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CONSTITUTIONAL LAW-I

(FUNDAMENTAL RIGHTS)

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I INTRODUCTION

THE YEAR 2010 is very significant from the point of view of administration of justice in general and the enforcement of fundamental rights in particular. Till now, it has consistently been held by the Supreme Court that a judicial decision/order of a court cannot violate the fundamental right of a person and 'judiciary' was not covered within the concept of "State" under article 12 of the Constitution of India with the result that no writ petition was maintainable against the decisions of the Supreme Court under article 32 or the High Courts under article 226 on the ground that the orders/decisions violated any of the fundamental rights.[1] The reason being that an order/decision of a court could be corrected in appeal/revision/review and, even by a curative petition (before the Supreme Court), as provided under law. A two-judge bench of the apex court (Aftab Alam and Asok Kumar Ganguly JJ) has now unequivocally admitted that even the decisions of the Supreme Court can violate the

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1 See Smt. *Ujjam Bai* v. *State of UP*, AIR 1962 SC 1621; *Basheshar Nath* v. *CIT*, 1959 Supp (1) SCR 528. But see *contra* views of Sabyasachi Mukharji J in *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602, where the learned judge was considering the question whether the directions given in a special leave petition by the Supreme Court on February 16, 1984 [reported in *R.S. Nayak* v. *A.R. Antulay* (1984) 2 SCC 183] were legally proper; whether the action and the trial proceedings, pursuant to those directions, were legal and valid; and whether the directions in question could be recalled or set aside or annulled in appeal. In the interest of expeditious disposal of the criminal case pending against the petitioner for nearly two and half years, the Supreme Court *vide* its order dated February 16, 1984, had directed thus: "Special Case No. 24 of 1982 and Special Case No. 3 of 1983 pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule are withdrawn and transferred to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. On being so assigned, the learned Judge may proceed to expeditiously dispose of the cases preferably by holding the trial from day to day."

According to the appellant, the above directions were given without any pleadings, without any arguments, without any such prayer from either side and without giving any opportunity to the appellant to make his submissions before

fundamental rights of citizens. Asok Kumar Ganguly J, speaking for the court, observed:[2]

> 57. The assumption … that there can be no violation of a person's human right by a judgment of this Court is possibly not correct. This Court in exercise of its appellate jurisdiction has to deal with many judgments of High Courts and Tribunals in which the High Courts or the Tribunals, on an erroneous perception of facts and law, have rendered decisions in breach of human rights of the parties and this Court corrects such errors in those judgments.
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> 58. The instances of this Court's judgment violating the human rights of the citizens may be extremely rare but it cannot be said that such a situation can never happen.

To buttress his argument, the learned judge further observed:[3]

> 59. We can remind ourselves of the majority decision of the Constitution Bench of this Court in Additional District Magistrate, Jabalpur v. Shivkant Shukla reported in (1976) 2 SCC 521.
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> 60. The majority opinion was that in view of the Presidential order dated 27.6.1975 under Article 359(1) of the Constitution, no person has the locus standi to move any writ petition under Article 226 before a High Court for Habeas Corpus or any other writ to enforce any right to personal liberty of a person detained under the then law of preventive detention (Maintenance of Internal Security Act of 1971), on the ground that the order is illegal or malafide or not in compliance with the Act ….
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> 61. The lone dissenting voice of Justice Khanna interpreted the legal position differently.…

issuing the same. It was submitted that the appellant's right to be tried by a competent court according to the procedure established by law enacted by Parliament and his rights of appeal and revision to the High Court under section 9 of the Criminal Law Amendment Act, 1952 had been taken away. Mukharji J held that it was manifest that the appellant had not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of articles 14, 19 and 21 of the Constitution as was evident from the observations of the seven judges bench judgment in *Anwar Ali Sarkar* case [AIR 1952 SC 75], where the apex court had held that even for a criminal, a special trial would be *per se* illegal as it would deprive the accused of his valuable right of defence which, others similarly charged, were able to claim. By the impugned directions, the High Court was given jurisdiction which it did not have under the law and this was the error as pointed out by Mukharji J. It was held that in rectifying any error committed by the court, no procedural inhibitions should debar the court because no person should suffer by reason of any mistake of the court. The impugned directions given on February 16, 1984 were contrary to law declared in *Anwar Ali Sarkar* case. No rule of *res judicata* would apply to prevent the court from entertaining the grievance and giving appropriate directions, the court ruled.

2 *Remdeo Chauhan @ Rajnath Chauhan* v. *Bani Kant Das*, 2010 (12) SCALE 184 at 194-95.

3 *Id.* at 195.

> 63. In fact the dissent of Justice Khanna became the law of the land when, by virtue of Forty Fourth Constitutional Amendment, Articles 20 and 21 were excluded from the purview of suspension during emergency.

The above view of Ganguly J would give rise to a serious debate as to whether it has opened a new method to challenge judicial verdicts under articles 32 and 226, keeping aside other remedies provided under other constitutional provisions such as civil and criminal appeals, special leave petitions, power of review, *etc*. and other statutory remedies by way of appeal, revision or review. Relying on the above views, will a person be able to challenge before the Supreme Court under article 32 a decision of a High Court given under article 226 on the ground that the High Court's decision violates his fundamental right? The answer has to be in the affirmative once it is conceded that a judicial verdict has violated any of the petitioner's fundamental rights. The principle of *res judicata*, which has hitherto been applied in writ petitions, may have to give way in the interest of rendering 'complete justice' as envisaged under article 142(1) of the Constitution. The views of the court in *Poonam* v. *Sumit Tanwar*,[4] regarding maintainability of a writ petition under article 32 against the order passed by a lower court or tribunal may be noted here. In that case, the court observed:[5]

> It is not generally assumed that a judicial decision pronounced by a Court may violate the Fundamental Right of a party. Judicial orders passed by the Court in or in relation to proceeding pending before it are not amenable to be corrected by issuing a writ under Article 32 of the Constitution.

It is quite common for the executive to be a litigant, both as the petitioner/appellant as well as the respondent, but the uniqueness of the cases reported during 2010 in the field of fundamental rights is that the Supreme Court and High Courts became litigants not only as respondents but also as the petitioner/appellant.[6] More significant is the fact that the Supreme Court lost not only its second appeal before the central information commission (CIC) in

4 AIR 2010 SC 1384.

5 *Id.* at 1387. For this view, the court relied on some decisions of sixties: *Sahibzada Saiyed Muhammed Amirabbas Abbasi* v. *State of MP*, AIR 1960 SC 768; *Smt. Ujjam Bai* v. *State of UP*, *supra* note 1 and *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1. The court did not notice other cases referred to in note 1, *supra*, which struck a contrary note.

6 See *Central Public Information Officer, Supreme Court of India* v. *Subhash Chandra Agrawal*, 2010 (12) SCALE 496; *Secretary General, Supreme Court of India* v. *Subhash Chandra Agarwal*, AIR 2010 Del 159; *Punjab & Haryana High Court at Chandigarh* v. *Megh Raj Garg*, AIR 2010 SC 2295; *Rakhi Ray* v. *High Court of Delhi*, AIR 2010 SC 932 and *Ramesh Kumar* v. *High Court of Delhi,* AIR 2010 SC 3714.

one case but also a writ petition before the High Court of Delhi, twice – before the single judge and, thereafter, before the full bench of three judges. The first case was a special leave petition filed by the central information officer, Supreme Court of India which came up for hearing before a two-judge bench (B. Sudershan Reddy and Surinder Singh Nijjar JJ) questioning the order of the CIC whereby CIC had directed the appellant to supply to the applicant (respondent before the Supreme Court) a copy of complete file/s as available in Supreme Court inclusive of copies of complete correspondence exchanged between the concerned constitutional authorities with file notings relating to the appointment of three judges, superseding three senior judges, as allegedly objected to by Prime Minister's Office (PMO) also. After some hearing, the court, speaking through B. Sudershan Reddy J, thought it appropriate that the matter be placed for constitution of a larger bench of appropriate strength to consider the following three substantial questions of law as to the interpretation of the Constitution:[7]

1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought. Whether the information sought for amounts to interference in the functioning of the judiciary.
2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision.
3. Whether the information sought for is exempt under section 8(1)(j) of the Right to Information Act, 2005.

The second case raised the controversy whether the office of the Chief Justice of India was under a statutory obligation to disclose the information about the assets of the judges of that court, an information available with him under a declaration. The CIC had directed the appellant to furnish the information demanded by the applicant (respondent before the Supreme Court). In a writ petition filed by the appellant before the High Court of Delhi, the single judge upheld the order of CIC. The full bench of the High Court also agreed with the decision of the single judge. The Supreme Court was not satisfied with the unanimous decisions of the High Court[8] and appealed to itself against the same. It is significant that despite these decisions, the assets of the judges were in fact disclosed on the court's website voluntarily. What remains in the appeal after such disclosure!

7 *Central Public Information Officer, Supreme Court of India* v. *Subhash Chandra Agrawal*, *id*. at 500-501. Significantly, of the three senior superseded judges, one was later elevated after the membership of the collegium changed.

8 *Secretary General, Supreme Court of India* v. *Subhash Chandra Agarwal*, *supra* note 6.

During the year 2010, some new controversies involving interpretation of the constitutional provisions came before the apex court. Thus, the court was called upon to decide whether the involuntary administration of scientific techniques of narco-analysis and the brain electrical activation profile (BEAP) to collect evidence in a criminal case was violative of the right against self-incrimination guaranteed under article 20(3) of the Constitution of India.[9] Another controversial question decided by a constitution bench was whether the powers of the High Court conferred by any statute (other than power of judicial review under articles 226 and 227 which cannot be taken away under any circumstances) can be taken away and vested in some other forums like the National Company Law Tribunal and the National Company Law Appellate Tribunal proposed to be established by the Companies (Second Amendment) Act, 2002.[10] The court answered the question in the affirmative but suggested amendments in law before the tribunals could be established so that they are manned by persons with capability of a judge of the High Court and certain other issues.

