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CONSTITUTIONAL LAW – I

(FUNDAMENTAL RIGHTS)

*S N Singh**

I INTRODUCTION

THE JUDICIARY played a very significant role during 2011 not only in respect of administration of justice, a function constitutionally assigned to it, but also in correcting aberrations in the policy making and working of the executive organ of the state in a large number of areas. Thus, the Supreme Court, taking a serious view of rampant corruption prevailing in the country, kept a strict vigil in respect of many cases relating to corruption such as black money stacked in foreign banks,[1] 2G spectrum,[2] multi-crore Ghaziabad provident fund scam,[3] misuse or diversion of funds under the Mahatma Gandhi national rural employment guarantee scheme,[4] corruption in land allotments by NOIDA,[5] and commonwealth games scam.[6] The apex court also considered important issues pertaining to fake encounters,[7] police atrocities,[8] rights to education,[9] food,[10] potable drinking

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* Advocate, High Court of Allahabad, U.P.

1 *Ram Jethmalani* v. *Union of India* (2011) 8 SCC 1 : 2011 (6) SCALE 691; see also *Ram Jethmalani* v. *Union of India*, 2011 (10) SCALE 753.

2 *Centre for Public Interest Litigation* v. *Union of India* (2011) 1 SCC 560; 2010 (13) SCALE 501; 2011 (2) SCALE 443.

3 *Nahar Singh Yadav* v. *Union of India*, AIR 2011 SC 1549 : (2011) 1 SCC 307 : 2011 Cri LJ 997.

4 *Centre for Environment & Food Security* v. *Union of India*, 2011 (4) SCALE 50 : 2011 (6) SCALE 212.

5 *NOIDA Entrepreneurs Assn*. v. *NOIDA* (2011) 6 SCC 508, 526 and 527.

6 *Centre for Public Interest Litigation* v. *Union of India* (2011) 4 SCC 1.

7 *Ravindra Pal Singh* v. *Santosh Kumar Jaiswal* (2011) 4 SCC 746; *Prakash Kadam* v. *Ramprasad Vishwanath Gupta* (2011) 6 SCC 189.

8 *Ajay K. Agrawal* v. *Sri Manmohan Singh*, 2011 (6) SCALE 444; *Central Bureau of Investigation* v. *Kishore Singh* (2011) 6 SCC 369 and *Mehboob Batcha* v. *State* (2011) 7 SCC 45; 2011 (4) SCALE 50; 2011 (6) SCALE 444.

9 *Environmental & Consumer Protection Found.* v. *Delhi Administration*, 2011 (6) SCALE 552, 563; 2011 (9) SCALE 123; 2011 (11) SCALE 12; 2011 (12) SCALE 503 and 2011 (13) SCALE 503.

10 *Centre for Environment & Food Security* v. *Union of India* (2011) 5 SCC 668 and 676; *People's Union for Civil Liberties* v. *Union of India*, 2011 (5) SCALE 134; 2011 (8) SCALE 15, 17, 24; 2011 (10) SCALE 648 (allocation of more foodgrains for public distribution system); *Shagun Mahila Udyogik Sahakari Sanstha Maryadit* v. *State of Maharashtra* (2011) 9 SCC 340.

water,[11] shelter,[12] health,[13] resettlement and rehabilitation of displaced persons on acquisition of land with reference to right to life under article 21,[14] the impact of liberalization,[15] rights of sex workers,[16] sewage workers,[17] scavengers,[18] juveniles,[19] child abuse[20] and exploitation.[21]

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11 *Environmental & Consumer Protection Found.* v. *Delhi Administration*, 2011 (9) SCALE 123 : 2011 (11) SCALE 12 : 2011 (12) SCALE 110 : 2011 (13) SCALE 503.

12 *People's Union for Civil Liberties* v. *Union of India*, 2011 (1) SCALE 293, 296, 712; 2011 (5) SCALE 242 : 2011 (8) SCALE 13, 19 : 2011 (10) SCALE 652 (need for night shelters in urban areas).

13 *All India Drug Action Network* v. *Union of India*, 2011 (12) SCALE 100 (the Supreme Court directed the revision of national list of essential medicines to be added in schedule – I to the Drugs (Price Control) Order, 1995); *Democratic Youth Federation* v. *Union of India*, 2011 (11) SCALE 398, 399, 400. The Supreme Court passed an *ad-interim* order to immediately ban the production, use and sale of endosulfan all over India in view of its harmful effects and further directed the statutory authorities to seize the permit given to the manufacturers of endosulfan till further orders. This order was passed keeping in view the fundamental right under article 21 and the precautionary principle. In *Democratic Youth Federation* v. *Union of India*, 2011 (13) SCALE 505, the court permitted 34 units of manufacturers and formulators of indosulfan to export the existing stock subject to certain conditions.

14 *State of M.P*. v. *Narmada Bachao Andolan* (2011) 7 SCC 639; *State of M.P.* v. *Medha Patkar*, AIR 2011 SC 3827 and *Narmada Bachao Andolan* v. v. *State of M.P*., AIR 2011 SC 1989.

15 *Simens Ltd*. v. *Simens Employees Union* (2011) 9 SCC 775; see also *Bajaj Hindustan Ltd*. v. *Sir Shadi Lal Enterprises Ltd*. (2011) 1 SCC 640 and *A.P. Dairy Development Corpn. Federation* v. *B. Narasimha Reddy*, AIR 2011 SC 308 : (2011) 9 SCC 286.

16 *Budhadev Karmaskar* v. *State of West Bengal* (2011) 11 SCC 538 (while dismissing a criminal appeal against conviction of a person for killing a sex worker and upholding his conviction, the court converted the case into a public interest litigation as the issue of sex workers to live with dignity and their rehabilitation was felt important); AIR 2011 SC 2636 : (2011) 10 SCC 277 : 2011 (8) SCALE 155 (certain directions were issued for providing funds to the panel constituted by the court to study the problem of sex workers and certain other directions were also issued regarding public awareness, etc.); (2011) 10 SCC 351 (constitution of a panel of five members to submit report on prevention of trafficking, rehabilitation of sex workers and conditions conducive to sex workers who wished to continue as sex workers with dignity and direction to Union of India, states and union territories to carry out survey for ascertaining as to how many sex workers wanted rehabilitation and to find out mechanism for rehabilitation); (2011) 10 SCC 354 : 2011 (10) SCALE 558 (directions regarding supply of ration cards and issuing voters' identity cards to sex workers).

17 *Delhi Jal Board* v. *National Compaign for Dignity and Rights of Sewage and Allied Workers* (2011) 8 SCC 568 : 2011 (7) SCALE 489 and *National Compaign Committee for Central Legislation on Construction Labour* v. *Union of India* (2011) 4 SCC 653 and 655 (directions for implementing law in respect of construction workers).

18 *Safai Karamchari Andolan* v. *Union of India*, 2011 (1) SCALE 708.

19 *Sampurna Behura* v. *Union of India* (2011) 9 SCC 801.

20 *Childline India Foundation* v. *Allan John Waters* (2011) 6 SCC 261 : 2011 Cri LJ 2305 and *Bachpan Bachao Andolan* v. *Union of India*, 2011 (4) SCALE 769.

21 *Bachpan Bachao Andolan* v. *Union of India*, AIR 2011 SC 3361 : (2011) 5 SCC 1 and *Childline India Foundation* v. *Allan John Waters*, 2011 Cri LJ 2305.

II NOTABLE DECISIONS IN NUTSHELL

Some of the most notable and controversial issues decided by the apex court related to mercy killing (euthanasia),[22] working of *khap panchayats* and honour killing,[23] *salwa judum*,[24] validity of subsidy for Haj pilgrims,[25] validity of allotment of land to an organization carrying the tag of caste, community or religion,[26] appointment of a person facing criminal charges as central vigilance commissioner,[27] membership of a banned organization was not a crime,[28] removal, relocation and regularlisation of religious structures built illegally on public land[29] and power of the court to order investigation by Central Bureau of Investigation (CBI) without the consent of the state in specific areas such as in case of an un-natural death,[30] when fair investigation was not being carried out by the police[31] and the implementation of the provisions of the Mahatma Gandhi National Rural Employment Guarantee Act, 2005.[32] Most of the issues raised in these cases have been coming up before the apex court from time to time but the problems are aggravating and remain un-ending.

The decision of the apex court in *Radhy Shyam* v. *State of U.P.*[33] is of great significance insofar as acquisition of agricultural land for commercial purposes by invoking urgency clause under section 17(1) of the Land Acquisition Act, 1894 is concerned. The case, *inter alia*, raised the issue of exercise of executive power arbitrarily without complying with the principles of natural justice in the form of section 5-A enquiry under the said Act.

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22 *Aruna Ramchandra Shanbaug* v. *Union of India*, AIR 2011 SC 1209 : 2011 (1) SCALE 673 : 2011 (3) SCALE 298, 673 : (2011) 4 SCC 454 and 524.

23 *Arumugam Servai* v. *State of T.N.*, AIR 2011 SC 1859; *Ashok Kumar Todi* v. *Kishwar Jahan*, AIR 2011 SC 1254 : (2011) 3 SCC 758 : 2011 Cri LJ 2317 and *Bhagwan Dass* v. *State (NCT of Delhi)* (2011) 6 SCC 396.

24 *Nandini Sundar* v. *State of Chhattisgarh*, AIR 2011 SC 2839 : (2011) 7 SCC 547 : 2011 (6) SCALE 839.

25 *Prafull Goradia* v. *Union of India* (2011) 2 SCC 568 : 2011 (2) SCALE 761.

26 *Akhil Bhartiya Upbhokta Congress* v. *State of M.P.*, AIR 2011 SC 1834 : (2011) 5 SCC 29 : 2011 (4) SCALE 355.

27 *Centre for PIL* v. *UOI,* AIR 2011 SC 1267 : (2011) 4 SCC 1 : 2011 (3) SCALE 148.

28 *Arup Bhuyan* v. *State of Assam*, AIR 2011 SC 957 : 2011 Cri LJ 1455; see also *State of Kerala* v. *Raneef*, AIR 2011 SC 340 and *Indra Das* v. *State of Assam* (2011) 3 SCC 380 : 2011 Cri LJ 1646.

29 See *Union of India* v. *State of Gujarat* (2011) 12 SCALE 237 and 411.

30 *Ashok Kumar Todi* v. *Kishwar Jahan*, *supra* note 23; *Nandini Sundar* v. *State of Chhattisgarh*, *supra* note 24 and *Centre for Public Interest Litigation* v. *Union of India* (2011) 1 SCC 560.

31 *Narmada Bai* v. *State of Gujarat* (2011) 5 SCC 79 and *Centre for Environment & Food Security* v. *Union of India* (2011) 5 SCC 668.

32 *Centre for Environment & Food Security* v. *Union of India*, 2011 (6) SCALE 212.

33 (2011) 5 SCC 553. This decision was followed in *Devender Kumar Tyagi* v. *State of UP* (2011) 9 SCC 164; see also *Ramji Veerji Patel* v. *Revenue Divisional Officer* (2011) 10 SCC 643 and *M/s. Kamal Trading Pvt. Ltd*. v. *State of West Bengal*, 2011 (13) SCALE 511.

Of late, there appears to be great anxiety at the level of highest judiciary not only in retaining but also asserting its 'independence' and, therefore, it gets apprehensive at every attempt by not only the legislative and executive actions but also at the hands of individuals invoking their statutory rights and remedies. The most notable example of this apprehension was noticeable in the application of the provisions of the Right to Information Act, 2005 (RTI Act) to the apex court.[34] One can understand the court's anxiety when the question of ouster of the power of judicial review[35] or contempt of the court[36] comes before it. But one fails to understand the apprehension in respect of issues pertaining to appointment of judges, corruption in judiciary or the judicial accountability. At times, the apex court has also been taking up petty matters such as the issue of not providing residential accommodation to the chairman (a retired judge of the Supreme Court) and other members of the green tribunal.[37] In a way, as rightly written by one advocate,[38] the Supreme Court today functions as all three wings of the government because the other two wings of the government have failed. This situation is not ideal; the courts are not infallible but in the present scenario, what the Supreme Court is doing seems necessary and inevitable, the author observed.

Many of the important cases referred to the Chief Justice of India in the previous year for constitution of larger benches remained pending till the end of the year 2011. This included the most controversial issue of reservations in admissions to educational institutions and public employment in favour of socially and educationally backward classes of Muslims.[39]

The trend of making reference of cases to larger benches and lingering the decision continued during 2011 also. Thus, in *Delhi Airtech Services (P) Ltd*. v.

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34 See *Central Public Information Officer, Supreme Court of India* v. *Subhash Chandra Agrawal* (2011) 1 SCC 496.

35 *Bajaj Hindustan Ltd*. v. *Sir Shadi Lal Enterprises Ltd*. (2011) 1 SCC 640.

36 See *Times of India* dated 09.12.2011, p. 19, news item titled "Bhushans stand by graft charges against 16 ex-CJIs".

37 See *Hindustan Times* dated 15.12.2011, news item titled "SC raps Centre over houses for tribunal".

38 Haripriya Padmanabhan, "The Supreme Court of India – Legislature, Executive and Judiciary Combined in One", (2009) PL (CL). At times, the apex court has cautioned the high courts from entertaining writ petitions in matters of policy: *Union of India* v. *J.D. Suryavanshi*, 2011 (10) SCALE 689.

39 *State of AP* v. *T. Damodar Rao*, 2010 (3) SCALE 344 : (2010) 3 SCC 462. Some other cases referred to larger benches during 2010 which remained pending by the end of the year 2011 include: *Society for Un-aided P. School of Rajasthan* v. *Union of India*, 2010 (9) SCALE 437 [constitutional validity of articles 15(5) and 21A of the Constitution of India]; *State of Uttaranchal* v. *Sandeep Kumar Singh*, JT 2010 (11) SC 140 : (2010) 12 SCC 794 [interplay between articles 16(4), 341(1) and 342(1)] and *Chebrolu Leela Prasad Rao* v. *State of AP*, 2010 (8) SCALE 668 [interplay between articles 15, 16, 371D and fifth schedule to the Constitution of India]; *Central Public Information Officer, Supreme Court of India* v. *Subhash Chandra Agrawal*, 2010 (12) SCALE 496 [disclosure of assets by the judges of the Supreme Court]; also see S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XLVI *ASIL* 159 at 162-65 (2010).

State of U.P.,[40] there was divergence of opinion between the two judges of the apex court constituting the bench on various questions of law arising under the Land Acquisition Act, 1894, particularly sections 5-A, 17(1) and 17(3-A) and the concept of reasonableness under article 14 of the Constitution of India. The order of the court merely stated that in view of the "divergence of opinion on conclusions and also on various legal questions discussed in two separate judgments by us, the matter is required to be placed before the Hon'ble Chief Justice of India for reference to a larger Bench to resolve the divergent views expressed in both the judgments and to answer the questions of law framed".[41]

What is the limit of Supreme Court's power under article 142 of the Constitution of India? Does the power of the apex court for "doing complete justice in any cause or matter pending before it" include power to perpetuate an *ultra vires* and unconstitutional law? The court has held so in *Academy of Nutrition Improvement* v. *Union of India*.[42] The Prevention of Food Adulteration Act, 1954 and rules made thereunder seek to prevent adulteration of food stuffs. The rules have been made by the central government in exercise of its power "for the purposes of the Act." In order to prevent iodine deficiency disorders (IDDs), the rules were amended in 2005, which provided that "no person shall sell or offer or expose for sale or have in his premises for the purpose of sale, the common salt, for direct human consumption unless the same is iodised." The validity of this amended rule was challenged by those dealing in common salt. The challenge, *inter alia*, was on the grounds that the rule was arbitrary, made in violation of article 19(1)(g) of the Constitution and the same was *ultra vires* the parent legislation. Raveendran J, while conceding that the court had no power to review policy decisions of the government, clearly held that the impugned rule was *ultra vires* the parent legislation as it was "not a rule required to be made to carry out the provisions of the Act, having regard to the object and scheme. It has nothing to do with curbing of food adulteration or to suppress any social or economic mischief." The judge, after bemoaning that article 142 of the Constitution vested "unfettered independent jurisdiction to pass any order in public interest to do complete justice", allowed the impugned *ultra vires* rule to continue for a period of six months. This kind of exercise of "unfettered jurisdiction" necessitates laying down of some guiding principles for the exercise of power under article 142 lest its exercise nullifies the entire constitutional jurisprudence.[43]

In the past, the Supreme Court had been issuing directions unhesitatingly to fill in the gaps in law.[44] Further, the directions issued by the apex court in one case

40 (2009) 9 SCC 354: AIR 2012 SC 573.

41 *Id.* at 437 read with 373 (of SCC) (questions framed for decision).

42 (2011) 8 SCC 274.

