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CONSTITUTIONAL LAW – I
(FUNDAMENTAL RIGHTS)

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I INTRODUCTION

NO CASE has been reported during 2009 laying down either any new principle for interpreting any of the provisions of part III of the Constitution or departing from any previous decisions. No path-breaking case has been reported during the year. By and large, the courts have applied the existing principles to new fact situations on justified grounds.

In the past, the Supreme Court in certain situations took upon itself the task of plugging the legal loopholes in the existing law by issuing directions which were to be followed by everyone till proper legislation was enacted by the appropriate legislature. Thus, directions were issued for arrest or detention of a judicial officer to protect the independence of judiciary,[1] prosecution of a judge of the Supreme Court or High Court,[2] industrial accident caused by leakage of lethal gas in Bhopal,[3] appointment and transfer of judges,[4] revamping of the system of blood banks,[5] directions for doing complete justice under article 142,[6] right to know,[7] prevention of sexual harassment of women at workplace,[8] safeguards in cases of arrest/detention[9] and investigation of hawala transaction cases.[10] In *Destruction of Public & Private Properties* v. *State of A.P.*,[11] taking *suo motu* cognizance of large scale destruction of public and private properties in the name of agitations, *bandhs*, *hartals*, *etc.*, the Supreme Court constituted two committees, one headed by a retired judge of the Supreme Court, K.T. Thomas J and the other

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1 *Delhi Judicial Service Assn.* v. *State of Gujarat* (1991) 4 SCC 406.
2 *K. Veeraswami* v. *Union of India* (1991) 3 SCC 655.
3 *Union Carbide Corporation* v. *Union of India* (1991) 4 SCC 584.
4 *Supreme Court Advocates-on-Record Assn*. v. *Union of India* (1993) 4 SCC 441.
5 *Common Cause* v. *Union of India*, AIR 1996 SC 929.
6 *D.D.A.* v. *Skipper Construction Co. (P.) Ltd.* (1996) 4 SCC 622.
7 *Dinesh Trivedi* v. *Union of India* (1997) 4 SCC 306.
8 *Vishakha* v. *State of Rajasthan* (1997) 6 SCC 241.
9 *D.K. Basu* v. *State of West Bengal* (1997) 1 SCC 416.
10 *Vineet Narain* v. *Union of India* (1998) 1 SCC 226.
11 AIR 2009 SC 2266.

headed by an eminent lawyer, F.S. Nariman. The Thomas committee recommended certain amendments in law. Accepting the recommendations, the court issued a number of directions as preventive and punitive measures which were to be followed till appropriate legislature enacted necessary legislation on the subject. The court, however, did not issue any directions on the recommendations of the Nariman committee which were meant for being followed by the print media while reporting cases pertaining to the above matter.

The Supreme Court has also been issuing directions to curb ragging in educational institutions.[12] Further directions were issued to control the mal-practice of ragging in the *University of Kerala* v. *Council of Principals of Colleges in Kerala.*[13] The court in this case, issued directions to ensure that innocent students are not subjected to punishment and, therefore, before taking any action, the culprit must be given an opportunity to explain his conduct. Despite the directions issued by the court from time to time, ragging continues un-abated in educational institutions which has taken many lives and destroyed academic career of the students all over the country.

To what extent the directions issued in numerous cases have achieved their purpose has not been studied. Experience shows that the directions are not being taken as seriously as they should be and the legislatures have not paid due attention to these directions to give them legal shape. The court has, however, not hesitated in issuing directions to fill in the legal lacunae.

II CONCEPT OF STATE

There is only one significant case on the subject in which the question was whether a society registered under the Societies Registration Act was amenable to the writ jurisdiction of court on the ground of being considered 'State' under article 12 of the Constitution. In *State of U.P.* v. *Radhey Shyam Rai*,[14] the services of the respondent computer officer/data processing officer were dispensed with by the U.P. Ganna Kishan Sansthan (the *Sansthan*) after abolishing the post. The respondent approached the High Court for a writ against the *Sansthan*. The question arose whether the *Sansthan* was 'State' under article 12 of the Constitution. Relying on the principles culled out from the decisions in *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*[15] and *R.D. Shetty* v. *International Airport Authority of India*,[16] Sinha J held that in order to decide whether a registered society could be considered 'State' within the meaning of article 12, the history of its constitution played an important role. The learned judge

12 *Vishva Jagriti Mission* v. *Central Government*, AIR 2001 SC 2793.
13 AIR 2009 SC 2223.
14 2009 (3) SCALE 754.
15 (2002) 5 SCC 111.
16 AIR 1979 SC 1628.

