appropriate government binds the head of the state. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group. Further, while considerations for the exercise of power under articles 72/161 may be myriad and their occasions protean, the same are left to the appropriate government. But no consideration or occasion can be wholly irrelevant, irrational, discriminatory or *mala fide*. Only in these rare cases will the court intervene. The court recommended that it regards it as fair that till new remission rules or short sentencing provisions are made keeping in with the experience gathered, current social conditions and accepted penological thinking, the present remission and

63 *Punjab State Warehousing Corpn., Chandigarh* v. *Manmohan Singh*, (2007) 9 SCC 337.
64 *Punjab Water Supply & Sewerage Board* v. *Ranjodh Singh,* (2007) 2 SCC 491.
65 *Prabir Banerjee* v. *Union of India*, (2007) 7 SCC 793.
66 *Kendriya Vidyalaya Sangathan* v. *Arunkumar Madhavrao Sinddhayae*, (2007) 1 SCC 283.
67 (2007) 8 SCC 312.

release schemes may usefully be taken as guidelines under articles 72/161 and orders for release passed.

The Supreme Court will not exercise its discretionary jurisdiction under article 136 in a bail granted under the Narcotic Drugs and Psychotropic Substances Act, 1985 where a clear application of the Act to the alleged offence had not been made out and *prima facie* the provisions of the Act are inapplicable. In this case the allopathic drugs mentioned in the allegation were covered by the Drugs and Cosmetics Act and were being used for "medicinal" purposes and none of these drugs were mentioned in schedule I appended to the rules under the 1985 Act. In addition, the accused had been in custody for more than two years.[68]

Under article 136 it would reappreciate the evidence in a criminal case which is based on circumstantial evidence and where the high court has converted into life imprisonment the death sentence given by the trial court.[69]

XXI NON LEGISLATOR MINISTERS: ARTICLE 164

In *Ashok Pandey* v. *Mayawati*,[70] the Supreme Court held that article 164(4) is not a source of power or an enabling provision for the appointment of a non-legislator as a minister even for a short duration. It is actually in the nature of a disqualification or a restriction for a non-legislator, who has been appointed as chief minister or a minister, as the case may be, to continue in office without getting himself elected within a period of six consecutive months.

XXII ADVERSE REMARKS AND ADVERSE POSSESSION

The Supreme Court will interfere under article 136 where adverse remarks are made by the high court against a chief minister and an IAS officer, in the matter of allotment of land to cooperative housing societies, without they having been parties to the writ proceedings and without any hearing having been given to them.[71]

In *Krishnamurthy S. Setlur (Dead) by LRs* v. *O.V. Narasimha Setty and others*,[72] it has been held by the apex court that it will interfere under article 136 and remit the matter to the appellate court where the decision of the appellate court on the issue of adverse possession contains several errors.

68 *State of Uttaranchal* v. *Rajesh Kumar Gupta*, (2007) 1 SCC 355.
69 *Ram Singh* v. *Sonia*, (2007) 3 SCC 1.
70 (2007) 10 SCC 16.
71 *State of Maharashtra* v. *Public Concern for Governance Trust and Others*, (2007) 3 SCC 587.
72 (2007) 3 SCC 569.

XXIII ARTICLE 166

In *Syndicate Bank* v. *Estate Officer & Manager, APIIC Ltd*,[73] the Supreme Court referred to a larger bench the issue of the effect of an admission by an authorized representative of the state having regard to the rules of executive business under article 166 of the Constitution while also referring to a larger bench whether a mortgage can be created without having a title by a registered conveyance deed. The question arose in the context of the widespread practice of banks giving advances merely on the basis of allotment letters of land from the government, instead of on the registered conveyance deeds of title of the allotted lands sought to be mortgaged to the banks.

XXIV ARTICLE 142

In the Taj Corridor scam case, *M.C.Mehta* v. *Union of India*,[74] faced with opposition to the court acting on the application of the *amicus* to send the CBI investigation and records to the statutory Central Vigilance Commission, the apex court had to point out the obvious that under article 142 it is empowered to take aid and assistance of any authority for doing complete justice in any cause or matter pending before it. Since the CVC after examining the CBI records placed before the court, fairly stated that its advice on these is only in the nature of an opinion, the court concluded that it was not required to examine the scope of the CVC Act, 2003

However, while holding in *Saurabh Prakash* v. *DLF Universal Ltd.*,[75] that the MRTPC has no jurisidiction to award compensation for mere breach of contract, the Supreme Court declared that when under article 142 it does justice between private parties on the basis of a consensus between them, the same is not to be treated as a precedent. Justice in such cases is done on the facts and circumstances of the case.

73 (2007) 8 SCC 361.
74 (2007) 1 SCC 110.
75 (2007) 1 SCC 228.