43 It may be remembered that in the past also, the apex court had passed orders/directions in matrimonial disputes which were contrary to express provisions of the Hindu Marriage Act, 1955: see Poonam Saxena, "Hindu Law", XLV *ASIL* 459 at 473 (2009) and XLVI *ASIL* 385 at 401 (2010).

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

during 2010 remained un-enforced by the executive/legislature.[45] In *Vineet Narain* v. *Union of India*,[46] the Supreme Court had directed in 1997 that for the purposes of granting previous sanction required under section 19 of the Prevention of Corruption Act, 1988 for the prosecution of a public servant for corruption, "time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (AG) or any other law officer in the AG's office." This direction is not being complied with by the sanctioning authorities as revealed from a catena of cases decided thereafter. In this connection, the matter relating to allocation of 2G spectrum by a union minister resulting in the loss of thousands of crores of rupees to the state exchequer is a clear instance where the application of the petitioner for grant of sanction for prosecution of the guilty persons was kept pending by Prime Minister's office for over three years before the petitioner approached the Delhi High Court and later on the Supreme Court in appeal.[47] In *Safai Karamchari Andolan* v. *Union of India*,[48] the Supreme Court had issued detailed directions/orders between 2005 and 2009 concerning prohibition and employment of manual scavengers and construction of dry latrines and also to appoint executive authorities as required under section 5 the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 by the states which adopted the Act. The states of Punjab, Tamil Nadu, Uttarkhand and Manipur and the Union Territory of Dadra and Nagar Haveli had not appointed the executive authorities. The court wanted that the provisions of the Act were strictly enforced and, therefore, it requested the respective high courts to enforce the provisions of the Act and the directions issued from time to time. Moreover, it directed the concerned secretaries of the states/union territory to remain present in the court on the next date of hearing if the executive authorities were not appointed till then. Likewise, in *Prakash Singh* v. *Union of India*,[49] the Supreme Court had, *inter alia*, issued directions to the state governments regarding state security commission, selection of minimum tenure of DGP, IG of police and other officers, separation of investigation, setting up of police establishment board and police complaint authority. By a subsequent order, the court directed the constitution of the Thomas Committee

45 Thus, in *Gainda Ram* v. *Municipal Corporation of Delhi* (2010) 10 SCC 715, the court had directed the appropriate government that the "Model Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2009" prepared by the Ministry of Housing and Urban Poverty Alleviation, Government of India be passed before 30th June 2011 but nothing was done till the end of the year and the right of the hawkers and street vendors continued to be regulated by the executive policies framed by the municipal authorities which was held to be in contravention of the provisions of article 19(1)(g) read with clause (6) of the Constitution. See S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XLVI *ASIL* 159 at 176-77 (2010).

46 (1998) 1 SCC 226.

47 *Dr. Subramanian Swamy* v. *Dr. Manmohan Singh* [Civil Appeal No. 1193 of 2012 decided on 31.01.2012], AIR 2012 SC 1185. The direction issued in *Vineet Narain* was again reiterated.

48 2011 (1) SCALE 708.

49 2006 (8) SCC 1 : 2006 (9) SCALE 444.

for implementing the above directions which submitted its report in 2010. While considering the matter of implementation of the direction on 06.11.2011, the court lamented that the direction issued in 2006 had not been complied with, partially or marginally complied with or there had been only paper compliance'.[50] These cases prove the scant regard the executive has to the judicial directions passed by even the highest court of the country. It equally indicates the helplessness of the judiciary in getting its judicial orders enforced with heavy hands. These instances erode public confidence in the administration of justice.

The worst case of non-compliance of the directions of the apex court for over a decade related to environment affecting a large number of hapless and innocent people of Bichhri village of Udaipur district in the State of Rajasthan on account of industrial activities of some companies which had made their life miserable for decades. Way back in 1987, a PIL was filed before the Supreme Court against Hindustan Agro Chemicals Ltd. along with its four other sister companies which were responsible for throwing toxic effluents in the open which polluted the soil and underground water besides environmental pollution in and around the village comprising of 350 hc of land and damaging the crops. The Supreme Court passed many directions including a direction to the central government to determine the amount required for carrying out the remedial measures including the removal of sludge in and around the complex of the companies.[51] Subsequently, *vide* its order dated 04.11.1997, the court had directed the above company to pay Rs. 37.385 crores towards the costs of remediation. The company never bothered to pay the amount and kept the litigation alive till 2011 on one pretext or the other. Taking a serious view of the matter, the court directed the payment of Rs. 37.385 crores with 12 per cent interest from the date of the court's order dated 04.11.1997 till its payment/recovery as land revenue and also imposed cost of Rs. 10 lakhs on the applicant.[52]

There are cases which indicate that the executive intentionally or unintentionally violates the directions issued by the court in the garb of implementing the directions. Thus, in *Union of India* v. *Assn. for Democratic Reforms*,[53] the Supreme Court had issued certain directions to the election commission to call for information by issuing necessary order in exercise of its power under article 324 of the Constitution of India from each candidate seeking election to Parliament or a state legislature as a necessary part of the nomination paper furnishing information: (1) Whether the candidate was convicted/acquitted/discharged of any criminal offence in the past, if any, whether he had been punished with imprisonment or fine; (2) prior to six months of filing of nomination, whether the candidate was accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge had been framed or cognizance taken by the court of law and, if so,

50 *Prakash Singh* v. *Union of India*, 2011 (13) SCALE 496, 497 and 500.

51 *Indian Council for Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1446 : (1996) 5 SCC 281.

52 *Indian Council for Enviro-Legal Action* v. *Union of India*, 2011 (7) SCALE 768 : (2011) 8 SCC 161.

53 (2002) 5 SCC 294.

the details; (3) the assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants; (4) liabilities, if any, particularly whether there were any overdues of any public financial institution or government dues and (5) the educational qualifications of the candidate. The Parliament enacted the Representation of the People (Third Amendment) Act, 2002 while implementing the directions. In *People's Union for Civil Liberties (PUCL)* v. *Union of India*,[54] the court struck down the amendment Act on the ground that the directions issued by it in *Union of India* v. *Assn. for Democratic Reforms*[55] were not implemented and the legislation was unconstitutional.

In *Maninderjit Singh* v. *Union of India*,[56] the court was considering the question of implementation of directions issued in 2005[57] for new high security registration plates for motor vehicles under the Motor Vehicles (New High Security Registration Plates) Order, 2001 issued under section 109(3) of the Motor Vehicles Act, 1988. The court had to issue fresh directions as it noticed that while implementing the directions, the Andhra Pradesh had invited tenders by segregating tender into different sections in contravention of the directions issued by it. The court also noted that majority of the states were not vigilant in implementing the directions and, therefore, it issued further directions of general nature giving the last opportunity to all the states to do the needful.

It is also to be noted that the court has held that non-compliance with a direction relating to a matter beyond its jurisdiction did not amount to contempt of court.[58] Without saying so in express words, the apex court did realise its mistake in issuing directions/orders in the past which were beyond its jurisdiction. In *Vineet Narain* v. *Union of India*,[59] the Supreme Court had directed that the "Central Vigilance Commission (CVC) shall be given statutory status." Since the direction had not been complied with by the central government, a contempt petition was filed for violation of the court's order. In *Union of India* v. *Prakash P. Hinduja,*[60] the Supreme Court pointed out that under the constitutional scheme, Parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. It is also well established that no mandamus can be issued to the legislature to enact a legislation.[61] Therefore, the court held that the "direction issued regarding conferment of statutory status on CVC cannot be treated to be of such a nature, the non-compliance whereof may amount to contempt of the order passed by this Court." Similar issue came up again before the Supreme Court in *Dayaram* v. *Sudhir Batham*.[62] In *Kumari Madhuri Patil* v. *Addl. Commr., Tribal Development*,[63] the Supreme Court, with a view to streamline the

54 (2003) 4 SCC 399.
55 *Supra* note 53.
56 W.P. (C) No. 510 of 2005, order passed on 08.12.2011, reported in AIR 2012 SC 348.
57 See *Assn. of Registration Plates* v. *Union of India* (2005) 1 SCC 679.
58 For the law on the contempt of court, see *ROIL Contempt of Court* (2011).
59 (1998) 1 SCC 226.
60 (2003) 6 SCC 195.
61 *Asif Hameed* v. *State of J. & K.*; 1989 Supp (2) SCC 364.
62 2011 (11) SCALE 448.
63 (1994) 6 SCC 241.

procedure for the issuance of social status certificates, their scrutiny and approval, had issued 15 directions. Direction 13 stated thus:[64]

> 13. The High Court would dispose of these cases as expeditiously as possible within a period of three months. *In case, as per its procedure, the writ petition/miscellaneous petition/matter is disposed of by a Single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 136.* (emphasis of the present author).

The above direction of the apex court had the effect of ousting the appellate jurisdiction (in the form of letters patent appeal wherever the same exists) of the high courts. In *Dayaram* case, after the dismissal of writ petition of the appellant by a single judge challenging the order of the screening committee, the letters patent appeal was dismissed by relying on the above direction 13. It was held by the full bench of the apex court that the 15 directions issued by the Supreme Court in *Kumari Madhuri Patil* were not statutory in nature and taking away the right of appeal by a judicial order was legally improper and held to be not a good law. The italicized portion of direction 13 was, therefore, overruled.

III RIGHT TO EQUALITY

Right to equality when not available

The right to equality is available only against the state and a private unaided educational institution, whether minority or non-minority, is not state and, therefore, right to equality cannot be claimed against such an institution. This principle would, however, apply only when there is no legal requirement to the contrary. Thus, in *Frank Anthony Public School Employees' Assn*. v. *Union of India*,[65] the Supreme Court had held that the provision of section 12 of the Delhi School Education Act, 1973, made inapplicable to un-aided minority schools by the provisions of sections 8-11[66], was discriminatory and violative of article 14 of the Constitution. A similar question, with some difference, came to be decided again in *Satimbla Sharma* v. *St. Paul's Senior Secondary School*.[67] In this case, the respondent missionary school, run by a minority, was recognized by the Council for the Indian School Certificate Examination but not getting any aid from the state after 1977-78 and it did not give the pay scales to its employees at par with that of the government schools. The apex court was called upon to decide whether the employees were entitled to parity, with

64 *Id.* at 256.

65 AIR 1987 SC 311.

66 Ss. 8-11 dealt with the terms and conditions of service of employees of recognized private schools according to which the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other benefits of employees of private recognized schools shall not be less than those of the corresponding status in government schools.

67 AIR 2011 SC 2926; also see *Unni Menon* v. *Union of India* (2011) 2 SCC 378; *Steel Authority of India* v. *Dibyenda Bhattacharya*, AIR 2011 SC 897 and *State of Rajasthan* v. *Daya Lal*, AIR 2011 SC 1193: (2011) 2 SCC 429.

government run schools, under article 14 of the Constitution. Patnaik J, rejecting the argument of parity claimed by the appellant, observed:[68]

> (T)he teachers of private unaided minority schools had no right to claim salary equal to that of their counter-parts working in Government schools and Government aided schools. The teachers of Government schools are paid out of the Government funds and the teachers of Government aided schools are paid mostly out of the Government funds, whereas the teachers of private unaided minority schools are paid out of the fees and other resources of the private schools. Moreover, unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not State within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority schools. Similarly, such unaided private schools are not State within the meaning of Article 36 read with Article 12 of the Constitution and as the obligation to ensure equal pay for equal work in Article 39(d) is on the State, a private unaided minority school is not under any duty to ensure equal pay for equal work.

Patnaik J also refused to issue writ of mandamus to the respondent because the pay and allowances of teachers in private unaided schools was a matter of contract between the school and the teacher which was not in the domain of law. The judge further held that the stipulation in clause (5)(b) prescribed by the council as one of the conditions for granting provisional affiliation to the respondent to the effect that the salary and allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the state government was neither statutory nor in the form of executive instructions and the same did not confer any right on the appellant.

The above decision no doubt states the existing law but it further indicates that there is an immediate need to have statutory provisions to ensure parity in the terms and conditions of service of employees of all private, whether minority or not and whether aided or not, as well as government schools as in *Frank Anthony* case. Only then one can think of quality education in the country.

In *PepsiCo India Holding (P) Ltd*. v. *State of Maharashtra*,[69] the appellant was the leading manufacturer of carbonated soft drinks, bottled drinking water and food products and for manufacturing these products, it used water supplied to it by the Maharashtra Industrial Development Corporation as a raw material. Higher rates of water charges were levied on the appellant as compared to other industries. The Supreme Court held that this treatment was not discriminatory. Sharma J held:[70]

> There cannot be any dispute to the fact that in the industries like that of the appellant, consumption of water is much more than all other types of

68 *Id*. at 2929.
69 (2011) 9 SCC 79
70 *Id.* at 93.

> industries as they use water as raw materials. Requirement and use of water in these industries is huge and therefore they are placed as one distinct category or class of their own. These industries stand apart from other industries and also differently situated from residential houses. Therefore, there is an intelligible differentia between these three categories so there is no discrimination.

Arbitrariness and unreasonableness

It is well settled that fundamental rights cannot be waived.[71] Thus, if an employee has agreed to certain terms of employment, he is not precluded from challenging the same if it violates any of the fundamental rights. Unfortunately, the decision in *Transport & Dock Workers Union* v. *Mumbai Port Trust*[72] seems to strike a different note. In this case, the plea of the appellant was that the duty hours of employees recruited as typists-cum-computer clerks prior to 01.11.1996 was six and half hours per day while the duty hours for those recruited after 01.11.1996 for the same post was seven and half hours. The appellant challenged this as discrimination and violation of article 14 of the Constitution. The respondent justified this difference for several reasons: With a view to avoid litigation, the existing employees recruited prior to 01.11.1996 were not disturbed; the employees recruited after 01.11.1996 were clearly told about the duty hours and they had accepted the same at the time of recruitment; that due to change in technology and with introduction of privatization and setting up private ports with whom the respondent had to compete, the respondent port decided as a policy to have uniform working hours for the personnel working on the indoor establishment and the outdoor establishment. While upholding the policy decision of the respondent, Markandey Katju J reminded the well established tests laid down and followed consistently in earlier decisions that article 14 did not prohibit reasonable classification.[73] Katju J further held:[74]

> In the present case, … the purpose of the classification was to make the activities of the Port competitive and efficient. With the introduction of privatization and setting up private ports, the respondent had to face competition. Also, it wanted to rationalize its activities by having uniform working hours for its indoor and outdoor establishment employees, while at the same time avoiding labour disputes with employees appointed before 1-11-1996. In the modern world businesses have to face competition with

71 *Basheshar Nath* v. *C.I.T.*, AIR 1959 SC 149.

72 (2011) 2 SCC 575; also see cases in which the impugned action/order was held be valid: *Shree Sidhbali Steels Ltd*. v. *State of U.P*. (2011) 3 SCC 193; *National Council for Teacher Education* v. *Shri Shyam Shiksha Prashikshan Santhan* (2011) 3 SCC 238 and *Orissa Power Transmission Corpn. Ltd.* v. *Khageswar Sundaray*, AIR 2011 SC 3428.

73 The judge quoted *Gopi Chand* v. *Delhi Admn*., AIR 1959 SC 609. To uphold a classification as valid, two tests must be satisfied: (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question.

74 *Transport & Dock Workers Union* v. *Mumbai Port Trust, supra* note 72 at 585-86.

> other businesses. To do so they may have to have longer working hours and introduce efficiency, while avoiding labour disputes. Looked at from this point of view the classification in question is clearly reasonable as it satisfies the test laid down….X X X

The judge went on to observe:[75]

> The policy decision of the Port cannot be said to cause any prejudice to the interest of the personnel recruited after 1-11-1996 because before their recruitment they were clearly given to understand as to what would be their working hours, in case they accept the appointment. In our opinion the introduction of the new policy was a bona fide decision of the Port, the acceptance of the conditions with open eyes by the appellants and the recruits after 1-11-1996 means that they can now have no grievance. It is well settled that courts should not ordinarily interfere with policy decisions.

The above observation of the judge keeps one wondering whether the well-established principle, that the fundamental rights cannot be waived, continues to remain valid today. While seeking a job, a person in not in such a bargaining position that he can dare to refuse any terms and conditions offered to him. It is also certain that while accepting the conditions offered to the employees, they would not have been told that their counterparts already in employment were required to work for less hours than what was required of them. How can they then be considered to have accepted the conditions voluntarily without any hesitation? Further, one is also reminded of what was said by G.S. Singhvi J in *Harjinder Singh* v. *Pubjab State Warehousing Corpn.*[76] that there was a noticeable shift in court's approach in labour matters on account of globalization, liberalization and privatization.