How much the public opinion and media can influence the executive and judiciary in taking up causes and cases of vital importance is very well reflected in a few cases reported during the year 2010.[11]

The judicial activism of the apex court to curb corruption by political figures and civil servants was reflected in some cases currently pending before it. One related to 2G spectrum scam in which a union minister was involved and whose decisions had allegedly defrauded the public exchequer to the tune of Rs. 1.76 lakh as revealed by Comptroller and Auditor General of India in its report. In this case, the court decided to monitor the progress of investigation being conducted by the central bureau of investigation.[12] The other related to the appointment of Chief Vigilance Commissioner who was one of the accused persons in a pending criminal case of import of palm oil.[13]

The Supreme Court in one of the cases decided during the year unequivocally deprecated the shift in the court's approach to the interpretation of labour legislations on the ground of globalisation and liberalisation of the economy. The court emphasised the need to interpret laws in conformity with the fundamental rights and the directive principles of state policy. [14]

9 *Selvi* v. *State of Karnataka*, AIR 2010 SC 1974 : (2007) 7 SCC 263; also see *Bhabani Prasad Jena* v. *Convenor Secretary, Orissa State Commission for Women*, AIR 2010 SC 2851 : (2010) 8 SCC 633; *Rohit Shekhar* v. *Shri Narayan Dutt Tiwari*, 2011 (212) DRJ 562, decided on 23.12.2010 by S. Ravindra Bhatt J, High Court of Delhi. The latter two cases relate to DNA test.

10 *Union of India* v. *R. Gandhi, President, Madras Bar Association* (2010) 6 SCR 857.

11 See, for instance, *Sidhartha Vashisht alias Manu Sharma* v. *State (NCT of Delhi)* (2010) 6 SCC 1; K.G. Balakrishnan, "Reporting of Court Proceedings by Media and the Administration of Justice", (2010) *SCC (J)* J-1.

12 *Centre for Public Interest Litigation* v. *Union of India*, 2010 (13) SCALE 501; also see *Kunga Nima Lepcha* v. *State of Sikkim*, AIR 2010 SC 1671.

13 See *Centre for PIL* v. *Union of India* (2011) 4 SCC 1.

14 *Harjinder Singh* v. *Punjab State Warehousing Corporation*, AIR 2010 SC 1116 :

The reservation of posts in public employment has always been one of the most contentious issues. The issues such as the eligibility/relaxation for reserved category candidates (SC/ST/OBC); the percentage of reservation, considerations of merit and maintenance of efficiency in administration, *etc.* continue to be vexed questions which have not been authoritatively resolved by the apex court till now. One of the live questions regarding reservation under article 16 has been whether a person holding a scheduled caste/ scheduled tribe certificate from state 'A' is entitled to get the benefit of reservation on the basis of that certificate from state 'B' after his migration to state 'B'. The difficulty may be that the caste indicated in the certificate issued by state 'A' may not have been included as a scheduled caste or scheduled tribe in state 'B'. This question was considered in some cases in the past.[15] This question once again came up before the Supreme Court in *State of Uttaranchal* v. *Sandeep Kumar Singh*,[16] in which a two-judge bench (B. Sudershan Reddy and S.S. Nijjar JJ) felt that the "extent and nature of interplay and interaction among Articles 16(4), 341(1) and 342(1) of the Constitution is required to be resolved"[17] and, therefore, the bench thought it appropriate that the matter be placed before the Chief Justice of India for constituting a bench of appropriate strength. Likewise, in *Chebrolu Leela Prasad Rao* v. *State of*

(2010) 3 SCC 192; also see *Maharashtra SRTC* v. *Casteribe Rajya Paivahan Karmachari Sanghatana* (2009) 8 SCC 556. Some of the cases in which the shift in trend can be found are: *Bajaj Hindustan Ltd.* v. *Sir Shadi Lal Enterprises Ltd.* (2010) 12 SCALE 654; *Secy., Cannanore Distt. Muslim Educational Assn.* v. *State of Kerala*, 2010 (5) SCALE 184; *Subhash* v. *State of Maharashtra* (2009) 9 SCC 344; *New India Assurance Co. Ltd.* v. *Nusli Nevelle Wadia* (2008) 3 SCC 279 : AIR 2008 SC 876; *State of U.P.* v. *Jeet S. Bist* (2007) 6 SCC 586; *Aravali Golf Club* v. *Chander Hass*, 2007 (14) SCALE 1; *J.K. Industries* v. *Union of India* (2007) 13 SCC 673*;Reliance Energy Ltd.* v. *Maharashtra Road Development Corpn. Ltd.* (2007) 8 SCC 1*; Indian Drugs & Pharmaceuticals* v. *Workmen* (2007) 1 SCC 408; *Zee Telefilms Ltd.* v. *Union of India* (2005) 4 SCC 649; *State of Punjab* v. *Devans Modern Breweries Ltd*. (2004) 11 SCC 26; *Kuldip Nayar* v. *Union of India* (2006) 7 SCC 1; *U.P. State Brassware Corpn. Ltd*. v. *Uday Narain Pandey* (2006) 1 SCC 479; *Secretary, State of Karnataka* v. *Umadevi (3)* (2006) 4 SCC 1; *State of West Bengal* v. *Kesoram Industries Ltd*. (2004) 10 SCC 201; *Modern School* v. *Union of India* (2004) 5 SCC 583; *Saurabh Chaudri* v. *Union of India* (2003) 11 SCC 146; *AIIMS Students' Union* v. *AIIMS* (2002) 1 SCC 428; *CTO* v. *Corromandal Pharmaceuticals* (1997) 10 SCC 648; *P. Rathianam* v. *Union of India* (1994) 3 SCC 394.

15 See *Marri Chandra Shekhar Rao* v. *Dean, Seth G.S. Medical College*, 1990 (3) SCC 130; *Action Committee on Issue of Caste Certificate to Scheduled Castes & Scheduled Tribes in the State of Maharashtra* v. *Union of India*, 1994 (5) SCC 244; *S. Pushpa* v. *Sivachanmugavelu*, 2005 (3) SCC 1; *Subhash Chandra* v. *Delhi Subordinate Services Selection Board*, 2009 (15) SCC 458. For identifying backward classes, see P.S.N. Murthy, "Legal Position of NCBC Guidelines for Identifying Backward Classes for the sake of Reservation – A Critical Analysis", AIR 2010 *Journal* 177.

16 JT 2010 (11) SC 140 : (2010) 12 SCC 794.

17 *Id.* at 146 (of JT).

AP,[18] a two-judge bench (Dalveer Bhandari and Deepak Verma JJ) was faced with a very significant issue of interplay between articles 15, 16, 371D and fifth schedule to the Constitution. The bench referred the following questions for decision by a larger bench:[19]

(1) What is the scope of paragraph 5(1), Schedule V to the Constitution of India?
   (a) Can exercise of power conferred therein override fundamental rights guaranteed under Part III"?
   (b) Does the exercise of such power override any parallel exercise of power by the President under Article 371D?
   (c) Does the power extend to subordinate legislation?
   (d) Does the provision empower the Governor to make new law?
(2) Whether 100% reservation is permissible under the Constitution.
(3) Whether the notification merely contemplates a classification under Article 16(1) and not reservation under Article 16(4).
(4) Whether the conditions of eligibility (i.e. origin and cut off date) to avail the benefit of reservation in the notification are reasonable.

During this year, one case was decided by a seven-judge bench of the Andhra Pradesh High Court. The case involved a very significant question of constitutional interpretation as to whether reservation in admissions to educational institutions and public employment is permissible in favour of "socially and educationally backward Muslims" through a state legislation.[20] The court gave a divided verdict and an appeal against the same was pending before the apex court by the end of the year. In this case, a three-judge bench (K.G. Balakrishnan CJI and J.M. Panchal & Dr. B.S. Chauhan JJ), while referring to a constitution bench the question of granting reservation to socially and educationally backward classes of Muslims, allowed four per cent reservation, as an *interim* measure till the disposal of the case, to 14 categories of persons covered under the A.P. Reservation in favour of Socially and Educationally Backward Classes of Muslims Act, 2007 excluding creamy layer.[21] The direction was to list the matter in the second week of August, 2010 but the same was pending till the end of the year 2010.

In yet another case, a three-judge bench (S.H. Kapadia, CJI and K.S. Radhakrishnan & Swatanter Kumar JJ) referred to the constitution bench the issues relating to constitutional validity of articles 15(5) and 21A of the Constitution with regard to reservation of seats in private educational institutions.[22]

18 2010 (8) SCALE 668. The case relates to certain advertisements issued in 1999 for appointment to non-executive posts in the State of Andhra Pradesh.
19 *Ibid*.
20 *T. Murlidhar Rao* v. *State of AP*, 2010 (2) ALT 357 (LB).
21 *State of A.P*. v. *T. Damodar Rao,* 2010 (3) SCALE 344 : (2010) 3 SCC 462.
22 *Society for Un-aided P. School of Rajasthan* v. *Union of India*, 2010 (9) SCALE 437; also read D.M. Dharmadhikari, "Right to Education", (2010) 3 *SCC (J)* J-7.

A very controversial question relating to the degree of state intervention in the management of private educational institutions, particularly un-aided institutions and those established by the minorities enjoying rights under article 30, engaged the attention of the apex court during 2010. The *interim* directions issued in May, 2009 by the Supreme Court in a case from the State of Madhya Pradesh,[23] aiming at curbing the powers of the state government in making admissions to private un-aided professional institutions, which was directed by the court to be listed for hearing in September, 2009, was not decided even during 2010. This delay has resulted in benefiting the private educational institutions while, at the same time, frustrated the object of the state legislation. A few cases were decided by the apex court regarding the rights of minorities to establish and administer educational institutions of their choice *vis-à-vis* the power of the state to interfere in them.[24]

Till the cases referred to larger/constitution benches are decided, the questions raised in them will keep hanging, leaving not only the reserved category and other candidates in the lurch but also the administrators and the educational institutions. In view of the importance of the issues raised in these cases, the constitution of larger benches at the earliest is the need of the hour to ensure clarity in law relating to reservations and educational institutions which are otherwise most contentious issues.

