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CONSTITUTIONAL LAW – II

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I INTRODUCTION

THE SURVEY focuses on cases decided by the apex court on constitutional issues other than fundamental rights. This attempt is the result of making wanderings into law reports delving deep into judicial treatment of questions relating to constitutional adjudication. Far from the boundaries of "mere case analysis", it ventures into an assay to (i) highlight comparative aspects of constitutional adjudication with reference to cases decided in earlier years on issue under consideration; (ii) project judicial diversity including inconsistencies, if any, noticed; (iii) evaluate judicial decisions with reference to juristic scholarship available on the point; and (iv) to project the judicial trends discernible on the basis of this years' judication in *omega*. While writing this survey, the author was inspired by few lines written by an Australian scholar:[1]

> There is strong view in today's polite intellectual circles that criticism of the court is decided 'non-U.' This convenient taboo is seen as applying with added strength to lawyers as the High Court's vassals, and most especially to academic lawyers, perhaps more as the High Court's jesters. The idea seems to be that once the court has delivered a constitutional decision, all are bound not merely to accept it as comprising an authoritative statement of the law of land, but also immediately to accord it intellectual obeisance, and to undertake not to dissent publically from that ruling no matter how implausible or even improper it may seem. If a lawyer, whether Attorney General or University Professor, does publically challenge a decision of the court, then that court and its supporters can be guaranteed to regard them with all the horrified disapproval of a dowager duchess who has just had a polecat introduced into her

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1 Greg Craven, "The High Court of Australia: A Study in the Abuse of Power", 22 UNSW LJ 216-17 (1999).

> farthingale… If a lawyer or even a politician genuinely believes that the court has strayed from the path of constitutional rectitude, then not only is it the right of that person publicly to say so, but also it becomes a solemn duty to do so.

II APPOINTMENT OF HIGH COURT JUDGES – ARTICLES 217 AND 224

The process of appointment of judges is important not only from the point of view of constitutional requirements but also relevant to the legitimacy of judicial process. Consequently, more significant issue is giving due importance to integrity and reputation of the proposed appointees. The cases under survey this year have addressed those issues. In *Shanti Bhushan* v. *Union of India*,[2] the Supreme Court considered the validity of appointment of an additional judge of the High Court as permanent judge. A writ petition was filed in public interest seeking quashing of the appointment of a Madras High Court judge on the ground that the required norms have not been followed while appointing him as a permanent judge of the High Court. The Chief Justice of India was required to consult the collegium as required at the time of initial appointment as additional judge. Since that was not done, the appointment was in violation of the law declared by the apex court in earlier cases[3] as well as paras 12 and 13 of the Memorandum of Procedure No K-110017/13/98USII dated 3.6.1999. On the other hand, Union of India contended that a total number of more than 350 additional judges have been appointed as permanent judges from 1.1.1999 to 31.7.2007 by the successive Chief Justices of India who had not consulted the collegium while considering the cases of appointment of additional judges as permanent judges of the High Court although the collegium was consulted at the stage of initial appointment as additional judges.

Rejecting the contention of the petitioners, the court ruled that the parameters of para 12 of the memorandum cannot be transported to para 13 in its entirety. While making the recommendations for appointment of an additional judge as a permanent judge, the Chief Justice of the High Court is not required to consult the collegium of the High Court. Additionally, there is no requirement of enquiry by the intelligence bureau. The Chief Justice, while sending his recommendation, has to furnish statistics of month-wise disposal of cases and judgments rendered by the judge concerned as well as the number of cases reported in the law journals duly certified by him. Further information required to be furnished regarding the

2 (2009) 1 SCC 657.

3 *Supreme Court Advocates-on-Record Association* v. *Union of India* (1993) 4 SCC 441 and *Reference No 1 of 1998*, Re (1998) 7 SCC 739.

total number of working days, the number of days the judge concerned attended the court and the days of his absence from court during the period for which the disposal statistics are sent. It is also clear from para 15 of the memorandum that at the stage of appointment of either as an additional judge or a permanent judge, the Union Minister of Law, Justice and Company Affairs is required to consider the recommendation in the light of such other reports as may be available to the government in respect of the names under consideration. The complete material would then be forwarded to the Chief Justice of India for his advice. This procedure is not required to be followed when an additional judge is appointed as a permanent judge. Having regard to the fact that there is already a full-fledged participative consultation in the backdrop of pluralistic view at the time of initial appointment as additional judge, repetition of the same process for appointing an additional judge as permanent does not appear to be the intention.[4] Where the constitutional functionaries have already expressed their opinion regarding the suitability of the person as an additional judge, the parameters stated in para 13 of the memorandum have to be considered differently from the parameters of para 12. Therefore, the plea that without consultation with the collegium, the opinion of the Chief Justice of India is not legal cannot be sustained.[5] A reading of the judgment reveals that the apex court recognized the importance of conferring discretion upon high constitutional functionaries and saw a sufficient check against its arbitrary exercise when it is structured by the element of plurality.

The appointment as permanent judge is, however, subject to additional judge's fitness and suitability. There is no right of automatic appointment as permanent judge or extension of appointment as additional judge. The court noted with concern that in the present case, the then Chief Justice of India opposed the appointment of respondent 2 as a permanent judge. In spite of this, not only his term was extended but he was also appointed as a permanent judge. The court deprecated this since it is crystal clear that the judges are not concerned with any political angle in the matter of appointment as additional judge or permanent judge; the then Chief Justice should have stuck to the view expressed by the collegium and should not have been swayed by the views of the government to recommend extension of the term of respondent 2 as it amounts to surrender of primacy by jugglery of words. But as the judge was due to retire on 9-7-2009, the court ruled that the belated challenge to such extensions cannot put the clock back.[6] There is no denying the fact that the person appointed must be of spotless reputation. Further attack on a person's reputation may harm him

4 *Supra* note 2 at 674-75.
5 *Id*. at 676-77.
6 *Ibid.*

badly as it is his most valuable treasure. The court made contextual literary *alpha* and *omega* references in aid of its legal view.[7]

The importance of integrity, suitability and reputation in case of judicial appointments was again emphasized in *N. Kannadasan* v. *Ajay Khose*[8] in the context of appointment of president of state consumer disputes redressal commission[9] under the Consumer Protection Act, 1986. It is indisputable that the functions of the commission are judicial. A practising advocate was appointed as an additional judge of the Madras High Court. During his tenure, the members of the bar made a representation against him alleging lack of probity and specifying the nature of the alleged misconduct on his part. Therefore, he was not appointed as a permanent judge and he demitted his office on 5.11.2005. As the post of president of the state consumer disputes redressal commission was going to fall vacant, the State of Tamil Nadu vide its letter dated 30.05.2008 requested the registrar of the Madras High Court to send a panel of eligible names of retired High Court judges after approval by the Chief Justice for its consideration. Accordingly, the Chief Justice of the High Court, who had joined only in May, 2008, sent to the state government a panel of three names including that of the appellant. The state government appointed the appellant as president of the commission on 26.07.2008. The appellants' appointment was successfully challenged before the Madras High Court. On appeal, the Supreme Court ruled that if a person did not have qualification for continuing to hold the office of the judge of the High Court, it was difficult to conceive as to how despite such deficiency in qualification he could be recommended for appointment to a statutory post, the eligibility criteria for which, *inter alia*, was a former judge of a High Court.[10] A judge whose

7 In its opening sentence, the court observed: "Judges, like Caesar's wife, should be above suspicion is the focal point in this petition under article 32 of the Constitution of India." In its concluding part, the court quoted what Shakespeare wrote in Othello [Act III, Scene 3, 155]:
"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls?
Who steals my purse steals trash; "tis something, nothing;
'T was mine, 'tis his, and has been slave to thousands:
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed."
Again in Richard II, Act I, Scene I, Shakespeare wrote:
"The purest treasure moral times afford
Is spotless reputation; that away,
Men are but glided loam or painted clay."

8 (2009) 7 SCC 1; see also, Margaret Takkington, "A Free Speech Right to Impugn Judicial Integrity in Court Proceedings," 51 Boston College LRev. 363 (2010): Examining why a free speech right to impugn judicial integrity must be recognized for attorneys when acting as officers of the court and making statements in court proceedings.

9 For precedents governing the appointment of president in the state commission, see *Ashish Handa* v. *Chief Justice of the High Court of P & H* (1996) 3 SCC 145; *Ashok Tanwar* v. *State of Himachal Pradesh* (2005) SCC 104.

10 *Supra* note 8 at 31.

tenure ended by way of non-extension as a stigma would not come within the purview of the definition of term "has been a Judge of the High Court" as prescribed in the Act.[11] Judicial emphasis on not appointing the judicial officers who did not carry good reputation so far as their honesty and integrity was concerned is appreciable[12] because it is a view that lends support to the concept of judicial legitimacy. If persons with doubtful integrity and reputation are appointed judges', people will lose faith in judiciary which would be a serious blow to the principle of judicial legitimacy.

The court took notice of the *Shanti Bhushan* case[13] which held that extension of the tenure of an additional judge was the prerogative of the Chief Justice of India but the court in that case was not concerned with a situation of this nature.[14] If the collegium of the Supreme Court including Chief Justice of India, which is a constitutional authority in the matter of appointment of judges and reappointment of additional judges, did not find him eligible, it would be beyond anybody's comprehension as to how the Chief Justice of a High Court could find him eligible for holding a statutory post for which the prescribed xqualifications were the same as for a judge of the High Court.[15]

Another important aspect of *Kannadasan*[16] case is court's nuanced view as to the independence of judiciary. If a person of doubtful integrity was appointed as a judge, it may affect independence of judiciary. Accordingly, the court ruled that independence and impartiality of judiciary is a basic feature of the Constitution. Constitutionalism envisages that all laws including the constitutional provisions should be interpreted so as to uphold the basic feature of the Constitution. A person lacking probity would not be a person who could be found fit for appointment as a High Court judge.

Mahesh Chandra Gupta v. *Union of India*[17] is another case in which the appointment of an additional judge of the Allahabad High Court was challenged. The appointee worked as a member of ITAT for eleven years. He had earlier worked as additional law officer, Law Commission of India. He was enrolled as an advocate of the High Court on 13.9.1975. His appointment was challenged on various grounds. First, that a mere enrolment

11 *Id*. at 41.

12 See *Brij Mohan L*al v. *Union of India* (2002) 5 SCC 1; *All India Judges Association* v. *Union of India* (1992) 1 SCC 119.

13 *Supra* note 2.

14 *Supra* note 8.

15 *Id*. at 32. The court in this case also ruled that the superior courts may not only issue a writ of *quo warranto* but also a writ in the nature of *quo warranto*. It is also entitled to issue a writ of declaration which would achieve the same purpose. Earlier also the Supreme Court in *Kumar Padma Prasad* v. *Union of India* (1992) 2 SCC 428 issued a writ of declaration although a writ of *quo warranto* was sought for.

16 *Supra* note 8 at 39.

17 (2009) 8 SCC 273.

which gave "a right to practise" was not enough to make a person eligible for elevation under article 217(2)(b) read with explanation (aa) of the Constitution. Thus, the court considered the question whether "actual practice" as against "right to practise" was the perquisite constitutional requirement of eligibility criteria under article 217(2)(b)? The court made a distinction between 'eligibility' and 'suitability.' The process of judging the fitness of a person to be appointed as a High Court judge fell in the realm of suitability. Similarly, the process of consultation fell in the realm of suitability. On the other hand, eligibility at the threshold stage came under article 217(2)(b). This dichotomy between suitability and eligibility finds place in article 217 (1) in juxtaposition to article 217(2). The word 'consultation' finds place in article 217(1) whereas the word 'qualify' finds place in article 217(2) The appointment of a judge was an executive function of the President. Article 217(1) prescribes the constitutional requirement of 'consultation." Fitness of a person to be appointed a judge of the High Court was evaluated in the consultation process. Once this dichotomy was kept in mind, it becomes clear that evaluation of the worth and merit of a person was a matter entirely different from eligibility of a candidate for elevation. Article 217(2) therefore, prescribes a threshold limit or an entry point for a person to become qualified to be a High Court judge whereas article 217(1) provides for a procedure to be appointed as a High Court judge which procedure is designed to test the fitness of a person to be so appointed; his character, his integrity, his competence, his knowledge and the like. Hence, article 217(1) and article 217(2) operate in different spheres. Article 217(1) answers the question as to who 'should be elevated' whereas article 217(2) deals with the question as to who 'could be elevated. Enrolment of an advocate under the Advocates Act, 1961 came in the category of who "could be elevated' whereas the number of years of actual practice put in by a person, which was a significant factor, came in the category as to who 'should be elevated.'[18] The court also made a distinction 'judicial' review' and 'merit review.' 'Eligibility was an objective factor. Who could be elevated is specifically answered by article 217(2). When 'eligibility' is put in question, it could fall within the scope of judicial review. However, the question as to who should be elevated, which essentially involves the aspect of 'suitability' stands excluded from the purview of judicial review.[19]

On analysis of the Legal Practitioners' Act, 1879, the Bar Councils Act, 1926 Act and the Advocates Act, 1961, the court came to the conclusion that they all dealt with a person's right to practice or entitlement to practise. The 1961 Act only sought to create a common bar consisting of one class of members, namely, advocates. Therefore, it ruled that the expression "an

18 *Id*. at 290-91.
19 *Id*. at 292.

advocate of the High Court" both pre- and post-1961, referred to person(s) right to practise. Therefore, actual practise cannot be read into the qualification provision, namely, article 217(2)(b). The legal implication of the 1961 Act was that any person whose name was entered on the State Bar Council would be regarded as "an advocate of the High Court." The substance of article 217(2)(b) was that it prescribed an eligibility criteria based on 'right to practise' and not actual practice.[20] The word 'standing' connoted the years in which a person was entitled to practise and not the actual years put in by a person in practise.[21]

The second ground of the petitioner was that even if a mere 'right to practise' amounted to having practiced as an advocate who ceased to practise and got himself employed for earning, and thereafter held an office of a member of the tribunal, the period of his holding office as a member could not be computed or taken into account with the aid of explanation (aa) to article 217(2)(b). The court ruled that explanation (aa) appended to article 217(2) was so appended so as to compute the period during which a person had been an advocate for any period during which he held an office of a member of a tribunal after he became an advocate. If a person had been an advocate for ten years before becoming a member of the tribunal, explanation (aa) would not be attracted because being an advocate for ten years *per se* would constitute sufficient qualification for appointment as a judge of the High Court.[22]

