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CONSTITUTIONAL LAW – II

(PROVISIONS OTHER THAN FUNDAMENTAL RIGHTS)

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I INTRODUCTION

THIS SURVEY highlights cases decided by Supreme Court of India and reported in the year 2010 involving questions of constitution law except those relating to fundamental rights. It makes brief reference to cases of constitutional law wherein established principles have been reiterated and detailed analysis of issues which have culminated in notable developments in constitutional law. The constitutional law being supreme law of the land is all pervasive. It is so because every law of the land is tested on the anvil of constitutional law. Consequently, the issues pertaining to constitutional law arise not only within the bounds of constitutional periphery but also in the context of statutory laws of the land.

II ADVOCATE-GENERAL – AGE FOR APPOINTMENT – ARTICLES 165 AND 217

Article 165 of the Constitution provides for appointment of advocate-general of the state. It states that the Governor of each state shall appoint a person who is qualified to be appointed a judge of the High Court to be advocate-general for the state. The qualifications for the appointment of a judge of a High Court are mentioned in article 217 which also prescribes that a judge of the High Court shall hold office until he attains the age of sixty-two years. The appointment of advocate-general of State of Uttaranchal was challenged by way of a public interest litigation in *State of Uttaranchal* v. *Balwant Singh Chaufal*[1] on the ground that the incumbent had crossed 62 years of age and was, therefore, not entitled to be appointed as advocate-general. The court dismissed the petition holding that the retirement age of High Court judge was not applicable to advocate-general. The provision

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1 (2010) 3 SCC 402.

relating to duration in the first clause of article 217 cannot be made applicable to the advocate-general because the Constitution contains a specific provision about the duration of the appointment of the advocate-general in the third clause of article 165 which says that the advocate-general shall hold office during the pleasure of the Governor.[2] Therefore, the first clause of article 217 cannot be read with the first clause of article 165 so as to disqualify a person from being appointed as advocate-general after the age of sixty-two years.[3]

III CONSTITUTIONAL SAFEGUARDS TO CIVIL SERVANTS - ARTICLE 311

Article 311 of the Constitution provides certain safeguards to civil servants. One of the safeguards is that a civil servant cannot be dismissed or removed from service without conducting a departmental enquiry. Further, enquiry should be conducted in accordance with the principles of natural justice so that the employee is given full opportunity to defend himself.

Non-supply of documents

In *State of Uttar Pradesh* v. *Saroj Kumar Sinha*,[4] an enquiry against an executive engineer was conducted under the U.P. Government Servant (Discipline and Appeal) Rules, 1999. The employee was denied access to documents sought to be relied upon against him. The effect of denial was that the employee was denied reasonable opportunity to make effective and plausible representation against the charge-sheet. It caused grave prejudice to him. Thus, enquiry proceedings were held to be clearly vitiated and violative of article 311 of the Constitution. The court reiterated the settled proposition of law that a government employee facing a departmental enquiry is entitled to all the relevant statements, documents and other materials to enable him to have a reasonable opportunity to defend himself in the departmental enquiry.[5]

Termination without enquiry

A provision in a service contract contrary to the stipulated safeguards cannot take away the constitutional right of the employee.[6] Similarly, neither the term in the attestation form nor any consent given by a government servant can take away the constitutional safeguard provided to a government servant. Suppression of material information and making a false statement in attestation form amounts to misconduct and, therefore, an employer may be justified in terminating his service during the period of probation. But a

2 *Id.* at 418.
3 *Id.* at 419.
4 (2010) 2 SCC 772.
5 The court referred to earlier judgments on the point: *Kashinath Dikshita* v. *Union of India* (1986) 3 SCC 229; *Tirlok Nath* v. *Union of India*, 1967 SLR 759 (SC); *State of Punjab* v. *Bhagat Ram* (1975) 1 SCC 155.
6 *Moti Ram Deka* v. *North East Frontier Railway*, AIR 1964 SC 600.

confirmed government servant who is the holder of a civil post cannot be dismissed without conducting the enquiry.

In *Kamal Nayan Mishra* v. *State of Madhya Pradesh*,[7] an employee submitted an attestation form certifying that the information given by him in the said form was correct and if any information was found to be false or incomplete in any material respect, the appointing authority may terminate him from the service without giving notice or showing cause. The employee was asked to submit attestation form, not when he was appointed, but after fourteen years of service. Even after knowing that the appellant had furnished wrong information, the employer did not take any action for seven long years, which indicated that the department proceeded for a long time on the assumption that the wrong information did not call for any disciplinary or punitive action. Nearly seven years later, the services of the employee were terminated without any enquiry on the ground of giving wrong information and concealment of facts in attestation form. The termination of the employee without an inquiry or hearing was held illegal and invalid.

IV DISTRIBUTION OF LEGISLATIVE POWERS ARTICLES 245-254

Under the scheme of the Constitution of India, there is a clear demarcation of legislative powers between the centre and the states. The Constitution exhibits supremacy of Parliament over the state legislatures. However, the principle of federal supremacy laid down in article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the union and state lists. An interesting issue was considered in *State of West Bengal* v. *Committee for Protection of Democratic Rights*,[8] wherein an objection was raised to the exercise of power by High Court under article 226 of the Constitution. The objection was based on the doctrine of distribution of legislative powers between the centre and states. It pertained to the direction given by the court for investigation of a case by CBI without the consent of the state in which the offences were committed. The court considered the issue: When the scheme of the Constitution prohibits encroachment by the union upon a matter which exclusively falls within the domain of the state legislature, like public order, police, *etc*. can the third organ of the state, *viz*. the judiciary, direct CBI, an agency established by the union to do something in respect of a state subject, to investigate a case without the consent of the state government concerned?[9]

7 (2010) 2 SCC 169.
8 (2010) 3 SCC 571.
9 *Id.* at 585.

The court ruled that from a bare reading of the constitutional provisions, it was manifest that the legislative power of the union to provide for the regular police force of one state to exercise power and jurisdiction in any area outside the state can be exercised only with the consent of the government of that particular state in which such area is situated, except the police force belonging to any state to exercise power and jurisdiction to railway areas outside that state.[10] However, the restriction imposed on the powers of the central government does not apply *mutatis mutandis* to the constitutional courts.

Some other issues pertaining to the distribution of legislative powers also arose for consideration during the year under survey and the court resolved them with the aid of the doctrine of pith and substance as well as the doctrine of repugnancy.

Pith and substance

One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists of seventh schedule. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, the courts examine the true character of the enactment, its object, scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is an established principle of law in India recognized by the Supreme Court and the High Courts.[11] This doctrine was explained and applied in *Zameer Ahmed Latifur Rehman Sheikh* v. *State of Maharashtra*[12] while upholding the legislative competence of the State of Maharashtra to enact the Maharashtra Control of Organized Crime Act, 1999 [MCOCA]. The appellant filed a writ petition before the High Court of Bombay challenging the constitutionality of section 2(1)(e) of MCOCA so far as the same related to "promoting insurgency." The High Court dismissed the writ petition. Before the Supreme Court, the appellant contended, *inter alia*, that 'insurgency' fell within the ambit of defence of India in entry I of the union list and, therefore, the Maharashtra state legislature did not have legislative

10 *Id.* at 586.