categorically held that besides the mode of creation and/or finance by the government, the duties and functions performed by the body were very important factors. In the present case, the functions, *viz.* imparting knowledge and training to the cane growers and other connected persons with a view to increase sugar production in the state, which the *Sansthan* was performing, were being performed earlier by the state government itself through its cane development department. The centres established by the government at various places were transferred to the *Sansthan* after its establishment in 1975 by a resolution of the state government issued in the name of the Governor of the state. The *Sansthan* was established by the government to take over its own functions to which it transferred the entire management, infrastructural facilities and assets. Half of the entire budget of the *Sansthan* was provided from the contingency fund of the state. From the inception, all its governing council consisting of eight members were public servants including U.P. Cane Commissioner. Later, the governing council consisted of 12 members with the minister in charge of cane department of the state government being its head and majority of its members were government officials. The director and finance officer were public servants. The Governor had vast powers not only to issue directions to the *Sansthan* which were binding on it but also to call for returns, accounts and other information regarding properties and activities of the *Sansthan*. The government had constituted a committee to streamline curriculum of the training courses undertaken by the *Sansthan*. Almost 80 per cent to 90 per cent of total expenditure of the *Sansthan* was met out of funds made available to it by the government. In view of the above facts, the court found that the *Sansthan* was 'State' under article 12 of the Constitution amenable to writ jurisdiction.

It has, however, become important to consider whether a private university established under a state legislation was 'State' under article 12 of the Constitution or not. In *Arun Kumar* v. *ICFAI University*,[17] it was held that even though the ICFAI university was established by the ICFAI University Act, 2003 passed by the state legislature, the university was not 'State' because "the University inspite of being a creature of a statute cannot be called a 'State' or an 'instrumentality of the State' within the meaning of Article 12 of the Constitution of India as there is no 'deep and pervasive control' of the State over this body." Unfortunately, the court did not consider the cumulative effect of all the factors which the Supreme Court had laid down in *Ajay Hasia* v. *Khalid Mujib*.[18] It relied only on one factor, *viz*. deep and pervasive state control of the university. This decision overlooks a catena of judicial pronouncements of the Supreme Court on the subject and does not at all answer the problems raised by creation of statutory bodies which has become a general trend now particularly in the

17 AIR 2009 (NOC) 2860 (UTR.).
18 AIR 1981 SC 487.

field of education where not only private statutory universities but also a very large number of "deemed universities" have come into existence. Moreover, a large number of public sector enterprises have gone in the hands of private sector. So long as they were public sector enterprises, they were agencies/ instrumentalities of the state but what about their status after they became private sector enterprises?

It would be useful to note the views of the Supreme Court in earlier cases in which it had laid down certain broad principles to decide whether any institution/organization could be treated to be an agency or instrumentality of the state so as to be treated as 'other authorities' for the purposes of part III of the Constitution. In *Rajasthan Electricity Board* v. *Mohan Lal*,[19] the court had held that every authority created by statute and functioning within the territory of India or under the control of the Government of India was "State" under article 12. Later, in *Ajay Hasia* v. *Khalid Mujib*,[20] which related to a registered society, the court culled down six factors from various decisions whose cumulative effect was to be seen to decide as to which bodies could be considered to be agencies or instrumentalities of the state for the purpose of article 12. These were: (i) If the entire share capital of the corporation is held by government, it would go a long way towards indicating that the corporation is an instrumentality or agency of government; (ii) Where financial assistance of the state is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character; (iii) Existence of "deep and pervasive State control" may afford an indication that the corporation is a state agency or instrumentality; (iv) It may also be a relevant factor…whether the corporation enjoys monopoly status which is state conferred or state protected; (v) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of government; and (vi) Specifically, if a department of government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of government.

It is necessary for the Supreme Court to consider at the earliest opportunity the existing principles mentioned above to decide the status of agencies/instrumentalities which owe statutory existence or have otherwise been vested with statutory powers and duties like statutory universities and deemed universities which decide the fate of a very large number of students, teachers and employees. In fact, the very existence of education at all levels is going in the hands of private sector with far-reaching implications. Keeping these bodies outside the ambit of article 12 would be

19 AIR 1967 SC 1857.
20 *Supra* note 18.

meaningless for constitutional guarantee of fundamental rights to the individuals.

III RIGHT TO EQUALITY

In some cases, the Supreme Court quashed rules/decisions of the state on the ground of discrimination or arbitrariness. It, however, clearly held that the right to equality cannot be claimed out of illegality.[21] In *Food Corpn. of India* v. *Ashis Kumar Ganguly*,[22] the plea of discrimination was accepted by the court. In this case, the appellants had appointed some employees of the central government on deputation and they were later on absorbed by it in assistant grade II. They were also given one additional increment. The respondents were employees of the state of West Bengal and appointed on deputation by the appellant. Later on, they were also absorbed by the appellant but they were appointed as assistant grade III employees. No increment was given to them. Pursuant to the orders passed by the Supreme Court in a writ petition filed by them, they were given the post of assistant grade II but they were refused one additional increment as given to the employees of the central government who had been absorbed by the appellant. The respondents approached the court contending that they had been discriminated. It was conceded by the appellant that the nature of duties, qualification and service conditions of both sets of employees were the same. The Supreme Court held that treating the employees of the central government and state government differently at the time of absorption for the purposes of giving additional increment was discriminatory under article 14 as the same was based solely on the source from where they had come.