The third ground of the petitioner was that consultation by members of the two collegiums was on the basis of performance of the appointee as a member of ITAT. The source of appointment being from "service', it was urged that there was no consultation regarding the appointee under article 217(2)(b). It was urged that if the performance of the appointee during the period he was holding the office of the member of ITAT was the subject-matter, then, it could not be said to be a consultation at all as there had not been any consultation regarding appointee under article 217(2)(b). The court treated the argument as misconceived. It ruled that the very purpose for enactment of article 217(2)(a) and 217(2)(b) was to provide for a mix of those from the bar and those from service who had past experience of working as judicial officers/officers in tribunals. This was the object behind a policy decision taken in the Chief Justices' conference of 2002. The object of adding explanation (aa) was to complement explanation (a) appended to article 217(2) and, together, they liberalized the source of recruitment for appointment to the High Court. Therefore, for eligibility purposes clause (aa) of the explanation read with sub-clause (b) of clause (2) of article 217 would apply to members of ITAT in the matter of

20 *Id.* at 300.
21 *Id.* at 293.
22 *Ibid*.

computation of the prescribed period for an advocate to be eligible for being appointed as a High Court judge. This aspect of the 'eligibility' has nothing to do with 'suitability.'[23]

In this regard, it was further contended that the Chief Justice of the Allahabad High Court had appointed a three-judge sub-committee to examine the quality of the judgments of the appointee under the zone of consideration from 'service' quota, and, therefore, if the sub-committee gave adverse comments about the person appointed in the course of his working as member of ITAT and the Chief Justice of the Allahabad High Court failed to forward that information to the Supreme Court collegium, it would certainly constitute a ground for judicial review based on the lack of effective consultation. The court, on meticulous scrutiny of the confidential files, found that the content of the report submitted by the sub-committee containing information regarding the lack of actual practice as an advocate of the High Court and the working of the appointee as a member of ITAT during the nascent years in office was before the Supreme Court collegium, *albeit* from a different channel. Further, that information was meticulously vetted and the recommendation of the High Court collegium for appointment was sent back by the Supreme Court collegium to the High Court collegium for consideration. The matter was re-examined by the High Court collegium. That collegium reiterated its position and it recommended once again that person for appointment as a judge of the High Court. There was thus an effective consultation. Since the consultation process stood complied with, its content was not amenable to judicial review.[24]

In this case also, as in *Shanti Bhushan* v. *Union of India*,[25] the court referred to safety-valve concept of plurality of opinion of judges' observing that:[26]

> (T)he concept of plurality of judges in the formation of the opinion of the Chief Justice of India is one of inbuilt checks against the likelihood of arbitrariness or bias.... At this stage, we reiterate that "lack of eligibility" as also "lack of effective consultation" would certainly fall in the realm of judicial review. However, when we are embarking a joint venture process as a participatory consultative process, the primary aim of which is to reach an agreed decision, one cannot term the Supreme Court collegium as superior to the High Court collegium. The Supreme Court collegium does not sit in appeal over the recommendation of the High Court collegium. Each collegium constitutes a participant in the participatory consultative process. The concept of primacy and plurality is in effect primacy

23 *Id.* at 307.
24 *Id.* at 309.
25 *Supra* note 2.
26 *Supra* note 17 at 305.

> of the opinion of the Chief Justice of India *formed collectively*. The discharge of the assigned role of by each functionary helps to transcend the concept of primacy between them.

Holding the appointment valid, the court deprecated the baseless allegations made in the supplementary affidavit against the institutional decision-making process. It stated that:[27]

> (C)ontinuity of an Institution is an important constitutional principle in the institutional decision-making process which needs to be insulated from opinionated views based on misinformation. At the end of the day 'trust' in the decision-making process is an important element in the process of appointment of judges to the Supreme Court and the High Court which is the function of integrated participatory consultative process.

It is important to note that in adjudicating the constitutional issues in this case, the court relied on writings of constitutional scholars like H.M. Seervai'[28] and DD. Basu.[29] The discernible trend of reference and reliance on juristic writings in aid of judicial reasoning reminds us the view of a scholar who wrote:[30]

> It seems to me not improbable that the growing and intolerable burden of the mass of more or less discordant case law may result in some change in our practice. A time may be coming when the courts will look for their law in the authentic and constructive writings of great lawyers rather than in that wilderness of precedents to which they now resort.

III COMMON LAW AND STATUTORY LAW – ARTICLES 13 AND 372

Common law principles are 'law' within the meaning of article 13 of the Constitution. By virtue of the provisions contained in article 372 of the Constitution, common law continues to operate even after the commencement of the Constitution unless it is modified or repealed. Common law, when it comes in conflict with principles enshrined in constitutional law, will cease to be operative. The Supreme Court in 1967

27 *Id.* at 309.
28 *Id.* para 40.
29 *Id*. para 41. See also, *Pradeep Chaudhary* v. *Union of India* (2009) 12 SCC 248.
30 See, John W. Salmond '*The Literature of Law*," 22 *Columbia L. Rev*. 197, 207 (1922); also see, Borris M. Komar, "*Text-Books as Authority in Anglo-American Law*" 11 *Calif. L. Rev* 397 [1922-23].

had settled the law that common law cannot override constitutional principles. *In Director of Rationing* v. *Corporation of Calcutta,*[31] it was ruled that the common law principle that "a statute would not be applicable to Crown unless it was provided in the statute itself" would be applicable in India in post-Constitutional era. However, overruling this view, the Supreme Court in *Superintendent and Remembrancer of Legal Affairs West Bengal* v. *Corporation of Calcutta*[32] the said common law principle was held to be violative of rule of law and thus inapplicable in India.

This year, the court laid down that when common law is modified by enactment of a statute, statutory law will prevail over common law. The common law doctrine of priority of state's debt has been recognized in India. Under this doctrine, where the crown's right and that of a subject meet at one and the same time, that of the crown will have priority over that of the subject. Crown debt means "debts due to the State or the King; debts which a prerogative entitled the crown to claim priority for before all other creditors." Such creditors, however, must be held to be 'unsecured creditors.' After the commencement of the Constitution, Parliament as also the state legislatures inserted provisions in various statutes providing that statutory dues shall be the first charge over the properties of the debtor. Thus, a debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property must prevail over the crown debt which is unsecured. In *Union of India* v. *SICOM Ltd.,*[33] the court considered the question whether the realization of the duty under the central excise will have priority over the secured debts in terms of the State Financial Corporations Act, 1951. The debtor in this case borrowed a certain sum of money from the state financial corporation under the State Financial Corporations Act, 1951 by executing a mortgage in favour of the corporation. It was later on found that the debtor also owed a certain sum of money to the central government in the form of excise duties. The central government's claim based on the doctrine of priority of crown's debt was rejected. The court ruled that when Parliament or state legislature makes an enactment, the same would prevail over the common law. A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of article 372 of the Constitution must be held to prevail over the crown debt which is unsecured one. The court relied on the law laid down in earlier judgments[34]

31 AIR 1960 SC 1355.

32 AIR 1967 SC 997. See also, in the matter of *B.H.P. & V. Ltd. Visakhapatnam*, AIR 1985 AP 207 [Modifying the common law concept of 'ownership" in tune with socialism enshrined in the Indian Constitution.]

33 (2009) 2 SCC 121.

34 See, *Dena Bank* v. *Bhikabhai Preabhudas Parekh & Co.* (2000) 5 SCC 694; *Sitani Textiles & Fabrics (P) Ltd.* v. *CCE & Customs* (1999) 106 ELY 296 (AP); *Central Bank of India* v. *Siriguppa Sugars & Chemicals Ltd.* (2007) 8 SCC 353; *State Bank of Bikaner & Jaipur* v. *National Iron & Steel Rolling Corporation* (1995) 2 SCC 19.

wherein it had been held that "the crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience as applicable to India do not accord the Crown a preferential right for recovery of debts over a mortgagee or pledge of goods or a secured creditor."

IV COMPLETE JUSTICE - POWER OF SUPREME COURT – ARTICLE 142

One of the most striking contemporary developments in the administration of justice is the courts' willingness to achieve justice *inter partes* in the light of facts of the individual case.[35] With a view to giving a quietus to litigation demanding "pragmatic solution", the Supreme Court has from time to time taken recourse to innovations and the powers vested in it under article 142 of the Constitution. In the year under survey, this power was exercised in relation to the following spheres.

Defeating delay

The court exercises its power with a view to avoiding further delay in the disposal of the matter. In *Saji Geevarghese* v. *Accounts Officer (Telephone Revenue),*[36] the appellant, a telephone subscriber, alleged overbilling of his telephone connection. The court came to the conclusion that the award passed by the arbitrator appointed under the Telegraph Act, 1885 was unsustainable because the arbitrator clearly recorded a finding that in spite of spurts in the billing there was no monitoring of the meter by the department as per guidelines issued by it. This had led to defective billing. In spite of this finding, the arbitrator gave only marginal rebate of 10%. The faulty billing was on account of negligence of the department as a result of which the valuable right of the subscriber to object to the increase and secure monitoring/inspection was taken away. Therefore, the court felt that justice could be done in such a situation only by restricting the billing to the average of the bills for one year prior to the dispute. In order to expedite the case, the court felt that no useful purpose would be served by remitting the matter to the arbitrator. Accordingly, to put an end to the litigation, and to do complete justice, the court itself modified the bills and directed the telephone department to send revised bill to the appellant.

35 J.C. Brady, *Judicial Pragmatism and Search for Justice Inter-partes*, The Irish Jurist 47 (1986).

36 (2009) 1 SCC 644, Also See, *Tirupati Jute Industries Private Ltd* v. *State of West Bengal* (2009) 14 SCC 406 [Supreme Court exercising its power under article 142 in order to give quietus to the litigation and deciding the matter itself instead of remitting back to the tribunal].

Monetary equity

Inter-partes dispute may result in undue delay of payment due to one of the parties. The court resorted to power of complete justice with a view to doing monetary equity in *Rajkamal Builders* v. *Ahmadabad Municipal Corporation*.[37] A project for construction of a bridge across river *Sabarmati* was undertaken by the Ahmadabad Municipal Corporation and the finance for the same was to be contributed by other statutory bodies and public sector organizations including Oil and Natural Gas Commission. The appellant-builder raised certain disputes in regard to its financial claims. Even though the liability towards the contract for the sum due awarded by the arbitrator was not under challenge, the builder could not get the payment due to it for nearly a decade because of the *inter se* dispute in regard to liability between Ahmadabad Municipal Corporation and the Oil and Natural Gas Commission. The court ruled that there is no reason why the appellant-builder should wait for payment till the issue was decided between two disputing government bodies. Accordingly, in exercise of power under article 142, the court directed that sum due to the builder shall be paid equally by two government bodies.

The benefit of monetary equity was also extended to a party to the illegality. In *Hamid Khan* v. *Ashabi*,[38] the dispute involved was with regard to a land. The landowner entered into two sale agreements one with the appellant and the other with an old lady. The appellant had invested a sum of Rs, 75,000/- in 1988. However, on the facts of the case, the court came to the conclusion that the appellant was a party to illegality in the transaction. With a view to doing complete justice to the parties, the court in exercise of its jurisdiction under article 142 of the Constitution balanced the equities. On the one hand was an old lady and her interest was required to be upheld while on the other hand was the appellant who had invested Rs. 75000/- in 1988. The court ruled that "although the appellant is a party to the illegality, but we do not intend to deprive him of the amount which he had invested."[39] Accordingly, the court directed that the appellant be paid three times of the amount paid by him to the landowner by way of compensation. Thereupon, the appellant was to vacate the land and a sale deed was to be executed in favour of the old lady.

In *Lajpat Rai Mehta* v. *Secretary to Government, Department of Power*,[40] however, the court adopted a different approach. It ruled that while exercising power under article 142 of the Constitution, the court need not grant relief to a litigant although it may be lawful for it to do so. The court is entitled to see the conduct of the parties so as to enable it to adjust equities. It is the duty of the court to see that the public exchequer should

37 (2009) 1 SCC 497.
38 (2009) 1 SCC 530.
39 *Id*. at 539.
40 (2009) 3 SCC 260.

not unnecessarily be depleted despite the fact that the state has neglected its duty. It appears that the court is more cautious when public exchequer is involved as against the pecuniary effect on non-state actors.

A time bound promotion granted to an employee was cancelled after ten years and recovery of excess amount paid was initiated in *Paras Nath Singh* v. *State of Bihar*.[41] The court in exercise of its power under article 142 directed that further recovery be stopped on that ground though the employee had given an undertaking to refund excess money yet keeping in view the fact that he was an illiterate person who did not understand implication of the undertaking and there was no fraud or misrepresentation on his part and part of the amount had already been recovered.[42]

Monetary equity and social welfare

The court also exercised its power under article 142 for social welfare. Where neither the assessee nor the state was entitled to collect tax but the tax had been realized it led to unjust enrichment. In such a case, the court can direct that the amount be spent for social welfare as was done in *State of Maharashtra* v. *Swanstone Multiplex Cinema (P) Ltd.*[43] The State of Maharashtra took a policy decision to provide certain exemptions to theatres in the matter of payment of entertainment duties under the provisions of the Bombay Entertainments Duty Act, 1923. In terms of the state policy, the assessee, engaged in the business of operating a multi complex theatre, availed the exemptions. However, even during the period for which the assessee was not liable to pay any duty, the entire duty was charged from cinema-goers. Before the High Court, the State of Maharashtra made an unsuccessful claim for recovery of duty from the assessee.