II STATE UNDER ARTICLE 12

Under article 15(4), special provisions can be made by the state for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes. Under article 15(5), special provisions can be made by law for socially and educationally backward classes of citizens or for the scheduled castes or the scheduled tribes for admission to educational institutions including private educational institutions except minority educational institutions. Under article 16, reservations can be made in matters relating to employment or appointment to any office under the state in favour of the above category of persons. It had been held by the Supreme Court that a society registered under some legislation can be treated to be 'state' under article 12 if it meets the tests of being considered an agency or instrumentality of the state.[25] The cumulative effects of six tests formulated in earlier cases was applied in these cases.

23 *Modern Dental College & Research Centre* v. *State of Madhya Pradesh*, AIR 2009 SC 2432; see S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XLV *ASIL* 125 at 136-38 (2009).

24 See *G. Vallikumari* v. *Andhra Education Society*, AIR 2010 SC 1105 : (2010) 2 SCC 497; *Secretary, Cannore District Muslim Educational Association* v. *State of Kerala*, AIR 2010 SC 1955; *Sindhi Education Society* v. *The Chief Secretary, Govt. of NCT of Delhi* (2010) 8 SCR 81 : (2010) 8 SCC 49.

25 *Ajay Hasia* v. *Khalid Mujib* (1981) 1 SCC 722; *State of UP* v. *Radhey Shyam Rai*, 2009 (3) SCALE 754 : (2009) 5 SCC 632; S.N. Singh, "Constitutional Law – I (Fundamental Rights), *supra* note 23 at 126.

The Supreme Court, while considering the validity of a rule made under the Delhi Education Act, 1973, had to decide whether Sindhi Education Society, a society registered under the Societies Registration Act, 1860, running a school for preservation of Sindhi language and receiving grant-in-aid from the government, was 'state' under article 12 so as to be bound by the government's reservation policy.[26] The court pointed out that merely receipt of grant-in-aid from the state did not make the institution 'state' as held in an earlier case.[27] In the present case, it was an admitted fact that the school was getting grant-in-aid from the government but it was a linguistic minority institution entitled to protection of article 30. The Delhi Education Rules, 1973 specifically provided that the state government will not have any strict control over minority institutions. The members nominated by the director of education to the managing committee of the school had only the right of limited participation in the meetings without any voting rights. The provision of nomination of two past or present teachers to the managing committee was not applicable to minority institutions. The requirement of giving intimation to establish a new school did not apply to minorities. The management of schools could be taken over by the administrator in certain cases but not those belonging to minorities. Moreover, a catena of decisions of the Supreme Court had taken a clear view that the state had no power to interfere with the establishment, administration and management of minority educational institutions except the power to regulate in a limited sense. In view of these factors, the Supreme Court held that the Sindhi Education Society was not state under article 12.

In *Tata Memorial Hospital Workers Union* v. *Tata Memorial Centre*,[28] the Supreme Court emphasised that merely because the government companies, corporations and societies were agencies or instrumentalities of the state, they could not be considered 'State' under article 12. The industry carried on by the organisation must be a government business. The power of the government to appoint directors, call for information and supervise business and discharging public functions do not make the organisation 'State'.

III DOCTRINE OF ECLIPSE UNDER ARTICLE 13

It is well settled that if a pre- or post-constitutional legislation is inconsistent or in contravention of any of the fundamental rights, the same is void to the extent of such inconsistency or contravention. The entire legislation does not become void or non-existent. It remains valid for those

26 *Sindhi Education Society* v. *Chief Secretary, Govt. of NCT of Delhi*, *supra* note 24.

27 *Lt. Governor of Delhi* v. *V.K. Sodhi* (2007) 15 SCC 136 (state council of education, research and training was not state in the absence of deep and pervasive state control).

28 AIR 2010 SC 1285 : (2010) 8 SCC 480.

who are not entitled to the fundamental rights. It also remains valid for all actions taken prior to the commencement of the Constitution of India. Further, the law remains dormant and becomes valid immediately the grounds of inconsistency or contravention are removed.[29] These principles were reiterated in *K.K. Poonacha* v. *State of Karnataka*.[30] The state legislature had enacted the Bangalore Development Authority Act, 1976 for acquisition of land for the development of Bangalore and establishment of an authority for the purpose. The legislation was neither reserved for the consideration of the President nor had received his assent. It was, therefore contended that the legislation was void for non-compliance with the provisions of article 31(3).[31] The Supreme Court held that the requirement prescribed under article 31(3) was merely procedural. If the law was within the legislative competence of the legislature and did not infringe any of the fundamental rights, the same could not be declared void on the ground of non-compliance with the procedural requirement. The court further observed:[32]

> If the post-enactment assent is necessary for making the law effective, then such law cannot be enforced or implemented till such assent is given. In other words, if a law is within the competence of the legislature, the same does not become void or is blotted out of the statute book merely because post-enactment assent of the President has not been obtained. Such law remains on the statute book but cannot be enforced till the assent is given by the President. Once the assent is given, the law becomes effective and enforceable. If the provision requiring re-enactment sanction or post-enactment assent of the President is repealed, then the law becomes effective and enforceable from the date of repeal and such law cannot be declared unconstitutional only on the ground that the same was not reserved for consideration of the President and did not receive his assent.

If a legislation had been struck down on the ground of violation of article 14 or 19 and that legislation is subsequently inserted in the ninth schedule to the Constitution thereby immunising it by virtue of article 31B, the legislation becomes valid and enforceable.[33]

29 See *Bhikaji Narain Dhakras* v. *State of MP*, AIR 1955 SC 781; *Keshavan Madhava Menon* v. *State of Bombay*, AIR 1951 SC 128 (article 13 did not have retrospective operation and, therefore, any action taken under the impugned legislation – Press (Emergency Powers) Act, 1931 - prior to the commencement of the Constitution did not become unconstitutional).

30 (2010) 9 SCC 671; also see *Bondu Ramaswamy* v. *Bangalore Development Authority* (2010) 7 SCC 129.

31 On the date of enactment, article 31(3) read thus: "No such law as is referred to in clause (2) made by the legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent." Article 31 was repealed w.e.f. 20.6.1979.

32 *Supra* note 30 at 698.

33 See *Glanrock Estates (P) Ltd*. v. *State of TN* (2010) 10 SCC 96.

IV RIGHT TO EQUALITY

Arbitrariness and discrimination

The casual approach of the taxing authorities in making assessments is depicted by *Jai Vijai Metal Udyog (P) Ltd*. v. *CIT*.[34] The appellant dealer was engaged in the manufacture of aluminium "properzi" redraw rods from aluminium ingots. These rods had no use in the market except for being used as a raw material in the manufacture of wires of different sizes. Two per cent tax and ten per cent surcharge of the tax was levied under the U.P. Trade Tax Act, 1948 treating the product as falling under entry 24 of the Act as "metal". Later on, the appellant was served with a notice that the assessment was wrong and fresh assessment was made by the respondent on the basis of assessment made in case of another company – Hindustan Aluminium Corpn. Ltd. (HINDALCO). The appellant challenged the assessment on the ground of discrimination under article 14 contending that the assessment made in favour of HINDALCO had been quashed by the High Court whereupon the same was reassessed by treating the product "properzi" redraw rods as "metal" under entry 24. The Supreme Court accepted the contention that the appellant had been discriminated and the assessment was quashed.

It has also been held by the Supreme Court that filling of more vacancies than the advertised number offends articles 14 and 16 as the recruitment of candidates in excess of notified vacancies amounts to denial and deprivation of the constitutional right to equality of those persons who acquired eligibility for the post in question in accordance with rules subsequent to the date of notification of the vacancies.[35]

In many cases, the Supreme Court refused to accept the contention of discrimination/arbitrariness. The concept of equality does not include 'negative equality'. Thus wrong decision in favour of a party does not entitle any other person to claim the same benefit.[36] In *Bhim Singh* v. *Union of India*,[37] the petitioner had filed a writ petition under article 32 praying the court to declare the MPLAD scheme (Members of Parliament local area development

34 (2010) 6 SCC 705.

35 *Rakhi Ray* v. *High Court of Delhi*, AIR 2010 SC 932.

36 *Fuljit Kaur* v. *State of Punjab*, AIR 2010 SC 1937 : (2010) 11 SCC 455.

37 (2010) 5 SCC 538; also see *M. Jagdish Vyas* v. *Union of India*, AIR 2010 SC 1596 : (2010) 4 SCC 150; *Jasbir Chhabra* v. *State of Punjab* (2010) 4 SCC 192; *Dalco Engineering (P) Ltd*. v. *Satish Prabhakar Padhye* (2010) 4 SCC 378 (the companies registered under the Companies Act, 1956 [except government companies covered under section 617] and establishments in private sector are not covered under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and, therefore termination of service of persons with disabilities by such employers does not amount to arbitrariness); *State of West Bengal* v. *W.B. Minimum Wages Inspectors Assn*. (2010) 5 SCC 225; *Goa Glass Fibre Ltd.* v. *State of Goa* (2010) 6 SCC 499; *Mumbai International Airport (P) Ltd*. v. *Golden Chariot Airport* (2010) 10 SCC 422' *A.K. Behera* v. *Union of India* (2010) 11 SCC 322 (merely prescribing higher qualification for the membership of administrative

scheme) arbitrary under article 14 and quash the same. The scheme envisages that every member of Parliament will get funds approved under the Appropriation Acts from time to time for identifying and recommending works of developmental nature in their local areas. The court noted that the scheme was implemented under strict guidelines through nodal officers and improvements are being made in the scheme for proper utilisation of funds from time to time. The court found nothing wrong in the scheme which had been implemented as per the constitutional scheme of utilisation of money. The petition was, therefore, dismissed.