11 See *A.S. Krishna* v *State of Madras*, AIR 1957 SC 297; *Kartar Singh* v. *State of Punjab* (1994) 3 SCC 569; *Bharat Hydro Power Corporation Ltd.* v. *State of Assam* (2004) 2 SCC 553; *Southern Pharmaceuticals & Chemicals* v. *State of Kerala* (1981) 4 SCC 391; *State of Rajasthan* v. *G. Chawla*, AIR 1959 SC 544; *Amar Singhji* v. *State of Rajasthan*, AIR 1955 SC 504; *Delhi Cloth and General Mills Co. Ltd.* v. *Union of India* (1983) 4 SCC 166; *Vijay Kumar Sharma* v. *State of Karnataka* (1990) 2 SCC 562; and *Prafulla Kumar* v. *Bank of Commerce Khulna*, AIR 1947 PC 60.

12 (2010) 5 SCC 246.

competence to enact the said part of section 2(1)(e). Rejecting the contention, the court ruled that even if the impugned part of MCOCA incidentally encroaches upon a field under entry 1 of the union list, the same cannot be held to be *ultra vires* in view of the doctrine of pith and substance as, in essence, the said part relates to maintenance of public order which is essentially a state subject and only incidentally trenches upon a matter falling under the union list. Therefore, it was within the legislative competence of the State of Maharashtra to enact such a provision under entries 1 and 2 of list II read with entries 1, 2 and 12 of list III of the schedule VII to the Constitution.[13]

Repugnancy

The Constitution empowers both Parliament and the state legislatures to make laws concurrently with respect to subjects mentioned in list III of the seventh schedule. Article 254 of the Constitution contains the mechanism for resolution of conflict between the central and the state legislations enacted with respect to any matter enumerated in the concurrent list. It is settled law that the question of repugnancy between a law made by Parliament and by a state legislature arises only in case both the legislations occupy the same field with respect to any matter enumerated in the concurrent list.[14] The settled law with regard to repugnancy between central and state law was applied in *Zameer Ahmed Latifur Rehman Sheikh* v. *State of Maharashtra*,[15] wherein the repugnancy between section 2(1)(e) of MCOCA and the provisions of the central Act, *viz*. the Unlawful Activities (Prevention) Act, 1967 [UAPA] section 15 as inserted in 2004, was in question. On examination of the preamble, the statement of objects and reasons and the interpretation clauses of MCOCA and UAPA, the court came to the conclusion that both the Acts operated in different fields and the ambit and scope of each was distinct. UAPA occupied a field different than that occupied by MCOCA. There was no clear and direct inconsistency or conflict between the said section 2(1)(e) MCOCA and sections 15 and 2(1)(o), UAPA.

V GLOBALIZATION AND CONSTITUTIONAL ETHOS

The Supreme Court judges are not mere phonographic recorders but are empirical social scientists and the interpreters of the social context in which they work. Therefore, judges must be on their guard to ensure that the winds of globalization do not overturn the constitutional philosophy. The decision

13 *Id*. at 263.

14 See *M. Karunanidhi* v. *Union of India* (1979) 3 SCC 431; *Government of Andhra Pradesh* v. *J.B. Educational Society* (2005) 3 SCC 212; *National Engineering Industries Ltd.* v. *Shri Krishna Bhageria*, 1988 Supp SCC 82; *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar* (1983) 4 SCC 45; *Zaverbhai* v. *State of Bombay*, A.I.R 1954 SC 752; *Deep Chand* v. *State of U.P.*, AIR 1959 SC 648.

15 *Supra* note 12.

in *Harjinder Singh* v. *Punjab State Warehousing Corporation*[16] related to retrenchment of an employee and involved interpretation of a social welfare legislation. The court noted with concern that of late, there has been a visible shift in the interpretation of social welfare legislations. The attractive mantras of globalization and liberalization are fast becoming the *raison d'etre* of the judicial process and an impression had been created that the constitutional courts were no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief had been denied to the employees falling in the category of workmen, who were illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by the court in three decades. Therefore, the approach of the court must be compatible with the constitutional philosophy of which the directive principles of state policy constituted an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer - public or private.[17] The court noted with concern a disturbing contrary trend discernible in recent times, sought to be justified in the name of globalization and liberalization of economy. It sounded a note of caution that any attempt to dilute the constitutional imperatives in order to promote the so-called trends of 'globalization' may result in precarious consequences. The court reminded judges of their duty to uphold the constitutional focus on social justice without being in any way misled by the glitz and glare of globalization.[18]

VI REMOVAL OF GOVERNOR – ARTICLE 156

Constitutionalism denotes limitations on the power of the authorities and institutions created under the Constitution. Thus, all public powers including constitutional powers should be exercised in tune with constitutional ethos. However, the existence of a written Constitution does not necessarily ensure existence of constitutionalism. In fact, judiciary plays a significant role in this regard. The decision of the Supreme Court in *B.P. Singhal* v. *Union of India*[19] signifies judicial reiteration of the concept of constitutionalism. In a writ petition filed in public interest challenging the constitutional validity of removal of the Governors of the States of Uttar Pradesh, Gujarat, Haryana and Goa, the court considered various questions of constitutional importance.

16 (2010) 3 SCC 192.
17 *Id*. at 210.
18 *Id*. at 213-214; also see *Mahanadi Coalfields Ltd* v. *Mathias Oram* (2010) 11 SCC 269.
19 (2010) 6 SCC 331.

Locus standi to raise constitutional issues

A Governor does not belong to a helpless section of society. Can any other individual seek relief on his behalf? The court ruled that with regard to the general question of public importance touching upon the scope of article 156(1), the petitioner had the necessary *locus*.[20]

Pleasure doctrine and constitutionalism

The scope and applicability of the doctrine of pleasure to the constitutional office of Governor was also considered in the wake of article 156(1) of the Constitution which provides that the Governor shall hold office during the pleasure of the President. The court referred to the origin of the doctrine in England; three broad categories based on the doctrine of pleasure,[21] various decisions and ruled that when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, it should necessarily be read as being subject to the 'fundamentals of constitutionalism'. The doctrine of pleasure, however, is not a licence with unfettered discretion to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of the pleasure. The withdrawal of pleasure cannot be at the sweet will, whim and fancy of the authority, but can only be for valid reasons.[22] Clause (3) of article 156 which provides that subject to the foregoing provisions of this article, a Governor shall hold office for a term of five years from the date on which he enters office is not intended to be a restriction or limitation upon the power to remove the Governor at any time under clause (1) of article 156. It only indicates the tenure which is subjected to the President's pleasure.[23]

Loss of confidence in Governor

If a party which comes to power with a particular social and economic agenda finds that a Governor is out of sync with its policies, should it be able to remove such a Governor? In this context, the court referred to the position of Governor and ruled that the Governor was neither the employee nor the agent of the union government. A Governor cannot be removed on the ground

20 *Id*. at 346; see, generally, Simon Evans, "Standing to raise Constitutional Issues Reconsidered", 22(3) *Bond LR* 38 (2010) [There is a strong case for reformulating the standing rules to provide greater certainty and to ensure that the interests that establish standing do not inappropriately preclude review of public action]; Patrick Keyzer, "Standing to raise Constitutional issues Reconsidered", 22(3) *Bond LR* 60 (2010) [Reform of Standing Rules is warranted]; Geoff Holland, "Standing as Barrier to Constitutional Justice – Can we create a new public paradigm?", 22(3) *Bond LR* 79 (2010).