On appeal, the Supreme Court held that the assessee was not entitled to retain the duty collected. In the absence of any express statutory provision, allowing the proprietors of the multiplex theatre to retain the benefit, it was difficult to arrive at such an inference. The state had power to impose tax. The state had power to grant exemption or concession in respect of payment of tax. It had, however, no power in terms of the provisions of the Constitution or otherwise to allow an assessee to collect the tax and retain the same. Further, the superior courts will not interpret the statute in such a way which will confer an unjust benefit to any of the parties, *i.e.* either the taxpayer or tax collector or the state. The statute must be interpreted reasonably. It must be so interpreted that it becomes workable. Interpretation of a statute must subserve a constitutional goal. A statute cannot be interpreted in such a manner as to enable an entrepreneur to get

41 (2009) 6 SCC 314.
42 *Ibid*.
43 (2009) 8 SCC 238.

undue advantage to the effect that he would collect tax from the cinema-goers and appropriate the same. When a person collects tax illegally he has to refund it to the taxpayers. If the taxpayers cannot be found, the court would either direct the same to be paid and/or appropriated by the state.[44] However, in this case, the state having granted exemption was not entitled to collect the duty, *i.e.* the state was not legally entitled thereto. The doctrine of *escheat* incorporated in article 296 of the Constitution was also held inapplicable on the facts of the case. Thus having found that neither the state nor the assessee was entitled to unjustly enrich itself with the huge amount of illegally collected duty from cinema-goers, the court exercised its power under article 142 to do complete justice in an innovative manner, as has been done in an earlier case,[45] and directed that "the state shall realize the amount to the extent the respondent had unjustly enriched itself and pay the same to a voluntary or a charitable organization, which according to it is a reputed civil society organization and had been rendering good services to any section of the disadvantaged people and in particular women and children."[46] The court requested the Chief Minister of the state to take up the responsibility in this behalf so that full, proper and effective utilization of the amount in question was ensured. The case signifies that the doctrine of unjust enrichment could be invoked irrespective of any statutory provisions against any person or state and that in the absence of any entitled person including state to retain the illegally collected tax money, the best way was to use it for social welfare of people.

Quashing the charge

In exercise of its power under article 142, the court can not only modify the sentence but also quash the charge.[47] This power is in addition to the statutory power under section 482 of the Code of Criminal Procedure. However, when a complaint against the accused reveals *prima facie* case of offence, the court would not quash the proceedings.[48] Such power should also not be exercised when it involves crime against society. In *Rumi Dhar* v. *State of West Bengal*,[49] the court sounded a note of caution that crimes against society were to be viewed seriously. A bank employee, charged of

44 *Id.* at 251.

45 In *Indian Banks' Association* v. *Devkala Consultancy Service* (2004) 11 SCC 1, the court found it difficult to direct refund of a huge amount to a large number of depositors from whom the bank had collected. Accordingly, it directed that the amount be spent for the benefit of the disabled in terms of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

46 *Supra* note 43 at 252.

47 See, *Delhi Judicial Service Association* v. *State of Gujarat* (1991) 4 SCC 406; *Union Carbide Corporation* v. *Union of India* (1991) 4 SCC 585.

48 See, *C.B.I* v. *Duncan Agro Industries* (1996) 5 SCC 591; *State of Haryana* v. *Bhajan Lal* 1992 Suppl (1) SCC 335; *State of Bihar* v. *P.P. Sharma* 1992 Suppl (1) SCC 222; *Janta Dal* v. *H.S. Chaudhary* (1992) 4 SCC 305.

49 (2009) 6 SCC 364.

conspiracy in defrauding the bank, entered into compromise with bank and returned the amount to the bank. His plea to quash the charge was rejected on the ground that both civil and criminal proceedings can proceed simultaneously. The bank was entitled to recover the amount. If criminal offences had been committed by the accused person, including the officers of the bank, criminal proceedings would also indisputably be maintainable. When a settlement was arrived at by, and between, the creditor and debtor, the offence committed as such did not come to an end. The exercise of power under article 142 would, however, depend on the facts and circumstances of each case. But this court, in terms of article 142 of the Constitution of India, would not direct quashing of a case involving crime against the society.[50]

Sentence modification

In *Puttaswamy* v. *State of Karnataka,*[51] the appellant was convicted for an offence punishable under sections 279 and 304-A of the Indian Penal Code, 1860 for causing death of a seven year old girl on account of rash and negligence driving of his tractor. During the hearing of appeal, the matter was compromised between the appellant and the complainant but the fact was that offence under section 304-A was not compoundable under the provisions of section 320, Cr PC. This troubled the constitutional conscience of court to do pragmatic justice in the light of the 'Constitutional Charter.'[52] Constitutional scholar[53] also refer to it as "Constitutional Remedial Power." Therefore, the court observed that the aforesaid question has troubled this court on different occasions, not only in connection with compounding of offences punishable under the criminal justice system but also in respect of civil and matrimonial matters in particular where the court has to strike a balance between the rigidity of law and doing substantial justice to the parties.[54] Thus, the court ruled that this was one of those cases where instead of confining the appellant in prison, the interest of justice would be better served if he was made to compensate the family of the deceased on account of loss suffered by them. Accordingly, while maintaining the appellant's conviction, notwithstanding the compromise arrived at between the parties, the court increased the amount of fine from Rs. 2000/- to Rs. 20,000 to be paid by the appellant

50 *Id*. at 372.

51 (2009) 1 SCC 711.

52 The term 'Constitutional Charter' has been used by former Solicitor-General of India, Shri C.K. Daphtry in *Prem Chand Garg* v. *Excise Commissioner U.P* 1963 Suppl (1) SCR 885, 896.

53 See, Kate Hofmeyr, "A Central Case Analysis of Constitutional Remedial Power", *South African L J* 521 (2008) [Referring to the remedial provisions of various Constitutions including article 142 of the Constitution of India and stating that the Indian Supreme Court has interpreted the provisions to give the courts wide remedial flexibility which is often utilized or provide for extensive and ongoing judicial supervision of cases.

54 *Supra* note 51 at 712.

to the parents of the deceased and reduced the sentence to the period already undergone. The court invoked its power under article 142 of the Constitution and also relied on earlier cases[55] for the view that even if an offence was not compoundable within the scope of section 320, the court may, in view of the compromise arrived at between the parties, reduce the sentence imposed while maintaining the conviction.

The court has exercised its power to do complete justice not only for reducing but also for enhancement the sentence.[56] In *Onam Liquor Tragedy* case,[57] the court came to the conclusion that the High Court was right in convicting the appellant but felt that the sentence awarded to the accused needed to be enhanced. Accordingly, it issued notice for enhancement of sentence. On behalf of the appellants, it was contended that despite article 142, issuance of such a notice was not permissible because that would be violative of article 21. The court ruled that article 142 provided sufficient power to pass such an order if the court was of the view that it was necessary for doing complete justice between the parties and the said power of issuing rule of enhancement could not be said to be one not mandated by law.

Transgression of statutory provision is impermissible

The wide and vast nature of power conferred under article 142 has been described as 'Constitutional Charter of the Supreme Courts' power.'[58] The court has used this power for issuing directions to comply with the statutory provisions.[59] However, the court has imposed a limitation on the exercise of this power. In exercise of this power, the court cannot transgress a statutory provision. In 1998, the apex court ruled that article 142 of the Constitution did not empower the court to transgress statutory provisions.[60] Now, the court has ruled that the directions issued by court under article 142 of the Constitution can neither be expanded by any authority nor construed *de hors* the statute. In *M.C. Mehta* v. *Union of India,*[61] the Supreme Court issued a direction that if a transport vehicle overtook any other four-wheel motorized vehicle, it would be construed as a contravention of the conditions of the permit which could entail suspension/cancellation of the permit and impounding of the vehicle. Pursuant to the said direction, an assistant commissioner of police, Delhi impounded a bus and suspended its permit on the ground that the vehicle owner had violated the direction of the Supreme Court. In *UP State Road Transport Corporation* v. *Commissioner*

55 See, *Surendra Nath Mohanty* v. *State of Orissa* (1999) 5 SCC 238; *Ram Lal* v. *State of J & K* (1999) 2 SCC 213; *Bachha Singh* v. *State of UP* (2002) 10 SCC 313; *Avinash Shetty* v. *State of Karnataka* (2004) 13 SCC 375.

56 *R.K. Anand* v. *Delhi High Court* (2009) 8 SCC 106.

57 *E.K. Chandrasenan* v. *State of Kerala* (1995) 2 SCC 99.

58 See, *Prem Chand Garg* v. *Excise Commissioner U.P.,* 1963 Suppl (1) SCR 885, 896.

59 See, *Municipal Board Pushkar* v. *State Transport Authority* 1963 Suppl (2) SCR 373.

60 See, *Supreme Court Bar Association* v. *Union of India* 1998 (4) SCC 409.

61 (1997) 8 SCC 770.

of Police Delhi,[62] this order was challenged contending that having regard to the provisions of section 86 of the Motor Vehicles Act, the officer was not the appropriate state transport authority and, therefore, could not have impounded the bus or suspended the permit. Allowing the appeal, the court ruled that the directions issued by the court in exercise of its jurisdiction under article 142 of the Constitution of India must be held to be in addition to the conditions contained in the permit and/or the provisions of the Act. The width and breadth of article 142 of the Constitution although wide, any direction issued thereunder by reason of an interpretation should not be expanded. Such directions must be read in the light of the provisions of the Motor Vehicles Act and not *de hors* the same. The direction did not confer any jurisdiction upon any authority which did not have any such power under the statute. Section 86 of the Act, on a plain reading, clearly conferred power to suspend a permit only on the authority which had granted it. The violation of the directions of the court would merely entail the consequences which would mean that the respondent could proceed to take action only in accordance with law including the provisions contained in section 88 of the Act. The court's emphasis was on the view that "the judge-made law in an area covered by the Parliamentary Act should not be applied in an expansive manner. Nothing should be deduced therefrom."[63]

V "CONSTITUTIONAL CONVERSATION" – LEGISLATIVE POWER TO SUPERSEDE JUDICIAL VERDICT - ARTICLES 245

An important issue in constitutional law is whether the legislature has the power to supersede the judicial verdict. The law is settled that it is within the province of the legislature to enact validating Act. The validity of a validating Act is to be judged by the following tests: (1) Whether the legislature enacting the validating Act has competence over the subject-matter?(2) Whether by validation, the legislature has removed the defect which the court has found in the previous law? (3) Whether the validating law is consistent with the provision of chapter III of the Constitution? If

62 (2009) 3 SCC 634 Also see, *Leila David* v. *State of Maharashtra* (2009) 4 SCC 578 [Supreme Court's power under article 142 is not meant to circumvent the procedure laid down in Contempt of Courts Act, 1971.]; *National Insurance Company* v. *V Parvathneni* (2009) 8 SCC 785 [Holding that if an insurance company has no liability, it cannot be compelled to pay by order of the court] Even the litigant cannot bypass the procedural requirement: *Nawab Shaqafath Ali Khan* v. *Nawab Imad Jah Bahadur* (2009) 5 SCC 162 a special leave petition was filed in SC directly against the order of district court. The court directed the same to be returned to the petitioners so as to enable them to refile the same before the High Court which may also be considered on its own merits]. But the court while exercising its power under article 142 can impose conditions. See, *Nahar Industrial Enterprise* v. *H.S.B.C.* (2009) 8 SCC 646.

63 *Id*. at 645.

these tests are satisfied, the Act can validate past transactions which were declared by the court to be unconstitutional.

In *State of Kerala* v. *Peoples Union for Civil Liberties*,[64] the settled principles of power of legislature to invalidate judicial pronouncement were reiterated. In this case, subsequent to the direction given by the High Court in the matter of Act 31 of 1975, the Kerala Legislature repealed the same and enacted a new one, *i.e.* Act 12 of 1999. The court ruled that where a new Act was enacted removing the very basis on which the High Court had declared a preceding Act invalid, it did not matter whether the same was termed as a validating statute or not. As in this case, the Act 31 of 1975 had not been declared to be invalid and therefore the question whether Act 12 of 1999 was a validating Act or not did not arise.[65]

But the legislature is incompetent to overrule the decision of a court without properly removing the base on which the judgment was founded. Constitutional scholars have described the process of validating Acts as "constitutional conversation" *i.e.* dialogue between the courts and legislatures.[66] *A. Manjula Bhashini* v. *Managing Director, Andhra Pradesh Co-operative Finance Corporation Ltd.*[67] was one more instance of constitutional conversation. In order to check the menace of irregular appointments, the A.P. legislature enacted the Andhra Pradesh [Regulation of Appointments to Public Services and Rationalization of Staff Pattern and Pay Structure] Act, 1994 which contained a provision as to imposition of bar for regularization of daily-wage and temporary employees. However, in spite of the prohibition contained against regularization of daily-wage employees and persons appointed on temporary basis, the state government wilted under the pressure exerted by the vested interests and exercising its executive power under article 162 of the Constitution issued the G.O No. 212 dated 22-4-1994 incorporating the policy for regularization of the service of those appointed on daily wages or nominal muster roll of consolidated pay, who had continuously worked for 5 years and were continuing on 25-11-1993 *i.e.* the date of enforcement of the 1994 Act. A number of persons who were employed on daily wages or nominal muster roll or consolidated pay, but did not complete five years on 25-11-1993, challenged the aforesaid G.O. by filing writ petitions and applications before

64 (2009) 8 SCC 46.

65 *Id.* at 83.