In *Dakshin Haryana Bijli Vitran Nigam* v. *Bachan Singh*,[23] the respondent had joined the appellants' services in work-charge capacity and worked as such for a number of years till he was regularised. For the purposes of pensionary benefits, his services rendered after regularization were counted leaving aside the services rendered in work-charge capacity. This was done on the ground that the respondent had not given his option despite the fact that two circulars had been issued by the appellants calling for option from the employees for the grant of benefit of work-charge service towards pensionary benefits. The court held that it was totally unreasonable and irrational to deny the respondent the pensionary benefits of the total service particularly when the appellants had failed to produce any record showing that the circulars were actually got noted in writing by the respondent. In the absence of any such record, the court inferred that the respondent had no knowledge about the options called by the appellants.

21 *General Manager, Uttaranchal Jal Sansthan* v. *Laxmi Devi,* AIR 2009 SC 3121.
22 AIR 2009 SC 2582.
23 AIR 2009 SC 2745.

In *State of H.P.* v. *Anjana Devi*,[24] some persons after their discharge/ release from naval service joined the service of state public works department (electrical wing) as junior engineers with effect from January, 1983. At that time, certain concessions in matters of seniority and fixation of pay were being made for ex-servicemen who were appointed to reserved vacancies. The vacancies were reserved for such persons only in non-technical services as per Demobilised Armed Forces Personnel (Reservation of Vacancies in the Himachal State Non-Technical Services) Rules, 1972. The ex-servicemen appointed against un-reserved vacancies were given choice to switch over to reserved vacancies which might occur even after joining the service in non-technical side. By a circular issued in May, 1983, the government extended the concessions to all ex-servicemen both in technical such as engineering and medical as well as non-technical services. The court held that there was a valid classification between ex-servicemen who were appointed prior to May, 1983 and those appointed subsequently. The benefit of reservation extended by May, 1983 circular could not be claimed by those appointed prior to that date as both classes of appointees formed separate class.

Distribution of state largesse

The allotment of industrial plot by an agency of the state has to be in accordance with article 14 of the Constitution.[25]

It has been held in *Meerut Development Authority* v. *Association of Management Studies*,[26] that a bidder had no right to challenge the conditions prescribed in the tender notice. The bidder had merely the right to be treated equally and fairly in the matter of evaluation of the competitive bids. There, however, cannot be any hidden agenda behind the notice. A bidder, therefore, can challenge the notice if the same had been tailor-made to suit any particular person or with a view to eliminate certain persons from the bidding process. The court observed:[27]

> (D)isposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's

24 AIR 2009 SC 2229.
25 *M.D., H.S.I.D.C.* v. *Hari Om Enterprises,* AIR 2009 SC 218.
26 AIR 2009 SC 2894.
27 *Id.* at 2899.

action in accepting or refusing the bid must be free from arbitrariness or favouritism.

In this case, the highest bidder for a plot of land meant for educational institutions had offered the price which was below the reserved price. Later on, the appellant changed the land use from educational use to residential use and invited fresh tenders. The court found nothing wrong in the action of the appellant in rejecting the respondent's bid and inviting fresh bids after changing the land use.

A bidder has no right to challenge the conditions stipulated by a state instrumentality in the tender notice.[28] In this case, the appellant, Ravi Development, submitted a proposal to the chief executive officer of Maharashtra Housing and Area Development Authority (MHADA) with a copy to the chief minister of the state for the development of some un-developed land owned by the latter on Swiss Challenge Method basis.[29] The housing department of the state government, held by the chief minister, forwarded the proposal to MHADA calling upon a detailed report on the proposal of Ravi Development. The MHADA while sending its report recommended that Swiss Challenge Method may be advertised on pilot basis which was accepted by the government. MHADA issued a public notice in which it was clearly stated that the lands in question shall be developed as per Swiss Challenge Method though the name of Ravi Development was not specifically mentioned in the notice. Four bids were received and the bidders had agreed that they knew the Swiss Challenge Method and gave an undertaking to that effect and also agreed that the original proposer shall be given an opportunity to take up the project on the highest eligible bid offer. They were informed accordingly. Ravi Development agreed to match the highest bid amount. The contract was therefore given to Ravi Development. In a writ petition filed by other bidders, the High Court struck down the action of MHADA in awarding the contract to Ravi Development on the ground that the Swiss Challenge Method was arbitrary and unreasonable. The Supreme Court noted that the petitioners while submitting their bid were fully aware of the Swiss Challenge Method and had agreed to accept the same. Moreover, they also knew through the tender notice that the proposal had been initiated by someone though the name of the proposer was not disclosed but that made no difference since the petitioners were not the original proposers. The court also found that no influence of any kind had been exerted by the chief minister in this proposal.

28 *Ravi Development* v. *Shree Krishna Prathisthan*, AIR 2009 SC 2519.

29 In Swiss Challenge Method, after floating tenders for the development of land, all tenders received are compared with the proposal given by the original proposer prior to floating of the tender (in the present case – Ravi Development) and the original proposer is given the opportunity to implement the project (first right of refusal). The said original proposer may raise his bid to the level of the highest bidder and take up the project. It is only when the original proposer refuses to raise his bid to the level of the highest bidder or take up the project, that the highest bidder gets the opportunity to implement the project.