21 [1] Offices held during the pleasure of the President without restrictions; [2] Offices held during the pleasure of President with restrictions and [3] Offices to which the doctrine is not applicable.

22 *Supra* note 19 at 352.

23 *Id*. at 358.

that he is out of sync with the policies and ideologies of the union government or the party in power at the centre. Nor can he be removed on the ground that the union government has lost confidence in him. It follows, therefore, that change in government at the centre is not a ground for removal of Governors holding office to make way for others favoured by the new government.[24]

Scrutiny of Presidential order

The court also considered the question whether the removal of the Governors in exercise of the doctrine of pleasure is open to judicial review. It rejected the contention that an order under article 156 is not justiciable. If the aggrieved person is able to demonstrate *prima facie* that his removal was arbitrary, mala fide, capricious or whimsical, the court will call upon the union government to disclose to the court, the material upon which the President had taken the decision to withdraw the pleasure. If the union government does not disclose any reason, or if the reasons disclosed or found are irrelevant, arbitrary, whimsical or *mala fide,* the court will interfere. However, the court will not interfere merely on the ground that a different view is possible or that the material or reasons are insufficient.[25]

VII JUDICIAL REVIEW - ARTICLE 226

The High Courts in India exercise vast discretionary powers under article 226 of the Constitution. However, self-imposed limitations have been observed by the courts while exercising such powers. In the year under survey, those limitations were reiterated. On the other hand, a notable feature of this aspect of constitutional law this year is that the apex court has ruled that the limitations which the Constitution puts on the central government is not applicable to the third organ of the government, *viz.* judiciary while exercising its power under article 226 for the protection of human rights.

Functional demarcation

While exercising its powers under article 226 of the Constitution, the High Court cannot perform the functions of any other authority. The bar against assuming the role of other authorities emphasizes judicial restraint in the matter of exercise of power under article 226 of the Constitution. During 2009, the apex court had reiterated this principle in various cases.[26] During 2010 also, the court reiterated this principle in *Punjab Roadways, Nawanshahar* v. *Patiala Bus Highways Private*.[27] Under the Motor Vehicles Act, 1988, grant

24 *Id*. at 372.
25 *Ibid*.
26 *Union of India* v. *Bilash Chand Jain* (2009) 16 SCC 601; *Indian Charge Chrome Limited* v. *Jagdish Rai Puri*, (2009) 14 SCC 351; *President Panchayat Union Council* v. *P.K. Muthusamy* (2009) 14 SCC 651.
27 (2010) 5 SCC 236.

of stage carriage permits is the function of the regional transport authority. In a writ petition filed by the private transport operators, the High Court gave a direction to the commissioner to grant one stage carriage permit with half return trip daily to the writ petitioner. Setting aside the direction given by the High Court, the apex court ruled that the powers of High Courts under article 226 of the Constitution are no doubt wide and expansive but the same cannot be exercised as an appellate authority exercising quasi-judicial functions. The power was highly discretionary and supervisory in nature. Grant of stage carriage permits was primarily a statutory function to be discharged by the regional transport authority under section 72 of the Act and not by the High Court while exercising its constitutional powers.

Interference with expert opinion

It is well established proposition of law that courts should not interfere with recommendations of an expert body.[28] It is normally wise and safe for the courts to leave decision to experts who are more familiar with the problem they face. However, if a provision of law is to be read or understood or interpreted, court has to play an important role.[29] The aforesaid proposition was reiterated by Supreme Court in *Secretary and Curator, Victoria Memorial Hall* v. *Howrah Gantantantarik Samity*,[30] in which directions were sought from Calcutta High Court relating to better administration of the monument, Victoria Memorial Hall. The High Court constituted an expert committee which made several recommendations including the one relating to erection of a new building within the same campus. The High Court, however, rejected the recommendation relating to raising of an annexe within the Memorial Campus. On appeal, the Supreme Court ruled that the recommendations of the expert committee should not have been turned down as the committee was appointed by the High Court itself. No allegations of *mala fides* or disqualification against any member of that committee were raised. The court deprecated that it was unfortunate that the High Court not only brushed aside its report but also labeled it as a so-called expert committee.[31]

Judicial discipline

Under articles 226 and 32 of the Constitution, the High Courts and the Supreme Court exercise concurrent jurisdiction in the matter of issuance of writs. However, judicial discipline requires that in hierarchical systems of

28 See *University of Mysore* v. *C.D. Govinda Rao*, AIR 1965 SC 491; *State of Bihar* v. *Dr. Asis Kumar Mukherjee* (1975) 3 SCC 602; *Dalpat Abasaheb Soluinke* v. *Dr. B.S. Mahajan* (1990) 1 SCC 305; *Central Areca Nut & Cocoa Mktg. & Processing Coop. Ltd.* v. *State of Karnataka* (1997) 8 SCC 31; *Dental Council of India* v. *Subharti K.K.B. Charitable Trust* (2001) 5 SCC 486.

29 *P.N. Bhargava* v *University Grants Commission* (2004) 6 SCC 661 and *Rajbir Singh Dalal (Dr.)* v. *Chaudhari Devi Lal University* (2008) 9 SCC 284.

30 (2010) 3 SCC 367.

31 *Id*. at 740.

courts, conflicting exercise of jurisdiction should be avoided. In *State of Maharashtra* v. *Farook Mohammed Kasim Mapkar*,[32] pertaining to Bombay communal riots after *Babri Masjid* demolition, the court emphasized that it was judicial propriety that a High Court should not exercise its jurisdiction under article 226 when the same matter was seized of by the Supreme Court under article 32 of the Constitution. However, on the facts of the case, the court came to the conclusion that the writ petition filed under article 226 had been filed well prior to writ petition under article 32 and that too by different persons. Further, there was no order prohibiting the High Court from proceeding further. Therefore, there was no violation of established procedure.[33]

Limitations

Restriction on Parliament by the Constitution and restriction on the executive by Parliament under an enactment do not amount to restriction on the power of the judiciary under articles 32 and 226 of the Constitution. In *State of West Bengal* v. *Committee for Protection of Democratic Rights*,[34] the court ruled that the High Court, in exercise of its jurisdiction under article 226 of the Constitution, can direct the CBI to investigate an offence, which is alleged to have been committed within the territorial jurisdiction of a state, without the consent of the state government. Such a direction by the High Court, in exercise of its jurisdiction under article 226 of the Constitution, will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of powers and shall be valid in law. Being the protectors of civil liberties of the citizens, the Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the rights guaranteed by part III in general and under article 21 of the Constitution in particular, zealously and vigilantly.[35] The court was not ready to accept the proposition that the doctrine of separation of powers would curtail the power of judicial review conferred on the constitutional courts even in situations where human rights were violated. In coming to the aforesaid conclusion, the court opined that the Constitution is a living and organic document. It cannot remain static and must grow with the nation. The constitutional provisions have to be construed broadly and liberally having regard to the changed

32 (2010) 8 SCC 582.

33 The court distinguished the earlier decision on point reported in *Chhavi Mehrotra* v. *D.G. Health Services*, 1995 Suppl (3) SCC 434.

34 *Supra* note 8.