A single person can be classified as a class

In *Md. Shahabuddin* v. *State of Bihar*,[38] an administrative notification issued by the High Court in exercise of its power under section 9(6), Cr PC to conduct trial of the appellant inside the Siwan jail for expeditious disposal of several sessions cases pending against him was assailed on the ground that the notification was applicable to a single individual and the same was violative of article 14 of the Constitution. Before the Supreme Court, it was, *inter alia*, argued by the state that a reign of terror had been created by the appellant and his "private army" in the last two decades was beyond imagination. A number of criminal activities were brought to the notice of the court to support the contention that the same were interfering with the administration of justice. On account of these activities, the district magistrate had informed the state government that the trial of the appellant in the district court was not possible. Moreover, such trials in individual cases had been held inside jail premises in the past also. In view of the special facts and circumstances of the case, L.M. Sharma J, upholding the impugned notification, observed:[39]

> (I)t is well settled law that a classification may be reasonable even though a single individual is treated as a class by himself, if there are some special circumstances or reasons applicable to him alone and not applicable to others. The reasons which necessitated the shifting of the venue of the trial of cases pending against the appellant only have already been discussed hereinbefore. It must be noted that no special procedure was prescribed and the cases were to be conducted and disposed of in accordance with the ordinary criminal procedure as prescribed under CrPC. I am, therefore, of the considered opinion that no prejudice was caused to the appellant while shifting the cases

tribunals cannot be considered arbitrary); *Rajasthan Pradesh Vaidya Samiti* v. *Union of India*, AIR 2010 SC 2221 : (2010) 12 SCC 609 (restriction on unqualified doctor's right to practise is a reasonable restriction); *Rajendra Kumar Srivastava* v. *Samyut Kshetriya Gramin Bank*, AIR 2010 SC 699; *State of West Bengal* v. *West Bengal Regd. Copy Writers' Assn.*, AIR 2010 SC 2184.

38 (2010) 4 SCC 653.

39 *Id.* at 727.

> to the Special Courts situated inside the premises of District jail, Siwan. Therefore, I am of the considered view that there is no violation either of Section 327 CrPC or of Articles 14 and 21 of the Constitution.

Distribution of state largesse

It is a settled principle that even in matters of distribution of state largesse, the principles of equality, reasonableness and fairness are applicable. In *State of U.P.* v. *Mata Tapeshwari Saraswati Vidya Mandir*,[40] the respondent schools were recognised first as junior high schools, then as high schools and later as intermediate colleges. By a decision taken by the state government, only those junior high schools were given grant-in-aid which existed prior to 30.6.1984 and the respondents did not get the same. Later on, the government allowed recognition of schools for a higher class or introduction of new subjects with the condition that the school will arrange its own funds for running the same. By a notification issued on 9.9.2006, 1000 unaided permanently recognised junior high schools (classes 6 to 8), which were getting aid prior to 30.6.1984, were selected for grant-in-aid with a condition that only junior high schools can apply for grant and schools imparting education below or above junior high school level were made ineligible to apply. Since the respondents were high schools and intermediate colleges (classes 9 to 12) after their ungradation and not receiving aid earlier on the basis of cut off date of 30.6.1984, they became ineligible. They challenged this action of the government on the ground that when the aid was being given to some of the institutions (which had been getting aid on account of being covered within the prescribed cut off date) despite their upgradation as high schools and intermediate colleges in respect of their junior high schools, the exclusion of the respondents was discriminatory and arbitrary. They contended that they were entitled to be considered for aid in respect of junior high classes run by them. The Supreme Court held that the action of the government was discriminatory as a class within the class had been created by the government's decision. It was observed:[41]

> (I)f it was the intention of the State Government to extend aid to unaided institutions at the junior high school level for improving the quality of education at the said level, it ought not to have excluded those institutions which continued to run junior high schools, but had been upgraded for the purpose of imparting education at the high school and intermediate college level. In other words, the object sought to be achieved by the Notification of 9-9-2006, has no intelligible nexus with the object it wishes to achieve.

40 (2010) 1 SCC 639; also see *State of UP* v. *Committee of Management*, AIR 2010 SC 402; *Tehri Hydro Development Corpn.* v. *Alstom Hydro France*, AIR 2010 SC 1886.

41 *Id.* at 646.

If the state has made an unequivocal promise to grant tax exemption, it cannot resile from its promise on the ground of 'promissory estoppel' and the state's inordinate delay in fulfilling its promise will amount to arbitrariness under article 14 of the Constitution. In *State of Bihar* v. *Kalyanpur Cement Ltd*.,[42] the respondent, a lime producing public sector company, despite continued losses suffered by it due to recession in cement industry, continued to carry on business on the basis of consistent and categorical assurances given by the appellant that it would give sales tax concession as per its industrial policy so that the financial institutions may provide reconstruction package for its rehabilitation. After more than three years, the respondent's application for tax exemption was rejected. The court, taking a serious view of the matter, directed the appellant to grant the exemption promised by it which was the basis on which the respondent had continued its business despite suffering losses.

V RESERVATIONS

Reservations in elections

The Panchayats (Extension to the Scheduled Areas) Act, 1996 passed by Parliament reserves for the scheduled tribes all seats of *mukhia* and *up-mukhia* of the gram panchayats at all levels and *adhyaksha* of zila parishads in the scheduled areas. A similar provision was also made by the state legislation, *viz.* Jharkhand Panchayat Raj Act, 2001 which also provided for "proportionate representation" in these bodies. The validity of this kind of reservation was challenged in *Union of India* v. *Rakesh Kumar*.[43] It was contended that cent per cent reservation was excessive and violative of article 14 of the Constitution. The Supreme Court held that in the context of panchayati raj institutions, article 243D(1) and (4) explicitly refer to proportionate representation for reservations in favour of SCs, STs and OBCs and with regard to panchayats located in scheduled areas, a departure has been made under the Jharkhand legislation in the interest of scheduled tribes. The court noted that total proportionate representation cannot exceed 80 per cent but in some cases, it may be much less, depending on the population figure of the scheduled tribes and backward classes. This kind of reservation was permissible under article 243M(4)(b).

Reservations in public employment and educational institutions

The most leading and controversial verdict of the year was from Andhra High Court's seven-judge fractured verdict on reservations in public employment and admissions in educational institutions.[44] In this case, the challenge was to the constitutional validity of the A.P. Reservation in favour

42 (2010) 3 SCC 274.
43 (2010) 4 SCC 50.
44 *T. Murlidhar Rao* v. *State of AP*, *supra* note 20.

of Socially and Educationally Backward Classes of Muslims Act, 2007 and the notifications issued thereunder which provided for reservation of 4 per cent seats to backward classes of Muslims in admissions in educational institutions and in public employment for their upliftment. The majority judgment of four judges was delivered by Anil R. Dave CJ and Mrs. T. Meena Kumari J, in her separate judgment, agreed with him in striking down the legislation on the ground of discrimination. Dave CJ held that the recommendations of the A.P. Commission for Backward Classes (dated 02.07.2007), which had formed the exclusive basis of identifying backward classes for the impugned legislation, were unsustainable, *inter alia*, on the ground that the commission had failed to evolve and spell out proper and relevant criteria for identification of social and educational backwardness and inadequate representation in public employment among classes of persons belonging to the Muslim community for whom reservations were recommended. The commission had substantially relied upon the data collected, and observations made, by others. The reservations were based solely on religion which was not permissible. One has to ultimately to wait for the larger bench decision of the Supreme Court where the matter is currently pending.

One important question was decided by the Supreme Court in *Jitender Kumar Singh* v. *State of U.P.*[45] In this case, the state advertised 1379 posts for direct recruitment of sub-inspectors in civil police and platoon commanders in PAC. Reservations were indicated to the extent to 10 per cent for women and 2 per cent for outstanding sportspersons, besides the reservations for scheduled castes, scheduled tribes and OBCs. After holding preliminary written and physical tests, followed by main written test and interview, the final selection list was announced. As per this final select list, 623 male and female candidates were selected in general category which included 163 OBC, 19 scheduled caste and 1 schedule tribe candidates. There was provision of relaxation/concession in fee and age for reserved category candidates by virtue of section 3(6) of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994. The reservation was more than 50 per cent of total posts. The select list was challenged on several grounds contending, *inter alia*, that the reserved category candidates, even when they had secured marks which was more or equal to those of general category candidates in the select list, could not be treated as general since they had availed the concession/relaxation in the form of age or fee; the reservation for women and sportspersons was not permissible and the total reservations for reserved category candidates had exceeded 50 per cent of total posts which was unconstitutional.

As to the main ground of attack, S.S. Nijjar J, rejecting the contention, held that the concessions availed of by the reserved category candidates in age relaxation or fee concession had no relevance to the determination of the *inter*

45 AIR 2010 SC 1851 : (2010) 3 SCC 119.

se merit on the basis of the final written test and interview and ultimate selection. The learned judge, relying on certain observation made in *Indra Sawhney*,[46] further observed:[47]

> (W)e are of the considered opinion that the submissions of the appellant that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the general category candidates is without foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled certain candidates to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16(1) of the Constitution of India. Concessions and relaxations in fee and age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates at par with general category candidates. It is only thereafter the merit of the candidates is determined without any further concessions in favour of the reserved category candidates.

The court, at the same time, reiterating the views expressed in *Indra Sawhney*, emphasised that in implementing the reservation policy, the state has to strike a balance between the competing claims of the individuals under article 16(1) and the reserved categories falling under article 16(4).

VI FREEDOM OF SPEECH AND EXPRESSION

Article 19(1)(a) of the Constitution of India guarantees freedom of speech and expression which is subject to restrictions mentioned in clause (2) of that article. Clause (2) permits the state to make law for imposing reasonable restrictions on the freedom of speech and expression in the interests of the sovereignty and integrity of India, the security of state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of

46 *Indra Sawhney* v. *Union of India*, AIR 1992 SCW 3682, para 743.
47 *Supra* note 45 at 1864-65 (of AIR).

court, defamation or incitement to an offence. The Supreme Court in *S. Khushboo* v. *Kanniammal*,[48] quashed the prosecution of the appellant under sections 499, 500 and 505, IPC and sections 4 and 5 of the Indecent Representation of Women (Prohibition) Act, 1986 pending against her for making morally provocative statement supporting pre-marital sex. The appellant's statement in Hindi as translated in English was as follows:[49]

> According to me, sex is not only concerned with the body; but also concerned with the conscious. I could not understand matters such as changing boyfriends every week. When a girl is committed to her boyfriend, she can tell her parents and go out with him. When their daughter is having a serious relationship, the parents should allow the same. Our society should come out of the thinking that at the time of the marriage, the girls should be with virginity.
>
> None of the educated men will expect that the girl whom they are marrying should be with virginity. But when having sexual relationship the girls should protect themselves from conceiving and getting venereal diseases.