The Swiss Challenge Method for the development of land was being followed not only in some of the foreign countries but also in some of the states in India and there was nothing wrong in the method. The court found the method good for encouraging the public-private partnership which was the need of the time and a laudable effort. Having given the bid and accepted the terms and conditions laid down in the notice, the petitioners could not challenge the contract awarded to Ravi Development. The court, however, issued certain directions for future compliance with a view to avoid any ill-effects of applying the Swiss Challenge Method for the development of land.

When a public body prescribes certain conditions for the award of a government contract, the condition must be fulfilled in totality otherwise denial of contract on the ground of not fulfilling the conditions cannot be held to be arbitrary. In *M/s. Electrical Mfg. Co. Ltd.* v. *M/s. Power Grid Corpn. of India Ltd.*,[30] the contract for setting up electrical transmission lines was refused to the appellant on the ground that though it had the experience of surveying optimizing tower locations, erecting and stringing with tension stringing equipment and had also the technical experience of completion of a part of line but it did not have the requisite experience of having experience of completing the entire line from one location to another extending to 100 kms. The court upheld the decision of the respondent in refusing the contract to the petitioner as all the conditions prescribed in the tender notice had not been fulfilled. The condition that the bidder shall have satisfactorily completed transmission lines meant that the entire line(s) had been completed which was not the case with the appellant.

IV RESERVATIONS

Reservations in educational institutions

No right to reservation in admissions to post-graduate medical courses

The reservation provision contemplated under clause (4) of article 15 as well as 16 is merely enabling.[31] This provision does not confer any fundamental right on any person to approach a court for a writ of *mandamus* against the state to make reservations in educational institutions. Moreover, if the central government has made any provision for reservation in admissions at the post-graduate level, the state governments are under no obligation to do the same and no court would issue a writ of *mandamus* for this purpose. The Supreme Court applied this principle in *Dr. Gulshan Prakash* v. *State of Haryana*.[32] In this case, the petitioners/appellants had approached the court praying for quashing the prospectus issued by the M.D. University, Rohtak for holding entrance test for admission to various post-

30 AIR 2009 SC 3001.
31 *Ajit Singh II* v. *State of Punjab* (1999) 7 SCC 209.
32 2009 (14) SCALE 290.

graduate medical courses (MD/MS/PG Diploma/MDS) in the State of Haryana for the year 2008-09 contending that no reservation had been made for the candidates belonging to scheduled castes/tribes. The plea was that the central government and many central universities including the University of Delhi had made reservation for admission to post-graduate medical courses. The Supreme Court rejected the argument that reservation was a matter of right for the scheduled castes/tribes. It was held that the state government had its own power to decide the question of reservation and it was not bound by what the central government had done. The court noted that the state government had considered the issue of making reservations at the post-graduate level in medical colleges from time to time keeping in view various factors including the views of the Medical Council of India and precedent in other states and had decided not to make any such reservations. Moreover, the members of scheduled caste/tribe had already been given the benefit of reservation in various medical courses upto 50 per cent of total seats at the under-graduate level in the medical courses. Having availed the benefit at one level, the reservation at the post-graduate level was neither feasible nor warranted for the members of scheduled caste/tribe. Dismissing the appeal, P. Sathasivam J held:[33]

> Though, even at the Post-Graduate level, reservation for SC/ST/ Backward Community is permissible in view of the specific decision by the State of Haryana not to have reservation for Scheduled Castes and Scheduled Tribes at the Post-Graduate level, there cannot be any mandamus by this Court as claimed by the appellants. After all, medical education is an important issue which should not have any mandatory condition of this nature which may give rise to a situation against public interest if so interpreted by the State Government as State Government is in a better position to determine the situation and requirement of that particular State, as mandated by the Constitution….
>
> Article 15(4) is an enabling provision and the State Government is the best judge to grant reservation for SC/ST/Backward Class categories at Post-Graduate level in admission and the decision of the State of Haryana not to make any provision for reservation at the Post-Graduate level suffers no infirmity. In our view, every State can take its own decision with regard to reservation depending on various factors. Since the Government of Haryana has decided to grant reservation for SC/ST categories/Backward Class candidates in admission at MBBS level *i.e.* under-graduate level, then it does not mean that it is bound to grant reservation at the Post-Graduate level also.

33 *Id.* at 298-299.

No reservation for single post in a cadre

It is well settled that there can be no reservation in respect of a single post in a cadre.[34] This principle was followed in *State of Karnataka* v. *K. Govindappa*.[35] In this case, the respondent was appointed as lecturer in history against the only post by a college but the government refused to approve the appointment on the ground that the post should have been reserved for a scheduled caste candidate by applying the roster principle. The court noted that all the posts of lecturers in various departments of the college amounted to separate cadre and they could not be clubbed as one single cadre. Since there was only one post of lecturer in the department of history, the same could not be reserved. The court upheld the decision of the High Court by which the state government was directed to give approval to the respondent's appointment.