In contrast to the above view, S. Sudershan Reddy J in *State of U.P.* v. *Bhupendra Nath Tripathi*,[77] struck down, on the ground of arbitrariness and unreasonableness, the government order by which eligibility to apply for special basic training course 2007 was limited only to those candidates who had passed B.Ed. examination from the institutions recognized by the National Council for Teacher Education (NCTE) established under the National Council for Teacher Education Act, 1993 (NCTE Act) leaving aside the candidates who had obtained B.Ed. degree prior to the establishment of NCTE and those who obtained their B.Ed. degree after enforcement of the 1993 Act during the period when the application of any institution or university was pending consideration before NCTE. The court noted that prior to the establishment of the NCTE, degrees such as B.Ed. for teacher education were awarded by the universities or institutions recognized by the university grants commission. The NCTE Act made no distinction between degrees awarded after the enforcement of the Act and those awarded prior thereto. Reddy J, therefore, held:[78]

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75 *Id.* at 586.
76 AIR 2010 SC1116.
77 AIR 2011 SC 63.
78 *Id.* at 71.

> In our considered view the State Government cannot make any distinction between the degrees obtained from the existing institutions prior to the Act coming into force but received recognition after the commencement of the Act and the degrees obtained from the recognized institutions after the Act coming into force. It is not shown how such a classification is based on an intelligible differentia and on a rational consideration and further how it bears a nexus to the purpose and object thereof. The impugned action of the State results in the classification or division of members of a homogeneous group and subjecting them to differential treatment without any rhyme or reason.

Distribution of state largesse

The state largesse cannot be distributed at will in a casual manner. The Supreme Court in *Krishan Lal Gera* v. *State of Haryana*,[79] while allowing an appeal in a public interest litigation, questioned the grant of a huge property of the state (6497 sq. yrs. which was part of a stadium spreading in 38 acres) to a private registered society at a paltry rent of one rupee per *annum*, without inviting offers/bids and without ensuring its exclusive use for sports/athletics. Likewise, allotment of 20 acres of land on political considerations to an organization carrying the tag of caste, community or religion without any advertisement and without inviting other similarly situated organizations/institutions to participate in the process of allotment was quashed by the Supreme Court on the ground of gross violation of article 14 of the Constitution.[80] If, however, a party is given an opportunity to participate in bidding process without complying with all essential requirement of the mandatory obligations prescribed in the advertisement, rejection of the bid cannot be considered to be arbitrary or perverse.[81]

It is well settled that the principles of fairness and reasonableness are applicable in matters pertaining to distribution of state largesse. While explaining the concept of state largesse, it was held by Asok Kumar Ganguly J that when the government had decided to allot a substantial plot for establishing a school by private organization and when pursuant to an advertisement issued for the purpose of allotment of the plot a number of organizations responded, the action of the government amounted to granting of state largesse as the government, being the owner of the plot, was allotting a scarce and valuable property.[82] In this case, the government issued an advertisement inviting proposals for establishing a school in a plot of land. After considering all proposals received, the plot was allotted to Sourav Ganguly. The lease deed was executed and possession of the plot was given to him. Later, the lessee applied for a bigger plot and promised to surrender the plot already given to him. Within a month of the application, a bigger plot was allotted in place of the earlier allotted small plot. This was done without any advertisement. The judge

79 (2011) 10 SCC 529; see also *I.T.C. Ltd.* v. *State of U.P*. (2011) 7 SCC 493.
80 *Akhil Bhartiya Upbhokta Congress* v. *State of M.P*., *supra* note 26.
81 *Goldyne Technoserve Ltd*. v. *State of M.P*., AIR 2011 SC 2574.
82 *Humanity* v. *State of West Bengal*, AIR 2011 SC 2308 : (2011) 6 SCC 125.

held the second allotment of plot to be arbitrary and violative of article 14 of the Constitution.

The Supreme Court struck down an order canceling the dealership awarded by Bharat Petroleum Corpn. Ltd. (BPCL) to Allied Motors Ltd. (the company) on the ground that the impugned order had been passed in an illegal and arbitrary manner.[83] In this case, it was claimed by the company that it had been the dealer of various products of BPCL for last thirty years and had been given ten awards for being the best petrol pump in NCT of Delhi. Samples had been taken on many occasions in the past, the same were found on testing by BPCL to be as per specification. The company contended that on a particular date, an unauthorized police officer along with the officials of BPCL conducted a raid at its petrol pump but did not collect and deliver sample as per Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1999 and on the very next day, without issuing any show cause notice, terminated its dealership. Dalveer Bhandari J, while quashing the impugned termination order and imposing cost of Rs. one lakh on the BPCL, observed:[84]

> (T)he haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing clearly indicates that the entire exercise carried out by the respondent Corporation non-existent, irrelevant and on extraneous considerations. There has been a total violation of the provisions of law and the principles of natural justice. Samples were collected in complete violation of the procedural laws and in non-adherence of the guidelines of the respondent Corporation.

In *NOIDA Entrepreneurs Assn*. v. *NOIDA*,[85] the officers of the respondent authority had changed the user of vast area of land from City Park to residential area without effecting any change in the master plan or in the relevant regulations. The officers changed the size and location of the residential plots allotted to their personal benefit and the benefit of their relatives and friends even without paying proper conversion charges. The apex court thought it proper to direct a CBI investigation into the motive for which this was done to establish the guilt and take appropriate action against the guilty officers. Reminding the officers of their duty as a trustee while holding a public office, B.S. Chauhan J observed:[86]

> The State or the public authority which holds the public property for the public or which has been assigned the duty of grant of largesse, etc. acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee.

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83 *Allied Motors Ltd.* v. *Bharat Petroleum Corpn*., 2011 (13) SCALE 618.
84 *Id.* at 628.
85 (2011) 6 SCC 508.
86 *Id.* at 524.

> The public trust doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The rule of law is the foundation of a democratic society.

The judge, applying the well known principle of equality and fairness in matters of distribution of state largesse, observed:[87]

> State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.

It is a general practice for the land development authorities to provide a clause at the time of allotment of plots to "fix" or "revise" the final sale price of the plots. In *Karnataka Industrial Areas Development Board* v. *Prakash Dal Mill*,[88] while allotting industrial plots, the lease-cum-agreement letter stated that "as soon as it may be convenient" the appellant will fix the price of the plots. After more than eleven years of the agreement, the appellant fixed the price which the respondents claimed to be unjust and arbitrary. The apex court upheld the decision of the high court quashing the demand letters issued on the basis of enhanced price fixation after a long period and it found the enhanced price to be arbitrary, unfair and violative of article 14.

IV RESERVATIONS

Reservations in admissions and public employment

A non-minority educational institution has no right to decide by itself the source from which admissions to a professional course could be made. In *Indian Medical Association* v. *Union of India*,[89] a private educational institution named Army College of Medical Sciences, Delhi (ACMS) was started by a registered society called Army Welfare Education Society (AWES). As per the admission policy/rules of ACMS, only the wards/children of former and current army personnel qualifying high school education and having taken the common entrance test conducted by appropriate authorities in NCT of Delhi were eligible for admission strictly on the

87 *Ibid.*
88 (2011) 6 SCC 714.
89 AIR 2011 SC 2365.

basis of *inter se* ranking in the entrance test without any distinction based on social, economic or cultural background of the army personnel. The admissions were allegedly made by ACMS as its admission policy/rules on the basis of exemption granted by Delhi government in exercise of power conferred by section 12(1)(b) of the Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence) Act, 2007. The question was whether 100 reservation of seats for the wards/children of present or former army personnel was permissible under article 15(5) of the Constitution. While admitting the problems faced by children/wards of army personnel and holding the admission policy of ACMS *ultra vires* the Act of 2007, the court held:[90]

> In case of non-minority institutions, especially professional institutions, the "source" can only be the general pool, and selection has to be based on inter-se ranking of students who have qualified and applying or opting to choose to be admitted to such non-minority educational institutions. ACMS may select only those students who have secured higher marks in the common entrance test with respect to seats remaining after taking into account reserved seats. This is notwithstanding what we may perceive to be an odious and inherently unjust situation. If any special provisions need to be made to protect the wards of Army personnel, this may possibly be done by the State, by laws protected by clause (5) of Article 15. The private society, of former and current army personnel by themselves cannot unilaterally choose to do the same.

Under clause (4A) of article 16 of the Constitution, nothing prevents the state from making provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services in the state in favour of scheduled castes and scheduled tribes which, in the opinion of the state, are not adequately represented. The constitutional validity of this provision, inserted by the Constitution (Seventy-seventh Amendment) Act, 1977 and the Constitution (Eighty-fifth Amendment) Act, 2001, had been upheld by the Supreme Court in *M. Nagraj* v. *Union of India*,[91] in which the court had clarified that this provision did not mandate the state necessarily to make law for the purpose of this clause but in case the state decided to make law, it must satisfy itself by quantifiable data that there was backwardness, inadequacy of representation in public employment and overall administrative efficiency. If that is not done, the law would be invalid. In *Suraj Bhan Meena* v. *State of Rajasthan*,[92] the apex court again reiterated the same view as follows:[93]

> (R)eservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and scheduled Tribes

90 *Id*. at 2400-01.
91 AIR 2007 SC 71.
92 AIR 2011 SC 874.
93 *Id.* at 886-87.

and Backward classes and subject to the condition of ascertaining as to whether such reservation was at all required.

The court noted that since such an exercise had not been done by the State Government of Rajasthan before issuing notification for making reservations in promotions, the decision of the high court quashing the notification issued by the state government was upheld by the apex court.

It has also been held by the Supreme Court that the provision of clause (4A) of article 16 was an enabling provision and applied only to promotional posts or upgradation involving selection and not to mere ungradation as it does not involve creation of any new posts. Thus, the upgradation given by Bharat Sanchar Nigam Ltd. to the seniormost ten per cent of the employees in grade III strictly as per seniority through the biennial cadre review (BCR) scheme did not attract the rule of reservation.[94]

V FREEDOM OF SPEECH AND EXPRESSION

Cinema is a very powerful means of communication but it differs in major respects with other modes of communication. K. Jagannatha Shetty J had rightly observed:[95]

> Movie doubtless enjoys the guarantee under Article 19(1)(a) but there is one significant difference between the movie and other modes of communication. The movie cannot function in a free marketplace like the newspaper, magazine or advertisement. Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for everyone who sees it. In view of the scientific improvements in photography and production the present movie is a powerful means of communication.

The Supreme Court has also emphasized that censorship of movies is a permissible and reasonable restriction under clause (2) of article 19 of the Constitution. This power is vested in the Central Board of Film Certification (Board) constituted under the Cinematograph Act, 1952. In *Prakash Jha Productions* v. *Union of India*,[96] the petitioner's film *Ararakshan* had received U/A certificate under the theme category "social" for exhibition in the whole country by the board after the same was screened for the members of board and persons belonging to scheduled caste, scheduled tribe, backward classes and legal experts. The film was

94 *BSNL* v. *R. Santhakumari Velusamy* (2011) 9 SCC 510.
95 *S. Rangarajan* v. *P. Jagjivan Ram* (1989) 2 SCC 574 at 583.
96 (2011) 8 SCC 372.

being exhibited in the whole country but the State of U.P., exercising powers under section 6(1) of the U.P. Cinemas (Regulation) Act, 1955, banned the exhibition of the film in the state. Section 6(1) confers discretionary power on the state government/district magistrate to suspend the exhibition of any "film which is being publicly exhibited" if the same is "likely to cause a breach of the peace". The court held that the film was not being publicly exhibited in the State of U.P. and, therefore, section 6(1) was not attracted. Such extraordinary power could not be exercised in respect of a film which has yet to be exhibited. Repelling the respondent's contention, the court observed:[97]

> (T)he contention of the State of U.P. that some of the scenes of the film could create a breach of peace or could have an adverse effect on the law and order situation cannot be accepted as this film is being exhibited in all other States of India peacefully and smoothly and in fact some of the States, where this film is being screened, are also similarly sensitive States as that of the State of U.P.. In such States the film is being screened without any obstruction or difficulty of law and order situation.

The court also emphasized that it was for the state to maintain law and order effectively and potentially. It held that once the film had been cleared by the board, its screening cannot be prohibited in the manner the state had tried to do.

Right to information

The right to freedom of speech and expression guaranteed under article 19(1)(*a*) of the Constitution means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping, unless it comes within the grounds of restrictions under article 19(2), would infract article 19(1)(*a*).[98]

The right to information has been held to be a part of the freedom of speech and expression.[99] The right to information, however, cannot be extended to violating the privacy of a person guaranteed under article 21 of the Constitution.[100] Likewise, a citizen has a right to obtain information from the Union of India with regard to all those documents and information which they had secured from Germany, in connection with black money stacked in foreign banks subject to certain restrictions. The Union of India was, however, exempted from revealing the names of those individuals who had accounts in banks of Liechtenstein, and revealed to it by Germany, with respect of whom investigations/enquiries were still in progress and no information or evidence of wrongdoing was available. Likewise, the names of those individuals with bank accounts in Liechtenstein, as revealed by Germany, with respect of whom investigations had been concluded, either partially or wholly,

97 *Id.* at 378. For right to information, see *Central Public Information Officer, Supreme Court of India* v. *Subhash Chandra Agrawal*, *supra* note 34.

98 *Amar Singh* v. *Union of India* (2011) 7 SCC 69 (telephone tapping of a public figure).

99 *People's Union for Civil Liberties* v. *Union of India* (1997) 1 SCC 301.

100 *Amar Singh* v. *Union of India*, *supra* note 98.

and show-cause notices issued and proceedings initiated could also be disclosed.[101] The right to information includes right to inspect the answer books in respect of any examination conducted by any institution[102] and also the standards fixed for moderation of answer papers.[103]

VI FREEDOM TO CARRY ON TRADE AND BUSINESS

Reasonable restrictions in public interest

The right of freedom to carry on any trade or business guaranteed under article 19(1)(g) of the Constitution is subject to reasonable restrictions which the state may impose by law. In *Md. Murtaza* v. *State of Assam*,[104] the appellants, who were wholesale vegetable and fruit vendors, were directed by an order of the high court to vacate their place of business as the place was close to the railway station and inside the Gauhati city which was very congested. The state had allotted the area to its department of handloom and textiles. The apex court noted that the government had already started the process of developing an area in the outskirt of the city for the wholesale market of fruit and vegetable to avoid problems of traffic congestion, health and hygiene, pollution, etc. The court held that the appellant no doubt had the fundamental right to carry on trade and business but the freedom was subject to reasonable reactions. Even though action caused some inconvenience to the present wholesale vendors, public interest prevailed over private interests. Delineating various factors to decide the reasonableness of restrictions permissible under clause (6) of article 19 of the Constitution, the court observed:[105]

> (T)o test the reasonability of a restriction we have to see the subject matter, the extent of restriction, the mischief which it seeks to check, etc. The reasonableness of the restriction has to be determined in an objective manner and has to be seen from the point of view of the interest of the general public and not merely from the point of view of the persons upon whom the restrictions are imposed…. Moreover, the impugned action of the authorities cannot be said to be unreasonable merely because in a given case, they may operate harshly…. As observed by the Supreme Court, … the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed and the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions

101 *Ram Jethmalani* v. *Union of India, supra* note 1.

102 *Central Board of Secondary Education* v. *Aditya Bandopadhyay* (2011) 8 SCC 497.

103 *Institute of Chartered Accountants of India* v. *Shaunak H. Satya*, AIR 2011 SC 3336.

104 2011 (9) SCALE 526

105 *Id*. at 529-30. The court relied upon several of its earlier decisions: *Hanif Quareshi* v. *State of Bihar*, AIR 1958 SC 731; *State of Gujarat* v. *Shantilal*, AIR 1969 SC 634; *Laxmi Khandasari* v. *State of UP*, AIR 1981 SC 873; *Divert* v. *State of Gujarat*, AIR 1986 SC 1323; *State of Madras* v. *Row*, 1952 SCR 597; *Peerless* v. *Reserve Bank*, AIR 1992 SC 1033; *Harakchand* v. *Union of India*, AIR 1970 SC 1453; *Jyoti Prasad* v. *Union Territory of Delhi*, AIR 1961 SC 1602; *Puthumma* v. *State of Kerala*, AIR 1978 SC 771 and *P.P. Enterprises* v. *Union of India*, AIR 1982 SC 1016.

> at the time etc., are the relevant considerations fore determining whether the restriction is reasonable.
> Further, … the standard of reasonableness must also vary from age to age and be related to the adjustments necessary to solve the problems which communities face from time to time. In adjudging the validity of the restriction the Court has necessarily to approach the question from the point of view of the social interest which the State action tends to promote….

Applying the above standards, the court found nothing unreasonable in the restriction imposed on the appellants. The market was causing immense traffic congestion, diseases, pollution, etc. The shifting of the market to the outskirts of the city or beyond was clearly held to be reasonable. The court also thought it better to leave such matters to the wisdom of the executive authorities.