The Supreme Court held that the statement should have been seen in the entire context in which it was made. The context was a survey published in a magazine regarding sexual habits of people in urban cities. Rejecting the argument that the statement was provocative or amounting to any offence, the court observed:[50]

> Admittedly, the appellant's remarks did provoke a controversy since the acceptance of pre-marital sex and live-in relationship is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in pre-marital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive. In the present case, the substance of the controversy does not really touch on whether pre-marital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to

48 AIR 2010 SC 3196 : (2010) 5 SCC 600.
49 *Id.* at 3199 (of AIR).
50 *Id.* at 3208.

> the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'

The court went on to add:[51].

> (D)issemination of news and views for popular consumption is permissible under our constitutional scheme. The different views are allowed to be expressed by the proponents and opponents. A culture of responsible reading is to be inculcated amongst the prudent readers. Morality and criminality are far from being co-extensive. An expression of opinion in favour of non-dogmatic and non-conventional morality has to be tolerated as the same cannot be a ground to penalise the author.

The freedom of speech and expression does not extend to scandalising a court lest it amounts to contempt. Where to draw a line between the freedom and contempt was the issue decided by the Supreme Court in *Indirect Tax Practitioners' Assn.* v. *R.K. Jain*.[52] In this case, the respondent had written several letters to the authorities bringing to their notice irregularities in appointments and transfers, mal-functioning and corruption in the working of the customs, excise and service tax appellate tribunal. As no cognizance was taken to the letters, the respondent wrote an editorial in a law report ([1997] 94 *Excise Law Times* A-65-A-82). The question was whether the editorial amounted to contempt of court as the same was intended to scandalise the functioning of the tribunal. The court held the editorial to be a bonafide expression of opinion by the respondent and, therefore, it did not amount to contempt.

VII FREEDOM TO CARRY ON TRADE AND BUSINESS

The freedom to carry on any trade or business guaranteed under article 19(1)(g) is available to the hawkers, vendors and squatters for selling their goods on the streets and pavements but reasonable restrictions can be imposed by law in public interest.[53] The restrictions on this fundamental right can be imposed only by law and in no other way. In *Gainda Ram* v. *Municipal Corporation of Delhi*,[54] the Supreme Court pointed out that even though

51 *Id.* at 3209.
52 (2010) 8 SCC 281.
53 See *Sodan Singh* v. *NDMC* (1989) 4 SCC 155; *Bombay Hawkers' Union* v. *Bombay Municipal Corpn.* (1985) 3 SCC 528.
54 (2010) 10 SCC 715.

hawking was being undertaken on the streets in Delhi for decades in the form of *tehbazari*, licence, permit and other methods, the same was not regulated by any law but by schemes formulated from time to time. This was so despite several rounds of litigation even before the Supreme Court. A Bill called the "Model Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2009 had been prepared by the Government of India but the same had not been passed. Flooded with a large number of petitions/appeals/interim applications relating to the issue, the Supreme Court issued certain guidelines pursuant to the scheme framed by the New Delhi municipal committee and municipal corporation of India to regulate hawking in Delhi, pending the passage of the above Bill. The court also issued directions that the Bill be passed by 30.6.2011 because regulating a fundamental right of a large number of persons for a very long time through schemes rather than legal provisions was not only improper but also un-constitutional. Only time will tell as to whether the direction to pass the Bill would be complied with because experience shows that such directions have not been implemented for years and most of the time they have not at all been implemented.[55]

VIII RIGHT TO LIFE AND PERSONAL LIBERTY

Ex post facto law

What is an *ex post facto* law for the purpose of article 20(1) of the Constitution of India? Wills[56] had classified penal law which can be considered *ex post facto* as follows:

- When law makes criminal an act which was innocent when done;
- When law makes a crime greater than it was when it was committed;
- When the law makes the punishment greater than the punishment was at the time when the act was committed;
- When law changes the rule of evidence so as to deprive a defendant of a substantive right; and
- When law makes retrospective qualifications for an offence which are out of a proper exercise of police power.

The Supreme Court in *Ravinder Singh* v. *State of HP*,[57] held that article 20(1) prohibited the conviction and punishment under an *ex post facto* law.

Double jeopardy

The protection of article 20(2) of the Constitution against prosecution and punishment for the same offence more than once is available only when the ingredients of both the offences are the same. If the prosecution for an

55 See S.N. Singh, "Constitutional Law – I (Fundamental Rights", XLV *ASIL* 125 (2009).

56 *Constitutional Law of United States*.

57 AIR 2010 SC 199; see also *Ganesh Thakur* v. *D.G., Border Security Organisation*, 2010 Lab IC 3996 (Gau.).

offence in a foreign country had been dropped, the accused cannot claim the protection of article 20(2).[58] In *Monica Bedi* v. *State of AP*,[59] the appellant contended before the Supreme Court that she had been tried and convicted by a competent court of jurisdiction at Lisbon, Portugal for being in possession of fake passport and, therefore, her trial and conviction for possessing the same passport before the CBI court at Hyderabad amounted to double jeopardy and in violation of article 20(2) of the Constitution India and as well as under section 300, Cr PC. Citing some leading decisions,[60] the court held that under article 20(2), there should not only be prosecution but also punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence. The words 'prosecuted or punished' are to be taken not distributively so as to mean prosecuted 'or' punished. Both the factors must co-exist in order that the operation of the clause may be attracted. Thus, the ambit and content of the fundamental right are much narrower than those of the common law in England or the doctrine of "double jeopardy" in the American Constitution. What is prohibited under article 20(2) is that the second prosecution and conviction must be for the same offence. If the offences were distinct, there would be no question of applying the rule as to double jeopardy. The test is to ascertain whether two offences were the same; not the identity of the allegations but the identity of the ingredients of the offences are relevant. If the same facts may give rise to different prosecutions and punishment, the protection afforded by article 20(2) would not be available. It is settled law that a person can be prosecuted and punished more than once even on substantially same facts provided the ingredients of both the offences are totally different and they did not form the same offence. The appellant's contention was that the facts based on which she was prosecuted and punished by a court at Lisbon and the facts based on which prosecution had been initiated in India resulting in conviction were the same and, therefore, the conviction of the appellant was hit by article 20(2) of the Constitution and section 300, Cr PC. The court rejected the contention holding that the same set of facts can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under IPC and at the same time constitute an offence under any other law. The bar to punishment twice over for the same offence arose only where the ingredients of both the offences were the same. The court further held:[61]

58 See *Jitendra Panchal* v. *Intelligence Officer, NCB*, AIR 2009 SC 1938; see S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XLV *ASIL* 125 (2009) at 139.

59 2010 (11) SCALE 629 : (2011) 1 SCC 284.

60 *Maqbool Hussain* v. *State of Bombay*, AIR 1953 SC 325 and *S.A. Venkataraman* v. *Union of India*, AIR 1954 SC 375.

61 *Supra* note 59 at 297-98 (of SCC). In *Securities and Exchange Board of India* v. *Ajay Agarwal*, AIR 2010 SC 3466, the Supreme Court held that a direction by SEBI issued under sections 4(3) and 11 of the Securities and Exchange Board of India Act, 1992 restraining the respondent from associating with any corporate body in accessing the securities and prohibiting him from buying, selling or dealing in securities did not make the respondent an accused so as to avail the protection of article 20(2) of the Constitution.

> The question that falls for our consideration is, whether the appellant can be said to have satisfied all the conditions that are necessary to enable her to claim the protection of Article 20(2) of the Constitution. The charges upon which the appellant has been convicted now, for the charges under the Penal Code, we will presume for our present purpose that the allegations upon which these charges are based, proved, resulting in conviction and punishment of the appellant are substantially the same which formed the subject-matter of prosecution and conviction under the penal provisions of Portuguese law. But we have no doubt to hold that the punishment of the appellant is not for the same offence.

In the light of the findings and conclusions reached by the court at Lisbon (in fact the court quoted many passages from the decision of the Lisbon court to analyse the real purport of the decision) and on a careful consideration of the entire matter and the facts placed before the court, it was held that the appellant's plea of double jeopardy was wholly untenable and unsustainable.

Right against self-incrimination

The right against self-incrimination under article 20(3) of the Constitution protects a person accused of an offence to be a witness against himself.[62] The question whether this right also extends to the investigation stage and whether the test results are of a testimonial character attracting the provision of article 20(3) was decided by a three-judge bench of the Supreme Court in *Selvi* v. *State of Karnataka*.[63] The question in this case related to involuntary administration of scientific techniques of narco-analysis, polygraph examination and brain electrical activation profile (BEAP) test for the purpose of investigation in criminal cases. The court pointed out that articles 20(3) and 21 guarantee right to privacy, both physical as well as mental. While physical privacy could be curtailed under Cr PC to a limited extent, there is no statutory provision to curtail mental privacy. Subjecting a person to involuntary narco-analysis, polygraph examination and brain electrical activation profile to extract testimonial responses intrudes upon a person's mental privacy and, therefore, not permissible in law. The protection of mental privacy was available both to the accused and the victim. The right against mental torture, cruel, inhuman and degrading treatment is implicit in article 21. The above tests affect the decision-making capacity of the person and the incriminating test results may prompt the police to inflict more mental pain on the individual. The court held such examination/test as a violation of article 20(3) in the following words:[64]

62 See *State of Maharashtra* v. *Abu Salem Abdul Kayyum Ansari* (2010) 10 SCC 179 (application of article 20(3) protection to an approver for whom pardon has been withdrawn for failing to make full disclosure).

63 *Supra* note 9.

64 *Id.* at 2060 (of AIR).

> (T)he compulsory administration of the impugned techniques violates the 'right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent forcible 'conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence.

While considering the contours of right to personal liberty and right against self-incrimination, the court held:[65]

> We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases ….(T)he compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the 'right to fair trial'. Invocation of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'.