V AFFIRMATIVE ACTION/PROTECTIVE DISCRIMINATION

The reservation is not an end in itself but merely a means to achieve an end, *viz.* upliftment of the weaker sections to bring them at par with others. The purpose of providing reservation in admissions to various courses to SC/ ST/OBC candidates in educational institutions is not to maintain the *status quo* but to provide the students of these categories an opportunity to come up at par with others. It is, therefore, incumbent on the educational institutions to ensure that the students of these categories are provided with extra, and even special, facilities and relaxations, during the course of their studies. The reservation can never achieve, as it has not achieved during last six decades, the real purpose unless strong affirmative action in the form of providing greater support system such as extra coaching, training, structural facilities, *etc.* are provided to the reserved category students. The Supreme Court missed a great opportunity of deciding some important issues in *Avinash Singh Bagri* v. *Registrar, IIT, Delhi*.[36] The first issue was whether each of the IITs (Delhi, Kharagpur, Mumbai, Chennai, Guwahati and Roorkee) can have their separate rules regarding studies, promotions, expulsions, *etc.* Will it not be discriminatory? The second issue was whether the rules of IIT, Delhi were discriminatory *vis-à-vis* other IITs and also arbitrary insofar as the expulsion of students on the ground of not securing minimum credits in the semester examinations was concerned? Finally, were the reserved category students entitled to extra coaching and other facilities not only to continue their studies but also to compete with others in and for higher studies? What was the reason for 85 per cent drop outs/failures among the

34 *P.G. Institute of Medical Education & Research* v. *Faculty Association* (1998) 4 SCC 1.
35 AIR 2009 SC 618.
36 (2009) 8 SCC 220.

reserved category students? Why 90 per cent reserved seats, as claimed by the petitioners, for higher degree courses remained vacant? This case undoubtedly highlights the plight of students belonging to reserved categories but leaves all questions un-answered.

According to the rules of IIT, Delhi, a student of 4/5 year B.Tech. degree course (which could be extended upto two more years) failing to secure the minimum credits was expelled from the institute. The requirement of securing minimum credits for students each year was thus:

Year	Credits for general category	Credits for SC/ST/OBC category
I	20	16
II	50	46
III	84	84
IV	120	120
V	156	156

The petitioners in this case, had been admitted to IIT, Delhi to the B.Tech. degree course during 2004-05 after qualifying in the All India Joint Entrance Test. They were expelled by the IIT, Delhi for having failed to secure the minimum credits in their second year. They contended that in 2008, 85 per cent of reserved seats in higher courses were not being filled up in IITs. In the absence of extra coaching and other facilities and infrastructure for the reserved category students, almost 90 per cent students either drop out or fail in the examinations. Other IITs such as Kharagpur, Mumbai, Chennai, Guwahati and Roorkee did not have any rule of expulsion for not having obtained the minimum prescribed credits in the examinations. Unlike other IITs, IIT Delhi did not have any provision for "Slow Track Programme" in which students were allowed to secure credits and they were not expelled. The students clearing a subject were awarded full credits assigned to the subject. In other IITs, the students failing to achieve the required credits were being properly advised by the Standing Review Committee (SRC). They pleaded that though SRC did exist in IIT, Delhi, the same was biased and did not extend any help to reserved category students.

P. Sathasivam J while accepting the arguments of the petitioners, observed:[37]

> It is not in dispute that SCs and STs are a separate class by themselves and the creamy layer principle is not applicable to them. Article 46 of the Constitution of India enjoins upon the State to promote with special care the educational and economic interests of

37 *Id.* at 230.

> the weaker sections of the people and protect them from social injustice and all forms of exploitation. These socially and economically backward categories are to be taken care of at every stage even in the specialized institutions like IITs. They must take all endeavour by providing additional coaching and bring them up at par with general category students.

The court issued direction to the respondent to consider the cases of six of the petitioners interested in pursuing their studies afresh in the light of various factors enumerated by it and re-appraise their performance taking note of the special features applicable to them and take a decision "one way or the other" within four weeks. The court, however, made it clear that the respondent was free to pass appropriate orders by considering all aspects including the policy of the Government of India in providing reservations to bring them in the mainstream with others. The court, however, did not deal with the discrimination in the rules of IIT, Delhi *vis-à-vis* other IITs. The court had a good opportunity to lay down general guidelines for affirmative action for the benefit of reserved category students. In the alternative, the court would have directed the central government or constitute a committee to go through the rules of all IITs to being them at par in the larger interests of the students. In any case, this decision should help the central government to do the needful not only for the benefit of education of reserved category students but also for ensuring uniformity in the rules of all IITs. There is absolutely no justification for having different rules governing the same courses of studies. After all, all IITs are centres of excellence for technical education and stand at par for all purposes.