66 E.g. See, Barry Friedman, "Dialogue and Judicial Review" 91 Mich. L.Rev. 577 [1992-93] [Stating that Constitutional interpretation is an elaborate discussion between Judges and Body Politic]; L. Carter, The Morgan '[Power' and forced Reconsideration of Constitutional Decisions, 53 University of Chicago L.Rev. 819 [1986] '["{…[L]egislative override have come the strategies for those who are disappointed with Justices conclusions]

67 (2009) 8 SCC 431. Also referring as to the criteria for examining as to whether a cut-off date prescribed by the government is violative of equality clause.

the High Court and the tribunal, respectively. A single judge of the High Court allowed the writ petitions and held that all persons employed on daily wages or nominal muster roll or contract basis were entitled to be considered for regularization on completion of five years. The division bench upheld the order of the single judge with the modification that daily wagers, *etc.* would be entitled to be considered for regularization with effect from the date of completion of 5 years' continuous service. On appeal by the state, the decision of division bench was upheld by the Supreme Court in *District Collector* v. *M.L. Singh*[68] subject to the condition that the other conditions laid down in the G.O. dated 22-4-1994 would have to be satisfied for the purpose of regularization. The state legislature in order to remove the ambiguity and imperfectness in the language of G.O. dated 22-4-1994 and make the policy of regularization an integral part of the 1994 Act, enacted amendment Acts 3 and 27 of 1998. On the validity of these amendment Acts being challenged on the ground that they have the effect of nullifying the judgments of this court in *M. L Singh* case,[69] the court reiterated the settled principle that the legislature cannot by bare declaration, without anything more, directly overrule, reverse or override a judicial decision. However, it can in exercise of plenary powers conferred upon it by articles 245 and 246 of the Constitution, render the judicial decision ineffective by enacting a valid law fundamentally altering or changing the conditions on which such a decision was based. Such a law could also be given retrospective effect with a deeming date or with effect from a particular date. The impugned Acts merely intended to remove the ambiguity in the government order dated 22-4-1994. The effect was neither nullifying nor overriding the judgment in *M.L. Singh* case[70] nor it amounted to encroachment on court's power of judicial review.[71]

Violation of statutory norms in public employment violates rule of law and this has been a subject of judicial deprecation. In this case, the court also observed that in the 1970's, 80's and early 90's, the country witnessed unusual phenomena in the field of public employment. Nepotism, favouritism and even corruption became hall mark of the appointments and a huge illegal employment market developed in this country. Lakhs of persons were engaged under the central and state governments in violation of the doctrine of equality clause and the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959. The officers who were entrusted with the task of making appointments on class II and class IV posts misused their power and employed their favourites or all those who enjoyed

68 (2009) 8 SCC 480.
69 *Ibid*.
70 *Ibid*.
71 *Supra* note 67 at 456.

political power without considering the claims of other similarly situated persons. The empowered authorities resorted to the mechanism of employing persons of their choice on daily wages or nominal muster roll or contract or part-time basis with the hope that on some future date the government will frame policy for regularization of such employees.[72] If the state government had sincerely implemented the provisions of the 1994 Act, it may have succeeded in cleansing the mess created due to irregular employment of thousands of persons and, thereby, saved considerable revenue which could be utilized for execution of welfare schemes and development programmes. By ensuring that appointments against the sanctioned posts are made only from among the candidates selected by the specified recruiting agencies like public service commission, *etc*. or from among the candidates sponsored by the employment exchanges, the state government could have demonstrated its commitment to the system established by the rule of law. Unfortunately, the state government wilted under the pressure exerted by the vested interests and framed policy for regularization of the services in spite of the law enacted.[73] On many earlier occasions, the court has expressed its concern on this point. In *Dalip Kumar Tripathy* v. *State of Orissa*,[74] a long select list for appointment to the post of sepoys prepared contrary to procedure prescribed under law by high ranking police officers was quashed. Again, in *Krishan Yadav* v. *State of Haryana*[75] involving challenge to the selection made by subordinate selection board Haryana to the posts of taxation inspectors, the Supreme Court found that the entire selection record had already been destroyed and the CBI inquiry confirmed the allegations of favouritism, nepotism, unfairness and political influence in disregard of the merit altogether. Thus, the court had an occasion to observe:[76]

> (T)hat fraud has reached its crescendo. It is highly regrettable that the holders of public offices both big and small have forgotten that the offices entrusted to them are sacred trust. Such offices are meant for use and not abuse. From a minister to menial everyone has been dishonest to gain undue advantages. The whole examination and interview have turned out to be farcical exhibiting base character of those who have been responsible for this sordid episode. It shocks our conscience to come across such a systematic fraud.

72 *Id*. at 440-41; Also see an earlier judgment in *Delhi Development Horticulture Employees' Union* v. *Delhi Administration* (1992) 4 SCC 99.
73 *Id*. at 461-62.
74 (1996) 10 SCC 375.
75 (1994) 4 SCC 165.
76 *Id*. at 174-75.

VI COURT OF RECORD AND POWER TO PUNISH FOR CONTEMPT – ARTICLES 129 AND 215

Articles 129 and 215 of the Constitution of India declare Supreme Court and every High Court to be a court of record having all the powers of such a court. One of the features of a court of record is that it has inherent power to punish for contempt of court. These articles do not confer any new jurisdiction or status on the Supreme Court and the High Courts. They merely recognize a pre-existing situation that the Supreme Court and the High Courts are courts of record and by virtue of being courts of record have inherent jurisdiction to punish for contempt. This inherent power to punish for contempt is summary. The jurisdiction contemplated by articles 129 and 215 is inalienable. It cannot be taken away or whittled down by any legislative enactment subordinate to the Constitution.

In *All India Anna Dravida Munnetra Kazhagam* v. *L.K. Tripathy*,[77] the Supreme Court reiterated its power to punish for contempt and also considered the scope of its power to punish for contempt. The court passed an *interim* order[78] restraining some political parties from proceeding with their call for *bandh*. Subsequently, a petition was filed under article 129 praying that respondents be punished for violation and disobedience of the court's order. Reading definition of 'Civil Contempt' in section 2(b) of the Contempt of Courts Act, 1971 with article 129 of the Constitution, the court recognized that being a court of record, it could punish a person for civil contempt if it was found that he had willfully disobeyed any judgment, *etc.* or violated an undertaking given to the court. On the facts of the case, the court came to the conclusion that the petitioners had not produced any legally admissible evidence to prove the violation of court's order. The chief minister had promptly withdrawn the call for *bandh* and there was no evidence to show that he had encouraged his party members to enforce the call for *bandh*. The chief secretary had issued instruction to collectors and superintendents of police to ensure maintenance of law and order. Instructions were also issued for maintenance of public transport and essential services.

The contempt power under article 215 "has to be exercised in accordance with the procedure established by law.[79] In *Leila David* v. *State of Maharashtra*,[80] two judges of the Supreme Court differed on this point. In an open court, some of the petitioners addressed the court in very

77 (2009) 5 SCC 417.

78 *Ibid*.

79 *L.P. Mishra (Dr.)* v. *State of U.P.* (1998) 7 SCC 379.

80 (2009) 4 SCC 578; Also see, *R.K. Anand* v. *Delhi High Court* (2009) 8 SCC 106 [Emphasizing that court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of court and that should allow him the fullest opportunity to defend himself].

intemperate and offensive language and one of them threw footwear at the bench in the presence of the solicitor general, two other additional solicitors general and a large number of advocates. Arijit Pasayat, J. passed an order directing the registrar to take the four persons into custody for sending them to prison for having allegedly committed contempt in the face of the court. A.K. Ganguly, J. disagreed with the view of Pasayat, J. ruling that the inherent power was not meant to circumvent the statutory requirements. The procedure, where contempt was in the face of the Supreme Court or a High Court, was prescribed under section 14(1) of the Contempt of Courts Act. The court could temporarily take the alleged contemnor in custody but it could not imprison him by way of punishment without following the safeguards under section 14(1) of the Act. Mere unilateral recording in the order that the contemnors stand by what they said in the court was not a substitute for compliance with the aforesaid mandatory statutory requirement. The statutory safeguards related to guarantee of right to one's personal liberty which could not be taken away except according to procedure established by law. It is true that the Supreme Court has inherent powers under article 129 to punish for contempt but the court cannot by-pass the procedure laid down in section 14 of the Contempt of Courts Act, 1971.

In *R.K. Anand* v. *Registrar, Delhi High Court*,[81] Delhi High Court exercised its power under article 215 of the Constitution. A sting operation pertaining to BMW hit-and-run accident case was telecast on NDTV wherein a prosecution witness was shown in a meeting with special public prosecutor, I.U. Khan, and senior defence counsel, R.K. Anand, negotiating for said witness's sell out in favour of the defence for a high price. Delhi High Court took *suo motu* cognizance on the basis of telecast alone; examined and accepted copies and transcripts of audio and video recording of sting operation on which telecast was based; convicted both the counsel for committing contempt of court and punished them by prohibiting them from appearing in Delhi High Court and courts subordinate to it for a period of four months and holding that they had forfeited their right to be designated as senior advocates and also imposed fine. On appeal, Supreme Court set aside the conviction of I.U. Khan but upheld the conviction of R.K. Anand holding that his action in trying to suborn the court witness in a criminal trial was reprehensible. His conduct before the High Court aggravated the matter manifold. He did not show any remorse for his gross misdemeanor and instead tried to take on the High Court by defying its authority. His actions and conduct established himself as a person who needed to be kept away from the portals of the court for a longer time. The punishment given to him by the High Court was wholly inadequate and not

81 *Supra* note 56.

commensurate to the seriousness of his actions and conduct. Accordingly, the court also issued notice to him for enhancement of punishment.

The court also ruled that telecast of sting operation exposing collusion between defence counsel and prosecutor in respect of suborning of prosecution witness concerning proceedings pending in court did not amount to obstruction of course of justice. The programme telecast showed that a conspiracy was afoot to undermine the "BMW hit-and-run case" trial. What was shown was proved to be substantially true and accurate. It was in larger public interest and served an important public cause. The court also rejected the contention that the TV channel should have carried out the stings only after obtaining permission of the trial court or the Chief Justice of Delhi High Court and should have submitted the sting materials to the court before its telecast. It would plainly be an infraction of the media's right to freedom of speech and expression guaranteed under the Constitution. It would amount to pre-censorship. It would be a sad day for the court to employ the media for setting its own house in order; and the media too would certainly not relish the role of being snoopers for the court.[82]

In *Sunkara Lakshminarasamma* v. *Sagi Subba Raju*,[83] one of the parties in the petition, *i.e.* a daughter-in-law made a false statement in the affidavit stating that her mother-in-law had died one year and six months ago. The deponent was held guilty of contempt of court and an exemplary costs of Rs. 25000/- was imposed by way of punishment.

VII HIGH COURTS POWERS OF JUDICIAL REVIEW - ARTICLE 226

Article 226 confers vast discretionary powers of most extensive nature as well as power of judicial review on the High Courts. The vast powers conferred on them impose an obligation to use them with circumspection. The principles governing the exercise of discretionary powers as well as judicial review are settled. The fact that in exercise of its power under article 226 of the Constitution, a writ petition has been entertained in public interest does not enlarge the scope of power of the High Court because parameters of a public interest litigation are well known.[84] In *Santosh Sood* v. *Gajendra Singh*,[85] during the pendency of a civil suit, the High Court entertained a petition in public interest and, without giving an opportunity of hearing to the plaintiff-appellant, passed an order of dispossession from disputed land. The High Court's action was held not

82 *Id*. at 197. The court also considered the admissibility and reliability of electronically recorded material.

83 2009 (7) SCC 460.

84 See, *Guruayoor Devaswom Manaaging Committee* v. *C.K. Rajan* (2003) 7 SCC 546.

85 (2009) 7 SCC 314.

sustainable and the matter was remitted back to the civil court with a direction to dispose of the same expeditiously. In the year under survey, the principles governing the exercise of power by the High Courts arose in the following context.

Academic matters

Policy matters fall within the province of the government[86] and are beyond judicial review unless they violate constitutional norms. Accordingly, court's interference in academic and educational matters is not proper except where interpretation of a statutory provision is involved. The "judges must not rush in where even educationists fear to tread" because it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies.[87] Therefore, courts cannot by their orders create courses, nor permit continuance of courses which were not created in accordance with law, or lower the minimum qualifications prescribed for admissions. *All India Council for Technical Education* v. *Surinder Kumar Dhawan*[88] is, to use the expression of the court, "a classic case where an educational course has been created and continued merely by the fiat of the court, without any prior statutory or academic evaluation or assessment or acceptance."[89] The All India Council for Technical Education took a decision to permit a bridge course for acquiring degree in engineering, to students who had passed advance diploma course provided the students had taken admission after passing 10+2 examination. Subsequently, the Delhi High Court permitted bridge course even to some of the students who passed post-diploma course provided they had also taken admission after passing 10+2 examination. The Punjab and Haryana High Court further diluted the eligibility conditions by permitting bridge course even to those students who had taken admission after passing 10+1 examination. On appeal the High Court's decision to permit candidates who had completed 10+1 plus four-years' post-diploma course to take the bridge course was set aside on the ground that the courts were neither equipped nor had the requisite academic or technical background to substitute themselves in place of statutory professional technical bodies and take decisions in academic matters involving standards and quality of technical education. If the courts start entertaining petitions from individual institutions or students to permit courses of their choice, either for their convenience or to alleviate hardship or to provide better opportunities, or because they thought that one course was equal to another without realizing the repercussions on

86 See, *Directorate of Film Festivals* v. *Gaurav Ashwin Jain* (2005) 4 SCC 737.

87 See, *J.P. Kulshrestha (Dr.)* v. *Allahabad University* (1980) 3 SCC 419; *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth* (1984) 4 SCC 27.

88 (2009) 11 SCC 726.

89 *Id.* at 736.

the field of technical education in general, it would lead to chaos in education and deterioration in standards of education. It is the function of AICTE to consider and grant approval for the introduction of new course or programme in consultation with the agencies concerned and to lay down the norms and standards for any course including curricula, instructions assessment and examinations.[90]

Raising of fresh plea

It is not permissible in a writ petition filed under article 226 of the Constitution for the parties to raise a fresh plea. However, in the interests of justice, the High Court may allow a party to raise a fresh plea but in such a case the principles of natural justice must be observed, *i.e.* the opposite party must be given an opportunity to rebut the same before taking a decision. In *Tirupati Jute Industries Private Limited* v. *State of West Bengal*,[91] some dismissed employees raised a fresh plea before the High Court that their dismissal order was illegal as the approval for their termination was not obtained by the manager of the establishment as required by standing order 14(e) of the company. A single judge accepted the new contention and held the dismissal illegal. The division bench affirmed the order of the single judge. The Supreme Court ruled that when a fresh plea involving question of fact was allowed to be raised, the opposite party must be given opportunity to let in evidence thereon. Neither the learned single judge nor the division bench could have assumed that there was no approval. If the High Court felt that the matter needed not be remitted and that it should decide the issue on merits, it ought to have given due opportunity to the appellant employer to produce before it relevant material to establish that it had complied with the standing order.[92]

Functional demarcation

In exercise of its discretionary powers under article 226 of the Constitution, the High Court cannot perform the functions of other authorities. In *Union of India* v. *Bilash Chand Jain*,[93] it was ruled that the High Court cannot itself perform the functions which are to be performed

90 *Id*. at 732. Also see, *State of Tamil Nadu* v. *Adhiyaman Educational and Research Institute* (1995) 4 SCC 104; *Government of Andhra Pradesh* v. *J.B. Educational Society* (2005) 3 SCC 212.

91 (2009) 14 SCC 406.