35 *Id.* at 602. [Power of judicial review constitutes integral part of basic structure of the Constitution and cannot be abridged or ousted by Acts of Parliament even by a constitutional amendment]; also see *Union of India* v. *R Gandhi* (2010) 11 SCC 1, 58 [While constituting tribunals, the legislature can prescribe the qualifications. The same is, however, subject to judicial review. If the court in exercise of power of judicial review is of the view that such tribunalization would adversely affect the independence or standards of judiciary, the court may interfere to preserve the independence and standards of judiciary.].

circumstances and the needs of time and polity.[36] The view taken in this case was followed in a subsequent decision relating to post-*Babri Masjid* demolition communal riot in *State of Maharashtra* v. *Farook Mohammed Kasim Mapkar*[37] with a note of caution that the High Court should give directions sparingly, cautiously and in exceptional situations. The decision in Soharabuddin fake encounter case, *viz*. *Rubabbudin Sheikh* v. *State of Gujarat*[38] is further extension of judicial power in this regard. It establishes the view that a High Court and the Supreme Court in exercise of constitutional power can direct investigation by CBI even after the filing of the charge sheet.

Reasoned order

Reasons are fundamental to justice delivery system. Therefore, in exercise of its power under article 226, the High Court should pass orders which are supported by reasons. In *Secretary and Curator, Victoria Memorial Hall* v. *Howrah Ganatantrik Nagrik Samity*,[39] the Calcutta High Court rejected the recommendations of the expert committee appointed by it without giving any reason. On appeal, the Supreme Court reiterated the settled legal position that not only an administrative but also a judicial order must be supported by reasons, recorded in it. It is the duty and obligation on the part of the court to record reasons while disposing the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice delivery system, to make known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice. A reasoned order ensures transparency and fairness in decision making.

VIII PARLIAMENTARY PROCEEDINGS – IMMUNITY FROM JUDICIAL SCRUTINY – ARTICLE 122

Under the constitutional scheme, each House of Parliament is to be the sole judge of the lawfulness of its own proceedings. The court cannot go into the lawfulness of the proceedings of the Houses of Parliament. The Constitution aims at maintaining a fine balance between the legislature, executive and judiciary. The object is to ensure that each of the constitutional organs functions within the respective assigned sphere. Precisely, that is the constitutional philosophy inbuilt into article 122 of the Constitution. In

36 On interpretation of the Constitution, the court relied on earlier pronouncements: *Kehar Singh* v. *Union of India* (1989) 1 SCC 204; *M. Nagraj* v. *Union of India* (2006) 8 SCC 212 and *I.R. Coelho* v. *State of Tamil Nadu* (2007) 2 SCC 1.

37 *Supra* note 32.

38 (2010) 2SCC 200.

39 *Supra* note 30.

Ramdas Athawale v. *Union of India*,[40] the issue regarding propriety of convening of the first session of the House on 29-1-2004 without the Presidential address was raised in the House. The Speaker gave a ruling declaring that as per the provisions of the Constitution, a session comes to an end when the House is prorogued. The Speaker's ruling was challenged before the Supreme Court which ruled that a plain reading of article 122 makes it abundantly clear that the validity of any proceeding in Parliament shall not be called in question on the ground of any irregularity of procedure. Proceedings are subject to judicial review if challenge is based on illegality. The petitioner was essentially raising a dispute as to the regularity and legality of the proceedings in the House of the People. The Speaker's decision adjourning the House *sine die* and direction to resume its sittings in part two essentially related to proceedings in Parliament and procedural in nature. Therefore, the business transacted and the validity of proceedings after the resumption of its sittings pursuant to the directions of the Speaker cannot be inquired into by the courts.[41]

IX PRECEDENT - ARTICLE 141

The principle of *stare decisis* is a distinguishing feature of the countries following the common law system. The principle has gained constitutional status under article 141 of the Constitution of India. In this area, the year under survey highlights the reiteration of the settled principle. Further, the notable feature is the judicial emphasis on duty of a lawyer not to abuse the legal process by seeking reconsideration of an established precedent when the matter is not *res integra*. A member of the legal profession seeking reconsideration of an earlier precedent must substantiate his claim with valid reasons.

Abuse of process

It is expected from a member of noble profession not to invoke jurisdiction of the court in a matter where controversy itself is no longer *res integra.* In *State of Uttaranchal Pradesh* v. *Balwant Singh Chaufal*[42] an advocate filed a writ petition challenging the appointment of advocate-general. The court noted with concern that the legal issue regarding applicability of age bar to appointment of advocate-general stood settled by a catena of decisions of the High Courts as well as a constitution bench decision of the Supreme Court. Raising this legal issue and invoking the jurisdiction of the High Court under

40 (2010) 4 SCC 1.

41 *Id*. at 14. The court relied on its earlier decisions in under article 143, Constitution of India, *In re (Special Reference)* No 1 of 1964), AIR 1965 SC 745; *Indira Gandhi* v. *Raj Narain*, 1975 Suppl SCC 1; *M.S.M Sharma* v. *Dr. Shree Krishna Sinha*, AIR 1960 SC 1186.

42 *Supra* note 1.

article 226 by way of public interest litigation[43] was an abuse of the process of the court. Where it is felt that a settled legal issue requires reconsideration, the petition in such a case must list out relevant case law and give justification for reconsideration. When the controversy raised is no longer *res integra,* it not only wastes precious time of the court and prevents the court from deciding other deserving cases, but also has immense potentiality of demeaning a very important constitutional office, and the person who has been appointed to that office.

Adieu to *stare decisis*

Under the *stare decisis* rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. A longstanding decision should not be easily interfered with, having regard to the fact that over the years, people have already settled their business in accordance therewith.[44] If the rule of *stare decisis* were followed blindly and mechanically, it would dwarf and stultify the growth of the law and affect its capacity to adjust it to the changing needs of the society.[45] In *Bhuwalka Steel Industries Ltd* v. *Bombay Iron and Steel Labour*,[46] the court recognized the necessity for fresh look on principles settled by judgments when demands of the changed facts and circumstances, dictated by forceful factors, supported by logic so require. The question before the court was as to the correctness of interpretation of the term "unprotected worker" used in the Maharashtra Mathadi, Hamal and other Manual Workers (Regulation of Employment and Welfare) Act, 1969, a social welfare legislation. The contention of the appellant was that for 32 years, the Bombay High Court had taken a consistent view in interpretation of the term "unprotected worker" to mean only casual labour and, therefore, this should not be disturbed on the principle of *stare decisis*. The court emphasized: (1) thousands of workmen were otherwise exploited by *toliwalas, mukadams* and at times, the employers; (2) the enactment was a beneficial enactment, providing the protection to such workers, who did not have the honest representation and it was with this lofty idea that a progressive legislation had been enacted. Accordingly, it ruled that the definition of the expression 'unprotected worker' would have to be all the

43 The court felt the necessity to examine all connected issues of public interest litigation and discussed [1] Nature and definition of public interest litigation; [2] its genesis and source; [3] Development of three phases of Public Interest Litigation; [4] Developments in other countries like Australia, USA, England and South Africa; [5] Impact of development of PIL in India on neighbouring countries like Pakistan, Bangladesh, Nepal and Sti Lanka and [6] need to curb frivolous and vexatious litigation and as a remedy to impose exemplary costs.

44 *Mahesh Ratilal Shah* v. *Union of India* (2010) 2 SCC 706; also see *Raj Narain Pandey* v. *Sant Prasad Tewari* (1973) 2 SCC 35.