The above observations of the court stands in direct contrast to the view expressed by Mahajan J in *Chintamanrao* v. *State of M.P*,[106] where the court was considering the validity of the Central Provinces and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act, 44 of 1948 and the order issued thereunder. In that case, These two petitions for enforcement of the fundamental right guaranteed under article 19(1)(*g*) of the Constitution were filed by a proprietor and an employee of a bidi manufacturing concern of Sagar district of the State of Madhya Pradesh contending that the above legislation authorizing the state to prohibit the manufacture of bidis in certain areas was inconsistent with the provisions of Part III of the Constitution and was, therefore, void. Under section 3 of the Act, the deputy commissioner may by notification fix a period to be an agricultural season with respect to such villages as may be specified therein. Under section 4(1), the deputy commissioner may, by general order which shall extend to such villages as he may specify, prohibit the manufacture of bidis during the agricultural season. The result of any such order, as prescribed under section 4(2), was that "no person residing in a village specified in such order shall during the agricultural season engage himself in the manufacture of bidis, and no manufacturer shall during the said season employ any person for the manufacture of bidis." In exercise of powers under section 3, on 13.06.1950 an order was issued by the deputy commissioner of Sagar forbidding all persons residing in certain villages from engaging in the manufacture of bidis.

The question for decision was whether the impugned legislation under the guise of protecting public interests arbitrarily interfered with private business by imposing unreasonable restrictions on lawful occupation. Mahajan J observed:[107]

> The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily

106 AIR 1951 SC 118.
107 *Id.* at 119.

or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.

The following classic observations of Mahajan J for deciding the "reasonableness" of a restriction is noteworthy:[108]

Clause (6) in the concluding paragraph particularizes certain instances of the nature of the restrictions that were in the mind of the constitution-makers and which have the quality of reasonableness. They afford a guide to the interpretation of the clause and illustrate the extent and nature of the restrictions which according to the statute could be imposed on the freedom guaranteed in clause (*g*). The statute in substance and effect suspends altogether the right mentioned in Article 19(1)(*g*) during the agricultural seasons and such suspension may lead to such dislocation of the industry as to prove its ultimate ruin. The object of the statute is to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas of the Province and it could well be achieved by legislation restraining the employment of agricultural labour in the manufacture of bidis during the agricultural season. Even in point of time a restriction may well have been reasonable if it amounted to a regulation of the hours of work in the business. Such legislation though it would limit the field for recruiting persons for the manufacture of bidis and regulate the hours of the working of the industry, would not have amounted to a complete stoppage of the business of manufacture and might well have been within the ambit of clause (6). The effect of the provisions of the Act, however, has no reasonable relation to the object in view but is so drastic in scope that it goes much in excess of that object. Not only are the provisions of the statute in excess of the requirements of the case but the language employed prohibits a manufacturer of bidis from employing any person in his business, no matter wherever that person may be residing. In other words, a manufacturer of bidis residing in this area cannot import labour from neighbouring places in the district or province or from outside the province. Such a prohibition on the face of it is of an arbitrary nature inasmuch as it has no relation whatsoever to the object which the legislation seeks to achieve and as such cannot be said to be a reasonable restriction on the exercise of the right. Further the statute seeks to prohibit all persons residing in the notified villages during the agricultural season from engaging themselves in the manufacture of bidis. It cannot be denied that there would be a number of infirm and disabled persons, a number of children, old women and petty shopkeepers residing in these villages who are incapable of being used for agricultural labour. All such persons are prohibited by law from engaging themselves in the manufacture of bidis; and are thus

108 *Id*. at 119-20.

> being deprived of earning their livelihood. It is a matter of common knowledge that there are certain classes of persons residing in every village who do not engage in agricultural operations. They and their womenfolk and children in their leisure hours supplement their income by engaging themselves in bidi business. There seems no reason for prohibiting them from carrying on this occupation. The statute as it stands, not only compels those who can be engaged in agricultural work from not taking to other avocations, but it also prohibits persons who have no connection or relation to agricultural operations from engaging in the business of bidi making and thus earning their livelihood. These provisions of the statute, in our opinion, cannot be said to amount to reasonable restrictions on the right of the applicants and that being so, the statute is not in conformity with the provisions of Part III of the Constitution. The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.

Rejecting the argument of the state that the state legislature was the proper judge to decide the reasonableness and quashing the order and directing the state not to enforce section 4 of the Act, the judge had observed:[109]

> Mr. Sikri for the Govt. of the Madhya Pradesh contends that the legislature of Madhya Pradesh was the proper judge of the reasonableness of the restrictions imposed by the statute, that that legislature alone knew the conditions prevailing in the State and it alone could say what kind of legislation could effectively achieve the end in view and would help in the grow more food campaign and would help for bringing in fallow land under the plough and that this Court sitting at this great distance could not judge by its own yardstick of reason whether the restrictions imposed in the circumstances of the case were reasonable or not. This argument runs counter to the clear provisions of the Constitution. The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision by this Court. In the matter of fundamental rights, the Supreme Court watches and guards the rights guaranteed by the Constitution and in exercising its functions it has the power to set aside an Act of the legislature if it is in violation of the freedoms guaranteed by the Const.

109 *Id.* at 120.

VII RIGHT TO LIFE AND PERSONAL LIBERTY

Double jeopardy

Section 300(1)[110] of the Cr PC, 1973 is wider than the protection afforded by article 20(2) of the Constitution. While under article 20(2) a person cannot be prosecuted and punished for the "same" offence more than once, section 300(1), Cr PC states that no one can be tried and convicted for the "same" offence or even for a "different" offence but on the same facts. In *Kolla Veera Raghav Rao* v. *Gorantla Venkateswara Rao*,[111] the appellant had been convicted under section 138 of the Negotiable Instruments Act, 1882. The Supreme Court held that on the same facts, he could not be tried or punished for the offence under section 420 or any other offence under the IPC, 1860 or any other statute.

Right against self-incrimination

The right to freedom of speech and expression includes freedom not to speak or freedom to keep silence.[112] The silence of an accused, however, cannot give rise to drawing an inference adverse to him.[113] The protection of article 20(3) extends not only to the stage of trial in the court but also prior to that stage, i.e., during investigation also.[114] The protection of that clause of article 20 does not extend to any kind of evidence but only to self-incriminating statements relating to charges brought against an accused. In *Balasaheb alias Ramesh Laxman Deshmukh* v. *State of Maharashtra*,[115] the controversy arose thus: A person was allegedly assaulted by four persons for which first information report was registered at the instance of the police (the police case). The statement of the appellant had been recorded during the investigation. After investigation, trial of four persons started and the appellant, having been named as a prosecution witness, was asked to give his evidence. While this trial was pending, a complaint was registered at the instance of a person about the aforesaid incident of assault in which the appellant was named as one of the accused persons (the complaint case). The appellant claimed the protection of article 20(3) contending that he could not be compelled to depose in the police case as the

110 S. 300(1) reads: Person once convicted or acquitted not to be tried for same offence.—(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof.

111 AIR 2011 SC 641 : 2011 (12) SCALE 1094; also see *State of U.P*. v. *Madhav Prasad Sharma* (2011) 2 SCC 202 and S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVI *ASIL* 159 at 177 (2010).

112 *Bijoe Emmaneul* v. *State of Kerala*, AIR 1987 SC 748 : (1986) 3 SCC 615.

113 *Rafiq Ahmad alias Rafi* v. *State of UP* (2011) 8 SCC 300 and *State of MP* v. *Ramesh* (2011) 4 SCC 786 : 2011 Cri LJ 2297.

114 *Nandini Satpathy* v. *P.L. Dani* (1978) 2 SCC 424.

115 AIR 2011 SC 304 : (2011) 1 SCC 364.

complaint case , accusing him as one of the accused persons, was pending trial and his evidence in the police case would implicate him in the complaint case. Distinguishing *Nandini Satpathy*[116]and rejecting the argument that the incident was the same in both police case as well as complaint case and the evidence of the appellant in police case will expose him in the complaint case as he was an accused in that case, C.K. Prasad J held:[117]

> Protection under Article 20(3) of the Constitution does not extend to any kind of evidence but only to self-incriminating statements relating to the charges brought against an accused. In order to bring the testimony of an accused within the prohibition of constitutional protection, it must be of such character that by itself it tend(s) to incriminate the accused. Appellant is not an accused in the Police case and in fact as a witness, whose statement was recorded under Article (section)161 of the Criminal Procedure Code, and therefore, not entitled to a blanket protection. However, in case of trial in the Police case answer to certain question if tends to incriminate the appellant he can seek protection at that stage. Whether answer to a question is incriminating or otherwise has to be considered at the time it is put. We are of the opinion that for invoking the constitutional right under Article 20(3) a formal accusation against the person claiming the protection must exist.

Right to personal liberty

The right to personal liberty cannot be taken lightly. There are two significant decisions of the Supreme Court raising issues of personal liberty *vis-à-vis* society's interest. In *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*,[118] the question related to the scope of anticipatory bail granted by a court. Does anticipatory bail granted under section 438, Cr PC remain valid only for a few days and the accused must surrender before the magistrate and apply for grant of a regular bail? Rejecting the argument regarding limited period validity of the anticipatory bail order and relying on an earlier constitution bench decision,[119] Dalveer Bhandari J observed:[120]

> (T)he power to arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under article 21 of the Constitution. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully co-operating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

116 *Supra* note 114.
117 Supra note 115 at 306 (of AIR).
118 AIR 2011 SC 312 : (2011) 1 SCC 694.
119 *Gurbaksh Singh Sibbia* v. *State of Punjab*, AIR 1980 SC 1632.
120 *Supra* note 118 at 329-30 (of AIR).

> A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

The power of a magistrate to issue non-bailable warrant for ensuring the presence of an accused in a complaint case was the subject matter of controversy in *Raghuvansh Dewanchand Bhasin* v. *State of Maharashtra*.[121] In this case, a complaint was filed against the appellant advocate for the offence under section 324, IPC. Since at the preliminary stage of hearing, the appellant was not present in the court, a non-bailable warrant was issued against him for securing his presence. But before the next date fixed for his presence, he appeared in the court and the warrant was cancelled. On 15th August (a public holiday), the police arrested him in full public view since the appellant could not produce the court's order canceling the warrant. The appellant approached the court against the police officer who had arrested him claiming adequate compensation and disciplinary action against the police officer responsible for his arrest on a public holiday despite his plea that the warrant had been cancelled. The apex court, while reprimanding the police arrest on a holiday without there being any urgency, found the appellant partly guilty for the arrest as, being an advocate, he did not care to procure the court's order canceling the warrant. The court, however, took serious view of the arrest which involved curtailment of personal liberty of a citizen. D.K. Jain J observed:[122]

> It needs little emphasis that since the execution of a non-bailable warrant directly involves curtailment of liberty of a person, warrant of arrest cannot be issued mechanically, but only after recording satisfaction that in the facts and circumstances of the case, it is warranted. The Courts have to be extra-cautious and careful while directing issue of non-bailable warrant, else a wrongful detention would amount to denial of constitutional mandate envisaged in Article 21 of the Constitution of India. At the same time, there is no gain saying that the welfare of an individual must yield to that of the community. Therefore, in order to maintain rule of law and to keep the society in functional harmony, it is necessary to strike a balance between an individual's rights, liberties and privileges on the one hand, and that of the State on the other.

The court, relying on an earlier decision,[123] held that to ensure the presence of an accused, the court should direct serving of summons along with copy of the complaint. In case, the accused avoids the summons, a bailable warrant may be issued. It is only thereafter that non-bailable warrant should be issued. The court regretted that this had not been done in the present case by the magistrate who had

121 AIR 2011 SC 3393.
122 *Id.* at 3396.
123 *Inder Mohan Goswami* v. *State of Uttaranchal*, AIR 2008 SC 251.

issued the non-bailable warrant in a mechanical manner. But the court did not give any relief to the appellant as he was responsible for his arrest by the police which was done in exercise of lawful authority of executing a warrant. The court gave detailed guidelines for the issue of non-bailable warrants in future.

A few cases were considered by the apex court during the current year regarding custodial violence/death where the court emphasized strict enforcement of directions issued by it in *D.K. Basu* case.[124] One such case was *Mehboob Batcha* v. *State*,[125] in which the court noted that despite custodial murder of a person kept in the police custody on the allegation of theft and gang rape of the wife of the deceased by the police in a barbaric manner, even the charges under section 302, IPC had not been framed. The lower courts had treated the murder as a suicide. Markandey Katju J while dismissing the appeal filed by the policemen who had been awarded merely three years of imprisonment, observed that this was a fit case falling within the category of "rarest of rare" cases in which death sentence should have been awarded.

Right to life and euthanasia

It is well-established principle that right to life under article 21 of the Constitution includes right to live with dignity but the right to life did not include right to die.[126] The question of euthanasia came before the apex court for decision in one of the instances of most heinous and beastly conduct of a human being in *Aruna Ramchandra Shanbaug* v. *Union of India*.[127] A staff nurse, Aruna Ramchandra Shanbaug, working in a hospital at Bombay, was attacked by a sweeper in the hospital on 27.11.1973 who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomised her. During this act, he twisted the chain around her neck. Due to strangulation, the supply of oxygen to her brain stopped and the brain was damaged. She was found lying unconscious on the floor with blood all over. The actual condition of Aruna Ramchandra Shanbaug was stated in para 122 of the decision as follows:[128]

> She recognizes that persons are around her and expresses her like or dislike by making some vocal sound and waving her hand by certain movements. She smiles if she receives her favourite food, fish and chicken soup. She breathes normally and does not require a heart lung machine or intra-venous tube for feeding. Her pulse rate and respiratory rate and blood pressure are normal. She was able to blink well and could see her doctors who examined her. When an attempt was made to feed her through mouth she accepted a spoonful of water, some sugar and smashed banana. She also licked the sugar and banana paste sticking on her upper lips and swallowed it. She would get disturbed when many people entered her room, but she appeared calm when she was touched or caressed gently.

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124 *D.K. Basu* v. *State of West Bengal* (1997) 1 SCC 416.

125 (2011) 7 SCC 45.

126 *Gian Kaur* v. *State of Punjab*, AIR 1996 SC 946. The court had relied upon the decision of the House of Lords in *Airedale NHS Trust* v. *Bland* (1993) All ER 82 (HL).

127 AIR 2011 SC 1290 : 2011 (1) SCALE 673 : (2011) 4 SCC 454 and (2011) 4 SCC 524.

128 *Id*. at 1331 (of AIR).

A writ petition under article 32 was filed by the victim's friend for mercy killing with withdrawal of life support system after 36 years of the incident. The patient was 60 years old at the time of filing the petition. During all these years, the victim had remained in a vegetative stage as stated above, not in coma, but without any hope of recovery. The doctors, nurses and other staff attending her did not recommend euthanasia and wanted her to live.

Markandey Katju J, while considering problem of euthanasia, distinguishing the active and passive euthanasia, observed:[129]

> Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life, e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma.
>
> The general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained.
>
> A further categorization of euthanasia is between voluntary euthanasia and non voluntary euthanasia. Voluntary euthanasia is where the consent is taken from the patient, whereas non voluntary euthanasia is where the consent is unavailable e.g. when the patient is in coma, or is otherwise unable to give consent. While there is no legal difficulty in the case of the former, the latter poses several problems….
>
> (A)ctive euthanasia is a crime all over the world except where permitted by legislation. In India active euthanasia is illegal and a crime under section 302 or at least section 304, IPC. Physician assisted suicide is a crime under section 306, IPC (abetment to suicide).

The judge extensively quoted law of several countries and relied upon the decision in *Airedale* case[130] which has been followed in later cases. The settled law in this matter in the United Kingdom is that in case of incompetent patients (passive euthanasia in which the patient cannot give consent either way), if the doctors act on the basis of informed medical opinion and withdraw the artificial support system if it is in the patient's best interest, the said act cannot be regarded as a crime. The judge considered the question as to who will decide the best interest of the patient. After analyzing the existing law in India, the judge was inclined to allow passive euthanasia in certain situations but he pointed out that there was no law regarding the legal procedure for withdrawing the life support system to a patient in 'permanent vegetative state' (PVS) or who was otherwise incompetent to take a decision.

129 *Id*. at 1311 (of AIR).
130 *Supra* note 126.

Following the technique adopted in *Vishaka*,[131] Katju J issued following guidelines to be followed till Parliament enacts necessary legislation:

> (i) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken *bona fide* in the best interest of the patient.
> (ii) (E)ven if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in Airedale's case.