VI FREEDOM TO CARRY ON TRADE AND BUSINESS

Power of state to control admissions and fee in private un-aided educational institutions

The Supreme Court took serious view of two state legislations on the ground that they violated the freedom of trade and business guaranteed to the citizens under article 19(1)(g) of the Constitution. In *Modern Dental College & Research Centre* v. *State of M.P.*,[38] the M.P. *Niji Vyavasayik Shikshan Santha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam*, 2007 had envisaged stringent control and regulation of admissions and fee by the state government in private un-aided educational institutions. The question raised in this case was: How far it was permissible under the Constitution for the state to control and regulate admissions and fee in private un-aided professional educational institutions in the State of Madhya Pradesh? The court pointed out that in *P.A. Inamdar* v. *State of Maharashtra*,[39] it was clearly held that the right to establish an educational

38 AIR 2009 SC 2432.
39 (2005) 6 SCC 537 : AIR 2005 SC 3226.

institution, for charity or for profit, being an occupation, was protected by article 19(1)(g) subject to reasonable restrictions which the state may impose by law. The court also noted that even though certain questions that had remained un-answered in *T.M.A. Pai Foundation* v. *State of Karnataka*[40] and *Islamic Academy of Education* v. *State of Karnataka*[41] had been answered in *Inamdar* case,[42] but even thereafter certain doubts or grey areas had remained un-answered. *T.M.A. Pai Foundation*[43] was 11-judge bench decision while *Islamic Academy of Education*[44] and *Inamdar*[45] were five and seven judge bench decisions, respectively. The court, therefore, observed that the latter two cases being smaller judge bench decisions could not have held anything contrary to what was held in *T.M.A. Pai Foundation.* In *T.M.A. Pai Foundation,* it was held (in para 41) that surrendering the total process of selection of students for admission to the state was unreasonable; an educational institution had a right to devise a rational manner of selecting and admitting students. As against this view, the court in *Inamdar* had held that if the admission procedure adopted by a private institution or group of institutions failed to satisfy all or any of the triple tests,[46] the same could be taken over by the state substituting its own procedure. In the present case, the court noted that *Inamdar* had not indicated as to which body will decide whether private un-aided educational institutions had failed to satisfy the triple tests and therefore the entire power to decide that question had been left to the state government giving it unbridled, absolute and unchecked power which was not permissible. In view of this, the two-judge bench of the court passed interim directions for making admission to private dental/ medical colleges for the year 2009-10 to ensure that 50 per cent of total seats shall be filled up by the state government and the remaining seats will

40 (2002) 8 SCC 481 : AIR 2003 SC 355.

41 (2003) 6 SCC 697 : AIR 2003 SC 3724.

42 *Supra* note 39.

43 *Supra* note 40.

44 *Supra* note 41.

45 *Supra* note 39.

46 The Supreme Court in *P.A. Inamdar* v. *State of Maharashtra* had observed that apart from the generalised position of law that the right to administer did not include the right to mal-administer, an additional source of power to regulate by enacting conditions accompanying affiliation or recognition existed. A balance was to be struck between the two objectives: (*i*) that of ensuring the standard of excellence of the institution, and (*ii*) that of preserving the right of the minority to establish and administer its educational institution. Subject to a reconciliation of these two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests: (*i*) the test of reasonableness and rationality, (*ii*) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it, and (*iii*) that there is no inroad into the protection conferred by article 30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution, is not taken away. (Para 122, *Pai Foundation*).

be filled up by the private institutions themselves. The capitation fee was prohibited in all cases. For this purpose, the state government and the private colleges were directed to hold separately single window examination for the entire state. The final decision in the case has yet to come but the views expressed in this case have created a great amount of uncertainty which needs to be cleared at the earliest by a larger bench.

Bar on filing suit for accounts of a dissolved un-registered firm

Section 69(3)(a) of the Partnership Act, 1932 does not bar institution of a suit by an unregistered partnership firm or any partner of such a firm for the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realize the property of a dissolved firm. The Maharashtra legislature, however, amended the above provision in 1984 and barred the institution of any such suit except in cases where the partnership firm was constituted for a duration of six months or with a capital of upto Rs. 2000/-. Thus, while any suit for the above purpose could be filed by all un-registered firms under the central legislation, the suit under the Maharashtra amendment could be filed by limited kinds of firms only, *viz.* those constituted for only six months or with a capital of Rs. 2000/-. Markandey Katju J observed that the Maharashtra amendment deprived a partner of a firm of his share in the property without any compensation and prohibited him from claiming dissolution of the firm. The learned judge accordingly held that the Maharashtra amendment was violative of articles 14, 19(1)(g) and 300-A and *ultra vires* the Constitution. Katju J observed:[47]

> The effect of the Amendment is that a partnership firm is allowed to come into existence and function without registration *but it cannot go out of existence* (with certain exceptions). This can result into a situation where in case of disputes amongst the partners the relationship of partnership cannot be put to an end to by approaching a court of law. A dishonest partner, if in control of the business, or if simply stronger, can successfully deprive the other partner of his dues from the partnership. It could result in extreme hardship and injustice. Might would be right. An aggrieved partner is left without any remedy whatsoever. He can neither file a suit to compel the mischievous partner to cooperate for registration, as such a suit is not maintainable, nor can he resort to arbitration, if any, because the arbitration proceedings would be hit by Section 69(1) of the Act.