45 Bhagwati J in *Bachhan Singh* v. *State of Punjab,* AIR 1982 SC 1329, 1331; see also Ian Bushnell, "Justice Evan Rand and the Role of a Jugde in the Nation's Highest Court", LXI UNB LJ 101, 121-29 (2010).

46 (2010) 2 SCC 273.

more broad, engulfing maximum area to the advantage of a workman. Consequently, it departed from the principle of *stare decisis*.

In *Jindal Stainless Limited* v. *State of Haryana*,[47] the court considered the question whether tests for determination of validity of entry tax laid down 49 years ago in *Atiabari Tea Company Ltd.* v. *State of Assam*[48] and *Automobile Transport (Rajasthan) Ltd* v. *State of Rajasthan*[49] should be revisited. What are the considerations which the court should keep in mind while opting for reconsideration of an earlier settled precedent? The court reiterated that it should ask itself whether in the interest of public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. Whether on the earlier occasion, did some patent aspects of the question remained unnoticed, or was the attention of the court not drawn to any relevant and material statutory provision, or was any previous decision bearing on the point was noticed? What was the impact of the error in the previous decision on public good? Has the earlier decision been followed on subsequent occasions either by the Supreme Court or by the High Court? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? Following the earlier decisions,[50] the court directed that these two judgments of 1961 and 1962 should be referred to a larger bench for reconsideration.

Foreign precedents

A survey of law reports confirms that there is notable international judicial trend of use of foreign precedents.[51] Indian judiciary has not only recognized the persuasive value of foreign decisions but has also recognized its use as legitimate. In *Amarinder Singh* v. *Special Committee, Punjab Vidhan Sabha*,[52] it was argued since the scope of "powers, privileges and immunities" available under articles 105(3) and 194(3) had not been codified by way of statute till date, it was permissible to rely on precedents relatable to the British House of Commons. The court ruled that all British precedents cannot be automatically followed in the Indian context. One reason for this is that Indian legislatures are controlled by a written Constitution and hence they do not

47 (2010) 4 SCC 595.
48 AIR 1961 SC 232.
49 AIR 1962 SC 1406.
50 *Keshav Mills Company Ltd.* v. *CIT*, AIR 1965 SC 1636 and *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra* (2005) 2 SCC 673.
51 See, generally, Pradyumna J. Tripathi, "Foreign Precedents and Constitutional Law", 57 *Columb L. Rev*. 319 (1957); Gerard V. La. Forest, "The Use of American Precedents in Canadian Courts", 46 *Maine L. Rev*. 211 (2005); Steven G. Calabresi & Stephanie Dotson Zimdahl, "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision", 47 *William and Mary L. Rev.* 743 (2005); Robert Reed, "Foreign Precedents and Judicial Reasoning" The American Debate and British Practice", 124 *LQR* 253 (2008).
52 (2010) 6 SCC 113.

have an absolute power of self-composition unlike the British House of Commons which is controlled by an unwritten Constitution. Another is that some of the English precedents involving the exercise of privileges were clear instances of overbreadth (*sic* overreach). Far from being good law, these old English cases had been subsequently described by authors as examples of arbitrary exercise of privileges.[53] British precedents were to be followed only to the extent they were compatible with our constitutional scheme.

X PRESIDENTIAL ADDRESS TO PARLIAMNENT- ARTICLES 85 AND 87

Article 87 of the Constitution is a mandatory provision which provides that at the commencement of the first session after each general election to the House of People and 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. Interpretation of this article was in question in *Ramdas Athawale* v *Union of India*[54] in which the court ruled that President's address was not warranted when there was prorogation of the House. A member of the Lok Sabha had filed a petition in the Supreme Court challenging the validity of the proceedings in the Lok Sabha commencing from 29-1-2004 on the ground that the President had not addressed both Houses of Parliament as envisaged under article 87 of the Constitution. The case of the petitioner was that the winter session of Lok Sabha commenced on 2-12-2003 and the House was adjourned *sine die* on 23-12-2003. Thereafter, the Speaker informed that the House, which was adjourned *sine die*, will resume its sittings on 29-1-2004. On 29-1-2004, when the session of Lok Sabha commenced, there was no address by the President informing the Parliament the cause of its summons and, therefore, the proceedings of Lok Sabha were unconstitutional. The court explained the difference between adjournment and prorogation. An adjournment was an interruption in the course of one and the same session, whereas a prorogation terminates a session. The effect of prorogation is to put an end with certain exceptions to all proceedings in Parliament then current. Presidential address is not warranted when the House adjourns *sine die* at the end of a year and resumes

53 *Id*. at 142; also see *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha* (2007) 3 SCC 184 [Decisions of foreign courts, though useful to understand the difficult constitutional philosophies and trends in law, as also common law principles underlying Indian statutes, are of limited or no assistance in interpreting the special provisions of the Indian Constitution, dissimilar to the provisions of foreign Constitutions, *per* Raveendran J]; *Union of India* v. *R. Gandhi*, (2010) 11 SCC 1 [Observing that counsel's reference to certain decisions of foreign courts may not be relevant in the Indian constitutional context. In particular, the decisions of the U.S. courts may not be relevant as the Indian Constitution does not envisage a strict separation of powers.].

54 *Supra* note 40.

its sitting next year. In the instant case, the resumption of sittings on 29-1-2004 by no stretch of imagination, could be characterized as commencement of a new session. The resumption of sittings was nothing but reconvening of the same session after its adjournment *sine die*. It is the second part of the same session. The words "first session of the year" in article 87(1) has no reference to resumption of adjourned session.[55]

XI PRIVILEGES OF LEGISLATURE - ARTICLES 105 AND 194

The exercise of legislative privileges is not an end in itself. They are supposed to be exercised in order to ensure that legislative functions can be exercised effectively, without undue obstructions. These functions include the right of members to speak and vote on the floor of the House as well as the proceedings of various legislative committees. In this respect, privileges can be exercised to protect persons engaged as administrative employees as well. The important consideration for scrutinizing the exercise of legislative privileges is whether the same was necessary to safeguard the integrity of legislative functions.

Breach of privilege test

The decision in *Amarinder Singh* v. *Punjab Vidhan Sabha*[56] signifies that the court would not recognize the use of privilege power by a legislature if it paved the way for triggering the indiscriminate and disproportionate use by incumbent majorities to target their political opponents as well as dissidents. The petitioner, a former chief minister of the State of Punjab, was alleged to have been responsible for improper exemption of vacant plot of land licensed to a private party from a pool of 187 acres of land notified for acquisition by Amritsar land improvement trust for a developmental scheme. On the report of the privileges committee, the petitioner was expelled from the membership of the thirteenth *vidhan sabha* for remaining term of the state legislature. The case of the *vidhan sabha* before the Supreme Court was that the alleged misconduct of the petitioner amounted to a breach of privilege as well as contempt of the House. Further, it was contended that since the powers, privileges and immunities conferred on the state legislatures had not been codified, it would not be proper to place limitations on their exercise. The implicit rationale was that the legislative assemblies should retain flexibility in the exercise of their privileges and the power to punish for contempt so that they can tackle new and unforeseen impediments to their reputation and functioning.[57] The question of alleged misconduct on the part of the petitioner warranted the exercise of legislative privileges under article 194(3) was answered in the negative. The court ruled that it was difficult to rule that the

55 *Id*. at 7-9.
56 *Supra* note 52.
57 *Id*. at 128.