The judge was particular in prescribing high court's approval keeping in view the possibility of mischief being done by relatives or others for inheriting the property of the patient. The judge also pointed that the high courts have power under article 226 of the Constitution not only to issue writs mentioned in that article but also any appropriate orders and directions including a direction for the purpose of giving approval for withdrawal of life support in case of incompetent patients. For this purpose, the chief justice of the concerned high court should constitute a bench of at least two judges to take a decision speedily at the earliest to avoid great misery to the relatives and friends of the patient. Before deciding the grant of approval, the bench should consult a team of three eminent doctors, preferably one each being a neurologist, psychiatrist and physician. The high court should give its decision assigning specific reasons for the same.

Right to life and livelihood

The question of livelihood of poor and illiterate/semi-literate tribals in Chhatisgarh engaged as special police officers (SPOs) on payment of small sums as honorarium to undertake counter-insurgency operations against Maoists/Naxalites in the state was considered in detail by the Supreme Court in *Nandini Sundar* v. *State of Chhatisgarh*.[132] In this PIL, the issue related, inter alia, to the nature of SPOs (popularly known as Koya Commondos), the manner of their training, their status as police officers, providing them firearms and allegations of excessive violence allegedly perpetuated by the SPOs as counter insurgency measures against Naxalites/Maoists. It was alleged in the petition that the State of Chhatisgarh was actively promoting the activities of a group called *Salwa Judum* which was an armed civilian vigilante group which was exacerbating the ongoing struggle and leading to widespread violation of human rights in the state. The state government refuted the allegations stating before the court that between 2004 and 2010, 2298 naxalite attacks took place in the state, killing 1803 persons (538 police and para-military personnel, 169 SPOs, 32 government employees and 1064 villagers) and

131 *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241.
132 *Supra* note 24.

the SPOs were an integral part of the overall security apparatus. The state informed the court that (i) the Union of India had approved the upper limit of the number of SPOs for each state for the purposes of reimbursement of honorarium under the security rated expenditure (SRE) scheme; (ii) SPOs were recruited under the Chhatisgarh Police Act, 2007 enjoying the "same powers, privileges and perform the same duties as coordinate constabulary and subordinate of Chhatisgarh Police"; (iii) the state government had framed Special Police Officers (Appointment, Training and Conditions of Service) Regulatory Procedures, 2011; (iv) the SPOs "are looked after as part of regular force and their welfare is taken care of by the State"; (v) two months training was provided to the tribals appointed as SPOs which included field and drill, weapon handling, first aid and medical care, yoga, 24 periods of training in law (IPC, Cr PC, Evidence, minor Acts, etc.), (vi) district superintendent of police controls SPOs; (vii) between 2005 and April, 2011, 173 SPOs lost their lives and 117 were injured and the state had made arrangement for giving relief and rehabilitation; (viii) tribals appointed as SPOs had better knowledge of the local terrain, geography, culture, etc. of the state which was not known to the police most of whom are from outside the state; (ix) though neither the Indian Police Act nor the Chhatisgarh Act, 2007 prescribe any qualification for appointment of police, in the appointment of SPOs preference was given to those who had passed fifth standard, etc. The Union of India accepted the important role played by the SPOs in assisting the district police and were relevant in counter-insurgency and counter-terrorism situations as well as in law and order situations. It further informed the court that (i) the SPOs were being paid honorarium between Rs. 1500/- and Rs. 3000/-; (ii) that the SRE scheme was operational in 83 districts of nine states to enable the state for "capacity building: to help in maintaining public order in the states affected by naxalite/maoists insurgency"; (iii) that the role of Union of India was merely to approve the upper limit of the number of SPOs to be appointed and the "appointment, training, deployment, role and responsibility" of SPOs were the responsibility of the states concerned; (iv) that historically, SPOs had played an important role in law and order and insurgency situations in different states. The court was, however, not satisfied with the claims of the Union of India and State of Chhatisgarh and held that the appointment of tribals as SPOs was an exploitation of poor and illiterate persons violative of their right under article 21 of the Constitution of India. A division bench of the court observed:[133]

> To employ such ill-equipped youngsters as SPOs engaged in counter-insurgency activities, including the tasks of identifying Maoists and non-Maoists, and equipping them with firearms, would endanger the lives of others in the society. That would be a violation of Article 21 rights of a vast number of people in the society. That they are paid only an "honorarium", and appointed only for temporary periods, are further violations of Article 14 and Article 21.

133 *Id*. at 2867 (of AIR).

The court further observed:[134]

> (P)ayment of honorarium to these youngsters, even though they are expected to perform all of the duties of regular police officers, and place themselves in dangerous situations, equal to or even worse than what regular police officers face, would be a violation of Article 14. To pay only an honorarium to those youngsters, even though they place themselves in equal danger, and even more, than regular police officers, is to denigrate the value of their lives. It can only be justified by a cynical, and indeed an inhuman attitude, that places little or no value on the lives of such youngsters. Further, given the poverty of those youngsters, and the feelings of rage, and desire for revenge that many suffer from, on account of their previous victimization, in a brutal social order, to engage them in activities that endanger their lives, and exploit their dehumanized sensibilities, is to violate the dignity of human life, and humanity.
>
> (T)he temporary nature of employment of these youngsters, as SPOs engaged in counter-insurgency activities of any kind, endangers their lives, subjects them to dangers from Maoists even after they have been disengaged from duties of such appointment, and further places the entire society, and individuals and groups in the society, at risk. They are all clearly violations of Article 21.

In view of the above, the court held the appointment of SPOs to perform any of the duties of the police officers except those specified in section 23(1)(h), (i)[135] of the Chhatisgarh Police Act, 2007 to be unconstitutional. The court did not stop there and issued an order on 05.07.2011 containing five directions, two of which may be noted below:[136]

> 75. (i) The State of Chhatisgarh immediately cease and desist from using SPOs in any manner or form in any activities, directly or indirectly, aimed at controlling, countering, mitigating or otherwise eliminating Maoist/ Naxalite activities in the State of Chhatisgarh;
>
> (ii) The Union of India to cease and desist, forthwith, from using any of its funds in supporting, directly or indirectly the recruitment of SPOs for the purposes of engaging in any form of counter-insurgency activities against Maoist/Naxalite groups….

134 *Ibid*.

135 Chhatisgarh Police Act, 2007, s. 23(1)(h), (i) reads as follows: 23. Role, functions and duties of the police.- The following shall be the functions and responsibilities of a police officer, - (1) … (h) to help people in situations arising out of natural or man-made disasters, and to assist other agencies in relief measures; (i) to facilitate orderly movement of people and vehicles, and to control and regulate traffic.

136 *Supra* note 133 at 2870.

On an application filed subsequently by the Union of India, the court[137] "clarified" that the second direction mentioned above be confined only to the State of Chhatisgarh. The relevant part of the order is noteworthy:[138]

> Mr. R.F. Nariman, learned Solicitor General, has submitted that the order was passed in the context of the writ petition filed, which was confined to the State of Chhatisgarh and, accordingly, the said portion of the order should also be read as being confined to the State of Chhatisgarh only. The learned Solicitor General has also indicated that there are Special Police Officers in other States as well, wherein in view of special circumstances grave and serious law and order problems could arise, in the event this order is to be interpreted to cover the rest of the country as well. The learned Solicitor General submitted that S.P.Os were deployed in other parts of the country where there were threats other than threats from Maoists and Naxalites.
>
> We have heard learned counsel for the petitioners, as well as for the State of Chhatisgarh, who agree that the order was passed in regard to the conditions in Chhatisgarh, and have stated the order may be confined to the State of Chhatisgarh. Accordingly, on such consensus, we allow I.A. No. 6 of 2011, and clarify that the order of 5th July 2011, shall, in regard to paragraph 75(ii), be confined to the State of Chhatisgarh alone.

It may be submitted here that this order "clarifying" the first order of 05.07.2011 was passed without looking into the ground realities in eight other states where SPOs were being appointed and for whom prayer was made by the solicitor General. In fact, even the first order should not have been passed without looking into all the details in all the nine states pertaining to the appointment of SPOs when the Union of India had stated before the court that the SRE scheme was being financed by it in nine states. It is rather surprising that the Union of India, instead of the other eight states adversely affected by the order, had chosen to seek "clarification" from the court. What was the interest of Union of India in moving the court for "clarification"? How was the order adversely affecting the Union of India was not indicated to the court. The "clarification" in fact amounts to modification of the order and the same is clearly discriminatory in so for as the State of Chhatisgrah is concerned. It is equally surprising that the State of Chhatisgarh which was directly affected had chosen not only to remain silent but agreed before the court to the clarificatory order. May be, they did not appreciate the real impact of the clarification. The "clarification" gives freedom to eight states to use SPOs for any purpose they wish while depriving the same freedom to the State of Chhatisgrah. The entire system of appointing SPOs in all states needs to be considered afresh in its totality in the light of deficiencies noted by the court in its order dated 05.07.2011.

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137 The bench was re-constituted with Altamas Kabir and S.S. Nijjar JJ since B. Sudershan Reddy J, constituting the bench when order was passed on 05.07.2011, had retired on 08.07.2011.

138 *Nandini Sundar* v. *State of Chhatisgarh*, 2011 (13) SCALE 331 at 331-332.

Right to fair trial includes right to legal representation

It is the right of every accused person to be defended by a counsel of his choice. There is also an equal duty cast on the lawyers to defend an accused however wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he/she may be regarded by the society. By passing a resolution, no bar association can deprive an accused from being defended by a counsel. An advocate has statutory right under section 30[139] of the Advocates Act, 1961 to practise before all courts throughout India including the Supreme Court and before any tribunal or person legally authorized to take evidence on oath. This right necessarily imposes a corresponding implied duty on every advocate to appear in every court/case whenever engaged to defend the client. In *A.S. Mohammed Rafi* v. *State of T.N.*,[140] the Coimbatore bar association passed a resolution that no member shall defend the accused policemen in the criminal case pending against them. Markandey Katju J took a very serious view of the resolution and observed:[141]

> Professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused of a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations of India are null and void and the right-minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita.

The adjudication of a criminal case without the defence counsel was likewise treated by the same judge (Markandey Katju J) as denial of fair trial of the accused. In *Mohd. Sukur Ali* v. *State of Assam*,[142] the appellant had engaged A.S.C. as his counsel but during the course of trial, he changed him and engaged B.S. When the case was listed, the cause list showed the name of A.S.C. who did not appear to defend the appellant as he had already been changed. Unfortunately, B.S. also did not appear, as his name had not figured in the cause list. The case was thus decided without a defence counsel. The Supreme Court unequivocally held that a criminal case (whether a trial or appeal/revision) should not be decided against the accused

139 It may be noted here that this provision has been enforced only after half a century with effect from 15.06.2011 *vide* Ministry of Law & Justice (Deptt. of Legal Affairs), Government of India Notification No. S.O. 1349(E) dated 09.06.2011, published in *gazette* of India extraordinary, part II, sec. 3(ii) dated 09.06.2011.

140 AIR 2011 SC 308 : (2011) 4 SCC 688.

141 *Id.* at 311 (of AIR).

142 AIR 2011 SC 1222 : (2011) 4 SCC 729 : 2011 Cri LJ 1690

in the absence of a counsel because such a trial would amount to unfair and unjust trial and violation of article 21 of the Constitution. The court held that it was only a lawyer who is conversant with law who can properly defend an accused in a criminal case. The judge further observed:[143]

> We reiterate that in the absence of a counsel, for whatever reasons, the case should not be decided forthwith against the accused but in such a situation the court should appoint a counsel who is practising on the criminal side as amicus curiae and decide the case after fixing another date and hearing him.
>
> If on the next date of hearing the counsel, who ought to have appeared on the previous date but did not appear, now appears, but cannot show sufficient cause for his non-appearance on the earlier date, then he will be precluded from appearing and arguing the case on behalf of the accused. But, in such a situation, it is open to the accused to either engage another counsel or the court may proceed with the hearing of the case by the counsel appointed as *Amicus Curiae*.

In the present case, since the accused had already been convicted in the absence of his counsel, the apex court, while remanding the case to the high court for fresh disposal in accordance with the above observations after hearing the defence counsel, was quite conscious of likelihood of some prejudice if the same judges again had to re-consider the matter and, therefore, in the interest of justice, directed that the matter be heard by a bench of judges other than those who had passed the impugned judgment.

Consequences of delayed trial

It is well established through numerous judicial pronouncements that right to life and personal liberty includes right to speedy trial.[144] The judicial pronouncements are, however, not uniform as to what would be the consequence of delay in the trial of an accused resulting from laxity of the prosecution. It has been held that delay does not give rise to passing of a release order[145] or quashing the prosecution of the accused.[146] The delay in the trial has serious consequences on the accused and, therefore, the court took a serious view of such delay in *Hardeep Singh* v. *State of M.P.*[147] In this case, the accused-appellant was prosecuted under section 420 read with section 34 of the IPC and sections 3 and 4 of the M.P. Recognised Examinations Act, 1937 for selling questions papers of the pre-medical test in three subjects. He

143 *Id.* at 1226 (of AIR).

144 See *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822; *Mohd. Maqbool Tantray* v. *State of J. & K.* (2010) 12 SCC 421; *Rafiq Ahmad Alias Rafi* v. *State of U.P.* (2011) 8 SCC 300; S N Singh, "Constitutional Law – I (Fundamental Rights)", XLV *ASIL* 125 at 140 (2009).

145 *P. Vijayan* v. *State of Kerala* (2010) 2 SCC 398.

146 *Sajjan Kumar* v. *CBI* (2010) 9 SCC 368; see also S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVI *ASIL* 159 at 183 (2010).

147 (2012) 1 SCC 748: 2011 (13) SCALE 289.

was arrested after a raid was conducted at the instance of the district collector on 08.06.1992. The accused-appellant was granted bail but the trial went on for seven years after which he was acquitted. Thereafter, the appellant moved an application before the judicial magistrate for prosecution of the collector and some others responsible for his prosecution. The application was dismissed for want of sanction under section 197, Cr PC to prosecute the collector and others. The appellant thereafter applied for sanction to the competent authority which was refused. The writ petition, review petition and appeal filed against the refusal of the competent authority to grant sanction was dismissed by the high court. In the special leave petition filed before the Supreme Court, the appellant contended that the prosecution knew from the beginning that the cases registered against him were false and it purposely delayed the trial causing great harm to his dignity and reputation and right to speedy trial had been violated under article 21 of the Constitution. Aftab Alam J noted the following facts from the judgment of the division bench:[148]

> The Division Bench of the High Court, hearing the appeal, examined the order-sheet of the trial proceedings and disagreeing with the learned Single Judge found and held that the responsibility for the delay in the trial proceedings for five years from15-3-1999 to 6-5-2004 lay with the State as no timely steps were taken by the prosecution to produce and examine the witnesses before the trial court. The Division Bench observed that an expeditious trial, ending the acquittal, would have restored the appellant's personal dignity but the State, instead of taking prompt steps to produce and examine the prosecution witnesses delayed the trial for five long years. The Division bench further held that there was no warrant for putting the appellant under handcuffs. His handcuffing was without justification and it had not only adversely affected his dignity as a human being but had also led to unfortunate and tragic consequences. The Division Bench, however, noted that even though there was an undue delay of five years in concluding the appellant's trial his liberty was not affected inasmuch as he was not in imprisonment but was on bail.

Disagreeing with the award of Rs. 70,000/- given by the division bench of the high court and enhancing it to Rs. 2 lakhs, Aftab Alam J, without laying down any principles, held:[149]

> (W)e find that in the light of the findings arrived at by the Division Bench, the compensation of Rs. 70,000 was too small and did not do justice to the sufferings and humiliation undergone by the appellant. In the facts and circumstances of the case, we feel that a sum of Rs. 2.00,000 (Rupees two lakhs) would be an adequate compensation for the appellant and would meet the ends of justice.

148 *Id.* at 293 (of SCALE).
149 *Id.* at 293-94.