92 *Id*. at 411; Also see *Sarva Shramik Sangh* v. *Indian Oil Corporation Ltd.* (2009) 11 SCC 609 [Stating that the assumption that there is an absolute bar on inconsistent pleas being taken by a party is not sound. What is impermissible is taking of an inconsistent plea by way of an amendment thereby denying the other side the benefit of an admission contained in the earlier pleading. Mutually repugnant and contradictory pleas destructive of each other may also not be permitted to be urged simultaneously by a plaintiff. But when there is no inconsistency in the facts alleged, a party is not prohibited from taking alternative pleas available in law].

93 (2009) 16 SCC 601.

by some other authority. If that authority passed an order which the High Court found not sustainable in law, the High Court could set aside the said order and remit the matter to the authority concerned for deciding the same afresh in accordance with law, but the High Court should not take over the function of the authority itself. The aforesaid view was reiterated in *Indian Charge Chrome Limited* v. *Jagdish Rai Puri*.[94] In this case, the state government, which was competent authority to grant permission for transfer of government land, refused to grant permission which was legally not sustainable. The High Court in exercise of its power under article 226 directed the government to grant necessary permission for transfer/ execution of a deed in respect of land in favour of the appellant. On appeal, the Supreme Court set aside the impugned order and remitted the matter back to the state government with directions that the government shall decide the application seeking permission to transfer the said land afresh in accordance with law.[95]

The bar against assuming the role of other authorities reminisces judicial restraint in the matter of exercise of power under article 226 of the Constitution. The judicial branch should be more careful when the matter pertains to its own wing, *i.e.* judiciary. In *Aravali Gold Club* v. *Chander Hass*,[96] *and Common Cause* v. *Union of India*,[97] the apex court had held that the judiciary should not ordinarily encroach into the domain of the executive or the legislature. Functional requirement of judiciary did not justify encroachment into executive's function. This principle was again asserted in *President, Panchayat Union Council* v. *P.K. Muthusamy*.[98] In one of the districts of Tamil Nadu, some accommodation was required for the district munsif-cum-judicial magistrate's court. The High Court directed that the old block development office building shall be allotted for the aforesaid court. On appeal, the Supreme Court held that it was not within the jurisdiction of the High Court to pass the aforesaid order. The High Court's concern that there should be proper accommodation for the munsif's court was understandable but for that purpose, the High Court could only make a request to the government and not direct the government to allot or give a particular land or building which belonged to the government or to anyone else. The order passed by the High Court was set aside with a request to the chief secretary to the government of Tamil Nadu to discuss the matter with the Registrar General of the High Court so as to resolve the problem expeditiously.

94 (2009) 14 SCC 351.

95 *Id.* at 352; Also see, *Tirupati Jute Industries Private Ltd.* v. *State of West Bengal*, 2009 (14) SCC 406 [Merely on the ground that the matter was pending for a considerable time, the division bench could not say that there was no need to remit the matter back to the tribunal.

96 (2008) 1 SCC 683.

97 (2008) 5 SCC 511.

98 (2009) 14 SCC 651.

Interference with judicial orders

The question whether the High Court in exercise of its extraordinary writ jurisdiction can interfere with a judicial order passed by a civil court of competent jurisdiction has been answered by the Supreme Court in the negative. In 1967, a constitution bench of nine judges ruled in *N.S. Mirajkar* v. *State of Maharashtra*[99] that "*certiorari* does not lie to quash the judgments of inferior courts of a civil jurisdiction." The learned judges in saying so followed the law relating to certiorari as prevalent in England and held that in England, the judicial orders passed by the civil courts of plenary jurisdiction in relation to matters brought before them are not amenable to the jurisdiction of *certiorari*. The court admitted the necessity of relying on the foreign law when it observed: 'that as *certiorari* is a technical word of England law and had its origin in that law, for determining its scope and content we have necessarily to resort to English law.'[100] In 2003, a bench of two judges of the Supreme Court in *Surya Dev Rai* v. *Ram Chander Rai*[101] ruled that "orders and proceedings of a judicial court subordinate to the High Court are amenable to writ jurisdiction of the High Court under article 226 of the Constitution." The two-judge bench could not overrule the *ratio* of the nine-judge bench but the learned judges justified their different view on the ground that the law relating to *certiorari* had changed both in England and India.

This year again in *Radhey Shyam* v. *Chhabi Nath*,[102] a bench of two judges was confronted with the question whether the High Court in exercise of its extraordinary writ jurisdiction can interfere with a judicial order passed by a civil court of competent jurisdiction. The court in this case explained that "the appreciation of the ratio in *Mirajkar* case[103] by the learned judges in *Surya Dev Rai*[104] is erroneous and with that we cannot agree."[105] The reasoning, *inter-alia*, given by the *Radhey Shyam* case was that "in any event change of law in England cannot dilute the binding nature of the ratio of the nine-judge bench and which has not been overruled and is holding the field for decades.[106] Accordingly, the court requested the Chief Justice of India for constituting a larger bench, to consider the correctness or otherwise of the law laid down in *Surva Dev Rai* case.[107] Judicial globalization[108] has led to the growth of judicial comparativism, *i.e.*

99 AIR 1967 SC 1.
100 *Id.* at 23.
101 (2003) 6 SCC 675.
102 (2009) 5 SCC 616.
103 *Supra* note 99.
104 *Supra* note 101.
105 *Supra* note 102 at 622.
106 *Ibid*.
107 *Supra* note 104.
108 See, Ann-Marie Slaughter, "Judicial Globalization", and 40 VA. J. Int'L Law 1103 (2000) and "A Global Community of Courts", 44 Harv. Int'l L.J. 191 (2003).

courts in various countries across the globe are relying on foreign precedents. However, views are divided on the use of foreign law. As is evident from the above, the practical problems of comparative constitutional law include the difficulty of comprehending foreign law; the difficulty in determining the effects of laws abroad, and the problems of transferring such experience into the domestic system.

Judicial review of Legislative function

In *Bihar State Electricity Board* v. *Pulak Enterprises*,[109] the validity of rates of fuel surcharge fixed for power was challenged and the court considered the scope of judicial review of price fixation. The court reiterated the settled law[110] that price fixation was generally a legislative function and in the absence of any provision in that regard the principles of natural justice would not be applicable and the scope of judicial review would also be limited to plea of discrimination.

Judicial review of Legislative motive

If the legislature of a state is competent to pass a particular law, it is not open to the High Court in exercise of its power of judicial review to impute malice to the legislature and go into its motive. The aforesaid limitation in exercise of power of judicial review has once again been emphasized in *State of Kerala* v. *Peoples Union for Civil Liberties.*[111] State of Kerala enacted the Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act, 1975 and framed the rules thereunder in 1986. The Act was enforced retrospectively, *i.e.* with effect from 1-1-1982. However, the state and revenue officers took no effective steps to implement the said Act in letter and spirit. On a writ petition in public interest, the Kerala High Court gave directions to the authorities under the Act to dispose of the applications pending before them. In contempt proceedings initiated against the state government for non-compliance with court's direction, state made a statement before a full bench of the High Court that "a new bill would be introduced before the Legislative Assembly in terms whereof a permanent solution to the problem of alienation of tribal lands shall be dealt with." Thereafter, the Kerala Restriction on Transfer by and Restoration of Lands to the Scheduled Tribes Act, 1999 was enacted. On its validity being challenged, the High Court did

109 (2009) 5 SCC 641.

110 See, *Prag Ice and Oil Mills* v. *Union of India* (1978) 3 SCC 459; *Rohtas Industries Ltd.* v. *Bihar S.E.B*, 1984 Suppl SCC 161, *Kerala S.E.B.* v. *S.N. Govinda Prabhu* (1986) 4 SCC 198, *Saraswati Industrial Syndicate Ltd* v. *Union of India*, (1974) 2 SCC 630; *Union of India* v. *Cynamide India Ltd.* (1987) 2 SCC 720; and *Shri Sitaram Sugar Co Ltd.* v. *Union of India* (1990) 3 SCC 223.

111 (2009) 8 SCC 46.

not doubt the legislative competence of the legislature but yet declared certain provisions of the 1999 Act *ultra vires* the Constitution on the ground that it was colourable in nature as by reason of the provisions of the 1975 Act and the orders passed in favour of members of the Scheduled Tribes, a vested rights accrued to the members of the Scheduled Tribes was destroyed by provisions of the 1999 Act. In view of the law laid down in earlier cases,[112] the High Court's view was regarded as "transgressing the limitations of its constitutional power." The doctrine of colourable legislation was confined strictly to the question of legislative competence of the legislature to enact a statute. Having accepted the legislative competence, the High Court could not have entered into the said question through a side door so as to hold that the transgression of limitations of constitutional power may be disguised or indirect. The High Court committed a fundamental error in failing to keep a distinction in mind in regard to the power of a law-making authority which was of a qualified character and the power granted to a legislative authority which was absolutely without any limitation and restriction, being plenary in character.[113]

On this point, an earlier opinion of the Supreme Court in *Sarbananda Sonowal* v. *Union of India*[114] reflects a different trend. A Constitution bench of five judges held the Migrants [Determination by Tribunals] Act, 1983 *ultra vies* the Constitution. The court observed that it created hurdles in achieving the purpose. "The IMDT Act has been so enacted and the rules thereunder have been so made that innumerable and insurmountable difficulties are created in the matter of identification and determination of illegal migrants. There cannot be even slightest doubt that the application of the IMDT Act and the rules made thereunder in the state of Assam had created the biggest hurdle and main impediment or barrier in identification and deportation of illegal migrants. On the contrary, it was coming to the advantage of such illegal migrants as any proceedings initiated against them end in their favour and enables them to have a document having official sanctity to the effect that they are not illegal migrants.[115] It also imputed motives and commented on the purpose:[116]

> A deep analysis of the IMDT Act, 1983 and the rules made there under would reveal that they have been purposely enacted or made so as to give shelter or protection to illegal migrants who came to

112 See, *K.C. Gajapati Narayan Deo* v. *State of Orissa*, AIR 1953 SC 375*; S.T.O.* v. *Ajit Mills Ltd.* (1977) 4 SCC 98; *Dharam Datt* v. *Union of India* (2004) 1 SCC 712; *Gujarat Ambuja Cements Ltd* v. *Union of India* (2005) 4 SCC 214; *B.R. Shankarnarayana* v. *State of Mysore*, AIR 1966 SC 1571.

113 *Supra* note 111 at 76.

114 (2005) 5 SCC 665.

115 *Id*. at 714.

116 *Id*. at 706.

Assam from Bangladesh on or after March 25th, 1971 rather than to identify and deport them."

The above case echoes' a view currently gaining ground: "modern-day courts reviewing a statute's constitutionality investigate the enacting legislature's purposes in ways that were unheard of throughout most of the country's past.[117]

Private individuals and property disputes

The question whether private individuals are amenable to the jurisdiction of writ court in connection with private disputes relating to property, possession and title was considered in *Radhey Shyam* v. *Chhabi Nath*[118] and answered in the negative. The court with the aid of earlier decisions[119] reiterated that wide jurisdiction under article 226 of the Constitution would remain effective and meaningful only when it was exercised prudently and in appropriate situations. The extraordinary remedy was not available in case of private individuals with private disputes relating to property. On this point, it is necessary to refer to two earlier judgments. In 1989, the Supreme Court propounded a view in *Anandi Mukta Sadguru* v. *V.R. Rudani*[120] that a writ petition filed by teachers of a private aided college was held maintainable. The words "any person or authority" in article 226 were not confined only to statutory authorities. They may cover any other person or body performing public duty. The nature of duty performed was taken into account again in 2005 in *Binny Ltd* v. *V. Sadasivan.*[121] The fact that an authority was performing a function of public importance was considered relevant even if it was a private body. Thus, the court ruled that: "a writ can also be issued against a private body or person especially in view of the words used in article 226. However, such a private body must be discharging a public function."

VIII HIGH COURTS SUPERINTENDENCE OVER SUBORDINATE COURTS - ARTICLE 227

While exercising its jurisdiction under article 227, the High Court has a limited role to play in exercise of its supervisory jurisdiction. High Court cannot enter into disputed question of fact. *Sneh Gupta* v. *Devi Sarup*[122]

117 Caleb Nelson, "Judicial Review of Legislative Purpose", 83 NYU L Rev. 1784, 1879 (2008).

118 (2009) 5 SCC 616.

119 See, *Sohan Lal* v. *Union of India*, AIR 1957 SC 529, *Mohd. Hanif* v. *State of Assam* (1969) 2 SCC 782; *Hindustan Steel Ltd.* v. *Kalyani Banerjee* (1973) 1 SCC 273; *State of Rajasthan* v. *Bhawani Singh*, 1993 Suppl (1) SCC 306; *Mohan Pandey* v. *Usha Rani Rajgaria* (1992) 4 SCC 61; *Prasanna Kumar Roy Karamkar* v. *State of West Bengal* (1996) 3 SCC 403; *P.R. Murlidharan* v. *Swami Dharmananda* (2006) 4 SCC 501.

120 (1989) 2 SCC 1607.

121 (2005) 6 SCC 657.

122 (2009) 6 SCC 194 at 198; The court relied on *Yeshwant Sakhalkar* v. *Hirabat Kamat Mhamai* (2004) 6 SCC 71.

involved a dispute relating to property between the parties and one party therein filed an application impugning the compromise decree disputing the fact that the compromise had been entered without her consent and knowledge. The High Court accepted the said contention and set aside the compromise decree opining that the same was illegal, null and void. On appeal, the court reiterated the settled law that the High Court cannot enter into disputed question of fact. Interference under article 227 was permissible if there existed an error apparent on the face of the record or, if any other well-known principle of judicial review was found to be applicable, *i.e.* where the findings arrived at in the impugned judgment were perverse and/or in arriving at the said findings, the judge concerned failed or neglected to take into consideration the relevant factors or based its decision on irrelevant factors not germane therefor.