Does DNA (deoxyribonucleic acid) test stand on a different footing? In *Ramkanya Bai* v. *Bharatram*,[66] the Supreme Court quashed the order of DNA test passed by the High Court at the appellate stage in a divorce proceeding

65 *Ibid.*
66 (2010) 1 SCC 85.

even though neither any allegation was made by the husband about wife's illicit/extra-marital relations nor any such prayer had been made by the husband in the divorce proceedings. The High Court had passed the order in a mechanical manner. In *B.P. Jena* v. *Convenor Secretary, Orissa State Commission for Women*,[67] during the pendency of divorce proceedings, the Orissa state commission for women passed an order directing the appellant to undergo DNA test. In a writ petition, the High Court also directed the DNA test. The Supreme Court held that though there was no prohibition on giving blood sample for DNA test, but the test itself had serious consequences to the child. It, therefore, held that the direction for this purpose should not be passed in a routine manner. Before passing such an order, the court has to consider diverse aspects including presumption under section 112 of the Evidence Act, 1872, pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test. In the present case, while the respondent commission had no power to issue any such direction, the High Court was not justified in issuing the direction as it had overlooked the fact that the divorce proceedings were already going on in the lower court and the question of paternity could be one of the issues before that court. In such a case, the lower court itself may direct the DNA test keeping in view all the relevant factors. In two cases, the Delhi and Andhra Pradesh High Courts directed the DNA test to decide the paternity of the child. While in Andhra case,[68] the husband had contested the paternity of the child on the ground that the wife was having extra-marital relations and was leading adulterous life, in Delhi case[69] the petitioner claimed to be son of a prominent politician and he had prayed for DNA test which was allowed by the court.

Mentally retarded woman's right to bear a child

A mentally retarded woman, subjected to rape when she was an inmate in a government-run welfare institution, became pregnant.[70] After having come to know of the pregnancy, the respondent administration approached the High Court for the termination of pregnancy. After obtaining expert opinion from a panel of doctors, the High Court allowed the petition against which the appeal came before the Supreme Court. By that time, the woman's pregnancy had already been for over 19 weeks. The Supreme Court held that a woman's right

67 *Supra* note 9. The Supreme Court quashed the order passed by the High Court at the appellate stage in a divorce proceeding directing DNA test even though neither any allegation was made by the husband about wife's illicit/extra-marital relations nor any such prayer had been made by the husband.

68 *Buridi Vanajakshmi* v. *Buridi Venkata Satya Ahara Prasad Gangadhar Rao*, AIR 2010 AP 172.

69 *Rohit Shekhar* v. *Shri Narayan Dutt Tiwari*, *supra* note 9.

70 *Suchita Srivastava* v. *Chandigarh Administration*, AIR 2010 SC 235. In another context, the Supreme Court recognised the dignified role of homemakers who had been classified by the government along with beggars and prostitutes: *Arun Kumar Agrawal* v. *National Insurance Co. Ltd*. (2010) 9 SCC 218.

to personal liberty included right to make re-productive choices, refuse to participate in sexual act, insist on use of contraceptive methods, carry pregnancy to the full term and give birth to a child. Reasonable restrictions have been placed on these rights by the Medical Termination of Pregnancy Act, 1971 (MTP Act). Under this Act, consent of the woman for termination of pregnancy is essential except in case of a minor or mentally ill woman but not against a mentally retarded woman. In such cases, the consent of the guardian of the pregnant woman is essential for termination of pregnancy. In the present case, the woman was major; she did not have any guardian and she wanted a give birth to the child. In these circumstances, the court held:[71]

> While a guardian can make decisions on behalf of a 'mentally ill person' as per Section 3(4)(a) of the MTP Act, the same cannot be done on behalf of a person who is in a condition of 'mental retardation'. The only reasonable conclusion that can be arrived at in this regard is that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is an essential condition for proceeding with the termination of a pregnancy. As stated earlier, in the facts before us, the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4)(b) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

In view of the above, the court refused to permit termination of pregnancy. At the same time, the court was conscious of the woman's mental capacity to cope up with the demands of carrying the pregnancy to its full term, child delivery and post-delivery child care. It issued directions for proper care and supervision of the woman and the child to the chairperson of National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities constituted under the 1999 Act which accepted the responsibility and undertook to consult Post-Graduate Institute of Medical Education and Research, Chandigarh in discharge of its responsibilities.

71 *Id.* at 244.

Delay in prosecution

The right to life and personal liberty guaranteed under article 21 includes right to speedy trial[72] but mere long delay in trial cannot be the ground for quashing a prosecution. In *P. Vijayan* v. *State of Kerala*,[73] a naxalite leader was arrested on 18.2.1970 for various offences. While being taken to the police station, he allegedly tried to escape and attacked the policemen which led to a clash in which police opened fire and the naxalite leader was killed. Till 1998, there was no allegation of killing in a fake encounter. When reports started appearing in the press in 1998 about fake encounter, a CBI investigation was ordered by the High Court of Kerala. CBI registered a case in 1999 and the charge-sheet naming three persons including the appellant was filed in 2002. The appellant filed an application for discharge under section 227, Cr PC pointing out various reasons such as his meritorious service and that nothing had been heard for a very long period but the same was rejected by the trial court without any detailed reasons which order was upheld by the High Court. In appeal before the Supreme Court, P. Sathasivam J, upheld the order of the courts below observing that while considering an application for discharge, the trial court had only to consider the application on the basis of documents and records as to whether there was "sufficient ground" for proceeding against the accused. In that case, no arguments had been advanced about delay in prosecution resulting in violation of article 21.

In *Sajjan Kumar* v. *CBI*,[74] the appellant was accused of his involvement in anti-Sikh riots which had taken place in October, 1984 and charges were framed against him in May, 2010 by the trial judge under various sections of the Indian Penal Code, 1860. It was contended that the continuation of the prosecution after about 23 years was against the protection provided by article 21 of the Constitution. Sathsivam J, relying on his own decision in *P. Vijayan*, held that though delay was also a relevant factor and every accused was entitled to a speedy trial under article 21, it would depend on various factors/ reasons and materials placed by the prosecution.. The learned judge further held that in the instant case, "though delay may be a relevant ground, in the light of the materials which are available before the Court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay…. Those materials have to be tested in the context of prejudice to the accused only at the trial."[75]

Trial of criminal cases inside jail

The right to life and personal liberty enshrined under article 21 includes right to fair trial. Fair trial includes open trial of an offender where the public,

72 See *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822 : (2009) 3 SCC 355; see also S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XLV *ASIL* 125 at 140 (2009); *Mohd. Maqbool Tantray* v. *State of J & K* (2010) 12 SCC 421.

73 (2010) 2 SCC 398.

74 (2010) 9 SCC 368.

75 *Id*. at 383.

media, *etc.* have full access which is also a requirement of section 327, Cr PC. A trial held inside jail premises cannot be considered to be unfair for this reason alone if the lawyers, media and public were free to watch the court proceedings subject to security procedures. In *Md. Shahabuddin* v. *State of Bihar*,[76] in exercise of its administrative powers under section 6(9), Cr PC, the Patna High Court had issued the impugned notification that for expeditious trial, all pending session cases against the appellant shall be tried inside the Siwan district jail premises. The court found nothing wrong in the impugned notification as the trial continues to be fair irrespective of the place where it is held provided all are allowed subject to security.

Right of a convict to claim clemency/remission of sentence

The President under article 72 and the Governor under article 161 of the Constitution have power to grant pardon to a convict. This power is a sovereign power not subject to any statutory provisions such as sections 432, 433 and 433-A of Cr PC. The exercise of this power does not wipe out the judicial decision but the same is subject to limited judicial review. The question is: If the state adopts a policy regarding remission of sentence with regard to article 72 or 161, does the policy apply retrospectively? In *State of Haryana* v. *Jagdish*,[77] a three-judge bench, on a reference by a two-judge bench, settled the confusion created by contradictory decisions of two judges benches[78] by holding that a convict has a right under article 21 to get his case considered for remission on the basis of policy which existed on the date of his conviction and sentence though he has no right to get the remission in all the cases. The policy referable to article 72 or 161 had no retrospective application.

Right to food, shelter and health

In order to protect the fundamental right of homeless and destitute persons, the Supreme Court issued many directions regarding identification of vulnerable persons, provide night shelters, community kitchens, *etc*.[79] The Supreme Court took a very serious view of huge wastage of foodgrains on account of inadequate storage facility available with the government. It noted with anguish large scale corruption and pilferage in public distribution system.[80]

76 *Supra* note 38.

77 AIR 2010 SC 1690.

78 See *State of Haryana* v. *Balwan*, AIR 1999 SC 3333 (the policy applicable on the date of consideration of remission under article 161must be applied for considering the remission of sentence) and two cases differently decided: *State of Haryana*, v *Mahender Singh* (2007) 13 SCC 606 and *State of Haryana* v. *Bhup Singh*, AIR 2009 SC 1252 (the policy applicable on the date of conviction and sentence must be applied for considering the remission of sentence).

79 *People's Union for Civil Liberties* v. *Union of India* (2010) 5 SCC 318 and 423; (2010) 12 SCC 176 and (2010) 13 SCC 45 and 63.

80 *People's Union for Civil Liberties* v. *Union of India* (2010) 11 SCC 719.

IX PREVENTIVE DETENTION

It is well established that the court cannot decide the sufficiency of grounds mentioned in a preventive detention order. The court is, however, entitled to scrutinise the materials relied upon by the detaining authority in coming to its conclusion. But even non-existent, misconceived or irrelevant ground may be enough to vitiate the detention order. In *Pebam Ningol Mikoi Devi* v. *State of Manipur*,[81] the petitioner's husband had started an evening newspaper named *Paojel* in 2006. By an order of the district magistrate passed in September, 2009, he was detained. It was alleged that the detenu alongwith some others planned to earn money by extortion as he was not in a position to run the press. For this purpose, he started printing letters from his press and sent them to the contractors and engineers. Before his detention, the police had recovered huge amount of money from his house and he was arrested. When he was presented before magistrate for judicial remand, the preventive detention order passed under the National Security Act, 1980 was served on him. The detenu made a representation which was rejected by the state government and the advisory board. The representation was forwarded after six days to the central government. The detention order was questioned by the detenu's wife on the grounds that the allegations made in the impugned detention order were vague, irrelevant and insufficient to sustain under article 22(5) of the Constitution; no cogent materials existed upon which the detaining authority could have formed the opinion that the detenu was likely to be released on bail; that there was a delay of six days in forwarding the detenu's representation and all the procedural requirements of article 22, which were mandatory in nature, had not been complied with. The High Court upheld the detention order. On appeal, the Supreme Court noted that the main basis of detention order was the statement of the detenu made before the investigating officer on the next day after his arrest, besides statements of two police constables, an accused, seizure memo, arrest memo and copy of a local newspaper. The court held that the main basis of the impugned order, being the detenu's statement, did not provide any reasonable basis for passing the order and there were no other documents to substantiate the involvement of the detenu in unlawful activities as alleged in the impugned order. Thus, the order was passed without any relevant materials. Moreover, the delay of six days, though not very long, was not explained in any manner. In view of this, the court had no doubt that the preventive detention order was liable to be quashed.