47 *V. Subramaniam* v. *Rajesh Raghuvandra Rao,* AIR 2009 SC 1858 at 1862.

VII RIGHT TO PERSONAL LIBERTY

Ex-post facto law

The prohibition imposed by article 20(1) of the Constitution with regard to *ex-post facto* law applies not only to creation of an offence and applying the same retrospectively but also to the imposition of higher degree of punishment than the one prescribed for the offence on the date when the same was committed. When the law creating an offence is amended altering the punishment but without in any way modifying or diluting the ingredients of the offence, the prohibition of article 20(1) will not apply. If, however, the quantum of punishment has been altered upward by amending the law, the enhanced punishment cannot be imposed for the offences committed prior to the amendment.[48]

Doctrine of double jeopardy

Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. An identical provision exists under section 300(1) of the Code of Criminal Procedure, 1973. Does prosecution and punishment by a foreign court for an offence act as a bar under article 20(2)? Further, if prosecution for an offence was dropped by a foreign court, does it act as a bar for prosecution of the accused for that offence in India? These issues were raised in *Jitendra Panchal* v. *Intelligence Officer, NCB*[49] with respect to conviction and punishment of 54 months in jail given to the appellant in the United States of America under section 846 of Title 21: United States Code (USC) Controlled Substances Act for pleading guilty of the charge of conspiracy to possess with an intention to distribute in USA controlled substance (hashish). The appellant could have also been prosecuted for other offences but the same were dropped because he had pleaded guilty to the offence of conspiring to possess controlled substance. After serving the sentence, the accused was deported to India where he was prosecuted for various offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). These included importing hashish from Nepal into India along with his co-conspirators, possession of the contraband in India and sale and export of contraband out of India, all offences under sections 29, 8(c), 12, 20(b)(ii), 23 and 24 of the NDPS Act. The court accepted the prosecution plea that the offence for which the appellant was convicted and punished in the United States was different from the offences for which he was being prosecuted in India. Moreover, the US courts would have had no jurisdiction to try offences under the NDPS Act for which Indian courts alone had jurisdiction to try irrespective of the fact whether the offences had been committed by an Indian citizen within or outside Indian territory. This was clear from the

48 *Superintendent, Narcotic Control Bureau* v. *Parash Singh*, AIR 2009 SC 244.
49 AIR 2009 SC 1938.

provisions of sections 3 and 4 of the Indian Penal Code, 1860. The court, however, did not touch the question as to whether the doctrine of double jeopardy could apply in a case where a person has been prosecuted and punished for the same offence by a foreign court.

Right to fair trial includes right to speedy investigation

The right to life and personal liberty guaranteed under article 21 of the Constitution includes not only right to fair trial but also the right to fair investigation.[50] In *Vakil Prasad Singh* v. *State of Bihar*,[51] the alleged offence of bribery committed by the appellant took place in April, 1981. After investigation, a charge-sheet was filed in February, 1982 and the magistrate took cognizance of the offence in December, 1982. The court noted that no proper investigation by competent police officer was conducted in the case even for over seventeen years despite High Court's order made in December, 1990. The requisite sanction for prosecution of the appellant was not taken even till the disposal of the case by the Supreme Court in January, 2009. The prosecution could not give any explanation whatsoever for delay in investigation. The appellant was in no way responsible for delay. The court held that the prosecution had failed to show any exceptional circumstance for condoning the callous and inordinate delay of more than two decades in investigation and trial which had violated the fundamental right of the appellant to have a speedy investigation and trial under article 21. The court, therefore, quashed the trial proceedings.

VIII PREVENTIVE DETENTION

Grounds to challenge preventive detention order at pre-execution stage

Can a person approach the court to challenge a preventive detention order before pre-execution stage *i.e.* prior to actual detention? In *Additional Secretary to the Government of India* v. *Smt. Alka Subhash Gadia*,[52] the Supreme Court had pointed out five grounds on which the court had interfered at the pre-execution stage. These were: (i) That the impugned order was not passed under the Act under which it purported to have been passed; (ii) That the impugned order was sought to be executed against a wrong person; (iii) That the impugned order was passed for a wrong purpose; (iv) That the impugned order was passed on vague, extraneous and irrelevant grounds; and (v) That the authority which had passed the impugned order had no authority to do so.