alleged misconduct on the part of the petitioner had the effect of obstructing the ordinary legislative functions of the *vidhan sabha*. In its role as a deliberative body which is expected to monitor executive functions in line with the idea of collective responsibility, the Punjab *vidhan sabha* was free to inquire into the alleged misconduct and examine its implications. However, the act of recommending the appellant's expulsion through the impugned resolution cannot be justified as a proper exercise of powers, privileges and immunities conferred by article 194(3).[58] The alleged improper exemption of land was an executive act and did not distort, obstruct or threaten integrity of the legislative proceedings in any manner. Therefore, using the route of legislative privileges to recommend the petitioner's expulsion was beyond the legitimate exercise of the privilege power of the House.[59]

Misconduct during previous term

Is it within the jurisdiction of a legislative assembly to take note of an incident concerning breach of privilege that has occurred during its previous term? This question also was considered in *Amarinder Singh.* The thirteenth Punjab *vidhan sabha* claimed breach of privilege on account of incident occurring during its twelfth term pertaining to an executive act of one of its members. The court came to the conclusion that on the facts of the case, it was improper to claim a breach of privileges on account of alleged misconduct which actually took place during the previous term of the *vidhan sabha*. The reason is that ordinarily, on dissolution of legislative assembly, its business does not survive. The exception to this norm is covered by the "doctrine of lapse" wherein the successor House can choose to take up a pending motion or any order of business after the reconstitution of the House. However, the court sounded a note of caution that its view should not be mistaken for a general proposition since in some circumstances there may be acts that have taken place during the previous terms of a legislature which could actually have the effect of distorting, obstructing or diluting the integrity of legislative business in the present term.

58 *Id*. at 141. The decision in *Raja Ram Pal* v. *Lok Sabha* (2007) 3 SCC 184 was distinguished on the ground that in that case the misconduct which was the ground for the MPs' expulsion and the same had a direct connection with their legislative functions, namely, those of asking questions at the behest of vested interests and the improper allocation of funds under the MPLADS respectively. But in the present case the impugned act caused no obstruction to conduct of legislative business.

59 *Id*. at 153. [The court emphasized that a breach of privilege by a member of the legislature can only be established when a member's act is directly connected with or bears a proximity to his duties, role or functions as a legislator. The test of proximity should be the rule of thumb, while of course accounting for exceptional circumstances where a person who is both a legislator and a holder of executive office may commit a breach of privilege.].

Privileges in respect of *sub-judice* matters

Is it permissible for a state legislature to exercise its privilege and expel a member pertaining to a *sub-judice* matter? In *Amarinder Singh,* the Punjab *vidhan sabha* passed an expulsion order against the petitioner who was alleged to have been involved in corruption and conspiracy to cause wrongful loss and abuse public office in relation to the exemption of land from an acquisition scheme. The privilege committee of the *sabha* was fully aware that the subject-matter of dispute was pending before the High Court. The impugned resolution was declared unconstitutional on the ground that ordinarily content of legislative proceedings should not touch *sub judice* matters. Rules of business and conduct of Punjab *vidhan sabha* also categorically lay down a prohibition on taking up of any matter pending adjudication before a court of law. On the facts of this case, it amounted to overreach into the judicial domain.

XII REPUBLICANISM AND PANCHAYATI RAJ INSTITUTIONS - PART X OF CONSTITUTION – ARTICLE 243–243-O

Democratic republicanism is inherent in the Indian constitutional framework. Like other representative democracies[60] of the world committed to a written Constitution and rule of law, the principles of self-government are also part of the Indian constitutional ethos. The institution of *panchayat* is an institution of self-governance. Prior to 1992, the constitutional provisions relating to *panchayat* were confined to article 40.[61] What was in a nebulous state as one of the directive principles under article 40, through the seventy-third constitutional amendment, metamorphosed to a distinct part of constitutional dispensation with detailed provision for the functioning of *panchayats*. The constitutional amendment is a turning point in the history of local self-governance with sweeping consequences in view of decentralization, grass-root democracy, people's participation, gender equality and social justice. Republicanism is the *sine qua non* of this amendment.

The constitutional validity of U.P. Panchayat Laws (Amendment) Act, 2007 was upheld in *Bhanumati* v. *State of U.P.*[62] observing that the impugned law was covered by entry 5 of list II in the seventh schedule which pertains to constitution and powers of local self-government or village administration. The court applied the settled principle of law that a legislative entry is generic

60 It has been accepted in the American Constitution that the right to local self-government is treated as inherent in cities and towns. Such rights cannot be taken away even by the Legislature. 56 *American Jurisprudence*, article 125].

61 Art. 40 provides that the state shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

62 (2010) 12 SCC 1.

in nature and virtually constitutes the legislative field and has to be very broadly construed. These entries demarcate 'areas' or 'fields' of legislation within which the respective laws are to operate and do not merely confer legislative power as such. The words in the entry should be held to extend to all ancillary and subsidiary matters which can reasonably be said to be encompassed by it.[63]

No-confidence motion

The constitutional amendment was challenged on the ground that there was no concept of no-confidence motion in the detailed constitutional provision under part IX of the Constitution. The court rejected the contention holding that when the Constitution specifically enables the state legislature to provide the details of election of the chairperson, the provision of no-confidence motion against the chairman cannot be challenged on the ground of its not being in the Constitution. A Constitution is not to give all details of the provisions contemplated under the scheme of amendment. There is no institutional setback or impediment to the continuity or stability of the *panchayati raj* institutions. If no confidence motion is passed against the chairperson of a *panchayat*, he ceases to be a chairman but continues to be a member of the *panchayat* and the *panchayat* continues with a newly-elected chairman. The court emphasized that no one is an *imperium imperio* in our constitutional set up.[64] Democracy demands accountability and transparency in the activities of the chairperson especially in view of the important functions entrusted to the chairperson in the running of the *panchayati raj* institutions. Such duties can be discharged by the chairperson only if he enjoys the continuous support of the majority members in the *panchayat*. Any statutory provision to demonstrate that the chairperson has lost the confidence of the majority is conducive to public interest and adds strength to such bodies of self-governance. Such a provision cannot be called either unreasonable or *ultra vires* part IX of the Constitution.[65]

Silence in Constitution

The court also ruled that the Constitution cannot be interpreted to exclude provision of no-confidence motion in respect of office of *panchayat* chairperson just because of its silence on that aspect. Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine *vis-à-vis* article 368 of the Constitution emerged out of this concept of silence in the Constitution. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary

63 *Id.* at 21.
64 *Id.* at 20.
65 *Id.* at 19-20. On earlier cases relating to no-confidence motion See, *Mohan Lal Tripathi* v. *District Magistrate, Rai Bareilly,* (1992) 4 SC 80; and *Ram Beti.* v. *District Panhayat Raj Adhikari,* (1998) 1 SCC 680.

change by the seventy-third constitutional amendment by making detailed provision for democratic decentralization and self-government on the principle of grass-root democracy cannot be interpreted to exclude the provision of no-confidence motion in respect of the office of the chairperson of the *panchayat* just because of its silence on that aspect.[66]

Purpose and motive

The validity of the amendment was also challenged unsuccessfully on the ground that in reducing the period for bringing the no-confidence motion from 'two years' to 'one year' and then in reducing the required majority from 2/3rd to simple majority, the legislature was guided by the sinister motive of some influential ministers to get rid of local leader who, as a *pradhan* or *panchayat*, may have become very powerful and competitor of the minister in the state. The court ruled that if a legislature is competent to enact a law, the question of motive which persuaded it in enacting the impugned legislation becomes irrelevant. The court will interfere in legislative process only when the statute is clearly violative of the right conferred on a citizen under part III.[67]