Protection of article 22(1), (2) not available in case of judicial custody

A reading of the decision in *Pragya Singh Thakur* v. *State of Maharashtra*,[150] indicates as to how an arrested person could languish in police/judicial custody and failed to get bail for violation of article 22 of the Constitution because her case was not properly and timely processed and argued by the counsel. On 29.09.2008, a bomb blast took place in Azad Nagar locality of Malegaon city killing six and injuring over 100 persons. ACR was registered the next day against unknown persons for various offences under the IPC, the Explosive Substances Act, and the Unlawful Activities (Prevention) Act, 1957. A scooter was used for the bomb blast which was purchased by the appellant in Surat, which, according to her, she had already sold in 2004. The appellant was residing in Indore when she was telephonically called by a police officer to travel to Surat in connection with the purchase of the scooter. Eventually, the appellant reached Surat on 10.10.2008 when the police officer met her at 10.00 p.m. at the residence of appellant's disciple. Between 10 to 22.10.2008, the appellant stayed at three private lodges and was admitted in two private hospitals for treatment. According to the appellant, she was subjected to severe beating by her disciple at the instance and insistence of the police and was profusely abused in very vulgar language by the police. The appellant was formally arrested by police on 23.10.2008 and produced before the magistrate the next day when she was remanded to police custody till 02.11.2008. It was only on 3rd November when she was again produced before the magistrate that the appellant could meet her relatives who got her signature on a blank *vakalatnama*. On that day, the appellant was remanded in judicial custody. During all this period, the appellant neither pleaded before the magistrate that she had been arrested on 10th October nor mentioned anything about the atrocities committed on her. She had, however, complained to the National Human Rights Commission (NHRC) about the atrocities committed by the police. In the bail application, the appellant pleaded that she was entitled to bail on the ground that the protection of article 22(1) and (2) had been violated as she was not produced before the nearest magistrate within 24 hours of her arrest on 10th October; that the grounds of arrest were not communicated to her; that she was not provided assistance of a lawyer and that the charge-sheet was not filed within 90 days of her arrest on 10.10.2008 as prescribed under section 167(2), Cr PC. The special judge as well as the high court dismissed the bail application disbelieving the appellant's allegations. With regard to physical violence, ill-treatment and harassment, the high court simply ignored the issue by observing that the matter was already pending before the NHRC. On appeal, the Supreme Court upheld the decision of the high court, rejecting all the contention of the appellant. The apex court was not convinced as to why the appellant had not made the allegations of arrest on 10th October, violation of article 22(1) and (2) and other issues at any stage prior to her filing a complaint before the magistrate on 17.11.2008. On the question of physical violence, ill-treatment and harassment, the apex court did not say anything except quoting one sentence from the high court's order. On the question of violation of article 22(1) and (2), J.M. Panchal J observed:[151]

150 (2011) 10 SCC 445.
151 *Id.* at 462.

> Even if it is assumed for the sake of argument that there was any violation by the police by not producing the appellant within 24 hours of arrest, the appellant could seek her liberty only so long as she was in the custody of the police and after she is produced before the Magistrate, and remanded to custody by the learned Magistrate, the appellant cannot seek to be set at liberty on the ground that there had been non-compliance of Article 22(2) or Section 167(2) of the Cr.P.C. by the police.

Unfortunately, the court did not address the issue as to why the appellant remained away for 10 days from her place of residence at Indore and chose to reside at a distant place like Bombay. Could it have been on her own volition or on the dictates of the police? Certainly, no one would like to be in the company of policemen on her own will and that too for constant questioning by the police. Further, it had not been denied that on being produced before the magistrate, the appellant had no counsel to object to her police remand and she could sign the *vakalatnama* only when produced second time before the magistrate and not before that date. Moreover, when an allegation is made before the high court or the Supreme Court regarding atrocities committed by the police, how can the court avoid the issue on the ground that the matter was already pending before the NHRC? The court could have ordered an enquiry into the matter or issued directions to NHRC to produce the record of the entire matter or, in the alternative, it could have directed a judicial investigation into the matter. This was not done in the present case. Finally, the observations of Panchal J regarding non-availability of the protection of article 22(2) after judicial order did not consider the fact that the allegations related to the period prior to the magisterial/judicial order which was a relevant factor. The final analysis of the case does not indicate a good picture of the arguments made by the appellant's counsel at the initial stage of the case. Had the matter been taken immediately to the court, say on 12 or 13.10.2008, the situation might have been totally different.

VIII PREVENTIVE DETENTION

The cases on preventive detention reported during 2011 clearly indicate that despite availability of all the resources including research assistance and e-resources, decisions are being given in ignorance of the previous decisions. Neither the counsel for the parties nor the judges have taken enough pains to find out and refer to the previously decided cases. Moreover, the preventive detention cases also highlight the general apathy, ignorance and casualness of the detaining authorities in passing detention orders without realising the importance of the right to life and personal liberty and that is the reason why in many cases the preventive detention orders, passed apparently on erroneous grounds, were quashed.

Constitution bench decision un-noticed by smaller benches

When a person was already in jail and no bail application on his behalf was pending in any court, can a preventive detention order be passed against him? A constitution bench of the apex court in *Haradhan Saha* v. *State of W.B.*,[152] had held

152 (1975) 3 SCC 198 at 209.

(*vide* para 34) that "where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order." Five cases were decided later on by division benches (four of them in 2006 itself) with two sets of conflicting opinions without any reference to the above constitution bench decision. Two-judges benches in three cases[153] held that if no bail application was pending and the detenu was already in jail in a criminal case, the preventive detention order would be illegal. On the contrary, without any reference to the above constitution bench decision and distinguishing *Rajesh Gulati*, Arijit Pasayat J on behalf of the division bench constituted by the same judges held in two cases[154] that the only requirement for passing a detention order was that the detaining authority should be aware that the detenu was already in custody and was likely to be released on bail on the ground that in similar cases bail had been granted.

In view of the above conflicting views expressed in various cases, a division bench, before which a similar question came up for decision in *Rekha* v. *State of TN*,[155] after hearing the parties and noting decisions which seemed to in conflict with each other, referred the matter for constitution of a larger bench. On reference, the full bench of the apex court[156] noted that the impugned detention order had specifically noted that the detenu was in jail pending a criminal trial and *he had not moved any bail application* in the criminal case at the time of passing the detention order. At the same time, the impugned order also mentioned that the relatives of the detenu were taking action by moving applications before higher courts for bail *since in similar cases bails were granted by the courts after a lapse of time* and, therefore, there was a real possibility of the detenu coming out on bail. The details of cases in which bail orders were passed were not mentioned in the impugned

153 See *Rajesh Gulati* v. *Govt. of NCT of Delhi* (2002) 7 SCC 129 (Ruma Pal and Arijit Pasayat JJ); *T.V. Sravanan* v. *State* (2006) 2 SCC 664 and *A. Shanthi* v. *Govt. of TN* (2006) 9 SCC 711. The latter two were decided by the same judges (B.P. Singh and Altamas Kabir JJ). Markanday Katju J in *Rekha* v. *State of TN*, 2011 (4) SCALE 387 at 392 observed that the latter two "decisions appear to have followed the Constitution Bench decision in *Haradhan Saha* v. *State of West Bengal*" though the fact is that there is no mention of *Haradhan Saha* in any of these decisions.

154 *Ibrahim Nazeer* v. *State of TN* (2006) 6 SCC 603 and *A. Geetha* v. *State of T.N.* (2006) 7 SCC 603

155 (2011) 4 SCC 260. The impugned detention order had been passed in exercise of powers under the Tamil Nadu Prevention of Dangerous Activities of Bottleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Slum-grabbers and Video Pirates Act, 1982 with a view to prevent the detenu from acting in any manner prejudicial to the maintenance of public order on the allegation that he was selling expired drugs after tampering with the labels and printing fresh labels showing them non-expired drugs.

156 *Rekha* v. *State of TN*, *supra* note 153.

detention order. After noting the above cases but without clearly stating as to which approach was correct, Markandey Katju J observed:[157]

> In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning that date of the orders, the bail application number, whether the bail order was passed in respect of the co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored.
>
> In our opinion, the detention order in question only contains ipse dixit regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this effect. Hence, the detention order in question cannot be sustained.

The judge further observed:[158]

> (E)ven if a bail application of the petitioner relating to the same case was pending in a criminal case the detention order can still be challenged on various grounds e.g. that the act in question related to law and order and not public order, that there was no relevant material on which the detention order was passed, that there were mala fides, that the order was not passed by a competent authority, that the condition precedent for exercise of power did not exist, that the subjective satisfaction was irrational, that there was non-application of mind, that the grounds are vague, indefinite, irrelevant, extraneous, non-existent or stale, that there was delay in passing the detention order or delay in executing it or delay in deciding the representation of the detenu, that the order was not approved by the Government, that there was failure to refer the case to the Advisory Board or that that the reference was belated, etc.

Pointing out the relationship between articles 21 and 22(3)(b), Markandey Katju J observed:[159]

> Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main

157 *Id.* at 392-93.
158 *Id.*at 393.
159 *Ibid*.

> rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial….
> Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India…. Article 22(3)(b) cannot be read in isolation, but must be read along with Articles 19 and 21….

With regard to the application of the views expressed by the constitution bench in *Haradhan Saha*,[160] Markandey Katju J observed:[161]

> No doubt it has been held in the Constitution Bench decision in *Haradhan Saha* case that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution…. *Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right*. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.
> Hence, the observation in SCC para 34 in *Haradhan Saha case* cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.

In yet another case,[162] preventive detention order had been passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). Harjit Singh Bedi J quashed the detention order on the ground that when the passport of the detenu had already been seized, there was no question of his going abroad for smuggling activities and there were no materials to hold that even without passport, the detenu would continue his smuggling activities within the country. Merely because the detenu had been intercepted on specific intelligence and that he had been arrested twice in the past on similar charges were considered by the court to be immaterial for the purpose of passing the impugned detention order.

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160 *Supra* note 152.

161 *Rekha* v. *State of TN*, *supra* note 153 at 396.

162 *Moulana Shamshunnisa* v. *Additional Chief Secretary*, AIR 2011 SC 1422. The court relied upon *Icchu Devi Choraria* v. *Union of India* (2009) 4 SCC 51, *Rajesh Gulati* v. *Govt. of NCT of Delhi* (2002) 7 SCC 129 and *Gimik Piotr* v. *State of TN* (2010) 1 SCC 609.

On the contrary, in *G. Reddeiah* v. *Govt. of A.P.*,[163] the detaining authority passed the impugned detention order under the A.P. Prevention of Dangerous Activities of Boot Leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 after taking the definite stand that the state "administration is not in a position to curb the illegal activities of the detenue under the normal procedure, who was habitually indulging in illicit trespass, cutting, dressing and transporting the red-sanders wood from the reserved forest owned by the state causing irreparable loss to national wealth" and the detenue was a "goonda" under section 2(g) of the Act. The detenue was in jail from 09.10.2010, released on 10.11.2010 and detention order was passed on 12.10.2010. The detenue was in jail as he was habitually committing forest offences and was facing criminal trial in eight cases. The court found that the actions of the detenue were not an isolated or stray incident but showed habitual conduct. Relying on the constitution bench decision in *Haradhan Saha* v. *State of West Bengal*[164] and distinguishing the two-judge bench decision in *Rekha* v. *State of T.N.*,[165] P. Sathasivam J (on behalf of himself and B.S. Chauhan J) upheld the detention order in the facts and circumstances of the case. The judge held:[166]

> It is clear that if the Detaining Authority was aware of the relevant fact, namely that he (detenue) was under custody from 09.10.2010 and he would be released or likely to be released or as in this case released on 10.11.2010 and if an order is passed after due satisfaction in that regard, undoubtedly, the order would be valid.
>
> (O)n going through the factual position and orders therein and in view of enormous activities of the detenue violating various provisions of IPC, the A.P. Act and the Rules, continuous and habituality in pursuing the same type of offences, damaging the wealth of the nation and taking note of the abundant factual details as available in the grounds of detention and also of the fact that all the procedures and statutory safeguards have been fully complied with by the Detaining Authority, we are of the view that the said decision (*Rekha*) is not applicable to the case on hand.

The same bench in an earlier case[167] had likewise upheld the detention order passed under the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-grabbers Act (No. 12 of 1985). In this case, the detenue had been indulging in criminal activities such as murder, attempt to murder, dacoity, rioting, damaging the public property, provoking the public, attempt to grab the property of the public, extortion, possession of illegal weapons, etc. right from the age of 30 and eleven criminal cases were mentioned in the detention order. The detenue had been convicted in

163 2011 (10) SCALE 224.
164 *Supra* note 152.
165 *Supra* note 153.
166 *Supra* note 163 at 231-33.
167 *D.M. Nagaraja* v. *Govt. of Karnataka*, 2011 (10) SCALE 592 : (2011) 10 SCC 215 : AIR 2012 SC 295.

one case and sentenced to nine years rigourous imprisonment. He was acquitted in two cases and four were pending when the detenue was granted bail. Sathasivam J upheld the detention order observing:[168]

> It is the subjective satisfaction of the Detaining Authority that in spite of his continuous activities causing threat to maintenance of public order, he (detenue) was getting bail one after another and indulging in the same activities. In such circumstances, based on the relevant materials and satisfying itself, namely, that it would not be possible to control his habituality in continuing the criminal activities by resorting to normal procedure, the Detaining Authority passed an order detaining him under the Act No. 12 of 1985. In view of the enormous materials which are available in the grounds of detention, such habituality has not been cited in the above referred *Rekha* (*supra*), we are satisfied that the said decision is distinguishable on facts with reference to the case on hand and contention based on the same is liable to be rejected.

Connotation of the expression "as soon as may be" under article 22(5)

Article 22(5) of the Constitution requires that when a person is detained under any preventive detention law, "the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order." In *Ummu Sabeena* v. *State of Karala*,[169] in all the four cases, the impugned detention orders passed under the COFEPOSA were served to all the detenus 10.03.2011; representations were made by the detenus on 30.03.2011; the same were rejected by the state government on 08.04.2011; the state government's decision was sent to the central government on 16.04.2011 and received by the latter on 21.04.2011; after receipt of all relevant papers and observations, the central government rejected the representations on 06.06.2011. The question was whether the delay on the part of the central government in taking a decision was fatal to the impugned detention orders. Relying on the constitution bench decision of the apex court[170] holding that time limit under article 22(5) had been kept deliberately elastic but the expression "as soon as may be" made sufficiently clear the concern of the framers of the Constitution that "the representation should be very expeditiously considered and disposed of with a sense of urgency and without any avoidable delay", A.K. Ganguly J found the explanation given by the central government as un-acceptable for upholding the detention orders and quashed the same with the following observation:[171]

> (W)e must hold that the procedural safeguards given for protection of personal liberty must be strictly followed. The history of personal liberty, as is well known, is a history of insistence on procedural safeguards.

168 *Id.* at 599 (of SCALE).
169 (2011) 10 SCC 781 : 2011 (13) SCALE 28.
170 *K.M. Abdulla Kunhi* v. *Union of India* (1991) 1 SCC 476.
171 *Supra* note 169 at 785.

> Following the said principle, we find that delay in these cases is for a much longer period and there is hardly any explanation. We, therefore, have no hesitation in quashing the orders of detention on the ground of delay on the part of the Central Government in disposing of the representation of the detenus.

IX RIGHT TO RELIGIOUS FREEDOM

The right to freedom of religion is not an absolute right. This right is subject, inter alia, to public order, morality and health. Thus, if an activity connected with religion tends to create public order problem, the freedom of religion can be curtailed. The burial of a dead person is certainly related to religious rituals but if the same leads, or is likely to lead, to public order problem, nothing prevents the state from imposing conditions on the performance of this religious ritual. In *Mohd. Hamid* v. *Badi Masjid Trust*,[172] the dead body of a *Baba* (Mohd. Mustafa Mohd. Ansari) was buried in a hurry in a school premises by forcibly occupying a class room of the school by breaking its lock which had lawfully been leased out by the government to the respondent. The court noted that the school land in question was to be used only for *dharmshala* and garden and even the lessee could not have given permission for the burial. The burial was at an unauthorized place without any authority of law. The court held that the entire action of forcible occupation of the premises and burying the dead body was "illegal, without jurisdiction and in violation of the law which brought in disturbance in the area and also created huge law and order problem for the Government." The court noted that even curfew had to be imposed in the area which was continuing for limited periods even on the date of hearing before the Supreme Court. After quoting religious texts[173] and two earlier cases decided by the Supreme Court,[174] it was held that though it was true that the dead body cannot be exhumed under the Muslim law once it is buried at a particular place, Muslim graves coming up unauthorisedly and illegally on other's land could be shifted in larger public interest for maintaining public order. Any such shifting will not be violative of the freedom under articles 25 and 26 of the Constitution of India.

When the state incurs some expenditure in the form of subsidy for a religious purpose, does it violate the provisions of article 27[175] of the Constitution of India? The state incurs expenditure for providing facilities for *Kumbh* mela, pilgrimage to Mansarovar, temples and gurudwaras in Pakistan. Likewise, the state provides

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172 2011 (8) SCALE 2.

173 *Fatawi Amalgiri* 556 and *Fatwa Darululoom Deoband* (Mez 403).

174 *Gulam Abbas* v. *State of UP* (1984) 1 SCC 81 and *Abdul Jalil* v. *State of UP* (1984) 2 SCC 138.