The power under article 227 of the Constitution cannot be used for the purpose of transfer of power. The nature of power of the High Court under article 228 is different from the one enshrined in articles 226 and 227 of the Constitution. An employee of West Bengal government filed an application under section 19 of the Administrative Tribunals Act, 1985 but the tribunal 'could not hear the application for various reasons.' Thereafter, in a writ petition filed under articles 226 and 227 of the Constitution, the High Court of Calcutta directed the tribunal 'to transmit all the original records of the application of the employee for taking a decision in the matter. The High Court ruled that: (1) in the event the learned tribunal could not hear out this matter, this court will, in exercise of its power under article 227 of the Constitution of India withdraw the same and hear out the matter, as the learned tribunal has failed to decide the matter; (2) the High Court having superintending power cannot remain passive institution when learned tribunal abdicates its legal, if not constitutional, duty. When a subordinate court or tribunal fails or neglects absolutely to function, it can be concluded without any hesitation that extraordinary situation has arisen that endangers due process of law. In such a situation, to discharge the constitutional obligation to the citizens of India, the High Court has power not only to withdraw the case of this nature but also to try the same; (3) the word 'superintendence' is of wide connotation. It has inclusive meaning which *inter alia* are to oversee and monitor so that things are done or act is accomplished with logical conclusion and finally in case of failure, to take upon itself to do and accomplish what ought to have been done by the person or forum subordinate to it. The state of West Bengal challenged the legality of this order before the Supreme Court in *State of West Bengal* v. *S.K. Sarkar*[123] which ruled that the scope of article 228 was different from articles 226 and 227. Article 228 of the Constitution covered a different

123 (2009) 15 SCC 445.

field from that covered by articles 226 and 227. It laid down the procedure regarding transfer of a case pending in courts subordinate to the High Court. This power was not to be founded under articles 226 and 227. Setting aside the impugned order of the tribunal, the court ruled that it would have been proper if the High Court in exercising its jurisdiction under article 227 had directed the tribunal to dispose of the matter expeditiously, instead of transferring the matter to itself. The court reiterated the settled law that under article 227, the High Court's function was limited to see that the subordinate court or tribunal functioned within the limits of its authority and that the said jurisdiction could not be exercised 'as the cloak of an appeal in disguise' and that the High Court under the powers conferred under article 227 could not withdraw a case to itself from a tribunal and dispose of the same.[124] The case propounds the view that judicial abdication or inaction by a subordinate court or tribunal does not entitle the High Court to transfer the case to itself and decide the same under supervisory jurisdiction. That power can be exercised only under article 228 when conditions specified therein are fulfilled.

IX HIGH COURT'S CONTROL OVER SUBORDINATE COURTS – ARTICLE 235

The control over subordinate courts including the power to transfer, maintain discipline and keep control over the judicial officers is vested in the High Courts under article 235 of the Constitution. The authority of High Court to control the subordinate courts has great dynamism. This year, the Supreme Court has emphasized that it is time to add to this power another dimension for monitoring and protection of criminal trials. The clarion call was given in BMW trial case, *viz. R.K. Anand* v. *Delhi High Court.*[125] Aftab Alam, J. observed:[126]

> (W)e must add here that this indifferent and passive attitude is not confined to the BMW trial or to the Delhi High Court alone. It is shared in greater or lesser degrees by many other High Courts. From experience in Bihar, the author of these lines can say that every now and then one would come across reports of investigation deliberately botched up or of the trial being hijacked by some powerful and influential accused, either by buying over or intimidating witnesses or by creating insurmountable impediments for the trial court and not allowing the trial to proceed. But unfortunately the reports

124 See, *State of Gujarat* v. *Vakhatsinghji Vajesinghji Vaghela,* AIR 1968 SC 1481; *Bathumal Raichand Oswal* v. *Laxmibai R. Tarta* (1975) 1 SCC 858; *Nagendra Nath Bora* v. *Commissioner of Hills Division,* AIR 1958 SC 398; *Thakur Jugal Kishore Sinha* v. *Sitamarhi Central Co-operative Bank Ltd.,* AIR 1967 SC 1125.

125 *Supra* note 81.

126 *Id.* at 207-208.

> would seldom, if ever, be taken note of by the collective consciousness of the court. The High Court would continue to carry on its business as if everything under it was proceeding normally and smoothly. The trial would fail because it was not protected from external interferences….
>
> Every trial that fails due to external interference is a tragedy for the victims of the crime. More importantly, every frustrated trial defies and mocks the society based on rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognizable and it then loses the trust and confidence of the people….
>
> Every failed trial is also, in a manner of speaking, a negative comment on the state's High Court that is entrusted with the responsibility of superintendence, supervision and control of the lower courts. It is, therefore, high time for the High Courts to assume a more proactive role in such matters. A step in time by the High Court can save a criminal case from going astray. An enquiry from the High Court registry to the quarters concerned would send the message that the High Court is watching; it means business and it will not tolerate any nonsense. Even this much would help a great deal in insulating a criminal case from outside interferences. In very few cases where more positive intervention is called for, if the matter is at the stage of investigation the High Court may call for status report and progress reports from police headquarter or the superintendent of police concerned. That alone would provide sufficient stimulation and pressure for a fair investigation of the case….
>
> In rare cases if the High Court is not satisfied by the status progress reports it may even consider taking up the matter on the judicial side. It may fix the venue of the trial at a proper place where the scope for any external interference may be eliminated or minimized. Article 235 of the Constitution that vests the High Court with the power of control over subordinate courts should also include a positive element. It should not be confined only to posting, transfer and promotion of the officers of the subordinate judiciary. The powers of control should also be exercised to protection them from external interference that may sometimes appear overpowering to them and to support them to discharge their duties fearlessly.

The aforesaid lines deserve serious consideration. Justice Aftab Alam observed that he 'authored the abovementioned lines from his experience in Bihar.' His observation reminds one of the expressions used by P.W. Young, J. "throwaway lines in a judgment" which means contextual or topical reference to an issue by a judge in his judgment. In this regard, he stated that the value of throwaway lines in a judgment should not be

underestimated. They are usually the result of serious research by the judge on point when all is worked out become unnecessary for the decision. The thought is, however, that learning should be preserved for later consideration. ..[A] Throwaway line is meant to stimulate thought in later cases, to motivate academics to build upon it and to encourage counsel in a later case to develop arguments based on it.[127]

X PARLIAMENT'S POWER TO RE-ORGANIZE STATES – ARTICLES 2 AND 3

The power of Parliament to admit a new state into the Indian Union is not unlimited but subject to the provisions of the Constitution. This element of Indian constitutionalism was propounded in 1994 by the Supreme Court in *R.C. Poudyal* v. *Union of India* [128] when Sikkim was admitted into the Indian Union. This year, the power was considered in the context of formation of new State of Uttarakhand. In *Pradeep Chaudhary* v. *Union of India,*[129] the constitutionality of the provisions of section 3 of the Uttar Pradesh Re-organization Act, 2000, whereby the district of Haridwar had been included in the State of Uttarakhand, was in question. The President of India referred the bill in regard to the proposed formation of State of Uttaranchal - wherein all areas coming within the territory of Haridwar were to form part of the new state - to the legislature of the State of Uttar Pradesh for ascertainment of its views. The reference was made to the state legislature of Uttar Pradesh in terms of proviso to article 3 of the Constitution of India. The legislature of UP adopted a resolution that the areas of Haridwar, as in the schedule to the bill, be deleted and should not form part of new state. Thereafter, when the Bill was introduced in the Lok Sabha, the district of Haridwar was included in the new state. The same was passed by both Houses of Parliament and the President of India assented to the bill and the Act came into force. Upholding the constitutionality, the court ruled that "it is Parliament's prerogative to place the Bill in either of the Houses, either in the same form or with amendments."[130] The court ruled that the view of the state legislature certainly would be taken into consideration but the same would not mean that the Parliament would be bound thereby. Substantive compliance with the said provision shall serve the purpose. What was mandatory was that the President must refer the bill to the legislative assembly for obtaining its views and even in a case where substantive amendment was carried out, the amended parliamentary bill need not be referred to the state legislature again for obtaining its fresh views.

127 P.W. Young, Current Issues, Aust. LJ 513 at 522 (1996).
128 1994 (Suppl) 1 SCC 324.
129 (2009) 12 SCC 248.
130 *Id.* at 252.

The term "consultation" means differently in different context. While power to introduce the bill was kept with Parliament, consultation with the state legislature although s mandatory but its recommendations were not binding on Parliament. "Consultation" in a case of this nature would not mean concurrence. It only means to ask or seek for the views of a person on any given subject.[131] The court's conclusion was aided by an earlier ruling of the Constitution bench in *Babulal Parate* v. *State of Bombay*.[132] It referred with approval and adopted the reasoning: "we see no reasons for importing into the construction of article 3 any doctrinaire consideration of sanctity of the rights of states or even for giving an extended meaning to the expression 'State" occurring therein. None of the constituent units of the Indian Union was sovereign[133] and independent in the sense the American colonies or the Swiss Cantons were before they formed their federal unions. The Constituent Assembly of India deriving its power from the sovereign people, was unfettered by any previous commitment in evolving a constitutional pattern suitable to the genius and requirements of the Indian people as a whole. Unlike some other federal legislatures, the Parliament, representing the people of India as a whole, has been vested with the exclusive power of admitting or establishing new states, increasing or diminishing the area of an existing state or altering its boundaries, the legislature or legislatures of the states concerned having only the right to an expression of views on the proposals. The adoption of the reasoning in the context of Union and States in the Indian federalism signifies progressive constitutionalism. One of the distinguishing features between progressive and conservative constitutionalism is that the latter seeks to narrow the reach of federal power while the former seeks to narrow the power of the States.[134] Secondly, the court took aid from the writings of a noted constitutional scholar who has observed: "These amendments are not required to be referred again to the State Legislature concerned nor is any fresh recommendation of the President necessary for their consideration."[135] In *Shanti Bhushan* v. *Union of India*[136] also, the court relied on writing of juristic scholars. Such a trend reinforces the academic relationship between judges and jurists. In law there is debate whether academic writing of scholars and jurists has any impact on the judicial decision making.[137]

131 *Ibid*.
132 AIR 1960 SC 51.
133 For a dissenting view that each State in the Indian Union is sovereign, see dissenting judgment of Subba Rao, J. in *State of West Bengal* v. *Union of India*, AIR 1963 SC 1241.
134 See, Erwin Chemerinsky, "Progressive and Conservative Constitutionalism as the United States Enters 21st Century"' 67 *Law and Contemporary Problems* 53 [2004].
135 See Durga Dutt Basu, *Commentary on the Constitution of India* 467 [8th edn.].
136 *Supra* note 2.
137 See, *Judges and Jurists in the Reign of Victoria*, The Hamlyn Lecture, Eleventh Series (1959).

XI PRECEDENT - ARTICLE 141

The distinguishing feature of the common law system is adherence to the principle of precedent which was incorporated in article 141 of the Constitution. Much ink has flown on the question: How to determine the *ratio decidendi* of a case? Professor Goodhart has summarized various principles in this regard.[138] However, quite often, the courts themselves encounter different perceptions on the determination of *ratio decidendi* of a case. Some cases under survey eloquently highlight this.

***Interim* directions**

Mere directions of a court without considering the legal position are not a precedent. In *Vishnu Dutt Sharma* v. *Manju Sharma*,[139] the court refused to grant divorce on the ground of 'irretrievable breakdown of marriage.' Rejecting the contention of the counsel, the court ruled "learned counsel for the appellant has stated that this court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position and hence they are not precedents. A mere direction of the court without considering the legal position is not a precedent."[140]

An *interim* order passed by the court cannot be treated as a precedent. So ruled the court in *State of Assam* v. *Barak Upatyaka D.U. Karamchari Sanstha.*[141] In a writ petition filed by a trade union representing a society registered under the Assam Co-operative Societies, the Assam High Court directed the statement government to release grants to the society to pay the salary and other emoluments to its employees. The High Court relied on an earlier case, *i.e. Kapila Hingorani* v. *State of Bihar (II)*[142] wherein it was observed that "we do not appreciate the stand taken by the State of Bihar now that it does not have any constitutional obligation towards a section of citizens, *viz.* the employees of the public sector undertakings who have not been paid salaries for years."[143] The court also observed in *Kapila Hingorani* v. *State of Bihar (I)*[144] that:[145]

> We, however, hasten to add that we do not intend to lay down a law, as at present advised, that the State is directly or vicariously liable

138 See, "Determining the *Ratio Decidendi* of a Case" in Essays in Jurisprudence and Common Law by Goodhart (1931).
139 (2009) 6 SCC 379.
140 *Id.* at 384. Also see, *Bihar School Examination Board* v. *Suresh Prasad Sinha* (2009) 8 SCC 483 [Courts should guard against danger of mechanical application of an observation without ascertaining the context in which it was made.].
141 (2009) 5 SCC 694.
142 (2005) 2 SCC 262.
143 *Id.* at 268.
144 (2003) 6 SCC 1.
145 *Id.* at 34-35.

> to pay salaries of the employees of the public sector undertakings or the government companies in all situations. We only say that the State cannot escape its liability when a human rights problem of such magnitude involving the starvation deaths and/or suicide by the employees has taken place by reason of non-payment of salary to the employees of public sector undertakings for such a long time."

Further, the directions were issued under article 142 of the Constitution.[146] Explaining the *ratio*, the court ruled in *Barak Upatyaka* case[147] that:[148]

> (T)he two decisions are *interim* orders made in a writ petition under article 32 of the Constitution. The said orders have not finally decided the issues raised; have not laid down any principle of law." These directions were not based on legal right of the employees, but were made to meet a human right problem involving starvation deaths and suicides. But in the case on hand, relief is claimed and granted by proceedings on the basis that the employees of corporations answering the definition of "State" have a legal right to get their salaries from the state government."

Accordingly, the court stated that a precedent is a judicial decision containing a principle, which forms an authoritative element termed as *ratio decidendi*. An *interim* order which does not finally and conclusively decide an issue cannot be a precedent. Any reasons assigned in support of such non-final *interim* order containing *prima facie* findings, are only tentative. Any *interim* directions issued on the basis of such *prima facie* findings are temporary arrangements to preserve the *status quo* till the matter is finally decided, to ensure that the matter does not become either infructuous or a *fait accompli* before the final hearing.

Judge-made law

Under the scheme of the Indian Constitution, the apex court has been assigned the duty of constitutional adjudication which includes interpretation too. In the process of interpretation, the judges make law. What is the status of judge-made law? Is it a binding precedent? In *M. Nagraj* v. *Union of India*,[149] the court ruled that "an interpretation placed by the court on any provision of the Constitution gets inbuilt in the

146 See, *Indian Bank* v. *ABS Marine* (2006) 5 SCC 72 [Leaving the question open as to whether a direction given by court under article 142 of the Constitution can be treated as precedent under article 141 of the Constitution].

147 *Supra* note 141.

148 *Id.* at 701-702.