XIII SUBORDINATE JUDICIARY - CARE IN APPOINTMENT AND SERVICE CONDITIONS – HIGH COURTS' DUTY UNDER ARTICLE 235

Under article 235, High Courts exercise control over subordinate judiciary. In 2009, the apex court had emphasized that the authority of High Court to control the subordinate courts has great dynamism and it is time to add to this power another dimension for monitoring and protection of criminal trials.[68] During 2010, the court emphasized two more aspects in this regard: [1] proper scrutiny and care warranted in appointing district judges, and [2] maintenance of satisfactory level of service conditions including service records of judicial officers. In *Kazia Mohammed Muzzammil* v. *State of Karnataka*,[69] the appellant, a practising advocate was appointed as a district judge on probation of two years but there was no communication extending his probation. However, after about four years, he was discharged from service on the ground that he was unsuitable to hold the post of district judge. Examining the validity of this order, the court expressed its anguish about the callous attitude of the High Court in producing the record before it. While

66 *Id*. at 17; also see F.S. Nariman, "The Silences in our Constitutional Law", (2006) 2 SCC (J) 15.

67 *Id*. at 24. For a different view, see *Sarbananda Sonowal* v. *Union of India* (2005) 5 SCC 665 and Caleb Nelson, "Judicial Review of Legislative Purpose", 83 *NYU L. Rev*. 1784, 1879 (2008) [Modern day courts reviewing a statute's constitutionality investigate the enacting legislature's purpose in ways that were unheard of throughout most of the country's past.].

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

69 (2010) 8 SCC 155.

examining this aspect, the Supreme Court found that all the confidential reports of the appellant for the relevant period were not available. Secondly, verification of his character and antecedents was not done before making his appointment.[70]

Dismissing the appeal of the judicial officer, the court held that the High Court had not maintained the expected standards of proper administration. There is a constitutional obligation on the High Court to ensure that the members of the judicial services of the state are treated appropriately with dignity and without undue delay. They are the face of the judiciary inasmuch as a common man primarily comes in contact with these members of the judicial hierarchy.[71] The court noted with concern that if the averments made against the judicial officer were true, it was a matter of serious concern for the High Court as he was being appointed as an additional district and sessions judge and would have remained as such for a number of years. It was expected of the government as well as the High Court to have the character verification report before the appointment letter was issued. The cumulative effect of the appellant in making incorrect averments in the court proceedings as well as the fact that his name was in the 'rowdy list' of the police station concerned were specific grounds for the court not to exercise its discretionary and inherent jurisdiction.[72] The court issued many directions to ensure that every judicial officer in the state is not denied what is due to him in accordance with law and on the basis of his performance. It ruled that the courts, while pronouncing judgments, should also take into consideration the issuance of direction which would remove the very cause of litigation. *Boni judicis est causas litium dirimere*.[73]

The judiciary has started taking a nuanced view as to the independence of the judiciary. If a person of doubtful integrity is appointed as a judge, it may affect independence of judiciary. A person lacking probity would not be a person who could be found fit for appointment as a judge.[74] The need for

70 The court noted that the appellant was placed in the 'rowdy' list of the police maintained by the police station concerned and his activities were being watched. The appellant had also unsuccessfully approached the High Court for striking down his name from the 'rowdy list'. Under rules 65 and 66 of the state interchange manual, the name of the appellant was inducted on the sheet of register of rowdies maintained by Karnataka police in form 100 in terms of rule 1059 of the Karnataka police manual which is normally treated as confidential. The averments made were that the appellant was the general secretary of an organization called *Majlis-Isa-o-Tanjim* and was in the habit of harbouring criminals, who were involved in serious crimes like murder and communal riots, *etc*. There was a specific charge against the appellant for his delivering provocative communal speeches which contributed to aggravate communal disturbance in Bhatakal. He was the president of the bar association, Bhatakal and used to provoke young people in that institution. Nineteen people were killed and many injured in a group clash.

71 *Supra* note 69 at 190.

72 *Id*. at 167.

73 *Id*. at 189.

74 See *N. Kannadasan* v. *Ajay Khose* (2009) 7 SCC 1.

proper scrutiny and care warranted in appointing district judges was reiterated in *Rajesh Kohli* v *High Court of Jammu and Kashmir*,[75] wherein the court ruled that the High Court had a solemn duty to consider and appreciate the service of a judicial officer before confirming him in service. The district judiciary is the bedrock of our judicial system and positioned at the primary level of entry to the doors of justice. In providing the opportunity of access to justice to the people of the country, the judicial officers who are entrusted with the task of adjudication must officiate in a manner that is becoming of their position and responsibility towards the society. Upright and honest judicial officers are needed not only to bolster the image of the judiciary in the eyes of the litigants, but also to sustain the culture of integrity, virtue and ethics among judges. The public perception of the judiciary matters just as much as its role in dispute resolution. The creditability of the entire judiciary is often undermined by isolated act of transgression by a few members of the bench and, therefore, it is imperative to maintain a high benchmark of honesty, accountability and good conduct.[76]

XIV SUITS BETWEEN STATES – ARTICLE 131

In a federal form of government, disputes may arise between the union and one or more states or between one state and another or others states. For adjudicating such disputes, Supreme Court enjoys original exclusive jurisdiction under article 131 of the Constitution. This article imposes two limitations on the exercise of the original jurisdiction. *First*, as to the party and the *second* as to the subject matter. What article 131 requires is that the dispute must be one which involves a question on which the existence or extent of a legal right depends. In *State of Orissa* v. *State of Andhra Pradesh,*[77] State of Orissa filed a suit under article 131 of the Constitution against the State of Andhra Pradesh for a declaration that the Borra group of villages, also referred to as *Borra Mutha*, forms part of the State of Orissa. State of Andhra Pradesh raised an objection to the maintainability of suit on the ground that the exercise of original jurisdiction under article 131 is subject to the other provisions of Constitution and, therefore, Supreme Court was barred from adjudicating delicate issues relating to state boundaries since article 1(2) read with entry 10 of the first schedule to the Constitution conclusively addresses this aspect. The court rejected this contention on the ground that the plaintiff had not sought any increase, alteration or diminishing

75 (2010) 12 SCC 783.

76 *Id.* at 793; also see *Union of India* v. *R. Gandhi*, *supra* note 53 at 58 [Rule of law can be meaningful only if there is an independent and impartial judiciary. An independent judiciary can exist only when persons with competence, ability and independence and with impeccable character man the judicial institutions].