175 Art. 27 reads: "Freedom as to payment of taxes for promotion of any particular religion.- No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion."

subsidy for Haj pilgrims. In *Prafull Gordia* v. *Union of India*,[176] the petitioner, a Hindu, challenged the constitutional validity of the Haj Committee Act, 2002 enacted in exercise of powers under entry 20, list I, seventh schedule to the Constitution of India. It was contended that the Act violated the provisions of article 27 as the state was providing subsidy for Haj pilgrimage out of taxes paid by him and others which is not permissible. The court held that article 27 was attracted not only when a legislation was specially enacted to provide that the proceeds of the tax would be utilized for a particular religion but also to a legislation of a general nature imposing taxes (e.g. income tax, excise, customs, sales tax, etc.), the substantial portion of proceeds of which are utilized for a particular religion. The court, however, held:[177]

> In our opinion Article 27 would be violated if a *substantial part* of the *entire income tax* collected in India, or a substantial part of the entire central excise or the customs duties or sales tax, or a substantial part of any other tax collected in India, were to be utilized for promotion or maintenance of any particular religion or religious denomination. In other words, suppose 25% of the entire income tax collected in India was utilized for promoting or maintaining any particular religion or religious denomination, that, in our opinion, would be violative of Article 27 of the Constitution.

In the present case, the petitioner had made no averments in the writ petition that a substantial part of any tax collected in India was being utilized for the purpose of Haj pilgrimage. What percentage of tax was being utilized for the Haj pilgrimage was also not stated. On the contrary, the court held:[178]

> (I)f only a small part of any tax collected is utilized for providing some convenience or facilities or concessions to any religious denomination, that would not be violative of Article 27 of the Constitution. It is only when *a substantial part* of the tax is utilized for any particular religion that Article 27 would be violated.
> Hence, in our opinion, there is no violation of Article 27 of the Constitution. There is also no violation of Articles 14 and 15 because facilities are also given, and expenditures incurred, by the Central and State Governments in India for other religions. Thus there is no discrimination.

Admittedly, the central government and state governments had been providing subsidy for pilgrimages. It was not justified for the court to insist the petitioner to provide the details as to what was the percentage of expenditure incurred. The information was available only with the government and the court should have asked for the information from it. Moreover, the court did not define "substantial part". Should it be in the form of percentage of total collection? What if the amount of subsidy was merely 100 or 200 crores? The case does not seem to have ended the entire controversy. In any case, the above views of the court remind one to the

176 (2011) 2 SCC 568 : 2011 (2) SCALE 761.
177 *Id*. at 572-73.
178 *Id*. at 573.

observations of O. Chinnappa Reddy J: "our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practises tolerance; let us not dilute it."[179]

An extreme case of religious intolerance was noticeable in the triple murder of Australian Christian Missionary.[180] Graham Stuart Staines, a Christian Missionary from Australia had been working among the tribals, lepsers in particular, in the State of Orissa. He was engaged in propagating and preaching Christianity in the tribal areas of interior Orissa. Staines along with his two sons and several other persons conducted camp in a village near a church hosting a number of programmes. While he along with his sons were sleeping in their vehicle parked outside the church, 60-70 persons came to the spot and set fire to the vehicle, preventing them from getting out of the vehicle. All three were burnt alive. The trial court convicted the appellant alongwith a number of other persons for various offences. The appellant was sentenced to death and another person was sentenced to life imprisonment. On death reference and appeals by convicted persons, the high court affirmed the conviction of the appellant but converted his death sentence to life imprisonment along with the other person. The high court acquitted all others for want of requisite evidence. On appeal, the Supreme Court, while upholding the conviction and sentence awarded by the high court, observed:[181]

> In a country like our where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. Our concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship.
>
> There is no justification for interfering in someone's religious belief by any means.

X RIGHT TO CONSTITUTIONAL REMEDIES

No judicial review in policy matters

It is a well-settled principle that the courts cannot exercise their power of judicial review in respect of policy matters/decisions[182] unless the same violates

179 *Bijoe Emmanuel* v. *State of Kerala*, AIR 1987 SC 748 : (1986) 3 SCC 615.

180 *Rabindra Kumar Pal @ Dara Singh* v. *Republic of India*, 2011 (1) SCALE 615 as modified in 2011 (1) SCALE 741.

181 *Id.* at 648 read with 741.

182 *Balco Employees' Union (Regd.)* v. *Union of India*, 2002 (2) SCC 333; *Federation of Railway Officers Assn.* v. *Union of India*, 2003 (4) SCC 289; *Directorate of Film Festivals* v. *Gaurav Ashwin Jain*, 2007 (4) SCC 737 and *Dhampur Sugar (Kashipur) Ltd*. v. *State of Uttaranchal* (2007) 8 SCC 418.

the right of a person.[183] In *Union of India* v. *J.D. Suryavanshi*,[184] the high court had issued a number of interim orders in a PIL to the railway administration such as provision of additional berths from three tier sleeper and AC class coaches in all trains, to complete second track between Gwalior and Indore, changes in timings of several trains, etc. The Supreme Court held the directions to be beyond the jurisdiction of the high court in exercise of power of judicial review. It was observed by R.V. Raveendran J that the courts should resist the temptation of usurping the power of the executive and interfere in the day-to-day working of the government departments. The court, therefore, quashed all interim orders issued by the high court.

The most controversial and leading case on the question of judicial review of policy decisions was *Nandiini Sundar* v. *State of Chhatisgarh*.[185] In this PIL, the issue related, inter alia, to the constitutional validity of the policy of engaging the poor tribals as SPOs to undertake most onerous duties which were worse than ordinary police officers. The court held the policy as unconstitutional since the same was violative of articles 14 and 21 of the Constitution.

No writ petition against final judgment

A final decision of the Supreme Court or of a high court cannot be challenged by filing a writ petition including a PIL. In *Joydeep Mukherjee* v. *State of WB*,[186] a PIL was filed under article 32 claiming several reliefs with regard to allotment of plots in Salt Lake City of Calcutta in exercise of chief minister's discretionary quota. The court noted that the matter had already been decided in earlier bunch of writ petitions by the Calcutta High Court as well as the Supreme Court wherein the courts, without approving the policy of discretionary allotment of plots, had quashed the allotment made in favour of a judge of Calcutta High Court while allotments made in favour of private parties had not been set aside on various grounds. Those decisions had attained finality and rights of the parties had already been settled. No further proceedings were taken. In view of the finality of the judgments, the apex court refused to permit the petitioner to re-open the cases again in a PIL. The court rightly stated that the "principles of finality as well as fairness demand that there should be an end to the litigation and it is in the interest of the public that the issues settled by the judgments of courts, including this Court, which have attained finality should not be permitted to be re-agitated all over again."[187] The court applied the principle of *res judicata* in this case. In this connection, the decision in *Indian Council of Enviro-Legal Action* v. *Union of India*,[188] may also be noted. In this case, the court reiterated that "the writ petition under Article 32 of the Constitution

183 *Bennett Coleman & Co*. v. *Union of India* (1972) 2 SCC 788.

184 2011 (10) SCALE 689.

185 *Supra* note 24. For a detailed discussion of this case, see Part VII in this survey titled "Right to life and personal liberty" in general and "Right to life and livelihood" in part VII, particular.

186 (2011) 2 SCC 706.

187 *Id.* at 713.

188 *Supra* note 52, particularly paras 109 – 119, 194 and 195.

assailing the correctness of a decision of the Supreme Court on merits or claiming reconsideration is not maintainable."[189]

Dismissal of PIL but taking *suo motu* cognizance of the same issue

In *Ajay K. Agrawal* v. *Sri Manmohan Singh*,[190] a PIL had been filed by the petitioner under article 32 raising the grievance regarding atrocities committed by Delhi police at the innocent people and the manner in which they had been dispersed by force in the midnight at *Ramlila Maidan* in furtherance of permission granted by the concerned authorities. The petitioner produced before the court copies of some prominent newspapers which depicted the sad state of affairs and the brutality committed by the police. The Supreme Court by an order dated 06.06.2011 dismissed the same on the ground that the petition had been filed primarily for gaining publicity. Despite this, the court was convinced that the matter was serious as the issue related to police brutalities on innocent people. Why not then the court ignore the motive of the petitioner as has been done in many cases in the past. In order to salvage the situation, by the same order, the court took *suo motu* cognizance of the matter and issued notice to various authorities to show cause and "file their personal affidavits" explaining the conduct of the police authorities.[191]

Justice should not only be done but must also appear and be seen to have been done

A judge should be an impartial person because justice should not only be done but the same must also appear to have been done is a fundamental principle of natural justice. This requires that one who has any interest in the subject matter is ineligible to be a judge in that case. In *Nandini Sundar* v. *State of Chhatisgarh*,[192] petition had been filed by the petitioner against the State of Chhatisgarh regarding engagement of special police officers (SPOs) for counter-insurgency operations against naxalites and atrocities committed by them. In that writ petition, an impleadment application had been filed by Peoples' Union for Civil Liberties (PUCL), of which one of the members of the division bench (B. Sudershen Reddy J), considering the petition, was a member. Through an anonymous letter, reservation was expressed as to whether the matter should be considered by that bench. The fact of one of the judges of the bench being a member of PUCL was disclosed in the court but all the counsels appearing in the case "in one voice stated that none of the parties has any objection whatsoever for hearing these petitions by this Bench."[193] The court then proceeded with the matter and decided the case finally by passing stringent directions. The question was whether this was the proper procedure to

189 The court relied on earlier decisions in *Mohd. Aslam* v. *Union of India* (1996) 2 SCC 749; *Khoday Distilleries Ltd.* v. *Supreme Court of India* (1996) 3 SCC 114; *Gurbachan Singh* v. *Union of India* (1996) 3 SCC 117; *Babu Singh Bains* v. *Union of India* (1996) 6 SCC 565; *P. Ashokan* v. *Union of India* (1998) 3 SCC 56 and *Ajit Kumar Barat* v. *Indian Tea Assn*. (2001) 5 SCC 42.

190 2011 (6) SCALE 444; also see *Kalyaneshwari* v. *Union of India*, 2011 (1) SCALE 651.

191 For a detailed study of cases relating to PIL, see *ROIL Public Interest Litigation* (2011).

192 *Supra* note 24.

193 *Nandini Sundar* v. *State of Chhatisgarh* (2011) 13 SCC 46.

ensure "impartiality" in the decision-making process? Will a counsel have enough courage to tell a bench of the Supreme Court that his case should not be heard by a particular judge of that court? Before the lower courts, such practices are common and the advocates have no difficulty in clearly stating that the judge was biased and his case should be transferred to another judge. The cases are transferred without much controversy. Many times, judges themselves state that they do not wish to hear the case on account of allegations of bias or prejudice. But it is very peculiar way of ensuring impartiality at the highest level of judiciary by asking the litigants as to whether they have any objections to the case being heard by a bench of judges, one or more of whom have some kind of direct or indirect interest in one or more of the parties. The best way to ensure impartiality in the decision-making process is that a judge should not allow a situation to come where he has to ask the parties about their objection to the case being heard by him; instead he should recuse himself the moment he comes to know of his direct or indirect interest in the case or relationship with the parties.

Laxity in enforcement of judicial orders/directions

Many times, the Supreme Court has deprecated the tendency on the part of state in not implementing its orders in letter and spirit and also for needless and avoidable litigation.[194] The worst case before the court related not only to avoiding the implementation of the court's directions passed on 13.02.1996 but also keeping the litigation alive till 2011 in an issue which concerned the environment affecting a large number of hapless and innocent people of Bichhri village of Udaipur district in the State of Rajasthan. Way back 1987, a PIL was filed before the Supreme Court when a group of persons set up chemical industries in and near the aforesaid village for producing chemicals like oleum and single super phosphate through Hindustan Agro Chemicals Ltd. along with its four other sister companies. The toxic effluents thrown in the open percolated beneath the soil and polluted the underground water besides environmental pollution in and around the village. The underground water had turned dark and dirty and became unusable for human consumption, animal consumption and agricultural irrigation. The Supreme Court accepted the "precautionary principle" and "polluter pays principle" as part of Indian law and passed many directions which, *inter alia*, included a direction to the central government to determine the amount required for carrying out the remedial measures including the removal of sludge in and around the complex of the companies.[195] Subsequently, while accepting the report of the Ministry of Environment and Forests, Government of India, *vide* its order dated 04.11.1997, the court had directed the above company to pay Rs. 37.385 crores towards the costs of remediation. The company never bothered to pay the amount; instead, it filed a review petition followed by a curative petition which were dismissed in 2002. The company filed further applications raising issues like unjust enrichment, restitution and compound interest. The apex court took a very serious view of this attitude of the company in not obeying the court's order passed fifteen years back and keeping the litigation

194 See, e.g. *Prakash Singh* v. *Union of India*, 2011 (13) SCALE 496, 497 and 500.
195 *Supra* note 51.

alive on one ground or the other. While directing the payment of Rs. 37.385 crores with 12 per cent interest from the date of the court's order dated 04.11.1997 till its payment/recovery as land revenue, the court imposed cost of Rs. 10 lakhs on the applicant.[196] This case indicates the attitude of big business houses not only towards compliance of the orders of the highest court of the land but also the scant regard they have for law and the humanity. It is not understood as to why the court did not proceed against the individuals who had disregarded the directions of the court and put them behind the bars after trial for criminal contempt of the court? This alone might have deterred the guilty not only in the present case but would have also given a lesson to other similar violators of law and judicial orders. In the normal course, the courts ordinarily insist payment of full or part payment of the amount awarded against a person before entertaining further proceedings like appeal, review, revision or even a writ petition, but in the present case, the court did not deem it proper to insist on any payment before the violator approaching it again and again challenging the court's order by way of review, revision and even a curative petition.

XI AWARD OF COMPENSATION

As pointed out in 2010,[197] in matters of awarding compensation to a person whose fundamental right has been violated, the apex court has not come out with any definite principles; it has adopted *ad hoc* approach on a case to case basis. This trend is again reflected in cases reported during 2011. In *A.S. Mohammed Rafi* v. *State of TN*,[198] without even mentioning the facts of the case, Markandey Katju J held that "without going into the merits of the controversy, we direct that a sum of Rs. 1,50,000/- (Rupees one lakh and fifty thousand only) be given to the appellant by the State of Tamil Nadu as compensation." This kind of order by the apex court leaves a lot of scope for any person to use the judgment as a precedent in any type of fact situation. In *Dy. Commr. Dharwad District* v. *Shivakka*,[199] the only bread earner of the family, leaving behind his wife and four children, had died in police custody on account of severe thrashing by a police sub-inspector. The high court had awarded compensation of Rs. 4 lakhs. On appeal, the Supreme Court, after

196 *Supra* note 52.

197 See S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XLVI *ASIL* 159 at 194 (2010).

198 *Supra* note 140; also see *Court on its Own Motion* v. *Directorate of Education GNCT of Delhi*, 180 (2011) DLT 160 (Deepak Misra CJ and Sanjiv Khanna J), in which the High Court of Delhi taking *suo motu* cognizance awarded Rs. 3 lakhs as *ex gratia* compensation in a case where the a girl student of XI standard, while drinking water inside the school, was hit by a stone thrown by someone from outside wall of the school which hit and damaged her eye. The court took serious view of the matter as the victim was not taken to a doctor for immediate treatment by the school authorities despite being informed of the incident. The court held the state liable. Similarly, the same division bench in *Court on its Own Motion* v. *Union of India*, 176 (2011) DLT 549 (DB), awarded compensation of Rs. 3 lakhs where a forty year old vegetable vendor was hit by a speeding vehicle and he was refused treatment in three government hospitals which ultimately resulted in his death for want of medical treatment.

199 2011 (2) SCALE 422.

quoting its earlier decisions and relying on *Chairman, Railway Board* v. *Chandrima Das*,[200] simply held that "we are of the view that the compensation awarded by the High Court is less than just. The high hourt should have taken note of the fact that the only bread winner of the family was killed in a barbaric manner and awarded adequate compensation." By exercising its powers under article 142, the court enhanced the amount to Rs. 10 lakhs. Relying on the same case, the Supreme Court in *Delhi Jal Board* v. *National Compaign for Dignity and Rights of Sewerage and Allied Workers*,[201] enhanced the amount of *interim* compensation awarded by the High Court of Delhi in case of death of sewerage workers on account of contemptuous apathy of the public authorities and contractors from Rs. 1.71 lakhs to Rs. 5 lakhs. Likewise, in *Hardeep Singh* v. *State of M.P.*,[202] without laying down any principles, the Supreme Court enhanced the amount of compensation from Rs. 70,000/- awarded by the high court to Rs. 2,00,000/- in case of a trial which was delayed for five years on account of laxity of the prosecution.