149 (2006) 8 SCC 212, 218.

provisions interpreted. Such articles are capable of amendment under article 368." Again, in *N Kannadasan* v. *Ajoy Khose*,[150] the court reiterated that in our constitutional scheme, the judge-made law becomes a part of the Constitution. The view was expressed in the context of judge-made law propounded in *S.P. Gupta* v. *Union of India*[151] that if a person has made himself disqualified to hold the post of a judge, the Chief Justice should not consider his name at all. It is his constitutional duty not to recommend his name for appointment.

It is interesting to note that constitutional scholarship is proposing a new paradigm for analyzing the role of precedent in constitutional law. The conventional perspective equates precedent with judicial decisions, particularly those of the Supreme Court and almost totally ignores the constitutional significance of precedents made by public authorities other than courts. Yet, non judicial actors produce precedents that are more pervasive than those made by the courts in constitutional law. Non-judicial precedents are not only confined to the backwaters of constitutional law, but they also pertain to serious constitutional matters. Therefore, a view has been expressed that shifting perspective from the Supreme Court to non-judicial actors will have several beneficial effects on the understanding and practice of constitutional law.[152]

"Experiencing ignored precedent:"[153] contours of non-compliance

If a judicial precedent is disregarded by judicial fraternity, it becomes a matter of judicial discipline. On the other hand, if a judgment or judicial order is not complied with, it becomes a contumacious subject. However, the tendency to flout judicial orders is increasing. In 1993, in *Maniyari Madhavan* v. *Inspector of Police, Cannanore*,[154] the court expressed its anguish over disturbing degree of indifference shown by state in complying with court's order. Again, in 2000, the Patna High Court lamented in *Bihar Tourism Development Corporation* v. *M/s Roy Construction*[155] that "hardly any order of court is implemented without threat of action in contempt." Court's latest anguish this year reminds that this is one aspect which requires immediate judicial and juristic attention, *i.e.* the extent to which there is non-compliance with the orders passed by the courts in India.

150 (2009) 7 SCC 1; But see, *UP State Road Transport Corporation* v. *Commissioner of Police Delhi* (2009) 3 SCC 634 [The judge-made law in an area covered by the parliamentary legislation should not be applied in an expansive manner. Nothing should be deduced therefrom].

151 1981 Suppl. SCC 87.

152 See, Michael J. Gerhardt, "Non-Judicial Precedent", 61 *Vand. L. Rev*. 713 (2008).

153 The term is not mine. It has been used by Timothy Schwartz in "Cases Time Forgot: Why Judges can Sometimes Ignore Controlling Precedent" 56 Emory LJ 1475 [2006-07].

154 1993 (Suppl) 2 SCC 501.

155 79 IL R 721 (Pat) (2000).

In *Special Land Acquisition Officer* v. *Mahaboob*,[156] the court observed that statistics show most that of the acquisitions relate to lands held by small farmers whose livelihood depends upon the acquired land. The land acquisition officers are supposed to offer a fair compensation by taking all relevant circumstances relating to market value into account. But in practice they seldom make reasonable offers. They tend to err on the "safer" side and invariably assess very low compensation. In fact, many a time even the reference courts are conservative in estimating the market value and it requires further appeals by the land-losers to the High Court and the Supreme Court to get just compensation. Further, we can take judicial notice of the fact that in several states, the awards of the reference court or the judgments of the High Courts and the Supreme Court increasing the compensation are not complied with and the land-losers are again driven to courts to initiate time consuming execution process which also involves considerable expense by way of lawyers fee to recover what is justly due to them.[157] It is interesting to note the current view prevailing among some scholars that Supreme Court rulings lack even binding effect and that every government official has, in every case, an independent constitutional duty to do what he/she thinks is right by the Constitution.[158]

XI REMOVAL AND SUSPENSION OF PUBLIC SERVICE COMMISSION MEMBER - ARTICLE 317

Impeccable functioning is expected from constitutional functionaries. The members of public service commission are expected to conduct their affairs fairly and impartially. This year, the Supreme Court conducted two enquiries under article 317 of the Constitution. In *Reference under Article 317 (2) Constitution of India*,[159] the Supreme Court conducted an enquiry against chairman of the Orissa Public Service Commission. The allegations leveled against him were: (i) he continued to act as chairman of the commission despite the fact that his two married daughters were candidates for the civil services examinations in 2000; (ii) he threatened a member with life and also threatened other members of the commission on many occasions in the commission's meetings; and (iii) he took bribe of Rs. 1.5 lakh to favour one candidate for appointment as a junior lecturer. The court ruled that none of the charges leveled were proved on the basis of record. The principle which requires that a member of a selection committee, whose

156 (2009) 14 SCC 55.
157 *Id.* at 60.
158 See, Michael Stokes Paulsen, "The Irrepressible Myth of Marbury", 101 Mich. L.Rev. 2706 (2003).
159 (2009) 1 SCC 337.

close relative is appearing for selection, should decline to become a member of the selection committee or withdraw from it leaving it to the appointing authority to nominate another person in his place need not be applied in case of a constitutional authority like the public service commission, whether central or state. If a chairman or member of the public service commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection no other person save a chairman and/or a member can be substituted in his place. And it may sometimes happen that no other member is available to take the place of such chairman or member and the functioning of the public service commission may be affected.[160] The court's reasoning is the application of the doctrine of necessity – which has been judicially propounded as an exception to the principle of bias. It is reiteration of the principle laid down in an earlier case.[161] Therefore, it becomes clear that the power exercised by the members of the public service commission thus becomes monopoly in nature. Prominent English jurists have suggested that power that is exercised by a person or body in carrying out a function, where only that person or body performs the function, should be regarded as public for the purposes of domestic judicial review and, therefore, amenable to review.[162] It is true that the English jurists have expressed their view in the context of statutory power. The Supreme Court of India has made a distinction between statutory power and constitutional power. Nonetheless, it is not incorrect to suggest that the constitutional power is also public power and thus not immune from judicial review.

In this case the married daughters of the chairman had withdrawn their candidature before the examinations were held. They had neither appeared in the examination nor had the chairman taken any step in selecting any of his two daughters for the Orissa civil services. None of the close relatives of the chairman had appeared for interview and, therefore, no occasion arose for him to withdraw from participation the interview. The second and third charges were also held not substantiated on record. The proceedings of different meetings of the commission indicated that the chairman had not acted in a manner so as to compromise the image, dignity and the impartiality of the public service commission. Rather, the record revealed that endeavour was made to avoid deadlock that had taken place due to non-cooperation of members of the public service commission. The atmosphere of the commission was absolutely vitiated and the members of the

160 *Id.* 344.

161 *Ashok Kumar Yadav* v. *State of Haryana* (1985) 4 SCC 417.

162 Collin D. Campbell, "Monopoly Power as Public Power for the Purposes of Judicial Review", 125 LQR 491 (2009) [Advancing the monopoly power test and contending not only that it would be appropriate for monopoly power to be subject to judicial but also that a monopoly power test could plausibly be employed by the courts as the sole test for determining the availability of judicial review].

commission had approached the press hitting at the chairman and criticizing the functioning of the commission under his leadership on a number of occasions. The appointment of the chairman was not liked by the member who leveled allegation of threat to her life and she herself wanted to be the chairman and, therefore, started behaving in a manner to defy the authority of the chairman.[163] The court also pointed out that it had come on record that the law department of the state government opined to refer the matter under article 317(1) of the Constitution against the remaining members of the public service commission for their acts of insubordination, non-cooperation, *etc.* amounting to misbehavior on their part but no reference was made to this court against the remaining members of the public service commission.[164]

The second enquiry against the chairman of Chhatisgarh public service commission was also conducted and the same is reported in *Reference under Article 317(1) of the Constitution of India, Chhatisgarh Public Service Commission.*[165] Article 317 of the Constitution does not define "misbehaviour" or enumerate what acts would constitute "misbehaviour." In this regard, judicial enumeration is that the actions of the member shall be transparent and he shall discharge his functions with utmost sincerity and integrity. If there is any failure on his part, or he commits any act which is not befitting the honour and prestige of a member or chairman of the public service commission, it would amount to "misbehaviour as contemplated under the Constitution.

Four allegations against the chairman of the Chhattisgarh public service commission were investigated in the light of the above enumerated misbehaviour. First, that he committed grave irregularities and mismanagement in conducting the preliminary examination for 2005; second, that he had unauthorisedly misused the government vehicles drivers and orderlies which were provided to him during his officiation in the post of director general of police; third, that he claimed house rent allowance, which was not admissible to him while staying in a police mess; and fourth, that while acting as chairman of the commission, he acted in a dictatorial manner and that his style of functioning was objectionable. On the facts of the case, the court found that there was no evidence of proved misbehaviour against the chairman. On the first allegation the court came to the conclusion that if any irregularities had taken place in the conduct of the examination, it was due to the fault of some of the officers of the public service commission and not by the chairman who was unnecessarily dragged into the controversy.[166] The chairman prior to his appointment in the

163 *Supra* note 159 at 342.
164 *Id.* at 344.
165 (2009) 8 SCC 41.
166 *Id.* at 43.

commission was the director general of police of the State of Chhattisgarh. He being ex-DGP of the naxalite-affected state was given some additional security while discharging his duties as chairman of the commission and therefore there was no impropriety on his part.[167] On his appointment as chairman, no official quarter was provided to him and he had to stay in the police mess almost throughout his career and had to suffer these types of allegations. Further, the Accountant General of the State deposed in the enquiry before the court that there was nothing irregular as per HRA Rules.[168] As regards the allegation that he acted in a dictatorial manner, neither any details were divulged nor any evidence was led to substantiate this. On the other hand, it was alleged that some of the members did not like the chairman taking strict actions regarding the conduct of the examination and other official functions.

Even in his deposition, the chairman stated that when he took over as chairman of the commission, there were four other members and 50 per cent of them did not belong to government service having ten years' experience as provided for under proviso to clause (1) of article 316 of the Constitution. Many of them were appointed on account of their political background. All these members wanted to know the confidential matters like where the question papers were printed and who set the question papers, *etc*. Some of the members gave a list of persons who should be appointed as the question paper setters. Accordingly, the court came to the conclusion that the chairman had not exhibited any improper behavior and all the charges leveled against him were baseless and there was not even *prima facie* proof of misbehaviour on the part of the chairman.[169]

It is interesting to note that in this case chairman deposed that "many members were appointed on account of their political background."[170] The Punjab and Haryana High Court had also observed in *Ashok Kumar Yadav* v. *State of Haryana*[171] that politics had played a major role in the appointment of the chairman and members of the commission and that they were men lacking in integrity, caliber and qualifications. These condemnatory observations were expunged by the Supreme Court holding that they not only went beyond averments in the writ petitions but were also totally unjustified and unwarranted as they were made without their being party to the writ petitions and this was clearly in violation of the principles of natural justice.

167 *Id.* at 44.
168 *Id* at 44-45.
169 *Ibid*.
170 *Ibid*.
171 1985 Suppl. (1) SCR 657.

XII SPECIAL LEAVE PETITION – ARTICLE 136

Casual and slipshod drafting – streamlining the filing process by government

Twenty-five years ago, *i.e.* in 1985, the Supreme Court lamented: "Laxity in drafting all types of pleadings is becoming the rule and a well drafted petition and exception. An ill drafted petition is offspring of union of carelessness with imprecise thinking and its brothers are slipshod preparation of the case and rambling and irrelevant arguments leading to waste of time which the courts can ill afford for reasons of their overcrowded docket."[172] To file such indifferent petitions is most disrespectful and discourteous to the highest court in the country.[173] The court's concern in this regard remains unheeded. On many earlier occasions a note of caution had been sounded that central government and state governments should act as model litigants.[174] This year also casual approach by government departments in litigation has been a subject of judicial deprecation. In *Special Land Acquisition Officer* v. *Mahaboob*[175] again, the court commented "thus the special leave petition is filed without any grounds in support of or questions of law. The possibility of any mix in typing is ruled out because para 5.2. narrates the facts correctly and other portions of the petition show that it relates to the case on hand. The notings at the end of the memorandum of the special leave petition state that it has been "Drawn by B, High Court Government Pleader" and "filed by A, advocate for the petitioner state". It is a matter of concern that minimum care is not taken even to verify the petition before filing. The court noted with concern that the frequency of carelessly drafted SLPs is rapidly increasing. The very purpose of requiring SLPs to be filed only through advocates-on-record would be defeated if SLPs prepared by some other counsel are mechanically filed without examination or verification by the advocates-on-record. The remedy by way of special leave under article 136 of the Constitution is an extraordinary remedy, intended to be invoked in special cases and should not be treated so casually, negligently or routinely.[176]

172 *Prabodh Verma* v. State of U.P. 1985 (1) SCR 216 at 251.

173 See, *Sukh Deo Narain* v. *State of Rajasthan,* 1985 (1) SCR 199. Also see, *Charan Lal Sahu Giani Zail Singh,* 1986 (2) SCR 6 [Deprecating filing of a petition in a cavalier fashion] *Mithilesh Kumar* v. *R. Venkatraman,* 1988 (1) SCR 525 [Deprecating the filing of a petition without giving adequate thoughts to its content merely to seek cheap publicity]; *Charan Lal Sahu* v. *Shri R.K. Narayanan,* 1997 (7) SCALE 124 [Deprecating filing of defective petition obsessed with a desire to find a place in some book of records].

174 See generally, *Urban Improvement Trust Bikaner* v. *Mohan Lal,* 2009 (13) SCALE 671; *Dilbagh Rai* v. *Union of India* (1973) 2 SCC 554, *Madras Port Trust* v. *Hymammu International* (1979) 4 SCC 176; *Bhag Singh* v. *Union Territory of Chandigarh* (1985) 3 SCC 737; and *Union of India* v. *Hem Raj Singh Chauha* (2010) 4 SCC 290,

175 (2009) 14 SCC 55.

176 *Id* at 57.