Markandey Katju J in *Deepak Bajaj* v. *State of Maharas*htra[53] held that the above grounds of judicial interference with a prevention detention order

50 See *Nirmal Singh* v. *State of Punjab*, AIR 2009 SC 984.
51 AIR 2009 SC 1822.
52 1992 (Suppl.) 1 SCC 496; see also *State of Maharashtra* v. *Bhaurao Punjabrao Gawande*, AIR 2008 SC 1705.
53 AIR 2009 SC 628.

at pre-execution stage were merely illustrative and not exhaustive. He, however, clearly stated that the power was to be exercised by the courts in exceptional cases and not as a general rule. "If a person against whom a preventive detention order has been passed can show to the Court that the detention order was clearly illegal why should he be compelled to go to jail", he asked. It would be a meaningless and futile exercise if a person was told that though the order was illegal, he must still go to jail and he would be released later. Katju J added one more ground to the above grounds, *viz.* if all the relevant documents/materials were not placed before the detaining authority, the detention order would be vitiated on the ground that all relevant materials were not considered by it while passing the detention order. In the present case, the basic allegations against the petitioner were that he had imported 29 consignments of goods duty free meant to be used as raw material for manufacture of goods which should have been exported. Instead of that, the petitioner sold them in local market. The confessions made by certain witnesses were placed before the detaining authority which were considered but the retractions made by the witnesses were not placed and therefore not considered by the detaining authority. It was held that non-consideration of the retractions and consideration of only confessions vitiated the detention order. The court, therefore, quashed the detention order.

Supply of materials/documents

Article 22(5) of the Constitution confers rights on a person detained under any preventive detention law to know the grounds on which the detention order was passed and he has a further right to make a representation against the order. This right, as interpreted by the Supreme Court in *Dr. Ram Krishan Bhardwaj* v. *The State of Delhi*,[54] conferred a right on the detenu to be furnished with particulars of the grounds of detention "sufficient to enable him to make a representation which on being considered may give relief to him." The communication of grounds required the formulation of grounds and application of mind to the facts and materials before the detaining authority. The copies of documents to which reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds.'[55]

The aforesaid principles were applied by Bhandari J in *Thahira Haris* v. *Govt. of Karnataka*.[56] In this case, the preventive detention order had been passed in 2004 against one Anil Kumar who was considered to be master-mind in smuggling red sanders out of the country. In 2008, preventive detention order was passed against the husband of the petitioner in the present case for abetting in the aforesaid smuggling by Anil Kumar. The order clearly made reference to the order passed against Anil Kumar but a

54 1953 SCR 708.
55 *Shalini Soni (Smt.)* v. *Union of India* (1980) 4 SCC 544.
56 AIR 2009 SC 2184.

copy of the detention order passed against Anil Kumar was not supplied to the detenu (petitioner's husband). Bhandari J quashed the detention order holding that the detenu did not get opportunity to make effective and meaningful representation against the order and the right under article 22(5) was violated. If, however, any material had merely been mentioned while narrating the facts/events and not relied upon by the detaining authority, the same need not be supplied to the detenu.[57]

IX PAYMENT OF COMPENSATION

The administration does not learn lessons from judicial pronouncements. This is so because the courts are reluctant to punish the guilty persons in the administration. The callous attitude of the administration even in matters like right to life and personal liberty was once again noticed in *Pooran Singh* v. *State of M.P.*[58] In this case, the petitioner had been convicted in 2000 for drug peddling as 150 gms. of opium had been recovered from his possession and sentenced to ten years rigorous imprisonment and fine for the offence under section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The High Court in 2003 reduced the sentence to three years and five months imprisonment and also reduced the amount of fine. A copy of the judgment reducing the sentence had been sent to the concerned court of special judge as well as to the superintendent of the jail where the petitioner was lodged. But neither modified warrant for the petitioner's release was issued nor he was released from jail. The petitioner should have been released in November, 2003. The petitioner was released only in 2008 after his brother filed an application before the special judge. After his release, the petitioner filed the present writ petition claiming compensation for his illegal detention for almost five years. After referring to the leading decisions of the Supreme Court on the question of power of the court to award compensation for violation of fundamental rights,[59] Ajit Singh J held that the violation of fundamental rights was a public wrong redressable under articles 32 and 226 of the Constitution. The liability for payment of compensation for violation of fundamental rights did not absolve the state from its liability. The learned judge, therefore, directed payment of rupees three lacs as compensation to be paid by the state to the petitioner within two months. He made it clear that this direction did not have punitive element in mind with a view to punish the guilty but merely to apply 'balm' to the petitioner's wounds. The court gave liberty to the petitioner to take recourse to traditional remedies if he was not satisfied with its direction and in any

57 *State of Tamil Nadu* v. *Abdullah Kadher Batcha*, AIR 2009 SC 507.

58 AIR 2009 MP 153.

59 *Rudal Sah* v. *State of Bihar*, AIR 1983 SC 1086; *Bhim Singh* v. *State of J&K*, AIR 1986 SC 494; *Nilabati Behra* v. *State of Orissa*, AIR 1993 SC 1960; *D.K. Basu* v. *State of West Bengal*, AIR 1997 SC 610.

such event, the amount paid to him was to be adjusted. The court did not stop here. It directed the state government to hold an enquiry into the matter and take action against erring officers. The Registrar (Vigilance) of the court was also directed to hold an enquiry immediately and submit a report within a month to the Registrar General of the High Court as to why modified warrant was not issued after the High Court's order reducing petitioner's sentence and directed that appropriate action be taken. This was indeed a perfect order from a writ court. The court in fact would have gone one step further by directing that the amount of compensation be recovered from the salary of the guilty officers.