77 (2010) 5 SCC 674.

of any area but only a declaration that the disputed area comes under the administrative jurisdiction of the plaintiff state. Consequently, it is correct to view that article 131 itself does not put fetters on the court to decide this original suit and there would be no encroachment on the constitutionally sanctioned power of Parliament to alter state boundaries.[78]

Exclusion of Supreme Court's jurisdiction

Defendant State of Andhra Pradesh also contended that in view of the proviso to article 131, the Supreme Court lacks jurisdiction to decide the suit which provide that the jurisdiction under article 131 shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which, having been entered into or executed before the commencement of the Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute. State of Orissa relied on a letter exchanged between the secretary to the Government of Madras and the chief secretary to the Government of India which simply listed the names of villages which would fall under the jurisdiction of Araku police station, which after the creation of the province of Orissa, remained under the Chintanpalli circle of Vizapatam district in the erstwhile Madras presidency. The court considered the question whether the said letter came within the expression "other similar instrument" used in the proviso so as to exclude its jurisdiction. It came to the conclusion that the letter in question cannot be described as an "other similar instrument" in the legal sense. The letter merely communicated the intentions of the Madras government at that point of time and it was not issued under the authority of a legislation or subordinate legislation. It could not be described as a document of a formal character which was made under constitutional or statutory authority. In the light of this finding, the original jurisdiction of the court was not barred with reference to the proviso to article 131 of the Constitution.[79]

Statutory provisions - No restraint on constitutional jurisdiction

Another question considered by the court was whether the proceedings in an original suit under article 131 of the Constitution were entirely distinguishable from ordinary civil suits. State of Andhra Pradesh raised an issue that suit was liable to be dismissed as no notice was served upon it by the plaintiff state as required under section 80 of the Code of Civil Procedure, 1908 and that the period of limitation prescribed for obtaining the nature of

78 *Id.* at 681; also see *Pradeep Chaudhary* v. *Union of India* (2009) 12 SCC 248, where in the court considered the scope of power of Parliament to admit a new state and alteration of boundary of a state when the district of Haridwar was included in the State of Uttarakhand. Also see *R.C. Poudyal* v. *Union of India*, 1994 (Suppl) 1 SCC 324.

79 *Supra* note 77 at 683.

relief sought by the plaintiff was only three years from the date of accrual of the right, as per article 58 of the Limitation Act, 1963. Rejecting the contention, the court ruled that the procedural provisions which regulate the admissibility of civil suits before ordinary civil courts do not apply in the strict sense when the Supreme Court exercises its original jurisdiction to decide suits between the states.[80]

However, on merits, the claim of the State of Orissa was rejected on the ground that it had failed to establish that it had exercised administrative control over the disputed area after the creation of Orissa in 1936. On the other hand, the defendant state has produced documents which entailed that it was the State of Andhra Pradesh and its predecessor states which had been exercising the administrative jurisdiction over the disputed area. Therefore, the prayer of the plaintiff state was rejected.[81]

XV TRANSFER OF JUDICIAL POWERS TO TRIBUNALS – CONSTITUTONAL LIMITATIONS – ARTICLE 323-A AND 323-B

Judicial functions and judicial powers are one of the essential attributes of a sovereign state and on considerations of policy, the state transfers its judicial functions and powers mainly to the courts established by the Constitution. That, however, does not affect the competence of the state, by appropriate measures, to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between the parties. This was the view expressed by the Supreme Court about five decades ago.[82] The question whether judicial functions traditionally performed by the courts can be transferred to a tribunal was answered in the affirmative in *Union of India* v. *R. Gandhi, President, Madras Bar Association*.[83] The court upheld the decision of the Madras High Court which held that the creation of the national company law tribunal and national company law appellate tribunal and vesting in them the powers and jurisdiction exercised by the High Court in regard to company law matters are not unconstitutional.[84] The Constitution contemplates judicial power being exercised both by the courts as well as the tribunals. Except the powers and

80 *Id*. at 685. On this point, the court reiterated the law laid down in earlier cases: *State of Rajasthan* v. *Union of India* (1977) 3 SCC 592*; State of Karnataka* v *Union of India* (1977) 4 SCC 608. [The jurisdiction conferred on the Supreme Court by article 131 of the Constitution should not be tested on the anvil of banal rules which are applied under the Code of Civil Procedure for determining whether a suit was maintainable. A proceeding under article 131 stands in sharp contrast with an ordinary civil suit].

81 *Supra* note 77 at 691.

82 See *Associated Cement Companies Ltd* v. *P.N. Sharma*, AIR 1965 SC 1595.

83 *Supra* note 53.

84 *Id*. at 67.

jurisdictions vested by the Constitution in superior courts and tribunals, powers and jurisdiction of courts are controlled and regulated by legislative enactments. It follows that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore, it cannot be said that the legislature had no power to transfer judicial functions traditionally performed by the courts to the tribunals.[85]

However, the legislative power in this regard is subject to constitutional limitation. While the legislature has the competence to make laws, providing as to which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts.[86] The court also expressed its concern about gradual erosion of independence of the judiciary and shrinking of the space occupied by the judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by the High Court. There is also a gradual dilution of the standards and qualification prescribed for persons to decide cases which were earlier being decided by the High Courts.[87]

XVI CONCLUSION

An analysis of pronouncements made by the apex court during 2010 reveals not only reiteration of the established principles but also of some notable developments in constitutional adjudication. Globalization and judicial globalization has taken place during the last few decades. Notions of globalization incompatible with the philosophy of Indian Constitution are to be discarded. Therefore, interpretation of social welfare legislations particularly those affecting the rights of the workers are to be viewed in the context of social welfare philosophy enshrined in part IV of the Constitution rather than the glare of globalization.

The existence of a written Constitution by itself is no guarantee of constitutionalism. Judiciary plays a significant role in this regard. Constitutionalism denotes the concept of limitation of powers on authorities

85 *Id.* at 49-50.

86 *Id.* at 51.

87 *Id*. at 60. The court also observed that in India, unfortunately, tribunals have not achieved full independence. Unless wide ranging reforms as were implemented as in United Kingdom and as suggested in *L. Chandra Kumar* v. *Union of India* (1997) 3 SCC 261 are brought about, tribunals in India will not be considered as independent. *id*. at 44.

and institutions created under the Constitution. This concept is evident in some of the pronouncements this year. In the matter of power of President to remove Governors, the court has ruled that the said power is not unfettered under the doctrine of pleasure but can be exercised for valid reasons only. The court thus put a limitation on the power of the President in conformity with the supremacy of the constitutional principles. By ruling that the President's power to remove a Governor is justiciable, the court also rejected the high power theory under which it is presumed in law that a power conferred on high constitutional authority is always exercised in good faith.

No institution created under the Indian Constitution enjoys unlimited powers. The Parliament as well as state legislatures enjoy privileges under the Constitution. Even that power is not unlimited and is to be exercised within constitutional limits. This principle was emphasized in the context of *vidhan sabha* of Punjab wherein the court refused to approve exercise of privilege by a state legislature which would pave the way to target political opponents. The exercise of privilege power is limited by established principle that privilege power can be exercised for protection of legislative functions.

Progressive constitutionalism signifies a trend towards protection of human rights and civil liberties rather than leaning towards restraint on rights. This trend of progressive constitutionalism was noticed this year in cases pertaining to scope of powers of High Court under article 226 of the Constitution to refer cases for investigation to the CBI without the consent of the concerned state government. The principle of legality propounded by courts in England is akin to the concept of progressive constitutionalism. Under the principle of legality, the court must, where possible, interpret a statute in such a way as to avoid encroachment of fundamental rights, some times described as constitutional rights.[88]

Constitutional silence does not mitigate the need of accountability, transparency and continuous support of majority in the institution of *panchayati raj* enshrined in part IX-A of the Constitution.

Tribunalization of justice has constitutional and judicial imprimatur in so far as it does not erode judicial independence.

88 See, *Ahmad* v. *H.M. Treasury,* (2011) 1 LRC 28, 79.