In *Gimik Piotr* v. *State of T.N.*,[82] a Polish citizen was found with undisclosed huge foreign currency notes at the Chennai international airport. Besides prosecution in a criminal court, the state government passed a detention order under Conservation of Foreign Exchange and Prevention of

81 (2010) 9 SCC 618.
82 (2010) 1 SCC 609.

Smuggling Activities Act, 1974 for smuggling foreign currency out of the country with a view to prevent him from smuggling goods in future. The petitioner/appellant contended that the detention order was passed against him on the basis of a single solitary act of alleged smuggling activity and he had no past antecedent and prejudicial activities. Moreover, his passport had already been impounded and, therefore, there was no possibility of the appellant moving out of the country for smuggling activities. Accepting the appellant's contention, the Supreme Court quashed the detention order holding that foreign currency cannot be smuggled out of the country when the detenu cannot move out the country since his passport had already been impounded. Being curtailment of right to life and personal liberty, higher degree of proof was required to pass a detention order which did not exist in the present case where the impugned order had been passed on a solitary ground of alleged smuggling of foreign currency.

X FREEDOM OF RELIGION

Proof of conversion of religion

In the election held in 2006, the appellant won from a constituency reserved for the scheduled caste but the election was challenged on the ground that she was a born Christian and she was not a scheduled caste.[83] The plea of the appellant was that though her father was a Christian who deserted his wife and her mother, who being a Hindu, continued to profess Hindu religion; she was born and brought up as a Hindu by her mother and she continues to profess Hindu religion from her childhood. She further contended that in order to reaffirm her faith in Hindu religion, she underwent rituals in 1994 in a Arya Samaj temple in Madurai regarding which she produced a duplicate copy (original having been lost) of the certificate from Arya Samaj. She also contended that her community accepted her and her mother as Hindus. She married a person belonging to Hindu Pallan community which was included as a scheduled caste in the Presidential order. In her examination-in-chief, the appellant had stated that as a Hindu, her household is celebrating all Hindu festivals. From birth, she has been living as a Hindu and following the Hindu customs and tradition. Her relatives were treating her as Hindu and all her relatives were Hindus. She had never gone to any church and she did not know anything about Christianity or the form of their worship. Earlier, she had contested election to a reserved constituency in the past and none had raised any objection.

The court held that to prove conversion from one religion to another, two elements must be satisfied: (i) there has to be a conversion and (ii) acceptance into the community to which the person had converted. With regard to the present case, the court held that a perusal of the conversion certificate issued

83 *M. Chandra* v. *M. Thangamuthu* (2010) 9 SCC 712.

by the Arya Samaj amply demonstrated that the appellant had proved her claim of reaffirmation of Hindu faith by undergoing rituals of conversion in the Arya Samaj, Madurai. The court upheld the appellant's claim of being a Hindu in the facts and circumstances of the case

XI RIGHT OF MINORITIES

What is the extent to which the state can interfere with the administration of a minority educational institution has always been a vexed question before the courts. It has, however, consistently been held that the state had a limited power of regulation in respect of minority educational institutions. It cannot control the establishment and management of such institutions. The power to make appointment of teachers and other staff is a part of regular administration and management of the school. In *Sindhi Education Society* v. *Chief Secretary, Govt. of NCT of Delhi*,[84] the impugned rule 64(1)(b) of the Delhi Education Rules, 1973 made under the Delhi Education Act, 1973 read:

> 64. (1) No school shall be granted aid unless its managing committee gives an undertaking in writing that: X X X
>
> (b) it shall fill in the posts in the school with the Scheduled Caste and the Scheduled Tribe candidates in accordance with the instructions issued by the Central Government from time to time ….

The appellant, a linguistic minority running a school receiving grant-in-aid from the government, was required to furnish the undertaking as required under the above rule for receiving grant. The appellant contended that being a minority institution, it was not obligatory for it to give effect to the government's reservation policy. As noted above,[85] the Supreme Court had no difficulty in holding that the Sindhi Education Society was not state under article 12 of the Constitution so as to apply the policy of reservation formulated under articles 15 and 16. Whereas article 15 expressly excludes minority educational institutions from the purview of clause (5) of article 15, reservations in appointments and employment can be made only in respect of state services. The minority institution not being 'state', no reservations could be insisted upon them. The court, therefore, held that rule 64(1)(b) could not apply to the appellant and the aid to the appellant cannot be denied on the ground of not furnishing the undertaking stipulated under the above rule.

In *Kolawana Gram Vikas Kendra* v. *State of Gujarat*,[86] by a circular issued by the state government, all government-aided educational institutions of the state (primary, middle and higher secondary schools and colleges, *Sanskrit pathshalas*, *sangeet vidyalayas*) were directed not give effect to any

84 *Supra* note 24.
85 Part II of this survey.
86 (2010) 1 SCC 133.

appointment in teaching and non-teaching posts without prior approval of the government/competent authority. The appellant, a minority institution getting 100 per cent grant from the state, had selected some candidates in direct pay scheme but the district education officer refused permission for the same. The appellant had not intimated the department before making the selection. The appellant contended that the circular was violative of article 30 of the Constitution as it amounted to interference in the administration of a minority educational institution. The Supreme Court did not accept the contention on the ground that the circular was meant only for ensuring that the proposed appointment was within the framework of the rules considering the workload and the availability of the post in the institution and whether the selected candidate possessed the prescribed qualifications. This was necessary to ensure that the grant received from the state is properly utilised. The circular did not require as to who should be appointed and did not interfere with the internal administration of the minority educational institution.

In *G. Vallikumari* v. *Andhra Education Society*,[87] the controversy related to dismissal of an employee of the respondent which was a registered society running a private linguistic minority school receiving 95 per cent aid from the government. After an enquiry conducted against the appellant clerk on the charges of neglecting duties, availing leave without prior permission absence from duty, flouting directions of the management, *etc*., she was removed from service by an order passed by the chairman of the managing committee. No prior approval of the director as required under section 8(2) of Delhi Education Act, 1973 was obtained for removal. The Supreme Court, relying on earlier decisions of the court,[88] held, *inter alia*, that section 8(2) of the Act interfered with the rights of minority educational institutions and, therefore, the same was inapplicable to such institutions. On facts of the case, the court found that after the enquiry report was sent to the appellant to show cause and receipt of the representation by the appellant, the chairman passed the impugned order without adverting to the contents of the representation and applying his mind. The court held:[89]

> (T)here is no escape from the conclusion that the order of punishment was passed by the Chairman without complying with the mandate of the relevant statutory rule and the principles of natural justice. The requirement of recording reasons by every quasi-judicial or even an administrative authority entrusted with the task of passing an order adversely affecting an individual and communication thereof to the affected person is one of the recognised facets of the rules of natural justice and violation thereof has the effect of vitiating the order passed by the concerned authority.

87 *Supra* note 24.

88 *Frank Anthony Public School Employees' Assn*. v. *Union of India* (1986) 4 SCC 707; *Y. Theclamma* v. *Union of India* (1987) 2 SCC 516.

89 *Supra* note 24 at 1115 (of AIR).

In view of the above, the court struck down the impugned order but instead of remitting the matter for disposal afresh, the court altered the punishment from removal to stoppage of three increments without cumulative effect and payment of 20 per cent of back wages.

XII RIGHT TO CONSTITUTIONAL REMEDIES

Public interest litigation

There have been several instances in the past when the Supreme Court had deprecated the tendency of the petitioners to approach the court by way of public interest litigation to ventilate personal grievances or to gain publicity or with some other ulterior motives.[90] Despite this, one public interest petition[91] was filed under article 226 before the Uttaranchal High Court challenging the appointment of the advocate general of the state on the ground of age. Terming the petition as an abuse of the process of the court, the petitioner was visited with cost of Rs. one lakh. The court also issued the following directions in "order to preserve the purity and sanctity of PIL":-

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual Judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request the High Courts who have not yet framed the rules, should frame the rules within three months. The registrar general of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court

90 See *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420 and Parmanand Singh, "Promises and Perils of Public Interest Litigation in India", 52 *JILI* 172 (2010.)

91 *State of Uttaranchal* v. *Balwant Singh Chaufal*, AIR 2010 SC 2550.

should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.

Locus standi in a public interest litigation

In *B.P. Singhal* v. *Union of India*,[92] in a writ petition filed as PIL under article 32 of the Constitution, the petitioner, *inter alia*, prayed for a writ of certiorari quashing the removal of four governors of the States of U.P., Gujarat, Haryana and Goa by the President on 2.7.2004 on the advice of the union council of ministers and a writ of mandamus to allow the said governors to complete their remaining term of office. Relying on an earlier decision,[93] a constitution bench held that the petitioner had no *locus standi* to approach the court for the benefit of individual governors who had themselves not approached the court for any relief but the petitioner had *locus standi* "with regard to the general question of public importance … touching upon the scope of Article 156(1) and the limitations upon the doctrine of pleasure."