The most shocking decision of the year was *State of Rajasthan* v. *Sanyam Lodha*[203] which related to grant of monetary relief to 392 victims of rape of minor girls. This case did not relate to award of compensation by any court for violation of fundamental rights under articles 20 and 21 of the Constitution of India but by exercise of discretionary power by the chief minister in granting relief to merely a few selected minor girls who were victims of rape ignoring vast majority from the chief minister's relief fund. Between January, 2004 and August, 2005, challans/ charge-sheets had been filed in 392 cases of rape of minor girls. Out of these, 13 were granted relief ranging between Rs. 10,000/- to 50,000/-; one was given Rs. 3,95,000/- and one was given Rs. 5,00,000/-. The rest 377 girls were not considered for any relief. PIL was filed before the Rajasthan High Court by an advocate and social activist complaining of arbitrary and discriminatory disbursement of relief under the chief minister's relief fund. Under the Rajasthan Chief Minister's Relief Fund Rules, 1999 (the court treated them as norms/guidelines and not rules), the annual income from the fund could be spent for (i) famine, flood and accident relief; (ii) hospital development and medical assistance; (iii) general assistance; (iv) security services welfare assistance; (v) child welfare relief; and (vi) development of the state, in the *ratio* of 50, 25, 10, 5, 5 and 5 per cent, respectively. The Rajasthan High Court, without quashing the aforesaid rules, read down the same to the effect that the chief minister "may utilize the fund equally and without discrimination for grant of financial help." R.V. Raveendran J found nothing wrong with the decision of the chief minister in granting the discriminatory relief as stated above holding that no person had a right to get *ex-gratia* payment. The judge further observed:[204]

200 (2000) 2 SCC 465; see also *Khatri (II)* v. *State of Bihar* (1981) 1 SCC 627; *Veena Sethi* v. *State of Bihar* (1982) 2 SCC 583; *Rudal Sah* v. *State of Bihar* (1983) 4 SCC 141 and *Nilabati Behera* v. *State of Orissa* (1993) 2 SCC 746.

201 2011 (7) SCALE 489.

202 *Supra* note 147.

203 2011 (9) SCALE 379.

204 *Id*. at 387.

> The need to treat equally and the need to avoid discrimination arise where the claimants/beneficiaries have a legal right to claim relief and the government or authority has a corresponding legal obligation. But that is also subject to the principles relating to reasonable classification. But where the payment is ex-gratia, by way of discretionary relief, grant of relief may depend upon several circumstances. The authority vested with the discretion may take note of any of the several relevant factors, including the age of the victim, the shocking or gruesome nature of the incident or accident or calamity, the serious nature of the injury or resultant trauma, the need for immediate relief, the precarious financial condition of the family, the expenditure for any treatment and rehabilitation, for the purpose of extension of monetary relief. The availability of sufficient funds, the need to allocate the fund for other purposes may also play a relevant role. The authority at his discretion, may or may not grant relief at all under Relief Fund Rules, depending upon the facts and circumstances of the case.

The judge was very much influenced in his views by the fact that the discretionary power had been vested in the hands of a "high functionary" which term the judge used more than five times in paras. 17-22 of the judgment. The following observation of the judge have the potentiality of nullifying the entire concept of not only 'reasonableness' and 'equality before law' but also the concept of 'fairness' and 'justice':[205]

> Where power is vested in holders of high office like the Chief Minister to give necessary monetary relief from such a Relief Fund, it is no doubt a power coupled with duty. Nevertheless, the authority will have the discretion to decide, where the Relief Fund Rules do not contain any specific guidelines, to whom relief should be extended, in what circumstances it should be extended and what amount should be granted by way of relief. When discretion is vested in a high public functionary, it is assumed that the power will be exercised by applying reasonable standards to achieve the purpose for which the discretion is vested.
>
> Whenever the discretion is exercised for making a payment from out of Relief Fund, the Court will assume that it was done in public interest and for public good, for just and proper reasons. Consequently anyone who challenges the exercise of the discretion, he should establish prima facie that the exercise of discretion was arbitrary, mala fide or by way of nepotism to favour undeserving candidates with ulterior motives. Where such a prima facie case is made out, the Court may require the authority to produce material to satisfy itself that the discretion has been used for good and valid reasons, depending upon the facts and circumstances of the case. But in general, the discretion will not be open to question.

205 *Id.* at 388.

In fact, the above observations seem to admit that the rules did not provide 'specific guidelines' for grant of relief. Further, the figures given by the petitioner clearly proved discriminatory manner of exercise of discretionary power though he did not allege *malafides* or nepotism or ulterior motives as he did not challenge the grant of higher amounts to two girls. What 'public interest and public good' was achieved by not considering 377 rape victims for grant of relief is not known! The judgment clearly brings out insensitiveness on the part of the court in remedying a situation where it could have played an activist's role in a matter of very grave nature involving the right to life of poor and helpless victims of sex by the heinous and criminal conduct of human beasts. This decision exposes the hollow claim of both the executive as well as the judiciary to the protection of fundamental right to life and personal liberty of those who have no alternative but to silently suffer the misdeed of criminals without any fear of law and legal system. It is this type of decisions which illustrates that a mere constitutional provision cannot help any person unless the executive and judicial machinery have the will to enforce them, strictly and humanely.

Another decision of the same judge in ill-famous Uphaar Cinema tragedy case[206] is equally disappointing. The fire tragedy in this case had occured in 1997 resulting in the death of 59 and injury to 103 persons viewing the matinee show in the Uphaar cinema hall in Delhi. The fire had started from the transformer of Delhi Vidyut Board installed in the ground floor parking area engulfing the cars parked in the nearby area and other materials stored in the area. The association of victims filed writ petition before the High Court of Delhi for the violation of fundamental right under article 21 claiming various reliefs and compensation jointly and severally against the owner of the cinema hall (licensee), licensing authority (Delhi police), Delhi Vidyut Board (DVB) municipal corporation of Delhi (MCD) and Delhi Fire Service to the tune of Rs. 11.8 crores to the legal heirs of the deceased, Rs. 10.3 crores for the injured and Rs. 100 crores for setting up and running a Centralised Accident and Trauma Services. The high court, while exonerating Delhi Fire Service, directed payment of compensation of Rs. 18 lakhs for the death of each person above twenty years of age, Rs. 15 lakhs for those who were of 20 years or lower age and Rs. one lakh to each injured person alongwith interest @ 9 per cent from the date of filing of the writ petition. Out of this amount, 55 per cent was to be paid by the licensee and 15 per cent each of DVB, MCD and licensing authority. The high court also directed payment of punitive damages of Rs. 2.50 crores to be paid by the licensee (being income from installing extra seats in the cinema hall from 1979 to 1996) for setting up a Central Accident Trauma Centre.

Raveendran J, while exonerating the MCD and licensing authority from responsibility and fastening the liability on the DVB for death and injury and relying

206 *Municipal Corporation of Delhi* v. *Association of Victims of Uphaar Tragedy*, AIR 2012 SC 100 : 2011 (12) SCALE 194.

on several decisions of the Supreme Court and foreign jurisdictions,[207] observed:[208]

> It is evident from the decision of this Court as also the decisions of the English and Canadian Courts that it is not proper to award damages against public authorities merely because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law. In regard to performance of statutory functions and duties, the courts will not award damages unless there is malice or conscious abuse. The cases where damages have been awarded for direct negligence on the part of the statutory authorities or cases involving doctrine of strict liability cannot be relied upon in this case to fasten liability against MCD or the Licensing Authority. The position of DVB is different, as direct negligence on its part was established and it was a proximate cause for the injuries to and death of victims. It can be said that insofar as the licensee and DVB are concerned, there was contributory negligence. The position of the licensing authority and MCD is different. They were not the owners of the cinema theatre. The cause of the fire was not attributable to them or anything done by them. Their actions/ omissions were not the proximate cause for the deaths and injuries. The Licensing Authority and MCD were merely discharging their statutory functions.

The judge, however, made it clear that the exoneration of DVB and liensing authority was only for monetary liability to the victims. The court then proceeded to consider the question whether income and multiplier method applied in private law could be applied while awarding what could be called a tentative or palliative compensation by way of public law remedy under article 226 or 32 of the Constitution. The high court had assumed the monthly income of each deceased adult as being not less than Rs. 15,000/- and determined compensation by applying multiplier of 15. After referring to three earlier decisions,[209] Raveendran J made the following observation which deserves serious consideration:[210]

> (W)hat can be awarded as compensation by way of public law remedy need not only be a nominal palliative amount, but something more. It can be by way of making monetary amounts for the wrong done or by way of

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207 *Rabindra Nath Ghosal* v. *University of Calcutta*, AIR 2002 SC 3560; *Union of India* v. *United India Insurance Co. Ltd.* (1997) 8 SCC 683; *Rajkot Municipal Corpn*. v. *M.J. Nakum* (1997) 9 SCC 552; *Geddia* v. *Proprietors of Bonn Reservo*irs (1878) 3 AC 430 (HL); *R* v. *Governor of Parkhurst Prison* (*Ex P. Hague*) (1991) 3 All ER 733; *John Just* v. *Her Majesty The Queen* (1989) 2 SCR 1228 (Canada); *Roger Holland* v. *Government of Saskatchewan* (2008) 2 SCR 551 and *Anns* v. *Merton London Borough*, 1977 (2) All ER 492.

208 *Supra* note 206 at 119 (of AIR).

209 *Rudal Sah* v. *State of Bihar*, *supra* note 200; *Nilabati Behera* v. *State of Orissa*, *supra* note 200 and *Sube Singh* v. *State of Haryana*, AIR 2006 SC 1177.

210 *Supra* note 206 at 121-22.

> exemplary damages, exclusive of any amount recoverable in a civil action based on tortuous liability. But in such a case it is improper to assume admittedly without any basis, that every person who visits a cinema theatre and purchases a balcony ticket should be of a high income group person. In the year 1997, Rs. 15,000/- per month was rather a high income. The movie was a new movie with patriotic undertones. It is known that zealous movie goers, even from low income groups, would not mind purchasing a balcony ticket to enjoy the film on the first day itself.. To make a sweeping assumption that every person who purchased a balcony ticket in 1997 should have had a monthly income of Rs. 15,000 and on that basis apply high multiplier of 15 to determine the compensation at a uniform rate of Rs. 18 lakhs in the case of persons above the age of 20 years and Rs. 15 lakhs for persons below that age, as a public law remedy, may not be proper. While awarding compensation to a large group of persons, by way of public law remedy, it will be unsafe to use a high income as the determinative factor.

The judge refused to apply the *Nilabati Behera*[211] decision and reduced compensation awarded by Delhi High Court by stating:[212]

> The reliance upon Neelabati Behera … in this behalf is of no assistance as that case related to a single individual and there was specific evidence available in regard to the income. Therefore, the proper course would be to award a uniform amount keeping in view the principles relating to award of compensation in public law remedy cases reserving liberty to the legal heirs of deceased victims to claim additional amount wherever they were not satisfied with the amount awarded. Taking note of these facts and circumstances, the amount of compensation awarded in public law remedy cases, and the need to provide a deterrent, we are of the view that award of Rs. 10 lakhs in the case of persons aged above 20 years and Rs. 7.5 lakhs in regard to those who were 20 years or below as on the date of the incident, would be appropriate. We do not propose to disturb the awrd of Rs. 1 lakh each in the case of injured. The amount awarded as compensation will carry interest at the rate of 9% per annum from the date of writ petition as ordered by the High Court, reserve liberty to the victims or the L.Rs. of the victims as the case may be to seek higher remedy wherever they are not satisfied with the compensation. Any increase shall be borne by the Licensee (theatre owner) exclusively.

The judge also reduced the amount of punitive damages from Rs. 2.5 crores to Rs. 25 lakhs for illegally installing additional seats. The amount awarded was directed to be paid in the *ratio* of 85 per cent by the licensee and 15 per cent by the DVB.

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211 *Supra* note 200.
212 *Supra n*ote 206 at 122.

In his separate but concurring judgment, K.S. Radhakrishnan J observed:[213]

> (A) Constitutional Court can award monetary compensation against State and its officials for its failure to safeguard fundamental rights of citizens but there is no system or method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact-situations. The yardsticks normally adopted for determining the compensation payable in a private tort claims are not as such applicable when a constitutional court determines the compensation in cases where there is violation of fundamental rights guaranteed to its citizens.
>
> Legal liability in damages exist solely as a remedy out of private law action in tort…. Constitutional courts, of course, shall invoke its jurisdiction only in extraordinary circumstances when serious injury has been caused due to violation of fundamental rights especially under Article 21 of the Constitution of India. In such circumstances the Court can invoke its own methods depending upon the facts and circumstances of each case.

The views of Raveendran J in discarding the high court's view do not seem to be justified. To suggest the victims/kins of victims to approach another forum for compensation after about 15 years of the incident would only prolong the litigation, thereby increasing the miseries of the affected. But this case once again not only proves, but even admits, the absence of any set principles to determine compensation for violation of fundamental rights.

XII CONCLUSION

In so far as the court's crusade against control of corruption is concerned, the cases taken up by the apex court had only been at the initial stages of investigation/ trial. Only time will tell as to what extent the judicial intervention in these cases has yielded any fruitful results. Likewise, court's numerous orders on right to education,[214] food,[215] potable drinking water,[216] shelter,[217] health,[218] *etc.* have yet to yield any decisive results. The biggest problem in these cases is the lack of monitoring mechanism to ensure compliance of the directions.

The decisions on preventive detention show that the courts are not consistent in applying the well-established principles laid down by larger benches which are not even noticed by the smaller benches which exposes the half-hearted research work which is undertaken with full infra-structural facilities before writing the judgments.

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213 *Id.* at 132-33.
214 *Supra* note 9.
215 *Supra* note 10.
216 *Supra* note 11.
217 *Supra* note 12.
218 *Supra* note 13.

The significant cases referred to larger benches during the years 2009 and 2010 were not decided during the year 2011. Such a delay results in conferring undeserved advantage or disadvantage not only to the litigating parties but, in most of the cases, the general public is adversely affected.

The year also witnessed one chief justice, one sitting judge and some retired judges of three high courts facing serious corruption/criminal charges. The sitting chief justice and judge had to eventually resign. But this should not be an end of the matter and proceedings against them deserve to be continued till their logical conclusion by initiating/completing their trial for corruption.[219]

Some of the decisions of the apex court reported in 2011 leave one wondering and bewildered and do not seem convincing and fair. In this respect, the order "clarifying" its own earlier decision prohibiting the engagement of special police officers (SPOs) in the State of Chhatisgarh for certain kinds of work while at the same time permitting them in eight other states does not seem to be fair and reasonable in the absence of any detailed analysis of the situation prevailing in those states.[220] The case is also significant from yet another point of view. Should a judge continue to hear the case after declaring that he was a member of the impleader organization (PUCL) contesting the case against the State of Chhatisgarh merely because none of the parties raised the objection against the judge hearing the case? This kind of decision-making is contrary to the basic principle of bias (impartiality).

Likewise, the decision of the Supreme Court in refusing to issue any directions for laying down any fair and reasonable principles for granting compensation from the chief minister's relief fund to minor girls who were victims of rape also does not satisfy the principles of fairness and equality.[221]

On the question of freedom of religion, the apex court took strong view of religious intolerance by those holding extreme views. The killing of Australian Christian missionary is an extreme case of religious intolerance. The court did not clearly decide the question of validity of grant of subsidy for Haj pilgrimage merely because the petitioner had failed to produce facts and figures of actual percentage of the amount of grant for the purpose. The court failed to direct the government to place before it the facts and figures of impugned subsidy.

The apex court has not come out with any consistent and uniform principles for considering award of compensation in cases of violation of fundamental rights. Time has come to clarify the law and lay down the basic principles to determine and award compensation to the victims whose fundamental rights are violated by the state instrumentalities. The only view expressed by the court is that the private law remedy available in law of torts cannot be applied to constitutional law remedy under articles 32 and 226 of the Constitution for determining compensation. But what would be the principles for determining compensation under these articles for

219 It would not be out of place to mention here that allegations against sixteen Chief Justices of the Supreme Court were also made by two senior advocates of Supreme Court who were facing contempt charges: see "Bhushans stand by graft charges against 16 ex-CJIs", *Times of India* dated 09.12.2011.

220 *Supra* note 24.

221 *Sanyam Lodha*, *supra* note 203.

violation of fundamental rights has not been indicated and the constitutional courts have exercised unfettered power to determine the same. This is a clear indication of uncertainty in a most significant area like fundamental rights. The non-compliance of the directions of the Supreme Court in numerous significant cases passed several years earlier, particularly in case of environmental degradation, is a matter of grave concern. The cases of violation of human rights decided during the year related not only to the police brutalities and insensitiveness but also to the human beings who conducted themselves as wild beasts.

The Supreme Court is not infallible. It can commit mistakes like any other institution but it had been willing to rectify its mistakes as it happened in *Dayaram* v. *Sudhir Batham*[222] in which the Supreme Court overruled one of the directions issued in *Kumari Madhuri Patil*[223] with a view to streamline the procedure for the issuance of social status certificates, their scrutiny and approval.

222 *Supra* note 62.
223 *Supra* note 63.