The unhealthy practice of filing special leave petitions with sketchy drafting is pervasive in private litigation too. In *Tamil Nadu Omni Bus Owners Association* v. *State of Tamil Nadu*[177] the constitutionality of Tamil Nadu Motor Vehicles Taxation (Amendment) Act, 1998 was challenged on the ground that levy of enhanced tax per seat on contract carriage was without any rationale and discriminatory. The basis of the challenge rests on the uneven burden placed on the owners of contract carriage *vis-à-vis* stage carriage. In a matter of this nature, the quantifiable data forms the basis of the challenge. When the petition is filed in such cases, there has got to be a precise formulation of the ground of challenge from the side of the appellant-petitioners based on some statistical data as to the disproportionality of the rate of tax. It is only thereafter that the burden will shift on to the state to submit quantifiable and measurable data. In this case, the court found that the initial burden on the appellant petitioners was not discharged in the sense that the petition filed before the High Court was sketchy. If allegations as made in the writ petition are vague, inaccurate or insufficient, it would not be possible for the state to submit its reply. Accordingly, the petitioners were allowed to withdraw the petitions with liberty to file a proper writ petition.

Delay in filing SLPs – state elephants' movement

There is no denying the fact that the 'state elephant moves at a very slow speed.' The same trend is discoverable in delay in filing the special leave petitions by the government departments. *Mahaboob* case,[178] the court had occasion to observe that more than half the numbers of SLPs filed in the Supreme Court were by the state governments and the Union of India. About 90 per cent of these petitions were filed with applications for condonation of delay. The delay was usually condoned keeping in view the administrative snarls and bottlenecks, governmental procedures and the public interest. Accordingly, the court emphasized the need to streamline the "decision-making process" procedure in filing the "special leave petitions" and reduce the delay. Delays in filing, virtually every SLP by the government(s), makes a mockery of the provisions relating to limitation and the meaning of "sufficient cause."[179]

Ethical decline: erosion of professional values

In *R.K. Anand* v. *Delhi High Court*[180] a senior advocate was held guilty of contempt of court for suborning a witness in a criminal trial, *i.e.* BMW car hit case. The court expressed its grave concern and dismay about the decline of ethical and professional standards among lawyers. The court sounded a note of caution:

177 (2009) 2 SCC 312.
178 *Supra* note 175.
179 *Id.* at 57.
180 *Supra* note 56.

> (T)he conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as special public prosecutor), both of them lawyers of long standing, and designated senior advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct.

The court expressed its concern on the falling professional norms among lawyers with considerable pain because it strongly felt that unless the trend is immediately arrested and reverse, it will have very deleterious consequences for the administration of justice in the country.[181]

Forum jumping - direct access to Supreme Court

It is settled law that though the existence of an alternative remedy by itself will not take away the jurisdiction of the Supreme Court under article 136, the court would not allow direct access by granting leave and entertain appeals against orders//judgments/decrees of the district or subordinate courts if remedy by way of appeal or revision to the High Court or other court or forum is available. This principle of law was once again re-affirmed in *Shin-Etsu Chemical Company Ltd.* v. *Vindhya Telelinks Ltd.*[182] In a commercial dispute, the plaintiffs filed a civil suit for a declaration that the long-term sale and purchase agreement entered into between them and the defendant was null and void and also sought a permanent injunction restraining the defendants from giving effect to any of the terms of the agreement. The defendants filed SLP directly in the Supreme Court against the appellate order passed by district court under section 50(1) of the Arbitration and Conciliation Act, 1996 without approaching the High Court but the same was held not maintainable. The court reiterated[183] that "article 136 is not intended to permit direct access to this court where other equally efficacious remedy is available and that this court would not grant leave under article 136 unless the appellant has exhausted all other remedies open to him."

In *Nawab Shaqafath Ali Khan* v. *Nawab Imdad Jah Bahadur*,[184] the heirs of the late Nizam of Hyderabad filed a special leave petition against

181 *Id.* at 207.
182 (2009) 14 SCC 16.
183 Court relied on earlier decisions on point, *viz*. *Punjab Agro Industries Corporation Ltd*. v. *Kewal Singh Dhillon* (2008) 10 SCC 128; *Shyam Sunder Agarwal & Co*. v. *Union of India* (1996) 2 SCC 132.
184 (2009) 5 SCC 162.

the order of chief judge, city civil court and it was argued on their behalf that article 136 should be widely construed so as to take into consideration a special situation where a litigation based on construction of a deed may finally be adjudicated upon by the court. Rejecting the contention, the petitions were returned with liberty to approach the High Court.

Interference with concurrent findings of fact

In exercise of its discretionary jurisdiction under article 136, the court does not interfere with concurrent findings of facts below. However, the Supreme Court cannot hold back its interference when acquittal is warranted in a given case to avoid injustice. In *S.V.L. Murthy* v. *State,*[185] the accused persons were not charged under section 409, IPC for entering into a conspiracy in respect of commission of offences under the Prevention of Corruption Act. However, the courts below concurrently gave findings as to their conviction and sentence. Interfering with the orders of the courts below, the Supreme Court ruled that it was one thing to say that ordinarily a concurrent finding of fact shall not be interfered with by the Supreme Court in exercise of its jurisdiction under article 136 of the Constitution but quite another to say that despite opining that the accused were entitled to acquittal, a judgment of conviction passed against them should be upheld. The jurisdiction of the Supreme Court must be exercised wherever the same was required to do so for securing the ends of justice and to avoid injustice. The appellants had been charged under wrong provisions. Proper charges had not been framed against them, and therefore Supreme Court did interfere despite concurrent findings of fact by the lower courts.[186] The court has a duty to prevent injustice to any of the parties to the litigation. It cannot allow its jurisdiction to allow the proceedings to be used to work as substantial injustice. The courts emphasis to prevent injustice fortifies legitimacy of judicial process.[187] In *Mahesh Dattaray Thirthkar* v. *State of Maharashtra,*[188] the court considered the question as to when interference with findings of facts in land acquisition matters was permissible. After referring to earlier cases, the court summarized various principles for exercise of discretion under article 136 of the Constitution.[189]

185 (2009) 6 SCC 77.

186 *Id.* at 81; also see, *Shashi Jain* v. *Tarsem Lal* (2009) 6 SCC 40 [Stating that this court in exercise of its jurisdiction will not be overreaching its power in appreciating the evidence on record to find out whether the order of the authorities below as confirmed by the High Court are perverse, not based upon proper and legitimate appreciation of evidence on record].

187 *Supra* note 185.

188 (2009) 11 SCC 141.

189 "[1] The powers of this Court under Article 136 of the Constitution of India are very wide; [2] It is open to this Court to interfere with findings of fact given by the High Court if the High Court has acted perversely or otherwise improperly; [3] When the evidence adduced by the parties in support of their respective cases fell short of reliability and acceptability

***Res judicata* – ignoring first order but challenging subsequent order**

The question whether the government or a statutory body which accepted and implemented an earlier decision of a court, can challenge subsequent decisions of the court following such earlier decision is settled and in such a case neither the principles of *res judicata* nor the principle of estoppel, nor the principle of legitimate expectation, nor the principle of fairness in action was attracted and therefore there was no bar to such a challenge.[190] In *All India Council for Technical Education* v. *Surinder Kumar Dhawan*,[191] the appellant council did not challenge the earlier decision of Delhi High Court which allowed admission to some of the students who were not eligible according to the criteria fixed by the appellant council. However, the appellant council filed a special leave petition against the subsequent decision of the Punjab and Haryana High Court when the council found that the courts by their successive orders were diluting eligibility conditions. The objection as to the maintainability of the petition was rejected on the basis of view propounded in *Akra* case.[192] The position would be viewed differently if the petitioners plead and prove that the state had adopted a 'pick-and-choose' method only to exclude the petitioners on account of mala fides or ulterior motives.

Revocation of leave

Article 136 uses the expression 'special leave petition' in contradistinction to the 'special appeal petition.' The word 'leave' has been used as synonym to the word 'permission.' Therefore initially when a case is filed under article 136, it is numbered as special leave petition. When the court grants permission, the effect is that the case is renumbered as appeal, *i.e.* 'civil appeal' or 'criminal appeal' as the case may be. The discretionary power vested in the Supreme Court under article 136 continues even after granting leave. If in the circumstances of the case, the court feels that leave ought not to have been granted and that no prejudice would be caused, the

and as such it is highly unsafe and improper to act on it; [4] The appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record; [5] The appreciation of evidence and finding results in serious miscarriage of justice or manifest illegality; [6] Where findings of subordinate courts are shown to be perverse or based on no evidence or irrelevant evidence or there are material irregularities affecting the said findings or where the court feels that justice has failed and the findings are likely to result in unduly excessive hardship; [7] when the High Court has redetermined a fact in issue in a civil appeal, and erred in drawing inferences based on presumptions; and [8] The judgment was not a proper judgment of reversal."

190 See, *State of Maharashtra* v. *Digambar* (1995) 6 SCC 683; *Col. B.J. Akara* v. *Government of India* (2006) 11 SCC 709.

191 (2009) 11 SCC 726.

192 *Supra* note 190.

court may revoke the leave already granted.[193] In *Shin-Etsu Chemical Company* case[194] the petition was filed on 11.12.2006 and the leave was granted on 22.10.2007, *i.e.* the matter was pending in the Supreme Court for about two years. Yet the court dismissed the appeal with liberty to the petitioner to approach the appropriate forum of appeal available. The court was not ready to treat the fact of grant of leave by itself as an exception on the ground that it would become an erroneous precedent.[195] In *Nawab Shaqafath Ali Khan* v. *Nawab Imdad Jah Bahadur*,[196] the court once again reiterated that there was no quarrel with the proposition that the discretionary jurisdiction under article 136 could be denied even after grant of leave unless exceptional and special circumstances existed that substantial and grave injustice had been done. However, the discretionary jurisdiction is to be exercised keeping in view the facts and circumstances of each case and no hard and fast rule can be laid down therefor.

Suo motu cognizance of malpractice

In exercise of its power under article 136, the Supreme Court can take *suo motu* cognizance of any malpractice in the legal process. *In Suraj Lamp & Industries (P) Ltd* v. *State of Haryana*,[197] the court took cognizance of malpractice prevailing in certain states regarding "avoidance of execution and registration of deeds of conveyance as the mode of transfer of freehold immovable property by increasing tendency to adopt 'power of attorney sales' by executing sale agreement/general power of attorney and will." The court observed that this mode of transfer of property was evolved by lawyers and document writers in Delhi to overcome certain restrictions on transfer of flats by the Delhi Development Authority. The illegal and irregular process of "power of attorney sales" spans several disputes relating to possession and title, and also results in criminal complaints and cross-complaints and extra-legal enforcement and forced settlements by land *mafia*. It also results in tax evasion, loss of revenue, and concealment of black money. Therefore, situation warrants special measures. Accordingly, the court requested the Solicitor General of India to appear in the matter and give suggestions on behalf of the Union of India. It also issued notices to ascertain views of various state governments concerned about steps to be taken to curb this malpractice.

193 See, *Taherakhatoon* v. *Salambin Mohammad* (1992) 2 SCC 635; *Raghunath G. Panhale*, v. *Chaganlal Sundarji & Co.* (1999) 8 SCC 1.
194 *Supra* note 182.
195 *Id.* at 23.
196 *Supra* note 184.
197 (2009) 7 SCC 363.

XIII TENTH SCHEDULE – DISQUALIFICATION OF MEMBERS OF HOUSE

Quite apart from the aforesaid developments, few notable judicial trends are worth noting. The question whether a member of the house has incurred disqualification under tenth schedule of the Constitution cannot be a subject matter for consideration in an election petition filed under the Peoples Representation Act, 1951. In an election appeal filed by a defeated candidate in *G.S. Iqbal* v. *K.M. Khader*,[198] it was argued before the Supreme Court that the respondent elected candidate continued to be member of two political parties, *viz.* DMK and TNIUML even after his election and consequently he incurred disqualification under the tenth schedule. Under the scheme of the Constitution, the power to declare 'disqualified' under tenth schedule vests in the speaker. The power of the speaker is subject to judicial review. The court refused to entertain the issue because no order passed by the speaker was impugned before it. The court ruled that the speaker of the house is, accordingly, a competent authority to decide the question as to whether the member of a house has become subject to disqualification under the tenth schedule. Therefore the question relating to disqualification under the tenth schedule has to be decided by the speaker and none else. The decision of the speaker in this regard is final subject to judicial review on the permissible grounds. But such an issue cannot be raised in an election appeal.

XIV CONCLUSION

The notable features of this years' survey include (i) judicial emphasis on the integrity and reputation in cases of judges appointment; (ii) recognizing importance of conferring discretion on high constitutional functionaries and tracing sufficient check against arbitrary exercise of power when it is structured by element of plurality; (iii) exercise of power of complete justice under article 142 for monetary equity and social welfare; (iv) reiteration that power of complete justice cannot be used to transgress statutory provisions; (v) invocation of inherent power of contempt as court of record for imposition of punishment on a senior advocate who indulged in deprecable act of buying a prosecution witness and emphasizing the need to keep him away from the portals of the court for a longer period; (vi) difference of opinion between two judges on the issue of following the prescribed procedure when contempt is committed in the face of the Supreme Court; (vii) limitations on the power of judicial review including impermissibility to examine the legislative motive; (viii)

198 (2009) 11 SCC 398; for an elaborate discussion on the law of disqualification under Tenth Schedule of the Constitution see, *Kihoto Hollohan* v. *Zachillu*, 1992 Supl. (2) SCC 651.

reference to a Constitution bench to examine the correctness of the view that in exercise of powers of High Court under article 226 of Constitution can interfere with orders of the subordinate courts; (ix) emphasis on judicial restraint, *i.e.* while exercising powers of judicial review High Court do not transgress the functions of other authorities; (x) enumeration of misbehaviour for the purpose of assessing alleged misconduct against members of the public service commission; (xi) judicial concern about violation of norms in the matter of public employment; (xii) need to improve the filing process of special leave petitions by government departments; (xiii) concern about laxity in drafting the petitions along with decline in professional standards and values; (xiv) taking *suo motu* notice of malpractice prevailing in certain states regarding "avoidance of execution and registration of deeds of conveyance as the mode of transfer of freehold immovable property by increasing tendency to adopt 'power of attorney sales' by executing sale agreement/general power of attorney and will; (xv) asking High Courts to add dynamism to its power of control over subordinate courts and thus to ensure that the trial is not hijacked by some powerful and influential accused either by buying over or intimidating witnesses or by creating insurmountable impediments for the trial court; (xvi) taking judicial notice of increasing tendency of flouting the judicial orders; (xvii); according status of precedent to judge made law.

It is also interesting to note two discernible trends in the current year's survey, namely, (i) use of literature in aid of judicial reasoning and; (ii) court's reliance on writings of jurists which paves the way to rein-force relationship between judges and jurists.