No writ petition under article 32 against a judicial order or to violate a statutory provision

The Hindu Marriage Act, 1955, under sub-section (1) of section 13B, confers power on a district court to pass a decree of divorce if a petition for dissolution of marriage is presented by both the parties to a marriage on the ground that they had been "living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved." However, the power cannot be exercised just on the receipt of the application. Sub-section (2) of section 13B further prescribes as follows:

> (2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied … that a marriage has been solemnised and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

In some cases, in the past, the Supreme Court, in exercise of its inherent powers under article 142, with a view to do complete justice in a case, had

92 (2010) 6 SCC 331 : 2010 (5) SCALE 134.
93 *Ranji Thomas* v. *Union of India* (2000) 2 SCC 81.

allowed decree of divorce even when the requirement of sub-section (2) had not been complied with.[94] But those cases had come up before the apex court by way of appeals. In *Poonam* v. *Sumit Tanwar*,[95] the couple had remained together just for two days after marriage and petition for divorce by mutual consent under section 13B was filed after about nine months. The family court refused to grant the decree in view of statutory requirement of sub-section (2) and advised the parties to make further efforts for reconciliation failing which the parties may come to the court after six months of the petition as mandated under sub-section (2) of section 13B. Being aggrieved by the order of the family court, the petitioner filed a writ petition under article 32 praying for a decree of divorce. The Supreme Court refused to circumvent the statutory provision of sub-section (2) of section 13B and upheld the order of the family court which was in accordance with statutory provision and no fundamental right of the petitioner had been violated. On the question of maintainability of a writ petition under article 32 challenging the order of a court, the court observed:[96]

> It is settled legal proposition that the remedy of a person aggrieved by the decision of the competent judicial Tribunal is to approach for redress a superior Tribunal, if there is any, and that order cannot be circumvented by resorting to an application for a writ under Article 32 of the Constitution. Relief under Article 32 can be for enforcing a right conferred by Part III of the Constitution and only on the proof of infringement thereof. If by adjudication by a Court of competent jurisdiction, the right claimed has been negatived a petition under Article 32 of the Constitution is not maintainable.

Exhausting alternative remedy

Under the Delhi Special Police Establishment Act, 1946, the CBI (Central Bureau of Investigation) can, subject to the consent of the state, take up investigation of a crime. Can the High Court or the Supreme Court in exercise of powers under article 226 or 32 order such an investigation without the consent of the state concerned? D.K. Jain J, speaking for a constitution bench, found nothing wrong in a High Court entertaining a writ petition under article 226 and directing the CBI to investigate a cognizable offence which had been committed within the jurisdiction of the state even though the state had not been consulted for such investigation.[97] The learned judge held that when the

94 See cases discussed by Poonam Pradhan Saxena, "Hindu Law" , XLV *ASIL* 459 at 473 (2009) and XLVI *ASIL* 380 at 396 (2010).

95 *Supra* note 4.

96 *Id.* at 1387.

97 *State of West Bengal* v. *Committee for Protection of Democratic Rights, West Bengal*, AIR 2010 SC 1476 : (2010) 3 SCC 571, followed in *State of Maharashtra* v. *Farook Mohammed Kasim Mapkar*, AIR 2010 SC 2971 : (2010) 8 SCC 582; also see *Rakesh Kumar Goel* v. *U.P. State Industrial Development Corpn*. (2010) 8 SCC 263.

CBI can investigate with the consent of the state, the court can also exercise its constitutional power of judicial review and order investigation by CBI without the consent of the state. The powers of the High Court cannot be diluted or ousted by statutory provisions. The learned judge further observed:[98]

> (A) direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the proctors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

The court, however, struck a note of caution thus:[99]

> (D)espite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise…. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national or international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights.

In *Kunga Nima Lepcha* v. *State of Sikkim*,[100] a three-judge bench, consisting of the same judges who were party to the above decision, dismissed a public interest petition on the ground that the onus of launching an investigation into the allegations against a chief minister for misusing his "public office to amass assets disproportionate to his known sources of income" was on the investigating agencies such as the state police, CBI or the central vigilance commission but the court was not the proper forum to direct initiation of investigation by the CBI. It was further held that the court under the Code of Criminal Procedure, 1973 had only a limited degree of control even in respect of ongoing investigations. It is clear that when the chief minister

98 *Id.* at 1496 (of *State of West Bengal*).
99 *Id.* at 1496-97.
100 *Supra* note 12.

of the state was the alleged offender, how can the state consent to a CBI investigation? Was not this a fit case in which it was necessary to provide credibility and instil confidence in the investigation? After all, during 2010 itself, the Supreme Court took upon itself the task of not only directing investigation by CBI but also decided to monitor the investigations being conducted by CBI in corruption and personal liberty cases.[101]

Writ of *quo warranto*

In *Hari Bansh Lal* v. *Sahodar Prasad Mahto*,[102] a PIL was filed praying for a writ of *quo warranto* against the appointment of the appellant as chairman of Jharkhand state electricity board. The Supreme Court held that a petition for the writ of *quo warranto* was not maintainable in service matters. The court further held that the suitability or otherwise of a candidate to a post in government service was the function of the appointing authority and not of the court unless the appointment was contrary to statutory provisions. This view seems to be a sweeping one as the very purpose of the writ of *quo warranto* is to decide whether a person was occupying a public office legally or not and, therefore, to say that in service matters the petition for *quo warranto* is not maintainable does not seem to be proper. Certainly, the question of suitability cannot be decided in such a writ petition.

Petition under article 32 not maintainable merely for violation of any statutory or constitutional provision

In *Ramdas Athawale* v. *Union of India*,[103] the petitioner filed a writ petition under article 32 of the Constitution challenging the validity of the proceedings in Lok Sabha which had commenced on 29.1.2004 without President addressing both Houses of Parliament as the session was new session of the year. As a matter of fact, the winter session of Parliament had commenced on 2.12.2003 and the Lok Sabha was adjourned *sine die* on 23.12.2003. By a notice of the Secretary General, the Lok Sabha resumed its sitting from 29.1.2004. The question was whether the resumption of sitting of the adjourned House could be treated to be first session of the year so as to attract the provisions of article 87(1) of the Constitution. Article 87(1), *inter alia*, requires that at the commencement of the first session of each year, the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons. If this provision was attracted in case of an adjourned session, the proceedings commencing from 29.1.2004 were unconstitutional. The court, however, did not accept this contention on

101 See also *Centre for Public Interest Litigation* v. *Union of India*, *supra* note 12 (2G spectrum case); *Rubabbuddin Sheikh* v. *State of Gujarat* (2010) 2 SCC 200 (Sohrabuddin fake encounter case); *Rubabbuddin Sheikh* v. *State of Gujarat*, AIR 2010 SC 3175 (fake encounter of Sohrabuddin Sheikh and disappearance of Kausar Bi).

102 AIR 2010 SC 3515.

103 AIR 2010 SC 1310.

the ground that commencement of proceedings after *sine die* adjournment did not attract article 87(1). The court, holding that there was not even a whisper of infringement of any fundamental right of the petitioner, made the following observations regarding maintainability of a writ petition:[104]

> (A)rticle 32 of the Constitution guarantees the right to a Constitutional remedy and relates only to the enforcement of the right conferred by Part III of the Constitution and unless a question of enforcement of a fundamental right arises, Article 32 does not apply….
>
> We reiterate the principle that whenever a person complains and claims that there is a violation of any provision of law or a Constitutional provision, it does not automatically involve breach of fundamental right for the enforcement of which alone Article 32 of the Constitution is attracted. It is not possible to accept that an allegation of breach of law or a Constitutional provision is an action in breach of fundamental right

XIII PAYMENT OF COMPENSATION

The Supreme Court does not seem to have come out with clear and settled principles for payment of compensation in cases of violation of fundamental rights. The decisions indicate a completely *ad hoc* approach on a case to case basis. In *Parasnath Tiwari* v. *Central Reserve Police Force*,[105] a member of the respondent police force was killed at the hands of a fellow constable because of mistaken identity. The parents of the deceased constable had approached the High Court for a compensation of Rs. five lakh only for mental agony and loss suffered by them due to the death of their only earning member of the family. The High Court awarded Rs. one lakh compensation. The father of the deceased constable was an old person and the deceased was the only earning member of the family. The Supreme Court, therefore, enhanced compensation to two lakh rupees. This order does not seem to have done real justice to old parents whose only bread-earner had been killed, even though accidentally. The prayer of the parents was quite reasonable.

Contrary to the above case, Delhi High Court awarded compensation of Rs. Five lakh in a PIL for accidental death of an old man of 77 years due to fall into an unbarricaded pit which did not have any reflected signs. The court awarded the compensation to the lone widow of the deceased whose children

104 *Id.* at 1319-20.

105 AIR 2010 SC 693. In *Jaywant P. Sankpal* v. *Suman Gholap*, AIR 2010 SC 208, the Supreme Court upheld the award of compensation of Rs. 45,000/- by the Maharashtra state human rights commission for brutal assault by the police.

had already died. The accident had been caused due to negligence of the contractor.[106]

In *State of Mizomram* v. *Sh. Hrangdala*,[107] Gauhati High Court has held that even when the writ petition involved disputed questions of facts, the petition would be maintainable as the claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty was a claim based on strict liability. For this view, the court relied upon two decisions of the Supreme Court.[108] The present petition was filed by the respondent against the state for compensation for illegal occupation of his land and demolition of his house erected thereon.

In *Rajendran Chingaravelu* v. *R.K. Mishra*,[109] the Supreme Court refused to award compensation to the appellant against the action of his illegal detention for more than 15 hours at Chennai airport and defaming him through media by prematurely and maliciously disclosing a false picture of the entire episode which had tarnished his image in the eyes of his friends and relatives. In this case, currency notes worth Rs. 65 lakh were being taken by the appellant while travelling in the plane. The amount was fully disclosed along with the source and its purpose at the Hyderabad airport. But when he reached Chennai airport, the income tax authorities pulled him out of the plane and seized the currency notes on the ground of suspicion. They even disclosed the whole episode to the media which covered the same extensively next day. Ultimately, the money was returned but the grievance of the appellant was his illegal detention for hours and loss of reputation because of media coverage. The Supreme Court found that the appellant was partly responsible for the episode for carrying huge amount of money and the income tax authorities had acted bonafide though they had exceeded the limits in enthusiasm for which they had expressed regrets. The court did not award any compensation to the petitioner.

106 *Criminal Justice Society* v. *Union of India*, AIR 2010 Del. 194.
107 AIR 2010 Gau. 84.
108 *D.K. Basu* v. *State of West Bengal*, AIR 1997 SC 610 and *ABL International Ltd.* v. *Export Credit Guarantee Corpn. of India Ltd.* (2004) 3 SCC 553.
109 (2010) 1 SCC 457.